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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2012-2013

2110427

Huntsville City Board of Education

v.

Ann Frasier et al.

(FMCS No. 11-02946)

MOORE, Judge.

The Huntsville City Board of Education ("the Board") appeals from a hearing officer's decision reversing the Board's decision to terminate the employment of Ann Frasier, Jodie Lindstrom, Johnna Lamelle, Rene Robinson, Deborah

Hatton, Bryant Benson, Anthony McCurdy, Freeman Milton, Tracy Powell, Anthony Crutcher, Garrison Friend, Patty Smith, David Yarborough, Carl Ford, Harvey Fisher, Jimmy Cobble, and Steve Berryhill (hereinafter referred to collectively as "the employees").

On April 25, 2011, Dr. Ann Moore, who was at that time the superintendent of the Board, gave notice to each of the employees and to the Board of her intent to recommend the termination of the employment of each of the employees. In each of those notices, Dr. Moore cited the reason for the proposed termination as "justifiable decrease in jobs in the system or other good and just causes," in accordance with former § 36-26-102, Ala. Code 1975, a part of the former Fair Dismissal Act ("the FDA"), former § 36-26-100 et seq., Ala. Code 1975, which has since been repealed and replaced by the Students First Act ("the SFA"), § 16-24C-1 et seq., Ala. Code 1975, effective July 1, 2011.[1] The notices further stated, in pertinent part:

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[1]Because the SFA does not apply retroactively, we apply the FDA in the present case. See Board of School Comm'rs of Mobile Cnty. v. Christopher, 97 So. 3d 163, 166-67 (Ala. Civ. App. 2012).

> "Due to financial circumstances, the Board must reduce the number of its employees. To accomplish this, the Board has adopted a Reduction in Force Plan. The selection of the employees to be terminated is based upon the job classifications affected by the Reduction in Force Plan and years of service within the Huntsville School System (those with fewer years of service in each specifically identified area to be terminated before those with greater seniority)."

In response to Dr. Moore's notices, the employees contested their proposed terminations. Pursuant to conferences held by the Board on May 17 and 18, 2011, the Board upheld the recommended terminations of the employees. Each of the employees was informed of the Board's decision, and each contested the Board's decision, pursuant to the FDA. The contests filed by the employees were consolidated, and a hearing was held on October 24 and 25, 2011. On January 26, 2012, the hearing officer entered a decision reversing the Board's decision, concluding that no action should be taken against the employees and sustaining the employees' objections to the Board's proposed terminations; the hearing officer made the following conclusions of law:

> "Pursuant to the Fair Dismissal Act, the issue to be decided in the present matter is,
>
> "Which of the following actions should be taken relative to the employee: Termination

> of the employee, a suspension of the employee, with or without pay, a reprimand, other disciplinary action, or no action against the employee?

"After careful consideration of the evidence submitted, argument advanced, and relevant statutes and case law precedents, the Hearing Officer concludes that no action should be taken against the Employee[s]. The Hearing Officer's reasoning follows.

"The Board has asserted two bases for its determination to initiate termination proceedings, a justifiable decrease in positions and other good and just cause. Both of these are supported exclusively by the financial difficulties the Board is facing. At the outset it is important to note that the adverse employment action is not being proposed for any disciplinary reasons.

"Neither a justifiable decrease in jobs nor good and just cause have been defined by the Fair Dismissal Act. In Ex Parte Wilson, 984 So. 2d 1161 (Ala. 2007) the Alabama Supreme Court analyzed the companion Teacher Tenure Act. The Court rejected Arbitrator Daugherty's 'seven tests' of Just Cause from labor grievance arbitration and held,

> "'"good cause" in a statute of this kind [the Teacher Tenure Act] is by no means limited to some form of inefficiency or misconduct on the part of the teacher dismissed, but includes any ground put forward by a school committee in good faith and which is not arbitrary, irrational, unreasonable, or irrelevant to the committee's task of building up and maintaining an efficient school system.'

"Id. at 1168 (Internal quotations omitted) (Bracketed information in original). To support the

proposed adverse action, the Board must, therefore, show its actions were rational, reasonable, relevant to its tasks, and logical. In less ephemeral and more concrete terms, the Board must provide sufficient proof that it was suffering a severe financial hardship, that the actions taken were in response to that hardship, and that it is reasonably likely that the actions will improve the financial condition of the Board.

"The Hearing Officer will assume -- without deciding -- that the Board is suffering a substantial financial hardship.[6] The Board has presented sufficient evidence in the form of the testimony of [Dr. Warren] Pouncey, who stated that there was a budgetary shortfall of approximately $36 million, to at least presume a financial hardship for purposes of this Award. This, however, is merely a necessary precondition and not, in and of itself sufficient to provide just cause or establish a justifiable decrease in positions. The Board also has the burden of proving by sufficient evidence that the action taken in response to this hardship is a necessary and reasonable step designed to directly improve the fiscal position of the institutions. Here, the Board failed to carry its burden.

"Evidence was presented regarding the salaries of each of the ... Employees. Those individuals' pay ranged from thirteen thousand to thirty-nine thousand per year. In an overly simplistic analysis, one could then assume that terminating the ... Employees would result in an annual reduction in expenditures of the combined salaries of each of the positions. However, this assumes without any proof that the work done by the ... Employees would either be performed by reassigned staff with no diminution in their ability to perform their original tasks, that the work could be outsourced or subcontracted at a reduced price, or that some or all of the ... Employees' tasks could be eliminated. Merely

eliminating the positions, without reducing or eliminating the duties or the cost of performing those duties may reduce the amount of salary in one line item of the Board's budget, but it does not provide any real savings to the Board. The proposed termination may not be supported by shifting amounts in line items in a budget; instead, it must meaningfully address the financial troubles and provide direct and measurable relief from those troubles.

"The above stated principle can be clearly seen in the evidence and argument set forth by the Board itself. During the hearing, the Board presented substantial evidence regarding the decision to rehire Lee Edminson, one laid off member of its staff. The argument presented by the Board was that this particular employee, by the nature of his duties and his performance thereof provided substantial cost savings over and above the actual cost incurred in maintaining him on payroll. That is, without looking at the value of the work produced, the salary and associated costs of the employee in a vacuum would be inadequate to evaluate the retention of the position.

"During the hearing, the Board presented evidence of two people who directly or indirectly supervise [many] of the ... Employees. As noted in the prior section, [John] Brown and [Marc] Seldon are the first or second level supervisors of each of the ... Employees except the Clerical Assistants. Many of the ... Employees spoke with great passion and feeling about the importance of their jobs and the effect their departures will have on the school. However, each is clearly personally invested in this testimony and should not be accepted without an understanding of this bias. Contrastingly, having observed it ore tenus and been able to witness the demeanor and conduct on the witness stand, the Hearing Officer finds that the testimony of Board

employees Brown and Seldon should be afforded great weight.

"In the instant case, the evidence presented by witnesses called by the Board and employed by the Board reflected little or no cost savings to be derived from the proposed termination of the ... Employees. The Hearing Officer can not merely assume there would be such benefit absent any evidence to support this assertion. In the Findings of Fact, supra, the Hearing Officer synopsized the testimony of Brown and Seldon regarding the positions they supervised. For example, Brown testified that the contracting of vehicle maintenance to another school system has resulted in the receipt of invoices that reflect greater costs than would have been observed had the work been performed by Berryhill and the rest of the Mechanics. Similarly, Brown stated that the employment of a qualified locksmith like Yarborough, saves the Board between $3,500 and $5,000 per month, far exceeding the annual salary this position earns. And Brown further testified that Smith's duties, operating a complex order tracking system, is critical and saves the system money every month. Seldon testified about preliminary plans to change warehouse and inventory duties, but did not provide any testimony about cost savings accruing for these positions. Similarly, Seldon testified about contracting out landscaping duties, but acknowledged that the cost quote he received did not include services for two Board facilities. As such, it would be speculation for the Hearing Officer to conclude that there would be actual savings from the position reductions. Based on this undisputed testimony, the Hearing Officer finds that the Board has failed to carry its burden of presenting credible evidence that the proposed terminations of the Employees would have significant fiscal benefit to the Board.

"Even assuming that the reduction in the positions held by the ... Employees, the Board has

failed to show that such reductions were mandated by financial concerns. Pouncey stated that there was a shortfall in the budget plus mandated surplus of $35,804,051. To address that, [Dr. Ed] Richardson testified that a savings of $40 million over two years would have been adequate, including a buffer against future proration or other budgetary issues, and further believed that $38.5 million over two years likely would have been sufficient. Whether a greater amount may have been more fiscally prudent or otherwise well founded is not before the Hearing Officer; the Board's own testimony was that a forty million dollar budgetary savings over two years was sufficient to address the stated rationale. Therefore any cuts beyond that threshold amount exceeded the 'due to financial circumstances' rationale given in the notice of intent to terminate.[8] The testimony in this case reflects that budget cuts already made and excluding in their entirety the [reduction in force] of the non-probationary employees would have been sufficient to achieve this goal of $40 million over two years.[9] As such, the proposed termination of the ... Employees is not warranted by financial difficulties.

"Finally, the Board argues that, with 1,100 support staff, it was significantly overstaffed compared to similarly situated school systems in other areas of Alabama. The [reduction-in-force] plans, including the one under which the ... Employees' terminations were proposed, were intended to reduce staff to approximately 850 people. This, according to both Pouncey and Richardson, would have brought the Board's personnel costs into line with other systems. The Hearing Officer, however, does not find this argument compelling. The Alabama appellate courts have held that a tenured school employee to be disciplined, including terminated, is entitled to a short and plain statement of the facts to be used against him and that said facts need to be complete without reference to surrounding

circumstances. See Ex Parte Soleyn, [33 So. 3d 584 (Ala. 2009)]. To be sure, overstaffing can cause financial hardship. However, financial hardship need not result from overstaffing; instead, it could be reduced income, here in the form of local taxes and/or prorated state funding, or increased expenses unrelated to personnel costs. The Board failed to put the ... Employees on notice, within the mandates of the statute and Soleyn, that they intend to rely on comparable staffing with other county and municipality school systems. Furthermore, even if adequate notice were given, the evidence does not warrant a termination of the ... Employees based on a comparison of staffing levels. The Board's evidence suggests that the comparison school systems were approximately the same size, but did not present evidence of any other circumstance on which the Hearing Officer can conclude that they are similarly situated nor did it present any qualitative evidence that those other systems were on sounder financial footing.

"[6]In so doing, the Hearing Officer need not reach and thus does not decide the ... Employees' assertions regarding the hiring of additional administrative staff members in support of the new Superintendent or the re-hiring of one probationary employee terminated during this Reduction in Force process. Nor will the Hearing Officer address the seemingly moving target of the amount of that hardship that [Dr. Warren] Pouncey's testimony provided where the amount of the default seemed to change nearly each time a page in the transcript was turned.

"[3]The short and plain statement of facts included in the notice of intent to terminate must, without reference to external information, provide the basis for the adverse employment action. The Board may not rely on surrounding circumstances not

> included in the notice. See Ex Parte Soleyn, 33 So. 3d 584 (Ala. 2009).
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> "[9]The Hearing Officer has been provided with a copy of the decision rendered in a companion case by Hearing Officer Hoyt Wheeler in which Mr. Wheeler found in favor of the Board concluding, in part, that 'the actions recommended by Richardson amount not to a cut of $46 million ... but rather to a $23 million cut that is held onto for two years. All things equal, the reduction in costs will cover the deficit of $20 million per year, but only a total of $6 to make up for the need to have a reserve ...."' (See Huntsville Bd. of Ed. v. Phelps, FMCS 11-02936 [Wheeler, 2011].) The undersigned does not disagree with Mr. Wheeler's mathematics; however, the Board's own testimony is clear that a $40 million dollar savings over two years is sufficient. Where the Board's agents have testified that $40 million is sufficient, it would be an inappropriate substitution of the wisdom of the Hearing Officer for the actions of the Board to suggest that more is needed."

(Some footnotes omitted.)

On February 3, 2012, the Board filed a notice of appeal from the hearing officer's decision reversing the Board's decision to terminate the employees' employment. This court entered an order requiring the Board to file a letter brief setting forth "special and important reason" for accepting the appeal, pursuant to former § 36-26-104(b), Ala. Code 1975. The Board complied, and, on June 19, 2012, this court accepted the appeal.

The Board argues on appeal that the hearing officer's decision was arbitrary and capricious in applying the wrong burden to the Board and in incorrectly assessing the issue to be decided. The Board also argues that the hearing officer erred in concluding that the Board gave the employees insufficient legal notice of the reason for their proposed terminations.

The Board argues that the threshold issue facing the hearing officer was whether the Board had proven a justifiable decrease in positions and that, until the hearing officer made that determination, the hearing officer was not entitled to proceed to consider the proper action relative to any particular employee. We agree. In Board of School Commissioners of Mobile County v. Christopher, 97 So. 3d 163 (Ala. Civ. App. 2012), Joann Christopher's employment was terminated pursuant to a reduction-in-force policy ("RIF policy"), and a hearing officer ultimately reversed the termination of her employment. 97 So. 3d at 165. In determining that the hearing officer had erred, this court stated, in pertinent part:

> "We cannot agree with the hearing officer's determination that former § 36-26-104(a)[, Ala. Code

1975,] authorized him to determine, in the absence of allegations of improper motive, whether the termination of a particular employee's employment was justifiable under a RIF policy. In situations in which an employee's employment is terminated under the FDA as a form of discipline, the alternatives listed in former § 36-26-104(a) have a function. The hearing officer is allowed to consider whether, in light of the particular conduct of the employee and the facts of the case, termination was warranted or whether a lesser or no disciplinary sanction, i.e., 'suspension of the employee, with or without pay, a reprimand, other disciplinary action, or no action,' would be warranted under the circumstances. In the case of a termination pursuant to a RIF policy, however, the conduct of the employee is not at issue. The purpose of a termination pursuant to a RIF policy is cost savings to the employing board. Where a termination of employment is made because of a justifiable decrease in the jobs in the system, see former § 36-26-102, [Ala. Code 1975,] the selection of any other form of discipline or sanction under former § 36-26-104(a) would not achieve the long-term cost-savings goal of the termination pursuant to a RIF policy.

"Further, in the context of similar terminations under teacher-tenure laws, our courts have rejected the standard utilized by the hearing officer in this case. In Williams v. Board of Education of Lamar County, 263 Ala. 372, 82 So. 2d 549 (1955), Williams's employment was terminated pursuant to a predecessor to the TTA [Teacher Tenure Act] that provided that a teacher's employment could be terminated for, among other reasons, a '"justifiable decrease in the number of teaching positions."' Williams, 263 Ala. at 375, 82 So. 2d at 552 (emphasis omitted). The board at issue in that case cited a decrease in jobs as the basis for seeking to terminate Williams's employment, and our supreme court agreed that the evidence supported a termination for that reason. Williams argued,

however, that her employment was terminated for personal reasons, specifically, for her failure to move to the school system in which she was employed, which was a violation of a school-system rule. This court rejected that argument, noting that the board in that case had not sought to terminate Williams's employment for that purported rule violation. Further, the court held that once it had been determined that the evidence supported the board's determination that there had been a justifiable decrease in the number of teaching positions available, no further inquiry was necessary with regard to the termination. Our supreme court explained:

> "'As we see it, the only pertinent inquiry was whether there was a "justifiable decrease in the number of teaching positions." That being established, the reason for selecting [Williams's] contract as the one to be cancelled was not open to inquiry. We find nothing in the Tenure Act establishing a criterion for determining what particular tenured teacher's contract should be cancelled when there is a "justifiable decrease in the number of teaching positions." In such situation, it seems to us that the right of selection is a matter resting entirely with the employing Board of Education.'

"Williams, 263 Ala. at 375, 82 So. 2d at 552. See also May v. Alabama State Tenure Comm'n, 477 So. 2d 438, 440 (Ala. Civ. App. 1985) ('[W]hen a Board is faced with a reduction in teaching positions, much must be left to the "enlightened discretion" of the Board after considering the entire situation.') (quoting Woods v. Board of Educ. of Walker Cnty., 259 Ala. 559, 561, 67 So. 2d 840, 841 (1953)).

"In Walker v. Montgomery County Board of Education, 85 So. 3d 1008, 1015 (Ala. Civ. App.

2011), this court cited the above-quoted portion of Williams, supra, in rejecting a similar argument asserted by Walker, a contract principal whose employment had been terminated pursuant to a provision in her contract that allowed termination for, among other things, '"[a] justifiable decrease in the number of positions due to decreased enrollment or decreased funding."' 85 So. 3d at 1016. Also, like Christopher in this case, Walker had argued that the board had other options available to it that would allow her to remain employed; in that case, Walker contended that the employment of other, probationary principals in other schools could have been terminated. This court rejected Walker's arguments, concluding:

> "'Although Walker's contract falls under the [Teacher Accountability Act ("TAA")] and not the TTA, we have found no provision in the TAA that "establish[es] a criterion for determining what particular [contract principal's] contract should be cancelled when there is a 'justifiable decrease in the number of [principal] positions.'" Williams, 263 Ala. at 375, 82 So. 2d at 552. The Board was entitled to make the decision regarding which contract principals would be nonrenewed or would have their contracts canceled. Courts are not permitted to usurp the role of the school board and cannot determine that another course of action other than the one taken by the school board might have been wiser or more equitable. State ex rel. Steele v. Board of Educ. of Fairfield, 252 Ala. 254, 261, 40 So. 2d 689, 695 (1949), overruled on other grounds, Ex parte Jackson, 625 So. 2d 425 (Ala. 1992).'
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> "Walker, 85 So. 3d at 1015-16."

97 So. 3d at 173-75 (footnote omitted).

The Board argues that the hearing officer exceeded his discretion in requiring the Board to "prov[e] by sufficient evidence that the action taken in response to this [financial] hardship is a necessary and reasonable step designed to directly improve the fiscal position of the institutions." We agree. In Christopher, this court reiterated that, once it is determined that there is a "'"justifiable decrease in the number of positions due to decreased enrollment or decreased funding,"'" courts may not usurp the role of the school board in determining which positions would be canceled. Christopher, 97 So. 3d at 175. Thus, this court has determined that our review is limited to whether the decision to terminate certain employees' employment is justified before the specific decisions regarding who is to be terminated are made. Necessarily, neither the hearing officer nor this court is entitled to second-guess the termination decisions of the Board, after the fact of the terminations, regarding whether those terminations actually yielded the intended results. To do so would be to "'usurp the role of the school board'" and "'determine that another course of action other than the one taken by the school board might have been wiser or more

equitable,'" which we are not permitted to do. Id. We conclude, therefore, that the hearing officer erred in proceeding to determine whether the terminations of the employees by the Board were designed to directly improve the financial hardship of the school system. Rather, the hearing officer was required to determine only whether there was a justifiable decrease in positions based on the alleged insufficient funding. The hearing officer went beyond that inquiry to determine whether the terminations were justified in light of a number of other factors. This, he was not permitted to do. Because the hearing officer exceeded his discretion, we reverse the hearing officer's decision and remand the cause for the hearing officer to determine whether there was a justifiable decrease in positions based on the school system's alleged financial hardship, without regard for any simultaneous measures taken by the Board to address that hardship or any circumstances that arise as a consequence to the terminations.

Because it may affect the decision on remand, we also address the Board's argument that the hearing officer improperly found that the Board had not given the employees

sufficient notice of the reason for their proposed terminations. As quoted above, the hearing officer concluded that the Board had failed to put the employees on notice that it was relying on overstaffing as compared with other county and municipality school systems. We note, however, that it does not appear that either Dr. Warren Pouncey, the Deputy Superintendent for Finance and Administration for the Alabama State Department of Education, or Dr. Ed Richardson, the former Superintendent of the Alabama State Department of Education who later served as Consultant to the Superintendent, discussed in their deposition testimony that the reason for the employees' terminations was overstaffing; rather, they discussed overstaffing only as a reason for the financial problems that the Huntsville School System was facing. The FDA required that a notice of proposed termination of employment contain "a short and plain statement of the facts showing that the termination is taken for one or more of the reasons listed in [former] Section 36-26-102." Former § 36-26-103(a), Ala. Code 1975. The employees argue that they were not given notice of what had caused any

purported financial conditions leading to the implementation of the RIF policy.

In Huntsville City Board of Education v. Stranahan, [Ms. 2110252, November 2, 2012] ___ So. 3d ___, ___ (Ala. Civ. App. 2012), this court stated:

> "In Bishop State Community College v. Archible, 33 So. 3d 588 (Ala. Civ. App. 2009), this court addressed whether a notice of termination under the former FDA was sufficient under § 36-26-103. In that case, two employees were notified of the intent to terminate their employment with Bishop State, a community college subject to the former FDA. The notices that the employees received stated an identical factual basis for each employee's termination, specifically '"You committed financial improprieties in relation to the receiving of financial aid and scholarships."' Archible, 33 So. 3d at 590. This court originally held that, considering the notice and the surrounding circumstances, that notice was sufficient under the former FDA. Bishop State Cmty. Coll. v. Archible, 33 So. 3d 577, 584 (Ala. Civ. App. 2008). On certiorari review, our supreme court held that this court had erred in considering the 'surrounding circumstances' in determining whether the notice provided to the employees by Bishop State was sufficient, and it reversed this court's judgment. Ex parte Soleyn, 33 So. 3d 584, 587 (Ala. 2009). On remand, this court stated:
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> > "'This court has held that, in order to afford minimal due process to an employee under the [Fair Dismissal] Act, the notice of proposed termination must advise the employee "'of the cause or causes for his [or her] termination in sufficient detail to fairly enable him [or

> her] to show any error that may exist.'" State Tenure Comm'n v. Page, 777 So. 2d 126, 131 (Ala. Civ. App. 2000) (quoting James v. Board of School Comm'rs of Mobile County, 484 F. Supp. 705, 715 (S.D. Ala. 1979), quoting in turn Stewart v. Bailey, 556 F.2d 281, 285 (5th Cir. 1977)); see also State Tenure Comm'n v. Jackson, 881 So. 2d 445, 449 (Ala. Civ. App. 2003) (stating that the notice of proposed termination should be "sufficiently detailed to provide an adequate opportunity for [the employee] to prepare a defense to those charges"). In the present cases, the notices of proposed termination do not meet the requirement of setting forth a "short and plain statement of the facts." Neither notice set forth what "financial improprieties" had been committed so as "to provide an adequate opportunity for [the employees] to prepare a defense to those charges." Jackson, 881 So. 2d at 449. The language used is so vague as to fall below the minimum due process that must be afforded an employee under the Act.'

"Archible, 33 So. 3d at 590-91.

"In the present case, the Board cited financial circumstances that necessitated the imposition of the RIF policy as the basis for the terminations, and it explained the manner in which the employees whose employment was to be terminated under the RIF policy would be selected. As the Board points out, in Archible, supra, the terminations at issue were proposed because of a specific set of allegations of misconduct, and this court determined that more information was required. It seems axiomatic that a more detailed statement of allegations of misconduct would be necessary to allow an accused employee to defend against those allegations. In this case, however, there are no adverse allegations

> for Stranahan or Holmes to defend against. The basis for the proposed terminations was that the Board was experiencing financial difficulties necessitating the implementation of the RIF policy."

Stranahan, ___ So. 3d at ___.

The employees do not appear to assert that financial difficulties did not require the implementation of the RIF policy. Rather, the hearing officer's decision and the employees' arguments on appeal are directed to the Board's failure to include overstaffing as a reason for the implementation of the RIF policy. We cannot agree that Ex parte Soleyn, 33 So. 3d 584 (Ala. 2009), and Bishop State Community College v. Archible, 33 So. 3d 588 (Ala. Civ. App. 2009), require the Board to include all the reasons that led to the financial difficulties that resulted in the implementation of the RIF policy. We conclude that the Board met its burden of sufficient notice to the employees regarding their terminations.

REVERSED AND REMANDED.

Thompson, P.J., and Pittman, Bryan, and Thomas, JJ., concur.