Rel: 02/17/2017

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2016-2017

2150965

Carolyn J. Dailey

v.

Monroe County Board of Education

Appeal No. 2016114

THOMPSON, Presiding Judge.

On January 12, 2016, the superintendent of the Monroe County Board of Education ("the Board"), pursuant to the Students First Act ("the SFA"), § 16-24C-1 et seq., Ala. Code 1975, notified Carolyn J. Dailey, a nonprobationary classified

employee, of his intention to terminate Dailey's employment with the Board. Dailey timely contested the superintendent's proposed termination of her employment, and she requested a hearing pursuant to the SFA. See § 16-24C-6(b), Ala. Code 1975.

The Board conducted a hearing. On March 23, 2016, at the close of the hearing, the Board orally informed Dailey that it had voted to uphold the superintendent's recommendation to terminate her employment.

On April 22, 2016, Dailey filed a notice of appeal to the State Superintendent of Education, requesting an administrative hearing. See § 16-24C-6(e), Ala. Code 1975. An administrative-hearing officer conducted a hearing, and, at the close of that hearing, the Board moved to supplement the administrative record to include a copy of the Board's written decision to terminate Dailey's employment; that motion to supplement is not contained in the record before this court. It is undisputed that the Board did not include a written decision in the record it submitted to the hearing officer, and Dailey disputed that she had received a written decision from the Board terminating her employment. Dailey opposed the

Board's motion to supplement the record, and both parties submitted briefs on their respective positions on that issue. The hearing officer never ruled on the motion to supplement.

The hearing officer issued an undated decision affirming the Board's termination decision; in a motion to clarify filed after that decision was issued, Dailey alleged that the hearing officer's decision had been transmitted to her or her attorney on August 4, 2016. In her August 10, 2016, motion to clarify, Dailey requested that the hearing officer clarify his decision to specify whether he found that she had received the Board's written decision and, if he found that she had not received the Board's written decision, determine the effect of the Board's failure to notify her in writing of its termination decision. The hearing officer denied the motion to clarify on August 10, 2016, and Dailey timely appealed to this court.

On appeal, Dailey argues that the SFA requires that the Board issue a written decision and that its failure to do so deprived her of her due-process rights under the United States Constitution. In support of her argument that the SFA requires that she be provided written notice of the Board's

termination decision, Dailey cites § 16-24C-6(d). That section provides:

> "Whether or not the employee requests a hearing before the governing board ..., the chief executive officer shall give written notice to the employee of the decision regarding the proposed termination within 10 calendar days after the vote of the board .... If the decision follows a hearing requested by the employee, the notice shall also inform the employee of the right to contest the decision by filing an appeal as provided in this chapter."

(Emphasis added.)

Dailey contends that she did not receive written notice of the Board's decision until the close of the administrative hearing, when the Board sought to supplement the record before the hearing officer to include its written decision; she avers in her brief submitted to this court that, out of an abundance of caution, she had appealed following the oral ruling of the Board within the period set forth in the SFA. The Board maintains that it did provide Dailey with "post-hearing notice of the Board's decision," but it concedes that the official record submitted to the hearing officer did not include a written decision by the Board concerning Dailey's employment.

Thus, the parties agree that the record before the hearing officer contained no written notice of the Board's

decision. The parties disagree, however, regarding whether such notice was required.

> "'[It is well established that where the issues involve only the application of law to undisputed facts appellate review is de novo. See, e.g., State Farm Mut. Auto. Ins. Co. v. Motley, 909 So. 2d 806, 810 (Ala. 2005). This has been held to be true where a hearing officer's decision is otherwise subject to more limited review. Ex parte Wilbanks Health Care Servs., 986 So. 2d 422, 425 (Ala. 2007) ("Review of the hearing officer's conclusions of law or application of the law to the facts is de novo."); Barngrover v. Medical Licensure Comm'n of Alabama, 852 So. 2d 147, 152 (Ala. Civ. App. 2002) ("The presumption of correctness does not attach to the hearing officer's conclusions of law; further, no presumption of correctness exists when a hearing officer improperly applied the law to the facts.").'
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> "Ex parte Soleyn, 33 So. 3d 584, 587 (Ala. 2009). See also Huntsville City Bd. of Educ. v. Stranahan, 130 So. 3d 204, 206 (Ala. Civ. App. 2013) ('We note that the facts pertaining to this issue are undisputed, and, therefore, the argument involves whether the hearing officers properly applied the law to the undisputed facts. Accordingly, this court reviews this issue de novo.'). We are not required to resolve any factual disputes in order to answer the questions of law presented in this case. Our review is therefore de novo."

Ex parte Lambert, 199 So. 3d 761, 765 (Ala. 2015).

In support of the hearing officer's decision, the Board relies upon Cox v. Mobile County Board of School

Commissioners, 157 So. 3d 897 (Ala. Civ. App. 2013). In that case, Cox contested, pursuant to the SFA, the decision of the Mobile County Board of School Commissioners ("the Mobile Board") to terminate her employment. The Mobile Board conducted a hearing on August 2, 2012, but did not issue its written notice of its termination decision until August 24, 2012. In her appeal, Cox argued that the Mobile Board's failure to issue its written notice of decision within 10 days after the hearing, as provided in § 16-24C-6(d) of the SFA, constituted an abandonment of its termination decision. This court disagreed, concluding that Cox had failed to show that she was prejudiced by the Mobile Board's late issuance of its written decision and, therefore, that her due-process rights were not violated under the facts of that case. 157 So. 3d at 903-04. In reaching its holding, this court stated, in part:

> "'In this case, as in all cases of statutory interpretation, we must consider the intent of the legislature in enacting the statute. Morgan County Board of Education v. Alabama Public School & College Authority, 362 So. 2d 850 (Ala. 1978); Drake v. Pennsylvania Threshermen & Farmers' Mutual Casualty Insurance Co., 265 Ala. 444, 92 So. 2d 11 (1957). The statute in this case is very clear in its provisions. It precedes every provision with the word "shall." The word shall is

> normally considered to be mandatory, but in some cases has been held to be merely directory.
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> "'It has been held that where a provision relates only to form or manner, it is directory. Mobile County Republican Executive Committee v. Mandeville, 363 So. 2d 754 (Ala. 1978); Board of Education of Jefferson County v. State, 222 Ala. 70, 131 So. 239 (1930). In the Mobile County case it was also stated that legislative intent controls over the use of the words "shall," "may," or "must." See also Morgan v. State, 280 Ala. 414, 194 So. 2d 820, appeal dismissed, cert. denied, 389 U.S. 7, 88 S. Ct. 47, 19 L. Ed. 2d 6 (1967). The use of the word "shall," therefore, should not be construed as mandatory if the intent of the legislature shows that the term is merely directory.'"

157 So. 3d at 902 (quoting Key v. Alabama State Tenure Comm'n, 407 So. 2d 133, 135 (Ala. Civ. App. 1981)). In Cox, supra, this court concluded that the 10-day period after a hearing in which a written notice of decision is to be issued by a board is directory, rather than mandatory; it then concluded that Cox had not argued or demonstrated that the "tardy notice" she had received of the Mobile Board's written decision had prejudiced her. Cox, 157 So. 3d at 903-04. The court then noted that "[w]hether a longer or a more clearly prejudicial

delay might constitute reversible error is not properly before us ...." Cox, 157 So. 3d at 904.

In this case, unlike in Cox, supra, the issue is not the timeliness of a written notice of decision of the Board pursuant to § 16-24C-6(d). Instead, in this case, the record does not demonstrate that any such written notice of decision was provided by the Board. The intent of the legislature in enacting the SFA was, in part, to provide "for fundamental fairness and due process to employees covered by" the SFA, and to "[e]liminat[e] costly, cumbersome, and counterproductive legal challenges to routine personnel decisions by simplifying administrative adjudication and review of contested personnel decisions." § 16-24C-2(1) & (5), Ala. Code 1975. In addition, in enacting the SFA, the legislature specified that the SFA was intended to "to provide rights, remedies, and obligations with respect to employment actions affecting or involving certain employees or categories of employees of city and county boards of education ...." Act No. 2011-270, Ala. Acts 2011, Title. Thus, it is clear from the intent of the legislature in enacting the SFA that, although the SFA is intended to simplify contests and reduce

costs, it is intended to do so while protecting the rights of the employees and teachers to which the SFA applies.

The requirement that the Board provide written notice of its termination decision to an employee is a "'provision[] which relate[s] to the essence of the thing to be done; that is, to matters of substance, [and, therefore, is] mandatory.'" Board of Educ. of Jefferson Cty. v. State, 222 Ala. 70, 74, 131 So. 239, 243 (1930) (quoting Alabama Pine Co. v. Merchants' & Farmers' Bank of Aliceville, 215 Ala. 66, 67, 109 So. 358, 359 (1926)). See also Howard v. Cullman Cty., 198 So. 3d 478, 485 (Ala. 2015) (affirming a determination by the trial court that "the timing provision of former § 40-7-42[, Ala. Code 1975,] is directory, while the requirement to levy the amount of property taxes necessary to fund a county's expenses is mandatory"). That conclusion is consistent with the holding of Cox, supra, which determined that the provision pertaining to the timing of the required written notice is directory.

The record does not demonstrate that the Board complied with the mandatory requirement that it provide Dailey with written notice of its decision. That conclusion, however,

does not end this court's analysis. Rather, this court must consider whether the hearing officer obtained jurisdiction to conduct an administrative review of the Board's decision in the absence of the written notice of the decision required by § 16-24C-6(d). D.C.S. v. L.B., 84 So. 3d 954, 957 (Ala. Civ. App. 2011) ("[J]urisdictional issues are of such importance that this court may take notice of them ex mero motu.").

In a recent case, this court considered, among other things, whether jurisdiction existed to consider an administrative action under the Alabama Administrative Procedure Act ("the AAPA"), § 41-22-1 et seq., Ala. Code 1975. Huntsville Hous. Auth. v. State Licensing Bd. for Gen. Contractors, 179 So. 3d 146 (Ala. Civ. App. 2014). In that case, the Alabama Licensing Board for General Contractors ("ALBGC") denied an application by the Huntsville Housing Authority ("HHA") for a general contractor's license, and the HHA requested an administrative hearing. After that hearing, a representative of the ALBGC informed a representative of the HHA that the application had again been denied and that a written decision would be sent to the HHA. The HHA appealed when it did not timely receive a written decision from the

ALBGC; this court's opinion recognized that the HHA argued that it had not received a written notice, but that it had appealed the oral denial regardless. 179 So. 3d at 148. The circuit court dismissed the HHA's appeal, concluding that it had failed to meet the requirements of the AAPA in filing its appeal. On appeal of that judgment to this court, this court concluded, among other things, that the AAPA requires that a final order be in writing, see § 41-22-16(a), Ala. Code 1975, and, therefore, that ALBGC's failure to enter the written decision required by the AAPA resulted in there being no decision of which the circuit court could obtain jurisdiction to review. Huntsville Hous. Auth., 179 So. 3d at 153-55. This court stated: "To be clear, this court holds that because there is no written final decision within the meaning of the AAPA in the present case, there is nothing for HHA to appeal from to invest the circuit court with subject-matter jurisdiction." Huntsville Hous. Auth., 179 So. 3d at 156. This court held that the circuit court had dismissed HHA's appeal for an incorrect reason, and, although it affirmed the result, i.e., the judgment of dismissal, this court directed

the trial court to enter a judgment in compliance with its opinion. Id.

Although Huntsville Housing Authority, supra, was decided under the AAPA, the conclusions of this court in that case and in this case are that the applicable statute requires the issuance of a written decision by the pertinent agency on the issue of the proposed termination of employment. There is no indication in the record that the Board complied with the mandate of § 16-24C-6(d) requiring that it issue a written notice of its decision to Dailey. Accordingly, the record contains no decision from which Dailey could appeal that would have invested the hearing officer with subject-matter jurisdiction. The hearing officer is instructed to enter an order dismissing the action. See § 16-24C-6(d), Ala. Code 1975. We pretermit discussion of the other issues raised in the parties' appellate briefs.[1]

[1]The parties dispute in their appellate briefs whether Dailey had a due-process right to written notice of the Board's decision and whether due process required that any such written notice contain findings of fact. We have concluded that the SFA required the Board to issue written notice to Dailey of its decision and that the Board failed to provide such notice, and, therefore, this court does not discuss any due-process issues in resolving this appeal.

APPEAL DISMISSED WITH INSTRUCTIONS.

Pittman, Thomas, Moore, and Donaldson, JJ., concur.