Rel: December 21, 2018

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170621

Ex parte Wilcox County Board of Education, Tyrone Yarbrough, individually and in his official capacity as superintendent of the Wilcox County Board of Education, and Bernard Martin and Lester Turk, individually and in their official capacities as members of the Wilcox County Board of Education

PETITION FOR WRIT OF MANDAMUS

(In re: Reginald Southall

v.

Wilcox County Board of Education, Tyrone Yarbrough, individually and in his official capacity as superintendent of the Wilcox County Board of Education, and Bernard Martin and Lester Turk, individually and in their official capacities as members of the Wilcox County Board of Education

(Wilcox Circuit Court, CV-14-12)

BOLIN, Justice.

The Wilcox County Board of Education ("the Board"); Tyrone Yarbrough, individually and in his official capacity as the superintendent of the Board;[1] and members of the Board Bernard Martin and Lester Turk, individually and in their official capacities, petition for a writ of mandamus directed to the Wilcox Circuit Court. The petitioners seek an order compelling the circuit court to vacate its order denying their motion to dismiss and to enter an order dismissing with prejudice all claims against them. We grant the petition and issue the writ.

Facts and Procedural History

Reginald Southall was a teacher at Wilcox Central High School. During a meeting of the Board in April 2013, then Superintendent Yarbrough recommended the nonrenewal of Southall's probationary contract. Five Board members were present during the vote. Upon a motion to accept Yarbrough's

[1]At some point after the underlying litigation was commenced but before this petition for a writ of mandamus was filed, Yarbrough cased being the superintendent. According to Rule 25(d)(1), Ala. R. Civ. P., the new superintendent was automatically substituted as a party as to the claims asserted against Yarbrough in his official capacity. For the purpose of consistency in this opinion, we use "Yarbrough" throughout when referring to the superintendent.

recommendation, three Board members voted in favor of not renewing the contract, one member opposed the recommendation, and one member abstained. Board members Joseph Pettway, Jr., Martin, and Turk voted in favor of Yarbrough's recommendation for the nonrenewal of the probationary contract. Clifford Twilley voted against the recommendation, and Donald McLeod abstained.

Normally, the Board consists of six members. One seat on the Board, however, was vacant at the time of the April 2013 meeting, due to an order of the circuit court enjoining the Board from filling the vacant seat.[2] Thus, the Board conducted business with only five members during the April 2013 meeting.

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[2]On March 3, 2013, the Wilcox Circuit Court removed Jeffery Saulsberry, the sixth member of the Board, and declared him ineligible to hold office as a Board member. The circuit court also issued a restraining order prohibiting the Board from filling the vacancy. On May 7, 2013, the circuit court appointed Saulsberry to fill the seat. This Court subsequently vacated the circuit court's order appointing Saulsberry as a Board member and ordered the State Superintendent of Education to fill the vacancy left by Saulsberry's removal. Ex parte State Bd. of Educ. (No. 1131426, April 24, 2015), 215 So. 3d 1022 (Ala. 2015) (table). Thus, between March 3, 2013, through May 7, 2013, the Board was judicially enjoined from filling the vacancy and thus from conducting business with six members.

On December 3, 2014, Southall filed a petition in the circuit court seeking a declaratory judgment, injunctive relief, and a writ of mandamus, in which he asserted that, because of the vacancy on the Board, the termination of his employment was the result of an illegal vote of the Board in violation of § 16-8-4, Ala. Code 1975. On January 12, 2015, the Board, Yarbrough, Martin, and Turk (hereinafter referred to collectively as "the petitioners"), filed a motion to dismiss pursuant to Rule 12(b)(6), Ala. R. Civ. P., asserting that Southall failed to state a claim upon which relief may be granted because, they argued, the Board's vote to accept the recommendation not to renew Southall's probationary contract complied with the law. The petitioners also moved to dismiss on the basis of Rule 12(b)(1), Ala. R. Civ. P., asserting that the circuit court lacked subject-matter jurisdiction because, they asserted, they are immune from liability. Three years passed before the circuit court considered the motion. After conducting a status conference on February 22, 2018, the circuit court denied the motion to dismiss without explanation, either of the delay in ruling or of the reasoning

for the ruling. On April 5, 2018, the petitioners filed this petition for a writ of mandamus.

Standard of Review

> "'"The writ of mandamus is a drastic and extraordinary writ, to be 'issued only when there is: 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court.' Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993); see also Ex parte Ziglar, 669 So. 2d 133, 134 (Ala. 1995)." Ex parte Carter, [807 So. 2d 534,] 536 [(Ala. 2001)].'
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> "Ex parte McWilliams, 812 So. 2d 318, 321 (Ala. 2001).
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> "'Subject to certain narrow exceptions ..., we have held that, because an "adequate remedy" exists by way of an appeal, the denial of a motion to dismiss or a motion for a summary judgment is not reviewable by petition for writ of mandamus.' Ex parte Liberty Nat'l Life Ins. Co., 825 So. 2d 758, 761–62 (Ala. 2002)."

Ex parte Kohlberg Kravis Roberts & Co., L.P., 78 So. 3d 959, 965-66 (Ala. 2011). Among those exceptions is when the petitioner challenges the subject-matter jurisdiction of the trial court, Ex parte HealthSouth Corp., 974 So. 2d 288, 292 (Ala. 2007), or when the petitioner asserts immunity. Ex

Ex parte Alabama Peace Officers' Standards & Training Comm'n, 34 So. 3d 1248 (Ala. 2009).

Discussion

A. Sovereign Immunity and Official-Capacity Claims

The Board contends that the circuit court should have granted the motion to dismiss as to Southall's claims against it seeking monetary damages, on the ground of sovereign immunity. Yarbrough, Martin, and Turk contend that dismissal is also warranted on those claims seeking monetary damages against them in their official capacities, on the ground of sovereign immunity. We agree.

It is well settled law that the State is generally immune from liability under § 14, Alabama Constitution of 1901. It is also well settled that the State cannot be sued indirectly by suing an officer in his or her official capacity.

> "Sovereign immunity is a jurisdictional bar that deprives a court of subject-matter jurisdiction. Ex parte Dep't of Mental Health & Mental Retardation, 837 So. 2d 808, 810-11 (Ala. 2002). The principle of sovereign immunity, set forth in Article I, § 14, Alabama Constitution of 1901, is a wall that is 'nearly impregnable.' Patterson v. Gladwin Corp., 835 So. 2d 137, 142 (Ala. 2002). The implications of sovereign immunity are '"not only that the state itself may not be sued, but that this cannot be indirectly accomplished by suing its officers or agents in their official capacity, when a result

> favorable to plaintiff would be directly to affect the financial status of the state treasury."' Patterson, 835 So. 2d at 142 (quoting State Docks Comm'n v. Barnes, 225 Ala. 403, 405, 143 So. 581, 582 (1932))."

Ex parte Alabama Dep't of Mental Health & Mental Retardation, 937 So. 2d 1018, 1022-23 (Ala. 2006).

County boards of education, along with the members of the those boards and superintendents sued in their official or representative capacity, enjoy the protection of immunity provided by § 14 when the action against them is effectively an action against the State. See Ex parte Montgomery Cty. Bd. of Educ., 88 So. 3d 837 (Ala. 2012)(holding that the Montgomery County Board of Education and members of the board in their official capacity were immune from suit under § 14 on a tort claim brought on behalf of an elementary-school student injured in the school's restroom); Ex parte Monroe Cty. Bd. of Educ., 48 So. 3d 621 (Ala. 2010)(holding that, for the purpose of sovereign immunity, county boards of education are considered agencies of the State); and Board of Sch. Comm'rs of Mobile Cty. v. Weaver, 99 So. 3d 1210 (Ala. 2012)(holding that superintendent was entitled to sovereign immunity in his official capacity as a State officer). Therefore, the Board

is absolutely immune from suit, as it is considered an agency of the State. In addition, to the extent Southall seeks monetary damages against the individual petitioners in their official capacities, they are also immune from suit.

Section 14 immunity, however, is not always absolute; there are actions against State officials that are not barred by the general rule of sovereign immunity.

> "[C]ertain actions are not barred by § 14. There are six general categories of actions that do not come within the prohibition of § 14: (1) actions brought to compel State officials to perform their legal duties; (2) actions brought to enjoin State officials from enforcing an unconstitutional law; (3) actions to compel State officials to perform ministerial acts; (4) actions brought against State officials under the Declaratory Judgments Act, Ala. Code 1975, § 6-6-220 et seq., seeking construction of a statute and its application in a given situation; (5) valid inverse condemnation actions brought against State officials in their representative capacity; and (6) actions for injunction or damages brought against State officials in their representative capacity and individually where it was alleged that they had acted fraudulently, in bad faith, beyond their authority, or in a mistaken interpretation of law. See Drummond Co. v. Alabama Dep't of Transp., 937 So. 2d 56, 58 (Ala. 2006)(quoting Ex parte Carter, 395 So. 2d 65, 68 (Ala. 1980)); Alabama Dep't of Transp. v. Harbert Int'l, Inc., 990 So. 2d 831 (Ala. 2008) (holding that the exception for declaratory-judgment actions applies only to actions against State officials). As we confirmed in Harbert, these 'exceptions' to sovereign immunity apply only to actions brought against State officials; they do not

> apply to actions against the State or against State agencies. See Alabama Dep't of Transp., 990 So. 2d at 840-41."

Ex parte Alabama Dep't of Fin., 991 So. 2d 1254, 1256-57 (Ala. 2008). In Ex parte Moulton, 116 So. 3d 1119 (Ala. 2013), this Court clarified and restated the sixth exception to § 14 immunity set forth in Drummond Co. v. Alabama Department of Transportation, 937 So. 2d 56, 58 (Ala. 2006), by holding that the exception applies only to the following:

> "(6)(a) actions for injunction brought against State officials in their representative capacity where it is alleged that they had acted fraudulently, in bad faith, beyond their authority, or in a mistaken interpretation of law, Wallace v. Board of Education of Montgomery County, 280 Ala. 635, 197 So. 2d 428 (1967), and (b) actions for damages brought against State officials in their individual capacity where it is alleged that they had acted fraudulently, in bad faith, beyond their authority, or in a mistaken interpretation of law, subject to the limitation that the action not be, in effect, one against the State. Phillips v. Thomas, 555 So. 2d 81, 83 (Ala. 1989)."

116 So. 3d at 1141.

Southall argues that, to the extent he seeks a judgment declaring that the termination of his employment was ineffective and prospective injunctive relief requiring reinstatement to his previous employment, the claims against

the individual petitioners in their official capacities fall within the first, third, fourth, and sixth exceptions.

First, Southall argues that Yarbrough and the individual Board members had a legal duty to recognize that he remains employed because, under § 16-8-4, there was no affirmative vote of a majority of the entire six-member Board. He also argues that the third exception is applicable because, he says, he is seeking to have them perform the ministerial act of continuing to treat him as employed and to return him to active status because, he says, there was no valid affirmative vote to terminate his employment. He further argues that the fourth exception to § 14 immunity exists because he brought this suit under the Declaratory Judgments Act, § 6-6-220 et seq., Ala. Code 1975, seeking the construction and application of § 16-8-4. Finally, he asserts that the sixth exception is applicable because, he says, the individual petitioners were operating under a mistaken interpretation of the law.

Before addressing the exceptions to § 14 immunity, this Court must differentiate between Southall's requests for monetary relief and for injunctive relief. In Harris v. Owens, 105 So. 3d 430 (Ala. 2012), a former state-university

employee brought an action against the university president and the individual members of the university's board in their official capacities, alleging that her employment had been wrongfully terminated. The trial court found that the university had not complied with the due-process procedures set forth in its employee handbook and that the former employee was entitled to backpay and benefits. This Court held:

> "In this case, § 14 immunizes the [university president and individual board members] from any claim for monetary damages. Therefore, the circuit court did not have subject-matter jurisdiction over [the former employee's] claim for backpay and benefits. See Ex parte Alabama Dep't of Transp., 978 So. 2d 17 (Ala. 2007). '"'"Lacking subject matter jurisdiction [a court] may take no action other than to exercise its power to dismiss the [claim].... Any other action taken by a court lacking subject matter jurisdiction is null and void."'" Ex parte Blankenship, 893 So. 2d [303,] 307 [(Ala. 2004)](quoting State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1029 (Ala. 1999), quoting in turn Beach v. Director of Revenue, 934 S.W.2d 315, 318 (Mo. Ct. App. 1996)).' Ex parte Alabama Dep't of Transp., 978 So. 2d at 27. Thus, the circuit court's order was void to the extent it purported to award backpay and benefits to [the former employee]."

105 So. 3d at 435.

In his petition in the circuit court, Southall sought a judgment declaring:

(1) that the Board and its members' actions of acting on a recommendation of Yarbrough without the proper majority vote violated § 16-8-4;

(2) that the nonrenewal of Southall's employment is invalid and that the act taken against him was beyond their authority;

(3) that Southall is due all pay and benefits he was receiving until a proper vote on the renewal of his contract is taken;

(4) that Southall had no break in service of his employment; and

(5) that the Board and its members did not have any authority to "non-renew" his contract under the circumstances.

He also sought the following injunctive relief:

(1) a preliminary injunction enjoining the Board from preventing him from returning to work as a teacher;

(2) a preliminary injunction enjoining the Board from withholding his pay and benefits until a proper vote of the Board on the renewal of his probationary contract could be taken;

(3) a permanent injunction enjoining the Board, its members, and their successors in office from releasing employees without having the proper majority vote as required under the Code of Alabama;

(4) a temporary restraining order and preliminary and permanent injunctions requiring the Board, its members, and

> Yarbrough to conform their actions to the law and prohibiting the Board from nonrenewing his contract without following the procedures required by law; and
>
> (5) an injunction enjoining the Board from implementing § 16-8-4 contrary to its meaning.

In addition, he sought a writ of mandamus:

> (1) compelling the Board and its members to perform their legal or ministerial duties;
>
> (2) requiring them to reinstate him as a teacher in the Wilcox County School System with all duties, responsibilities, privileges, and pay to which he says he is entitled as if he had not been discharged;
>
> (3) requiring an accounting of all moneys and benefits lost as result of the alleged breach of duty by the Board and its members and awarding the same to Southall;
>
> (4) awarding costs and attorney fees; and
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> (5) granting any other relief deemed sufficient by the court.

Thus, Southall's requests for a declaratory judgment and injunctive relief included requests for monetary relief, such as an award of all moneys and benefits. Section 14 immunity bars any action characterized as an action seeking a declaratory judgment or an injunction "when it is nothing more than an action for damages." Lyons v. River Road Constr. Co.,

858 So. 2d 257, 263 (Ala. 2003). Therefore, to the extent Southall couches his requests for monetary relief within his requests for declaratory and injunctive relief against the individual petitioners in their official capacities, we conclude that none of the exceptions to § 14 are applicable and that, therefore, the individual petitioners are immune from suit in their official capacities.

It should be noted that, to the extent Southall argues that Yarbrough should not be cloaked with § 14 immunity because he failed to perform a legal duty, his argument is unavailing. In Board of School Commissioners of Mobile County v. Weaver, 99 So. 3d 1210 (Ala. 2012), we held that the superintendent of the Mobile County Public School System was not vested with the authority to employ or to terminate principals and teachers beyond making a recommendation to the school board. We stated:

> "Assuming, without deciding, that a duty did arise on behalf of Superintendent Nichols to implement the reduction-in-force policy based on the circumstances surrounding the representations contained in the letter of May 9, it was the Board's individual members in their official capacities who were vested with the authority to provide the plaintiffs with the ultimate relief sought, i.e., reinstatement to their positions with backpay. § 16-8-23, Ala. Code 1975. Like the situation presented in Ex parte

> Bessemer Board of Education, [68 So. 3d 782 (Ala. 2011),] where the Board members were vested with the statutory duty to pay the plaintiff teacher her appropriate salary increase, it was the individual board members in this case who were vested with the statutory authority to reinstate the plaintiffs to their positions as assistant principals. However, unlike the situation presented in Ex parte Bessemer Board of Education, the individual Board members in this case were not sued and were not made parties in this case. Only the Board and Superintendent Nichols were made parties to this case. The Board is entitled to absolute immunity, and Superintendent Nichols is not vested with the authority under § 16-8-23, Ala. Code 1975, to grant the plaintiffs the relief they request. Accordingly, we cannot conclude that this action is an action to compel Superintendent Nichols to perform a legal duty; thus, it does not fall within the first designated 'exception' to § 14 immunity."

99 So. 3d at 1220-21.

Like the superintendent in Weaver, the superintendent in the present case cannot provide Southall with the relief he requested. The superintendent makes recommendations to the school board with respect to personnel matters. Section 16-8-23 provides that "[t]he county board of education shall appoint, upon the written recommendation of the county superintendent, all principals, teachers, clerical and professional assistants authorized by the board." Yarbrough had the authority only to make recommendations to the Board. Therefore, this Court cannot conclude that Southall's

allegations against Yarbrough fall within the first "exception" to sovereign immunity.

Southall's more convincing argument, however, is that his nonmonetary requests for declaratory or prospective injunctive relief against the individual petitioners in their official capacities fall within the fourth and/or sixth exceptions in Drummond Co.

Throughout his petition before the circuit court, Southall alleged that the individual Board members either acted beyond their authority or "failed to understand" § 16-8-4 when they voted in favor of adopting Yarbrough's recommendation not to renew Southall's probationary contract. He also requested a declaratory judgment regarding the application of § 16-8-4 to his situation. Therefore, to the extent Southall requested declaratory or prospective injunctive relief, such as the reinstatement of his position and guidance regarding the application of § 16-8-4 to his specific circumstances, we conclude that his requests related to the application of § 16-8-4 meet the fourth and sixth exceptions as to the claims against the individual Board members in their official capacities.

B. State-Agent Immunity[3]

Yarbrough, Turk, and Martin also assert that they are entitled to State-agent immunity as set forth in Ex parte Cranman, 792 So. 2d 392 (Ala. 2000), as to the claims asserted against them in their individual capacities because they are being sued based on their actions in either recommending that Southall's employment not be renewed or voting on that recommendation as a Board member.[4]

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[3]It is important to note that this Court rarely resolves a claim of State-agent immunity during such an early stage of the proceedings. We have said that "'"[a] motion to dismiss is typically not the appropriate vehicle by which to assert ... qualified immunity or State-agent immunity and ... normally the determination as to the existence of such a defense should be reserved until the summary-judgment stage, following appropriate discovery."'" Ex parte Walker, 97 So. 3d 747, 750 (Ala. 2012) (quoting Ex parte Alabama Dep't of Youth Servs., 880 So. 2d 393, 397-98 (Ala. 2003), quoting in turn Ex parte Alabama Dep't of Mental Health & Mental Retardation, 837 So. 2d 808, 813-14 (Ala. 2002)). This Court has repeatedly observed that "'"[i]t is a rare case involving the defense of [State-agent] immunity that would be properly disposed of by a dismissal pursuant to Rule 12(b)(6), [Ala. R. Civ. P.]."'" Ex parte Alabama Dep't of Mental Health & Retardation, 837 So. 2d at 814 (quoting Ex parte Butts, 775 So. 2d 173, 177 (Ala. 2000), quoting in turn Patton v. Black, 646 So. 2d 8, 10 (Ala. 1994) (quoting earlier cases)). Nonetheless, because we conclude that the Board's vote was not invalid as a matter of law, we discuss the immunity issue.

[4]Cranman was a plurality opinion. The test set forth in Cranman was subsequently adopted by a majority of the Court in Ex parte Butts, 775 So. 2d 173, 178 (Ala. 2000).

The law governing actions against our State and its agents is well settled:

> "'State-agent immunity protects state employees, as agents of the State, in the exercise of their judgment in executing their work responsibilities.' Ex parte Hayles, 852 So. 2d 117, 122 (Ala. 2002). In [Ex parte] Cranman[, 792 So. 2d 392 (Ala. 2000),] this Court restated the rule governing State-agent immunity:
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> > "'A State agent shall be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's
> >
> > "'(1) formulating plans, policies, or designs; or
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> > "'(2) exercising his or her judgment in the administration of a department or agency of government, including, but not limited to, examples such as:
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> > "'(a) making administrative adjudications;
> >
> > "'(b) allocating resources;
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> > "'(c) negotiating contracts;
> >
> > "'(d) hiring, firing, transferring, assigning, or supervising personnel; or
> >
> > "'(3) discharging duties imposed on a department or agency by statute, rule, or regulation, insofar as the statute, rule, or regulation prescribes the manner for performing the duties and the State agent performs the duties in that manner; or

> "'(4) exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons; or
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> "'(5) exercising judgment in the discharge of duties imposed by statute, rule, or regulation in releasing prisoners, counseling or releasing persons of unsound mind, or educating students.
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> "'Notwithstanding anything to the contrary in the foregoing statement of the rule, a State agent shall not be immune from civil liability in his or her personal capacity
>
> "'(1) when the Constitution or laws of the United States, or the Constitution of this State, or laws, rules, or regulations of this State enacted or promulgated for the purpose of regulating the activities of a governmental agency require otherwise; or
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> "'(2) when the State agent acts willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law.'

"792 So. 2d at 405."

Ex parte Estate of Reynolds, 946 So. 2d 450, 453-54 (Ala. 2006).

Thus, State-agent immunity extends to decisions and actions involving "the hiring, firing, transferring, assigning

or supervising of personnel." Cranman, 792 So. 2d at 405. Because it is clear that Yarbrough's recommendation and the Board's vote to accept his recommendation were acts involving the nonrenewal of an employee contract, the individual petitioners have demonstrated that their acts fall within a category of State-agent immunity. Thus, the burden then shifted to Southall to demonstrate that the individual petitioners "act[ed] willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law." Id. Southall alleges throughout his petition in the circuit court that the individual petitioners acted beyond their authority or that they misunderstood or incorrectly applied the law. The petition filed by Southall in the circuit court, however, does not set forth any specific facts indicating that the Board members owed a duty in their individual capacities to provide any employment benefits to a probationary employee. Clearly, the claims are actually claims against the Board for actions taken as an employer and are not claims against State officials for the tortious breach of a personal or individual duty. As previously discussed, it is clear that the Board members were

acting in their official capacities when the Board, acting with five members, cast three votes to accept Yarbrough's recommendation not to renew Southall's probationary contract. Therefore, to the extent the individual-capacity claims are in effect claims against the State, the claims are barred by § 14 immunity.

C. Application of §§ 16-8-4 and 16-24C-5, Ala. Code 1975

Southall contends that the Board members' vote not to renew his contract was invalid because it was not based on a majority of the full six-member Board.

Southall argues that the nonrenewal of his probationary contract was void because a majority of the "whole board" did not vote to accept Yarbrough's recommendation. In his petition before the circuit court, he argued that the nonrenewal of his employment contract deprived him of his property and liberty interests without due process of law.[5]

Southall bases his argument on § 16-8-4, which provides, in pertinent part, that "[n]o motion or resolution shall be

[5]We note that probationary classified teachers are afforded less due process than are tenured and nonprobationary classified employees. See §§ 16-24C-5 and -6, Ala. Code 1975.

declared adopted without the concurrence of the majority of the whole [county] board [of education]." Thus, he characterizes the issue as whether the requirement of a majority of the "whole board" requires the total original membership of the body, regardless of whether the actual membership has been reduced by a vacancy beyond the Board's control, or whether the requisite majority of the "whole board" is determined with reference to the actual number of members of the Board present at the time of the vote, so long as a quorum is present.

Southall, however, ignores a section of the Students First Act, § 16-24C-5(c), Ala. Code 1975, which specifies the process for terminating probationary teachers. Section 16-24C-5(c) provides, in pertinent part, that "[p]robationary teachers who are not employees of a two-year educational institution operated under the authority and control of the Department of Postsecondary Education may be terminated at the discretion of the employer upon the written recommendation of the chief executive officer, a majority vote of the governing board, and issuance of written notice of termination to the teacher on or before the fifteenth day of June." (Emphasis

added.) Section 16-24C-3(5), Ala. Code 1975, in pertinent part, defines a "governing board" as "[t]he body of elected or appointed officials that is granted authority by law, regulation, or policy to make employment decisions on behalf of the employer."

In State Farm Mutual Automobile Insurance Co. v. Motley, 909 So. 2d 806 (Ala. 2005), we stated:

> "'"Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the Legislature must be given effect."'
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> "Blue Cross & Blue Shield v. Nielsen, 714 So. 2d 293, 296 (Ala. 1998)(quoting IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992)).
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> "'Of course, the rule is well recognized that in the construction of a statute, the legislative intent is to be determined from a consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found. The intent so deduced from the whole will prevail over that of a particular part considered separately.'

> "Blair v. Greene, 246 Ala. 28, 30, 18 So. 2d 688, 689 (1944).
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> > "'It is well settled that when it is interpreting a statute this Court seeks to give effect to the intent of the Legislature, as determined primarily from the language of the statute itself. Beavers v. County of Walker, 645 So. 2d 1365, 1376 (Ala. 1994) (citing [McCall v.] McCall, 596 So. 2d 2 (Ala. Civ. App. 199[1])); Volkswagen of America, Inc. v. Dillard, 579 So. 2d 1301 (Ala. 1991). Also, our rules of statutory construction direct us to look at the statute as a whole to determine the meaning of certain language that is, when viewed in isolation, susceptible to multiple reasonable interpretations. McRae v. Security Pac. Hous. Servs., Inc., 628 So. 2d 429 (Ala. 1993).'
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> "Ex parte Alfa Fin. Corp., 762 So. 2d 850, 853 (Ala. 1999).
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> > "'"When interpreting a statute, [a court] must read the statute as a whole because statutory language depends on context; [a court] will presume that the Legislature knew the meaning of words it used when it enacted the statute."'
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> "Ex parte USX Corp., 881 So. 2d 437, 442 (Ala. 2003)(quoting Bean Dredging, L.L.C. v. Alabama Dep't of Revenue, 855 So. 2d 513, 517 (Ala. 2003))."

909 So. 2d at 813-14.

This is not a case where the Board independently chose not to fill a vacancy or where a member deliberately absented himself or herself to prevent the Board from conducting

business. This is a rare case in which a State court had judicially enjoined the Board from filling a vacancy. Thus, it is clear that "the whole body" of board members who were authorized to conduct business as a governing board was no more than the then five members of the Board. We therefore must conclude that, under the limited circumstances of this particular case, a majority of the five members was all that was required to accept Yarbrough's recommendation not to renew Southall's probationary contract.

This Court recognizes that there are instances when a majority of a full board or council is necessary to fill a vacancy on the body. Southall cites Reese v. State ex rel. Carswell, 184 Ala. 36, 62 So. 847 (1913), for the proposition that a vacancy on the body does not reduce the number of votes needed, if the statute requires a majority of the whole body. In Reese, the president of a municipal council, who under the council's charter was a member of the council, and seven councilmen met to fill a vacancy on the council. At that time, subsection 7 of § 1192 of the Code 1907 provided that, in all elections of municipal officers, a "concurrence of a majority of the whole number of elected members" was required.

184 Ala. at 44, 62 So. at 850. We held that the statute imposed a requirement of affirmative action by a majority of all the elected members of the council to fill the vacancy. The Court therefore concluded that at least five votes were necessary. It reasoned that nothing in the statute itself indicated that a majority of a quorum of members was sufficient for the purposes of filling a vacancy. The circumstances and the statute at issue in Reese, however, are substantially different from those in Southall's case. Reese concerned a municipal council operating under a different statute, not a board of education proceeding under the terms of § 16-24C-5(c), which requires a written recommendation and "a majority vote of the governing board" before the employment of a probationary teacher can be terminated. In addition, the municipal council itself in Reese was not prevented from filling a vacancy as a result of a court-ordered injunction. Thus, Reese is distinguishable.

Southall also cites two attorney general opinions for the proposition that a majority of the full county board of education is required to terminate the employment of an employee of the school system. We note that, although an

attorney general opinion may constitute persuasive authority, the opinion is not binding upon this Court. T-Mobile South, LLC v. Bonet, 85 So. 3d 963, 978 (Ala. 2011).

In a 1983 opinion, a representative asked the attorney general to advise what would happen if the superintendent of education recommended the nonrenewal of a school secretary's contract and the board, which had five members, voted two votes for, two votes against, and one member abstained. The attorney general evaluated whether the secretary would remain an employee under §§ 16-8-4 and 16-9-23, Ala. Code 1975. He concluded that, because § 16-9-23 provides that the superintendent has the general authority to recommend dismissal and because § 16-8-4 requires a "concurrence of a majority of the whole board," there would be no majority vote for the nonrenewal of the contract. Ala. Op. Att'y Gen. No. 84-00102 (Dec. 20, 1983). First, we note that the attorney general's opinion predates the Students First Act of 2011, which governs the Board's vote on the nonrenewal of Southall's probationary contract. Thus, the Board in Southall's case was tasked with considering Yarbrough's recommendation under the terms of § 16-24C-5(c), which requires "a majority vote of the

governing board" before terminating a probationary teacher's employment. In addition, Southall's case is substantially different because the Board was judicially enjoined from filling a vacancy; the issue in the attorney general's opinion was whether a 2-2-1 vote was sufficient to nonrenew.

Southall also cites a 2009 attorney general opinion in which a county board of education was tasked with voting on the distribution of settlement funds and wished to change the required concurrence for transacting such business from a simple majority to a super majority. Ala. Op. Att'y Gen. No. 2009-082 (June 23, 2009). Relying on § 16-8-4, the attorney general determined that no motion could be adopted requiring the concurrence of the majority of the whole board. Thus, the attorney general concluded that a county board of education could not adopt a resolution requiring a 4/5 majority vote of the total membership of the board for the distribution of the settlement funds. Southall's case is markedly different. The board in the 2009 attorney general opinion was not operating under the Students First Act of 2011 or any court-ordered injunction. Furthermore, in Southall's case, the Board did not attempt to transition from a majority to a super majority.

Conclusion

Based on the foregoing, we conclude that the petitioners have demonstrated a clear legal right to the order sought. We grant the petition for a writ of mandamus directing the Wilcox Circuit Court to vacate its February 22, 2018, order and to enter an order dismissing the underlying action.

PETITION GRANTED; WRIT ISSUED.

Stuart, C.J., and Main, Wise, Sellers, and Mendheim, JJ., concur.

Parker, J., concurs in part and dissents in part.

Shaw and Bryan, JJ., concur in the result in part and dissent in part.

PARKER, Justice (concurring in part and dissenting in part).

I concur as to Parts A and B of the "Discussion" section of the main opinion. I dissent as to Part C for the reasons stated in Justice Shaw's special writing.

SHAW, Justice (concurring in the result in part and dissenting in part).

As to Part "A" of the "Discussion" section of the main opinion, I concur in the result. Under Ala. Const. 1901, Art. I, § 14, the plaintiff, Reginald Southall, is clearly not entitled to monetary damages, including "backpay." In some situations when a former employee has worked for the State and then the State, contrary to statute, has paid the employee incorrectly, the employee, seeking to obtain the difference in pay, might be able to allege a claim that falls outside § 14 immunity. See, e.g., Ex parte Bessemer Bd. of Educ., 68 So. 3d 782 (Ala. 2011). Similarly, some claims seeking payment when the State has contracted for services and has accepted those services might not be barred by § 14. Alabama State Univ. v. Danley, 212 So. 3d 112, 127 (Ala. 2016) ("[O]nce the State has contracted for services and has accepted those services, it is legally obligated to pay for those services, and a claim seeking to enforce that legal obligation falls within the parameters of the first 'exception' to § 14 immunity."). But when an employee alleges the improper termination of his or her employment, the employee cannot

recover backpay for services never performed because of that termination; such backpay is simply a form of "damages," the recovery of which is barred by § 14. Danley, 212 So. 3d at 126 (holding that § 14 barred a claim seeking a portion of a salary the plaintiff would have been entitled to receive but for an alleged wrongful termination), and Harris v. Owens, 105 So. 3d 430, 435 (Ala. 2012).[6] Here, Southall is seeking money that he would have been paid had his probationary employment not been terminated and had he continued working as a teacher. Such a claim, whether pursued by a writ of mandamus or by seeking injunctive or declaratory relief, is one for damages that is barred by § 14. Danley and Harris, supra. I agree with the judgment of the main opinion that the monetary claims against the petitioners are barred.[7]

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[6]Additionally, Southall may not recover attorney fees in this case. Ex parte Town of Lowndesboro, 950 So. 2d 1203 (Ala. 2006).

[7]I agree that the Wilcox County Board of Education, as an agency of the State, is absolutely immune from suit under Ala. Const. 1901, Art. I, § 14, on the state-law claims in this case. Ex parte Hale Cty. Bd. of Educ., 14 So. 3d 844, 848 (Ala. 2009). As to the official-capacity claims against Tyrone Yarbrough, the former superintendent of the Board, I also agree that Southall has failed to demonstrate that an exception to § 14 immunity applies in this case. See Board of Sch. Comm'rs of Mobile Cty. v. Weaver, 99 So. 3d 1210, 1212 (Ala. 2012).

I further agree that, to the extent that Southall requested declaratory and prospective injunctive relief to determine whether his employment had been improperly terminated and whether he was entitled to be reinstated as an employee, those claims against certain members of the Wilcox County Board of Education ("the Board") in their official capacities are not barred by § 14.

As to Part "B" of the "Discussion" section of the main opinion, I also concur in the result. I believe that the individual-capacity claims against Tyrone Yarbrough, the former superintendent of the Board, and Bernard Martin and Lester Turk, who are members of the Board, are barred by § 14. Those claims alleged a violation of their duties as officials; no duties they might have owed Southall individually or personally are implicated. See Barnhart v. Ingalls, [Ms. 1170253, November 21, 2018] ___ So. 3d ___ (Ala. 2018). Thus, the claims against them are, in effect, claims against the State, and any so-called exceptions to § 14 do not apply to allow the purported individual-capacity claims to proceed. Phillips v. Thomas, 555 So. 2d 81, 83 (Ala. 1989) ("State officers and employees, in their [individual capacities,] ...

are absolutely immune from suit when the action is, in effect, one against the State."). Because these claims are barred by § 14, an analysis regarding whether State-agent immunity also bars them is pretermitted.

I respectfully dissent to Part "C" of the "Discussion" section of the main opinion. Whether the trial court has jurisdiction is the only matter before us in this mandamus petition. The substantive merit of Southall's claim that a majority of the Board failed to vote in favor of the termination of his employment is not before us; that issue can and must be instead reviewed on appeal. Liberty Nat'l Life Ins. Co., 825 So. 2d 758, 761-62 (Ala. 2002) ("[B]ecause an 'adequate remedy' exists by way of an appeal, the denial of a motion to dismiss or a motion for a summary judgment is not reviewable by petition for writ of mandamus.").

BRYAN, Justice (concurring in the result in part and dissenting in part).

I concur in the result as to Part A and Part B of the "Discussion" section of the main opinion. I dissent as to Part C for the reasons stated in Justice Shaw's special writing.