No. 1020990

IN THE SUPREME COURT OF ALABAMA

BIRMINGHAM BOARD OF EDUCATION,

Defendant-Appellant,

vs.

DOROTHY BOYD,

Plaintiff-Appellee

On Appeal from the Circuit Court of Jefferson County

BRIEF OF APPELLEE DOROTHY BOYD

Jerome Tucker
1728 Third Ave. North
Suite 500
Birmingham AL 35203
(205) 328-0055

Charles Norton
Alabama Education Ass'n
P.O. Box 4177
Montgomery AL 36103-4177
(334) 834-9790

Sam Heldman
Gardner, Middlebrooks, Gibbons,
Kittrell & Olsen
2805 31st St. NW
Washington DC 20008
(202) 965-8884

Vance McCrary
Gardner, Middlebrooks, Gibbons,
Kittrell & Olsen
McAdory Bldg.
2013 First Ave. North
Birmingham AL 35203
(205) 250-7776

Statement Regarding Oral Argument

There is no need for oral argument. The issues are not especially complex. Moreover, as explained in the Argument, there is not even a justiciable issue in this Court; this appeal is nothing more than a request for an advisory opinion from this Court, and as such the appeal should be dismissed without any unnecessary expenditure of the Court's time.

Table of Contents

Statement Regarding Jurisdiction

There is no justiciable live controversy in this appeal, for a variety of reasons discussed in this Brief. Accordingly, this Court does not have jurisdiction.

Table of Authorities

Statement of the Case

This case is about the rights of a non-probationary school employee, Ms. Boyd, who learned that the Birmingham Board of Education was preparing to decide whether to terminate her employment. The School Board has appealed from an injunction requiring it to comply with certain rudimentary principles of fairness. In the end, however, this appeal is merely the Board's request for an advisory opinion, and the appeal does not amount to a live justiciable dispute.

Relevant proceedings were as follows.

The case was brought by Dock Stanford and Dorothy Boyd. The Defendants were the Board and Dr. Wayman Shiver, individually and as Superintendent. Stanford and Boyd had received notice that the Superintendent and the Board proposed to terminate their employment; they challenged various aspects of the pre-termination procedures followed by the Board and Superintendent. [Complaint, C-1 to -11].

The Superintendent, meanwhile, decided *not* to proceed towards possible termination of plaintiff Stanford. [E.g., C-351]. Therefore, Stanford's claim was dismissed with

prejudice as moot. [C-390]. The claim of Plaintiff Boyd, however, remained active.

After hearing from counsel for the parties, the trial court issued a preliminary injunction enjoining the Board:

> from proceeding with the pre-termination hearing [of Ms. Boyd] unless such board,
>
> (a) gives notice of the cause or causes for termination in sufficient detail to fairly enable plaintiff to show any error that may exist;
>
> (b) provides the names and nature of testimony of witnesses;
>
> (c) provides a meaningful opportunity to be heard; and
>
> (d) has a due process hearing before an impartial board.

[C-283 to -284].

Defendants, in a motion for summary judgment, for clarification, and for other relief, asserted that the preliminary injunction did not prohibit them from proceeding with Boyd's pre-termination hearing as they had planned. [C-288]. Nonetheless, no such hearing took place, and Defendants continued to argue for their preferred view as to what pre-termination procedures were necessary. [C-285 to -303].

The trial court denied Defendants' motion. [C-390 to -391]. The trial court certified a question for immediate

appeal [C-391], but this Court declined to allow the Defendants' appeal. [C-395].

The trial court then made the preliminary injunction permanent, and ordered "the parties" to comply with it – thus making the injunction binding not only on the Board (which had been enjoined in the preliminary injunction) but also on the Superintendent, who was a co-Defendant individually and in his official capacity. [C-397].

Defendants did not, at any time, counterclaim for any declaratory or other relief as to the lawfulness of various aspects of their existing policy regarding pre-termination hearings.

A notice of appeal was filed *only* by the Board, and *not* by the Defendant Superintendent. [C-413].

Statement of the Issues

1. Whether this appeal presents a live justiciable controversy, where (a) the Board contends that the trial court's injunction does *not* prohibit the actions the Board seeks to take, and the Board seeks an advisory opinion from this Court to that effect, without either having taken the challenged action or having counterclaimed for a declaratory judgment; (b) the Board *cannot* proceed to

terminate Boyd without the participation of the Superintendent, yet the Superintendent has not appealed from the injunction and therefore is indisputably bound by it; and (c) the Board does not even challenge the injunction's requirement that Boyd be given adequately detailed notice of the charges against her, and the Board's indisputable failure to comply with that requirement makes all other issues academic at this point.

2. Whether a nonprobationary school employee facing possible termination is entitled, under the Fair Dismissal Act or the U.S. Constitution's Due Process guarantee, to a hearing at which the school board will learn the relevant facts from the testimony of witnesses before deciding whether to terminate the employee – or whether, as the Board would have it, a school board can terminate an employee before ever having had a meaningful chance to learn the facts that would show whether termination is warranted.

Statement of the Facts

Plaintiff Dorothy Boyd had, at the time the Complaint was filed, been employed by the Board as a bus driver for

more than five years. [C-5]. As such, Boyd was entitled to the protections of the Fair Dismissal Act, Ala. Code § 36-26-100 *et seq.* and enjoyed nonprobationary status under the Act.

In August 2002, Boyd received a letter from the Superintendent indicating that the Board proposed to terminate her employment "on the grounds of incompetence and other good and just cause." [C-20]. The "specific reasons," according to the Superintendent's letter, consisted of the assertion that the "Board has been notified by its insurance company that it will nor [sic] insure you as a driver under our current vehicle insurance policy because of the number of traffic violations that are listed on your Motor Vehicle Report; and, in addition to the accidents listed on your current Motor Vehicle Report, you also have a high number of minor accidents in the past." [C-20]. The letter indicated that Boyd had the right to contest the proposed termination pursuant to the Fair Dismissal Act. [Id.].

Ms. Boyd was also notified, by separate letter, that she was placed on leave with pay as of September 3, 2002. [C-104].

The notice given by the Superintendent placed Ms. Boyd in an impossible position: the Superintendent's letters were so vague as to the alleged details of anything that Ms. Boyd had allegedly done wrong, that Ms. Boyd could not meaningfully prepare to defend against the proposed termination. For instance, those letters referred to alleged "traffic violations" on Ms. Boyd's Report, when in actuality she did not have more than one traffic violation in the last five years, and that was in her private vehicle [C-225, C-385]; but without knowing any details about what "violations" would be alleged against her, she could not meaningfully prepare to refute such allegations. Without any more detail, Ms. Boyd also could not know whether she was facing possible termination because of accidents in which she was completely blameless, such as incidents in which she had *obeyed* the Board's requirement that she stop at all railroad crossings and had been struck by other drivers who did not stop. [C-239 to -240].

In order to gather sufficient information to allow a reasonable opportunity to defend her job – and for related purposes, to otherwise ensure the fairness of the hearing on proposed termination – Ms. Boyd through counsel asked

the Board and Superintendent for certain items of information, and requested the opportunity to examine the Board's witnesses at the hearing and the opportunity to call witnesses of her own. [C-21 to -23].

The Board responded through its counsel that it would not provide the information requested by Ms. Boyd, but that she would be receiving a further letter "notifying her … of the charges against her." [C-117]. Thereafter, the Superintendent sent Ms. Boyd a further letter setting the time and place for the pre-termination hearing. [C-106]. That further letter, however, added literally nothing to the too-vague "charges" that had been contained in the previous letter; indeed, the two letters were almost word-for-word identical in this regard. [See C-106 and C-20]. Thus Ms. Boyd never received, prior to the proposed hearing, any specific notice of what she had allegedly done to warrant termination. This lack of sufficient notice was one of the issues that Ms. Boyd specifically relied upon, in litigating this case. [E.g., C-233 to -234, C-239-41].

Nor has any such notice been given, at any time subsequent to the trial court's issuance of the preliminary injunction. And the proposed pre-termination hearing has

never taken place. Defendants – despite having asserted both in the trial court and in this Court that the injunction does not prohibit them from going forward with the hearing under the procedural rules they had planned to utilize[1] – have decided as a matter of litigation strategy to take a peculiar approach. Defendant Shiver, the Superintendent, has decided not to appeal the injunction [C-397] that binds him along with the other parties. And the Defendant Board, which has appealed, seeks a ruling

[1] See C-288 ("Defendants believe they could have proceeded with the hearing without violating the Order."); C-301 (asserting that the preliminary injunction, the terms of which were later made permanent, did "not even address" whether the Board's policy No. 3121, governing the nature of the pre-termination procedure that would be provided, "complies with the law."); C-302 (arguing that the Board did not believe that the hearing to be provided under that policy would have been in violation of the injunction); Appellant's Brief to this Court, p. 5 ("the Board believed that it could have proceeded with the hearing set for October 29, 2002 without violating the [preliminary injunction].").

from this Court on a question that *might* have been arisen and *might* even have been dispositive *if* Defendants had provided sufficiently specific notice of the charges and had convened the pre-termination hearing: the question whether the hearing must include examination of witnesses.

Statement of the Standard of Review

We agree that review of the permanent injunction is *de novo* (*see TFT, Inc. v. Warning Systems, Inc.*, 751 So.2d 1238, 1241 (Ala. 1999)), if there is jurisdiction and if the appeal is justiciable. This Court considers the questions of justiciability and appellate jurisdiction in plenary fashion.

Summary of the Argument

This appeal amounts merely to the Board's request for an advisory opinion about whether a pre-termination hearing, under the Fair Dismissal Act, must include witness testimony and examination. This Court's jurisdiction in civil cases, however, does not extend to the issuance of advisory opinions. There is no actual live controversy over the issue on which the Board seeks a ruling, because (a) the Board claims that the injunction does not actually

prohibit the acts that the Board contemplates, but the Board wants this Court to give an advisory opinion about the matter anyway; (b) the Board and Superintendent indisputably have failed to comply with the injunction's requirement of detailed notice of the reasons for the proposed termination, and the Board has not argued that this aspect of the injunction was in error, and so no hearing can go forward in any event; and (c) the Superintendent did not appeal, so the injunction is certainly binding on him and so any reversal of the injunction as to the Board would have no practical effect.

If the Court does reach the question that the Board seeks to present – i.e., whether a pre-termination hearing under the Fair Dismissal Act entails the presentation, and examination, of witnesses for and against termination – then the Court should answer the question in the affirmative. The fundamental reason is that this is the only way that the decisionmaker – the members of the school board – will have a reasonable opportunity to acquaint themselves with the facts, before making a decision. School board members come to pre-termination hearings, as a general rule, without prior knowledge of the facts that

shed light on whether a particular employee should or should not be terminated. And school board members cannot acquire a reasonable basis for deciding disputed facts, or disputed policy questions, merely by hearing a battle of competing *allegations*; only by learning *facts* through *evidence* can board members have any semblance of an opportunity to make a reasoned decision about an employee's fate.

Argument

By this appeal, the Board asks this Court for a mini-treatise on the topic of pre-termination hearings under the Fair Dismissal Act, Ala. Code § 36-26-100 *et seq.* The Board also seeks a declaration that its Policy No. 3121, titled "Pre-Termination Hearing Policy under the Fair Dismissal Act," is lawful. *See, e.g.*, Board Brief p.8 ("the Board seeks guidance from this Court regarding what specific steps must be taken, if any, in the pre-termination process of employees covered by the Fair Dismissal Act."); p.25 (reiterating this request for "guidance" on that point, and asserting that "[t]he Board is entitled to a ruling by this Court that its Policy No. 3121 is, as currently written, in compliance with all

requirements of both state law and the United States Constitution.")

Thus the Board – having failed even to counterclaim for declaratory judgment in the trial court – seeks an advisory opinion in this Court. And there is one particular question, it seems, on which the Board seeks an advisory opinion: Does a proper pre-termination hearing under the Fair Dismissal Act entail the presentation and cross-examination of witnesses so that the decisionmaker can have facts upon which to base a decision? Or, as the Board would have it, does such a hearing mere entail the presentation of *hearsay allegations* against the employee and no opportunity for the employee even to present witnesses to refute those allegations? That is the one sole potential question of law that emerges with any clarity from the rather vague arguments by the Board. *See* Board Brief p.17 (apparently describing "this exact issue" as being whether an evidentiary hearing is required in pre-termination process); pp.16-23 (arguing that presentation and examination of witnesses is not required).

We show herein that this Court does not have jurisdiction to decide, and should not decide, that

question in this case. This Court's jurisdiction does not extend to the issuance of advisory opinions in civil cases; and there are, as shown herein, specific procedural aspects of this case that make it clear that this appeal is merely a request for an advisory opinion.

We also show, in the final section of the Argument, that the best interpretation of the Fair Dismissal Act is that witnesses *are* to be called, examined, and cross-examined at pre-termination hearings. Therefore, if the Court does reach that question, the answer is that the Board's policy is unlawful insofar as it fails to provide that procedure.

1. This appeal is, in substance, merely a request for an advisory opinion, and so it should be dismissed.

This Court should dismiss the appeal for lack of jurisdiction and justiciability, because this appeal is merely a request for an advisory opinion. The Board and its amicus argue that a decision on this appeal will provide welcome guidance for future actions of school boards. But this Court sits to resolve live controversies in lawsuits, not to provide advisory opinions or "guidance".

It is well settled that the judicial power in civil cases does not extend the issuance of advisory opinions. Even where a party seeks a declaratory judgment – and here, it may be noted, the Board did not even seek such relief – the law "does not empower courts to decide moot questions, abstract propositions, or to give advisory opinions, however convenient it might be to have these questions decided for the government of future cases." *Bruner v. Geneva County Forestry Dep't*, ___ So.2d ___, 2003 Ala. LEXIS 149, *23 (Ala. 2003). "A mere difference of opinion or disagreement or argument on a legal question affords inadequate ground for invoking the judicial power." *Stamps v. Jefferson County Bd. of Ed.*, 642 So.2d 941, 944 (Ala. 1994).

Even a case that presents a justiciable controversy in the trial court may – by virtue of the circumstances present when the case is appealed – cease to be justiciable and become merely a request for an advisory opinion. In those cases, this Court dismisses the appeal. *See, e.g., Water Works and Sewer Board v. Petitioners Alliance*, 824 So.2d 705, 708 (Ala. 2001); *Bethune v. Nettles*, 738 So.2d 850, 853-54 (Ala. 1999).

In short, no matter how convenient a litigant might think it would be to get a mini-treatise from the court to resolve questions that would arise in future cases, that is not the purpose of courts under our judicial system. Courts exist instead to decide concrete disputes between actual litigants. The only litigants in this appeal are Ms. Boyd and the Board; a concrete dispute between these parties is not the occasion for sweeping pronouncements about issues of law that are not even dispositive of the concrete dispute between these litigants.

Thus, the Board's avowed request that this Court use this case as the vehicle for dissemination of broad general principles and "guidance" that might be useful to various other people and entities in the future (*see* Board Brief, p.8, p.23 n.3 (demonstrating that the Board has expressly waived a procedural point on which it relied below as putative grounds for dismissal, because the Board deems it more important to receive an advisory opinion from this Court than to win this lawsuit), p.24 (asking this Court to "clarify" and give "guidance"); p.25 (seeking a declaration that the Board's policy is lawful in all respects, and seeking "guidance") must fail. As the Board's brief makes

clear, this appeal is an unabashed request for an advisory opinion.

And indeed, even beyond the fact that the Board is avowedly seeking an advisory opinion in this case, there are various aspects of the factual background and procedural posture of the case that confirm that there is no live justiciable controversy here.

First, the Board has taken the position both in the trial court and in this Court that the injunction does not actually prohibit the Board from going forward with the hearing that it had planned, under the procedures that it had planned to use. *See* C-288, C-301 (stating that the preliminary injunction, which was later made permanent, did "not even address" the legality of the Policy that the Board now asks this Court to uphold); Board Brief to this Court, p. 5. The Board is therefore in substance asking this Court at most for an *interpretation* of the injunctive order, asking this Court to agree with the Board that the injunction does not prohibit the Board's contemplated action. That is a classic and inappropriate sort of request for an advisory opinion: a request for a ruling about what the legal consequences might be, if certain

conduct is undertaken. But the Board did not even counterclaim below for a declaratory judgment of that sort, nor would such a declaration be appropriate in the guise of appellate review. If the Board wanted to test whether its interpretation of the injunction was correct, the Board would have easily available means to do so. The Board might or might not then be held to have violated the injunction. Then this Court might then have a concrete controversy to review. But there is no free-ranging appellate jurisdiction by which the appellate courts can give advisory opinions about what injunctions mean, nor is there any general free-ranging jurisdiction to answer interesting legal questions. *See Siegelman v. Ala. Ass'n of School Boards*, 819 So.2d 568, 576 (Ala. 2001)(holding that in order to present a justiciable controversy, "the parties must be damaged and seeking a remedy, not just advice."). The Board's own view is that it does not admit to any "damage" – it will not aver that the injunction prohibits the actions it wants to undertake – but the Board seeks "advice" to make sure. That is not the function of an appeal.

Second, under the circumstances of this case the

question on which the Board seeks an advisory opinion (i.e. whether a pre-termination hearing entails witness testimony) is purely academic at this point because the Board has not even hinted at a willingness to comply with an aspect of the injunction that would precede the convening of a hearing: the giving of adequately detailed notice as to why Boyd's termination was proposed. Boyd litigated, specifically and at length, the issue of the inadequacy of the notice that she had received. (E.g., C-233 (addressing the "vague … notice" in the very first paragraph of Boyd's brief in support of injunction); C-238; C-239-40 (specifically addressing, at length, the lack of sufficient detail in the notice of reasons for termination)). Having received only a vague and undetailed sketch of the proposed reasons for her termination, Boyd could not even know how to proceed to defend her career at a pre-termination hearing, whether or not witnesses would be testifying.

Having heard the parties' arguments on this issue, the trial court included in its injunction a requirement regarding adequate notice of charges. *See* C-283 (ordering that the hearing cannot proceed unless Boyd is given

"notice of the cause or causes for termination in sufficient detail to fairly enable plaintiff to show any error that may exist."). Until and unless that aspect of the injunction were obeyed, there would be no ripe controversy about the procedures to be followed at the hearing, because there could be no hearing at all under the injunction. Yet the Board has done nothing to comply with the notice requirement in the injunction, and has not even argued about it on appeal, instead focusing its energies on the purely academic issue of witnesses. Where the issue of the availability of witnesses could potentially be dispositive only in the hypothetical future event that the Board complied with the prior requirement of notice – and again, that eventuality is purely a future hypothetical at this point – the issue presented by the Board is not ripe for resolution in this Court at present. *See, e.g.*, *Baldwin County v. Palmtree Penthouses, Ltd.*, 831 So.2d 603 (Ala. 2002) (no jurisdiction, and no live controversy, where the dispute was merely over things that might or might not occur in the future); *Conseco Finance Corp. v. Slay*, 839 So.2d 617 (Ala. 2002) (same).

Third and finally, this appeal is non-justiciable and

presents no live controversy because the Superintendent did not appeal. The Superintendent, who is a defendant individually and in his official capacity, was bound by the plain terms of the final injunction. (*See* C-397 (final injunction ordering "the parties" to comply with the terms of the preliminary injunction). He is therefore indisputably prohibited from taking part in any pre-termination process that would violate any aspect of the injunction. And, by not appealing the injunction, he has forfeited any potential argument that might allow him to participate in any such proceeding. If the Board asserts in its reply brief (in an attempt to rescue this appeal from being a mere request for an advisory opinion) that the injunction *does* require presentation of witnesses at a pre-termination hearing, then it is by the same token clear that the Superintendent would be bound by the injunction not to take part in any pre-termination hearing that violated that requirement. And, because the Superintendent did not appeal, the Superintendent would remain so bound. But, under the statutory distribution of authority between school boards and school superintendents, and under the long-standing customs and practices pertaining to the

distribution of that authority, the Board itself is in no position to proceed on its own without the Superintendent's participation. A school board cannot terminate a teacher such as Ms. Boyd without the superintendent's active involvement. *See* Ala. Code § 36-26-103 (requiring superintendent's involvement as a prerequisite to termination); C-215, C-217, C-219 (reflecting superintendent's integral involvement in the process). Therefore, with the Superintendent being indisputably and permanently bound by the injunction because he did not appeal, it would make no practical difference whatsoever if the Board somehow extricated itself from the injunction's requirements. We do not know why the Superintendent chose not to appeal, but by making that choice he has made the Board's appeal even more purely academic. *See Stamps v. Jefferson County Board of Ed.*, 642 So.2d 941, 944 (Ala. 1994) (demonstrating that the absence of correct parties, particularly the absence of correct governmental officials as parties, can make a case non-justiciable).

For these reasons, this Court should not entertain the request for an advisory opinion and should dismiss the appeal.

2. Examination of witnesses is an integral part of a pre-termination hearing under the Fair Dismissal Act.

If the Court reaches the issue despite what has been shown above, then the Court should hold that a proper pre-termination hearing under the Fair Dismissal Act includes the testimony and cross-examination of any witnesses whose testimony provides the basis for the case for termination, as well as the opportunity for the employee to call witnesses to support her defense against termination.

We recognize that, at least in some contexts, a public employer can provide a pre-termination hearing that does not entail the presentation and cross-examination of witnesses; if the governing statute so provides, then the Constitution will allow something less than a full evidentiary hearing, *at least in some circumstances*. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) (requiring a pre-termination hearing prior to the termination of a public employee with a property interest in continued employment, but not necessarily an evidentiary hearing). But the Fair Dismissal Act is best understood, as a matter of statutory interpretation, as providing for

an evidentiary hearing prior to termination.[2]

The core critical point is that, unless a school board hears evidence through witness examination and related procedures, the board will have no reasonable factual basis for making an appropriate decision before depriving the employee of her property interest in her occupation. In

[2] We also suggest that, as a matter of due process, a pre-termination hearing must involve a decisionmaker who has the opportunity to acquire sufficient factual information to allow a reasoned resolution of any factual disputes. In practice, this will mean that where (as here) the decisionmaker (the school board) is not already personally acquainted with the relevant facts, there must be some provision for testimonial evidence at the pre-termination hearing, as a matter of due process. This Court does not have to decide that question in this case, because the case can instead be decided as a matter of statutory interpretation; but the constitutional issue (under state and federal constitutions) does exist, and is relied on as well in this case, and offers an additional reason to interpret the statute in a way that avoids the constitutional question.

other statutory schemes, where the relevant pre-termination decisionmaker has already had a chance to learn facts about the employee's conduct and record, an evidentiary pre-termination hearing may not be required; but where the pre-termination hearing is the decisionmaker's first opportunity to become familiar with the relevant facts, the hearing must include evidentiary presentations in order to constitute a fair hearing.

It is settled, and is not disputed by the Board in this case, that the Fair Dismissal Act requires a hearing before the termination of a non-probationary employee. The Board specifically does not dispute that a hearing is required: "Following *Loudermill*, Alabama courts have logically interpreted the requirements of the [Fair Dismissal Act] to mandate some form of pre-termination hearing." (Board Brief, p.16). This is not only a constitutional requirement under *Loudermill*, but is also the proper interpretation of the words of the Act itself. *See, e.g.*, *Allen v. Bessemer State Tech. Coll.*, 703 So.2d 383 (Ala. Civ. App. 1997). For instance, § 36-26-104 requires that an employee remain in paid status until the charges are "heard and determined"; and this Court has interpreted that

phrase to refer to the school board's *pre-termination* decisionmaking process. *See Ex parte Birmingham Board of Ed.*, 601 So.2d 93, 98 (Ala. 1992) (holding that pay continues only until the board has "heard and determined" that the employee is to be terminated). This in turn means that the statute specifically contemplates a *hearing* (at which the matter is "*heard*," *see* § 36-26-104) prior to termination.[3]

It is also settled that the statutory pre-termination hearing is a hearing before *the school board*, at which the board itself makes the decision whether to terminate the employee. *See, e.g., Bolton v. Board of School Comm'rs*, 514 So.2d 820, 823 (Ala. 1987) (holding that a decision by

[3] Because § 36-26-104 contemplates a pre-termination hearing before the Board, amicus Alabama Association of School Boards errs in suggesting that the provision of any sort of pre-termination hearings at all is somehow not based in the text of the Act. (Amicus Brief, pp. 7-9). It is clear that the legislature did intend that school boards would hold pre-termination hearings, for that is what the statute's language plainly contemplates as reflected in this Court's decision in *Ex parte Birmingham Board*.

the school board as to whether to terminate the employee is "clearly contemplated" by the Fair Dismissal Act). *See also* Amicus Brief of Ala. Ass'n of School Boards, p.8 (recognizing that *Bolton* requires a decision by the school board).

Thus the pre-termination decisionmaker, under the Fair Dismissal Act, is the school board, an entity which (at least in the great majority of cases involving employee terminations) will have no prior knowledge of the facts that are relevant to the decision. In some other public employment scenarios, the pre-termination decision may rest with a decisionmaker who has performed the employer's investigation of the relevant circumstances and therefore has some reasonable basis for factual knowledge. But that is not the case, under the Fair Dismissal Act. School board members are, as a rule, not involved in the intricacies of individual human resources decisions until *after* the Superintendent has brought the matter to the board's attention through a recommendation of dismissal. *See* § 36-26-103 (reflecting that it is the Superintendent who initiates an employee's possible termination, by a recommendation to the board).

Therefore, under the procedures created by the Fair Dismissal Act, school board members enter a pre-termination hearing with no meaningful basis for any knowledge about whether a proposed termination is warranted or not; if any board member happens to have any information at all prior to the pre-termination hearing, the pre-hearing acquisition of such knowledge is haphazard and partial at best. School boards as a general rule perform no investigation prior to pre-termination hearings, and board members have no statutory procedure for having acquired such information until the pre-termination hearing commences.

Therefore, in order to make any sense whatsoever of the legislature's decision to hold pre-termination hearings before the Board, one must infer that the legislature intended that at the conclusion of the pre-termination hearing the Board would have gained a level of knowledge that would allow a reasonable person to feel reasonably comfortable in making a decision as to whether to terminate a worker's livelihood. It would be unreasonable to assume that the legislature meant to lay this awesome decisionmaking power at the feet the board members, but that the legislature intended that the board members would

exercise this power *without becoming well-informed on the facts*. *Ex parte Birmingham Board*, 601 So.2d at 97 (holding that, as with any statute, the Fair Dismissal Act must be read with reasonableness in mind).

But if a school board hears neither witnesses in favor of termination, nor witnesses against, the board members will have no reasoned basis whatsoever to make even a provisional decision resolving factual disputes or resolving the propriety of termination. Consider, for instance, a hypothetical reminiscent of the facts in this case: if a superintendent asserts to the board that an employee has multiple driving infractions, but the employee asserts that she has only one such infraction, no reasonable board member would have any reasonable basis for confidence in her own ability to resolve that dispute without having heard witnesses on the matter, or otherwise having gained specific factual knowledge of the matter. And again, the pre-termination hearing is *the* forum in which board members can acquire that sort of information before making their decision. If pre-termination hearings simply consist of unsworn and unsifted dueling oral allegations, as the Board would have it in this case, then

a pre-termination under the Act will not even fulfill the constitutionally mandated function of being an "initial check against mistaken decisions." *See Loudermill*, 470 U.S. at 545. It will, instead, be the mere shell of a hearing.

As further support for interpreting the statute as envisioning an evidentiary pre-termination hearing, we note that the post-termination hearing is designated in the statute as being a "*de novo*" consideration of the matter. Ala. Code § 36-26-106. At the very least, the designation of the post-termination process as a *de novo* consideration necessarily implies that the pre-termination decision was a reasoned decision based on some cognizable amount of reliable information. In other words, a decisionmaking process is called "*de novo*" – rather than being called the *initial decision* or some similar terminology – if and only if it is a follow-up to an earlier exercise of informed judgment. But if a school board never takes the opportunity to acquaint itself with evidence prior to the termination, and thus never has the wherewithal to make an informed decision, then nothing coming later can reasonably be called a *de novo* review of the haphazard process that

the board adopted. This means, as argued above, that the pre-termination hearing before the school board must involve the board's acquisition of a reliable evidentiary basis for the board's exercise of the its fact finding role and its discretionary judgment. And this in turn means that the board members must hear evidence from witnesses at the pre-termination hearing.

Again, we understand that some statutory schemes can constitutionally allow some pre-termination hearings to go forward without witness testimony; but where (as under the Fair Dismissal Act) the decisionmaker has no prior knowledge of the facts, a pre-termination hearing must entail actual evidence if it is to be a meaningful process. This even rises, we submit, to a constitutional necessity because otherwise the pre-termination hearing is not a meaningful protection; but even one might disagree on the constitutional question, this is clearly the best answer as a matter of statutory interpretation. This Court is not required to interpret the statute as providing the mere floor of constitutional requirements. The question is instead what makes best sense of the legislature's intent in placing pre-termination decisions in the hands of the

board members themselves – assuming, as we should, that the legislature intended to create a sensible statutory scheme that led to reasonably-informed and fair decisions.

The main objection by the Board (and by amicus curiae Alabama Association of School Boards) is that the presentation of witnesses at a pre-termination hearing would result in duplicative effort and expense because (according to the Board and its amicus) this would result in two evidentiary hearings, one pre- and one post-termination, in every case. (*See* Board Brief, pp. 21-22; Amicus Brief, pp.5-6, 20-21). That superficially plausible argument, however, on reflection reveals itself as the heart of the problem: the Board assumes, and wants this Court to assume, that every employee suggested for termination will in fact be terminated, and that no substantial number of pre-termination hearings will have a result favorable to the targeted employee. But this Court should not indulge – much less endorse – the assumption that all or even substantially all pre-termination hearings will in fact result in terminations; the very point of the process is that the school board is supposed to make up its mind *after* the hearing, rather than assuming at the

commencement of the hearing that termination is a nearly foregone conclusion. Once we remove the assumption that pre-termination hearings are a rubber-stamp sham, the Board's argument about duplicative effort fades away into nothingness. In fact, school systems can and should take pre-termination hearings seriously because they may well result in the exoneration of innocent employees, which will in turn result in immense savings for the school system (both in avoided litigation costs, and most importantly in the preservation of the career of a long-term employee). But that will never happen unless this Court requires boards of education to acquaint themselves with the facts before imposing "industrial capital punishment."[4]

[4] Termination is widely referred to, among employment lawyers, scholars, and neutral decisionmakers, as "industrial capital punishment" in light of the gravity of its consequences. *See, e.g.*, Cynthia Estlund, "Free Speech and Due Process in the Workplace," 71 Indiana L.J. Volume 1 (Winter 1995), available at <http://law.indiana.edu/ilj/v71/no1/estlund.html> ("Termination of employment is likely to have a harsher impact on one's life and well-being, and carry a greater social stigma, than would a modest criminal

The Board also attempts to justify its position by asserting that a cursory pre-termination process is necessary so that a school system will be able to remove an employee swiftly if the employee presents a safety risk. (Board Brief, pp. 17-18). Here, however, the Board is grasping at straws. Even if a school system is required to have the fullest evidentiary hearing imaginable prior to termination, the school system can suspend an employee immediately without pay if the system thinks it is necessary to do so. *See* § 36-26-104 ("The employing board may suspend said employee with pay until the charges are heard and determined."). The Board indeed exercised that authority in this case. [C-217]. So, the Board's argument in favor of speedy pre-termination process at the expense of fairness and accuracy, as supposedly being required in order to preserve public safety, is hollow.

Finally, we note that a rule requiring the presentation and examination of witnesses at a pre-termination hearing will be to the ultimate benefit of the state's public

---

fine. It is no accident that, in the law and language of labor arbitration, discharge is regarded as "industrial capital punishment.").

school systems, as well as to the employees. The benefit to the employees is obvious: it is that they will have some opportunity for real factual consideration before losing their occupation, their paycheck, and even such benefits as their family insurance coverage. (It must be remembered that a post-termination hearing, while valuable, comes substantially *after* the employee has already suffered significant monetary loss and interruption of her career).

The benefit to the employers, while perhaps less immediately obvious, is also important: if this Court allows school boards to defer so completely to superintendents in termination decisions, indeed to go so far as to fail to inquire independently into the truth of what the superintendent alleges, then this Court will have substantially increased the likelihood of employer liability under federal anti-discrimination laws. If an employee is given a fair evidentiary hearing, and an independent determination from an unbiased decisionmaker prior to termination, then the employer will have a much greater chance of success in arguing that the alleged biases of lower officials cannot be attributed to the employer itself. *See Stimpson v. City of Tuscaloosa*, 186

F.3d 1328, 1331-32 (11th Cir. 1999) (holding that public employer was not liable for employment discrimination, despite unlawful bias on the part of the persons who had recommended the plaintiff's termination, where the plaintiff received an evidentiary hearing before an unbiased decisionmaker *prior to* termination). But if boards of education fail to provide that sort of independent inquiry prior to termination, then they will more easily be held liable for the biases of lower level officials. *See id.* (noting that entity can be held liable on the basis of biases of lower officials, where the decisionmaker acted as a rubber-stamp rather than undertaking an independent inquiry prior to termination).

Thus, a rule requiring witness examination at pre-termination hearings is to the benefit of all parties; and this conclusion should be unremarkable, given the presumably uncontroversial principle that enhanced fairness in governmental decisionmaking, and enhanced factual knowledge on the part of the governmental decisionmakers, are to the benefit of all concerned persons.

Conclusion

The Court should either dismiss the appeal or affirm the decision below.

Respectfully submitted,

_____
Jerome Tucker
1728 Third Ave. North
Suite 500
Birmingham AL 35203
(205) 328-0055

_____
Sam Heldman
Gardner, Middlebrooks, Gibbons,
Kittrell & Olsen
2805 31st St. NW
Washington DC 20008
(202) 965-8884

_____
Charles Norton
Alabama Education Ass'n
P.O. Box 4177
Montgomery AL 36103-4177
(334) 834-9790

_____
Vance McCrary
Gardner, Middlebrooks, Gibbons,
Kittrell & Olsen
McAdory Bldg.
2013 First Ave. North
Birmingham AL 35203
(205) 250-7776

Certification of Font

This document was prepared in Courier New, 13 point, according to the word-processing application that was used in its preparation.

Certificate of Service

I certify that a copy of the foregoing was served by U.S. Mail on the following this _____ day of June, 2003.

Thomas L. Stewart
Leslie M. Klasing
Emond, Vines, Gorham
& Waldrep
2101 6th Ave. North
Suite 700
Birmingham AL 35203

David. R. Boyd
Balch & Bingham
P.O. Box 78
Montgomery AL 36101

_____