REL: December 6, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180316

Dr. Eric Mackey, in his official capacity as State Superintendent of Education

v.

Edward Clinton Davis

Appeal from Montgomery Circuit Court
(CV-17-901917)

HANSON, Judge.

Dr. Eric Mackey, in his official capacity as State Superintendent of Education, appeals from a summary judgment entered by the Montgomery Circuit Court in favor of Edward

Clinton Davis. For the following reasons, we reverse the judgment of the circuit court and remand the case for further proceedings consistent with this opinion.

Facts and Procedural History

On June 29, 2016, the State of Alabama Department of Education ("the Department") sent Davis, who had been employed as an educator by the Montgomery County Board of Education, a certified letter informing him that the Department proposed to take action to revoke and/or to nonrenew his Professional Educator Certificate ("the teaching certificate"). The letter explained:

> "Under Ala. Code 16-23-5(a) (1975), '[t]he State Superintendent of Education may revoke any certificate issued under this chapter when the holder has been guilty of immoral conduct or unbecoming or indecent behavior.' Alabama Administrative Code [(Dep't of Educ.)], r. 290-3-2-.04 ... further allows the State Superintendent to refuse to issue, to suspend, to recall a certificate, or to impose other sanctions against a certificate holder for just cause. ...
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> "Pursuant to the above authorities, you are hereby notified of the [Department]'s proposed action, up to and including the revocation and non-renewal of your Alabama Professional Educator Certification ('Certification'). This proposed action applies to any and all certification or licensure issued to you by the [Department] or the Alabama State Superintendent of Education. The proposed action is based upon the following reasons:

"1. While you were employed by the Montgomery County School System as an educator at Carver High School, you behaved unprofessionally toward T.H., a 17-year-old female student. More specifically:

"A. You made T.H., the student, feel uncomfortable by touching her on the thigh inappropriately, giving her compliments, and tightly hugging her.

"B. At the beginning of 2015-2016 school year, in your classroom, you touched [T.H.]'s legs while giving her instructions.

"C. On or about November 5, 2015, in your classroom during your fifth-period science class, you placed your hand on [T.H.'s] leg and rubbed her leg while giving her instructions. This was witnessed by another female student (B.C.).

"D. During T.H.'s sixth-period physics class, you entered the classroom and asked her not to report the incident to her parent or the principal.

"E. You have made T.H. feel uncomfortable by telling her every day that she looks pretty and by giving her tight hugs.

"2. As a result of previous action from the [Department] and the State Superintendent of Education, you previously received a suspension, probation, a letter of reprimand, and were required to complete pre-approved classes on boundaries and classroom management. You failed to complete your required classes on boundaries and classroom management.

"3. Your misconduct toward T.H., mentioned above, violated your settlement agreement and your probation with the Department.

"4. Your 2013 settlement agreement with the Department arose from your inappropriate behavior toward female students in 2010.

"A. In or around September of 2010:

"1. You asked S.J., a female student, to send a photograph of herself in a swimsuit to your personal cellular telephone.

"2. You told [S.J.] that she had 'nice breasts.'

"B. In or around March of 2010:

"1. You offered to change the failing grade of T.W., a female student, in exchange for sex or the purchase of a pair of Air Jordan shoes. You tried to flirt with T.W. on other occasions. You invited T.W. to your house with the implication that you would have sex. You received a pair of shoes purchased by some students in your classroom.

"2. You touched the breasts, thighs, and stomach of C.M., a female student, put your arms around her, and made sexual advances toward her. You showed C.M. photos of scantily-clad women on your cell phone, and you claimed they were former students. You told C.M. that you love her breasts.

> "5. Your repeated misconduct has been unprofessional, immoral, unbecoming, and indecent for an educator.
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> "6. This action is brought based upon the facts and circumstances underlying and giving rise to the conduct referenced."

Davis requested an administrative hearing concerning the proposed action to revoke and/or to narrow his teaching certificate. A hearing was conducted before an administrative-law judge ("ALJ") on February 3, 2017. On April 17, 2017, the ALJ issued a document stating the ALJ's findings of fact and conclusions of law, determining that Davis was "guilty of immoral, unbecoming, and indecent behavior rendering him unfit to teach" and recommending that Davis's teaching certificate be revoked and not renewed.

On September 13, 2017, Michael Sentance, who was then the State Superintendent of Education, sent a certified letter to Davis announcing his decision to accept the ALJ's recommendation to revoke and to nonrenew Davis's teaching certificate. Sentance wrote:

> "The Administrative Law Judge has recommended in this case that the revocation and non-renewal of your Alabama Professional Educator Certificate is justified and warranted pursuant to her findings of fact applied to the above-referenced statutory, administrative, and regulatory authority and

> guidelines in conjunction with authoritative case law.
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> "The entire administrative record in this matter, including the Administrative Law Judge's recommendation, was submitted for my review and consideration. I have thoroughly and carefully read, examined, and analyzed the complete administrative record for this matter. Based upon my review, I agree with and adopt the factual and legal determinations made by the Administrative Law Judge. Additionally, based upon my full review of the material contained in the administrative record and the application of the factors set out in controlling case law ..., I find a direct relationship between your conduct and your ability to be an effective teacher of and role model for Alabama students. I find your conduct to have been immoral, indecent, unbecoming, and just cause for the revocation and non-renewal of your Alabama Professional Educator Certificate.
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> "Thus, pursuant to Ala. Code 16-23-4 (1975) and Ala. Admin. Code, r. 290-3-2-.04 ... and the authority granted therein, my finding is that your Alabama Professional Educator Certificate is hereby revoked and will not be renewed."

On the same day Sentance's decision to revoke and to nonrenew Davis's teaching certificate was issued, Sentance notified the State Board of Education of his intent to resign effective the following day.

On October 2, 2017, Davis filed an application for rehearing with the Department, which was denied by operation of law, and Davis timely filed his notice of appeal with the

Department. On December 11, 2017, Davis timely filed in the circuit court his petition for judicial review of the decision to revoke and to nonrenew his teaching certificate, contending that the decision to revoke/nonrenew his teaching certificate was in error for two reasons. First, Davis contended that, pursuant to § 41-22-15, Ala. Code 1975, and Bice v. Taylor, 157 So. 3d 161 (Ala. Civ. App. 2014), the State Superintendent of Education was required to have read and reviewed the entire administrative record before rendering a decision to revoke/nonrenew Davis's teaching certificate. Specifically, Davis questioned whether, given the timing of Sentance's resignation letter, Sentance had actually read the entire administrative record. Second, Davis contended that, because he had previously been acquitted of criminal-harassment charges arising from the alleged at-school inappropriate touching of T.H., the double-jeopardy provisions of the state and federal constitutions prohibited the Department from taking additional action against him based upon the same alleged conduct.

On April 3, 2018, Dr. Ed Richardson, in his capacity as the acting State Superintendent of Education, moved the

circuit court for the entry of a summary judgment in favor of the Department. Richardson argued that the undisputed facts established that Sentance had indeed read and reviewed the entire administrative record before revoking and/or nonrenewing Davis's teaching certificate. Richardson also argued that double jeopardy had no application. In support of the motion, Richardson attached, amongst other exhibits, the affidavit of Sentance. In that affidavit, Sentance testified, in pertinent part:

> "7. On or about May 15, 2017, I was provided with what I understand to be the entire administrative record from Edward C. Davis's certification case. The pages that I read are now labeled as CV Admin. Rec. 50 to CV Admin. Rec. 832, in the record filed for purposes of this appeal. ...
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> "8. When I received the record, I was aware of the opinion issued by the Alabama Court of Civil Appeals in [Taylor v.]Bice, 157 So. 3d 161 (Ala. Civ. App. 2014). I had also been advised by the Department of Education's Office of General Counsel that I must be sure to read the entire administrative record before making a decision regarding any contested administrative case heard by a hearing officer.
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> "9. In addition to receiving a paper copy of the entire administrative record on or about May 15, 2017, I also received an electronic copy of the administrative record on or about July 6, 2017.
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> "10. After I received the paper copy of the administrative record in this matter it took me

> approximately a week to ten days to completely read it. I recall reading the administrative record after regular work hours in my office at the Alabama State Department of Education and, as I recall, possibly on a weekend visit to my office.
>
> "11. After reading the entire administrative record, I independently concluded that I agreed with the hearing officer -- that Edward C. Davis should not be allowed to hold a certification to teach in an Alabama public school. My conclusion was that Mr. Davis's certification should be revoked and not renewed.
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> "....
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> "13. I was busy as the State Superintendent of Education, but I made a point to read the entire Administrative Record regarding Mr. Davis.
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> "....
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> "17. To reiterate, I read the entire administrative record for Mr. Davis's case before making my decision to revoke and not renew his certification."

Davis opposed the motion for a summary judgment and argued that Sentance's affidavit was due to be stricken on the grounds that it contained testimony going to the ultimate issue in the case and that Sentance's testimony was not credible. In challenging the veracity of the affidavit, Davis noted that Sentance's decision had come on the same day that he had offered his resignation, and Davis also pointed to a number of newspaper articles indicating that Sentance had been

fighting to hold onto his job in the days leading up to his decision to accept the ALJ's recommendation to revoke/nonrenew Davis's teaching certificate. Davis contended that, without the affidavit, there was no evidence establishing that Sentance had actually read the administrative record before making his decision to revoke/nonrenew Davis's teaching certificate.[1] He also argued that there were unresolved material questions of fact surrounding Sentance's assertion that he had read the entire administrative record and that Davis was entitled to discovery from Sentance about those questions.[2] Davis further argued that the action to revoke/nonrenew his teaching certificate was barred by the doctrine of res judicata because he had been acquitted of a charge of criminal harassment of T.H. in the Montgomery Municipal Court, a charge stemming from the same conduct made the basis of the Department's action to revoke/nonrenew his teaching certificate. Davis submitted no affidavits or additional evidentiary material beyond that contained in the

[1]The circuit court did not rule on Davis's motion to strike.

[2]Davis did not, however, file an affidavit pursuant to Rule 56(f), Ala. R. Civ. P.

administrative record in opposition to the motion for a summary judgment, nor did he file a cross-motion for a summary judgment.

On September 17, 2018, the circuit court entered a summary judgment in favor of Davis, ordering as follows:

> "The Court having considered Defendant's Motion for Summary Judgment, and for cause shown, it is hereby ORDERED that this matter be REMANDED back, for further proceedings, to the current State Superintendent, Dr. Eric Mackey,[3] to cure the lone statutory error of the record [not[4]] being read."

Mackey and Davis each filed postjudgment motions. Mackey argued that the circuit court's judgment was in error because, he said, the only evidence before the circuit court indicated that Sentance had, in fact, read the administrative record. Davis, on the other hand, argued that the judgment should be amended to address the double-jeopardy issue. On December 10, 2018, the circuit court entered the following order amending its judgment:

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[3]In April 2018, Mackey was appointed to the position of State Superintendent of Education. Because he is a party in his official capacity, Mackey, pursuant to Rule 25(d)(1), Ala. R. Civ. P., was automatically substituted for Richardson.

[4]It is clear that the circuit court concluded that the administrative record had not been read, and we interpret the judgment accordingly.

> "(A) [The State Superintendent of Education] is to redact from the record any and all testimony, exhibits, or other evidence relating solely to factual accusations that formed the basis of criminal charges against [Davis] for which he was acquitted at trial; and
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> "(B) Upon remand, State Superintendent Eric Mackey is to consider only the redacted record, and, pursuant to § 41-22-15[, Ala. Code 1975,] is to accept briefs and oral argument from counsel for the parties prior to entry of a new final order."

Mackey timely appealed.

Standard of Review

In this case, the circuit court entered a summary judgment in favor of Davis.

> "[An appellate court] review[s] a summary judgment de novo. Potter v. First Real Estate Co., 844 So. 2d 540, 545 (Ala. 2002) (citing American Liberty Ins. Co. v. AmSouth Bank, 825 So. 2d 786 (Ala. 2002)).
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> > "'"[An appellate court will] apply the same standard of review the trial court used in determining whether the evidence presented to the trial court created a genuine issue of material fact. Once a party moving for a summary judgment establishes that no genuine issue of material fact exists, the burden shifts to the nonmovant to present substantial evidence creating a genuine issue of material fact. 'Substantial evidence' is 'evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' In reviewing a

> summary judgment, we view the evidence in the light most favorable to the nonmovant and entertain such reasonable inferences as the jury would have been free to draw."'
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> "844 So. 2d at 545 (quoting Nationwide Prop. & Cas. Ins. Co. v. DPF Architects, P.C., 792 So. 2d 369, 372 (Ala. 2000)) (citations omitted).
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> "Summary judgment is appropriate only when there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law . Rule 56(c)(3), Ala. R. Civ. P."

Hooper v. Columbus Reg'l Healthcare Sys., Inc., 956 So. 2d 1135, 1139 (Ala. 2006).

Analysis

On appeal, Mackey argues that the circuit court erred in entering a summary judgment in favor of Davis. We agree. First, to the extent the judgment, as amended, reached the issue whether Sentance had read the administrative record, there was absolutely no basis in the appellate record for the circuit court to have summarily determined that Sentance had not read the administrative record. The requirement that the State Superintendent of Education read the administrative record is found in § 41-22-15, Ala. Code 1975. That section provides, in part:

> "If any official of the agency who is to participate in the final decision has not heard the case or read

> the record and his vote would affect the final decision, the final decision shall not be made until a proposed order is prepared and an opportunity is afforded to each party adversely affected by the proposed order to file exceptions and present briefs and oral argument to the official not having heard the case or read the record."

In Bice v. Taylor, 157 So. 3d 161 (Ala. Civ. App. 2014), the Department sought, as in this case, to revoke and to nonrenew a teacher's teaching certificate. Following a contested hearing, an ALJ recommended that the teacher's teaching certificate be revoked and nonrenewed, and that decision was adopted by the then State Superintendent of Education, Dr. Joseph Morton. On appeal to the Montgomery Circuit Court, an evidentiary hearing was conducted and evidence was offered indicating that Morton had made the decision to adopt the recommendations of the ALJ on the same day he received the ALJ's report and 3,500-page administrative record, leading the circuit court to conclude that Morton had not actually read the administrative record. The circuit court thus concluded that Morton had violated the teacher's due-process rights and ordered the teacher's teaching certificate to be reinstated. On appeal, this court agreed that Morton had not complied with § 41-22-15. We reasoned:

> "The parties do not dispute that the Superintendent acts as the sole authorized decision-maker under Ala. Code 1975, § 16-23-5, and that Dr. Morton did not hear the case. They do disagree as to whether Dr. Morton read the record. The circuit court found that Dr. Morton probably did not read the record due to the fact that he indicated his agreement with [the] recommendation on the same date he received that recommendation even through the administrative record was approximately 3,500 pages. In his affidavit, Dr. Dr. Morton did not state unequivocally that he had read the administrative record, but he did state that he had 'reviewed' the materials provided to him, which he believed constituted the whole administrative record. Regardless of our standard of review on this factual point, we conclude that the evidence substantiates that Dr. Morton did not read the administrative record."

Bice, 157 So. 3d at 169 (footnotes omitted). This court concluded that the violation of § 41-22-15 could be cured by remanding the case with instructions that § 41-22-15 be complied with, and this court reversed the circuit court's judgment to the extent it ordered the reinstatement of the teacher's teaching certificate.

In this case, however, unlike in Bice, Sentance unequivocally testified that he read the entire 780-page record over a 7- to 10-day period before making his decision

to revoke and to nonrenew Davis's teaching certificate.[5] That testimony is consistent with the statement in Sentance's letter to Davis, also in the record, in which he informed Davis that he had "thoroughly and carefully read, examined, and analyzed the complete administrative record for this matter." Thus, even assuming that it was procedurally proper for the circuit court have considered entering a summary judgment in favor of the nonmovant, Davis,[6] the circuit court

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[5]Davis argues on appeal that the circuit court could may have properly disregarded Sentance's affidavit as self-serving and not credible. However, "'"'"a court may not determine the credibility of witnesses on a motion for summary judgment."'"'" Davis v. Sterne, Agee & Leach, Inc., 965 So. 2d 1076, 1089 (Ala. 2007) (quoting Dixon v. Board of Water & Sewer Comm'rs of the City of Mobile, 865 So. 2d 1161, 1166 n. 2 (Ala. 2003)). Of course, this is not to say that a nonmovant cannot challenge the veracity or credibility of affidavit testimony, and "[d]oubts as to the credibility of the movant's affiants or witnesses may lead the court to conclude that a genuine issue of material fact exists." 10A C. Wright, A. Miller, and M. Kane, Federal Practice and Procedure 2726 (4th ed. 2016); see also, e.g., Tanner v. Ebbole, 88 So. 3d 856, 878 (Ala. Civ. App. 2011), and Kidd v. Early, 289 N.C. 343, 366-71, 222 S.E. 2d 392, 408-11 (1976). Nevertheless, whether Davis offered sufficient evidence to cast doubt on Sentance's testimony so as to create a question of fact regarding whether he read the administrative record -- an issue we do not reach -- is not the same as establishing that he undisputedly did not read the record for the purpose of meeting Davis's own summary-judgment burden.

[6]Typically, "'a trial court should not sua sponte enter a summary judgment in favor of a party who has not filed a

could not have concluded that Sentance's alleged failure to read the record was an undisputed material fact warranting the entry of a judgment in Davis's favor as a matter of law. See Walters v. Walters, 266 So. 3d 85, 89 (Ala. Civ. App. 2018) (reversing a summary judgment when the movant had failed to make a prima facie showing that there was no genuine issue of material fact and that she was entitled to a judgment as a matter of law).

Next, we turn to Davis's contention that the Department's action was prohibited by double-jeopardy principles. As to that issue, Davis relies on Crump v. Alabama Alcoholic Beverage Control Board, 678 So. 2d 133 (Ala. Civ. App. 1995). In Crump, a store owner was criminally prosecuted for

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motion seeking such a judgment without affording "an opportunity to present evidence in opposition to it."'" Giles v. Brookwood Health Servs., Inc., 5 So. 3d 533, 555 (Ala. 2008) (quoting Alpine Assoc. Indus. Servs. v. Smitherman, 897 So. 2d 391, 395 (Ala. 2004), quoting in turn Moore v. Prudential Residential Servs. Ltd. P'ship, 849 So. 2d 914, 927 (Ala. 2002)). Nevertheless, "[a] summary judgment motion may be granted in favor of a nonmovant ... when all parties have had the opportunity to be fully heard on all relevant issues." Mountain Lakes Dist., N. Alabama Annual Conference, United Methodist Church, Inc. v. Oak Grove Methodist Church ex rel. Green, 126 So. 3d 172, 181 (Ala. Civ. App. 2013). Mackey argues that he did not have the opportunity to be fully heard on the issues, particularly as to the contention that portions of the administrative record be redacted on remand.

allegedly having sold alcoholic beverages to a minor in violation of § 23-3A-25(a)(3), Ala. Code 1975. Following the store owner's acquittal of that criminal charge, the Alcoholic Beverage Control Board ("the ABC Board") instituted an administrative-forfeiture proceeding against the store owner pursuant to § 23-3A-24(b), Ala. Code 1975. Following a hearing before the ABC Board, the ABC Board imposed a $1,000 fine against the store owner. The store owner appealed from that decision to the St. Clair Circuit Court and argued that, because of her acquittal in the criminal proceeding, the doctrine of res judicata barred the later civil proceeding by the ABC Board. The circuit court affirmed the ABC Board's decision, and the store owner appealed to this court.

On appeal, this court reversed the circuit court's affirmance of the ABC Board's decision. Relying on the rule that "'[t]he acquittal of [a] defendant on a criminal charge is not a bar to the enforcement of a civil right by the state against the same defendant based upon the facts which constituted such criminal charge ... unless the civil right thus sought to be enforced is itself a proceeding for the further punishment of the defendant,'" Crump, 678 So. 2d at

136 (quoting State ex rel. Knight v. deGraffenried, 226 Ala. 169, 170, 146 So. 531, 532 (1933))(emphasis added), this court explored the issue whether the ABC Board's fine constituted "further punishment." In doing so, this court utilized the test set out in United States v. Halper, 490 U.S. 435 (1989) -- which test was abandoned by the Supreme Court in Hudson v. United States, 522 U.S. 93 (1997) -- to determine whether a civil sanction constituted "punishment" for double-jeopardy purposes. In Halper, the Court had stated:

> "[T]he determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.
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> "... We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. ... Furthermore, '[r]etribution and deterrence are not legitimate nonpunitive governmental objectives.' Bell v. Wolfish, 441 U.S. 520, 539, n. 20 (1979). From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. ..."

Halper, 490 U.S. at 448-49. Relying on Halper, this court, by a 3-2 vote, concluded that the $1,000 fine imposed by the ABC

Board could not "fairly be said to serve a solely remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, i.e., punishment." 678 So. 2d at 138. Accordingly, this court reversed the judgment of the circuit court and remanded the case for the entry of a judgment in favor of the store owner. Our supreme court subsequently denied certiorari review, with three justices dissenting. Ex parte Alabama Alcoholic Beverage Control Bd., 678 So. 2d 140 (Ala. 1996).

In distinguishing this court's majority decision in Crump, Mackey adopts verbatim the reasoning of the ALJ, who concluded, in part:

> "[U]nder the reasoning of Crump, [the Department] is not attempting to punish Davis for the same misconduct as alleged in the harassment case, but rather [the Department] is carrying out its statutory duty regarding teacher certification. The court in Crump focused on the punitive nature of the fine, as evidenced by the statutory language of 'punishment' and 'penalties.' [678 So. 2d] at 137. The court also found the fine was not related to the costs of the ABC Board regulating alcoholic beverages. Id. at 138.
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> "[The Department's] proposed action, however, is not a fine or punitive, but is carrying out the State Superintendent's duty to insure a safe learning environment for students. See § 16-23-5(a)[, Ala. Code 1975]. Last, Alabama courts have found that disciplinary action that is remedial in

> nature in response to the same misconduct that is the basis of criminal prosecution does not violate the Double Jeopardy Clause. Ex parte K.H., 700 So. 2d 1201 (Ala. Crim. App. 1997); see generally Coleman v. State, 642 So. 2d 532 (Ala. Crim. App. 1994); Jenkins v. State, 367 So. 2d 587 (Ala. Crim. App. 1978). In Ex parte K.H., a student was suspended from school for drug possession. Id. The court held his criminal prosecution did not violate the Double Jeopardy Clause because of the remedial goal of the suspension. Id. at 1203. The court explained that the suspension served the goals of 'safety, institutional order, and the rights of other students to an education.' Id. at 1204. Likewise, here the goals of [the Department] in its proposed action are not punitive, but rather to provide a safe learning environment for students, free from inappropriate conduct, in furtherance of the rights of students to an education. For these reasons, the Crump decision is not applicable to Davis's case and the charges that he argues should be dismissed are not dismissed."

We agree with the ALJ's analysis. The purpose of teacher licensing is the protection of the public, especially its youngest members, and the revocation or nonrenewal of a teaching certificate is, therefore, intended as a remedial measure rather than a punitive one -- it is to protect the welfare of students. See, e.g., Ex parte K.H., 700 So. 2d 1201, 1205 (Ala. Crim. App. 1997); Pendergraft v. Department of Health, Bd. of Med., 19 So. 3d 392, 394 (Fla. Dist. Ct. App. 2009) (holding that purpose of statute permitting revocation of medical license was "to protect the public, not

to provide penal or criminal sanctions"); Manocchio v. Kusserow, 961 F.2d 1539 (11th Cir. 1992) (holding that excluding a physician convicted of filing fraudulent Medicare claim from participation in Medicare program was remedial rather than punitive and did not violate the Double Jeopardy Clause); United States v. Reed, 937 F.2d 575, 578 (11th Cir. 1991) (holding that suspension of mail carrier after criminal punishment was remedial and did not violate the Double Jeopardy Clause); and United States v. Bizzell, 921 F.2d 263, 267 (10th Cir. 1990) (holding that exclusion of defendants from Housing and Urban Development program was remedial and noting that, "[w]hile those persons may interpret debarment as punitive, and indeed feel as though they have been punished, debarment constitutes the 'rough remedial justice' permissible as a prophylactic governmental action" (quoting Halper, 490 U.S. at 446)). Thus, even under the Halper test applied by this court in Crump, the Department's actions seeking to revoke and to nonrenew Davis's teaching certificate did not violate the double-jeopardy provisions of the state or federal constitutions.

Nevertheless, we cannot fail to recognize that the continued viability of Crump, Ex parte State Alcoholic Beverage Control Board, 654 So. 2d 1149 (Ala. 1994), and other cases relying on Halper are doubtful, at best, given that the United States Supreme Court has abandoned the holding in Halper as "ill considered" and "unworkable." Hudson, 522 U.S. at 101-02. Indeed, our supreme court has recognized the United States Supreme Court's implicit overruling of Halper. In Tillis Trucking Co. v. Moses, 748 So. 2d 874 (Ala. 1999), our supreme court rejected an appellant's argument that the double-jeopardy test set out in Halper applied, noting:

> "Moreover, even that holding has been 'disavow[ed]' in Hudson, 522 U.S. 93, 94, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). In Hudson, the Court held that 'the Double Jeopardy Clause of the Fifth Amendment is not a bar to the later criminal prosecution because the administrative proceedings were civil, not criminal.' Id."

Tillis, 748 So. 2d at 886 n.11. Thus, this case is more appropriately analyzed under post-Hudson double-jeopardy principles.

In overruling Halper, the United States Supreme Court in Hudson reaffirmed the pre-Halper rule established in United States v. Ward, 448 U.S. 242 (1980), under which, the Court

held, the Double Jeopardy Clause "protects only against the imposition of multiple criminal punishments for the same offense." 522 U.S. at 99. The Supreme Court explained:

> "Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. Helvering[v. Mitchell, 303 U.S. 391,] 399 [(1938)]. A court must first ask whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.' [United States v.] Ward, 488 U.S. [242,] 248 [(1980)]. Even in those cases where the legislature 'has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect,' id., at 248-49, as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty,' Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956).
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> "In making this later determination, the factors listed in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963), provide useful guideposts, including: (1) '[w]hether the sanction involves an affirmative disability or restraint'; (2) 'whether it has historically been regarded as a punishment'; (3) 'whether it comes into play only on a finding of scienter'; (4) 'whether its operation will promote the traditional aims of punishment-retribution and deterrence'; (5) 'whether the behavior to which it applies is already a crime'; (6) 'whether an alternative purpose to which it may rationally be connected is assignable for it'; and (7) 'whether it appears excessive in relation to the alternative purpose assigned.' It is important to note, however, that 'these factors must be considered in relation to the statute on its face,' id. at 169, and 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a

> civil remedy into a criminal penalty, Ward, supra, at 249 (internal quotation marks omitted)."

Hudson, 522 U.S. at 99-100.

The facts of Hudson are instructive in this case. In Hudson, the Office of the Comptroller of Currency ("the OCC") concluded that several bankers had made loans in violation of several banking statutes and regulations. The OCC imposed monetary penalties on the bankers and, as in this case, occupational disciplinary measures. The bankers were later indicted on criminal charges arising from the same conduct, and they moved to dismiss the criminal charges on double-jeopardy grounds. In rejecting the bankers' argument, the Supreme Court concluded that the fines and debarments were civil in nature and that, therefore, the criminal prosecution of the bankers did not violate the Double Jeopardy Clause.

> "While the provision authorizing debarment contains no language explicitly denominating the sanction as civil, we think it significant that the authority to issue debarment orders is conferred upon the 'appropriate Federal banking agenc[ies].' [12 U.S.C.] §§ 1818(3)(1)-(3). That such authority was conferred upon administrative agencies is prima facie evidence that Congress intended to provide for a civil sanction. ...
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> "... [W]e find that there is little evidence, much less the clearest proof that we require, suggesting that either OCC money penalties or

> debarment sanctions are 'so punitive in form and effect as to render them criminal despite Congress' intent to the contrary.' [United States v.]Ursery, [518 U.S. 267,] 290 [(1996)]."

522 U.S. at 103-04.

On the authority of Hudson, we conclude that the revocation and nonrenewal of Davis's teaching certificate was not a criminal sanction implicating the double-jeopardy provisions of the state or federal constitutions. The revocation of a teaching certificate is unquestionably a civil sanction that is not so punitive as to be rendered a criminal punishment. Accordingly, Davis was not entitled to a summary judgment on double-jeopardy grounds.

Conclusion

The circuit court erred in entering a summary judgment in favor of the nonmovant, Davis. There was evidence before the circuit court indicating that Sentance had read the full administrative record prior to his decision to revoke and nonrenew Davis's teaching certificate. Furthermore, the Department's action seeking the revocation and nonrenewal Davis's teaching certificate was not a criminal proceeding barred by principles of double jeopardy. Accordingly, we

reverse the judgment of the circuit court and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Thompson, P.J., and Donaldson, J., concur.

Moore and Edwards, JJ., concur in the result, without writings.