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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

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Ex parte Undrea Johnson

PETITION FOR WRIT OF CERTIORARI  
TO THE BARBOUR CIRCUIT COURT

(In re: Undrea Johnson

v.

Matthew Alexander and  
Barbour County Board of Education)

(Barbour Circuit Court, CV-20-900015)

MOORE, Judge.

Undrea Johnson appealed from a judgment of the Barbour Circuit Court ("the trial court") dismissing his request for

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a nonjury expedited evidentiary hearing following the nonrenewal of his employment contract by the Barbour County Board of Education ("the Board"). As discussed further below, we have elected to treat the appeal as a petition for a common-law writ of certiorari, which we have granted, and we now affirm the trial court's judgment.

### Procedural History

Johnson originally entered into an employment contract with the Board to act as a principal for a term lasting from July 1, 2016, to June 30, 2019. On July 1, 2019, the Board extended the end date of the contract to June 30, 2020. On July 2, 2019, the Board placed Johnson on administrative leave with pay pending an investigation into alleged financial fraud committed by Johnson. On March 10, 2020, the Board delivered a letter to Johnson providing, in pertinent part:

"Please accept this notice that the Board non-renewed your ... principal contract at its meeting on March 9, 2020, to be effective June 30, 2020, .... This action was taken as a result of willful failure to comply with board policies/procedures, failure to fulfill duties and responsibilities imposed under principals by law, and/or other good and just cause associated with fiscal management of school funds."

On March 16, 2020, Johnson delivered a letter to the Board requesting "a nonjury expedited hearing before the Circuit

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Court of [Barbour] County," asserting that "[t]his request is made within 10 days of the [Board]'s notice of cancellation of the principal contract, and pursuant to [Ala. Code 1975,] § 16-24B-3 ...."

On April 21, 2020, Johnson filed in the trial court a "request for a non-jury expedited evidentiary hearing," allegedly pursuant to the Teacher Accountability Act ("the Act"), Ala. Code 1975, § 16-24B-1 et seq. In his request, to which Johnson attached his contract of employment and the above-referenced letters, Johnson asserted that the Board had canceled his contract of employment for cause, that he had timely requested a nonjury expedited evidentiary hearing to contest the cancellation, and that, under Ala. Code 1975, § 16-24B-3, the Board had an obligation to promptly notify the trial court of the request. According to Johnson, Matthew Alexander, the superintendent of the Board, informed him that his contract had been nonrenewed, not canceled, and that the Board had no obligation to notify the trial court of the request for a nonjury expedited evidentiary hearing. Johnson averred that the failure of Alexander and the Board to notify the trial court of Johnson's request for a nonjury expedited

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evidentiary hearing breached the employment contract and violated Johnson's constitutional right to due process and his rights under the Act. Johnson sought, among other things, a nonjury expedited evidentiary hearing before the trial court within 45 days; an order reinstating him as a contract principal within the Barbour County school system; an order enjoining the Board from discontinuing his salary and other benefits pending the entry of a final order; and an award of attorney's fees and costs.

On May 11, 2020, Alexander and the Board filed a motion to dismiss. In that motion, Alexander and the Board asserted that Johnson's contract of employment had been nonrenewed, not canceled, and that, under § 16-24B-3, Johnson, not the Board, was required to promptly file any request for a nonjury expedited evidentiary hearing with the trial court, which hearing would be limited solely to a determination of whether the contract had been nonrenewed for improper personal or political reasons. Alexander and the Board argued that Johnson had not timely filed his request for a nonjury expedited evidentiary hearing and that Johnson further was not entitled to the type of nonjury expedited evidentiary hearing

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he had requested. Alexander and the Board also asserted that Johnson's claims were barred by sovereign immunity and that there was no viable due-process violation at issue.

Johnson filed an opposition to the motion to dismiss on May 21, 2020, contending that his employment contract had been canceled and maintaining that Alexander and the Board had failed to notify the trial court of his request for a nonjury expedited evidentiary hearing. Alexander and the Board filed a reply brief in support of their motion to dismiss on May 22, 2020. On June 3, 2020, the trial court granted the motion to dismiss filed by Alexander and the Board. Johnson filed a notice of appeal to this court on June 13, 2020.

### Analysis

Before proceeding to the merits, we must first address a motion filed by Alexander and the Board to dismiss Johnson's appeal. In that motion, Alexander and the Board argue that this court lacks jurisdiction to consider Johnson's appeal.

Two provisions of the Act control the right of a contract principal to appeal a decision of a circuit court. First, § 16-24B-3(g) provides that "[t]he decision of the circuit court or mediator shall be final and exclusively appealable to the

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Alabama Court of Civil Appeals, as a nonevidentiary appeal in which review is limited to the record from the expedited evidentiary hearing as provided for in [the Act]." Second, § 16-24B-5(a), Ala. Code 1975, provides:

"All appeals of a final decision from the expedited evidentiary hearing shall lie with the Alabama Court of Civil Appeals. An appeal shall be filed within 14 days after the receipt of the final written decision of the circuit judge or the mediator. An appeal by either party shall be perfected by filing a written notice of appeal with the clerk of the Court of Civil Appeals within 14 days after the receipt of the final written decision of the circuit judge or the mediator by the party. Failure to file a timely notice of appeal shall render the decision of the circuit judge or the mediator final. Within 28 days after an appeal is filed, the chief executive officer shall transmit the record to the clerk. Failure of the chief executive officer to timely transmit a full and accurate record to the clerk shall result in a favorable decision being entered by the court for the contract principal."

We agree with Alexander and the Board that neither § 16-24B-3(g) nor § 16-24B-5(a) expressly authorizes an appeal from an order dismissing a request for a nonjury expedited evidentiary hearing. The plain language of both Code sections allows an appeal from only a final decision of a circuit court following such a hearing. This court has held that, "[b]ecause the right of appeal is purely statutory, strict compliance with the statute authorizing the appeal is

required." In the Matter of Anonymous, 720 So. 2d 497, 497 (Ala. Civ. App.), aff'd, In re Anonymous, 720 So. 2d 497 (Ala. 1998). In this case, Johnson's appeal does not comply with either § 16-24B-3(g) or § 16-24B-5(a); therefore, the appeal ordinarily would be due to be dismissed. See In the Matter of Anonymous, supra.

However, when an applicable statute provides no right of appeal or other means of review, a party aggrieved by a judicial determination made pursuant to the statute may obtain judicial review by petitioning for the common-law writ of certiorari. See Hardy v. Birmingham Bd. of Educ., 634 So. 2d 574, 576 (Ala. Civ. App. 1994). In this case, § 16-24B-3 of the Act bestows upon a contract principal the right to a nonjury expedited evidentiary hearing when his or her employment contract has been canceled or nonrenewed. Whether the contract has been canceled or nonrenewed, when a contract principal requests such a hearing, that request is to be filed with the appropriate circuit court for consideration. The Act does not provide any right to appeal a decision of the circuit court to dismiss or to deny that request. Although the legislature may have prohibited an appeal under those

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circumstances, that prohibition "'does not affect the authority of the court to review the proceedings below by granting certiorari.'" South Alabama Skills Training Consortium v. Ford, 997 So. 2d 309, 331 (Ala. Civ. App. 2008) (quoting Ex parte Smith, 394 So. 2d 45, 47-48 (Ala. Civ. App. 1981)). Accordingly, this court denies Alexander and the Board's motion to dismiss and has elected to treat Johnson's appeal as a petition for the common-law writ of certiorari. See Holloway v. Personnel Bd. of Jefferson Cnty., 528 So. 2d 341, 342 (Ala. Civ. App. 1988). "On certiorari our review is limited to the consideration of whether the circuit court properly applied the law and whether the decision is supported by any legal evidence." Id.

Turning to the merits, we note that the Act sets forth the procedure by which a contract principal may contest the termination of his or her employment contract. Section 16-24B-3(e)(2) provides:

"Within five days of the action of the employing board of canceling or nonrenewing the contract of the contract principal, the employing board shall provide written notice pursuant to subsection (c) to the contract principal with a statement of the reasons upon which such action was taken.



"a. Within 10 days of the date of receipt of notice provided to a contract principal informing him or her of an action by the employing board to nonrenew the principal's contract at the end of its current term, the contract principal, by filing written notice with the chief executive officer, may request a nonjury, expedited evidentiary hearing to demonstrate that the chief executive officer's or supervisor's recommendation to nonrenew the contract was impermissibly based upon a personal or political reason, or the recommendation was approved based upon personal or political reasons of the chief executive officer, supervisor, or the employing board, which shall be the sole issues at any such hearing. The contract principal shall bear the burden of proof by a preponderance of the evidence. The hearing shall be before the circuit court in the judicial circuit of the county in which the employing board sits. The expedited evidentiary hearing shall be binding on all parties. Promptly after delivering a written request for such a hearing, the contract principal or his or her designee shall file with the appropriate circuit court a request for an expedited hearing and shall provide a copy of the request to the chief executive officer.

"b. In the case of a contract principal who is recommended for cancellation for cause pursuant to subdivision (1) of this subsection, within 10 days of the date of receipt by the contract principal of the notice informing him or her of an action by the employing board to cancel the principal's contract for cause as provided in subdivision (1) of

this subsection, the principal may, by filing written notice with the chief executive officer, request a nonjury, expedited evidentiary hearing before the circuit court in the county in which the employing board sits. The chief executive officer shall provide notice to the circuit court promptly after receiving such notice, that the employing board requests the nonjury, expedited evidentiary hearing. At the hearing the employing board shall bear the burden to prove, by a preponderance of the evidence, that the cancellation is solely for cause pursuant to subdivision (1) of this subsection."

Under § 16-24B-3(e)(2), a contract principal may request a nonjury expedited evidentiary hearing upon receipt of written notice of the cancellation or nonrenewal of his or her employment contract. If the contract is canceled, the superintendent or other chief executive officer who has received a written request from the contract principal for the hearing must promptly file in the appropriate circuit court a request for a hearing to substantiate the cause of the cancellation. On the other hand, if the contract is not renewed, the contract principal must promptly file the request for the hearing in the appropriate circuit court to prove that his or her employment contract was not renewed for improper personal or political reasons.

In their motion to dismiss, Alexander and the Board argued that Johnson's employment contract had not been renewed and that, therefore, the procedure set forth in § 16-24B-3(e)(2)a. applied. Johnson countered that his employment contract had been canceled for cause, triggering the procedure set forth in § 16-24B-3(e)(2)b. Johnson argues that the trial court erred in resolving that factual dispute adversely to him when dismissing the case.

Citing Ex parte Safeway Insurance Co. of Alabama, 990 So. 2d 344 (Ala. 2008), Johnson argues that the assertions by the Board and Alexander that his contract was nonrenewed and that the trial court therefore lacked jurisdiction to consider his request for a nonjury expedited evidentiary hearing based on the untimeliness of that request amounted to a facial challenge to his request for an evidentiary hearing before the trial court, which, he argues, required the trial court to accept the factual allegations asserted in his request. Specifically, Johnson asserts that the trial court was required to accept the allegation in his request that his contract had been canceled, rather than nonrenewed, and that, accordingly, based on § 16-24B-3(e)(2)b., Alexander, rather

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than Johnson, was required to promptly provide notice to the trial court of Johnson's request for an evidentiary hearing.

In Safeway, our supreme court discussed the distinction between facial and factual challenges to jurisdiction presented in a Rule 12(b)(1), Ala. R. Civ. P., motion to dismiss, concluding that such a motion "can allege either a facial challenge, in which the court accepts as true the allegations on the face of the complaint, or a factual challenge, which requires consideration of evidence beyond the face of the complaint." 990 So. 2d at 350. Even assuming that the trial court in the present case was required to accept the factual allegations in Johnson's request for a nonjury expedited evidentiary hearing as true, however, we conclude that the trial court could have concluded from Johnson's request itself that his contract had been nonrenewed, rather than canceled.

In his request for a nonjury expedited evidentiary hearing under the Act, Johnson asserted that the Board had notified him "that his principal contract was being non-renewed." Additionally, Johnson attached as an exhibit to his request for an evidentiary hearing a copy of the letter he

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received from Alexander notifying him on March 10, 2020, that "the Board non-renewed [his] contract principal contract." Although Johnson included factual allegations on the face of his request for an evidentiary hearing that referenced both the nonrenewal and the cancellation of his contract, the contents of Alexander's letter, among other documentation attached to the request for an evidentiary hearing that refers to the "non-renewal" of Johnson's contract, are controlling. See McCullough v. Alabama By-Prods. Corp., 343 So. 2d 508, 510 (Ala. 1977) (holding that, "[u]nder Alabama law, an exhibit attached to a pleading is not only a part of it, but, in case of a variance between the allegations of the pleading and the exhibit attached thereto, the contents of the exhibit control"), and Rule 10(c), Ala. R. Civ. P. (stating that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes").

Johnson argues that, despite Alexander's description of his employment termination as a "non-renewal" of his contract, the reasons given for the nonrenewal of his contract -- willful failure to comply with board policies/procedures, failure to fulfill duties and responsibilities imposed on

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principals by law, and other good and just cause -- suggest that his contract was canceled for cause rather than nonrenewed. We disagree. Section 16-24B-3(c) of the Act provides that, when an employing board decides not to renew a contract principal's employment contract, the board shall provide written notice to the contract principal not only of the decision not to renew the contract, but also of "the reasons for the decision to nonrenew the contract," which "may be based on any reason except personal or political reasons." By providing Johnson with a list of the reasons for the decision to nonrenew his contract, Alexander did not transform the nonrenewal into a cancellation.

Moreover, it is clear from the language of § 16-24B-3(e)(2), that it is not the reasoning given for the termination of the contract that dictates whether the contract has been canceled or nonrenewed. Section 16-24B-3(e)(2)a. refers to the nonrenewal of a principal's contract "at the end of its current term," while § 16-24B-3(e)(2)b. refers to "a contract principal who is recommended for cancellation for cause." Additionally, Johnson's employment contract, which was also attached as an exhibit to Johnson's request for a

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nonjury expedited evidentiary hearing before the trial court, provides, in pertinent part:

"Section 6. Cancellation. (a) For the duration of this Contract, the Contract may be canceled for any of the reasons enumerated in state law and regulations....

"Section 7. Contract Non-Renewal. (a) Non-renewal of this contract shall be upon the recommendation of the superintendent and a majority vote of the Board no less than 60 days before the end of this Contract...."

In both the Act and the employment contract at issue in the present case, the distinction between cancellation and nonrenewal of the contract turns on whether the termination of the contract becomes effective during or at the end of the term of the contract. The nonrenewal of a contract becomes effective at the end of the contract term, while the cancellation of a contract may occur during the term of the contract. In the present case, regardless of the reasoning provided by the Board, it is clear from the March 10, 2020, letter to Johnson that the effective date of the Board's decision to terminate Johnson's contract was June 30, 2020, the end of Johnson's contract term following the one-year extension by the Board in 2019. Accordingly, the trial court properly determined from the allegations in Johnson's request

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for an evidentiary hearing, along with the exhibits attached thereto, that Johnson's contract was nonrenewed rather than canceled.

Because the record supports only the conclusion that Johnson's contract was not renewed, the burden was on Johnson, under § 16-24B-3(e)(2)a., to timely file his request for a nonjury expedited evidentiary hearing to contest that the nonrenewal of his contract was impermissibly based on personal or political reasons. Alexander and the Board moved to dismiss the request for an evidentiary hearing because, they argued, Johnson had not timely filed the request and had not alleged that his employment contract had been nonrenewed due to improper personal or political reasons. The trial court granted the motion to dismiss without explanation. On appeal, Johnson argues only that he timely filed his request for a nonjury expedited evidentiary hearing; Johnson does not argue that he sufficiently alleged that his contract had been nonrenewed for improper personal or political reasons, as contemplated in § 16-24B-3(e)(2)a.

"In order to secure a reversal, "the appellant has an affirmative duty of showing error upon the record." Tucker v.



Nichols, 431 So. 2d 1263, 1264 (Ala. 1983).  
It is a familiar principle of law:

"'"When an appellant confronts an issue below that the appellee contends warrants a judgment in its favor and the trial court's order does not specify a basis for its ruling, the omission of any argument on appeal as to that issue ... constitutes a waiver with respect to the issue."

"'Fogarty v. Southworth, 953 So. 2d 1225, 1232 (Ala. 2006) (footnote omitted) (emphasis added). This waiver, namely, the failure of the appellant to discuss ... an issue on which the trial court might have relied as a basis for its judgment, results in an affirmance of that judgment. Id. That is so, because "this court will not presume such error on the part of the trial court." Roberson v. C.P. Allen Constr. Co., 50 So. 3d 471, 478 (Ala. Civ. App. 2010) (emphasis added).'"

"Soutullo v. Mobile Cty., 58 So. 3d [733] at 738 [(Ala. 2010)] (some emphasis added). See also Ex parte Sikes, 218 So. 3d 839, 847 (Ala. Civ. App. 2016) ('[T]here were alternate bases for the trial court's ruling that Sikes has failed to address in his brief on appeal, and, therefore, he has waived any argument as to the propriety of those alternate bases for the trial court's ruling. "This court is required to affirm a judgment if the appellant has waived any arguments regarding an alternative basis for the judgment."' (quoting Drake v. Alabama Republican Party, 209 So. 3d 1118, 1122 (Ala. Civ. App. 2016) (emphasis added)))."

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Norvell v. Norvell, 275 So. 3d 497, 502-03 (Ala. 2018). See also Forbes v. Brawley, 295 So. 3d 1101, 1106 (Ala. Civ. App. 2019) (discussing the application of the reasoning in Norvell to appeals from dismissals). Because Johnson has failed to address an argument on which the trial court might have relied in entering its judgment, we cannot conclude that the trial court failed to properly apply the law. See Holloway, supra.

#### Conclusion

As explained above, we deny the motion to dismiss the appeal and have elected to treat the appeal as a petition for the common-law writ of certiorari. Because Johnson has failed to present an argument to this court from which we could conclude that the trial court failed to properly apply the law or that the judgment of dismissal is not supported by any legal evidence, see Holloway, supra, the trial court's judgment is affirmed.

AFFIRMED.

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

Edwards, J., concurs in the result, without writing.