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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2012-2013

2110366

Huntsville City Board of Education

v.

Clark Sharp

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v.

Huntsville City Board of Education

(FMCS No. 11-02938)

THOMAS, Judge.

Clark Sharp was employed by the Huntsville City Board of Education ("the Board") as a mechanic; Sharp was a nonprobationary support employee. In 2010, the Board was facing a nearly $20 million shortfall in its fiscal year 2009 budget and had also failed to comply with the Fiscal Accountability Act, codified at Ala. Code 1975, § 16-13A-1 et seq., specifically § 16-13A-9, which requires the Board to maintain at least one month's operating budget in reserve. The State Board of Education ("the State"), through its Deputy Superintendent for Finance and Administration, Dr. Craig Pouncey, notified the Board of its concern over the Board's fiscal issues. Among the issues that raised significant concern for Dr. Pouncey was that over 85% of the Board's local funds were used to pay what Dr. Pouncey considered to be an exorbitant number of support staff. In fact, the Board spent $1,400 per pupil on its support staff. Based on his review of the Board's finances, Dr. Pouncey urged the Board to implement a drastic reduction in personnel or, he warned, face having the State intervene and take over the operation of the school system.

The Board decided to cooperate with the State; it hired the former State Superintendent of Schools, Dr. Ed Richardson, as a consultant to assist it with making a plan to reduce the Board's operating budget. Dr. Richardson recommended a two-stage reduction of the Board's personnel. Ultimately, the Board, utilizing its Reduction-in-Force ("RIF") Policy, reduced personnel by terminating nearly all of its probationary support personnel in March 2011 ("the March RIF plan") and by terminating the remaining probationary support personnel, reassigning 9 or 10 assistant principals, releasing 154 nontenured teachers, and terminating 77 nonprobationary support personnel in April 2011 ("the April RIF plan") (the March RIF plan and the April RIF plan are sometimes referred to collectively as "the RIF plan"). Sharp was notified in April that he was recommended for termination of employment in conjunction with the April RIF plan.

The notification Sharp received from the Board's superintendent, Dr. Ann Roy Moore, read as follows:

> "You are hereby given notice of my intention to recommend termination of [your] employment [as] a Mechanic for Huntsville City Board of Education as provided in § 36-26-102, Ala. Code 1975. The reason for the proposed termination is as follows:

justifiable decrease in jobs in the system or other good and just causes.

"The facts showing that the termination is taken for one or more of the reasons listed in § 36-26-102, Ala. Code 1975, are as follows:

"1) Due to financial circumstances, the Board must reduce the number of its employees. To accomplish this, the Board has adopted a Reduction in Force plan. The selection of the employees to be terminated is based upon the job classifications affected by the Reduction in Force plan and years of service within the Huntsville School System (those with fewer years of service in each specifically identified area are to be terminated before those with greater seniority)."

The notice further specified that the Board would hold a meeting on the proposed termination on May 17, 2011, and that Sharp was entitled to request a conference with the Board, provided he gave the Board the requisite notice of his desire for a conference.

Sharp appeared at the hearing, as did his counsel, who spoke with the Board regarding the proposed termination. The Board voted to terminate Sharp's employment, and Sharp was given written notice of the termination. Sharp then gave the Board notice that he contested the termination and that he

requested a hearing pursuant to the former Fair Dismissal Act ("the FDA"), former § 36-26-100 et seq., Ala. Code 1975, which has since been repealed and replaced by the Students First Act ("the SFA"), § 16-24C-1 et seq., Ala. Code 1975, effective July 1, 2011.[1] A hearing was held before a hearing officer on November 2, 2011. After the hearing, the hearing officer entered an award overturning the Board's decision to terminate Sharp's employment.

In his award, the hearing officer noted that the Board had faced financial issues and that it had faced being taken over by the State if it had not acted to address its financial shortcomings. The hearing officer then found that Dr. Richardson had recommended to the Board which employees to terminate; he further found and took issue with the fact that, according to the hearing officer, Dr. Richardson had not conferred with John Brown, the Board's Director of Maintenance, Facilities, Construction, Transportation, and Safety, regarding Brown's opposition to the termination of all

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[1]Because the SFA does not apply retroactively, we apply the FDA in the present case. See Board of Sch. Comm'rs of Mobile Cnty. v. Christopher, 97 So. 3d 163, 171 (Ala. Civ. App. 2012).

the mechanics in the Board's employ. The hearing officer also stated that "[t]here was no evidence that by firing the mechanics and outsourcing their various duties, any money would be saved." The hearing officer concluded:

> "It was the duty of the Board to prove that [its] RIF of these mechanics did accomplish the statute requirement [(sic)] that the decrease in jobs was justifiable or that there was good and just cause[. Ala. Code 1975, §] 36-26-102.
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> "In view of the absence and failure of the Board to establish a legitimate need to lay off this employee, I shall determine that no action should have been [(sic)] against this employee."

Finally, the hearing officer noted that, after the institution of the RIF plan, the Board had added certain "staff employees" with salaries ranging from $49,271 to $141,600 per year, that the Board intended to contract with Teach for America to supply teachers for $550,000, and that the Board had purchased for $853,000 certain computer equipment for students in lieu of textbooks. The hearing officer stated that he had recited these expenditures in the award to "underscore the point that enough adjustment in the work force had been made and[, thus that the financial issues faced by the Board had been resolved] and did not necessitate the termination of this

employee who conceivabl[y] saves money for necessary services."

The Board sought to appeal the hearing officer's award to this court. After the Board filed a letter brief setting out "special and important reasons," pursuant to former Ala. Code 1975, § 36-26-104(b), we accepted the appeal. Sharp perfected a cross-appeal from the hearing officer's award.

On appeal, the Board argues that the hearing officer impermissibly substituted his judgment for the Board's judgment and erred by requiring the Board to prove a legitimate need to lay off Sharp instead of requiring the Board to prove only a justifiable decrease in jobs within the system. The Board further argues that it proved a justifiable decrease in jobs within the system. On cross-appeal, Sharp argues that the hearing officer should have also determined that the notice of proposed termination of his employment did not comply with former Ala. Code 1975, § 36-26-103(a), because it did not give him enough factual information to form a defense to the termination. The Board argues that we should dismiss the cross-appeal filed by Sharp because the hearing officer's award was wholly in Sharp's favor and he therefore

has no adverse decision from which to appeal. See, e.g, Personnel Bd. of Jefferson Cnty. v. Bailey, 475 So. 2d 863 (Ala. Civ. App. 1985). In the alternative, the Board further argues that the termination notice provided to Sharp complied with former § 36-26-103(a).

We will first consider the issues raised by the Board's appeal. We have recently had the opportunity to clarify the role of a hearing officer when faced with an appeal from a termination of employment under a RIF plan. See Huntsville City Bd. of Educ. v. Frasier, [Ms. 2110427, November 30, 2012] ___ So. 3d ___, ___ (Ala. Civ. App. 2012); Huntsville City Bd. of Educ. v. Stranahan, [Ms. 2110252, November 2, 2012] ___ So. 3d ___, ___ (Ala. Civ. App. 2012); and Board of Sch. Comm'rs of Mobile Cnty. v. Christopher, 97 So. 3d 163, 174 (Ala. Civ. App. 2012). Once a hearing officer has concluded that a school board has demonstrated that it had established as a ground for termination a justifiable decrease in jobs within the system, in the absence of allegations that the termination was motivated by an improper motive, the hearing officer is not permitted to further inquire into "whether the termination of a particular employee's employment was justifiable under a

RIF policy."[2] Christopher, 97 So. 3d at 174. As we have further explained, "the responsibility for making the difficult decisions regarding which positions to eliminate pursuant to a justified implementation of a RIF policy rests with the Board and ... hearing officers and the courts 'are not permitted to usurp the role of the school board.'" Id. at 176 (quoting Walker v. Montgomery Cnty. Bd. of Educ., 85 So. 3d 1008, 1016 (Ala. Civ. App. 2011)).

In his award, the hearing officer specifically determined that the Board had not proven that it had "a legitimate need" to terminate Sharp's employment specifically. In support of his conclusion, the hearing officer noted that Sharp and the other mechanics employed by the Board had performed valuable services that, according to the hearing officer, had saved money for the Board. In addition, the hearing officer

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[2]As we have recently determined, a hearing officer may, of course, review whether the terms of the RIF policy were properly applied to a particular employee. See Huntsville City Bd. of Educ. v. McLemore, [Ms. 2110386, December 14, 2012] ___ So. 3d ___, ___ (Ala. Civ. App. 2012) (affirming a hearing officer's reversal of an employee's termination when the Board had failed to properly apply the retreat provision of the RIF policy).

concluded that the outsourcing of the duties performed by the mechanics would not result in any savings to the Board.

Those conclusions, however, are outside the scope of the question to be considered by the hearing officer when considering an appeal from a termination resulting from the implementation of a RIF plan. That Sharp or the other mechanics performed valuable services for the Board while employed is irrelevant to whether the termination of Sharp's employment was permissible. Moreover, whether the outsourcing of the duties performed by the mechanics ultimately resulted in a savings to the Board is also outside the scope of the hearing officer's review. The only "'pertinent inquiry'" to be made by the hearing officer was whether the Board had proven a justification for decreasing the number of jobs in the system at the time the Board determined that a RIF plan should be instituted. Christopher, 97 So. 3d at 174 (quoting Williams v. Board of Educ. of Lamar Cnty., 263 Ala. 372, 375, 82 So. 2d 549, 552 (1955)).

As we explained in Frasier:

> "[T]his court has determined that our review is limited to whether the decision to terminate certain employees' employment [pursuant to a RIF plan] is justified before the specific decisions regarding

> who is to be terminated are made. Necessarily, neither the hearing officer nor this court is entitled to second-guess the decisions of the Board, after the fact of the terminations, regarding whether those terminations actually yielded the intended results. To do so would be to '"usurp the role of the school board"' and '"determine that another course of action other than the one taken by the school board might have been wiser or more equitable,"' which we are not permitted to do. [Christopher, 97 So. 3d at 1175 (quoting Walker, 85 So. 3d at 1016)]. ... [T]he hearing officer was required to determine only whether there was a justifiable decrease in positions based on the alleged insufficient funding. The hearing officer went beyond that inquiry to determine whether the terminations were justifiable in light of a number of other factors. This, he was not permitted to do. ... [T]he hearing officer [should] determine whether there was a justifiable decrease in positions based on the school system's alleged financial hardship, without regard for any simultaneous measures taken by the Board to address that hardship or any circumstances that arise as a consequence to the terminations."

___ So. 3d at ___.

However, the hearing officer in the present case did not clearly indicate whether he had determined that the Board had established that its financial condition was such that it was required to institute the RIF plan and, thus, that there was a justifiable decrease in jobs within the system. Some of the statements in the hearing officer's award indicate that he might have questioned the extent of the RIF plan and whether

all the terminations the Board imposed under the April RIF plan were necessary to secure the fiscal soundness of the system. Thus, we reverse the hearing officer's award and remand the cause to the hearing officer for him to enter an award determining whether, based on the evidence presented at the November 2011 hearing, the Board proved a justifiable decrease in jobs within the system such that the April RIF plan, which applied to certain nonprobationary support employees, including Sharp, was necessary.

We turn now to the issue raised by Sharp in his cross-appeal. Sharp argues that the notice of proposed termination he received from the Board was deficient because it did not contain sufficient information to permit him to mount a defense to his proposed termination. Under former § 36-26-103(a), a notice of proposed termination was required to "contain a short and plain statement of the facts showing that the termination is taken for one or more of the reasons listed in [former] Section 36-26-102." Specifically, Sharp complains that the notice failed to contain facts supporting the need to implement the RIF plan, regarding the alleged impending takeover of the school system by the state, or indicating why

mechanics like Sharp were selected for termination of employment under the RIF plan. Sharp relies on Bishop State Community College v. Archible, 33 So. 3d 588, 590 (Ala. Civ. App. 2009), in which this court determined that a termination notice given to an employee of a college had failed to apprise the employee of the facts underlying the charges giving rise to the proposed termination, as required by former § 36-26-103(a), and, thus, that the employee had been deprived of the opportunity to marshal facts to prepare an adequate defense to those charges.

The Board argues that Sharp's cross-appeal is due to be dismissed. Typically, a party may not take an appeal from a decision that is wholly favorable to him. Bailey, 475 So. 2d at 865-66. The hearing officer's award overturned the Board's termination of Sharp's employment and restored Sharp to his employment; thus, that award was wholly favorable to Sharp. However, Sharp's appeal is in the nature of a conditional cross-appeal, which becomes ripe for review in the event that the judgment under review is reversed as a result of the appeal. See First Props., L.L.C. v. Bennett, 959 So. 2d 653, 657 (Ala. Civ. App. 2006); Bess v. Waffle House, Inc., 824 So.

2d 783, 787 (Ala. Civ. App. 2001). We will therefore consider whether the hearing officer should have determined that the notice provided to Sharp was insufficient under former § 36-26-103(a).

As we have recently determined, the notice of proposed termination of employment in a case involving the institution of a RIF plan is not required by former § 36-26-103(a) to include all the facts giving rise to the need for that RIF plan or supporting the decision to include a particular class of employees or a particular employee in that RIF plan. Stranahan, ___ So. 3d at ___.

As we explained in Stranahan:

> "In the present case, the Board cited financial circumstances that necessitated the imposition of the RIF policy as the basis for the terminations, and it explained the manner in which the employees whose employment was to be terminated under the RIF policy would be selected. As the Board points out, in Archible, [33 So. 3d at 590], the terminations at issue were proposed because of a specific set of allegations of misconduct, and this court determined that more information was required. It seems axiomatic that a more detailed statement of allegations of misconduct would be necessary to allow an accused employee to defend against those allegations. In this case, however, there are no adverse allegations for Stranahan or Holmes to defend against. The basis for the proposed terminations was that the Board was experiencing

financial difficulties necessitating the implementation of the RIF policy.

"Neither Stranahan nor Holmes disputed the necessity of the implementation of the RIF policy. Rather, each argued before their hearing officer that, as to him, the decision to terminate was erroneous. Stranahan and Holmes argue on appeal, as each did before the respective hearing officers, that the notice they received from the superintendent did not afford them sufficient information to defend against the specific selection of them as employees whose employment was to be terminated. However, this court has held that, once it is established that financial circumstances warrant the implementation of a RIF policy, a hearing officer has no discretion to determine whether a particular employee's employment should be terminated pursuant to that RIF policy; rather, in the absence of an allegation that the termination was made for an improper motive, such determinations are within the province of the employing board. Board of Sch. Comm'rs of Mobile Cnty. v. Christopher, 97 So. 3d at 176. The determination of which employees are to be dismissed pursuant to a RIF policy is left to the Board, and the Board was not required to present evidence justifying its decision to terminate the employment of a particular employee pursuant to the RIF policy. Christopher, supra; see also Walker v. Montgomery Cnty. Bd. of Educ., 85 So. 3d 1008, 1015-16 (Ala. Civ. App. 2011) ('The Board was entitled to make the decision regarding which contract principals would be nonrenewed or would have their contracts canceled. Courts are not permitted to usurp the role of the school board and cannot determine that another course of action other than the one taken by the school board might have been wiser or more equitable.'). Therefore, because the Board had no burden of justifying its termination decisions made pursuant to the RIF policy, we conclude that it was not required to include in its 'short and plain'

> statement of facts a justification of its decision to terminate the employment of Stranahan or Holmes in particular."

___ So. 3d at ___.

Similarly, in the present case, the Board provided notice to Sharp that he would be included in the proposed terminations necessitated by the RIF plan that the Board was planning to institute as a result of its precarious financial position. The Board was not required to give Sharp notice of every aspect of the Board's financial issues that the Board had determined necessitated the RIF plan, the anticipated cost savings expected as a result of the RIF plan, or the basis the Board used to determine that Sharp's position would be included in the RIF plan. Thus, based on Stranahan, the notice provided to Sharp complied with former § 36-26-103(a).

APPEAL -- REVERSED AND REMANDED WITH INSTRUCTIONS.

CROSS-APPEAL -- AFFIRMED.

Thompson, P.J., and Pittman, Bryan, and Moore, JJ., concur.