

THE 2004 ALABAMA TEACHER TENURE ACT:  
ISSUES AND APPLICATION

by

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## ABSTRACT

In 2004, Alabama abolished its previous teacher tenure law that allowed for teachers to appeal adverse board decisions to a seven member Alabama State Tenure Commission. In its place, the Alabama legislature provided a process for teachers to appeal terminations, transfers, and major/minor suspensions to a hearing officer. The hearing officer was either selected from a panel of arbitrators through the Federal Mediation and Conciliation Services' Office of Arbitration Services (FMCS) or could be mutually agreed upon by the parties. Unlike the previous tenure law, the hearing officer was not required to give any deference or consideration to the board's decision below. Not long after its adoption and implementation, the 2004 Alabama Teacher Tenure Act came under fire for not fulfilling its intended goals of providing for an expedited and less-costly method of review for adverse employment actions. By 2011, Alabama's (as well as most other states') political landscape had changed significantly and the 2004 Alabama Teacher Tenure Act was repealed and replaced with the Students First Act. This qualitative research project analyzes the issues and application of arbitration-type hearings in 106 Alabama K-12 tenured certified personnel adverse employment actions. Specifically, the research addresses the issues regarding Alabama's 2004 Teacher Tenure Act, including how hearing officers trained as employment law arbitrators decided for or against board decisions in adverse employment actions, what trends emerged from their decisions, and what legal principles remain applicable for school administrators.

## LIST OF ABBREVIATIONS AND SYMBOLS

AASB	Alabama Association of School Boards
AEA	Alabama Education Association
AFL-CIO	American Federation of Labor and Congress of Industrial Organizations
AFT	American Federation of Teachers
ALJ	Administrative Law Judge
ALSDE	Alabama State Department of Education
ASTC	Alabama State Tenure Commission
AYP	Adequate Yearly Progress: Under the No Child Left Behind Act, this was a determination of whether schools or districts made adequate progress towards meeting benchmarks on approved student assessments.
CTF	Chicago Teachers Federation
EAP	Employee Assistance Program: An employer-sponsored program to assist employees with personal and work-related issues.
ELL	English Language Learner
FDA	Alabama Fair Dismissal Act: The companion statute to Alabama's Teacher Tenure Act for school support staff members.
FERPA	Family Educational Rights and Privacy Act
FMCS	Federal Mediation and Conciliation Service
IDEA	Individuals with Disabilities Education Act
IEP	Individualized Education Program: A document written for a child identified for special education services that outlines goals for the student and the services that will be provided to help the child reach those goals.
LEAP	Louisiana Educational Assessment Program
NCLB	No Child Left Behind Act of 2001: Federal legislation enacted to ensure that all children have an equal opportunity to access a high-quality education.

NEA	National Educators Association
PAC	Political action committee
PEPE	Alabama Professional Education Personnel Evaluation Program: Alabama's teacher evaluation system.
RTT	Race to the Top: A competition where states applied for federal educational grant funds during the Obama administration.
SFA	Alabama's Students First Act of 2011: Legislation that repealed Alabama's Teacher Tenure Act
§	Section
TTA	Alabama Teacher Tenure Act

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## CHAPTER 1

### INTRODUCTION TO THE STUDY

Tenure provides teachers with protection from arbitrary dismissal without due process of law (McNeal, 2013). Most states have tenure legislation, granting due process protection, for teachers who have completed a probationary period of employment, generally two to three years. Since 2010, more than 20 states have passed legislation designed to address teacher effectiveness, including linking teacher tenure and teacher dismissal to student achievement in an effort to improve overall teacher quality (Mead, 2012). The end result is that the most recent changes to teacher tenure have resulted in greatly limiting tenure attainment and protections, or eliminating it completely (McNeal). A combination of several factors serve as the impetus behind this legislative activity. First, many states adopted legislative changes in response to federal policy incentives, particularly the United State Department of Education's Race to the Top initiative. Second, in 2010, newly elected governors and legislative majorities in many states focused legislative efforts on education reform. Alabama, like many other states, made significant changes to its teacher tenure and dismissal laws in 2004 and again in 2011. Finally, as illustrated by a recent court case from California and its subsequent media coverage, the general public continues to believe that tenure provides a teacher job security for life, even when a teacher is ineffective or incompetent (*Vergara v. State*, 2014; Edwards, 2014).

An analysis of previous Alabama teacher tenure law is critical to understanding the political climate that supported recent changes. In 1939, Alabama originally codified its teacher tenure and dismissal provisions in the Alabama Teacher Tenure Act (TTA), Title 16, Chapter 24

of the *Code of Alabama* (1975), largely to address arbitrary and politically-based adverse employment decisions regarding teachers (Marshall, Baucom, & Webb, 1998). For instance, at the time Alabama adopted its tenure law, it was not uncommon for wholesale teacher dismissals in a local school system after teachers campaigned for the wrong candidate in the election of a board of education member or superintendent (Harvey, 2002). Like many states at that time, the provisions of the TTA included substantive and procedural due process protections for teachers. The 1939 version of the TTA contained two articles. Article I of the TTA set forth the tenure provisions for teachers. Article 2 provided for the creation of the Alabama State Tenure Commission (ASTC) to hear the appeals of tenured teachers from adverse employment decisions made by local school boards. Similar tenure provisions were enacted for noncertified employees, such as clerical and lunchroom staff, maintenance and custodial employees, and bus drivers under the Fair Dismissal Act (FDA) found in Title 36 Chapter 26 of the *Code of Alabama* (1975).

Under the 1939 TTA, teacher cancellation and transfer cases were initially brought before the local school board with adverse employment actions subsequently appealed to the ASTC. The ASTC consisted of seven members who were appointed by the governor, the State Superintendent of Education, the Alabama Education Association, the Alabama Association of School Boards, and the Alabama Congress of Parents and Teachers. Of the seven-member commission, two members were not educators. Based upon its findings, the ASTC could sustain or rescind a board's action depending on whether it found that the record of the proceedings before the board and the evidence recorded at a hearing before the board supported the board's action or that the board was in violation of the law (Alabama State Tenure Commission, 2008). The ASTC had a great deal of authority, including the power to retry a case brought before it and

to reach its own conclusions of fact (*Sumter County Bd. of Educ. v. Alabama State Tenure Comm'n*, 352 So. 2d 1133, 1135 (Ala. Civ. App), *aff'd* as modified, 352 So. 2d 1137 (Ala. 1977)).

Appeals from the ASTC could be made by the teacher or the employing school board by submitting the case to the circuit court. At the circuit court level, the court would consider briefs, the record of proceedings before the school board, the review of the ASTC, and oral argument of counsel to determine whether or not the decision of the ASTC should be reversed. From the circuit court, appeals were made to the Alabama Court of Civil Appeals and from there, by writ of certiorari, to the Alabama Supreme Court. On appeal, regardless of whether at the circuit court or appellate level, the ASTC's decision could be reversed only if the court found that procedural requirements were not properly complied with or that the ASTC's decision was so contrary to the weight and preponderance of the evidence as to be unjust (*County Bd. of Educ. of Shelby County v. Alabama State Tenure Comm'n*, 392 So. 2d 842 (Ala. Civ. App. 1980), *cert. denied*, 392 So. 2d 844 (Ala. 1981)). In Alabama, over sixty years of published opinions of the Alabama appellate courts provided school boards and teachers alike with interpretations and guidance concerning the provisions of the Alabama teacher tenure law utilizing the ASTC.

During the 2000 Alabama legislative session, substantial changes were proposed to the Alabama Teacher Tenure Act. One of the goals of the proposed changes was to streamline the process to remove incompetent or non-exemplary teachers from the classroom. However, many legislators questioned whether the bill would actually make it less expensive and time-consuming for school boards to remove such teachers, particularly as teachers would stay on payroll through the arbitration process (Owen, 2000). Disputes also arose over the cost of using an arbitrator instead of the ASTC to hear appeals. As a result, instead of sweeping changes to the

tenure law that would have repealed the existing Teacher Tenure and Fair Dismissal Acts, the Teacher Accountability Act (2000) enacted on July 1, 2000, simply amended the existing tenure law with only minor modifications to the existing tenure law as it related to teachers. The law did, however, make major changes to the employment, evaluation, and termination of principals.

However, just a mere four years later during the 2004 legislative session but with a new Republican governor in office, the Alabama legislature made significant changes to Alabama teacher tenure law, specifically by abolishing the ASTC and enacting a process for terminating tenured teachers that purported to take less time and money. The tenure law reforms were originally part of Governor Bob Riley's 2003 platform--a proposed tax and accountability amendment to the Alabama constitution, an amendment that was soundly rejected by Alabama voters, predominately because of the increased taxes proposed by the amendment. Despite this political setback, Governor Riley persisted with recommended changes to the TTA. These recommendations to the TTA mirrored the earlier efforts made in 2000 to replace appeals to the ASTC with an arbitration process (Owen, 2000).

Illustrating the cumbersome nature of the previous process, the ASTC had, during a 38-year period from 1960 through 1998, heard 746 termination and transfer hearings, an average of less than 20 cases per year (Gibbons, 2000). During 1987-2002, ASTC records show a two-to-one margin favoring local boards of education in teacher dismissal and transfer cases, but often at a cost approaching \$100,000 and a lengthy two to five years to remove a non-exemplary teacher from the classroom (Sherman, 2003). The legislature envisioned that the 2004 changes in the tenure law, which included progressive disciplinary measures including long-term and short-term suspensions in addition to termination, would reduce the time to terminate a tenured teacher to a few months, compared to the two to three years common under the previous law. Instead of

appealing an adverse employment decision to the ASTC, a hearing would be held before an independent arbitrator, either selected by mutual agreement or from the Federal Mediation Conciliation Service (FMCS), who, after a *de novo* hearing, would uphold the board's decision, reverse the decision, or order a different remedy. Additionally, the legislation purported to shorten the appeal process by removing appeals to the circuit court and allowing appeals directly to the Alabama Court of Civil Appeals.

Paul Hubbert, Executive Director of the Alabama Education Association, supported the change in Alabama's tenure law, stating, "It is less expensive for the employer and the employee and it should take a timely three to six months as opposed to several years" to contest adverse board disciplinary actions (Sherman, 2003). Clinton Carter, Montgomery County School Superintendent, also supported the changes in tenure law, citing the burdensome nature of existing tenure law. Noting that the board also had to bear the costs of hiring a court reporter and providing transcripts of hearings to the parties, Carter stated:

The employee does not pay for anything except a private legal counsel if they want one. It can easily cost \$30,000 to \$50,000 to reach a conclusion and you still don't get rid of the teacher. This new proposal would shorten the time and costs. Perhaps, boards would not be as reluctant to bring charges if they did not bear the cost of all the legal maneuvering. I'm willing to try the new system. It is well worth the risk that the new system is better than what we are doing now.

Almost as soon as the first teacher challenges proceeded under the TTA, the law came under fire, mainly based on perceptions that the arbitration process did not fulfill its intended goals of providing an expedited and less-costly method of reviewing adverse teacher employment actions. In 2011, Senate Bill 310, known as the Students First Act (SFA), was enacted by the Alabama legislature, repealing the 2004 TTA. Importantly, the SFA made significant changes to the hearing process and level of review to the TTA. Instead of an arbitration hearing where the hearing officer considered the evidence *de novo*, the SFA requires



that the hearing offer must give deference to the decision of the employer. Section 16-24C-6(e), *Code of Alabama* (1975). In addition, the SFA provides limits on how long a tenured teacher continues to receive pay pending termination. The SFA was supported by the Alabama Association of School Boards and the Council of Leaders in Alabama Schools and opposed by the Alabama Education Association and the Alabama Federation of Teachers.

### **Statement of the Problem**

Extensive analysis of prior Alabama teacher tenure cases has been undertaken, but none of the 2004 TTA. Riddle (1974) and Johnson (1989) examined judicial decisions in Alabama tenure cases. Gibbons (2000) analyzed 746 ASTC termination and transfer cases in addition to 181 court cases. Given the current debate over the status of tenure nationally, as well as the continued debate over tenure in Alabama, a meaningful analysis of the 2004 TTA may assist state policymakers in designing future legislation impacting teacher tenure.

### **Purpose of the Study**

The purpose of this research project was to document and analyze teacher dismissal and other adverse disciplinary actions pursuant to the 2004 TTA in order to identify common trends, issues, and guidelines. This study covers 106 TTT arbitration-adapted hearing opinions related to teacher tenure and any subsequent published appeals from 2005 to 2015. This research will analyze and identify issues and trends in TTA hearing officer decisions, providing public school administrators and school board members with additional insight to make more effective employment decisions related to teachers. This study has implications beyond Alabama as 25 states utilize an arbitrator or hearing officer at some level of an adverse employment action, whether at an initial hearing or on appeal. Additionally, this research will provide data for legislators and other educational stakeholders to review to determine whether or not the 2004

TTA accomplished its purported goals as well as whether or not the TTA was as flawed as advertised during the debate and subsequent passage of the 2011 SFA. Finally, this research will inform other state policymakers as teacher tenure laws continue to evolve with educational reform measures.

### **Significance of the Problem**

The timing of this study is significant because there has been no careful examination of arbitration awards since the passage of the 2004 TTA and its subsequent repeal and replacement by the SFA in 2011. The seven years of hearing decisions will provide some insight as to what impact the law had on teacher employment actions, specifically in regard to expense, time, and prevailing party status. Additionally, the hearing decisions are not recorded in any unified format and are not readily accessible to educational professionals who may use this information to make better-informed personnel decisions. This includes other jurisdictions currently using or who are proposing similar tenure law requiring the use of arbitrators or hearing officers with a similar level of deference and review to arbitral-type decisions.

Furthermore, the results of this study will provide Alabama educators with information about trends in teacher tenure cases, along with insight regarding the continuing debate concerning the pros and cons of teacher tenure. As a result of sweeping political changes, the current political climate in Alabama and across much of the rest of the nation has targeted teacher tenure as a subject of needed educational reform. The results from this study, particularly for administrators in other states that currently use arbitration, will assist school boards, administrators, teachers, and attorneys in decision-making regarding adverse employment actions.

## **Methodology**

Alabama TTA hearing officer opinions related to certified personnel will be obtained from the Alabama Association of School Boards. These decisions will represent the adverse employment decisions challenged under the 2004 TTA. The researcher will brief each arbitration award using a thumbnail briefing format, a process to identify essential case elements. (Statsky & Wernet, 1995). Through qualitative research, the research will attempt to isolate data that will provide educational decision-makers relevant information to assist in making better-informed teacher employment decisions.

## **Research Questions**

The following research questions guided and structured this research:

1. What were the statutory rights of tenured teachers and certified staff involved in adverse employment decisions under the 2004 TTA?
2. What were the outcomes of adverse employment actions for teachers and certified staff in hearings under the TTA? (a) How many cases were appealed to a hearing officer during the period of 2005 through 2011? (b) What types of cases were heard during that period? (c) How many cases were brought during each year during that period?
3. What trends developed as part of the hearing process? (a) What types of cases were heard during the time period studied? (b) Were there certain grounds or combination of grounds that were more likely to result in a favorable decision for the board? (c) What procedural errors were the most common in unfavorable decisions for the school board? (d) Did the arbitration-adapted hearing process provide the expedited process intended by the law? (e) To what extent did the arbitration hearing officers apply prior Alabama teacher tenure case law in arbitration

awards? (f) Was there a difference in the types and number of adverse employment actions taken each year during the period the TTA was in effect?

4. How were hearing officer decisions been treated on appeal? (a) How many decisions were subsequently appealed to the Alabama appellate courts? (b) What were the trends, if any, in appellate decisions? (c) What trends, if any, were observed in appellate decisions?

5. Are there any applicable legal principles and procedures for school administrators and school districts to consider before taking adverse employment action against a teacher, even under the SFA?

### **Limitations**

The following limitations apply to the study:

1. This study is limited to K-12 public school teacher adverse employment actions that were arbitrated from 2005 through 2011.

2. Appeals are limited to those granted at the discretion of the Alabama Court of Civil Appeals and the Alabama Supreme Court as identified by Westlaw computerized research system. Opinions were verified by a search of West's Alabama Reporter.

3. This study is limited to cases submitted to a hearing officer pursuant to the TTA from local school board decisions.

4. This study is limited to the hearing officer opinions provided to the researcher by the Alabama Association of School Boards.

5. This study is limited to cases that are appealed to the Alabama Appellate Courts.

## Assumptions

This study was conducted with the following assumptions:

1. Reviewed hearing officer opinions are accurate and complete regarding cases heard.
2. That the researcher has interpreted the hearing officer opinions accurately.
3. Cases on appeal were located as a result of a Westlaw computer search and West's Alabama Reporter.

## Definitions

Definitions of legal and educational terms used in this study are as follows:

*Administrative Law Judge*--“An official who presides at an administrative hearing and who has the power to administer oaths, take testimony, rule on questions of evidence, and make factual and legal determinations. Also termed *hearing examiner; hearing officer; trial examiner*” (Black, 2009, emphasis in original).

*Annotation*--“A brief summary of the facts and decision in a case, especially one involving statutory interpretation” (Black, 2009).

*Appeal*--“A proceeding undertaken to have a decision reconsidered by a higher authority; especially the submission of a lower court's or agency's decision to a higher course for review and possible reversal” (Black, 2009).

*Arbitration*--“A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding” (Black, 2009).

*Arbitrator*--“A neutral person who resolves disputes between parties, esp. by means of formal arbitration” (Black, 2009).

*Arbitrary*--“Founded on prejudice or preference rather than on reason or fact. This type of decision is often termed *arbitrary and capricious*” (Black, 2009, emphasis in original).

*Award*--“A final judgment or decision, esp. one by an arbitrator or by a jury assessing damages. Also termed *arbitrament*” (Black, 2009, emphasis in original).

*Brief*--“A written statement setting out the legal contentions of a party in litigation, especially on appeal; a document prepared by counsel as the basis for arguing a case, consisting of legal and factual arguments and the authorities in support of them” (Black, 2009).

*Burden of proof*--“A party’s duty to provide a disputed assertion or charge” (Black, 2009).

*Cancel*--“To terminate a promise, obligation, or right” (Black, 2009).

*Cancellation*--“An annulment or termination of a promise or an obligation” (Black, 2009).

*Case law*--“The doctrine holding that a decision rendered in a former appeal of a case is binding in a later appeal” (Black, 2009).

*Certiorari*--“An extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review” (Black, 2009).

*Citation*--“A reference to a legal precedent or authority, such as a case, statute, or treatise that either substantiates or contradicts a given position” (Black, 2009).

*Collective bargaining*--“Negotiations between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, discipline, and fringe benefits” (Black, 2009).

*Contract*--“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law” (Black, 2009).

*De novo*--“Anew” (Black, 2009).

*Dismissal*--“Termination of an action or claim without further hearing; a release or discharge from employment” (Black, 2009).

*Due process*--“The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case” (Black, 2009).

*Estoppel*--“A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true” (Black, 2009).

*Evidence*--“Something (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact; the collective mass of things, especially testimony and exhibits, presented before a tribunal in a given dispute” (Black, 2009).

*Ex parte*--“On or from one party only” (Black, 2009).

*Fact*--“Something that actually exists; an aspect of reality. Facts include not just tangible things, actual occurrences, and relationships, but also states of mind such as intentions and opinions” (Black, 2009).

*Good cause*--“A ground for legal action; a legally sufficient reason” (Black, 2009).

*Holding*--“A court’s determination of a matter of law pivotal to its decision; a principle drawn from such a decision” (Black, 2009).

*Immorality*--the lack of “conformity with recognized rules of correct conduct,” particularly with regard to sexual matters (Black, 2009).

*Incompetence*--“The state or fact of being unable or unqualified to do something” (Black, 2009).

*Insubordination*--“A willful disregard of an employer’s instructions, especially behavior that gives the employer cause to terminate a worker’s employment; an act of disobedience to proper authority” (Black, 2009).

*Intemperance*--“A lack or moderation or temperance; especially habitual or excessive drinking of alcoholic beverages” (Black, 2009).

*Mandamus*--“A writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usually to correct a prior action or failure to act” (Black, 2009).

*Moral turpitude*--“Conduct that is contrary to justice, honesty, or morality” (Black, 2009). “Moral turpitude means, in general, shameful wickedness – so extreme a departure from ordinary standards of honest, good morals, justice, or ethics as to be shocking to the moral sense of the community” (50 Am. Jur. 2d Libel and Slander § 164 at 454 (1995)).

*Opinion*--“A court’s written statement explaining its decision in a given case, usually including the statement of facts, points of law, rationale, and dicta” (Black, 2009).

*Precedent*--“The making of law by a court in recognizing and applying new rules while administering justice; a decided case that furnishes a basis for determining later cases involving similar facts or issues” (Black, 2009).

*Tenure*--“A status afforded to a teacher or professor as a protection against summary dismissal without sufficient cause” (Black, 2009). Tenure is a provision created by state statute or contractually created to provide a teacher with certain due process rights and privileges (Gooden, Eckes, Mead, McNeal & Torres, 2013).



## **Organization of the Study**

Chapter 1 comprises the introduction to the study, including the purpose and significance of the study, methodology and procedures, research questions, limitations and assumptions of the study, and definitions of terms used in the study.

Chapter 2 consists of a review of the literature related to teacher tenure, including political and legislative influences for change, in K-12 education.

Chapter 3 describes the methodology and procedures utilized in the research process.

Chapter 4 presents case briefs from each Alabama arbitration opinion from 2005 through 2012, including an analysis of the opinions that were briefed.

Chapter 5 provides a summary of the data, conclusions of the researcher, guidelines for educational administrators, and recommendations for further study.

CHAPTER 2  
REVIEW OF LITERATURE

**Introduction**

As defined by Scott (1986), tenure is a form of job security conferred upon teachers who have successfully completed a probationary period of employment. Tenure generally refers to statutory protections conferred upon teachers by states to protect teachers, who have typically taught for specific period of time--usually three years--within a single school district, from “unlawful, arbitrary, and capricious [school] board actions” (Vacca & Boshier, 2008, p. 125). In *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972), the United States Supreme Court held that these protections give rise to a property interest within the purview of the Fourteenth Amendment because a teacher has a “legitimate claim of entitlement” to employment beyond the stated duration of an employment contract. State statutes contain substantive provisions delineating specific grounds for terminating a teacher’s contract as well as procedural provisions for what procedures should be followed in doing so.

In 1939, the Alabama legislature enacted the Teacher Tenure Act to protect teachers from arbitrary and capricious actions by their administrators and local boards of education. At that time, tenure laws or their equivalent existed in 19 states and the District of Columbia. By 1950, 42 states had some form of tenure or tenure-like legislation. By the late 1960s, the idea of tenure was entrenched on a national level (Marshall et al., 1998). Today, tenure varies according to the state in which a teacher is employed. Once a teacher has been awarded tenure, commonly called continuing service or permanent teacher status, the teacher is entitled to due process when faced

with dismissal, transfer, or other adverse employment action by the school board. In Alabama, there are two classes of teachers--those who are tenured and those who are not. Section 16-24-2(a), *Code of Alabama* (1975) defines tenure as follows:

Any teacher in the public schools who shall meet the following requirements shall attain continuing service status: Such teacher shall have served under contract as a teacher in the same county or city school system for three consecutive school years and shall thereafter be reemployed in such county or city school system the succeeding school year.

Teachers who teach in the same school district for three school years and who are reemployed by the same school district the following year become tenured under Alabama law. Tenure, also called continuing service status, provides teachers with the expectation of further employment the following year.

Tenure has come under intense scrutiny as school districts throughout the nation struggle to meet accountability mandates. Indeed, when teacher tenure makes the news, the resulting public sentiment often illustrates the viewpoint that “tenure may be the teaching profession’s dearest public relations nightmare” (Owen, 2000). This attitude is reflected in studies on the general public’s perceptions of teachers. For example, in one study on teacher incompetence, 95% of those surveyed believe that teacher incompetence is widespread in secondary education (Branch, 2001). Generally, most researchers suggest and use 5% as a best estimate for the number of teachers that are either incompetent or non-exemplary (Menuey, 2007). However, various studies report that these teachers are dismissed at a rate of less than 1%.

With increased interest in education reform, legislative attention to teacher tenure has increased. Beginning in 2011, several states began an overhaul of their tenure laws. Florida, North Carolina, Kansas and Idaho repealed tenure outright, phased out tenure or removed due process provisions, although Idaho’s legislative attempt to abolish tenure was thwarted by voters

(Thomson, 2014). Florida replaced its tenure law with a merit-pay law (See, *Student Success Act*, S. 736, 2011 Leg., Reg. Sess. (Fla. 2011)). In a move that caught the attention of the national media and was a topic of fierce debate for almost a month, Wisconsin effectively eliminated the collective bargaining rights for public employees while also as requiring those employees to pay a higher share of their pension and health care costs (Marley, 2011). After three years of litigation, in 2014 the Wisconsin Supreme Court upheld the 2011 law, stripping most public workers, including teachers, of the majority of their collective bargaining rights (Shaw, 2014). Shortly after Wisconsin eliminated collective bargaining for teachers, Tennessee repealed a 1978 law that mandated collective bargaining (Ghianni, 2011). Tennessee's Lt. Governor stated, "For years upon years, one union has thwarted the progress of education. Reform after reform has been refused or dismantled. The barrier that has prevented us from putting the best possible teacher in every classroom will soon be removed" (Ghianni). Other states, including Indiana and Michigan, adopted similar right-to-work legislation, potentially impacting teacher tenure protections. During the four years of significant changes to teacher tenure nationally, Alabama followed suit by enacting significant changes to its teacher tenure law with the Students First Act of 2011 (Beyerle, 2011).

Although there have been legislative changes to teacher tenure protections in many states, a recent California court decision may lead to additional litigation over state tenure laws. In June 2014, a Los Angeles County trial court judge ruled in *Vergara v. State* that several California state laws violated the state constitution's equal protection clause. Specifically, the trial court ruled that state tenure laws unfairly impacted minority and disadvantaged students by leaving ineffective teachers in classrooms, violating equal protection (Sawchuk, 2014). In April 2016, the California Court of Appeal reversed the lower court's decision in *Vergara v. State of*

*California* (Cal. Ct. App. April 14, 2016) and reaffirmed that California’s system for attracting and retaining quality teachers is consistent with the state constitution. The unanimous appellate opinion held that,

Plaintiffs failed to establish that the challenged statutes violate equal protection, primarily because they did not show that the statutes inevitably cause a certain group of students to receive an education inferior to the education received by other students. Although the statutes may lead to the hiring and retention of more ineffective teachers than a hypothetical alternative system would, the statutes do not address the assignment of teachers; instead, administrators – not the statutes – ultimately determine where teachers within a district are assigned to teach. Critically, plaintiffs failed to show that the statutes themselves make any certain group of students more likely to be taught by ineffective teacher than any other group of students. (Vergara, p. 6)

The California Teachers Association celebrated the ruling, stating, “the reversal affirms the arguments of educators, civil rights groups, legal scholars and education policy experts that the state statutes affirming educator rights do not harm students” (California Teachers Association, 2016).

### **Teacher Unions, Associations, and the Development of Teacher Tenure**

In the early 1900s, teachers were subjected to poor working conditions, including low pay, over-crowded classrooms, and employment often subjected to changes in political climate (Marshall et al., 1998). As a result, largely in response to the changing hierarchies and organization of the nation’s largest urban school systems, but also as a result of poor working conditions, teachers began to organize into teacher associations (Urban & Wagoner, 2000). Although the National Educators Association (NEA) was founded in 1857 as a policy-making organization and spearheaded efforts to protect teachers’ jobs through tenure as early as 1884, the NEA was not particularly focused on the working conditions of teachers in the early 1900s. However, during that same time period, the Chicago Teachers Federation (CTF), had aligned itself with the local labor federation in Chicago and, by rallying support of several nearby local

teacher associations in Chicago that, unlike the NEA at the time, were focused on improving the working conditions of teachers, formed the beginnings of the American Federation of Teachers (AFT). Shortly thereafter, the AFT received a charter from the American Federation of Labor and quickly gained national visibility with the addition of the local teacher associations in New York City.

By 1920, the AFT had expanded to approximately 100 local organizations. During this time, the NEA also experienced growth, largely related to a renewed focus on the needs of its teacher members. In 1923, the NEA organized the Committee of One Hundred on Problems of Tenure to research tenure law. Four years later, the Committee reported that four types of teacher tenure existed: (a) employment where teachers could be dismissed at any time; (b) a specific contract where a teacher was guaranteed one year of employment; (c) indefinite tenure where incompetent or unfit teachers could be dismissed at any time, and (d) permanent tenure, where a teacher could not be removed absent committing a crime or violating moral codes (Donovan, 1938, pp. 271-272).

In 1939, a study concluded that teachers nationwide were being dismissed for predominantly personal, rather than professional, reasons and with no basis to challenge the dismissal. While incompetency was one of the causes given for dismissal, other causes, including immorality or rumors of immorality, marriage, childbirth, and political activity, made it clear that teachers were subjected heightened moral expectations (Delon, 1972). As a result, the AFT and NEA began to successfully lobby for protections for teachers, reasoning that such laws would attract more qualified teachers by providing more job security. Opponents, however, believed that tenure would prevent the dismissal of poor teachers.

During the 1960s, both the AFT and the NEA underwent substantial restructuring. The NEA basically dropped any pretense of unification in the education profession as teachers and administrators found themselves more often in adversarial positions (Campbell, Cunningham, Nystrand, & Usdan, 1985). During this period, the American Association of School Administrators and the National Association of School Principals became separate organizations (Campbell et al.). The AFL-CIO, recognizing the critical role that teachers could play in the organization of white collar workers at a time when blue collar jobs were disappearing, assisted the AFT as well. Further allowing the NEA and AFT to pursue much more aggressive tactics in protecting the rights of teachers was the issuance of Executive Order #10988 by President John F. Kennedy in 1962 (Campbell et al.). This order allowed public employees, including teachers, the ability to collectively bargain at the state and local level.

Today, both the AFT and the NEA are both active politically at the federal level as well as at the state and local level. Likewise, both groups promote teacher tenure, along with collective bargaining, as a vital component of teacher employment (Coleman, Schroth, Molinaro, & Green, 2005). In states with collective bargaining, teacher unions negotiate with school boards to determine terms of employment (Ingram, 2003). As recently as 2006, teacher unions, because of the political power inherent an allegiance of a large group of members with experienced union leaders, were able to typically prevail in negotiations (Peterson). However, membership in the NEA has declined 9% from 2011 to 2015. In addition, several states, including Kansas, Michigan, and North Carolina, recently enacted legislation that prohibits school districts from collecting teacher union dues via payroll deduction, leading to the projection of a decline in union membership in those states (Dunn & Derthick, 2015). In addition, a recent Supreme Court ruling, *Harris v. Quinn*, 534 U.S. \_\_\_\_ (2014), has potential implications for states that allow

collective bargaining by public employees. Specifically, the language by the majority's decision in *Harris* may lead to increased political and legal attacks where nonmembers of public employee unions are currently compelled to pay union dues for collective bargaining activities that they oppose. In the majority decision concerning this freedom of speech issue, the Court opened the door to future legal challenges by noting the inherent difficulty of determining the difference between costs related to collective bargaining and contract purposes compared to political purposes. As collective bargaining rights of teachers continue to come under fire in several states, along with other attacks on tenure protections, it will be interesting to see the future evolution of teacher tenure rights and the political power of unions.

### **Property Interests and Due Process Conferred by Tenure**

Tenure, created through state legislation, provides that teachers will only be terminated for satisfactory cause and following specific procedural requirements. The types of statutory rights and protections, along with procedures, vary from state to state (Cambron-McCabe, McCarthy & Thomas, 2004). Most states require a probationary period, generally three years, where the school district has the opportunity to evaluate a teacher's competence and ability to teach before a teacher is awarded tenure. During this probationary period, teachers typically enter into a term-contract, usually for one year, with the school board.

The Fourteenth Amendment guarantees that no state shall "deprive any person of life, liberty, or property without due process of law" (U.S. Const. amend. XIV §1). Due process requirements apply not only to judicial proceedings, but also to actions by governmental agencies, including school boards. In tenure cases, procedural due process requirements, specifically notice and hearing provisions, are embodied in a state's tenure law, collective bargaining agreement, or school district policy. Where a teacher is tenured or under contract, a



teacher has a property right in either continued employment with the board or employment under the stated terms of the contract (*Bd. of Regents v. Roth*, 408 U.S. 564 (1972)).

When dismissing or imposing serious disciplinary consequences (e.g., long term suspension without pay), more than minimal due process is followed. As described by Joyce (2000), most states have a statutory process that is followed that include some or all of the following steps to some degree:

Step One: The Superintendent, in consultation with the principal, makes a determination to dismiss, non-renew, or impose serious disciplinary action on a teacher.

Step Two: Official notice of the decision is sent to the teacher, stating the charges and/or reasons for the dismissal. The notice also provides the teacher's rights, including how to contest the dismissal.

Step Three: The teacher's response to the Superintendent's notice, including a request for a hearing before the Board.

Step Four: A board hearing with the opportunity to review evidence from the teacher.

Step Five: The board's decision, including written notice of the decision to the teacher.

Step Six: Appeal by teacher pursuant to state statute

Often, the time it can take from the decision to dismiss a teacher to final appeal, along with the expense and complexity of complying with various statutory requirements, are cited as reasons many administrators are reluctant to dismiss a tenured teacher (Kennedy, 2000).

## **The Debate over Teacher Tenure**

Teacher quality research indicates the need for teacher tenure reform. First, teacher effectiveness is the most important school-based factor when it comes to improving student achievement as measured by estimated teacher impacts on student achievement testing. Second, teacher quality is a “highly variable commodity” (Goldhaber and Hansen, 2010, p. 1). Finally, research indicates that only a small number of tenured teachers are dismissed for poor performance, despite that up to 15% of teachers nationally do not meet minimal competency standards (Tucker, 2001).

Research indicates that 5% to 15% of the 2.7 million teachers in public school classrooms perform at levels deemed to be incompetent (McGrath, 1995; Tucker, 1997). Teachers deemed incompetent, generally defined as a lack of content knowledge or adequate pedagogical or classroom management skill, are terminated at a rate of less than 1% (Tucker, 2001). Many opponents of tenure argue that the due process protections of teacher tenure are so onerous as to make dismissal or other adverse employment actions impractical and point to the low percentage of teachers who lose their job because of poor performance. Others cite the high costs of dismissing low performing teachers, providing examples where the process not only proved costly, but was also very time consuming. One such experience, reported by the hearing officer who heard the dispute, illustrates the potential pitfalls in terminating a tenured teacher accused of incompetency (Menacker, 1994). As described by Menacker in his article entitled “A Dilemma in Teacher Dismissal Hearings: Determining What is Right When Both Sides are Wrong,” one particular due process hearing covered “52 days of oral argument, and 15 months from beginning to end” as well as “over 500 exhibits of evidence, including books, video cassettes, training manuals, magazine articles, correspondence, student papers, lesson plans, school bulletins,

journal articles, . . . evaluations, videotapes, lesson plans, student work, correspondence with parents, student standardized test performance, and attendance records” (p. 463).

On the other hand, proponents of tenure argue that the due process provisions of tenure provide only minimal protections for teachers and that the reasons that poor-performing teachers remain in classrooms is because administrators are not doing their jobs in evaluating teachers properly (Weisberg et al., 2009). Interestingly, after synthesizing case law up to 2003 concerning teacher evaluation, Zirkel (2003) found that much of the confusion regarding the law of teacher evaluation is not just the preventative approach favored by much of the law-based literature, but also because of the lack of accurate legal knowledge by administrators. Furthermore, in many cases, Zirkel (2010) argued that it is not the procedural protections afforded teachers that keep poor performing teachers in classrooms, but rather a lack of will. In fact, when school districts move to dismiss a teacher, tenured or not, school districts prevailed over the teachers at over a four-to-one ratio (Zirkel). For Zirkel (2013), the threat of litigation by a teacher should not provide him or her with “an ironclad protection from individual accountability” (p. 50).

Concerned with the growing perception that school districts were losing teacher employment cases in increasing numbers, Gavin and Zirkel (2008) examined and compared the outcomes of teacher-initiated court decisions from 1977-1981 with 1997-2001 court decisions. The researchers found that school districts succeeded over the teacher by a considerable margin during both time periods. As a result, the researchers concluded that the results “counter the prevailing perception that the case law makes it almost impossible to terminate incompetent teachers, instead supporting and extending syntheses specific to teacher evaluation that the courts tend to side with school districts in such matters” (Gavin & Zirkel, p. 33).

Similar to the study by Gavin and Zirkel (2008), Batagiannis (1985) found that when administrators and school districts adhere to certain guidelines, courts will support their judgment when it comes to the dismissal of incompetent teachers. Courts will examine the evidence of a teacher's incompetence, measuring the teacher's performance "against the standard required of others performing the same or similar duties" (Batagiannis, p. 944). Remediation is another factor that courts will consider, specifically whether remediating the teacher's deficiencies is possible and, if so, whether any remediation occurred, the length of the remediation, and the results of such efforts.

In a study surveying a small number of administrators by Painter (2000), elementary and middle school principals were asked to identify the number of "low-performing teachers they had identified during their careers" (p. 258). The researcher deliberately used the term low-performing instead of incompetent in an attempt to increase the number of teachers that a principal might consider as part of his or her response. As part of the survey, the principals were asked what outcomes occurred as a result of their efforts in working with the teachers, including remediation (successful and unsuccessful), transfer, resignation or dismissal. Additionally, the principals were asked to identify perceived barriers in dealing with low-performing teachers. The majority of principals (67.6%) cited teacher unions or collective bargaining agreements as impediments to dealing effectively with low-performing teachers. Another significant barrier noted by 56.8% of principals was time, including "lack of time available for proper, thorough evaluation and follow through" and "too many demands on the principal leaving very little time for supervision of teachers" (p. 260).

In a study of teachers' perceptions of professional incompetence and barriers to the dismissal process, Menuet (2007) surveyed 213 elementary school teachers in the same school

district. Research question one, “What are teachers’ perceptions of the definition of professional incompetence?” asked teachers to use a 4-point Likert scale to rate 18 factors. Of those 18 factors, teacher responses suggest that that a teacher’s “inability to express content clearly, weak classroom management skills, poor professional judgment, poor attitude towards teaching responsibilities, behavior causing low morale or fear among students, poor reading/writing/speaking skills, lack of subject matter knowledge, failure to teach curriculum prescribed, refusal to obey school rules, lack of lesson planning, and lack of professional development” were of particular importance, all having mean scores of 3.00 or greater (p. 316). Additionally, participants wrote in over 30 more factors that they considered factors indicating professional incompetence. The most commonly appearing factor, also raised by interview participants, was that of “difficulty working as part of a team” (p. 316).

Menuey’s research question two, “What are teachers’ perceptions of strategies used with incompetent teachers?” asked the teachers to rate 19 strategies using a 4-point Likert scale. Ten of the strategies scored means below 2.00, suggesting that many strategies discussed in the literature are not used in practice. Only five strategies rated over a 2.40, including “voluntary transfer to another school in same district, successful remediation/improvement, retirement-based on age or years of teaching, voluntary switch to another teaching assignment in the school, and involuntary switch to another teaching assignment in the school” (pp. 316-317). In interviews, the teachers spoke of teachers who did not improve after transfer, but also those that benefitted from having a “clean slate” at a new school. When interviewed, teachers also added that principals often did nothing to deal with incompetent teachers, often creating tension between the interviewed teachers and their administrators.

The final research question asked teachers to rate eight barriers to the dismissal of incompetent teachers. All eight barriers scored between 2.99 and 2.11. The strongest barriers identified by teachers were, beginning with the highest rank, “protection of employee by professional association, legal and other expenses, difficulty providing needed documentation, required administrative time, unclear definition of incompetence, and lack of resolve or strength of character by principal” (p. 318).

### **Arbitration as an Alternative Dispute Resolution Process**

Under the 2004 TTA, when an Alabama teacher filed a contest from a Board’s decision to terminate a teacher, the teacher and the board could “either (1) mutually agree upon a person to hear the teacher’s contest, or (2) submit a joint request for a panel of arbitrators to the Federal Mediation and Conciliation Services’ Office of Arbitration Services (FCMS).” *Code of Alabama* (1975), §16-24-20(b). Each party had the opportunity to strike names on the list provided by the FCMS, rank the remaining names on the list, and return the list to the FCMS. The FCMS would then compare the lists and invite the selected hearing officer to serve. If for some reason the hearing officer could not be appointed from the list, the FMCS would make the appointment from other members of the panel.

For teacher terminations, the *Code of Alabama* (1975), §16-24-20(c) provided the following:

During all hearings conducted before a hearing officer pursuant to this article, the hearing officer may consider the employment history of the teacher, including, but not limited to, matters occurring in previous years. Testimony and evidence shall be admitted into evidence at the discretion of the hearing officer. The hearing officer may also have the authority and discretion to exclude or limit unnecessary or cumulative evidence.

In addition, the hearing officer had the authority to “issue subpoenas to compel the attendance of witnesses and production of papers necessary as evidence and/or information in connection with

the dispute or claim.” *Code of Alabama* (1975), §16-24-10(a). The hearing officer conducted a hearing *de novo*, rendering a decision based upon the evidence submitted to him or her. Five options were available to the hearing officer “relative to the employee: Cancellation of the employment contract, a suspension of the employee, with or without pay, a reprimand, other disciplinary action, or no action against the employee” *Code of Alabama* (1975). The hearing officer had 30 days to render a written decision that includes findings of fact and conclusions of law. If the decision of the hearing officer was appealed to the Alabama Court of Civil Appeals, appeals were granted only when there appeared to be special reasons for granting the appeal. Even if an appeal was granted, the decision of the hearing officer was affirmed on appeal unless the Court of Civil Appeals found the decision of the hearing officer was arbitrary and capricious. Importantly, for a board actions contested under the TTA, the board action was not final pending the hearing officer’s decision.

For major suspensions over seven days, the *Code of Alabama* (1975) §16-24-16 provided for a hearing much like that of a teacher termination. However, for minor suspensions of seven days or less under the *Code of Alabama* (1975) §16-24-17, the hearing officer only considered briefs from the parties along with any supporting exhibits to determine whether the board had just cause to suspend the teacher.

For teacher transfers, the *Code of Alabama* (1975) §16-24-7 provided that a contested transfer would not be effected until a hearing officer approved the transfer. Once a teacher was provided a notice of intent to recommend transfer by the superintendent, the teacher could demand a hearing before the board. At that hearing, testimony could be taken regarding the purpose of the transfer. On appeal, the hearing officer would review the record of the proceedings before the board, including the notice provided to the teacher, all paperwork filed

with the board, a transcript of any testimony taken at the hearing before the board, other evidence, and the findings and decisions of the board. At the arbitration hearing, the teacher and the board were allowed to present arguments based on the facts and law, but no witnesses were allowed to be called. The hearing officer considered the proceedings before the board and the arguments presented at the hearing to determine whether the evidence was insufficient for the board to take the action, whether such action was taken for political or personal reasons, or whether such action was arbitrarily unjust.

Because the 2004 TTA provided that hearing officers reviewed the board's action *de novo*, with no deference given to the board's decision, along with the limited standard of review of the hearing officer's decision on appeal, an examination into the background and training of arbitrators is important. The Federal Mediation and Conciliation Service states on the homepage of its website that "it is an independent agency whose mission is to preserve and promote labor-management peace and cooperation. Headquartered in Washington, DC, with two regional offices and more than 70 field offices, the agency provides mediation and conflict resolution services to industry, government agencies and communities." The FMCS website also states "applicants for the FMCS roster must demonstrate experience, competence, and acceptability in decision-making roles in the resolution of disputes arising from collective bargaining agreements." Applicants will be added to the roster if he or she meets the following qualifications:

- (1) Is experienced, competent, and acceptable in decision-making roles in the resolution of labor relations disputes; or
  - (2) Has extensive and recent experience in relevant positions in collective bargaining;
- and



(3) Is capable of conducting an orderly hearing, can analyze testimony and exhibits and can prepared clear and concise findings and awards within reasonable time limits (FCMS website).

An applicant can demonstrate his or her qualifications by submitting five recent arbitration awards while serving as an arbitrator under a collective bargaining dispute. Another alternative is for an applicant to attend the FMCS Labor Arbitrator Training Course along with the submission of two recent arbitration awards and submission of extensive collective bargaining experience. In addition to selecting arbitrators from the FMCS roster, the TTA provides that parties may mutually agree upon a person to hear the teacher's contest, but does not specific any specific training in alternative dispute resolution (e.g., arbitration or mediation) is necessary.

Ginsburg (2010) reviewed the level of judicial review for arbitration. He noted that arbitration is often viewed as a supplement to the judicial system by "providing relatively cheap, speedy, and expert decision-making" (p. 1013). Specifically, Ginsburg stated,

If the standard of review is too rigorous, the benefits of arbitration in terms of speed, cost, and finality may be lost because parties will frequently appeal arbitral awards to the courts. On the other hand, if review is too limited, arbitrators might deliver poor quality decisions that undermine the attractiveness of arbitration as a whole. The law must choose a point somewhere on the spectrum, and it generally leans toward minimal review. (p. 1014)

Ginsberg argued that the standard of review should be higher, specifically noting that more judicial review would be likely to increase the minimum floor for quality in arbitration decisions.

In addition to the judicial review of arbitration awards, biases of arbitrators may affect decision-making. Caudill and Oswald (1993) investigated arbitrator gender and age on arbitration decisions based upon a theoretical framework for gender effects examined in criminology and behavioral literature. The researchers examined arbitrator responses to a

hypothetical employee discharge based upon a positive drug test (the scenario was based upon an actual situation). Two versions of the case were written--one in which the discharged employee was male and the other where the discharged employee was female. The cases were distributed so that half of the male and half of the female arbitrators received the case where the discharged employee was male and the other half received the female case version. Arbitrators were then asked to rule by selecting decisions from a prepared list, including upholding the termination, reinstating the employee (full pay or partial pay), or a suspension. The researchers concluded that female discharged employees are overall more likely to have terminations overturned, but that female arbitrators are less likely to reinstate terminated female employees than the male arbitrators. This research also supported the earlier research by Nelson and Curry (1981) that older arbitrators treat employees less favorably than younger arbitrators.

In 1990, Thornton and Zirkel examined the consistency and predictability of arbitration awards, noting that few studies had focused on these characteristics. The researchers used “consistency” as the degree of agreement by arbitrators on a given case, similar to inter-rater reliability while “predictability” referred to what others would expect the arbitrator to decide. Thornton and Zirkel stated that this is important because,

Consistency is one of the essential elements of justice or, more specifically, fairness. . . . If arbitrator decisions are largely random events--if inconsistency is the rule--would it not be just as well for the parties to select some other outcome (perhaps flipping a coin?) to decide the outcome? (p. 294)

In addition, if arbitration awards are inconsistent, this has an impact on predictability. Predictability is important because it serves to reduce the number of employee grievances that proceed to arbitration. Where both parties can accurately predict arbitration awards, then there is a chance that the matter may be settled at a lower level than arbitration. Previous research found differences based upon the experience of the arbitrators and the backgrounds of the arbitrators,

including differences between those who hold law degrees compared to those with degrees in other fields such as psychology, economics, business, or labor relations.

Thornton and Zirkel (1990) used a survey instrument to collect demographic information from the respondents, but also provided the respondents with two arbitration scenarios, followed with two variations, for a total of six scenarios. The scenarios were changed by adding a fact in the employee's favor and, in the other scenario, a fact in the employer's favor. The scenarios involved a just-cause dismissal based upon excessive absenteeism and a contract interpretation case based upon seniority. They found that the arbitrators were inconsistent in their decision-making, although they were most consistent when the employer had formulated and applied an applicable policy pertaining to the scenario. More importantly, "the observed inconsistency in awards was not significantly attributable to the gender, legal training, age, or experience of the arbitrators," which was troubling based upon previous research on arbitrator experience (p. 305). The inconsistency between the arbitrators also mean that the awards were not very predictable. Because the study did not examine the opinion parts of arbitration decisions or examine options where there is some type of middle ground to the decision, Thornton and Zirkel stated that "further research is needed that focuses on the opinion part of an arbitration decision and on acceptability as well as predictability" (p. 306).

### **Tenure and Politics**

Although Alabama is an at-will employment state and teachers cannot collectively bargain as a union, the majority of teachers and other support personnel belong to the Alabama Education Association (AEA). The AEA lobbies the state legislature on behalf of its 105,000 members. From 1969 through 2012, its Executive Director, Paul Hubbert, was regarded by many as the most powerful lobbyist in Montgomery, turning the AEA into a political juggernaut for its

predominantly Republican opponents (Lowry, 2010). In addition to his duties as Executive Director of the AEA, Hubbert, also a former Democratic nominee for Governor, served as the vice chairman of the Alabama Democratic party until his resignation in July 2010.

Following the November 2010 elections, the Alabama legislature, for the first time in history, became majority Republican. In addition to this significant political change, the AEA played a significant, if not entirely pivotal, role in the state's gubernatorial race, illustrating the power that this non-union association wields in Alabama politics on behalf of its members. The AEA contributed at least \$700,000, and possibly as much as \$3 million, to run political attack advertisements during the Republican primary and runoff elections. Many political pundits viewed the attack advertisements against Republican candidate Bradley Byrne as instrumental in his loss of the Republican nomination for governor to Robert Bentley (Lowry, 2010). In Alabama, political contributions can be made to political action committees (PACs), sometimes resulting in less-than-transparent political maneuvering. In Byrne's case, one of the political action committees that financed attack advertisements before the primary election, the True Republican PAC, received most of its funding from other PACs heavily funded by the AEA. Byrne, a former state school board member and state senator who was appointed as chancellor of the state's two-year college system after the system was plagued by a number of corruption scandals, frequently opposed the AEA as part of his largely successful attempts to clean up the two-year system (Hillyer, 2010). Meanwhile, as a state senator, Bentley worked with the AEA to defeat attempts to pass legislation that would authorize charter schools in Alabama, legislation that the AEA vehemently opposed.

After losing the Republican runoff for governor, Byrne claimed that the AEA had a corrupting influence on state government, noting that the AEA's top two officials, Hubbert and

Associate Executive Secretary Joe Reed, held positions as vice chairmen of the state Democratic party (“Paul Hubbert leaving,” 2010). Two days after Byrne lost the Republican runoff, Hubbert announced that he was leaving his position as vice chairman of the Alabama Democratic Party, but gloated that the AEA turned out an estimated 50,000 votes for Robert Bentley, the winner of the Republican runoff for governor. Indeed, the AEA openly urged registered Democrats to vote in the Republican primary for Bentley (Hillyer, 2010). While Hubbert claimed he was stepping down because it would be in the best interests of the AEA for him not to be active in the Democratic party, State Republican Party Chairman Mike Hubbard said that the Democratic Party would continue to remain under the AEA’s influence as the AEA’s Associate Executive Secretary Joe Reed and other employees and members of the AEA served in various leadership positions within the party.

Understanding the power that the AEA has historically exercised in Alabama politics is critical to an understanding of the interplay between the AEA and any attempts to reform teacher tenure laws. One such example involves a teacher termination case from the Washington County school system, a small, rural school system located in south Alabama. In 2009, media outlets reported that a Washington County teacher, convicted in 2008 of enticing a child for sex, was continuing to be paid while in prison (Cloos, 2009). After she was charged, the Washington County Board of Education terminated her from her teaching job in 2007, citing as grounds for her termination the same charge in the indictment. The teacher appealed her termination while she was in prison. Under the 2004 TTA, a teacher who appealed his or her dismissal must be paid until the conclusion of arbitration. If an arbitrator upheld the termination, the teacher did not have to repay any money. Because any arbitration hearing would possibly involve self-incrimination based upon the criminal charge her termination was based upon, her arbitration

hearing could not be held until the criminal charges were resolved in court. Additionally, although the teacher's certificate was temporarily suspended following her conviction, the school system still could not revoke her pay in a separate administrative ruling (Cloos).

A great deal of outrage followed the media reports, much of it directed at the AEA.

Hubbert went on the defensive, claiming,

[The] case of where a convicted and jailed teacher is still on the school payroll today in Washington County is being exploited in the media as a reason for changing the Tenure Law. AEA believes that those who are attacking either haven't read the current law or they are deliberately trying to weaken the law by their constant attacks. The fact that a teacher in prison is continuing to be paid is the board's lack of legal advice or poor advice regarding the termination of the teacher. (Hubbert, 2009)

Hubbert correctly stated that the board should have issued a new termination notice for the teacher for "neglect of duty" as she certainly could not perform her duties as a teacher while incarcerated, therefore eliminating the need to wait until her criminal case concluded. However, Hubbert did not end with his criticism of the school system's decision and the advice of its legal counsel. Instead, he went on to contend that the "Washington County delay was part of a planned effort to radically change the Tenure Law." Likewise, the AEA's associate Executive Director Joe Reed, also attacked the Washington County termination case as an attack on teacher tenure, calling it "wasting taxpayer money to prove a worthless point" (Reed, 2009). He claimed that "fighting the AEA is the school board's only goal" in this case, all because "this school system can't do its job" (Reed).

As a result of the Washington County teacher case in 2010, Alabama enacted the Fincher Act calling for the immediate revocation of a teacher's certification upon conviction of a Class A felony sex offense (Leech, 2010). While the Fincher Act received support from the AEA, the Washington County case opened the door to additional debate about Alabama's tenure law. In one article, highlighting the application of the Fincher Act to a Baldwin county case involving a

basketball coach convicted of enticing a child for immoral purposes and several other counts of sexual abuse, Alabama's State Superintendent of Education, Joe Morton, noted that other parts of the tenure law should also change. He stated, "The whole arbitration hearing--OK, we tried it. There's no shame in admitting we made a mistake and it didn't work," pointing out that many hearings were held with out-of-state arbitrators who often work with teachers' unions and, therefore, were biased (Leech). Larry Craven, general counsel for the Alabama Department of Education, said that the 2004 TTA is "an unworkable system, and we end up getting crazy rulings" (Leech). Craven also said that teachers had no incentive to resign their teaching positions or to surrender their teaching certificates while their arbitration proceedings were underway as they would still be paid under the appeals process, stating that "it could take one to three years to settle it" (Leech).

These comments by the state Superintendent of Education and its general counsel highlight much of the tension concerning Alabama's tenure laws during the 2010 elections. Following the November 2010 elections, Hubbert and the AEA faced uncharted territory--a Republican controlled legislature. Additionally, the Alabama Republican Party fully intended to remind Hubbert and the AEA that their involvement in the primary and runoff elections for governor, along with other bitter battles over the year, would not be forgotten. Almost immediately, the legislature began a systematic attack on the AEA. In December 2010, the legislature passed a new law, Alabama Act No. 2010-761, that prohibits payroll deductions from public employees to political organizations, claiming that it costs taxpayer money to collect dues, such as AEA dues, that unions and other associations can use it for political purposes (Cavanagh, 2010). The AEA filed for an injunction in federal court to prohibit the law from taking effect on March 2011. The suit, naming three north Alabama school boards, the Governor, the State

Superintendent of Education and other elected and appointed officials as defendants, claimed that the law violates the First and Fourteenth Amendments to the U.S. Constitution and that the intent of the law was to discriminate against the AEA for its political activities (Stephens, 2011). The suit also stated that if AEA could not collect dues via payroll deductions, it would lose members, and therefore, revenue. Meanwhile, the law would allow automatic deductions for charities and credit unions (Stephens).

On March 18, 2011, two days before the payroll deduction law was to take effect, the federal judge in the AEA suit granted the AEA's request for a temporary injunction. In his ruling, the federal court judge stated that the AEA had “‘demonstrated a substantial likelihood on the success on their claim’” that the new law violated the organization's rights under the First and Fourteenth Amendments to the U.S. Constitution (*Ala. Educ. Ass'n v. Bentley*, CV-11-S-761-NE (D. Ala. March 18, 2011); Bonvillian, 2011). The order requires the defendants to continue to allow employees with payroll deductions for AEA membership dues. The final ruling in this case was anticipated greatly by political experts as this case represented more than a lawsuit on payroll deduction, although certainly a ruling against the AEA would have a tremendous negative impact in its yearly revenues from lost membership dues (Bonvillian). In February 2014, the U.S. Court of Appeals for the 11th Circuit overturned the preliminary injunction (Cason, 2014). This ruling represented a potentially historic shift in political power from the Democratic, heavily AEA-influenced party, to the Republicans and the Republican leadership publicly celebrated. Alabama Republican Party chief Bill Armistead, noting that the switch to bank drafts would hurt AEA's membership, stated, “The dues will now be right in front of them [employees], instead of automatically taken out before they received their paychecks. For an organization . . . with the goal of electing candidates who would be blindly



loyal to the AEA, this could mean rough waters ahead.” Armistead continued, stating, “Rank and file members of the AEA are hardworking teachers and support personnel who want what is best for the children. The teachers’ union has historically held little accountability to its members, instead relying on scare tactics to force their cooperation. The special interest group is far more interested in attempting to regain power than they are in protecting the students, teachers and school administrators of our state” (Gore, July 2014). Also acknowledging the shift in political climate, Hubbert, who stepped down as AEA chief in 2011, wrote a letter to members of the AEA board in September 2014, concerned about the steep decline in membership and revenue, along with the AEA’s unsuccessful challenges to Republican-led changes in teacher tenure law and other education-related legislation (Cason, September 2014).

Another example of the interplay between tenure and politics occurred in Florida. In March 2010, the Florida legislature passed Senate Bill 6, proposing to dismantle teacher tenure by replacing tenure for new teachers with one-year contracts and tying future pay raises for all teachers to student achievement (Hafenbrack, March 2010). In a dramatic move, after initially backing the bill during committee votes, Florida Governor Charlie Crist vetoed the controversial bill, angering Republican members of his party (Hafenbrack, April 2010). In fact, less than a month before the veto, on March 23, 2010, Governor Crist indicated that he would likely sign the bill into law, stating “That’s how it is for most of us--you do well, you keep your job. It seems to me that wouldn’t be a bad idea in the area of education, too” (Hafenbrack, March 2010). However, in the weeks before the veto, the governor received an outpouring of opposition by educators and parents, including over 65,000 phone calls and e-mails in opposition to the bill.

By vetoing the teacher tenure legislation after initially supporting the measure, Crist likely ended any future bids for political office as a Republican. Whether or not Crist truly had

education's best interests at heart in this move remains uncertain. In fact, some political strategists at the time viewed Crist's veto as a calculated political move, believing he would announce his candidacy for the United States Senate, running as an independent candidate. Specifically, at the time that Crist vetoed the teacher tenure legislation in Florida, polling data placed him at least 18 points behind his potential Republican rival, but the same polling data indicated that Crist would win a three-man race as an independent candidate. Indeed, Crist announced shortly after the veto that he would run for Senate as an independent, anticipating that his veto would strengthen his following among independent voters and even by moderate Democrats (Farrington, October 2010). However, Crist was not successful in his bid for the United States Senate.

### **Federal Initiatives and Teacher Tenure**

President Barack Obama announced on July 24, 2009, that states could compete for and win millions of dollars in federal grant funds through the Race to the Top (RTT) competition (The White House, 2009). The motivation behind this program was to drive nation-wide, systemic school reform. In nearly every year between 2001 and 2008, there were few significant education legislative and policy changes nationally. Following the announcement of RTT, however, there was a dramatic increase in the adoption of the educational reform policies promoted by the grant competition. By 2014, states awarded RTT grants adopted, on average, 88% of the policies, compared to 68% among states that applied and were not awarded grant funds, and 56% among states that never applied (Howell, 2015). The RTT competition emphasized five areas for educational reform. First, the grant encouraged states to adopt common academic standards, better known as the Common Core State Standards, and offer assessments designed to measure higher-order and critical thinking skills. Second, RTT focused

on attracting and keeping the best teachers in the classroom through to expanded professional development support for teachers, placing the most talented teachers in the schools where they were needed the most, and revising teacher evaluation, retention, and compensation policies to encourage and reward teacher effectiveness. Third, RTT promoted the use of longitudinal data to improve instruction. Fourth, RTT supported the use of innovation in transforming struggling schools. Finally, RTT endorsed sustaining education reform through encouraging collaboration between business and other stakeholders to support math and science education by promoting high-performing charter schools, and other innovative measures designed to raise student achievement and close the achievement gap.

Following the announcement of the RTT competition, many states began to undertake efforts to promote educational reforms in order to position themselves more competitively for the grant. Several states enacted legislation that would allow, expand, or strengthen public charter schools. Some states, including California and Michigan, also made changes in teacher evaluation, specifically by tying student performance data to evaluations. In March 2010, two states, Delaware and Tennessee, were awarded the first round of RTT grants, totaling \$600 million dollars (U.S. Department of Education, 2010).

Applications for the second round of RTT funds were due in June 2010. Several states engaged in a legislative flurry of activity to strengthen their competitive position in the application process. For example, in April 2010, Louisiana, largely because of the potential to receive up to \$175 million in RTT funds, proposed, and later passed, legislation that would require annual evaluations of teachers that included evidence of growth in student achievement as a key component of the evaluation (“Agenda for Change,” 2010). A review of Louisiana’s May 28, 2010, second round RTT application includes much emphasis on teacher evaluation and

retention, teacher training, assistance for low-performing schools, and charter schools. The recent changes to Louisiana's teacher evaluation system, including annual evaluations and a provision that student achievement will comprise 50% of the evaluation, referred to as a "value-added teacher evaluation model," were, in fact, critical components of Louisiana's RTT application (U.S. Department of Education, 2010). Louisiana's value-added model calculates a student's academic growth by using a student's socioeconomic background, academic history, attendance averages, discipline records, exceptionalities, and other factors to predict how much progress a student should make in one year. Results from standardized tests, such as the Louisiana Educational Assessment Program (LEAP), will be used by administrators and teachers to determine whether a student met the predicted academic growth. These student outcomes will count for 50% of a teacher's yearly evaluation. Teachers rated as ineffective will receive targeted professional development to assist their quality of instruction. Teachers who receive ineffective ratings three or more times during their teacher certification period will not be recertified unless an appeal is made by the school board (Louisiana Department of Education, 2010). Despite these radical changes to teacher evaluation, Louisiana was not selected as one of the ten states that received grants through the second round of the RTT competition, placing 13th.

In 2010, Colorado, like Louisiana, changed its teacher evaluation process to include a value-added measure for student performance (Slevin, June 2010). Teachers will be evaluated annually, with at least half of their evaluation based upon whether their students have progressed during the school year. New teachers will be required to show increased student achievement for three consecutive years to earn tenure. In comparison to Louisiana, where veteran teachers risk the non-renewal of their teaching certificate, tenured teachers in Colorado whose students do not show progress for two consecutive years would lose the protections provided by tenure. Even

then, dismissal can still be appealed to the state supreme court with the burden on the school district to prove why the teacher should be terminated. Colorado's sweeping changes to its teacher tenure laws were also a response to a pending application for RTT stimulus funds. However, Colorado, like Louisiana, was not a round two winner, placing 17th among applying states (U.S. Department of Education, 2010).

Like many states, Alabama applied for round two RTT funds. However, unlike states such as Colorado and Louisiana, Alabama did not make any significant changes to teacher tenure laws and its application ranked last out of all 36 states that applied (Phillips, 2010). Cited as a major reason why Alabama did not score well was that the judges believed that Alabama could not adopt the reform measures specified in its application, largely because of the AEA's opposition to many reform measures (Phillips). In an Open Letter to U.S. Secretary of Education Arne Duncan, Joe Morton, Alabama's State Superintendent of Education at that time, specified many flaws with RTT in its application of rules to Alabama's situation. First, Morton noted that all 12 states that won round two RTT funds have charter schools (Morton, 2010). Charter schools are vehemently opposed by the AEA. Additionally, Morton questioned why the U.S. Department of Education would establish criteria requiring states have the support of their local union affiliates when it was clear that the state and national organizations, AEA and NEA, would not provide support for RTT reform measures. In fact, AEA directed all 132 local association affiliates to withhold support for RTT (Morton). In fact, Morton wrote that "[i]f a state has to have the teacher's union support and cannot get it, then that state has no chance of funding" under RTT (Morton, p. 3).

With regard to the RTT program, only time will tell if the program had its purported impact to create systemic and effective educational reform, although it inarguably had a marked

impact on educational policy reform (Howell, 2015; Smarick, 2010). Initially, many states believed themselves to be strongly positioned to receive grants, even states such as New Jersey that have notable barriers to reform. Such complacency by states to even apply for the grant in such cases underscores whether or not such any reform initiatives proposed by that state would be fully implemented. Another concern is that states were competing not because they are committed to reform, but because the recession had depleted education budgets. For instance, New York's governor dropped his opposition to a charter-cap lift, pointing to the potential for \$400 to \$700 million to flow into the state's education budget if New York won a RTT grant. If money provides incentives for change, that is one thing. However, if a state is merely professing its support for bold reforms and only going through the motions to receive funds, that is problematic. Furthermore, where states pursued and implemented RTT program reforms, will those states be able to sustain their reform efforts now that RTT funding has ended? (Howell, 2015).

### **Teacher Evaluation and Tenure**

Appropriate evaluation of teachers is critical in teacher employment decisions. Unfortunately, Zirkel (2010) reports that schools and school systems are frequently unable to accurately assess teacher performance or act on data collected on a teacher's instructional performance in any significant manner. Not only do many school systems not distinguish between the poor performers and those teachers who doing an exemplary job, but in many cases there are not evaluation systems in place to provide those teachers in the middle with support for professional growth. As a result, most teachers are rated good or great, teacher excellence goes unnoticed, and poor performance is not addressed.

Teacher evaluation may be formative or summative in nature. Formative evaluations are designed to improve teaching, usually through informal classroom observations where information is gathered for the teacher to analyze and identify areas of improvement (Rossow & Stefkovich, 2005). In comparison, summative evaluations are used to determine whether a teacher is performing at an acceptable level and consist of formal processes for documentation during the evaluation process. Summative evaluations are often used to provide documentation about a teacher's competence in the classroom. As a result, teachers evaluated with summative instruments may have negative feelings about the evaluation and are less likely to view the collected data as an opportunity to improve teaching (Glickman, 2001).

There is some debate about whether the “value-added” teacher evaluation model adopted by some states as part of education reform efforts will be a useful predictor of teacher job performance for making tenure decisions. Value-added methods rely on tracking individual test score gains for individual students (Croft & Buddin, 2015). For example,

The value-added score of a fifth-grade math teacher is a function of how much his or her students improve their math test score between the end of fourth and fifth grades. Calculating a value-added score is more challenging in early grade, because experts differ on whether younger students can complete standardized assessments. It is also more challenging in high school because old students often completed more specialized classwork, such as Calculus or Trigonometry, which may be more difficult to assess with value-added methods. (p. 2)

Current empirically derived estimates of teacher effectiveness include significant assumptions about student learning and the extent that statisticians can adjust for learner differences and teachers in specific classes (Ballou, Sanders, & Wright, 2004; Todd & Wolpin, 2003). However, as research indicates that teacher quality is the most important factor in student achievement, placing accountability on individual teacher performance seems to be a logical step in teacher evaluation. Goldhaber and Hansen (2010) found that value-added model estimates of teacher

performance assume three things. First, that teacher quality over time is relatively stable. Second, that value-added model estimates of teacher performance are more reliable when based upon multiple years of observation as opposed to a single year. Finally, a teacher's early career performance is a reliable indicator of their performance in future years.

In Alabama, the conservative Alabama Policy Institute specifically calls for the use of a value-added model to evaluate teacher effectiveness as part of tenure reform (Yerby, 2016). For those opposed to using value-added measures of a teacher's job performance to determine whether a teacher earns or retains tenure or even a teaching position, there are only modest multi-year correlations in teacher effects that cannot be attributed to either true teacher performance or factors beyond a teacher's control. On the other hand, with evidence indicating that often school systems are not very discriminating in making tenure decisions, there is the potential that using value-added evaluations will lead to the de-selection of teachers early in their careers, leading to a potential increase in the quality of the teacher workforce. Early research indicates that using value-added models to estimate teacher effectiveness is superior to using observable teacher variables, such as degrees earned and years of experience, in making personnel decisions.

Another challenge with value-added methods incorporated into teacher evaluations involves teachers who teach outside tested subjects and grades, allowing those teachers to bypass a value-added method of evaluation while making the evaluation process more rigorous for teachers who teach tested subjects (Croft & Buddin, 2015). Because of this concern, some alternatives were proposed by Croft and Buddin. One option is to use a school-wide measure, although this may be unfair as teachers would be held accountable for student achievement in courses where they may have little impact. Another option would be to administer other



assessments than statewide math and ELA tests that are aligned to curriculum standards from other subjects and content areas.

Four common criticisms of value-added methods in teacher evaluation were identified and rebutted by Croft and Buddin (2015). The first criticism is that achievement tests are not completely accurate and should not be used. However, research indicates that achievement tests are highly correlated to effective teaching. Second, value-added measures cannot take into account all of the potential variables that may impact a student's achievement test scores. Again, research shows that the absence of these variables has little effect on traditional estimates of teacher effect on student achievement. A third criticism is that value-added measures may be unstable from year-to-year, largely because of measurement error in the tests as well as variations in class size. However, over multiple years and classes, research indicates that this concern is greatly reduced. A final criticism identified by Croft and Buddin is that value-added measures do not "provide a direct indication of why some teachers are more effective than others, or how individual teachers could improve. However, value-added measures are highly correlated with teaching practices" as found by at least three research studies (pp. 10-11).

As a result of research examining teacher evaluation practices in 12 school districts in Arkansas, Ohio, Colorado, and Illinois, Weisberg et al. (2009), formulated four recommendations for practice. First, teacher evaluations systems should differentiate teachers based upon their effectiveness, specifically whether they provide instruction that supports student achievement. Second, administrators and evaluators must be rigorously trained in such a teacher evaluation system and be accountable for making consistent assessments of teacher performance. Third, the teacher evaluation system must integrate stakes to evaluation outcomes with system policies for teacher assignment, professional development, compensation, retention, and

dismissal. Lastly, an examination of dismissal policies, including due process, should result in an expedited process.

One projected result of a rigorous teacher evaluation system that is implemented with fidelity, teachers rated as ineffective or non-exemplary, facing clear justification of their inability to meet standards, are likely to leave the profession voluntarily. For other teachers, remediation is necessary. Principals often have a negative perception of remediation, citing the time needed to document, collect data, write assistance plans, and assist the teacher; the impact on students; and the human element of being forced to provide constructive feedback that may not be well-received by the teacher (Rossow, 2005). Additionally, principals believe that remediation is rarely successful and only prolongs the process of removing an ineffective teacher (Kennedy, 2000). Teachers who need remediation may also display animosity, become defensive, and view offers of assistance as punitive in nature, behaviors that often prevent successful remediation. In fact, Mosley (2008), after studying 117 court cases involving remediation, found that the data indicates that remediation does not change the outcomes when it comes to dismissing an ineffective teacher. Similarly, Barnes (2008) concluded that when a teacher is deemed incompetent and remediation is involved, courts will uphold a school district's decision to either terminate or suspend the teacher.

For teachers that do not opt to leave voluntarily and for whom remediation proves unsuccessful, Weisberg et al. (2009) proposed that a short, expedited hearing before an arbitrator should provide sufficient due process to ensure that the evaluation process was properly followed and that employment judgments were made in good faith. Another suggestion by Sutton (2009) includes extending the probationary time for a teacher to earn tenure, for example five years instead of the typical three, and including a tenure review every five years. If the tenure review is

not satisfactory, then a teacher would be placed on probationary status and required to earn tenure as if they were a new teacher.

As of March 2016, 43 states require student achievement data be considered as part of a teacher evaluation. In 35 of those states, student achievement is required to be a significant consideration for a teacher's performance rating (Jacobs, 2016). Furthermore, 23 states have adopted requirements that tie tenure decisions to teacher performance. Whether teachers obtain tenure is not as important as how those decisions are made. The National Council of Teacher Quality recommends that states require evidence of effectiveness rather than years in a classroom prior to awarding tenure as well as extending the probationary time for a teacher to gain tenure.

Goldhaber and Walch (2016) concluded that ultimately "the potential for tenure policies to affect the teacher workforce and student achievement is based on the level of discretion that is exercised, the quality of the decisions that principals and administrators make regarding which teachers should be dismissed, and the perceptions of teachers and prospective teachers" (p. 14). Reforms will have little effect if administrators do not take action to dismiss ineffective teachers and if effective prospective teachers are deterred from the education profession because of diminished job protections.

### **No Child Left Behind and Teacher Tenure**

In 2002, the No Child Left Behind Act (NCLB) became law. Although NCLB was replaced by the Every Student Succeeds Act in 2015, provisions of NCLB narrowed the focus on student achievement and teacher quality and was a factor in legislative scrutiny of teacher tenure. The goals of NCLB were noble, seeking to ensure that all children have a "significant opportunity to obtain high-quality education" and that the achievement gap between advantaged and disadvantaged students would (20 U.S.C. §6301) narrow. The success, or failure, of meeting

the goals of NCLB were measured yearly on state assessments and whether states, school districts, and schools achieved adequate yearly progress (AYP) on benchmarks established by their performance on those assessments.

Schools that did not meet AYP are subject to three sanctions. First, schools that did not make AYP for two consecutive years were identified for school improvement. As part of a school's plan to come out of school improvement, the school had to offer parents the option to transfer their child to a school not in school improvement and provide for teacher mentoring (20 U.S.C. §6316(b)(1)). Next, if a school did not make AYP for four consecutive years, the school was required to undergo corrective action. This includes student transfers, implementation of a new curriculum, extensions to the school day or school year, restructuring of the school's internal organizational structure, reducing managerial authority at the school, and replacing "the school staff who [were] relevant to the failure to make adequate yearly progress" (20 U.S.C. §6313(b)(7)(C)(i) through (iv)(III)). Finally, if a school did not make AYP for five consecutive years, the school was required to restructure under NCLB. Actions required by the school district included converting the school into a charter school, takeover by the state educational agency, major restructuring of the school that provided for "fundamental reforms" designed to improvement student achievement, or "replacing all or most of the school staff (which may include the principal) who are relevant to the failure to make adequate yearly progress" (20 U.S.C. §6313(b)(8)(B)(i)-(v)).

Oluwole and Green (2009) analyzed the corrective action and restructuring provisions of NCLB for potential substantive and due process challenges related to these provisions. Specifically, the researchers focused on the correction action restructuring option of replacing teachers relevant to the failure to make AYP. If a district sought to replace a teacher as "relevant

to the failure to make AYP,” what factors should be considered? As the researchers stated, “relevance” is a broad term and it is likely that a district would have had a difficult time proving that a specific teacher directly contributed to a school’s failure to make AYP, particularly given the many variables beyond a teacher’s control that contribute to a student’s academic performance (Oluwole & Green, p. 496). As a result, teacher terminations based upon student test scores and evaluations could have resulted in an arbitrary application of NCLB’s provision to dismiss certain teachers.

While actual implications of NCLB’s sanctions for schools that fail to consistently make AYP never seemingly came to fruition, school districts had to carefully consider the application of NCLB’s broad language on the replacement of teachers relevant to the failure to make AYP before implementation because of the potential for due process claims. Oluwole and Green (2009) recommended avoiding the use of this provision and to use another option available under NCLB. Additionally, the researchers noted that because of the negative connotations involved with this provision, the best teachers may have been discouraged from accepting positions at schools that struggled to make AYP--a result that ran counter to the goals of NCLB.

Although NCLB was due for reauthorization in 2007, Congress did not act to do so. In 2011, President Obama announced that state educational agencies would have flexibility with NCLB in exchange for heightened college and career readiness expectations for students (U.S. Department of Education, 2013). Between 2011 and 2015, when NCLB was replaced with the Every Student Succeeds Act, over 43 states requested and were granted flexibility to improve student outcomes outside the previous requirements of NCLB (U.S. Department of Education, 2015). Nonetheless, the best student outcomes continued to be dependent upon teachers’ devotion to improved professional practice.

## CHAPTER 3

### METHODOLOGY AND PROCEDURES

This study was based upon document-based, historically-referenced qualitative research grounded in the review of arbitration hearing officer opinions related to contested adverse teacher employment decisions under the 2004 TTA. Hearing officer opinions pertaining to teacher termination, partial termination, suspension, and transfer cases from 2005-2011 were the primary source documents used to complete this research project, along with any adverse employment actions subsequently appealed to the Alabama appellate courts. During the period of time studied, there were 106 hearing officer opinions involving the 2004 TTA.

#### **Research Materials**

The source materials used in this study include written arbitration-adapted hearing officer decisions submitted by local boards of education to the Alabama Association of School Boards and case law concerning issues of teacher tenure in Alabama. Furthermore, scholarly literature related to teacher tenure was used to provide additional insight and analysis concerning teacher tenure.

The arbitration hearing decisions from Alabama teacher tenure cases have a significant role in this study. An arbitration decision consists of the written opinion of the hearing officer in disputed adverse employment actions involving Alabama teachers. In almost all cases, the written opinions closely resemble judicial opinions issued by a court. The written opinions include the facts before the hearing officer, the disputed issues, the disposition of the matter, including legal reasoning and analysis in support of the decision, and a decision by the hearing

officer. These written opinions, along with any subsequent appellate opinions, serve as the data analyzed in this study.

### **Methodology**

Unlike a quantitative research study typically designed to test a preconceived theory, qualitative research often is performed to discover theory (Gall, Gall, & Borg, 2003). Strauss and Corbin (1998) call this approach to qualitative research “grounded theory,” defined as follows:

Theory that was derived from data, systematically gathered and analyzed through the research process. In this method, data collection, analysis, and eventual theory stand in close relationship with one another. A researcher does not begin a project with a preconceived theory in mind (unless his or her purpose is to elaborate and extend existing theory). Rather, the researcher begins with an area of study and allows the theory to emerge from the data. Theory derived from data is more likely to resemble the “reality” than is theory derived by putting together a series of concepts based on experience or solely through speculation (how one thinks things ought to work). Grounded theories, because they are drawn from data, are likely to offer insight, enhance understanding, and provide meaningful guide to action. (p. 12)

Like many school administrators, the researcher, a former high school principal, had some familiarity with Alabama’s 2004 TTA, but little actual experience with its implementation outside of the local school setting. This allowed the researcher to enter this study with an open mind, yet aware of the potential for any biases that might still be present. The researcher’s own limited experiences and reflection upon them, along with the data generated by the case briefs, allowed the researcher to begin conceptualizing patterns and trends. During this process, described as theorizing by Strauss and Corbin, the researcher “formulated [concepts] into a logical, systematic, and explanatory scheme,” leading to the development of a theory (p. 21). As defined by Strauss and Corbin, a “theory denotes a set of well-developed categories (e.g., themes, concepts) that are systematically interrelated through statements of relationship to form a theoretical framework that explains some relevant social, psychological, educational, nursing, or other phenomenon” (p. 22).

## **Research Questions**

1. What were the issues raised during the arbitration hearing officer process?
2. What were the outcomes of adverse employment actions for teachers in arbitration hearings? (a) How many cases were appealed to hearing officers during the period of 2005 through 2011? (b) What types of cases were heard during that period? (c) How many cases were brought during each year during that period?
3. What trends developed as part of the arbitration process? (a) What types of cases were heard during the time period studied? (b) Were there certain grounds or combination of grounds that are more likely to result in a favorable or unfavorable award for the board? (c) What procedural errors were the most common in unfavorable decisions for the school board? (d) Did the arbitration hearing process provide the expedited process intended by the law? (e) To what extent did the arbitration hearing officers apply Alabama teacher tenure case law in arbitration decisions?
4. How were arbitration hearing decisions treated on appeal? (a) How many hearing officer decisions were subsequently appealed to the Alabama appellate courts? (b) What were the trends, if any, in appellate decisions? (c) What trends, if any, were observed in appellate decisions?
5. What are the applicable legal principles and procedures for school administrators and school districts to consider before taking adverse employment action against a teacher?



### **Search Specifics and Limitations**

All adverse teacher employment actions arbitrated from 2005 to 2011 were examined and included in a case briefing, coding, and analysis process. Included cases involved adverse teacher employment actions in K-12 public schools in Alabama. As a result, only adverse teacher employment actions that were timely contested prior to the repeal of §§16-24-1 through 16-24-22, *Code of Alabama* (1975) were reported and examined.

### **Research Data Collection**

To gather and analyze data related to the research questions, the following procedures were used:

1. Arbitration hearing officer opinions were obtained from the Alabama Association of School Boards (AASB). Located in Montgomery, Alabama, the AASB maintains records of these opinions.
2. Cases appealed to the Alabama Court of Civil Appeals and the Alabama Supreme Court were identified using Westlaw's computerized legal databases and verified with search in West's Alabama Digest.
3. Successful adverse employment actions were analyzed to produce guidelines for practice.

### **Data Analysis**

Photocopies of arbitration awards from 2005-2011 were obtained from the AASB. The arbitration opinions submitted by the hearing officers generally include legal reasoning or justification for the award similar to a judicial court opinion. Therefore, case briefs were used to summarize arbitration opinions along with the reported judicial decisions of the Alabama

appellate courts. Each of the arbitration decisions and court opinions was briefed following the form of analysis set forth by Statsky and Wernet (1995, p. 41, 138), including:

1. Citation: Information, such as the volume and page of the reporter, providing a location where the case can be found. For the arbitration opinions, this includes a number assigned by the Federal Mediation and Conciliation Service.
2. Key facts: Information about the case central to the holding(s) by the court, administrative agency or arbitrator.
3. Issue(s): the legal question(s) before the court, administrative agency, or arbitrator.
4. Holding(s): the court, administrative agency, or arbitrator's answer to the legal questions stated in the case.
5. Reasoning(s): the court, administrative agency, or arbitrator's reasons for the holding.
6. Disposition: The order of the court, administrative agency, or arbitrator.

These items served as broad categories for analysis of groupings and trends of the arbitration opinions.

As part of the case briefing process, the researcher had the opportunity to analyze each hearing officer opinion and determine what patterns and trends emerged. The case briefing process utilizes several constants, including the key facts, issues, holdings, reasoning, and disposition of each case, that were used to group cases according to the determined patterns and trends. Key facts, such as the background surrounding the dispute, assisted the researcher's understanding of why a particular matter was contested. The key legal issue, or the specific legal question to be answered, generally was whether there was sufficient evidence to support a school district's adverse employment action against the teacher. The holding consisted of the hearing officer's answer to the legal question at issue, accompanied by his or her reasoning behind the

decision and a final order. All of these components provided the researcher with data that can be used to seek patterns and trends in the data and formulate guidelines for practitioners.

## CHAPTER 4

### CASE BRIEFS AND ANALYSIS

This chapter presents 106 case briefs, representing cases reviewed by hearing officers under the Alabama Teacher Tenure Act from 2005-2011. The cases are for K-12 tenured classroom teachers as well as other certified employees covered under the provisions of the TTA. The case brief procedure used followed the form of analysis set forth by Statsky and Wernet (1995). The cases are presented in ascending chronological order based upon the date of the hearing officer's decision. The cases include a citation, the name of the hearing officer, the FMCS Case No. assigned, if any, and date of decision, followed by the facts, issues, holding, reasoning, and disposition. If the case was appealed to the Alabama appellate courts, the citation and treatment is provided, but the actual appellate decision is discussed in the analysis.

#### **Case Briefs**

##### **2005**

Citation: *Brooks v. Board of School Commissioners of Mobile County*, FMCS Case No. 05-01477 (April 20, 2005).

Hearing Officer: McReynolds, Michael B.

Key Facts: The Board recommended cancellation of Brooks's contract for neglect of duty, failure to perform duties in a satisfactory manner, and other good and just cause. While the decision was appealed, Brooks was placed on paid administrative leave. Just before the hearing commenced, the Board reinstated Brooks to the same principal position, effectively rescinding its termination decision. The Board argued that there was no reason for the Hearing Officer to hear

this matter as anything beyond a finding that Brooks had been reinstated to his position was beyond the authority of the hearing officer. Brooks claimed that the previous personnel actions taken by the Board were procedurally invalid and that there would be no reason for the Board not to re-institute proceedings in the future.

Issue: Whether the Hearing Officer has the authority to estop the Board from commencing new termination proceedings against Brooks on the basis of the same grounds previously asserted in its withdrawn termination proceeding?

Holding: The Hearing Officer held that restricting the Board from initiating future personnel actions would exceed its statutory authority under the TTA.

Reasoning: The Hearing Officer found that even if the Board abandoned the contract cancellation proceedings against Brooks by rescinding its decision, a hearing officer is still limited to considering a specific contested action. By rescinding its decision to cancel Brooks's contract, the Board remedied any procedural or substantive claim arising from the contested decision and rendered any further contest moot. Because Brooks received pay while on leave and was returned to his previous position, Brooks suffered no loss of wages or benefit. Furthermore, the Hearing Officer noted that Brooks would have been specifically precluded by the TTA to seek any damages he might have suffered by the Board's action.

Disposition: The Board's rescission of its decision to terminate Brooks's contract was a full and complete remedy.

Citation: *Dunn v. Board of School Commissioners of Mobile County*, FMCS Case No. 05-01608 (April 30, 2005).

Hearing Officer: Hoffman, Robert, B.

Key Facts: The Board terminated Dunn, a science teacher and basketball coach. Dunn was a basketball coach for 13 years. During pre-season varsity basketball practices, he allowed players to punish other players by hitting and kicking them while Dunn timed the punishment. Nine players received this punishment over a six-week period. Dunn testified:

I allowed it to take place, in hindsight now, knowing that I felt a little uncomfortable about it . . . and because it didn't take place on a constant basis, on a daily basis, every time it was over I was feeling a little bit better about it because we were getting closer to the season . . . and I think I was blinded by the fact that the kids were progressing so much that I allowed it to happen. . . . I was blinded by the progress . . . all of the good things they were doing. (p. 4)

A student who was going to be punished twice in one practice tried to quit. When Dunn stated that there was no quitting, he allowed the team to punish their teammate in his presence. The player was hit at least 15 times by his teammates and was bruised. When brought to the administration's attention, an investigation followed. In a meeting with the Assistant Director for Human Resources, Dunn apologized. The Human Resources director seemed satisfied with the apology and wished Dunn a good season. However, the media learned of the incident and shortly thereafter Dunn was placed on administrative leave. The Board upheld the recommendation of the Superintendent to terminate Dunn's employment as a teacher and head varsity basketball coach despite the testimony of many players, parents, and guardians praising Dunn and asking that the Board not allow this one incident to end his career.

Issue(s): Did the Board meet the burden of presenting reasonable and substantial evidence of Dunn's misconduct? And, if so, what action should be taken? Specifically, whether cancellation of Dunn's contract and his removal from the school district, effectively ending his teaching and coaching careers, is the just and proper action?

Holding: The TTA allows the Hearing Officer the discretion to consider the employment history of the teacher, including but not limited to, matters occurring in previous years.

Reasoning: Dunn argued that his entire employment record should be taken into account to either mitigate or cancel his termination. When considering the facts, the Hearing Officer focused on the 13 years of experience the teacher had coaching and teaching, particularly highlighting his work while employed at a Title I school. There was also no evidence that Dunn was not a good teacher. The Hearing Officer clearly believed that Dunn's conduct was very wrong, including allowing his players to buy into a "street justice" of punishment (p. 9). The Hearing Officer was also troubled by Dunn's efforts to "somehow downplay the seriousness of his misconduct, testifying that at worst it happened only once a week is a weak effort to somehow cover-up what instead was a six-week long parade of innocent players being trampled while he stood by and timed these cruel beatings" (p. 10). The Hearing Officer found that the Board reasonably and substantially proved that Dunn engaged in serious misconduct. Nonetheless, the Hearing Officer was swayed by Dunn's spotless employment record, the testimony of students and parents/guardians, as well as colleagues.

Disposition: The Hearing Officer terminated Dunn's coaching duties for four years, but reversed his termination of teaching contract and imposed a 30-day suspension without pay. In addition, Dunn was ordered to provide all players with a verbal apology and all parents/guardians with a written apology.

Appeal: Reversed and remanded by *School Com'rs of Mobile County v. Dunn*, 962 So. 2d 805 (Ala. Civ. App. 2006); reversed and remanded by *Ex parte Dunn*, 962 So. 2d 814 (Ala. 2007).

Citation: *Webster v. Board of School Commissioners of Mobile County*, FMCS Case No. 05-01882 (July 30, 2005).

Hearing Officer: Byars, Lloyd L.

Key Facts: The teacher gambled on a basketball game with a student during class (although the Hearing Officer found that there was a question as to whether the wager occurred during instructional time). The Board terminated Webster's employment for immorality and other good and just cause. Webster denied making the wager with the student.

Issue(s): Which action should be taken against Webster: cancellation of the employment contract, a suspension (with or without pay), a reprimand, other disciplinary action, or no action taken?

Holding: Although the evidence showed that Webster gambled with one of his students, the Hearing Officer held that termination was too harsh a disciplinary action for a long-term employee with no formal disciplinary record, considering the nature of the alleged misconduct and lack of progressive discipline.

Reasoning: The principal did not take action when the gambling allegation came to light, nor did the principal recommend termination until after the Central Office administration became aware of the incident and investigated. Furthermore, the principal testified that Webster was a "dependable, good employee." Additionally, Webster had no record of formal discipline. Although Webster's behavior was "serious breach of professional behavior for a high school teacher," constituting immorality and other good and just cause for taking action, "neither the principal's inaction nor the decision to take the harshest action against a long-term employee with no formal discipline in his record seems fair and reasonable under the circumstances" (p. 9).

Disposition: Webster's termination was reversed and he was reinstated without backpay. However, Webster was on paid administrative leave from August 20, 2004, until his reinstatement in July 30, 2005. The Board requested that the Hearing Officer suspend Webster without pay so as to penalize him. The Hearing Officer declined to do so, amending the original



award--“The period that the Grievant was on administrative leave from August 20, 2004 until his reinstatement shall serve as a disciplinary suspension with pay.”

Citation: *Haynes v. Board of School Commissioners of Mobile County*, FMCS Case No. 05-02904 (August 1, 2005).

Hearing Officer: Woodward, Joe D.

Key Facts: Haynes, who also served as the basketball coach, requested permission to buy 50 “wind suits” as a fundraiser for the basketball program. When the fundraiser ended, 29 of the wind suits were unaccounted for and five vests were also unaccounted for, totaling \$1293.00. The teacher contended that all of the items were accounted for, but that several items were in fact given away or sold by the principal. The teacher and his witnesses testified that the principal often went into the teacher’s office to get wind suits without accounting for them. The principal testified that the teacher had used a blank purchase order to buy unauthorized items instead of the athletic shoes he had given permission for the teacher to purchase. The principal also testified that the teacher was insubordinate by not following his directive to collect full payment before issuing the wind suits or shoes to students and others, resulting in \$1024.00 uncollected for these items. The principal requested an accounting of all funds and requested an audit by the school district’s resource officer. Following the school resource officer’s report, the teacher was suspended without pay. There was another audit that found 29 missing wind suits and a total of \$2317.00 in wind suits, shoes, and vests that were unaccounted for. The teacher presented evidence that all merchandise was accounted for and that the principal had collected some of the money in cash. Additionally, many of the purchasers had not been given receipts, including those who purchased the items from the principal. The bookkeeper testified that she received signed, blank purchase orders from the principal on multiple occasions and that those purchase orders

were used to purchase items for various departments on his instruction. The teacher testified that all items were accounted for, that he had not personally taken any items without payment, and that he had not wrongfully appropriated any items for his own use. He further testified that basketball game receipts, as collected by the principal, were understated and not accounted for and that the principal and his brother had taken over collection of all gate and concession receipts. In short, the Board alleged that Haynes misappropriated athletic apparel and did not follow proper policy and procedures for purchase orders. Haynes countered the Board's allegations with evidence that his principal actually sold some of the apparel himself - for cash - and did not properly receipt those funds.

Issue(s): Did the Board properly terminate the contract of the teacher and, if not, what should the remedy be?

Holding: The Board did not meet its burden of proof that it had just cause to cancel the Haynes's contract for any of the nine specific reasons listed in its in its notice of cancellation, except possibly that the teacher failure to follow purchase order procedures properly.

Reasoning: The Board contended that Haynes was terminated for violating the system's policies and procedures numerous times, including unsatisfactory performance in administering the basketball program, failing to properly account for athletic fees and fund raising revenues, failure to properly obtain purchase orders, failure to maintain accurate records, lack of adequate communication with school stakeholders, failure to follow a specific directive, and allowed the school to incur substantial costs for unauthorized purchases. The teacher contended that he was "maliciously and without cause" accused of wrongdoing. Although the school resource officer and audit report revealed several accounting errors, he had managed the basketball program in an "excellent fashion and with good results" for several years (p. 16). The Hearing Officer stated

that evidence showed other motivations were behind Haynes' termination, specifically those of the principal, whose testimony diminished his own credibility. Evidence showed the principal had access to the teacher's office and that he himself sold the wind suits personally - collecting funds and not writing receipts, although the principal denied doing so. The teacher's good reputation also weighed heavily in the Hearing Officer's decision.

Disposition: Termination reversed. Haynes reinstated was immediately and a letter of warning issued (the teacher was suspended with pay in July 2004 and the hearing was held in June 2005 with a decision on August 1, 2005).

Citation: *Bolding v. Montgomery County Board of Education*, FMCS Case No. 05-01211 (August 30, 2005).

Hearing Officer: Odom, Jr., James

Key Facts: Students reported that Bolding, a second grade teacher, inflicted corporal punishment upon classmates in the bathroom with a yardstick. In addition, students reported that Bolding hit a student on her hand with a ruler, used profanity in the classroom on a daily basis and called students derogatory names. On one occasion, the principal witnessed Bolding asleep at his desk. Students were sitting around talking and tried to wake Bolding up by shouting the principal's name, but Bolding did not wake up until the principal nudged him. In addition to failing to follow numerous other directives, Bolding repeatedly did not complete lesson plans in a timely manner. Furthermore, the Board's letter to Bolding said that Bolding admitted to using profanity in front of students, that he hit a student with a ruler, and used a student as a lookout. In addition, while on administrative leave pending the investigation of many of the allegations against him, Bolding contacted one of his students at home and told him not to discuss anything

that went on in class. At his hearing, Bolding alleged that the principal disliked him and set out to have him fired.

Issue(s): What action should be taken against Bolding?

Holding: The Hearing Officer held that the Board had just cause to terminate Bolding's contract, stating:

Bolding had been warned not to hit his students. No matter his relationship with his principal; no matter Bolding's considerable rapport with his students; no matter their respect and affection for him; his violations of the rule that prohibits a teacher from hitting students were examples of extremely bad judgment. Moreover, they put the Board at great financial risk. These violations serve as good and just cause for terminating his contract . . . and that Bolding's contract be terminated is the decision here. (p. 20)

Reasoning: The principal had a substantial file on Bolding, but the Hearing Officer found that the principal did not make up the incidents documented. Instead, while the principal might have been industrious in seeking out evidence against Bolding, Bolding provided such evidence by his continuous infractions of the rules. Moreover, the students' accounts of the incidents were too many and too similar to accept Bolding's explanations that they were accidents or did not happen.

Disposition: Termination upheld.

Citation: *Fuller v. Muscle Shoals City Board of Education*, FMCS Case No. 05-57147-3 (September 24, 2005).

Hearing Officer: Hardin, Patrick

Key Facts: While assigned to her previous school, Fuller, a special education teacher, took a maternity leave of absence during the spring semester of 2003-2004 school year. She requested and was granted an additional leave of absence for the entire 2004-2005 school year. When Fuller indicated she would return for the 2005-2006 school year, the Superintendent, in consultation with the special education coordinator, decided to leave the teacher who had filled

Fuller's vacancy in that position and transfer Fuller to another school when she returned from her leave of absence.

Issue(s): Was the evidence sufficient to support the transfer of Fuller? Was it made for political or personal reasons? Was the transfer arbitrarily unjust?

Holding: The Board was justified in its decision to transfer Fuller.

Reasoning: The measures taken by the Board to provide Special Education services were reasonable and the Superintendent was trying to best utilize the teacher resources at hand for the 2005-2006 school year. His actions were made in good faith and there was no evidence of any animosity in the decision. Additionally, there did not appear to be any retaliation for Fuller's leave of absence.

Disposition: Transfer upheld.

Citation: *Allen v. Florence City Board of Education*, FMCS Case No.--None (October 3, 2005).

Hearing Officer: Battle, Joseph

Key Facts: Because of increased enrollment of English as a Second Language students in the school system, the Board approved the Superintendent's recommendation to transfer Allen from English as a Second Language Facilitator System Wide/English Teacher at the alternative learning center to English as a Second Language Facilitator/English as a Second Language Teacher at Designated Schools.

Issue(s): Was the transfer of Allen without loss of status or in violation of her contract and whether the transfer was arbitrarily unjust.

Holding: The transfer was an exercise of the Board's reasonable administrative function.

Reasoning: The transfer was not arbitrary, capricious or unjust because the reasons for the transfer serve a reasonable administrative function, specifically better serving the needs of an increased ESL student population. Furthermore, the transfer did not result in a loss of status as Allen never had a job description or a salary schedule position as a Facilitator or Coordinator. She received no loss in pay. Finally, the learning center where Allen taught English had become a night school and she had no desire to teach at night.

Disposition: Transfer upheld.

Citation: *Menefee v. Montgomery County Board of Education*, FMCS Case No. 05-02699 (October 7, 2005).

Hearing Officer: Staudter, Donald

Key Facts: The board terminated Menefee, a special education teacher, for failure to perform duties in a satisfactory manner, insubordination, neglect of duty and other good and just cause. Specifically, the board found that Menefee failed to complete his Individualized Educational Plans (IEP) in a timely manner despite directives given to him by his principal. Additionally, during a conference to address this concern, Menefee walked out of the conference, using profanity. He also engaged in intimidating and threatening conduct towards his principal, resulting in school security being called, and sexually harassed a colleague.

Issue(s): Whether the board has just cause to terminate Menefee, and if not, what should be the remedy?

Holding: The board did not produce sufficient evidence to terminate Menefee.

Reasoning: The Hearing Officer stated that “Discharge has been referred to as the economic capital punishment and the final (sic)” (p. 9). The board did not provide any IEP’s completed by other teachers for comparison, there was no evidence of previous disciplinary

actions, and there was conflicting testimony. The Hearing Officer stated, “If there is any doubt/question with respect to an employee’s termination, that employee must be given another opportunity” (p. 30).

Disposition: Termination reduced to a written warning.

Citation: *English v. Board of School Commissioners of Mobile County*, FMCS Case No. 05-03711 (October 30, 2005).

Hearing Officer: Goldstein, Jay

Key Facts: The Board terminated English for failure to perform in a satisfactory manner and other good and just cause, specifically for wrongfully removing school supplies from another teacher’s classroom, without her permission. English had previously been disciplined by the Board for allegedly selling school supplies and food items, against Board policy, and pocketing proceeds from the school store.

Issue(s): Was the suspension and subsequent termination of English for just cause in accordance with the TTA? If not, what shall be the remedy?

Holding: The Board had just cause to discipline English. However, his termination did not meet the standard of just cause for termination.

Reasoning: Although the Board argued that English’s actions were intentionally taken, that there was no excuse for his behavior, and that he was previously disciplined for a similar situation involving lack of judgment, the Hearing Officer found that the Board engaged in a “rush to judgment” (p. 12). There was a 1998 allegation that was the subject of a motion in limine. The Hearing Officer refused to consider this incident because there was no formal action taken and English had not had the opportunity to refute the 1998 allegations, stating “the obvious rationale of the [TTA] is that the School Board shouldn’t be able to put documents in a personnel

file and not give the employee the opportunity to refute them” (p. 9). The Hearing Officer also found another previous instance of similar behavior that occurred in 2003 was of little relevance. The Hearing Officer reasoned that even though the teacher was suspended for two weeks, the Board policy regarding candy/notebook sales were overshadowed by evidence that the policy was sometimes enforced and often overlooked and ignored. The Hearing Officer noted that the Board did not charge English with theft and that English’s poor judgment in this instance was more likely the result of his poor social skills and a failure to understand “office politics.” Furthermore, the Hearing Officer noted that English had “an exceedingly lengthy term of employment” and said that this, along with the relative lack of seriousness of the violation (the property English allegedly stole was valued under \$10), influenced his decision. The Hearing Officer noted that had the Board charged English with theft, it could have enforced the TTA’s provision that a teacher charged with moral turpitude would be denied pay during an appeal of a Board’s adverse employment decision. In other words, the Hearing Officer questioned why the Board did not attempt to preclude his pay, if English’s behavior was so serious. The Hearing Officer also applied the seven tests for just cause from arbitration law, a test that required him to favorably consider English’s lengthy term of employment, the lack of seriousness of the misconduct, and the Board’s improper use of progressive discipline.

Disposition: English’s termination was reduced to three weeks without pay and a disciplinary letter that serves as a final warning that any future failure to follow the Board’s policies and procedures or exercising poor judgment would result in more severe discipline, including termination.

Citation: *Winston v. Board of School Commissioners of Mobile County*, FMCS 05-04250-3 (November 10, 2005).



Hearing Officer: Hardin, Patrick

Key Facts: Winston had a 12-month contract as the coordinator of a grant funded program. When the Board was notified that the grant funds could only be used to fund student contact positions, not coordinator positions, the Board partially terminated Winston's contract, reducing her from a 12-month employee to a 9-month employee and reassigning her to a classroom teaching position. Winston applied for other 12-month positions, but was not selected.

Issue: Did the Board have good and just cause to alter Winston's employment status from that of a 12-month employee to a 9-month employee?

Holding: The Board had good and just cause for its decision.

Reasoning: The Board did not want to use local funds to pay for the coordinator position. The Hearing Officer stated that "the decisions by which the Superintendent and the Board allocate scarce funds among more-or-less -worthy programs lie at the core of the control of the school system by democratically elected representatives of the people. Even when those decision[s] yield bad results, as may have happened in this case, the budgetary discretion of the Board is not lightly to be second-guessed in a quasi-administrative proceeding" (p. 4).

Disposition: Partial termination upheld.

Citation: *Wilson v. Madison County Board of Education*, FMCS Case No. 05-03316 (November 18, 2005).

Hearing Officer: Hamner, Lawrence

Key Facts: Wilson was a certified physical education teacher employed by the Board for 12 school years. She also served as the varsity cheerleading coach, receiving supplemental pay for that position. During the 2003-2004 school year, the cheerleaders participated in a fundraiser to cover expenses in competing in the national championships. Wilson did not immediately turn

the funds in to the school for deposit. Ten days after the fundraiser, Wilson discovered that \$5970.00 was missing. She did not immediately report the missing funds to the Central Office, but did tell her building principal a few days after she realized the money was missing. An investigation by the sheriff's department cleared Wilson of criminal wrongdoing. Because of her negligence and failure to follow board policy concerning collected money, she was directed to repay the money. Wilson did so and received specific directions from the Superintendent how to handle funds. During spring of 2005, the Superintendent notified Wilson that he intended to recommend the termination of her contract for several reasons, including allowing another person to coach the junior varsity squad after receiving directives from her administration not to do so, for operating a personal gymnastics business for profit out of the school gymnasium, for altering the payee on checks payable to the school and depositing the checks into her personal checking account, for not allowing the cheerleaders access to the lunchroom during lunch, for charging a nonrefundable fee to the cheerleaders, for inconsistently assigning demerits and fees to cheerleaders, for using cheerleader fees to pay expenses of outside individuals to attend the national competitions, for holding more fundraisers than allowed, and the 2003-2004 loss of funds.

Issue(s): Did the Board have just cause to terminate the employment contract of Wilson?

If not, what shall the remedy be?

Holding: The Board did not have just cause to terminate Wilson.

Reasoning: The Hearing Officer noted Wilson's "unblemished" record over the 12 years of her employment with the Board (p. 45). In addition, the Hearing Officer found that the administration had never had any problem with Wilson until one parent became a factor, specifically noting that this was not the first school where this particular parent had made

allegations of discrimination (the parent had filed multiple complaints with the U.S. Department of Education. Neither the parent nor her daughter were called to testify).

In addressing each charge individually, the Hearing Officer found that the administration knew about the other coach and even acquiesced to allowing her to assist Wilson. Although finding that the use of the gym for personal game violated the Code of Alabama prohibiting the private business use of public facilities by public employees, the Hearing Officer found that she did not hide such use of the gym and that others employed by the Board were doing so as well. As for the check alterations, Wilson, who had given a child private lessons but received two checks payable to the school, testified that the parent gave her permission to change the payee on one check and that the other check was returned to the parent to make the correction to Wilson as payee. The parent was not called to testify to refute Wilson's testimony. The Hearing Officer stated:

Should Wilson have accepted verbal permission to alter the payee on the first check...or accepted the [second] check knowing that someone other than the maker thereof did the altering? Probably not! Is it, however, sufficient to warrant disciplinary action to the extent sought herein by the [Board]? To answer in the affirmative would be a miscarriage of justice. (p. 19)

Likewise, the Hearing Officer noted that the testimony was that Wilson, after being given a directive to take her students to lunch every day, did so. The Hearing Officer reasoned that "At no point does it appear that cheerleaders were denied an opportunity to go to the lunchroom. That school records indicate that not too many cheerleaders purchased lunch proves nothing. Admittedly such records only indicate when full \$1.75 lunches are purchased. A la carte purchases are not shown" (p. 20). He further went on to state, "One can almost take judicial notice of the fact that cheerleaders tend to watch what they eat so as not to gain weight" (p. 20). The remainder of the charges were addressed similarly by the Hearing Officer.

The Hearing Officer then applied arbitration law's seven tests for just cause to determine whether just cause existed to terminate Wilson's contract and found that just cause was not satisfied. Specifically, the Hearing Officer found that other cheerleading coaches within the school system were allowed to use some of the same procedures forming the basis of the Board's action, but no disciplinary action had been taken against them.

Disposition: Termination reversed as to Wilson's position as a teacher. However, by law Wilson's cheerleading coaching position was not a continuing service position and Wilson would not be returned to that position without the approval of the Superintendent and Board.

Appeal: Reversed and remanded with instructions, *Madison County Bd. of Educ. v. Wilson*, 984 So. 2d 1153 (Ala. Civ. App. 2006); affirmed *Ex parte Wilson*, 984 So. 2d 1161 (Ala. 2007).

Citation: *Bradford v. Huntsville City Board of Education*, FMCS Case No. 05-04204 (November 21, 2005).

Hearing Officer: Lockwood, Robert

Key Facts: The Board terminated Bradford's contract for incompetency, insubordination, neglect of duty, failure to perform duties in a satisfactory manner or other good and just cause. A list of 17 facts was included in the notice. The teacher had classroom management issues and a specialist was assigned to help her improve. While at another school in the system, she placed two kindergarten students in the wrong dismissal hallway line, resulting in the two kindergarten students walking out the door and down a busy street. Her principal reduced her class size from 15 students to ten in an attempt to further assist her. At her second school, another specialist was assigned to Bradford to help with reading instruction. The principal testified that had "never seen as bad a teacher in her 28 years of education experience" (p. 5). Testimony showed that

recommendations that would help Bradford improve her instruction did not yield positive results. Bradford argued that the Board failed to follow the principle of progressive discipline and that her termination should be rescinded.

Issue(s): Was Bradford terminated for just cause? If not, what shall the remedy be?

Holding: Bradford was given the opportunity to improve and did not do so, despite the Board's numerous efforts to help her improve as a teacher. The Hearing Officer stated, "Given all of the opportunities provided to her without any of them showing positive results, I am in no position to take issue with the Board's termination decision in this matter. The education of youngsters in the Huntsville, Alabama community would in no way be enhanced with [Bradford's] reinstatement" (p. 20).

Reasoning: The Board made "Herculean efforts" to improve Bradford's performance, particularly with her classroom management deficiencies (p. 18). The Board made "countless efforts, running the gamut from consultations, classroom visits, specific written recommendations, weekend hours of counseling, visits to other schools, and even shopping with Grievant for classroom supplies" to improve her performance as a teacher (p. 19-20). In his reasoning, the Hearing Officer noted the following:

The termination of a teacher is no light matter, given the weighty responsibilities confronting such a professional and the requisite academic training necessary for embarking on such a career. Indeed, teaching is considered to be not just a noble career, but to many, a sacred trust. This is true not just for the high school teacher or college professor, but even more so, for the elementary and preschool teacher who helps form intellect, will and character of future citizens of the state, nation, and world before them. (p. 17)

Disposition: Termination upheld.

Citation: *Robinson v. Board of School Commissioners for Mobile County*, FMCS Case No. 05-04420 (November 25, 2005).

Hearing Officer: Moberly, Robert B.

Key Facts: After misstating her income on a free and reduced lunch program for her son for four years in a row and failing to adequately supervise students on a out of state field trip, the Board terminated Robinson's employment for immorality, insubordination, neglect of duty, failure to perform duties in a satisfactory manner, and other good and just cause. The teacher, after an audit income verification showed that her income exceeded the limits for her son to qualify for free and reduced lunch, even resubmitted another application that misstated her income. The teacher maintained that she just hurriedly filled out the forms and provided the incorrect income numbers out of "force of habit."

Issue(s): Was the Board justified in terminating Robinson and, if not, what should the remedy be?

Holding: The Board was justified in terminating Robinson for intentionally misstating her gross income. Because of this, the Hearing Officer found it unnecessary to make any findings regarding the alleged misconduct during the field trip.

Reasoning: The Hearing Officer found that the misstatements of income on the free and reduced lunch form were intentional, finding Robinson's testimony not credible, noting that if Robinson could fill out a form correctly with her child's social security number, then she was also able to look at her pay stub and correctly determine her gross monthly earnings. He found Robinson's argument that she should just have to repay the program instead of termination unpersuasive, even though Robinson had 19 years of service with excellent evaluations and no prior discipline. In explaining his reasoning, the Hearing Officer cited the following from an arbitration treatise:

Norman Brand, Ed., *Discipline and Discharge in Arbitration* 229-30 (BNA 1998): 'When an employee intentionally . . . submits a false claim . . ., employer-employee trust is

impaired. When the employee engages in these activities to gain some economic or personal benefit from the employer, these acts are considered serious offenses akin to theft. When an employee is found to be willfully dishonest in this context, Hearing Officers uphold stiff penalties, including discharge, although some will consider mitigating circumstances. In contrast, when discipline relates to innocent or inadvertent misrepresentations that are not intended to deceive and cause no loss to the employer, Hearing Officers tend to view discharge or other severe discipline unfavorably.’ (pp. 8-9)

Disposition: Termination upheld.

Citation: *Johnston v. Baldwin County Board of Education*, FMCS Case No. 05-04807

(December 13, 2005).

Hearing Officer: Mills, William H.

Key Facts: Johnston was terminated for violating test security by making unauthorized copies of the Stanford Achievement Test (SAT), a required state student assessment. A teacher observed Johnston with note cards in his hand that had example test questions and that she thought she saw SAT copies on his table and that he appeared to be reading the questions to the students. This teacher did not testify at the hearing, but did provide a written statement that was placed in evidence. The Hearing Officer explained that hearsay rule is not usually strictly applied in hearings such as this, but hearsay evidence may be admitted if it has an indicia of reliability. The Hearing Officer said that based upon the teacher’s written statement, he was unable to conclude that Johnston was using SAT material in talking to or instructing his students. However, the Board also presented evidence that copies of pages from the math, science, and language portions of the test booklet were located in Johnston’s briefcase. At his hearing, Johnston admitted that he copied pages from the SAT material, but that he did not know that this was a violation of test security. As a result of Johnston’s testing violations, the test results for 18 students were invalidated.

Issue: Did the Board have grounds to cancel the contract of Johnston?

Holding: The Board had cause for disciplinary action against Johnston, but that suspension, rather than termination, was the appropriate remedy.

Reasoning: In the conclusion section of his decision, the Hearing Officer noted that at the time of his ruling, no court decisions had been rendered concerning the TTA, specifically as to the specific role, function, and authority of a hearing officer in conducting a hearing and rendering a decision under the Act. He stated:

In their brief, Mr. Johnston's counsel argue that general principles of labor arbitration jurisprudence should be applied in this proceeding. [The TTA] does not explicitly address this subject. However, Section 16-24-20 of [the TTA] provides for appointment by the Federal Mediation and Conciliation Services Office of Arbitration Services from its roster of Hearing Officers as an optional method for selecting hearing officers. Such Hearing Officers are customarily engaged in labor arbitration; a fact the Legislature obviously knew when it enacted [the TTA]. Section 16-24-209(b) of [the TTA] refers to a preference for a hearing officer "who is experienced in employment law." From these provisions, it must be concluded that the Legislature contemplated, or at least recognized, that labor arbitration jurisprudence has some part in the resolution of disputes by hearing officers. (p. 13)

The Hearing Officer then went to compare the TTA with the previous tenure law, including how the proceedings and procedures had changed. The Hearing Officer concluded that the nature of the proceeding under the TTA was an adversarial proceeding with the hearing officer acting in a judicial or quasi-judicial role, including that the TTA "appears to create a circumstance comparable to an appeal from a district court or probate court to a circuit court for a trial de novo" with no deference given to what the employing board may have done (p. 17). The Hearing Officer, stating that the TTA appears to recognize labor arbitration jurisprudence, found that "unless an explicit contract provision provides otherwise, the employer has the burden of proof in establishing a factual basis for disciplinary action against an employee" (p. 22).

Although the Hearing Officer found that there was clear and convincing evidence that Johnston violated test security policy relating to standardized tests and was guilty of neglect of



duty and failure to perform duties in a satisfactory manner, as well as other good and just cause to terminate Johnston's contract, the Hearing Officer did not end his holding with this determination. The Hearing Officer stated that a determination of appropriate disciplinary action must be taken. Despite the fact that test scores for Johnston's class were invalidated in two subject areas of the SAT, the Hearing Officer did not find that this "gravely affected or frustrated" the purpose of standardized testing (p. 27). Furthermore, there was no previous disciplinary action taken against Johnston by the Board and the Hearing Officer cited this as a mitigating factor in his decision. As such, the Hearing Officer was not convinced that a deterrent effect on the same or similar conduct in the future could not be achieved by discipline less than the cancellation of Johnston's contract.

Disposition: Termination reduced to 18-month suspension without pay.

## **2006**

Citation: *Barnes v. Mobile County Board of School Commissioners*, FMCS Case No. 05-04501 (February 5, 2006).

Hearing Officer: Wesman, Elizabeth C.

Key Facts: In 1999, Barnes transported a group of students to a baseball game and consumed some beer. On the way home, she struck a curb and had a flat tire as a result. Barnes self-reported the incident to her principal who memorialized the conversation and noted that Barnes agreed to seek treatment and refrain from drinking alcohol or her professional career would be in jeopardy. In December 2004, Barnes's principal sent her a letter of concern about classroom management, including concerns that she had smelled what she believed was the odor of alcohol coming from her on several occasions and that a parent had sent her an anonymous letter concerning suspicions of alcohol use. The principal extended an offer to help Barnes,

including a referral to the Employee Assistance Program (EAP) for help. In February 2005, the principal sent Barnes another memorandum regarding Barnes's conduct at a January 2005 classroom management workshop. Specifically, the principal noted that several individuals informed her that Barnes appeared to be under the influence of alcohol at the workshop. In April 2005, Barnes arrived late to that day's standardized testing. The principal testified that she smelled alcohol in Barnes's breath and that she was having difficulty walking. The principal drove Barnes to be tested and her blood alcohol level was 0.178. Barnes was placed on administrative leave pending Board action. The Board terminated her employment. Upon receipt of that notice, Barnes offered to resign if the letter of termination was withdrawn and any reference to it was removed from her file. She also notified the Board that she was undergoing treatment. The Board declined to accept Barnes's conditions for resignation, but reassigned Barnes to a different school and grade for the 2005-2006 school year after she notified the Board she was contesting her termination.

Issue(s): Did the Board have just cause to discipline Barnes and, if not, what should the remedy be? If there was just cause, was the discipline appropriate and, if not, what should the appropriate discipline be?

Holding: While there was just cause to discipline Barnes, the discipline was excessive.

Reasoning: "There can be no question about the legitimacy of the Board's concern regarding its responsibility for the safety and well-being of the school children in its care. However, one cannot fail to note that, in light of an undisputed teacher shortage in the school district, the Board was not reluctant to" re-employ Barnes the next school year (p. 12-13). The Hearing Officer further quoted Board policy for employees who previously tested positive for drugs or alcohol, providing for random testing for "no less than 12 months and no more than 60

months following return to duty” (p. 12). The Hearing Officer also stated that “what is troubling, however, is that at no time, from June 1999 until April 2005, was [Barnes] required to undergo substance abuse testing, show proof of participation in residential or outpatient counseling, or demonstrate regular attendance at AA or NA meetings” (p. 10).

Disposition: Reduced Barnes’s termination to probationary status with random testing through the 2007-2008 school year. If Barnes remains drug and alcohol free, her termination would be expunged from her employment record. If she tests positive, her termination will take effect on the date of the positive test.

Citation: *Williams v. Marshall County Board of Education*, FMCS Case No. 05-06066 (February 23, 2006).

Hearing Officer: Kennedy, Bryan

Key Facts: Based upon declining enrollment in past years as well as projections that the enrollment would continue to decline, the Board abolished its Building Trades Program at its technical school. Williams, a 10-month employee, was offered a transfer to a 12-month position in the maintenance department. Williams did not agree to the transfer. He was notified by letter on September 2, 2005, that he would be terminated from his position as instructor from the school system.

Issue(s): Did the Board properly follow the correct procedure to cancel Williams’s contract?

Holding: The transfer/cancellation of Williams’s contract was not proper under the TTA.

Reasoning: Although the Board established legitimate reasons for abolishing the Building Trades Program, the Board did not provide Williams written notice that he would not be

employed for the next school year on or before the last day of school in accordance with the TTA.

Disposition: Termination reversed.

Citation: *Cooley v. Mobile County Board of School Commissioners*, FMCS Case No. 06-00077 (March 1, 2006).

Hearing Officer: Goldberg, Mitchell

Key Facts: Cooley received an on-the-job injury in September 2001 while breaking up a fight between two female students. One of the students kicked her in the knee. She was on a medical leave of absence through May 2002. In August 2002, the Board requested a medical certification justifying additional extended leave and that doing so would protect her employment. She was also informed that her continued absence might result in Board action. She supplied the medical certification and had surgery in October 2002. In June 2003, her physician indicated that she was disabled by her injury and would be unable to work for some time. She received notice of the recommendation to terminate her contract in August 2005. During this time, Cooley had difficulty obtaining lost pay for her on-the-job injury, including reimbursement for out-of-pocket expenses. She also had a pending Title VII claim against the Board, claiming her principal had engaged in acts of sexual harassment.

Issue(s): Whether Cooley neglected her duties or whether there was other good and just cause to cancel her teaching contract.

Holding: The Board was not justified in cancelling Cooley's contract.

Reasoning: Cooley communicated with the Board regarding her medical condition and her ability to return to work. The Board did not attempt to determine her condition when it moved to terminate her contract. She was also never advised that she was in violation of any

Board policy that required her to continually update the Board regarding her medical status. Finally, there was evidence, including the testimony of an assistant superintendent as well as the Board's own inaction, that the Board did not interpret the leave of absence policy to require contract cancellation after two years.

Disposition: Termination reversed. Cooley was given just over a year (March 1, 2006 until July 1, 2007) to return to work after her extended leave or the Board could terminate her.

Citation: *Evans v. Birmingham Board of Education*, FMCS Case No. 05-03511 (April 15, 2006).

Hearing Officer: Sandefer, Jim M.

Key Facts: Evans, a physical education teacher, tested positive for alcohol use in 2003. At that time, he was advised that if he tested positive for alcohol use in the future, he would be terminated. The Human Resources Officer also recommended that Evans contact the Employee Assistance Coordinator to seek professional assistance. In November 2004, he again tested positive for alcohol. He was placed on administrative leave for violating Board policy on alcohol use.

Issue(s): Was the termination of Evans justified?

Holding: The Board was justified in terminating Evans.

Reasoning: The Hearing Officer found that Evans was under the influence of alcohol at school on two occasions and that his state of intoxication must have been extremely high when he reported to work. Students were under his supervision both times. From April 2005 through January 2006, Evans was drug tested through the UAB Drug Free Program and had no positive results, but he was not tested for alcohol. Therefore, the Hearing Officer found that the program results did not prove that Evans was not drinking during that period, only that he did not test

positive for drugs. Finally, the Hearing Officer found that Evans had already been given his second chance. He was also heavily persuaded by evidence that indicated that Evans had to be highly intoxicated while at school, contradicting Evans's claims that he stopped drinking around 10:00 p.m. the night before both positive tests. His breath alcohol level was .079 at 1:50 p.m. the first instance and was .110 at 3:01 the second instance. In both cases, well over 16 hours had passed since the time Evans claimed he had his last drink.

Disposition: Termination upheld.

Citation: *Alvarez v. Mobile County Board of School Commissioners*, FMCS Case No. 06-01872 (June 24, 2006).

Hearing Officer: Kilroy, Robert

Key Facts: The board suspended Alvarez, an elementary teacher with 25 years of service, after a fifth grade student alleged that Alvarez grabbed him by the collar, screamed at him, dropped him to the floor, and isolated him from other students. This incident occurred while students were dismissing for the day. Other students were questioned and the only consistent recollection was that Alvarez grabbed the student by his collar as the student was either ducking or falling down. Alvarez contended that the student attempted to take his money clip away from him and, as the student turned away from him and stumbled, Alvarez grabbed the student by his shirt, reprimanded him for attempting to steal from him, and directed the student to sit away from other students. In addition, the student's parents made repeated demands that disciplinary action be taken against Alvarez. The school resource officer investigated this incident with the only consistency being that, at some point, Alvarez grabbed the student's shirt at the shoulder or collar.

Issue(s): Did the board have just cause to suspend Alvarez for 30 days?

Holding: There was not just cause to suspend Alvarez.

Reasoning: The Hearing Officer found Alvarez's version of the incident to be the most credible and that Alvarez's conduct was proper as a teacher to maintain order and discipline, as well as to correct inappropriate behavior.

Citation: *White v. Limestone County Board of Education*, FMCS Case No. – None (August 16, 2006).

Hearing Officer: Battle, John

Key Facts: The Board terminated White, a science teacher with over ten years' experience with the system for incompetence, immorality, neglect of duty, failure to perform duties in a satisfactory manner and/or other good and just cause. Specifically, White showed videos and computer images to his 8th grade students rather than providing instruction, that the videos were not age-appropriate for his students, that the videos and images contained sexual themes and profanity, and that he had pornographic images on his school computer.

Issue(s): Did the Board have sufficient evidence to terminate White's contract?

Holding: The evidence in support of the reasons to terminate White outweighed any reasons for suspension without back pay.

Reasoning: White violated Board policy regarding acceptable computer use by allowing his computer to access Internet sites that are offensive and for having pornographic images on his computer (White alleged that a student aide downloaded the images, which would also have been a violation of policy). This constituted insubordination and neglect of duty. However, the Hearing Officer did not find that White's conduct was immoral or that he was incompetent.

Disposition: Termination upheld.

Citation: *Crooks v. Sumter County Board of Education*, FMCS Case No. 06-00497  
(September 5, 2006).

Hearing Officer: Pecklers, Michael

Key Facts: The new superintendent of the school system notified Crooks in September that he intended to cancel her contract for neglect of duty, failure to perform her duties in a satisfactory manner, insubordination and other good cause. Specifically, the principal testified that Crooks failed to follow directives instructing her to create and submit lesson plans, that Crooks's classroom was not engaging to students, and that she had poor classroom management. The principal also testified that he offered Crooks several opportunities to improve her planning, instruction, and classroom management skills. In addition, Crooks's attendance was poor. She was observed four times during the spring using Alabama's Professional Education Personnel Evaluation Program (PEPE) and received several scores of 1 and 2 (out of a 4 point scale) in several categories. The principal offered Crooks a plan for improvement, but she refused to discuss the plan with him. However, Crooks offered evidence that her principal did not properly utilize PEPE because her first observation occurred in January, that her observations were not conducted in accordance to PEPE requirements, and that her principal never completed a Professional Development Plan as required. Furthermore, her last evaluation had occurred nine years prior.

Issue(s): Whether the evidence produced by the Board was sufficient to provide good and just cause.

Holding: The Board did not produce sufficient evidence to provide good and just cause to terminate Crooks.



Reasoning: This was not a case that warranted termination, particularly with no progressive discipline taken against the teacher. PEPE was designed to be a formative evaluation designed to improve a teacher's instructional practices by identifying weaknesses and providing professional development to improve in those areas. Although the Alabama State Department of Education allowed individual school systems the opportunity to use PEPE in a summative manner to be used for decisions such as termination, the Board did not adopt PEPE for this purpose. Even if it had, the principal did not comply with PEPE requirements. Evaluations conducted over nine years previously indicated that Crooks was performing her duties at or above an average level. At no point was Crooks informed that her employment was in jeopardy.

Disposition: Termination reduced to a seven day suspension without pay.

Citation: *McClanahan v. Birmingham City Board of Education*, FMCS Case No. – None (September 16, 2006).

Hearing Officer: Sandefer, Jim

Key Facts: The Board partially transferred McClanahan, a teacher who served two schools as a .5 teacher at each campus, to another .5 placement. McClanahan opposed the transfer because she had hoped to get a full-time position at the school she was being transferred from. A position did open, but she did not apply for it and another teacher with less experience filled the position.

Issue(s): Was the evidence insufficient for the Board to take the action, whether such action as taken for political or personal reasons, or whether such action was arbitrarily unjust?

Holding: The Board had the right to take the action it did and that the action was not taken for political or personal reasons and was not arbitrarily unjust.

Reasoning: Both teachers were tenured, but the other teacher was desired for the full-time position because of his arts program. McClanahan received proper notice of the Board's decision to transfer her and her transfer was without loss of status or violation of contract.

Disposition: Transfer upheld.

Citation: *Wright v. Lauderdale County Board of Education*, FMCS Case No. 06-01835 (October 3, 2006).

Hearing Officer: Bird, John

Key Facts: Wright used a 15-passenger van during a field trip and failed to properly supervise students while on the field trip. He was also accused of making sexual advances towards a female student.

Issue(s): Whether there was just cause for the Board to terminate Wright's contract.

Holding: The Board proved by a preponderance of the evidence Wright's neglect of duty and failure to perform duties satisfactorily, holding that addressing whether "other good and just cause" was proved was unnecessary.

Reasoning: While finding that the Board did not prove that Wright engaged in immoral acts, specifically the sexual advances he was accused of, the Hearing Officer stated that Wright abused his position as a club advisor through his many phone calls, voice mails, and text messages sent to the female student. In fact, Wright "reminded her each night to take her birth control pills. And he insisted there was nothing wrong in such communication" (p.23). The Hearing Officer also stated that taking the female student with him during the field trip, without the other students, not only left the students unsupervised, but created an air of impropriety. Using the 15-passenger van for the field trip, without disclosing to the Board that he intended to

do so, violated federal and state laws for transporting students and subjected the Board to liability.

Disposition: Termination upheld.

Citation: *Jackson v. Birmingham City Board of Education*, FMCS Case No. 06-03411 (October 18, 2006).

Hearing Officer: Hoffman, Robert

Key Facts: Jackson, a veteran teacher with over 16-years of experience, was employed as a Title 1 Resource teacher. During the 2004-2005 school year, she defied numerous directives from her principal, specifically by missing numerous required faculty meetings, not performing required assigned supervision, sleeping in front of the class, and leaving early on several occasions. The Board notified Jackson of her notice of proposed contract termination on August 15, 2005 and was placed on administrative leave.

Issue(s): Whether the Board had reasonable and substantial evidence to terminate Jackson's contract and whether Jackson timely raised the issue of notice of her termination.

Holding: The Hearing Officer held that the evidence was reasonable and substantial to terminate Jackson's contract. Furthermore, although Jackson raised the issue at hearing that her notice of termination should have been given to her prior to the end of the 2004-2005 school year, the Hearing Officer held that nothing prevents a Board from cancelling a contract during the school year and that she failed to raise the address the timing issue in a timely manner and, therefore, was estopped from doing so.

Reasoning: The Hearing Officer found that there "no question Jackson engaged in the conduct described in detail" by her principal (p. 15). Her conduct, including failure to attend mandatory faculty meetings and failure to monitor students continued despite numerous

conferences where she was given clear and direct orders from her principal as well as verbal and written warnings. She “loudly proclaimed that she would not follow any of his directives and openly refuse[ed] to do so, suggest[ing] a teacher who clearly was not deserving of continuing her employment” (p. 18) As to the timeliness of her contention that her termination was untimely because she was not notified at the end of the 2004-2005 school year, the Hearing Officer held that there is nothing that prohibits a Board from cancelling a teacher’s contract during a school year and that there was no evidence to suggest that she was not employed at the start of the 2005-2006 school year. Alternatively, the Hearing Officer held that she had numerous opportunities to raise this issue prior to the hearing. Estoppel, where one party would have been disadvantaged and unable to fully and fairly litigate an issue, also applied to this case.

Disposition: Termination upheld.

Citation: *Smith v. Talladega City Board of Education*, FMCS Case No. 06-04690 (October 23, 2006).

Key Facts: The Board partially transferred Smith, a school guidance counselor, from one elementary school to another. Smith served two schools and a colleague served two others. Prior to the partial transfer, Smith served a total of 482 students while her colleague served a total of 710. The switch in schools equalized the student load, giving Smith 582 students and her colleague 610 students. Smith, however, argued that the better way to reduce her colleague’s caseload would be to transfer one of the high school counselors to the elementary school.

Issue(s): Was the evidence sufficient to transfer Smith? Was the action taken for political or personal reasons? Was the action arbitrarily unjust?

Holding: The evidence was sufficient to partially transfer Smith, was not arbitrarily unjust, and was not taken for personal or political reasons.

Reasoning: Although Smith argued that a better proposal would have been to transfer one of the high school counselors to the elementary position, the Hearing Officer found that the Board articulated satisfactory reasons for its actions, even if there was another action that could also be considered and might be an even better decision. Some adjustment to the workload was necessary and it is not unreasonable to keep the elementary school counseling responsibilities with the two elementary counselors.

Disposition: Transfer upheld.

Citation: *Taylor v. Butler County Board of Education*, FMCS Case No. 06-03867  
(December 11, 2006).

Hearing Officer: Caldwell, William

Key Facts: Taylor was terminated for failure to abide by the Alabama Educator Code of Ethics, insubordination, failure to properly supervise students, harassment, failure to perform duties in a satisfactory manner and failure to maintain appropriate lesson plans and grades. Taylor claimed that she was terminated for political and personal reasons, specifically that the Board deliberately set out to find a reason to terminate her, that she was not properly evaluated, and that she was denied representation during a disciplinary conference with the Superintendent two weeks before she was terminated. Taylor alleged that she and other African-American teachers at the school were treated differently than their white colleagues and that her termination was racially motivated.

Issue(s): Was Taylor terminated for just cause, and if not, what is the appropriate remedy?

Holding: Although Taylor had failed to perform her duties in a satisfactory manner for some time, she was never given notice of her deficiencies and her evaluations indicated that she

was performing her duties in a satisfactory manner. Therefore, “basic fairness and due process” precluded affirming Taylor’s termination.

Reasoning: The Hearing Officer did not find sufficient evidence that the termination action was racially motivated or for political or personal reasons. However, despite evidence of letters and conferences with Taylor with directives to grading, lesson planning, instruction, classroom management, and professionalism, she was never informed that she would be subject to termination if her inadequate performance continued.

Disposition: Termination reduced to a thirty day suspension without pay.

Citation: *Taylor v. Butler County Board of Education*, FMCS Case No. 06-04719 (December 18, 2006).

Hearing Officer: Sergeant, Stanley

Key Facts: Taylor was suspended for four days without pay based upon allegations of insubordination and violations of the Alabama Educator Code of Ethics. During the 2005-2006 school year, Taylor had a series of disciplinary problems, including failure to follow standardized testing procedures, failure to provide appropriate instruction, unprofessional conduct, and tardiness. The four-day suspension was given pending Taylor’s termination (See FMCS 06-03867) for insubordination towards the Superintendent and for verbally abusing her students as witnessed by one of the Central Office’s Instructional Specialists.

Issue(s): Was the suspension of Taylor for just cause?

Holding: The decision of the Board to suspend Taylor for four days without pay was justified.

Reasoning: Taylor refused to comply with numerous directives from her Superintendent, “which, by any commonly accepted definition, constitutes insubordination” (p. 16). In addition,

yelling at students and verbally abusing them, as witnessed by the instructional specialist, was evidence of her violation of the Alabama Educator Code of Ethics. Finally, Taylor’s disciplinary record was not unblemished and that she continued a “pattern of misbehavior” that continued for many years.

Disposition: Four-day suspension upheld.

Citation: *Young v. Clay County Board of Education*, FMCS Case No. 06-04782  
(December 30, 2006).

Hearing Officer: Reynolds, James

Key Facts: Young, a tenured teacher, was promoted to assistant principal in November 2003. She served as an assistant principal from that time until May 2006. She was notified at that time that her contract would not be renewed and she was being transferred to a teaching position. The reason given for the transfer was to eliminate locally-funded positions such as the one she held. The Board argued that Young had not served three consecutive years as an assistant principal to earn tenure in that position at the time of the transfer.

Issue(s): Whether or not the transfer of Young from her position of assistant principal to teacher was in compliance with applicable Alabama law?

Holding: Whether or not Young had reached tenure as an assistant principal, the Board would have taken the same action. The notice was timely and proper, there was no evidence that the transfer was for political or personal reasons, and the decision was not arbitrarily unjust. For sound fiscal reasons, the Board needed to eliminate locally funded elementary assistant principal positions.

Disposition: Transfer upheld.

Citation: *Pettway v. Bullock County Board of Education*, FMCS Case No. – None (2006).

Hearing Officer: Gordon, William

Key Facts: Pettway was a guidance counselor for the Board. She changed the grades of a student, without the permission of his teachers, to make him eligible for basketball.

Issue(s): Was the Board's decision to terminate Pettway supported by the evidence?

Holding: The Board's decision was supported by the evidence.

Reasoning: The Hearing Officer stated, "Even though the hearing officer finds that Pettway changed a student's grades without the permission of his teachers, the hearing officer can find that a punishment other than termination is warranted. Based upon the record before the hearing officer, I find that the Board's decision to terminate Pettway's employment is supported by the evidence and proper; and there is no reason for the hearing officer to substitute his judgment for that of the Board" (p. 1).

Disposition: Termination upheld.

Citation: *Outland v. Greene County Board of Education*, FMCS Case No. – None (2006).

Hearing Officer: No name provided

Key Facts: Outland contested her transfer of employment.

Issue(s): No opinion.

Holding: Transfer upheld.

Reasoning: The evidence was sufficient for the Board to transfer Outland and the action was not taken for political or personal reasons and was just.



**2007**

Citation: *Hodge v. Crenshaw County Board of Education*, FMCS Case No. 06-03412 (January 16, 2007).

Hearing Officer: Harris, Joe

Key Facts: The Board terminated Hodge based upon insubordination, failure to perform duties in a satisfactory manner, and other good and just cause. A parent contacted the school principal and alleged that Hodge grabbed her child by his cheeks, shook him and accidentally spit in his eye. Hodge vehemently denied that this incident took place, but that even if it did, it did not warrant the “economic equivalent of the death penalty” (p. 7). Hodge was the only witness to the incident who testified at the hearing; however, the Board interviewed four students concerning the incident and found their reports to be more credible than Hodge’s denial. Moreover, the Board argued that this incident was not isolated and that there were other incidents where Hodge “inappropriately and aggressively put her hands on children despite explicit instructions by her supervisor and principal, as well as the Superintendent of Schools, to ‘not touch the children’” (p. 7).

Issue(s): Did the Board establish by a preponderance of the evidence grounds to terminate Hodge’s contract?

Holding: The Board failed to establish by a preponderance of the evidence that Hodge “grabbed [a student] by his cheeks, shook him, and accidentally spit in his eye” (p. 25)

Reasoning: The Hearing Officer quoted the following from Hodge’s brief: “The Board did not call the student who claimed to be victimized, did not take his written statement, did not audio record his statement, did not call any witnesses to the event and did not have any witnesses write out a statement. In short, the Board offered nothing through actual witnesses to the event

that was in the witnesses' actual words'" (p. 10). Because the Board has the burden of proof by the preponderance of the evidence, this type of hearsay evidence is prejudicial to Hodge.

Although the rules of evidence do not apply to such hearings, there is an increased concern that the proceedings could be unfair to the teacher under some circumstances, noting that "not only does the Board's hearsay evidence lack in weight, it creates real problems concerning fundamental notions of fairness and due process as announced by the Alabama courts" (p. 15).

The Hearing Officer went on to state that while he believed that there were some instances where Hodge was too aggressive with a student, that he was convinced that some students - and their parents - were out to "get" Hodge, resulting in any confrontation between Hodge and a student being greatly exaggerated. In short, the Hearing Officer reasoned that there was a "concerted effort among some of the students and parents" to end Hodge's career and that the administration and the Board simply "began to grow weary" of dealing with the increased number of complaints (p. 18). Prior to her termination, Hodge had over thirty-four years of service, free of any disciplinary action for thirty-three of those years. The Hearing Officer also held that previous disciplinary measures (a reprimand and a five-day suspension with pay) were not part of the issue in this case.

Disposition: Termination reversed. Ordered that Hodge be reinstated to her former position, with full seniority and benefits. Also, the Board was to reimburse Hodge for lost wages, if any, as a result of its violation of the TTA.

Citation: *Gum v. Walker County Board of Education*, FMCS Case No. 06-60094 (May 15, 2007).

Key Facts: Gum, a librarian, had significant attendance issues. The policy at her school specified that it was the employee's responsibility to put in sick leave in writing ahead of time or

call on the day he or she will be absent. Gum missed 16 days in November 2005, then missed work every day for the remainder of the school year. She did not request a leave of absence and that there was not a substitute certified librarian who filled her absences. Gum also testified that although she previously served as an administrator, she was unaware of any formal policy to report leave or request a leave of absence. Gum claimed that she was out to care for her sick mother as well as deal with her own medical problems and request a leave of absence in August 2006 for the 2005-2006 school year.

Issue(s): Was Gum terminated for just cause, and if not, what shall be the remedy?

Holding: The Board had sufficient cause to terminate Gum for neglect of duty.

Reasoning: Gum did not fulfill her professional obligations because she did not follow Board policy in requesting personal leave or in certifying her sick leave. She only applied for a leave of absence well after the end of the 2005-2006 school year after she did not receive a contract for the 2006-2007 school year. Furthermore, she did not discuss her absences with her school administration. In short, she made no effort to inform the Board of her plans to fulfill her obligations as an elementary school librarian.

Disposition: Termination upheld.

Citation: *Smith v. Washington County Board of Education*, FMCS Case No. 06-04359 (June 1, 2007).

Hearing Officer: Clarke, Jack

Key Facts: The Board terminated Smith's contract at the end of the 2005-2006 school year, after Smith did not timely post grades for the third nine weeks. She was two weeks past the deadline when her grades were posted, despite being given written notice that her grades were not posted and being given an absolute deadline, which she did not meet. Smith had also posted

grades late on at least three other occasions. On one occasion, she had been on sick leave. In the fall of 2005, she met with her principal concerning not posting grades in a timeline manner and sending progress reports home to parents. After that meeting, she misplaced her glasses and could not read print without them. It took 13 days to receive a new pair, but she began to catch up on grading at that time. At the end of the fall semester in 2005, Smith did not submit one class's grades in a timely manner to be included on student report cards.

Issue(s): Whether the Board satisfied its burden of proof and if so, what is the appropriate penalty.

Holding: Although the Board met its burden of proof to prove insubordination and for failure to perform duties in a satisfactory manner, the facts did not justify cancellation of Smith's contract.

Reasoning: On one of the occasions Smith was late posting grades, she was taking legally entitled sick leave. On another, her late submission of grades was done out of her desire to help students rather than motivated by disrespect or disobedience. However, although Smith was under a doctor's care, the Hearing Officer found that her failure to submit grades in a timely manner did constitute insubordination and failure to perform her duties in a satisfactory manner. Smith had a 20-year history of being an excellent teacher with a reputation for going the extra mile to teach her students, which factored into the Hearing Officer's decision to mitigate the discipline imposed by the Board.

Disposition: Termination reduced to written warning.

Citation: *Montgomery v. Huntsville City Board of Education*, FMCS Case No. 07-02927 (September 8, 2007).

Hearing Officer: Sandefer, Jim

Key Facts: Montgomery was accused of throwing a chair and hitting a student with a chair while she was covering another class for an absent teacher. Prior to that, she had sent a number of students to the office for disruptive behavior. Police were contacted by some of the parents/grandparents of the students, although there was no physical evidence of any injuries and the police declined to press charges. Montgomery claimed that she overturned a chair to get the students' attention. She was placed on administrative leave, then suspended for five days without pay.

Issue(s): Was the evidence sufficient for the Board to have suspended Montgomery?

Holding: The evidence was sufficient for the action taken by the Board.

Reasoning: Montgomery had already been told verbally and in writing to notify the office when students were disruptive. The classroom was in disarray when the principal entered. Montgomery's actions were disruptive enough that a teacher in an adjacent room stepped into Montgomery's classroom. She did not follow previous directives on how to handle a disruptive situation.

Disposition: Suspension upheld.

Citation: *Miller v. Cherokee County Board of Education*, FMCS Case No. 07-03792 (October 1, 2007).

Hearing Officer: Kennedy, Bryan

Key Facts: The Board transferred Miller from an Alabama Reading Initiative Specialist to a Reading Coach.

Issue(s): Was the transfer of Miller in accordance with the TTA? If not, what is the remedy?

Holding: The transfer would result in a loss of status for Miller.

Reasoning: Although the Board argued that the transfer was necessary to reduce the number of positions funded from local funds, Miller argued that this was not a transfer because she served as a system-wide reading coordinator specialist, a supervisory position, and that the reading coach was an instructor position. The Superintendent testified that Miller supervised the reading coaches within the system. Therefore, the Hearing Officer held that moving Miller to the position of reading coach would result in a loss of status.

Disposition: Transfer reversed, but the decision does not restrict the Board from abolishing the position and placing her in another position for which she is qualified.

Citation: *Henderson v. Birmingham City Board of Education*, FMCS Case No. – None (October 18, 2007).

Hearing Officer: Simon, Kenneth

Key Facts: The Board contended that Henderson, a tenured teacher, did not perform his duties in a satisfactory manner during the 2004-2005 and 2005-2006 school years. Henderson exhibited a pattern of turning in lesson plans late, if at all, during the 2004-2005 school year and did not submit any lesson plans during the first semester of 2005-2006. A teacher assigned to assist Henderson with his lesson planning observed that he kept his grade books in Wal-Mart bags with a number of other disorganized papers. In addition, Henderson struggled with classroom management. At one point, an administrator was in his classroom for an entire period without Henderson realizing she was there. During that observation, no instructional content was offered to the class and students were all over the classroom, including 20 students who were not supposed to be there. Again, assistance was provided to help Henderson. He would improve for a short time, then once support was withdrawn, he would regress. Numerous attempts were made to document Henderson's deficiencies and provide support to no avail throughout both school

years. Henderson was referred to the EAP at the end of 2005 as his administrators had noted “a deterioration in his personal appearance, inappropriate behavior, poor judgment, failure to follow through on assignments, and confusion. Henderson refused to sign the referral because he said he didn’t need the help” (p. 7). He was referred to EAP again in September 2005 for the same concerns, but Henderson indicated he had been to EAP on his own. In October 2005, Henderson had a confrontation with a student and went into a state of severe mental distress, raising concerns about whether he was a danger to himself or others. He rambled excessively “about his manic depression, hospitalization at UAB, military experience in Desert Storm, suicide missions, Secret Service agents trying to get him, and people in white vans looking for him” (p. 10). He was placed on administrative leave with pay and in March 2006, the superintendent recommended Henderson’s termination.

Issue(s): Was there sufficient evidence to terminate Henderson’s contract?

Holding: Henderson’s “classroom shortcomings constitute incompetency, neglect of duty, the failure to perform duties in a satisfactory manner, and other good and just cause” (p. 15).

Reasoning: Henderson’s failure to submit lesson plans after being directed to do so constituted incompetency, neglect of duty, the failure to perform duties in a satisfactory manner, and other good and just cause. The evidence was also overwhelming that Henderson could not manage his classroom or provide effective instruction. However, the Board did not have the right to require Henderson to consult with EAP counselors and the Board did not meet its burden of proof on that issue.

Disposition: Termination upheld.

Citation: *Burkette v. Montgomery County Board of Education*, FMCS Case No. 070710-3450-3 (October 26, 2007).

Hearing Officer: Popular, John

Key Facts: Burkette entered another teacher's classroom and had a heated discussion with her. The teacher reported that Burkette told her to "stay the hell out of my face" and then outside the hallway, he said to her "tell it all bitch" (p. 3). No student reported hearing any profanity in the classroom, but another teacher heard the comment, "Tell it all bitch." The teacher reported this to the principal a few days later. Following her report, the principal directed the two assistant principals to locate Burkette and direct him to the principals' office. As the two men walked Burkette to the office, Burkette remained on his cell phone. They reported that Burkette said that he had to "talk to this crazy asshole man in the office" and that one of them better "turn his ass around" while talking on the phone as the assistant principals escorted him to the office (p. 4).

Issue(s): Was there just cause to suspend Burkette for five days?

Holding: The Board did not prove that Burkette used profanity in another teacher's classroom. However, the Board did prove that he used profanity towards a teacher in the hallway and that he was insubordinate to the administrators who escorted him to the principals' office.

Reasoning: The Hearing Officer found cause for disciplinary action, but found that "due process" was tainted because the investigation performed by a Central Office was incomplete and did not allow the Board to all information needed for its decision, resulting in a modification of the Board's disciplinary action.

Disposition: Five-day suspension reduced to three days.

Citation: *Thomas v. Birmingham City Board of Education*, FMCS Case No. – None (November 21, 2007).

Hearing Officer: Sandefer, Jim



Key Facts: Thomas testified positive for cocaine after his students were left unattended in his classroom. Board policy strictly prohibits the use of controlled substances that may result in impaired work performance or harm to the Board's image. Thomas also did not follow a directive requiring him to report to a work drug screening.

Issue(s): Was the termination of Thomas justified based upon the facts?

Holding: The evidence supported Thomas's termination.

Reasoning: Thomas was clearly under the influence of cocaine while at school. He was notified of his suspension with pay and given information concerning the Board's employee assistance program. He never submitted to a drug test to return to work, despite numerous directives to do so.

Disposition: Termination upheld.

Citation: *Todd v. Birmingham City Board of Education*, FMCS Case No. 07-00798 (November 26, 2007).

Hearing Officer: Williams, Roger

Key Facts: Todd was employed by the Board for more than 30 years, serving as a teacher, school administrator, director of schools, and director of human resources. Todd voluntarily transferred into his position as a supervisory attendance hearing officer in 2003, but there was a disagreement concerning Todd's position as described at the time of transfer and his actual job duties. Over a three year period and following a Level III grievance from Todd, the parties attempted to develop a mutually agreeable job description, but did not do so. In May 2006, Todd was placed on administrative leave following a recommendation from his supervisor that he be fired for insubordination because he refused her requests to attend daily meetings, write class III hearing reports that supported his decisions, conduct hearings within 10 days of suspensions,

attend training sessions, and assist in the office. The Board terminated Todd's employment in November 2006.

Issue(s): Was there just cause for Todd's termination?

Holding: The evidence only supported one of the six charges in the Superintendent's recommendation for termination and Todd's misconduct was not sufficiently serious to constitute just cause for his termination, particularly since there was no progressive discipline. Therefore, termination would be inappropriately severe.

Reasoning: The Hearing Officer found that the evidence only showed that Todd was guilty of failing to conduct Class III hearings in March 2006 and that he consistently refused to attend staff meetings.

Disposition: Termination reduced to a 30 day suspension without pay.

Citation: *Muhammad v. Selma City Board of Education*, FMCS Case No. 070705-58186-3 (December 14, 2007).

Hearing Officer: Brundige, Eugene

Key Facts: The Board terminated Muhammed for insubordination, neglect of duty, and other good and just cause.

Issue(s): Was Muhammad's termination for just cause and was just cause established by substantial evidence? If not, what, if any penalty should be imposed?

Holding: Muhammad's misconduct was not serious enough to warrant termination, but was serious enough for significant discipline.

Reasoning: The Hearing Officer found that Muhammad was insubordinate, but not to the level of direct insubordination that would support termination. Likewise, he found evidence of neglect of duty, but also not to the level that would support termination. Muhammad also did not

cooperate with his supervisors to address significant issues with student performance, specifically that he attempted to fail half of his class. However, the Hearing Officer stated that “the concept of ‘just cause’ encompasses the concept of progressive discipline” (p. 19). Additionally, the Hearing Officer considered Muhammad’s positive performance evaluations as a mitigating factor.

Disposition: Termination reduced to a 60 day suspension.

## **2008**

Citation: *Webb v. Montgomery County Board of Education*, FMCS Case No. 07-02131 (January 15, 2008).

Key Facts: The Board terminated Webb for using profanity towards students, including one incident where Taylor was alleged to have directed profanity at a student and then assaulting the student by intentionally tossing liquid on the student from a cup Webb was drinking from. In addition, the Board cited eleven other incidents where Webb was given written warnings, letters of concern, written reprimands, a five-day suspension and a 10-day suspension.

Issue(s): Was there sufficient evidence to cancel Webb’s contract?

Holding: Only two charges were proven: that Webb was disrespectful to his supervisor and that he acted inappropriately out of frustration by throwing water towards the student.

Reasoning: Whether or not Webb cursed the student was not conclusively proven, and not punishable, although losing his temper and throwing water in the direction of the student is actionable. In addition, the Hearing Officer allowed a *de novo* review of each of the eleven previous disciplinary actions and determined that only one charge, disrespecting his principal, merited discipline (although Webb had already received a written reprimand for his conduct).

Disposition: Termination reduced to a 20-day suspension without pay (The Hearing Officer ordered two, ten-day suspensions for two charges, including the charge of disrespecting his principal for which Webb had already received a written letter of reprimand).

Appeal: Appeal and cross-appeal reversed and remanded, *Montgomery County Bd. of Educ. v. Webb*, 53 So. 3d 96 (Ala. Civ. App. 2008); reversed and remanded, *Ex parte Webb*, 53 So. 2d 212 (Ala. 2009).

Citation: *Eddie v. Choctaw County Board of Education*, ALJ-Direct Appeal, OAH-08-336

Hearing Officer: ALJ-Direct Appeal (None indicated)

Key Facts: Eddie was a Family Life teacher for the Board. During the 2005-2006 school year, the Alabama State Department of Education found her program to be deficient and uncertifiable, recommending the closure of the program. The Board terminated Eddie and she appealed. The Hearing Officer ordered that the Board use local funds to employ Eddie for the 2007-2008 school year. The ALSDE also verified during that time that the program would not be reinstated. The Board could not continue to fund the position and, in keeping with the Hearing Officer's order, cancelled Eddie's contract at the end of the 2007-2008 school year. Eddie filed a "Motion for Enforcement" in April 2008, which the Hearing Officer denied as his order and award had been complied with by the Board. Eddie sought to have the Board enter into the request for another Hearing Officer to hear her appeal from her termination and the Board declined to do so as her appeal from her termination had already been completed and all administrative remedies exhausted.

Issue(s): Was this a termination covered by the TTA?

Holding: No.

Reasoning: Eddie was not able to gain Business/Industry Certification for her program during the 2007-2008 school year, allowing for the cancellation of her contract at the end of such school year.

Disposition: Direct appeal dismissed.

Citation: *Staten v. Huntsville City Board of Education*, FMCS Case No. 07-02515 (Board Decision March 15, 2007 – no Hearing Officer decision date).

Hearing Officer: Modjeska, Abigail

Key Facts: Following allegations of sexual abuse made by four students in 2004, Staten was allowed to continue teaching pending the outcome of criminal proceedings. A mistrial on those proceedings was declared in September 2006. In December 2006, Staten was arrested for having sex with a prostitute at a public car wash and was convicted of public lewdness. Staten was terminated in March 2007.

Issue(s): Did the Board have just cause to terminate Staten's employment?

Holding: The Board had ample cause for terminating Staten's employment.

Reasoning: Staten argued that because the Board did not terminate him when the students first made their allegations, but allowed him to teach with certain restrictions for over two years, his conviction for public lewdness did not have a relationship to his ability to teach students. However, the Board argued that his recent conviction showed poor judgment and that those who work with children must be of strong moral character. Staten also did not deny any of the allegations at the hearing and the testimony by the students and the report of the arresting officer on the public lewdness charge were credible.

Disposition: Termination upheld.

Citation: *Shivers v. Alabama Department of Youth Services*, FMCS Case No. 07-03934-3 (February 14, 2008).

Hearing Officer: Dunn, Sr., John

Key Facts: Shivers, a teacher at a DYS facility, was terminated by the Board based upon neglect of duty and failure to perform duties in a satisfactory manner. Specifically, Shivers transferred contraband in the form of a cell phone to a student after accepting the package from the child's parent shipped to his home address and then passing the phone to the student. He was also charged with failing to properly supervise students, resulting in the assault of one student and with failing to truthfully participate in an official administrative investigation into these incidents.

Issue(s): Did the Board have just cause to terminate Shivers's contract?

Holding: The Hearing Officer found that the evidence only supported that Shivers delivered contraband to a student. This one charge, along with his thirty years of employment, made his termination too severe.

Reasoning: In finding that Shivers was "not untruthful" in the administrative investigation into whether he provided a student with contraband, and despite testimony from the parent that she talked to Shivers and sent him the package containing the contraband to his home address, the Hearing Officer stated:

The testimony of the Grievant started with his denial that he transferred any contraband to a student. He denied knowing or speaking to the [parent] at any time. In later testimony he said that if he did talk with [the parent] he did not remember it. For the reasons set forth above, the testimony of the Grievant is less persuasive than that of the witnesses for the Employer. To say that the Grievant was untruthful in the investigation of contraband is to look into his mind at the time of his response to the investigative inquiries. Although the Grievant may have personally believe (sic) everything he said, it is more believable that he was mistaken in his recollections of the events in his testimony and in his reports. Suffice it to say that he was mistaken in what he said and did. The evidence does not

support a charge that his recollection and report of his acts were not in accordance with his subjective belief of truthfulness regardless of the other contradictory testimony. The evidence does not indicate that he was intentionally untruthful. It is more probable that he believed what he said although his belief was not sufficiently persuasive when faced with other external evidence and the lapse of time. (pp. 4-5)

The Hearing Officer continued, stating:

Discharge from employment is economic death in the work force. It stigmatizes an individual with a brand of one who was found unworthy or being able to continue to work in the employment of his choice. Discharge is the final step in disciplinary action and should be resorted to only when all else fails. To say that discharge is too severe a penalty to impose upon the Grievant is not to minimize the gravity of his action. He violated a major principle of the juvenile punishment and rehabilitation program of the State of Alabama. Just as most infractions to the wrongful actions of the inmates would be met with punishment and a second chance, the Grievant is entitled to another opportunity to redeem himself in view of all the evidence presented. (p. 12)

Disposition: Termination reduced to thirty days' unpaid suspension.

Citation: *Holt v. Montgomery County Board of Education*, FMCS Case No. 08-00458

February 15, 2008).

Hearing Officer: Sweeney, Donald

Key Facts: The Board transferred Holt from Adult Education to a fourth grade teacher position. The reason for the transfer was that the school system determined it would no longer use teacher units in support of the Adult Education program, had not received grant funding and had relinquished its responsibilities for the program to the local community college.

Issue(s): Did the Board violate the TTA when it transferred Holt?

Holding: The Board's action was supported by sufficient evidence, was not for political or personal reasons, and was not arbitrarily unjust.

Reasoning: The Board notified Holt in May that there was a possibility that she would be transferred, but that it wanted to wait until funding for her position was finalized. Once the

program was no longer funded, Holt's position no longer existed and the Board had no alternative but to transfer her.

Disposition: Transfer upheld.

Citation: *Calhoun v. Montgomery County Board of Education*, FMCS Case No. 07-0822-04359-3 (April 14, 2008).

Hearing Officer: Sandefer, Jim

Key Facts: The Board sought to transfer Calhoun, a kindergarten teacher with 38 years of teaching experience, to a sixth grade teaching position. In 2006, Calhoun had major surgery in May and did not return to teaching until October. Her substitute had not performed a number of essential duties, including progress monitoring. When Calhoun returned to work, progress monitoring was run on her class. By the end of the 2006-2007 school year, 88% of her students benchmarked on grade level. However, starting in January of 2007, Calhoun was sent numerous and continuous letters with additional directives, requests for information, and allegations of poor instructional performance from her school principal.

Issue(s): Was the evidence insufficient for the Board to transfer Calhoun and additionally, was the action taken for political or personal reasons or arbitrarily unjust?

Holding: The evidence did not support the transfer of Calhoun.

Reasoning: The decision to transfer Calhoun was a culmination of events that began when Calhoun asked the instructional coach why her students tested lower when they were tested by her and that the instructional coach viewed that as Calhoun making this "a personal issue against" her (p. 13). After that, there was an immediate, negative change in Calhoun's work environment.

Disposition: Transfer reversed.



Citation: *Turks v. Lowndes County Board of Education*, FMCS Case No. 07-03851 (April 29, 2008).

Hearing Officer: Clarke, Jack

Key Facts: The Board terminated Turks for giving students answers to Alabama High School Graduation Exam math questions, for altering testing procedures, for having an answer key, and for failure to report a test security violation.

Issue(s): Did the Board have satisfactory evidence that Turks neglected his duties or failed to perform his duties in a satisfactory manner or have other good and just cause to cancel his contract? If so, what was the appropriate disciplinary action?

Holding: The Board did not satisfy its burden of proving Turks was involved in the cheating allegations, but that Turks did fail to report a test security violation when the test administrator left the testing room on two occasions.

Reasoning: Although the Board presented evidence that several students initially reported that Turks verbally provided test answers when the test administrator left the testing room, three students recanted and none of the other students who made the report were called to testify. The Board was also unable to produce the actual students' answer documents so that the Hearing Officer could compare the student responses to determine whether there was a similar pattern to responses, erasures, slash marks, etc. Therefore, the Hearing Officer found that the evidence was insufficient to prove the allegations that Turk provided the students with answers to the test. Furthermore, although the Board did prove that Turks failed to report a test security violation, other employees were aware that the test administrator left the classroom and did not report the violation. The Hearing Officer was unwilling to allow the Board to discipline Turks while opting not to discipline others.

Disposition: Termination reversed. The Board must return Turks to his last teaching position or to another teaching position that is mutually agreeable to the parties.

Citation: *Nelson v. Montgomery County Board of Education*, FMCS Case No. 07-03874; *Davis v. Montgomery County Board of Education*, FMCS Case No. 07-03874; and *Powell v. Montgomery County Board of Education*, FMCS Case No. 07-03874 (June 2, 2008).

Hearing Officer: Sandefer, Jim

Key Facts: These three cases were consolidated because the issues involving the School Improvement Specialists were identical. Following a budget-driven reorganization of the system, their positions as Curriculum Specialists were eliminated. All three employees contested the change. After acknowledging that the notice given to the three did not allow for sufficient due process, the three were placed School Improvement Specialist positions working with Title 1 schools in need of improvement. This was done specifically to amicably resolve the insufficient notice that their Curriculum Specialist positions were eliminated. After one year, all three employees were given proper notice of partial cancellation of their contracts, taking them from a 209-day contract to a 187-day contract and requiring them to transfer to different positions.

Issue(s): Was the evidence sufficient to partially cancel the contracts and transfer Davis, Powell, and Nelson?

Holding: The Board's decision to transfer and partially cancel the three employee's contracts was not politically or personally motivated and the decision by the Board was supported by substantial evidence.

Reasoning: The Board's decision that the Title 1 office was overstaffed and that Title 1 funds could be more effectively spent in other areas was a reasonable administrative function.

Disposition: Transfer and partial cancellation upheld.

Citation: *Browder v. Montgomery County Board of Education*, FMCS Case No. 08-0084-3 and 08-0084-4 (June 8, 2008).

Hearing Officer: Goldberg, Mitchell

Key Facts: Browder contested two Board actions, her transfer and partial cancellation of her contract. Browder was a secondary testing coordinator and the Board sought to transfer her from that position to a teaching position, which would result in a reduction in pay because of a shortened contract period. The Board sought the transfer because of Browder's poor performance in her position as testing coordinator. Browder argued that she was denied due process because she had not been formally notified of any performance issues.

Issue(s): Was there sufficient evidence to support the transfer and partial cancellation of Browder's contract?

Holding: The Board's decision to transfer and partially cancel Browder's contract was reasonable and not made for political or personal reasons and not arbitrarily unjust.

Reasoning: The Board's failure to follow progressive discipline procedures and lack of formal evaluation was excusable in this case. The evidence supported the need for the Board's action based upon Browder's inability to take directives from her supervisor. The Hearing Officer found Browder to be intelligent and able to perform the duties of her job, but that she had no right to be insubordinate. As a result, the relationship between Browder and her supervisor had created a climate of mistrust and impacted the efficiency of the department.

Disposition: Transfer and partial cancellation upheld.

Citation: *Paris v. Talladega City Board of Education*, FMCS Case No. 08-01678-3 (June 15, 2008).

Hearing Officer: Gold, Charlotte

Key Facts: The Board terminated Paris, an elementary school principal, for incompetence, insubordination, neglect of duty, immorality, failure to perform duties in a satisfactory manner and/or other good and just cause. Specifically, the Board alleged that Paris converted school property for her own use without Board approval, that she was dishonest to her superintendent and the state auditor, that she violated the Alabama Code of Ethics, that she was improperly reimbursed for travel expenses based upon false/fraudulent travel forms, and that she failed to account for and properly deposit funds.

Issue(s): Whether, based upon the evidence, the Board had cause to cancel Paris's employment? If not, is a lesser action warranted? If not, what shall the remedy be?

Holding: There was insufficient evidence to support Paris's termination.

Reasoning: While there was evidence to support the Board's decision, there was no previous discipline and previous events could only be considered as background information.

Disposition: Termination reversed. The Hearing Officer stated, "A lesser action, a suspension with pay consisting of time withheld from service is warranted" (p. 21).

Citation: *Barry v. Oxford City Board of Education*, FMCS Case No. 08-01816 (June 16, 2008).

Hearing Officer: Odom, Jr., James

Key Facts: Barry was arrested for possession of marijuana and pled guilty to misdemeanor possession. Barry argued that the Board did not give sufficient credit and weight to his employment record in terminating him. Furthermore, Barry argued that there is no nexus between the reason stated by the Board for its action (immorality) and Barry's ability to perform his work as a teacher.

Issue(s): Based upon the evidence, did Barry's arrest, guilty plea, and sentencing for criminal misdemeanor possession of marijuana justify the Board's action? If not, what action, if any, is appropriate?

Holding: Barry's "contract of employment [was] due to be cancelled, that the facts demonstrate[d] a lack of moral certitude that is not only expected of, but demanded of an individual in the unique position that a teacher holds" (p. 8)

Reasoning: Once Barry's conviction became known, it would have been unacceptable to the parents of the 9 to 12 year old students in his class for him to continue as a their teacher. His administrators testified that his conviction would destroy the parents' confidence in him as a person to entrust their children. The Hearing Officer stated, "There is an easily recognized nexus between a teacher's morality and his or her competence as a teacher" and it is a reasonable inference that his conviction makes Barry morally unfit to teach young children (p. 8)

Disposition: Termination upheld.

Citation: *Kemp v. Bullock County Board of Education*, FMCS Case No. 08-01089 (June 22, 2008).

Hearing Officer: Yancy, Dorothy

Key Facts: The Board terminated Kemp, a veteran special education teacher with over twenty-eight years of experience, for forging a parent's signature on an IEP and then lying to his supervisors when confronted with the evidence of his forgery. Additional reasons for his termination included missing mandatory meetings, writing IEPs that contained significant spelling and grammatical errors, writing identical IEPs for different students, failing to timely reevaluate three special education students, and for allowing a student worker to access confidential special education records.

Issue(s): Whether or not the charges brought against Kemp by the Board merit discharge or a lesser penalty?

Holding: The Board proved, by clear and convincing evidence, that Kemp's contract should be cancelled for insubordination, incompetence, neglect of duty and just cause.

Reasoning: The Hearing Officer used a modified version of the seven tests of "just cause" (p. 11). Specifically, the Hearing Officer affirmatively answered the following questions: 1) Did the employee have notice of misconduct and what actions could lead to discipline? 2) Was the rule reasonable? 3) Did the employer make an effort to discover whether the employee did in fact violate the rule? Was the investigation fair? 4) Did the Board obtain substantial proof that the employee was guilty as charged? 5) Were the rules applied evenhandedly? and 6) Was the Board's discipline reasonably related to the seriousness of the offense?

Disposition: Termination upheld.

Citation: *Cagle v. Tuscaloosa County Board of Education*, FMCS Case No. – None (June 26, 2008).

Hearing Officer: Williams, Roger

Key Facts: Cagle was suspended for five days without pay after being disrespectful to her principal. Cagle's daughter had reported to her mother that the principal yelled at her earlier in the day. After school that day, Cagle confronted her principal as a parent and, in doing so, Cagle yelled at her principal. Other teachers who witnessed the verbal altercation described it as "highly inappropriate and disrespectful" and that they were afraid for their principal (p. 7). Cagle argued that she had signed out for the day and should not be disciplined for conduct that occurred while she was acting in her role as a parent. Cagle also argued that the Board did not comply with the TTA's notice requirements as she was provided written notice of the Board's

decision to suspend her within the two days of her conference. The Board argued that Cagle had actual notice of the decision as she was present when the Board announced its decision and that she was not denied due process or otherwise prejudiced by the few days' delay.

Issue(s): Was the notice given to Cagle improper so as to not comply with the TTA? Was there sufficient evidence to support her five day suspension without pay?

Holding: The late written notice was error without injury and did not bar the Board from suspending Cagle. There was just cause to suspend Cagle for her misconduct.

Reasoning: Cagle was not prejudiced or disadvantaged by receiving late written notice of what she and her attorney already knew. Although Cagle was acting as a parent, she was still required to treat her supervisor with respect. In addition, her colleagues witnessed the behavior, making her misconduct worse.

Disposition: Suspension upheld.

Citation: *Priget v. Birmingham City Board of Education*, FMCS Case No. 08-01705 (July 8, 2008).

Hearing Officer: Grossman, Mark

Key Facts: After a verbal altercation with a female colleague, Priget grabbed her around the waist tightly, causing a ruler that was in one of his hands to dig into her skin. Even when she asked him to let her go, he refused and squeezed her harder. She suffered a non-displaced rib fracture and missed nine days of work. Priget claimed that he was just playing around with his colleague and that he had no intention of harming her.

Issue(s): Should the termination of Priget be sustained? If not, what is the remedy?

Holding: The Board had just cause to terminate Priget.

Reasoning: The Hearing Officer concluded that Priget grabbed his colleague in an “aggressive and hurtful way. There was no doubt that the squeezing was done in a hurtful manner and was not done playfully” (p. 10). This constituted a physical attack on a co-worker and there is no excuse for this behavior.

Disposition: Termination upheld.

Citation: *Alvis v. Trussville City Board of Education*, FMCS Case No. 08-03293-3 (August 20, 2008).

Hearing Officer: Keyl, Mark

Key Facts: The Board transferred Alvis, a business education teacher, from the high school to the middle school. The reasons stated for the transfer was the emphasis by the Alabama State Department of Education on developing student technology proficiency at an earlier age and the system required Alvis’s expertise at the middle school level. Alvis was chosen for the transfer because she only taught the basic technology class at the high school while the other two teachers taught more advanced courses.

Issue(s): Was there insufficient evidence for the transfer of Alvis? Was the transfer taken for political or personal reasons, or whether such action was arbitrarily unjust.

Holding: The evidence was sufficient to warrant Alvis’s transfer.

Reasoning: The evidence supported the Board’s decision that Alvis was best suited to meet the needs of the school system as a technology teacher at the middle school level. There was no claim or evidence to suggest that the decision was made with any purpose other than the best interest of the students.

Disposition: Transfer upheld.



Citation: *Baker v. Eufaula City Board of Education*, FMCS Case No. 08-039446

(October 7, 2008).

Hearing Officer: Moffett, Kenneth

Key Facts: The Board transferred Baker from a special education teacher at one elementary school to a self-contained special education teaching position at another elementary school. This was necessary because the system reconfigured its schools and the retirement of a self-contained teacher made it necessary. Baker argued that the reduction in force policy should apply and that a teacher with less seniority should be transferred to the position, not her.

Issue(s): Was Baker's transfer proper?

Holding: The re-configuration of the elementary schools and the addition of an autism component did not constitute a change of program direction that would trigger implementation of the Board's reduction in force policy.

Reasoning: The program was one of teaching special education and Baker would continue to teach special education. Adding the Autism class was nothing more than an addition to the other special education classes offered by the Board.

Disposition: Transfer upheld.

Citation: *Watkins v. Dekalb County Board of Education*, FMCS Case No. 08-04127

(November 7, 2008).

Hearing Officer: None listed

Key Facts: Watkins was transferred from English Language Learner (ELL) teacher for Grades 7, 8, and 10 to an ELL teacher for Grades 7-12 at the same school. Prior to this arbitration, Watkins taught students 7-9 in his own classroom, which was not shared with another teacher. At the start of the 2007-2008 school year, he was informed that he would have to share

his classroom and would teach students in Grades 7, 8 and 10. He was also assigned other clerical and administrative duties. Watkins contested this assignment, regarding it as a transfer, but the Board took the position that it was not. After no response from the Board, the teacher filed a proceeding with the Office of Administrative Hearings and in February 2008, an Administrative Law Judge (ALJ) held that the action taken by the Board to change the teacher's duties as to grade assignments constituted a transfer and that a Board hearing was required. The ALJ's decision was affirmed by the Circuit Court of Montgomery County which denied the Board's petition for writ of certiorari to review the ALJ's decision. In June 2008, the Board notified the teacher that it accepted the recommendation of the Superintendent to transfer the teacher from Grades 7, 8, and 10 to Grades 7-12. The reason for the transfer was that the number of ELL students at the school varies greatly by grade, month, and year, and that it needed to have a teacher available to teach all students Grades 7-12. The teacher filed a timely appeal and a hearing followed. The teacher did not testify at the hearing. At the Board hearing, evidence was presented that the school had one of the highest growth rates of ELL students, that the number of ELL students in all grade levels fluctuated regularly for various reasons, and that ELL teachers in other schools regularly teacher ELL students in all grades. The change in classroom space was made because teachers of core content with large classes had a greater need for unshared classrooms than ELL teachers who often worked with individual students.

Issue(s): Whether the evidence was insufficient for the employing Board to transfer the teacher, whether the action was taken for political or personal reasons, and whether the action was arbitrarily unjust.

Holding: The failure of the Board to give notice of the proposed transfer before the end of 2007-2008 school year has no effect on the validity of the notice actually given in June 2008.

TTA does not require that notice of transfer be given before the end of a school year and there is no limitation of time when a notice of transfer must be given. In addition, because the TTA provides that a transfer does not become effective after a notice of contest is filed until a hearing officer upholds the transfer, the time of the notice does not negatively affect the teacher. Finally, a change in the room assignment is not a transfer under the TTA.

Reasoning: Evidence presented by the Board supported the transfer and there was no evidence to support that the transfer was for personal/political reasons or arbitrarily unjust.

Disposition: Transfer upheld.

Citation: *Bishop v. Birmingham City Board of Education*, FMCS Case No. – None (November 14, 2008).

Hearing Officer: Simon, Kenneth

Key Facts: The Board terminated Bishop's contract after finding that she converted student funds for a field trip to Europe for personal gain. She placed funds into a separate bank account and wrote several checks to herself, Wal-Mart, Big Lots, and other vendors during 2005. That account was closed in 2006 and a second account was opened. When the trip was finally cancelled in 2007, parents reported difficulty in receiving refunds. Upon investigation, the Board's CFO determined that more than \$13,000 had been paid by parents, but over \$10,000 was missing. All of the money was eventually refunded, including \$10,100 paid from Bishop. Bishop claimed that she turned over funds to a teacher to invest in a high-yield, interest bearing account (that teacher died in 2006), that she reimbursed students with cash from the checks made payable to her (she kept documentation in a receipt book that was stolen from her classroom while she was on sick leave), and that she reimbursed herself for items used as fundraisers (but that money

was stolen from her classroom on two occasions). No funds were turned over to the school bookkeeper.

Issue(s): Did Bishop use funds raised for the field trip for her own use? Did Bishop report or turn over the funds to the school bookkeeper?

Holding: The Board presented sufficient evidence to prove that Bishop converted funds for her own personal use, constituting good and just cause for her termination.

Reasoning: Bishop's explanation for the missing funds "was unverifiable, inconsistent, contradicted by others, strangely convenient, and otherwise unsatisfactory" (p. 13).

Disposition: Termination upheld.

Citation: *Perdue v. Montgomery County Board of Education*, FMCS Case No. 08-01570 (November 15, 2008).

Hearing Officer: Moberly, Robert

Key Facts: The Board terminated Perdue, a special education teacher, for physically and verbally abusing a wheelchair-bound nonverbal student and for using inappropriate physical restraints on the student.

Issue(s): Did the Board properly terminate Perdue?

Holding: The Board had good cause to terminate Perdue's contract.

Reasoning: Video evidence showed Perdue slapping the student in the face. Photos were taken of the inappropriate restraints where the student's support hose was used to secure her arms to prevent her from removing her clothing.

Disposition: Termination upheld.

Citation: *Ellis v. Huntsville City Board of Education*, FMCS Case No. 08-04064 (November 17, 2008).

Hearing Officer: Williams, Robert

Key Facts: Towards the end of the school year, an email was sent to all staff members reminding them to enforce specific rules in the days remaining. Ellis posted the rules on his door. He later violated several of the rules, including pulling a student from another teacher's class and allowing that student to eat food he brought in for the student. He then interrupted another teacher's class, calling a student a "faggot" in the presence of another teacher and students and slamming the classroom door. He received a written reprimand for his behavior in May 2008. In the meantime, the Alabama State Department of Education issued Ellis a letter of reprimand for his conviction of Theft of Property, Third Degree in 1986. This reprimand resulted from a settlement agreement with the state department of education. Upon receipt of the state department's reprimand in June 2008, the Superintendent notified Ellis of her intention to recommend his suspension for seven days without pay. Prior to this suspension, Ellis had received multiple written reprimands and suspensions with and without pay.

Issue(s): Did the Board have sufficient evidence to suspend Ellis for seven days?

Holding: The reprimand given Ellis at the end of the school year was the final decision for his conduct and could not be used to support subsequent disciplinary actions. Therefore, the evidence was not sufficient to suspend Ellis.

Reasoning: The misconduct that formed the basis for the written reprimand in May 2008 could not constitute just cause for the suspension and that Ellis was personally singled out for disparate treatment.

Disposition: Suspension reversed.

Citation: *Hornsby v. Gadsden City Board of Education*, FMCS Case No. – None (December 9, 2008).

Hearing Officer: Feinstein, Daniel

Key Facts; A first grade student with attention-deficit disorder with hyperactivity (ADHD) closed himself in a locker on a dare. Deciding to teach the child a lesson, Hornsby lined up the remainder of the students, turned off the lights, took the other students outside the classroom, and left the student in the locker.

Issue(s): Did the Board have good and just cause to terminate Hornsby?

Holding: The evidence was sufficient to uphold the termination.

Reasoning: The teacher confined the student in the locker, providing sufficient evidence for her termination.

Disposition: Termination upheld.

Citation: *McKinnis v. Lowndes County Board of Education*, FMCS Case No. 08-55586-3 (December 9, 2008).

Hearing Officer: Pecklers, Michael

Key Facts: The Board imposed a two day suspension without pay for insubordination. McKinnis insisted that she would not follow a directive from her principal to call him on his work cell phone if she needed to be absent from work. This requirement was included in an expectation packet provided to all employees of the school. Prior to a conference where McKinnis was given this directive by her principal, she had called front office staff at the school to report her absences, resulting in school personnel trying to attempt to secure substitutes to cover her class. During that conference, McKinnis stated, "I am not calling that number. I've never called it before" and walked out of her principal's office.

Issue(s): Was the evidence sufficient for the Board to suspend McKinnish for two days without pay and was this for just cause?

Holding: The two day suspension was for just cause.

Reasoning: Boards may impose the minor discipline of suspensions of seven days or less upon teachers for just cause. McKinnis, along with all other employees, must obey legitimate orders of her superiors. Requiring her to call a specific phone number prior to a specific time to report an absence are “legitimate and transparent policy expectations of school administrators to safeguard students’ well being by ensuring adequate and timely class coverage” (p. 21-22).

Disposition: Suspension upheld.

## **2009**

Citation: *Hinds v. Huntsville City Board of Education*, FMCS Case No. 08-02465 (2009)

Hearing Officer: Bahakel, Roberta

Key Facts: Hinds suffered from bipolar disorder. While on her medication, she was a good teacher. When she was non-compliant, she engaged in incidents of inappropriate behavior. Her administrators worked with her over several years and accommodated her as much as possible. Upon her return from inpatient treatment, she pushed a student against the wall and used profanity in front of students, eventually becoming highly agitated. She was taken to the nurse’s office where she started emptying her pockets. A box cutter was in one of her pockets. Because of her agitation and possession of the box cutter, the administrators called her father who came to school and took her home. She was placed on administrative leave following that incident. Hinds argued that the Board violated its own policy by not offering her the option of utilizing its EAP.

Issue(s): Did the Board violate its policy in regard to the EAP? Did the Board have good and just cause to terminate Hinds’s contract?

Holding: The Board did not violate its policy and had good and just cause to terminate Hinds's contract.

Reasoning: Hinds was diagnosed with bipolar disorder before her episodes of inappropriate behavior began and was under the care of a physician. Even if she had seen an EAP Counselor, she would have been referred to the same doctor she was already seeing for her condition. Although the inappropriate behaviors were infrequent, the last incident was of particular severity and warranted significant disciplinary action.

Disposition: Termination upheld.

Citation: *Stallworth v. Wilcox County Board of Education*, FMCS Case No. – None (2009).

Hearing Officer: Wolfson, Jerome

Key Facts: Stallworth had a history of excessive absenteeism and the Board sought to terminate her. She argued that she had a number of illnesses that resulted in her absences

Issue(s): Was there just cause to terminate Stallworth?

Holding: Termination was too harsh a penalty.

Reasoning: Progressive discipline required that the Board notify Stallworth that she would be subject to disciplinary action for continued absences.

Disposition: Termination reduced to "attendance probation." If Stallworth is absent for more than a set number of days, the Board may proceed with her termination.

Citation: *Brooks v. Phenix City Board of Education*, FMCS Case No. 80702-037623 (January 8, 2009).

Hearing Officer: Baroni, Barry



Key Facts: In April 2008, the Superintendent received an anonymous package in the mail. Inside was a statement from “concerned parents” with numerous pages printed from pornographic websites showing nude photos of Brooks and describing sexually explicit acts. In addition, photos of Brooks’s bare breasts were found on her school computer.

Issue(s): Did the Board have grounds and other good and just cause for Brooks’s termination? If not, what is the proper remedy?

Holding: The preponderance of the evidence showed that Brooks engaged in “hard core” Internet immorality making her unfit to teach (p. 15).

Reasoning: Teachers are held to a heightened scrutiny because of their position in the public’s trust, even when it comes to off-duty misconduct. Brooks’s nude and semi-nude photos were on websites easily accessible on the Internet. The Board proved a nexus between Brooks’s conduct and her duties as a teacher, particularly to her fitness and capacity to discharge her position under Alabama’s line of immorality case law.

Disposition: Termination upheld.

Citation: *Danzy v. Mobile County Board of School Commissioners*, FMCS Case No. 08-04487 (March 2, 2009).

Hearing Officer: Ray, Phillip

Key Facts: Very similar facts to 08-04371 and 08-04313. Facing a major budgetary shortfall where the Board’s fund balance decreased from \$45 million to approximately \$7 million from 2005 to 2008, the Board implemented a reduction in force. Danzy was transferred from an Area School Improvement Coordinator position to an Area School Improvement Specialist position within federal programs. Less-tenured Specialists were returned to the classroom, so the result was everyone was returned to their last tenured position.

Issue(s): Whether the transfer was sufficient for the board to take action, whether such action was for political or personal reasons, and whether such action was arbitrarily unjust.

Holding: There was sufficient evidence to transfer Danzy because of the financial exigency required a reduction in force.

Reasoning: The reduction in force was necessary, was properly implemented, and the evidence did not suggest her transfer was influenced by either personal or political animus. Furthermore, neither party contended that the Board's decision to transfer her was based upon her performance.

Disposition: Transfer upheld.

Citation: *Hasan v. Mobile County Board of School Commissioners*, FMCS Case No. 08-04371 (May 19, 2009).

Hearing Officer: Donnelly, Peter

Key Facts: In 2008, all public schools across the state were impacted significantly by proration. The Board implemented its reduction in force (RIF) policy, with only central office administration selected for the RIF. Fifteen specialists, including Hasan, who was a School Improvement Specialist, were selected for the RIF. Hasan was hired on September 8, 2006, placing her 13th in seniority among specialists. She had obtained tenure in the system as a teacher in 1987, but had not obtained tenure as a specialist. She was selected as one of the seven Specialists for the RIF. As a tenured teacher, she was advised by letter that she was being transferred out of the Central Office and that her contract as a Central Office employee was partially cancelled. She was offered a teaching position in the system. She elected to appeal.

Issue(s): Did the Board fail to apply TTA mandated seniority provisions or misapply its own RIF policy in the transfer and partial cancellation of Hasan's contract? Hasan argued the

she had more tenure in the system as a teacher and had more system-wide seniority than the Specialists who were not selected for the RIF.

Holding: The Board properly selected Hasan for the RIF.

Reasoning: Hasan's reliance on the TTA was misplaced as the TTA provides that a teacher obtains "continuing service status" with three plus years of service plus reemployment for a fourth. Even with tenure, a teacher's contract may be cancelled. Hasan does not contend she was selected for the RIF for personal or political reasons. The TTA has no application to a RIF in Central Office administration except to the extent that the Board's RIF policy provides some employment security for former teachers selected for a RIF. The Board has the discretion to apply position function seniority in selecting employees for RIF.

Disposition: Transfer and partial cancellation upheld.

Citation: *Colson v. Jefferson County Board of Education*, FMCS Case No. – None (May 26, 2009).

Hearing Officer: Sandefer, Jim

Key Facts: The Board terminated Colson for committing and pleading guilty to bankruptcy fraud, for causing her 18-year-old daughter to commit perjury for her, and by failing to acquit herself in a manner becoming a Board employee. The fraud charges arose from her Chapter 7 bankruptcy proceedings, in which she certified that she only had one checking account with a balance of \$200. In reality, she had another account with another bank with a balance of over \$200,000 - life insurance proceeds from her husband's death - when her declaration was made. Once the bankruptcy trustee was aware of the funds and demanded that she turn over the funds, she refused to turn over the funds. Instead, she transferred \$75,000 to her daughter, withdrew \$50,000 in cash, and put \$90,000 into another account. Colson told the trustee that the

\$75,000 had been taken from the account by her daughter and was stolen from her car while on a trip. Later, the daughter admitted that Colson told her to lie about the stolen funds and that her mother had gotten a “good deal” by having \$268,000 in credit card debt discharged in bankruptcy and then receiving more money that was not turned over to the court. Colson’s indictments for perjury were published in the newspaper and the Superintendent received a copy. Colson pled guilty to the charges, and because they were felonies, the Superintendent believed that Colson had violated the Alabama Educator’s Code of Ethics. Furthermore, he did not believe Colson could credibly continue to serve as an administrator.

Issue(s): Was the termination of Colson’s employment with the Board justified based upon the facts?

Holding: Colson’s behavior is not the kind one expects from a principal and role model, constituting good cause for her termination.

Reasoning: The Hearing Officer stated:

Good cause not only means for some kind of inefficiency or misconduct on the teacher’s part, but includes any ground put forward by a school committee in good faith and which is not arbitrary, irrational, unreasonable, or irrelevant to the committee’s task of building up and maintaining an efficient school system. Limited only by the statutory provision that they must be good and just causes, the jurisdiction and discretion to determine what these causes may be rests in the hands of school authorities. (pp. 17-18)

By pleading guilty to two perjury charges and by requesting that her daughter lie and commit perjury, “it seems obvious that [Colson’s] behavior is not appropriate for a Board employee” (p. 18). These crimes of perjury and suborning and procuring her daughter to commit perjury are acts of moral turpitude. That she received good evaluations is not at issue, but that having an administrator who is a convicted felon is. Furthermore, if she was a principal, the Teacher Accountability Act allows for the termination of a principal convicted of a felony. She also violated the Educator’s Code of Ethics. All educators should have high moral standards.

Given that teachers and others in the school community were aware of her conviction, she would not be able to command respect from those aware of her conviction, including students.

Disposition: Termination upheld.

Citation: *Glenn v. Mobile County Board of School Commissioners*, FMCS Case No. 08-04313 (June 4, 2006).

Hearing Officer: Hoffman, Robert

Key Facts: Very similar facts to 08-04371 and 08-04487. The Board's RIF policy was revised in March 2008 and adopted in a public meeting following input from the AEA. The RIF policy provided that if an employee was identified to be cut, an employee with a valid teaching certificate who had achieved tenure as a teacher prior to being assigned to Central Administration shall be returned to another vacant teaching position if such employee is legally qualified for that position. In May 2008, Glenn, a School Improvement Specialist in her second contract year, was notified of the Board's intent to transfer as well as the partial cancellation of her contract.

Issue(s): Glenn challenged the transfer and partial cancellation on due process/procedural grounds. The TTA required the Board notify an employee on or before the last day of school that the employee was no longer being offered employment. Did the Board properly notify Glenn that it would cancel her contract?

Holding: The Superintendent notified Glenn on May 5, 2008, of the Board's intent to transfer her. On May 9, 2008, she was notified that her contract was partially cancelled. The Hearing Officer held that neither notice accomplished what it intended - her non-employment as School Improvement Specialist per the RIF.

Reasoning: The transfer notice was not the same notice given to other non-tenured employees on the same date - they were notified the Board approved a motion not to renew their contracts. Instead, Glenn received the same notice that tenured employees received. Absent the notice given to non-tenured employees, the Hearing Officer held that Glenn's employment continued because contract cancellation involves tenured employees and the notice given to Glenn was clearly directed to someone in a tenured contract for the School Improvement Specialist position. The Board clearly sent the wrong notice, leaving Glenn with a presumption of reemployment, and therefore was estopped from cancelling her contract. The Hearing Officer was unwilling to conclude that the transfer letter meant Glenn would no longer be employed as a School Improvement Specialist and the partial contract cancellation of a tenured contract really meant that the Board wanted to end her School Improvement Specialist job and give her tenured rights to transfer because she had tenure from another position. The Hearing Officer ignored the fact that Glenn did not have a tenured contract to partially cancel, which effectively rendered the Board's action null and void.

Disposition: Transfer and partial cancellation reversed.

Appeal: Reversed and remanded with instructions, *Bd. of School Com'rs of Mobile County v. Glenn*, 70 So. 3d 340 (Ala. Civ. App. 2010).

Citation: *Eatman v. Greene County Board of Education*, FMCS Case No. 09-01085 (July 13, 2009).

Hearing Officer: Fernandez, Don

Key Facts: Eatman was hired under an alternative certification process called the Alternative Baccalaureate Certification (ABC) approach. This non-traditional certification approach is used to certify teachers who have a college degree, but do not hold a teaching

certificate. Three years of employment are required along with passage of the Praxis exam in a specific content area. When Eatman took the Praxis April 2007, he earned a score of 152. At that time, a passing score was 151. However, his application was not sent to the Alabama State Department of Education until after June 1, 2007. A rule change effective June 1, 2007 changed the passing score to a 153. As a result, the Alabama State Department of Education denied Eatman's certification. The Board employed Eatmon an additional year to allow him time to improve his score. He was not able to obtain the required score and he was terminated. Eatman enrolled in a masters' program in physical education and passed the Praxis in that content area.

Issue(s): Was the Board justified in terminating Eatmon?

Holding: The failure to ensure that Eatman's application was not received by the State Department of Education prior to June 1, 2007, although both Eatman and the Board were at fault, should not be grounds to deny his certification.

Reasoning: If Eatman's application for certification had been received by the Alabama State Department of Education before June 1, 2007 his score of 152 would have been sufficient for certification. Although Eatman "should have followed up on his application, he was operating on the premise that he had obtained a passing score and that only the necessary administrative process had to take place for him to receive his certification" (p. 9). The hearing officer also stated that the Alabama State Department of Education had the right to change a required passing score, but that it did not have the right to change it retroactively for those who had already taken the exam.

Disposition: Termination reversed. Additionally, since Eatman "also obtained a passing score for his Praxis exam in physical education, he should be dually certified in both social studies and physical education" (p.10).

Citation: *Helton v. Madison County Board of Education*, FMCS Case No. – None  
(August 28, 2009).

Hearing Officer: Pate, Lenora

Key Facts: The Board transferred Helton from a teaching position at its career technical center to a high school. The reason for the proposed transfer was reduced student enrollment in Helton's CAD/Drafting program at the career technical center and the creation of an engineering academy at the high school. During the previous school year, Helton taught five students - all in the morning. He taught no students in the afternoon. In addition, the district had recommendations from the Alabama State Department of Education and the Public Affairs Council of Alabama to offer the drafting program at one of the high schools. Prior to recommending the transfer, the the Board considered Helton's preference for one high school and invited Helton to tour the facility and discuss plans for the engineering academy. Helton did not express any concerns with the transfer at that time.

Issue(s): Was the evidence insufficient for the Board to take the transfer action; whether such transfer action was taken for political or personal reasons; or whether such transfer action was arbitrarily unjust? The Hearing Officer stated that she did not have legal authority to address the transfer of a program from one location to another and that this not subject to challenge by Helton.

Holding: There was sufficient evidence to support the Board's decision.

Reasoning: By transferring Helton to a comprehensive high school with an engineering focus, the Board hoped that enrollment in Helton's CAD/drafting classes would grow to make it economically feasible to continue offering the program. There was no evidence of any other



motive for the transfer other than the Board's desire for Helton to continue teaching drafting to its students.

Disposition: Transfer upheld.

Citation: *Bowling v. Morgan County Board of Education*, FMCS Case No. 09-02283-3 (August 29, 2009).

Hearing Officer: Wolfson, Jerome

Key Facts: Bowling, a principal, had to be driven home because he was having difficulty speaking, was lethargic, and fell asleep at his desk. About six weeks after that incident, Bowling delivered a letter to a teacher requesting that her physician spouse, who was not his own doctor, provide a prescription to him for Fentanyl patches, a Class 2 narcotic. The Board terminated Bowling because of these incidents, finding that Bowling was addicted to drugs and refused to admit it. He also refused to seek rehabilitation or avail himself of other resources provided by the Board. Bowling claimed he experiences severe back pain and that he suffered reactions to his prescribed medication, including Fentanyl patches. The day prior to his being found asleep at his desk, he had gone to the emergency room for pain and received an injection of Demerol in addition to his usual medications. He claimed that the request of the teacher was made because he had misplaced or lost his current supply of Fentanyl patches and that his own doctor would not write an additional prescription for two more weeks.

Issue(s): Whether the Board had just cause to cancel Bowling's contract?

Holding: Bowling's behaviors did not constitute incompetency, insubordination, neglect of duty, immorality or failure to perform his duties in a satisfactory manner. No evidence was submitted that he willfully engaged in drug use or attempted to secure drugs for any purpose

other than to alleviate his back pain. Nonetheless, his actions were improper and deserving of discipline, not discharge.

Reasoning: The Hearing Officer found that the testimony of the assistant principal and others who worked with Bowling were not “competent, substantial, nor credible” (p.7). The Hearing Officer continued, stating:

For more than the past twenty years, physicians have studied and written extensively on the subject of drug seeking behavior caused by undertreatment of pain. The medical condition has come to be known and accepted as Pseudoaddiction. Physicians are in agreement that it can be caused by either utilizing medication that is insufficiently potent or not giving the patient the medicine frequently enough. Pseudoaddiction behaviors include drug seeking, aggressive pain complaints, impulsive analgesic use and physical behaviors trying to demonstrate pain along with other problematic behaviors. The Pseudoaddiction behaviors disappear when pain control is improved when pain control is improved and access to appropriate medication is increased. (p. 7)

As a result, the Hearing Officer held that pseudoaddiction could be ruled out as a cause of Bowling’s behaviors, justifying a mitigation in discipline.

Disposition: Termination reduced to a 10-day suspension with pay.

Citation: *Thomas v. Sumter County Board of Education*, FMCS Case No. 08-04850-3 (September 8, 2009).

Hearing Officer: Modjeska, Abigail

Key Facts: The Board notified Thomas, a Family and Consumer Science teacher, that it proposed to transfer her to another school because of program needs. The teacher notified the Board that she wished to appeal the transfer decision. The teacher, through her Alabama Educator Association (AEA) UniServ representative, notified the Superintendent that she had a conflict with the July 22 hearing date. The Superintendent and the AEA representative entered into a “gentleman’s agreement” to postpone the hearing date to August 5. The Board transcript from August 5 references a letter from the Board attorney to the AEA representative reflecting

the mutual agreement to reschedule the intended transfer hearing. At the August 5th hearing, the teacher did not attend and her AEA representative, when asked to address the Board, declined to make a statement on her behalf. The Board upheld the Superintendent's decision to transfer the Thomas.

Issue(s): Whether the failure of the Board to send notice to the teacher that the hearing would be postponed violated the notice provisions of the TTA. The TTA requires written notice in two instances: 1) notice of the Board's intent to transfer and 2) when the transfer is approved by the Board. The TTA does not specify what notice is required for procedural matters, including requests for postponement.

Holding: There was no violation of the TTA. There was evidence that the AEA representative was actually representing the teacher, although the teacher argued that there was no formal request for AEA representation until after the final transfer decision. The Board acted reasonably in assuming that the AEA representative was acting for the teacher in agreeing to postpone the hearing and the Board is not responsible that he failed to notify the teacher of the postponement.

Reasoning: The TTA is silent as to the procedural requirements for postponement of a hearing, but found that there was sufficient evidence to assume the AEA representative was acting on the teacher's behalf in requesting the postponement. Additionally, the Hearing Officer found that if there was a lack of process, it was cured through the arbitration process. The teacher appeared and testified at the hearing why she believed her transfer was improper. The evidence showed that the transfer was done because the Board could no longer afford to keep her in her previous position and, if it wanted to retain her as a teacher, transfer was her only option.

Disposition: Transfer upheld.

Citation: *Hyche v. Cherokee County Board of Education*, FMCS Case No. – None (October 17, 2009).

Hearing Officer: Pierson, J. J.

Key Facts: Hyche served as a teacher and assistant principal for twenty years. The Board approved the Superintendent's recommendation to transfer Hyche from a .5 assistant principal/.5 alternative school teacher to assistant principal of Gaylesville High School. The reason for the transfer was to eliminate locally funded positions, including the position Hyche held. The assistant principal position at Gaylesville High School was funded at a .5 level from the state. Prior to the arbitration hearing, Hyche filed a Motion for Summary Judgment, claiming that the Board committed a procedural error in the vote on his transfer. Specifically, Hyche claimed that only two of the five Board members voted for the transfer. The Board opposed the motion, claiming that the TTA did not provide for summary judgment motions and denied that the Board failed to comply with statutory requirements in the transfer vote. The Hearing Officer agreed that he did not have the authority to rule on motion for summary judgment and directed the parties to hearing.

Issue(s): Was the transfer of Hyche arbitrary, capricious and unjust (personally or politically motivated)?

Holding: The Hearing Officer held that "the preponderance of the evidence" supported that the transfer was made for the reasonable administrative function of saving money.

Reasoning: The Hearing Officer found that Hyche's salary and benefits were fully funded by local funds and that his transfer would reduce that amount by half. In addition, the Board created a budgetary plan that resulted in 45 transfers during the 2009-2010 school year to shift

funding from local to state funding sources. Of the 45 transfers, 44 were voluntarily accepted. Furthermore, there was no loss of status in the transfer.

Disposition: Transfer upheld.

Citation: *Coleman v. Montgomery County Board of Education*, FMCS Case No. 09-03949 (October 30, 2009).

Hearing Officer: Starr, Kenneth

Key Facts: Coleman was the Coordinator of Community Education program. The program was funded through a variety of sources, including the Department of Human Resources, Community Education, federal grants, and tuition for some of the participants. In 2007, the Board and a local technical college filed a single grant application for federal funds and received approximately \$1.2 million in 2007-2008 with \$450,000 allocated to the Board for the Community Education Program. Coleman, who was responsible for preparing grant applications, was aware of the joint effort in 2007, but the record was unclear whether she sought permission to apply for a federal grant in 2008. It also was unclear how the program was funded from 2008-2009. In 2009, Coleman asked her superintendent about applying for federal forms, including a deadline date for the application. She was notified that the technical college would be applying for the grant. About that same time, the Board notified Coleman that as part of a reduction in force, her position as Coordinator of the Community Education program would be eliminated and that she would be transferred to a position in the Office of Student Support Services at her same salary.

Issue(s): Whether the transfer of Coleman was done for political or personal reasons and therefore violated the TTA and whether the manner in which Coleman was transferred was contrary to the Board's own reduction in force policy.

Holding: The Board did not notify Coleman of her need to apply for positions for which she may have been qualified prior to unilaterally transferring her to a position she did not desire. The evidence was not sufficient for the Board to transfer Coleman.

Reasoning: The Board argued that Coleman did not raise its unwillingness to apply for federal funds for three years, that Coleman was offered a position of Curriculum Coordinator for a new GED/credit recovery program that she declined, that many non-tenured employees were terminated and the only ones who were retained were uniquely qualified for specific positions, and that Coleman never applied for any vacant position for which she might have been qualified prior to her transfer. However, Coleman argued that the decision to eliminate her position was for political reasons, specifically arguing that the Board's decision not to apply for federal funds was politically motivated and such decision would adversely impact her position. The Hearing Officer found that a political relationship between the Board and the Director of Adult Education at the technical school, who also happened to be a state senator, made the Board's decision not to apply for federal funding for adult education politically motivated. Nonetheless, the Hearing Officer stated that while the "elimination of the Adult and Community Education programs may have been politically motivated, that is legally insufficient" to find that the transfer violated the TTA (p. 9). However, Coleman was not notified of her need to apply for open positions while other employees did submit applications to the Board to make informed personnel decisions.

Disposition: Transfer reversed.

Citation: *Granger v. Montgomery County Board of Education*, FMCS Case No. 09-01218 (November 2, 2009).

Hearing Officer: Goldstein, Jay

Key Facts: Other teachers and students overheard Granger using the words “Columbine” and “gun” as his fourth grade students loudly left class during class change. More specifically, students reported that he made statements to the students that if he had a gun, “it would be like Columbine all over again and if [he] had a gun [he] would kill 9 out of 10 from one class and 19 out of 20 from the other class” (p. 5). These statements were made after Granger had been warned by his principal about his harsh tone with students. The next day, one of his colleagues told him that she had to report to Human Resources to discuss the statements he made the day before. Granger told her to “stick to the story” that the comments were made in a conversation with her and the students overheard them. This occurred even after he had already denied making any statement about a gun and Columbine to his principal.

Issue(s): Was there just cause for Granger’s termination? If not, what penalty should be imposed.

Holding: The more serious charge of violence was not proven to establish just cause for termination. While inappropriate behavior was proven, the Hearing Officer held that mitigating factors deem termination too harsh a penalty.

Reasoning: Over his twenty years of employment, Granger’s performance was satisfactory and he had never received any form of discipline. Although the Board presented evidence of serious misconduct, the Hearing Officer stated that “it does not automatically follow that the choice of penalty [i.e., termination of a teacher’s contract] was appropriate if there is evidence also of mitigating and/or explanatory circumstances. Termination under such circumstances would be a ‘draconian’ decision” (p. 13). Specifically, the Board “rushed to judgment in this matter and attempted to raise an ‘incident’ to a charge of ‘violence’” (p. 13).

Disposition: Termination reduced to suspension. The Board was ordered to provide outside psychological testing and treatment for anger management and, if Granger was found fit for duty, would be reinstated to a teaching position. Once reinstated, he was to be suspended without pay for 30 days with a one-year probationary period.

Citation: *Frye v. Walker County Board of Education*, FMCS Case No. – None (November 17, 2009).

Hearing Officer: Battle, Joseph

Key Facts: Prior to his termination, Frye had been warned about inappropriate conduct involving sexual comments directed towards students and adults and complaints of sexual harassment. Some examples of Frye's misconduct included telling a custodian that "a male student had been 'hit in the balls' and that she might like to put a band-aid on him...talking with other employees about the sexual activities of students...comparing a lighthouse to a 'dildo' in conversations with other employees...discussed sexual 'positions' from pornographic magazines with a student" as well as several reports that he touched students in ways that made them uncomfortable (p. 5).

Issue(s): Did the Board properly terminate Frye for incompetence, neglect of duty, immorality, failure to perform duties in a satisfactory manner or other good and just cause?

Holding: That the Board properly cancelled Frye's contract.

Reasoning: Frye was given a written reprimand and transferred to another school in 2002. The discipline was given because of inappropriate comments. This progressive discipline was considered as part of Frye's employment history. Frye's conduct also more likely than not created a hostile work environment for several of his female colleagues. Even if, as Frye contended, the comments were made jokingly, the conduct on its fact was inappropriate and



showed a lack of judgement. Remediation was not a possibility because Frye continued his misconduct, even after a written and verbal warnings.

Disposition: Termination upheld.

Citation: *Tyler v. Montgomery County Board of Education*, FMCS Case No. 09-03461 (December 20, 2009).

Hearing Officer: Ahrens, Frederick

Key Facts: Tyler was employed by the Board for approximately 20 years and had received numerous awards for teaching as well as strong Alabama Professional Education Personnel Evaluation program evaluations. During a two-month period in 2009, Tyler exchanged a number of emails with one of her students, JS. Some of the emails from JS contained questionable language, but Tyler did not instruct JS to stop using such language. In addition, when another teacher told JS he did not need to hang around Tyler, Tyler told JS that the teacher's husband had made an inappropriate pass at her.

Issue(s): Did the Board have just cause to terminate Tyler's employment contract? If not what was the proper remedy?

Holding: The evidence did not support termination of Tyler's employment contract.

Reasoning: The Hearing Officer stated that Tyler "blurred the line between teacher, student and friend" (p. 4). However, although Tyler made mistakes and admitted to using poor judgment, Tyler's "long tenure, spotless disciplinary record, numerous awards for excellence in education, and her earned respect from fellow education professionals and students, deserve consideration and thus the penalty of termination is not appropriate" (p. 5).

Disposition: Termination reduced to a one-week suspension without pay.

Citation: *Tompkins v. Montgomery County Board of Education*, FMCS Case No. 09-0360 (December 30, 2009).

Hearing Officer: Williams, Don

Key Facts: Tompkins, who was a teacher at an alternative school, complained and filed grievances concerning disciplinary problems in his classroom, his belief that he was in danger from his students, and that his administrators were not taking steps to protect him. He videotaped incidents that occurred over several days. Videos of his classroom were broadcast by a local news station and clips were emailed throughout the school system. Tompkins denied providing the video to the news station, but admitted that he allowed a non-employee of the school system to view the videotapes. An affidavit was produced by the Board confirming that the news station received the video from Tompkins.

Issue(s): Did the Board have good and just cause to terminate Tompkins?

Holding: The Board had sufficient grounds to cancel Tompkins's contract.

Reasoning: The Hearing Officer noted that Board policy states that "the institution may not release information without the authority of the student, parents, or guardian" and the Board notified Tompkins that there was just cause to terminate his employment for violating board policy relating to student privacy rights. Specifically, the Board's policy was designed to enforce the provisions of the federal Family Educational Rights and Privacy Act (FERPA). Tompkins's exemplary employment history was not a mitigating factor to impose a discipline other than termination.

Disposition: Termination upheld.

**2010**

Citation: *Mizell v. Montgomery County Board of Education*, FMCS Case No. 09-03946 (January 4, 2010).

Hearing Officer: Baroni, Barry

Key Facts: Mizell, an educational specialist in the office of curriculum and instruction, was reassigned as part of a reduction in force to an assistant principal position when the Board was faced with significant reduction in funding as part of statewide proration. The Board reduced the number of central office staff in her position from eight to four and, like Mizell, other employees were reassigned to assistant principal positions, displacing non-tenured assistant principals. Those reassigned were also given the opportunity to apply for newly-created positions.

Issue(s): Whether the Board properly reassigned Mizell in accordance with its reduction in force policy?

Holding: The Hearing Officer held that the transfer was proper. There was no evidence or argument that there was a loss of status or pay and no evidence or argument that the transfer was made for any political or personal reasons. The Board complied with its reduction in force policy.

Reasoning: Although Mizell argued that the Board violated its reduction in force policy when it placed less senior employees into positions for which she was certified, the Hearing Officer found that those positions were supervisory in nature, not parallel to her position as an educational specialist and that others selected for positions were better qualified.

Disposition: Transfer upheld.

Citation: *Thomas v. Huntsville City Board of Education*, FMCS Case No. 09-04048

(January 21, 2010).

Hearing Officer: Feinstein, Daniel

Key Facts: When Thomas was hired by the Board, she had at least three years of teaching experience. Everyone who testified at the hearing described Thomas as very caring towards her students, but there was a substantial amount of disagreement about her effectiveness as a teacher. Her evaluations in 2002, 2003, and 2006 indicated that she barely met the minimum cumulative score required as a teacher. In 2007, a kindergarten student in her class wandered away without Thomas's knowledge. Parents began to complain about grammatical errors in materials Thomas sent home, poor classroom organization, and unchallenging instruction. After the principal received numerous complaints, a Central Office staff member observed Thomas for one hour and witnessed a poorly planned, disorganized lesson where materials did not correspond with the daily lesson plan and there was no evidence of small group learning. In addition, another staff member was assigned to assist Thomas, including two to three times weekly for 90 minutes each session from September through November 2007. Despite this and other significant interventions, evaluations continued to indicate no improvement in Thomas's instruction. Thomas's cumulative score for the 2007-2008 school year was well under the score required for tenured teachers. The 2008-2009 school year started with similar complaints from parents, including lack of structure and poor instruction. In September 2008, Thomas was given a smaller classroom and a reduced class roster. In February 2009, she left the class unsupervised, leaving to get a drink of water and make photocopies. While she was out, two students began horseplaying, leaving one student with bruises. In April 2009, during another classroom observation, Thomas exhibited a clear lack of planning and poor classroom management skills.

Issue(s): Whether the notice of intent to terminate Thomas was legally sufficient, whether the Board has carried its burden of establishing that disciplinary action is proper under the TTA, and whether the action was taken for improper motives? If so, which of the following actions should be taken relative to the employee: termination of the employee, a suspension of the employee, with or without pay, a reprimand, other disciplinary action, or no action against the employee?

Holding: The Hearing Officer held that the factual allegations contained in the Board's notice of intent to terminate were sufficient to provide proper notice under the TTA. The Board satisfied its burden of establishing incompetency, failure to perform duties in a satisfactory manner, and other good and just cause.

Reasoning: Although Thomas showed a sincere effort to improve, despite intensive and ongoing training, any improvement was very slight, if at all. Even with that effort, she was still not competent to perform her duties as a teacher and the only appropriate discipline was termination.

Disposition: Termination upheld.

Citation: *Roberts v. Huntsville City Board of Education*, FMCS Case No. 09-04093 (February 19, 2010).

Hearing Officer: Williams, Cary

Key Facts: Roberts was terminated in 2009 for failure to perform duties in a satisfactory manner, neglect of duty, incompetency, insubordination, or other good and just cause. In the Board's notice to Roberts, 35 reasons were listed for her termination, highlighting her lack of competency to teach. In 2006, after Roberts struggled with the loss of a parent and her own divorce, her principal referred her to an EAP. She was diagnosed with depression and began

seeing a professional counselor. Unfortunately, she began a sexual relationship with him and began abusing drugs. During her own testimony, Roberts admitted that due to her drug addiction, she was not a competent teacher and should not have been in the classroom during that time. After receiving her notice of termination, Roberts sought outpatient drug rehabilitation.

Issue(s): Whether the evidence proved a ground or grounds asserted for termination of Roberts' employment? Whether the cancellation was for political or personal reasons? Whether cancellation was the appropriate action or should another action be ordered?

Holding: The Board sustained its burden of proof and proved all 35 reasons listed in the cancellation notice provided to Roberts.

Reasoning: By her own admission, Roberts should not have been in the classroom. Although Roberts argued that she should be given a second chance, subject to random drug testing, the hearing officer stated that "the Board would still be obligated to expend time and resources to cancel Roberts' contract a second time and there is insufficient evidence to support taking this gamble" (p. 16-17).

Disposition: Termination upheld.

Citation: *Fuqua v. Mobile County Board of School Commissioners*, FMCS Case No. 09-04368 (April 1, 2010).

Hearing Officer: Oberdank, Lawrence

Key Facts: Because of a reduction in teaching units, Fuqua was transferred from one middle school to another. She contested the transfer and, at the same, time, began interviewing at other locations, including a high school. Human Resources contacted Fuqua in July 2009 and offered her a position at the high school and she accepted it because she wanted to teach at the

high school level again. Several days later, Human Resources called Fuqua and informed her she would be transferred to the middle school as originally recommended.

Issue(s): Was Fuqua's transfer in violation of contract? Was the decision arbitrary, unjust or influenced by political or personal reasons?

Holding: There was no evidence that the Board's action was arbitrary, unjust or influenced by political or personal factors and, therefore, the Hearing Officer sustained the Board's decision.

Reasoning: Fuqua did not argue that her transfer was made because of reduction of teaching units, resulted in loss of status, or was made for personal or political considerations. Instead, she contended that she had an oral contract to be reassigned to the high school and that by not doing so and by not allowing her the right of first refusal to select where she would be transferred, the Board's action was arbitrarily unjust. However, the Hearing Officer stated that even if the transfer was reversed, Fuqua would return to her previous school. Moreover, no evidence was introduced that the transfer was made for any of the reasons prohibited by the TTA.

Disposition: Transfer upheld.

Citation: *Oglesby v. Talladega County Board of Education*, FMCS Case No. 10-01168-3 (May 17, 2010).

Hearing Officer: Harris, Joe

Key Facts: Oglesby was suspended for seven days without pay for physically grabbing a student after prior warnings not to have physical contact with students and for using profanity around and towards students. He argued that the Board denied him due process and a fair hearing during his conference with the Board prior to the Board's decision to suspend him. He claimed

that no witnesses with actual knowledge of any of the events that formed the basis of his suspension at the conference, that he was unable to confront the witnesses against him, and that the notice given to him to initiate his suspension was incomplete and deficient.

Issue(s): Was there sufficient evidence for the Board to suspend Oglesby for seven days?

Holding: The evidence was not sufficient to support the suspension.

Reasoning: The Hearing Officer found that “the fact that the Board’s evidence was almost entirely hearsay, together with the denial of any right to question the only witness presented by the Board and the problems with the Board’s notice to Oglesby, may have amounted to the denial of a fair proceeding” (p.3). The Hearing Officer also commented on the legislature’s use of the word “conference” in the TTA instead of “hearing” for minor suspensions, noting that this suggests that there is no requirement as to whether hearsay or cross-examination is allowed. Because the discipline only involved a minor suspension, the Hearing Officer was unwilling to find that the teacher was deprived of his constitutional right to procedural due process, specifically because Oglesby’s property interest was not as strong as it would have been if he had been terminated. Nonetheless, the Hearing Officer was concerned that most of the evidence against Oglesby was hearsay, and not direct evidence. In viewing the sufficiency of the evidence surrounding the incident that triggered Oglesby’s suspension, where a student was disrespectful to Oglesby and Oglesby took the student by the arm and walked him to the principal’s office, the Hearing Officer stated:

The evidence was not sufficient to support such a punishment in the context of a teacher trying to hold on to his authority under very difficult circumstances, and was not sufficient for the Board to determine that there was just cause for the action, based upon what Oglesby was responding to...and that this teacher is dealing with high school students, nearly adults, and in my view, nobody can command any group of students’ respect and attention or maintain control over the classroom, if he is absolutely prohibited from even touching a student - especially once the students find out about it. (p. 24)



Disposition: Suspension reversed.

Citation: *Nelson v. Russell County Board of Education*, FMCS Case No. 10-1006-0023-3 (June 25, 2010).

Hearing Officer: Wood, Jeanne

Key Facts: Nelson, a band director with 13 years' experience, was terminated for physically assaulting a student by placing his hands around the child's neck. He also directed profanity towards the student in the presence of other students. The student, RGM, was disrespectful to Nelson and Nelson, in his written statement, responded, "'You don't come into my MF'ing class and tell me what to do'" (p. 4). Nelson directed RGM to the office but RGM ignored his directives and went into the gym and climbed to the top of the bleachers. Nelson followed and a struggle ensued. Nelson had bruises on his arms and elbows and RGM had scratches on his neck.

Issue(s): Did the Board meet its burden of stating and proving proper grounds for terminating Nelson's contract? Was it for political or personal reasons? Was termination the appropriate penalty based upon the facts and the law?

Holding: The Board failed to meet its burden that Nelson choked the student. However, the Board met its burden for Nelson's unprofessional conduct of using profanity.

Reasoning: The Hearing Officer reasoned that there was insufficient evidence to prove that Nelson choked RGM. RGM did not testify at the hearing and his written statement only said that Nelson grabbed him by the throat. The only adult witness said she thought Nelson choked RM, but she was sitting behind a table at the bottom of the bleachers and could not hear what was said. The Hearing Officer also similarly discounted the testimony of other students who testified that they witnessed Nelson choking RGM. The Hearing Officer stated that one witness

testified that “RGM was screaming for help which corroborates Nelson’s testimony about RGM screaming the entire time he was restraining him. Screaming is inconsistent with the ability of someone that is being choked” (p. 11). Furthermore, when RGM refused to go to the office as directed, the hearing officer stated, “It was a perfectly reasonable response to restrain the student by taking him down to the floor between the bleachers....A teacher stands in Loco Parentis while a student is in school. A parent may very well reach for his own child in the same manner in order to obtain compliance with his instruction. There has been no evidence presented that such a touching would be considered abuse” (p. 12). The Hearing Officer also noted that there was no evidence such restraint violated school board policy. Although Nelson did display unprofessional conduct by directing profanity towards RGM and by pursuing him into the gym, the Hearing Officer found that this does not mean he is unfit to be a teacher. In determining what disciplinary action should be taken, the Hearing Officer considered Nelson’s prior employment record as well as the mitigating factor of RGM’s significant disciplinary history, stating “it appears [Nelson’s] lapse in judgment was provoked by the student’s abject disrespect” (p. 15).

Disposition: Termination reduced to a 15-day suspension.

Citation: *Petitt v. Jefferson County Board of Education*, FMCS Case No. 10-52678 (July 22, 2010).

Hearing Officer: Feinstein, Daniel

Key Facts: The Board terminated Petitt based upon the following: ““On or about March 3, 2009, [the Teacher] went into the team dugout and slapped K.C., a student in the face....[The Teacher] has previously engaged in physical altercations with students, and has been directed to avoid having physical contact with students”” (p.1).

Issue(s): Did the Board meet its burden of establishing that disciplinary action is proper under the TTA, was the action taken for improper reasons, and was the action taken appropriate?

Holding: The reasons for Petitt's termination was supported by substantial evidence and his termination was appropriate.

Reasoning: Although the Hearing Officer found that the student likely exaggerated Petitt's physical contact, the Hearing Officer did find that Petitt initiated physical contact with the student. Petitt himself admitted to jokingly making a comment about slapping the student and that his hand made contact with the child's face. Moreover, there was evidence that the child's cheek was red and swollen, indicating that force was used. Because Petitt ignored previous directives to avoid physical contact with students, "he, at a minimum, reached towards the student's face and caused contact. Even if assuming - without deciding - that this was intended in a joking manner, this conduct violated this oft repeated instruction" (p. 15). Therefore, the Board presented sufficient evidence that Petitt was insubordinate.

In addition, the Hearing Officer stated:

Any reasonable adult should know that engaging in a verbal and physical altercation with a child would likely lead to discipline. That a teacher would think it a good idea to go to the dugout, mock the team calling them 'bat boys,' invade the players' bench area during a school sanctioned game, walk up to a student and reach towards his face, even in a lighthearted and joking manner and exhibit no regret or remorse simply befuddles [the] hearing officer. (p. 16)

As such, the Hearing Officer held that Petitt's conduct constituted just cause for the Board to terminate his employment. As to appropriateness of the disciplinary action, the Hearing Officer stated, "An authority figure should not jokingly slap a child" and that "no discipline short of termination [would] suffice" (p. 17).

Disposition: Termination upheld.

Citation: *Isaacs v. Jefferson County Board of Education*, FMCS Case No. 10-10250-3  
(August 5, 2010).

Hearing Officer: Odom, Jr., James

Key Facts: The Board terminated Isaacs following an investigation where, when a female student's zipper broke on her pants, Issacs told her to staple her pants, but also told her "don't staple your pussy" (p. 2). In addition to this reason for terminating Isaacs, the Board found that Isaacs had used profanity, failed to follow the directives of his supervisors and responded to several directives in a "defiant, argumentative, sarcastic, and unprofessional manner [and that he] exhibited threatening, antagonistic, and unprofessional behavior" (p. 2).

Issue(s): Did the Board meet its burden of proof and if so, are the allegations proved among the permitted reasons for termination?

Holding: The Board had good and just cause to terminate Isaacs. He exhibited a pattern of unprofessional conduct unacceptable for a teacher.

Reasoning: The zipper incident provided the impetus for the Board's action. However, the Hearing Officer found the evidence insufficient to prove that specific charge. Isaacs argued that if that charge was not proven, he could not be held accountable for behavior that occurred in the past. The Hearing Officer disagreed, finding that to do so would result in condonation of Isaacs's past poor behavior. The Board documented twelve instances of unprofessional conduct by Isaacs demonstrating his "unacceptably defiant and challenging attitude with school authorities" (p. 20). For example, the Hearing Officer noted that Isaacs refused to accept an administrator's admonishment reminding Isaacs that paddling students was a violation of board policy, with Isaacs responding to his administrator with a letter demanding an opinion from the Attorney General and asking the principal, "maby[sic] you would like to spank me!?!?" (p. 15).

When an administrator issued a memorandum of concern after Isaacs left school during class to get a haircut, Isaacs responded with a letter that stated, “‘I appreciate your ‘note.’ As you know, dereliction of duty’ is in the eye of the beholder. It helps to clearly understand ones (sic) surroundings, etc.... - I appreciate your compliment on my haircut. I happened to be a damn good teacher also. Thanks for the ‘note’ of confidence, it really helped start my day off well today” (p. 16). Another example of his misconduct occurred when Isaacs had a discipline problem with a student, told his administrator to “‘get this kid the fuck out of my class”” and then proceeded to taunt the student when he was removed from his classroom (p. 16). A final example illustrating his unprofessional behavior occurred after Isaacs’ assistant principal wrote him a letter of concern after several late arrivals to school. Isaacs confronted his administrator, calling him a “liar,” saying “‘this is bullshit”” and then, as he left the office, asked the administrator, “‘Would you ever come to school with a gun and shoot somebody?”” (p. 20). In regard to the last incident, the Hearing Officer found that statement to be a threat and “in a school setting, the remark is about as unacceptable as [he] could imagine” (p. 22).

Disposition: Termination upheld.

Citation: *Stapleton v. Ozark City Board of Education*, FMCS Case No. 10-04075 (October 10, 2010).

Hearing Officer: Hales, Edward

Key Facts: The Board transferred Stapleton from a physical education teaching position at a high school to a physical education teacher at an elementary school. Prior to his transfer, there had been several incidents while he served as an assistant football coach and the head girl’s basketball coach. Initially, after alleging that there was unsatisfactory officiating in the girls basketball team’s first tournament game, Stapleton removed the team from the tournament in

protest. The school was sanctioned by the Alabama High School Athletic Association for failing to complete the tournament, fined \$250, and placed on probation for one year. Later, Stapleton was involved with others in the community that wanted the head football coach removed, creating discord within the football program and school. Stapleton was removed from all coaching duties. In 2010, the Board faced a budget shortfall of over \$500,000 and implemented its reduction in force policy and this included the transfer of tenured teachers, including Stapleton.

Issue(s): Was the evidence sufficient to support the transfer of Stapleton?

Holding: The evidence was sufficient to transfer Stapleton, was not made for political or personal reasons, and was not arbitrary or unjust.

Reasoning: Although Stapleton argued that his transfer was taken for personal reasons, the Hearing officer found that the evidence did not support his contention. The necessary reduction in force created a vacancy at the elementary school and with Stapleton's duties at the high school diminished, he was the appropriate teacher to transfer.

Disposition: Transfer upheld.

Citation: *Howard v. Birmingham City Board of Education*, FMCS Case No. – None (November 4, 2010).

Hearing Officer: Sandefer, Jim

Key Facts: Howard, a special education teacher, was terminated for verbally and physically abusing autistic students in her class. A student teacher assigned to Howard notified her supervisor about Howard's conduct, specifically "that Howard screamed and yelled at her students constantly, forcefully put the children in time-out, physically grabbed a student...and banged and slammed objects on tables to get the students' attention" (p. 6-7). The student teacher

also witnessed Howard hitting and spanking students. Once the student teacher made her report, other teachers began to report inappropriate behavior they had witnessed. Prior to this investigation, there had been other allegations of misconduct, but Howard, who often used a wheelchair herself, claimed those incidents were misunderstandings.

Issue(s): Was the Board's decision to terminate Howard justified?

Holding: It is in the best interest of the students that the Board's recommendation to terminate Howard be upheld as her behavior was not acceptable.

Reasoning: The evidence indicated that Howard's students were subjected to physical and verbal abuse. The Hearing Officer stated:

These children are special needs children, several of which cannot even communicate verbally. A teacher of such children should be protective of these children while providing them with a classroom conducive for educating them. The Board, as well as the parents of such children, rely on teachers to ensure the safety and well being of these students while providing them with the best education possible. (p. 12)

Disposition: Termination upheld.

Citation: *Wall v. Tarrant City Board of Education*, FMCS Case No. 10-04174 (November 5, 2010).

Hearing Officer: Williams, Roger

Key Facts: The Board partially cancelled Wall's contract from a 1.0 career technical teacher to a .5 teacher following significant state and local funding cuts. In addition, the number of students enrolled in Wall's automotive technology classes had declined significantly during the previous three to four school years.

Issue(s): Was the partial cancellation of Wall's contract reasonable and justified?

Holding: The partial cancellation of Wall's contract was for good and just cause.

Reasoning: The evidence unequivocally proved that the reductions in state and local funding and loss of earned teacher units required a reduction in the number of teaching positions.

Disposition: Partial cancellation upheld.

Citation: *Shoemaker v. Alabama Department of Youth Services*, FMCS Case No.10-03012 (November 19, 2010).

Hearing Officer: Dennis, Rodney

Key Facts: Shoemaker, a welding teacher for the Alabama Department of Youth Services, was suspended for 20 days for using a wooden paddle to hit students and allowing students to hit one another with his paddle while under his supervision. Shoemaker admitted that he had paddled students over the past twenty-nine years. He also admitted that he allowed his students to play a game where they swapped licks with a paddle until one of the students quit. Alabama Department of Youth Services policy prohibits corporal punishment.

Issue(s): Should Shoemaker be suspended for 20 days?

Holding: A five day suspension is the “proper level of penalty to instruct Shoemaker that his handling of the matter was unacceptable” (p. 9).

Reasoning: The Hearing Officer found that although Shoemaker admitted paddling students and that he allowed them to paddle one another, the agency did not provide a copy of the investigative report that prompted Shoemaker’s suspension nor did the agency provide any evidence that employees were aware of what disciplinary actions might flow from the use of corporal punishment in violation of policy. The Hearing Officer also considered Shoemaker’s employment history as a mitigating factor and that “employee discipline applied in a unionized environment should be progressive in nature. It should be severe enough to get the



employee's attention, but at the same time be corrective, serving to educate the individual in regard to his or her behavior in the future" (p. 8-9).

Disposition: 20-day suspension reduced to a 5-day suspension.

Citation: *Rickard v. Florence City Board of Education*, FMCS Case No. 09-0360 (November 25, 2010).

Hearing Officer: Williams, Don

Key Facts: The Board terminated Rickard for continued repeated tardiness following multiple warnings and reprimands. Rickard argued that he had health conditions and medication that caused him to be tardy to work and that he was usually only a few minutes tardy to work.

Issue(s): Did the Board have sufficient grounds to terminate Rickard?

Holding: Rickard's repeated tardiness, even with accommodations, over a period of years constituted grounds for termination.

Reasoning: Rickard's repeated tardiness prevented him from providing close supervision of his 2nd grade students. Although Rickard has health conditions, the Hearing Officer stated, "It is difficult to fathom how the medication or ill health prevented Rickard from rising just a few minutes earlier to arrive at work on time" (p. 13-14). Moreover, the administration made numerous attempts to correct Rickard's behavior with no improvement by Rickard.

Disposition: Termination upheld.

## **2011**

Citation: *Bell v. Tallassee City Board of Education*, FMCS Case No. 10-04550 (January 4, 2011).

Hearing Officer: Bain, Trevor

Key Facts: Following a reduction in funding, the Board transferred Bell from her position as a ten-month guidance counselor to nine-month kindergarten teacher. Bell argued that the notice of transfer was deficient because she was never given written reasons for the transfer and that the Board's action was not a transfer, but was a partial cancellation of her contract. The Board argued that any deficiency in the notice was harmless because Bell was provided the reasons for her transfer and that she waived her right to contest the proposed transfer on based on such deficiency when she notified the Board of her contest to the transfer. In addition, the Board argued that Bell's transfer is simply a change in position, and that the Alabama State Department of Education did not fully fund guidance counselor positions.

Issue(s): Was there sufficient evidence for the Board to transfer Bell, was it for political or personal reasons, or was it arbitrarily unjust?

Holding: There was sufficient evidence to support the transfer based upon the reduction in funding. The Hearing Officer also held that the transfer was not taken for political or personal reasons. However, the transfer was arbitrarily unjust.

Reasoning: The Board has a reduction in force policy that provides that the Board will consider years of teaching with the system, years of educational experience, and qualifications to teach particular subjects. Although Bell had the least number of years in the position of guidance counselor of the five counselors, the Board should have also considered her length of service with the system. Additionally, the transfer resulted in a loss of status. Bell's transfer should have been designated a transfer/partial cancellation as her contract would change from a ten-month to a nine-month contract resulting in a loss of income.

Disposition: Transfer denied.

Citation: *Mims v. Tuscaloosa County Board of Education*, FMCS Case No. 10-58476-3 (January 7, 2011).

Hearing Officer: Williams, Roger

Key Facts: During the 2008-2009 school year, following cuts in state funding, the Board came under financial intervention by the Alabama State Department of Education because the Board did not have a reserve equal to one month's operating expenses as required by law. State funding was prorated by 7.5% in the fall of 2009, resulting in a loss of \$6,500,000. Additional proration in 2010 resulted in an additional loss of \$2,500,000 in state funding. As a result, the Board implemented a reduction in force and developed a new organizational chart. At that time, Mims was one of three assistant superintendents. After the new organizational chart was approved by the Board, the three assistant superintendent positions were eliminated and one deputy superintendent position was created. Mims did not apply for the deputy superintendent position and it was filled with one of the other assistant superintendents. When the other assistant superintendent retired, Mims indicated to the Superintendent that he planned to retire in December 2009. In the meantime, Mims was offered a principalship at a middle school. Mims declined that position as well as other positions that became available. Mims and the Superintendent discussed how to resolve this situation and Mims responded that he wanted to get to the end of his contract and that if that could happen, it would be acceptable. The Superintendent clarified with Mims that this agreement would be subject to his retiring at the end of his contract in June 2010. Mims signed an acceptance letter agreeing to these terms. This agreement prevented Mims's termination in December 2009. In March 2010, Mims sent the Superintendent an email that stated his plans had changed and that he was no longer planning to retire at the end of his contract. The Superintendent recommended Mims's termination and the

Board terminated Mims in June of 2010. Mims argued that he never told the Superintendent that he would retire, only that he planned to do so

Issue(s): Was Mims terminated for a justifiable decrease in the number of positions and for other good and just cause?

Holding: Mims's termination was due to a justifiable decrease in the number of assistant superintendent positions and the Board's reduction in force policy.

Reasoning: The evidence was uncontradicted that Mims's assistant superintendent position was eliminated because of the financial exigency caused by proration. In addition, Mims was offered another position, declined it, and could have been terminated in December 2009. Instead, by mutual agreement, Mims was allowed to remain with the Board through the end of his contract while performing temporary duties.

Disposition: Termination upheld.

Citation: *Reinhart v. Mobile County Board of School Commissioners*, FMCS Case No. 10-00095 (January 15, 2011).

Hearing Officer: Goldberg, Mitchell

Key Facts: In 2005, after barely meeting the system's summative performance standard, Reinhart's elementary principal recommended him for involuntary transfer. Recognizing that his teaching performance had deteriorated because of serious personal problems and agreeing with his principal that he might be a better middle or high school teacher, Reinhart transferred to a middle school in the system. After one semester in a challenging, high-poverty school, he wanted to leave, but instead took a medical leave of absence for the remainder of the year. He applied for other positions and was hired to teach 4th grade for the 2006-2007 school year at another elementary school in the system. Almost immediately, his principal noted deficiencies in his

instruction and classroom management. His principal attempted to have him transferred and Reinhart also sought a voluntary transfer. Both requests were denied and he returned as a 4th grade teacher. His students' test scores were the lowest of the 4th grade teachers and he continued to receive written disciplinary actions for failure to follow policies and directives from his principal. 2008-2009 continued much the same and Reinhart was placed on a Plan of Assistance. By the end of the 2009 school year, his contract was cancelled.

Issue(s): Whether the evidence supported cancellation of Reinhart's contract, whether there were any improper motives for cancellation such as political or personal reasons, and whether cancellation is the appropriate penalty?

Holding: Although Reinhart is capable of satisfactory teaching performance, he did not do so in his present position.

Reasoning: After affording little weight was given to documents and records that were not shared with the teacher but that formed part of some of the charges against him, the Hearing Officer found ample evidence to support Reinhart's termination. The Hearing Officer found testimony particularly persuasive from a Central Office staff member who observed Reinhart's class and reported that the students were out of control and little instruction was occurring. In addition, Reinhart's poor performance was reflected by his students' poor test scores. In finding that Reinhart's performance was unsatisfactory, the Hearing Officer considered his many years of experience, his educational level, his opportunities and participation in professional development, and the individualized assistance provided to him. The Hearing Officer did not consider a transfer as an appropriate remedy because it would "force [Reinhart] upon a principal who does not want him as a teacher" and the same concerns about his classroom performance would continue to exist. The Hearing Officer stated that Reinhart "should attempt to complete

his teaching career, if he chooses, at another Alabama school system that is more suitable to his talents and abilities” (p. 37).

Disposition: Termination upheld.

Citation: *Carter v. Alabama Department of Youth Services*, FMCS Case No. 10-02342 (January 29, 2011).

Hearing Officer: McPherson, George, Jr.

Key Facts: Carter served as a teacher in the Special Program Achievement Network (SPAN), working with students in the juvenile court system. She was suspended for ten days without pay after she hung up on her immediate supervisor during a telephone conversation with him. She had also previously walked out on her immediate supervisor when he needed to speak with her about an incident, and she had been repeatedly disciplined for unprofessional conduct with staff and students.

Issue(s): Did the Agency have just cause to suspend Carter for ten days without pay?

Holding: The Agency had just cause to suspend Carter for insubordination.

Reasoning: Carter hung up the phone on her supervisor because she was angry at him for giving her a directive with which she did not want to comply. In addition, testimony showed that Carter "constantly argued with her colleagues and supervisors throughout her tenure in the program" (p. 3). Carter argued that she had already been previously disciplined for unprofessional conduct and that those incidents should not be considered in her discipline in this case. However, the Hearing Officer found that these previous warnings provided the foundation for more severe discipline.

Disposition: Suspension upheld.

Citation: *McDonald v. Montgomery County Board of Education*, FMCS Case No. – None (February 1, 2011).

Hearing Officer: Sandefer, Jim

Key Facts: Following a reduction in force because of proration, McDonald was transferred from a full assistant principal (1.0) at one school to an assistant principal split (.5/.5) between his current school and another school. His 1.0 position had been reduced to a .5 unit resulting in the change. Although he was given a choice where he would spend the other half of his time, he declined to do so. Some assistant principals lost their administrative positions and were returned to the classroom. Others, like McDonald, were moved to other positions. McDonald's contract was not reduced and his salary remained the same. McDonald argued that his transfer was unfair because other assistant principals with less seniority were allowed to stay at a school full time. However, the Board had attempted to keep employees at the schools they were located in to leave administrative teams together where possible.

Issue(s): Was the Board's decision to transfer McDonald due to the reduction in force, was the staffing of assistant principals made for political or personal reasons, and was the action arbitrarily unjust?

Holding: There was sufficient evidence that the transfer was needed based upon loss of funding and there was no evidence there was a political or personal motive behind the transfer, and the transfer was not arbitrarily unjust. In addition, there was no loss of status or violation of contract as a result of the transfer.

Reasoning: Although McDonald argued that his request to be considered for the principalship of his school had an impact on this decision, there was no evidence presented to support his contention.

Citation: *Parham v. Huntsville City Board of Education*, FMCS Case No. – None (February 18, 2011).

Hearing Officer: Sandefer, Jim

Key Facts: Parham, a special education teacher working with emotionally conflicted students, was terminated based upon over thirty-five reasons supporting the grounds of incompetency, insubordination, neglect of duty, failure to perform duties in a satisfactory manner, or other good and just cause. Some of the allegations included that Parham put his hands around the neck of a student, that he told a student “he was going to ‘beat the hell out of him,’” that he directed profanity towards his students, that his students were allowed to be unsupervised, that he threatened a student with physical harm, and that he failed to complete IEPs on a timely basis (p. 7).

Issue(s): Was the Board’s decision to terminate Parham justified based upon the evidence and in accordance with the TTA?

Holding: The Board had just cause to terminate Parham.

Reasoning: There was substantial and overwhelming evidence that showed Parham was incompetent, insubordinate, and that he neglected his duties. Even when he performed his duties, he did so in an unsatisfactory manner. Parham had previously received a 10-day suspension without pay for dragging a female student down the hallway by her arm and had received numerous written reprimands. He was provided with feedback as to areas where he needed to improve, but he did not do so.

Disposition: Termination upheld.

Citation: *Miller v. Phenix City Board of Education*, FMCS Case No. 10-04796 (February 19, 2011).



Hearing Officer: Dinneen, Edith

Key Facts: Miller admitted that he had sexual intercourse with a 15-year-old student in his classroom and was charged with rape.

Issue(s): Whether Miller's contract was properly terminated for immorality, incompetency, neglect of duty, and/or for other good and just cause, and not for political or personal reasons.

Holding: The Board had sufficient evidence to terminate Miller's employment contract.

Reasoning: The evidence supported the conclusion that Miller had sexual contact with a 15-year-old student on school property. The Hearing Officer held that this constituted immoral conduct and rendered Miller unfit and incompetent to serve as a teacher.

Disposition: Termination upheld.

Citation: *Carter v. Alabama Department of Youth Services*, FMCS Case No. 10-04847 (February 22, 2011).

Hearing Officer: Tidwell, Carol

Key Facts: The Alabama Department of Youth Services terminated Carter's contract because he paddled students and he showed students an inappropriate and/or pornographic photograph on his cell phone. The paddling was not the main factor in the decision to terminate Carter as another teacher received a 20-day unpaid suspension for the same misconduct. Carter claimed that he showed the photograph to the students, who were being treated by the Accountability Based Sexual Offender Program, to discourage them from engaging in homosexual activity. The picture depicted a nude male, viewed from the back, with his genitalia visible. The picture prominently focused on the man's anus which protrudes from his body and is

bright pink. Carter testified that he showed the two students the picture and told “them when you do homosexual things, this [is] what will occur, what can happen to you” (p. 7).

Issue(s): Did the Department of Youth Services have good and just cause to cancel Carter’s contract?

Holding: The Department had other good and just cause to terminate Carter’s contract.

Reasoning: Carter’s poor explanation for showing the students the picture, that he was attempting to deter homosexual behavior, falls within the definition of other good and just cause.

Disposition: Termination upheld.

Citation: *Harrison v. Geneva County Board of Education*, FMCS Case No. 10-04131-3 (February 24, 2011).

Hearing Officer: Williams, Roger

Key Facts: Harrison served as an Instructional Specialist, a 12-month position. After proration in October 2009, the Board lost \$2.8 million in state funding and also had decreased federal funding. The Board eliminated the instructional specialist position and determined that it would use Federal funds, which funded 80% of the position, to support Title 1 schools. Thereafter, Harrison was transferred from her 12-month central office position to a 9-month local school position. Harrison argued that she believed the Superintendent had recommended her transfer to a local school special education teaching position for personal reasons, specifically that she disagreed with him as to whether the system should pursue district accreditation or individual school accreditation by the Southern Association of Colleges and Schools and that the Superintendent was angry at Harrison for assisting a colleague in a move to a new office, comparing it to a janitor’s closet. The parties agreed that Harrison was an excellent Instructional Specialist.

Issue(s): Whether the partial cancellation and transfer of Harrison was taken for political or personal reasons or was in arbitrarily unjust?

Holding: The evidence proved that the Board's actions were taken because it decided that it would be more beneficial to the school system to use its funds in elementary school classrooms rather than for an Instructional Specialist position.

Reasoning: The evidence was insufficient to prove that Harrison's contract was partially cancelled for personal reasons because there was no connection between the incidents cited by Harrison and the Superintendent's recommendation to eliminate the Instructional Specialist position.

Disposition: Partial cancellation and transfer upheld.

Citation: *Love v. Opelika City Board of Education*, FMCS Case No. 11-00496 (April 13, 2011).

Hearing Officer: Shaw, Sue

Key Facts: In 2009, Love received a suspension after grabbing a student by the neck and using profanity. She also received a one year probation by the State Board of Education. In 2010, Love told a student, "I don't owe you shit" when a student said something to Love about owing him money (p. 7). Love admitted making the statement and was placed on administrative leave. Shortly thereafter, the Superintendent notified Love that he was recommending the cancellation of her contract for unprofessional conduct and for her history of acting in an unprofessional manner related to the 2009 incident.

Issue(s): Did the Opelika City Board of Education have good and just cause, as required by the TTA, to terminate the employment contract of Love? If not, what shall be the remedy?

Holding: The Board did not have good and just cause to terminate Love. Termination of Love for her use of the word “shit” in a classroom was excessive.

Reasoning: On the whole, Love’s evaluations were satisfactory. The Superintendent only included two incidents, the use of the word “shit” and the choking incident in its notice of intent to recommend termination. Although he stated that Love had a history of acting in an unprofessional manner, this is an overbroad phrase that rendered impossible for Love to present a defense. In addition, Love was never notified that her suspension in 2009 was her “last chance” for progressive discipline and that any further problems would result in termination.

Disposition: Termination reversed. The Hearing Officer ordered a 5-day suspension without pay, a reprimand, and Love placed on notice that any future serious infraction may result in termination.

Citation: *Nicholson v. Mobile County Board of School Commissioners*, FMCS Case No. 11-0019 (April 18, 2011).

Hearing Officer: Rice, Richard

Key Facts: The Board transferred Nicholson from one school to another because of budgetary reasons. At the time of the transfer, the Board faced large scale budget cuts.

Issue(s): Whether the evidence was insufficient for the Board to take the action, whether such action was taken for political or personal reasons, or whether such action was arbitrarily unjust.

Holding: The Board did not violate the TTA.

Reasoning: No argument was made that the decision of the Board was made for political or personal reasons. Although Nicholson argued that it was arbitrarily unjust to transfer her to a school resulting to an all female administration where students have a large number of behavior

problems, the Hearing Officer found no supporting rationale for this argument. Additionally, although the Board received some unexpected federal funding after its decision, the Hearing Officer said that the Board did not have to consider the impact these funds might have on Nicholson's transfer, particularly as there was no guarantee the funds would be received in future years.

Disposition: Transfer upheld

Citation: *Moon-Williams v. Montgomery Board of Education*, FMCS Case No. – None (May 3, 2011).

Hearing Officer: Gutman, Edward

Key Facts: Moon-Williams, a special education teacher, was given instructions to complete all IEPs by the end of the school year for the next school year. Moon-Williams did not complete her IEPs and, during the start of the next school year, she copied and pasted a February IEP meeting document into the new school year document and indicated that an IEP meeting was held in May of the previous school year. She signed the names of two individuals who attended the February meeting to the May IEP, although those individuals did not attend the May meeting. During an audit, the student's IEP indicated that the document was not created until August 18, 2010, but the meeting date was listed as May 18, 2010. When this was discovered, the two individuals who Moon-Williams listed as attending and signing the May IEP stated that they had not signed the May IEP nor had they given Moon-Williams permission to sign their names. In September, the system's special education director issued a letter of reprimand to Moon-Williams that stated that Moon-Williams had created a major violation of IDEA by forging the signatures, had denied the child a free and appropriate public education (FAPE) by not holding the IEP meeting, but documenting that it was held, and causing the school system to be in non-

compliance of federal and state guidelines. Moon-Williams did not acknowledge the letter or respond to it. Once the letter was forwarded to Human Resources, the Human Resources director for the system recommended to the Superintendent that Moon-Williams be suspended without pay for 20 days. The specific reasons for the recommendation is that forgery is a criminal offense, that Moon-Williams had exposed the system to legal liability, that the system's progressive discipline guidelines allowed for suspension on a first offense for falsification of records, and that another teacher who forged signatures on an IEP was suspended for 20 days. The Board adopted the Superintendent's recommendation to suspend Moon-Williams in November 2010.

Issue(s): Did the Board have just cause to suspend Moon-Williams?

Holding: The Board had substantive just cause, but not procedural just cause to suspend Moon-Williams.

Reasoning: The Board established just cause for suspending Moon-Williams because it proved and Moon-Williams admitted the forgery of the signatures on the IEP. The Hearing Officer stated:

Moon-Williams's explanation that she forged signatures on the IEP because she was too busy to document a meeting and develop the IEP properly cannot be taken seriously. No matter how busy she was during this period, she cannot be excused from falsifying documentation required by federal law. Moreover, while the requirement of doing a school year IEP might have been burdensome for the reasons Ms. Moon-Williams explained, she cannot justify her deception of changing the dates on the February IEP and signing for the team members as if a team meeting had been conducted. (*Montgomery County Bd. of Educ. v. Moon-Williams*, 107 So. 3d 205, 210 (Ala. Civ. App. 2012))

However, despite finding that Moon-Williams engaged in egregious conduct, the Hearing Officer found that suspending Moon-Williams after she had already received a reprimand for the same misconduct violated a principle of "workplace double jeopardy" (p. 210).

Disposition: Suspension reversed.

Appeal: Reversed and remanded, *Montgomery County Bd. of Educ. v. Moon-Williams*, 107 So. 3d 205 (Ala. Civ. App. 2012).

Citation: *Crutch v. Lawrence County Board of Education*, FMCS Case No. – None (August 3, 2011).

Hearing Officer: Unknown

Key Facts: After administrators received complaints from students and parents and after documenting Crutch's poor job performance with respect to grades and lesson plans, the Superintendent recommended termination of Crutch's employment. The notice listed the following reasons for Crutch's termination: Incompetence, neglect of duty, failure to perform duties in a satisfactory manner, insubordination, or other good and just cause. The notice also included 32 statements of fact in support of the reasons. Crutch did not attend the Board meeting on her termination. However, she did contest the decision.

Issue(s): Did the Board have good and just cause to cancel Crutch's contract?

Holding: The Board proved, by a preponderance of the evidence, the statutory grounds stated in its notice to Crutch.

Reasoning: None identified. The Hearing Officer's opinion was sealed and Crutch did not appeal the hearing officer's decision. As a result, facts were obtained from *Crutch v. Lawrence Cnty. Bd. of Educ.*, et al, 2014 WL 3889898 (N.D. Ala. 2014).

Disposition: Termination upheld.

Appeal: After her termination was upheld by the hearing officer, instead of appealing her termination to the Alabama Court of Civil Appeals, Crutch filed a federal lawsuit, claiming that her termination was racially discriminatory in violation of 42 U.S.C. §1983. Crutch also asserted claims under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment

Act of 1967, and Alabama law. Those claims were dismissed early in litigation. The court granted summary judgment for the Board, finding that Crutch did not meet her burden of showing that she was similarly situated to white teachers that she claims were not disciplined as harshly as she was. “The Board made its decision to terminate Crutch’s employment based on her documented history of poor performance and her failure to admit wrongdoing.” *Crutch v. Lawrence County Bd. of Educ.*, et al, 2014 WL 3889898 (N.D. Ala. 2014; p. 5).

### **Analysis of Hearing Officer Opinions**

This research project was undertaken to identify issues related to the implementation of the Alabama TTA. The purposes of the research were to document and analyze adverse disciplinary actions pursuant to the TTA to identify common trends, issues, and guidelines. In this study, the data are derived from the hearing officer opinions related to adverse disciplinary actions involving certified educator suspension, transfer, partial contract cancellation, or termination actions as well as subsequent appeals. There were a total of 106 TTA cases utilizing the TTA arbitration-adapted process beginning with *Brooks v. Bd. of School Com’rs of Mobile County* (April 20, 2005) and ending with *Crutch v. Lawrence County Bd. of Educ.* (August 3, 2011). After briefing these cases, further analysis will detail outcomes, determine issues, and identify trends found among all 106 opinions. This analysis will help inform school boards, administrators, teachers, and attorneys in the decision-making process for adverse employment actions, particularly in jurisdictions with a similar process for arbitrator/hearing officer review of board decisions. In addition, this will help guide legislative changes to teacher tenure laws in Alabama and elsewhere.



## Outcomes

The most cases were decided during 2008 when hearing officers decided a total of 23 adverse employment actions, which follows 2007 where 21 boards voted in favor of an adverse employment action. In the other years under the TTA, the number of board decisions and the number of hearing officer decisions remained fairly consistent, with the exception of 2004, when the TTA was first adopted and initial cases had not yet been heard by a hearing officer and 2011, when the TTA was repealed. Overall, hearing officers upheld board decisions in 67 of the 106 cases or 63% of decisions. For a more detailed listed of each case, the adverse employment action proposed, and the disposition, see Table 4. Table 1 shows the number of cases decided by year.

Table 1

*Number of Cases Decided per Year*

Board Decisions by Year		Hearing Officer Decisions by Year	
2004	5	2004	0
2005	17	2005	14
2006	11	2006	16
2007	21	2007	10
2008	15	2008	23
2009	12	2009	17
2010	14	2010	13
2011	1	2011	13

Of the 106 cases, the number of days between the board’s action and for the hearing officer’s decision could be determined in all but six cases (no dates were reported in *Pettway v. Bullock County Bd. of Educ.* (FMCS No.--None), *Outland v. Greene County Bd. of Educ.* (FMCS No.--None), *Staten v. Huntsville City Bd. of Educ.* (FMCS No. 07-02515), *Hinds v. Huntsville City Bd. of Educ.* (FMCS No. 08-02465), *Stallworth v. Wilcox County Bd. of Educ.* (FMCS No.--None), and *Shoemaker v. Alabama Dept. of Youth Services* (FMCS No. 10-03012).

The length of time between board action and the hearing officer’s decision is important for a number of reasons, but one reason is particularly important. When a teacher contested an adverse employment action, this effectively “stayed” the teacher in whatever position, status, pay, etc., he or she was in pending the decision of the hearing officer. For example, if a teacher contested a transfer, the transfer was not effectuated while the contest of the transfer was ongoing. If a board voted to terminate an employee, the employee received pay during that time. The frequency of adverse employment actions by year to days of decision and type of Board action is summarized in Table 2. Table 3 summarizes the number of days from board decision to hearing officer decision, including whether or not the case was decided for or against the Board.

Table 2

*Frequency of Adverse Employment Actions by Year by Days to Decision*

	0-99 Days	100-149	150-199	200-249	250-299	300-349	350-399	400-449	450+
2005		4	2	5	1	1	1		
2006	3		3	2	1		2	2	
2007		2	2	2	1	1	1	2	1 (583 days)
2008		6		4	3	1	6	1	1 (555 days)
2009		2	4	4		1	4	1	
2010		2	4	2		2		2	
2011			4	5	1	1	1	1	1 (590 days)
Board Action	2 Trans. 1 Term.	5 Terms. 10 Trans. 1 Susp.	6 Terms. 5 Trans. 6 Susp. 2 PT.	20 Term. 3 Trans. 1 Susp.	5 Term. 1 Trans. 1 PT.	5 Term. 2 Trans.	8 Term. 6 PT. 1 Susp.	6 Term. 1 Trans. 2 Susp.	3 Terms.

*Note: Trans. = Transfer; Term. = Termination; Susp. = Suspension; PT = Partial Termination*

Table 3

*Number of Days from Board Decision to Hearing Officer Decision by Type of Board Action and Number of Cases Decided for Board*

Type of Board Action	Average Number of Days for Decision	Longest Time to Decision	Range of Days for Decision	Number of Cases	For Board?
Minor Suspension	207	405	147-405	7	4
Major Suspension	240	379	155-379	4	1
Transfer	181	435	88-435	23	19
Partial Termination	175	195	155-195	2	2
Partial Termination and Transfer	355	378	264-378	7	6
Termination	267	590	92-590	63	35

### **Minor Suspensions**

Sections 16-24-17 through 16-24-19, *Code of Alabama* (1975), provided for minor suspensions of teachers for seven days or less without pay with just cause. Following a conference with the board and notification of board action to suspended the teacher, the teacher had 15 days upon notice of the board’s decision to file a notice of contest and request a review of the suspension by a hearing officer (selection of the hearing officer pursuant to §16-24-20, *Code of Alabama* (1975)). Once selected, the hearing officer provided the parties with a date to submit written materials, between 30 and 60 days of the appointment of the hearing officer. Based upon the written submissions of the parties, the hearing officer determined whether the evidence was sufficient to take action. The hearing officer rendered a written decision, with findings of fact and conclusions of law, within 30 days from the deadline for the submission of written materials. The decision of the hearing officer was final.

There were seven cases involving minor suspensions. In those cases, three of the seven cases were decided in favor of the teacher. Of those three cases, one suspension was reduced

from five days to three because the hearing officer found the investigation into the teacher's misconduct was tainted (*Burkette v. Montgomery County Bd. of Educ.*). Two suspensions were reversed outright (*Ellis v. Huntsville City Bd. of Educ.* and *Oglesby v. Talladega County Bd. of Educ.*). On average, 207 days passed between the date of the board's vote to suspend the teacher and the date of the hearing officer's decision (a range of 147-405 days). Five of the cases were decided in less than 200 days, one case was decided in 238, and another case was decided in 405 days.

### **Major Suspensions**

Sections 16-24-14 through 16-24-16, *Code of Alabama* (1975) provided for major suspensions (more than seven days) of teachers. Like minor suspensions, the teacher had the right to a conference with the Board. However, unlike minor suspensions, the teacher was entitled to a full hearing with a hearing officer as part of the review instead of submission of written materials. The hearing officer conducted a *de novo* hearing to determine whether there was just cause for the suspension and determined which action should be taken: a suspension with or without pay, a reprimand, other disciplinary action, or no action. The hearing officer's decision could be appealed to the Alabama Court of Civil Appeals.

Of the four major suspensions reviewed by a hearing officer, three of the four cases were decided in favor of the teacher. The length of time between board action and hearing officer decision could not be identified in one case, but the remaining three cases took 155 days, 187 days, and 379 days from board action to hearing officer decision (a range of 155-379 days). Two major suspensions were reversed (*Alvarez v. Bd. of School Com'rs of Mobile County* and *Moon-Williams v. Montgomery County Bd. of Educ.*), one suspension was reduced from 20 days to five

(*Shoemaker v. Alabama Dep't. of Youth Services*), and one suspension was upheld in favor of the board.

### **Partial Terminations**

The process for reviewing a contested partial termination of a teacher contract was very similar to that of a major suspension, including the right to appeal the hearing officer's decision to the Alabama Court of Civil Appeals to determine whether the decision was arbitrary and capricious. Two partial terminations were decided under the TTA. Both decisions were for the board. One decision took 155 days while the other took 195 days. In both cases, the board stated fiscal reasons to justify its need for the partial termination action.

### **Partial Terminations and Transfers**

Similar to partial terminations and major suspensions, a teacher could request review of a board's action in partially terminating a contract and transferring the teacher to a new position. Like partial terminations, budgetary and staffing considerations were stated by the board to support the need for taking action. Seven partial terminations and transfers were decided, with only one decision against the board and that decision was eventually reversed on appeal (*Glenn v. Bd. of School Com'rs of Mobile County*). Three of the seven cases were consolidated with the same hearing officer as they were based upon the same facts. On average, these cases took 355 days from the date of the board's action to the decision of the hearing officer (a range of 264-378 days).

### **Transfers**

Sections 16-24-5 through 16-24-7, *Code of Alabama* (1975), set forth the provisions for the transfer of a teacher. A teacher could obtain a hearing officer's review of the board's decision. A hearing would be held, but no witnesses could be called. The hearing officer

reviewed the proceedings to determine whether the evidence was insufficient for the board to take action, whether the action was taken for political and personal reasons, or whether the action was arbitrarily unjust. The decision of the hearing officer was final.

Twenty-three transfers were decided under the TTA, taking on average 181 days from the date of the Board's decision to transfer and the Hearing Officer's decision. The shortest amount of time from board action to hearing officer decision took 88 days while the longest decision took 435 days – well over one year. Only four transfer cases were decided against the Board (*Miller v. Cherokee County Bd. of Educ.*, *Calhoun v. Montgomery County Bd. of Educ.*, *Coleman v. Montgomery County Bd. of Educ.*, and *Bell v. Tallassee City Bd. of Educ.*).

### **Terminations**

Sections 16-24-8 through 16-24-10, *Code of Alabama* (1975), set forth the provisions for the cancellation, or termination, of a teacher's contract. Teachers could be terminated for “incompetency, insubordination, neglect of duty, immorality, failure to perform duties in a satisfactory manner, justifiable decrease in the number of teaching positions or other good and just cause, but cancellations may not be made for personal or political reasons” §16-24-8, *Code of Alabama* (1975). If contested, the hearing officer held a *de novo* hearing and decided which of the following actions should be taken relative to the employee: termination of the employee's contract, a suspension of the employee with or without pay, a reprimand, other disciplinary action, or no action. The hearing officer's decision could be appealed to the Alabama Court of Civil Appeals and was to be affirmed on appeal unless the court found the decision arbitrary and capricious. If so, the court could order the parties to conduct another hearing.

There were 63 cases involving terminations under the TTA. Hearing officers upheld the board's decision in all but 28 cases. Of those cases, 20 cases involved the reduction of

termination to another form of discipline and eight cases reversed the termination outright. The shortest length of time from board action to hearing officer decision was 92 days with three decisions, two with the same hearing officer (Kenneth Simon), taking over 500 days. The longest length of time for a decision was 590 days (*Reinhart v. Bd. of School Com'rs of Mobile County*). The average number of days from board action to hearing officer decision was 267 days.

Table 4

*Case Brief Summary by Date of Decision*

Parties	FCMS#	Date of Decision	Days Decision	Disciplinary Action	Disposition	For the Board?	Keywords
<i>Brooks v. Bd. of School Com'rs of Mobile County</i>	05-01477	April 20, 2005	183	Termination withdrawn	Board's rescission of the cancellation of Brooks' contract was a full and complete remedy.	Y	Estoppel
<i>Dunn v. Bd. of School Com'rs of Mobile County</i>	05-01608	April 30, 2005	130	Termination	Termination of Dunn's coaching duties for four years. Reversed termination of teaching contract and imposed a 30-day suspension without pay. Dunn to provide all players with a verbal apology and all parents/guardians with a written apology.	N	Coach, student discipline, employment history
<i>Webster v. Bd. of School Com'rs of Mobile County</i>	05-01882	July 30, 2005	221	Termination	Reinstated without back pay. However, Webster was on paid administrative leave from August 20, 2004, until his reinstatement in July 30, 2005. The Board requested that the arbitrator suspend Webster without pay so as to penalize him. The Hearing Officer declined to do so, amending the original award - "The period that the Grievant was on administrative leave from August 20, 2004 until his reinstatement shall serve as a disciplinary suspension with pay."	N	Gambling, employment history, progressive discipline, labor law
<i>Haynes v. Bd. of School Com'rs of Mobile County</i>	05-02904	August 1, 2005	144	Termination	Reinstated the teacher immediately and a letter of warning issued (the teacher was suspended with pay in July 2004 and the hearing was held in June 2005 with a decision on August 1, 2005).	N	Coach, school funds, sports, related lawsuit
<i>Bolding v. Montgomery County Bd. of Educ.</i>	05-01211	August 30, 2005	320	Termination	Termination upheld.	Y	Insubordination, prior warning, corporal punishment, profanity

*(table continues)*



Parties	FCMS#	Date of Decision	Days Decision	Disciplinary Action	Disposition	For the Board?	Keywords
<i>Fuller v. Muscle Shoals City Bd. of Educ.</i>	05-57147-3	September 24, 2005	138	Transfer	Transfer upheld.	Y	Needs of students, return from leave of absence
<i>Allen v. Florence City Bd. of Educ.</i>		October 3, 2005	113	Transfer	Transfer upheld.	Y	Needs of students
<i>Menefee v. Montgomery County Bd. of Educ.</i>	05-02699	October 7, 2005	234	Termination	Termination reduced to a written warning.	N	Labor law, second chance, progressive discipline, insubordination, profanity, sexual harassment, special education, FERPA
<i>English v. Bd. of School Com'rs of Mobile County</i>	05-03711	October 30, 2005	380	Termination	Termination reduced to three weeks without pay and a disciplinary letter that serves as a final warning.	N	Theft, one more chance, employment history
<i>Winston v. Bd. of School Com'rs of Mobile County</i>	05-04250-3	November 10, 2005	195	Partial Termination	Partial termination upheld.	Y	Grant, loss of funds, budgetary decisions
<i>Wilson v. Madison County Bd. of Educ.</i>	05-03316	November 18, 2005	252	Termination	Termination reversed.	N	Labor law, ethics, personal gain, coaching role, school funds, evidence
<i>Bradford v. Huntsville City Bd. of Educ.</i>	05-04204	November 21, 2005	209	Termination	Termination upheld.	Y	Incompetence, remediation, classroom management, progressive discipline
<i>Robinson v. Bd. of School Com'rs of Mobile County</i>	05-04420	November 25, 2005	196	Termination	Termination upheld.	Y	Labor law, progressive discipline, employment history, falsification of documents, dishonesty

(table continues)

Parties	FCMS#	Date of Decision	Days Decision	Disciplinary Action	Disposition	For the Board?	Keywords
<i>Johnston v. Baldwin County Bd. of Educ.</i>	05-04807	December 13, 2005	207	Termination	Termination reduced to 18 month suspension.	N	Labor law, standardized testing, progressive discipline, employment history
<i>Barnes v. Bd. of School Com'rs of Mobile County</i>	05-04501	February 5, 2006	279	Termination	Reduced termination to probationary status with random testing through the 2007-2008 school year. If Barnes remains drug and alcohol free, her termination will be expunged from her employment record. If she tests positive, her termination will take effect on the date of the positive test.	N	Alcoholic, EAP, treatment, probation
<i>Williams v. Marshall County Bd. of Educ.</i>	05-06066	February 23, 2006	245	Termination	Termination reversed.	N	Timely notice, procedure
<i>Cooley v. Bd. of School Com'rs of Mobile County</i>	06-00077	March 1, 2006	197	Termination	Termination reversed. Cooley was given just over a year (March 1, 2006 until July 1, 2007) to return to work after her extended leave or the Board could terminate her.	N	Labor law, related litigation, on-the-job injury, leave of absence, notice of board policy
<i>Evans v. Birmingham City Bd. of Educ.</i>	05-0351	April 15, 2006	389	Termination	Termination upheld.	Y	Alcoholic, second change, labor law
<i>Alvarez v. Bd. of School Com'rs of Mobile County</i>	06-01872	June 24, 2006	187	Major Suspension	Suspension reversed.	N	Physical and verbal abuse of student, justified conduct
<i>White v. Limestone County Bd. of Educ.</i>		August 16, 2006	92	Termination	Termination upheld.	Y	Labor law, insubordination, closed hearing, pornography
<i>Crooks v. Sumter County Bd. of Educ.</i>	06-00497	September 5, 2006	363	Termination	Termination reduced to a seven day suspension without pay.	N	Progressive discipline, evaluation, no prior warning

(table continues)

Parties	FCMS#	Date of Decision	Days Decision	Disciplinary Action	Disposition	For the Board?	Keywords
<i>McClanahan v. Birmingham City Bd. of Educ.</i>		September 16, 2006	88	Transfer	Transfer upheld.	Y	Proper notice, not arbitrarily unjust
<i>Wright v. Lauderdale County Bd. of Educ.</i>	06-01835	October 3, 2006	406	Termination	Termination upheld.	Y	Improper relationship with student, field trip
<i>Jackson v. Birmingham City Bd. of Educ.</i>	06-03411	October 18, 2006	441	Termination	Termination upheld.	Y	Insubordination
<i>Smith v. Talladega City Bd. of Educ.</i>	06-04690	October 23, 2006	95	Transfer	Transfer upheld.	Y	Deference to Board
<i>Taylor v. Butler County Bd. of Educ.</i>	06-03867	December 11, 2006	229	Termination	Termination reduced to a 30-day suspension without pay.	N	Employment history, progressive discipline, no prior warning, evaluation
<i>Taylor v. Butler County Bd. of Educ.</i>	06-04719	December 18, 2006	185	Minor Suspension	Four day suspension upheld.	Y	Employment history, insubordination, verbal abuse of students, ethics
<i>Young v. Clay County Bd. of Educ.</i>	06-04782	December 30, 2006	220	Transfer	Transfer upheld.	Y	Loss of funding, locally-funded position
<i>Hodge v. Crenshaw County Bd. of Educ.</i>	06-03412	January 16, 2007	321	Termination	Termination reversed. Ordered Hodge to be reinstated to her former position, with full seniority and benefits. Also, the Board was to reimburse Hodge for lost wages, if any, as a result of its violation of the TTA.	N	Labor law, sufficiency of evidence, hearsay, physical abuse of student
<i>Gum v. Walker County Bd. of Educ.</i>	06-60094	May 15, 2007	250	Termination	Termination upheld.	Y	Attendance, neglect of duty

(table continues)

Parties	FCMS#	Date of Decision	Days Decision	Disciplinary Action	Disposition	For the Board?	Keywords
<i>Smith v. Washington County Bd. of Educ.</i>	06-04359	June 1, 2007	381	Termination	Termination reduced to written warning.	N	Employment history, insubordination
<i>Montgomery v. Huntsville City Bd. of Educ.</i>	07-02927	September 8, 2007	152	Minor Suspension	Suspension upheld.	Y	Incompetency, insubordination, classroom management, sufficiency of evidence
<i>Miller v. Cherokee County Bd. of Educ.</i>	07-03792	October 1, 2007	110	Transfer	Transfer reversed, but the decision does not restrict the Board from abolishing the position and placing her in another position for which she is qualified.	N	Labor law, loss of status, funding
<i>Henderson v. Birmingham City Bd. of Educ.</i>		October 18, 2007	583	Termination	Termination upheld.	Y	Mental illness, EAP, incompetency, remediation
<i>Montgomery County Bd. of Educ.</i>	070710-3450-3	October 26, 2007	154	Minor Suspension	Five-day suspension reduced to three.	N	Profanity, insubordination, due process, incomplete investigation, modification of discipline
<i>Thomas v. Birmingham City Bd. of Educ.</i>		November 21, 2007	225	Termination	Termination upheld.	Y	Drug use, EAP, drug screening
<i>Todd v. Birmingham City Bd. of Educ.</i>	07-00798	November 26, 2007	409	Termination	Termination reduced to a 30-day suspension without pay.	N	Insubordination, progressive discipline, sufficiency of evidence
<i>Muhammad v. Selma City Bd. of Educ.</i>	070705-58186-3	December 14, 2007	213	Termination	Termination reduced to a 60-day suspension.	N	Labor law, employment history, progressive discipline, hearsay, insubordination

(table continues)

Parties	FCMS#	Date of Decision	Days Decision	Disciplinary Action	Disposition	For the Board?	Keywords
<i>Webb v. Montgomery County Bd. of Educ.</i>	07-02131	January 15, 2008	378	Termination	Termination reduced to a 20-day suspension without pay. (Two ten-day suspensions for the two charges)	N	Sufficiency of evidence, insubordination, prior disciplinary action, profanity, assault
<i>Shivers v. Ala. Dep't of Youth Services</i>	07-03934-3	February 14, 2008	266	Termination	Termination reduced to thirty days unpaid suspension.	N	Labor law, employment history, progressive discipline, sufficiency of evidence, injury to student, contraband
<i>Holt v. Montgomery County Bd. of Educ.</i>	08-00458	February 15, 2008	140	Transfer	Transfer upheld.	Y	Funding, deference to Board
<i>Calhoun v. Montgomery County Bd. of Educ.</i>	07-0822-04359-3	April 14, 2008	290	Transfer	Transfer reversed.	N	Sufficiency of evidence, employment history, standardized test scores, personal animus
<i>Turks v. Lowndes County Bd. of Educ.</i>	07-03851	April 29, 2008	348	Termination	Termination reversed. The Board must return Turks to his last teaching position or to another teaching position that is mutually agreeable to the parties.	N	Standardized testing, disparate treatment, burden of proof, sufficiency of evidence
<i>Nelson v. Montgomery County Bd. of Educ.</i>	07-03874	June 2, 2008	374	Partial termination and transfer	Transfer and partial cancellation upheld.	Y	Reduction in force
<i>Davis v. Montgomery County Bd. of Educ.</i>	07-03874	June 2, 2008	374	Partial termination and transfer	Transfer and partial cancellation upheld.	Y	Reduction in force
<i>Powell v. Montgomery County Bd. of Educ.</i>	07-03874	June 2, 2008	374	Partial termination and transfer	Transfer and partial cancellation upheld.	Y	Reduction in force

(table continues)

Parties	FCMS#	Date of Decision	Days Decision	Disciplinary Action	Disposition	For the Board?	Keywords
<i>Browder v. Montgomery County Bd. of Educ.</i>	08-0084-3 and 08-0084-4	June 6, 2008	357	Partial termination and transfer	Transfer and partial cancellation upheld.	Y	Progressive discipline, insubordination
<i>Paris v. Talladega City Bd. of Educ.</i>	08-01678-3	June 15, 2008	143	Termination	Termination reversed. "A lesser action, a Suspension with pay consisting of time withheld from service is warranted" (p. 21).	N	Progressive discipline, employment history, ethics violation, dishonesty, conversion of school property, sufficiency of evidence
<i>Barry v. Oxford City Bd. of Educ.</i>	08-01816	June 16, 2008	273	Termination	Termination upheld.	Y	Morality, nexus, drugs, marijuana, arrest, conviction
<i>Kemp v. Bullock County Bd. of Educ.</i>	08-01089	June 22, 2008	226	Termination	Termination upheld.	Y	Forged special education documents, sufficiency of evidence
<i>Cagle v. Tuscaloosa County Bd. of Educ.</i>		June 26, 2008	405	Minor Suspension	Suspension upheld.	Y	Teacher as parent, insubordination, late written notice
<i>Priget v. Birmingham City Bd. of Educ.</i>	08-01705	July 8, 2008	201	Termination	Termination upheld.	Y	Harassment of colleague
<i>Alvis v. Trussville City Bd. of Educ.</i>	08-03293-3	August 20, 2008	134	Transfer	Transfer upheld.	Y	Restructuring, needs of students
<i>Baker v. Eufaula City Bd. of Educ.</i>	08-039446	October 7, 2008	140	Transfer	Transfer upheld.	Y	Reduction in force
<i>Watkins v. DeKalb County Bd. of Educ.</i>	08-04127	November 7, 2008	140	Transfer	Transfer upheld.	Y	Needs of students, timing of notice

(table continues)

Parties	FCMS#	Date of Decision	Days Decision	Disciplinary Action	Disposition	For the Board?	Keywords
<i>Bishop v. Birmingham City Bd. of Educ.</i>		November 14, 2008	555	Termination	Termination upheld.	Y	Theft, misappropriation
<i>Perdue v. Montgomery County Bd. of Educ.</i>	08-01570	November 15, 2008	354	Termination	Termination upheld.	Y	Physical and verbal abuse, special education students, restraint, criminal charges
<i>Ellis v. Huntsville City Bd. of Educ.</i>	08-04064	November 17, 2008	147	Minor Suspension	Suspension reversed.	N	Progressive discipline, employment history, insubordination, prior reprimand used as basis for termination
<i>Hornsby v. Gadsden City Bd. of Educ.</i>		December 9, 2008	221	Termination	Termination upheld.	Y	Sufficiency of evidence, restraint
<i>McKinnis v. Lowndes County Bd. of Educ.</i>	08-55586-3	December 9, 2008	238	Minor Suspension	Suspension upheld.	Y	Insubordination
<i>Brooks v. Phenix City Bd. of Educ.</i>	080702-037623	January 8, 2009	237	Termination	Termination upheld.	Y	Teacher Internet pornography, immorality, nexus
<i>Danzy v. Bd. of School Com'rs of Mobile County</i>	08-04487	March 2, 2009	300	Transfer	Transfer upheld.	Y	Labor law, reduction in force
<i>Hasan v. Bd. of School Com'rs of Mobile County</i>	08-04371	May 19, 2009	378	Partial termination and transfer	Transfer and partial cancellation upheld.	Y	Reduction in force, Board deference
<i>Colson v. Jefferson County Bd. of Educ.</i>		May 26, 2009	249	Termination	Termination upheld.	Y	Criminal charges, fraud, conviction, felony, ethics

(table continues)

Parties	FCMS#	Date of Decision	Days Decision	Disciplinary Action	Disposition	For the Board?	Keywords
<i>Glenn v. Bd. of School Com'rs of Mobile County</i>	08-04313	June 4, 2009	366	Partial termination and transfer	Transfer and partial cancellation reversed.	N	Reduction in force, tenure in supervisory position
<i>Eatman v. Greene County Bd. of Educ.</i>	09-01085	July 13, 2009	193	Termination	Termination reversed. Additionally, since Eatman "also obtained a passing score for his Praxis exam in physical Education, he should be dually certified in both social studies and physical Education" (p.10).	N	Teacher certification, hearing officer authority, Praxis
<i>Helton v. Madison County Bd. of Educ.</i>		August 28, 2009	114	Transfer	Transfer upheld.	Y	Needs of students, return from leave of absence
<i>Bowling v. Morgan County Bd. of Educ.</i>	09-02283-3	August 29, 2009	156	Termination	Termination reduced to a 10-day suspension with pay.	N	Substance abuse, pseudoaddiction, sufficiency of evidence, credibility of witnesses
<i>Thomas v. Sumter County Bd. of Educ.</i>	08-04850-3	September 8, 2009	435	Transfer	Transfer upheld.	Y	Funding, program needs
<i>Hyche v. Cherokee County Bd. of Educ.</i>		October 17, 2009	150	Transfer	Transfer upheld.	Y	Reduction in force
<i>Coleman v. Montgomery County Bd. of Educ.</i>	09-03949	October 30, 2009	155	Transfer	Transfer reversed.	N	Reduction in force, no notice to apply for other positions
<i>Granger v. Montgomery County Bd. of Educ.</i>	09-01218	November 2, 2009	350	Termination	The Board will provide outside psychological testing and treatment for anger management and, if Granger found fit for duty, will be offered and reinstated to a teaching position. Once reinstated, he will be suspended without pay for 30 days with a one year probationary period.	N	Labor law, threats by teacher, progressive discipline, employment history

(table continues)



Parties	FCMS#	Date of Decision	Days Decision	Disciplinary Action	Disposition	For the Board?	Keywords
<i>Frye v. Walker County Bd. of Educ.</i>		November 17, 2009	140	Termination	Termination upheld.	Y	Progressive discipline
<i>Tyler v. Montgomery County Bd. of Educ.</i>	09-03461	December 30, 2009	223	Termination	Termination reduced to a one-week suspension without pay.	N	Employment history, professional judgment, inappropriate teacher/student relationship
<i>Tompkins v. Montgomery County Bd. of Educ.</i>	09-0360	December 30, 2009	230	Termination	Termination upheld.	Y	Employment history, related litigation, FERPA
<i>Mizell v. Montgomery County Bd. of Educ.</i>	09-03946	January 4, 2010	178	Transfer	Transfer upheld.	Y	Labor law, reduction in force
<i>Thomas v. Huntsville City Bd. of Educ.</i>	09-04048	January 21, 2010	185	Termination	Termination upheld.	Y	Incompetence, classroom management, remediation
<i>Roberts v. Huntsville City Bd. of Educ.</i>	09-04093	February 19, 2010	229	Termination	Termination upheld.	Y	Substance abuse, addiction, mental health, competency, second chance
<i>Fuqua v. Bd. of School Com'rs of Mobile County</i>	09-04368	April 1, 2010	323	Transfer	Transfer upheld.	Y	Reduction in force
<i>Oglesby v. Talladega County Bd. of Educ.</i>	10-01168-3	May 17, 2010	167	Minor Suspension	Suspension reversed.	N	Sufficiency of evidence, physical abuse, justified conduct, hearsay

(table continues)

Parties	FCMS#	Date of Decision	Days Decision	Disciplinary Action	Disposition	For the Board?	Keywords
<i>Nelson v. Russell County Bd. of Educ.</i>	10-1006-00023-3	June 25, 2010	336	Termination	Termination reduced to a 15 day suspension.	N	Sufficiency of evidence, justified conduct, profanity, physical abuse, employment history
<i>Petitt v. Jefferson County Bd. of Educ.</i>	10-52678	July 22, 2010	232	Termination	Termination upheld.	Y	Slapped a student, professional judgment, insubordination
<i>Isaacs v. Jefferson County Bd. of Educ.</i>	10-10250-3	August 5, 2010	215	Termination	Termination upheld.	Y	Insubordination, profanity, threats, employment history
<i>Stapleton v. Ozark City Bd. of Educ.</i>	10-04075	October 10, 2010	105	Transfer	Transfer upheld.	Y	Reduction in force
<i>Howard v. Birmingham City Bd. of Educ.</i>		November 4, 2010	441	Termination	Termination upheld.	Y	Physical and verbal abuse, special Education students
<i>Wall v. Tarrant City Bd. of Educ.</i>	10-04174	November 5, 2010	155	Partial termination	Partial cancellation upheld.	Y	Reduction in force
<i>Shoemaker v. Alabama Dep't of Youth Services</i>	10-03012	November 19, 2010		Major Suspension	20-day suspension reduced to 5 days.	N	Labor law, employment history, progressive discipline corporal punishment, no prior warning
<i>Rickard v. Florence City Bd. of Educ.</i>	09-0360	November 25, 2010	145	Termination	Termination upheld.	Y	Tardiness, accommodation, neglect of duty
<i>Bell v. Tallasse City Bd. of Educ.</i>	10-04550	January 4, 2011	170	Transfer	Transfer denied.	N	Reduction in force, loss of status, arbitrarily unjust

(table continues)

Parties	FCMS#	Date of Decision	Days Decision	Disciplinary Action	Disposition	For the Board?	Keywords
<i>Mims v. Tuscaloosa County Bd. of Educ.</i>	10-58476-3	January 7, 2011	187	Termination	Termination upheld.	Y	Reduction in force
<i>Reinhart v. Bd. of School Com'rs of Mobile County</i>	10-00095	January 15, 2011	590	Termination	Termination upheld.	Y	incompetence, insubordination, classroom management
<i>Carter v. Alabama Dep't of Youth Services</i>	10-02342	January 29, 2011	379	Major Suspension	Suspension upheld.	Y	Progressive discipline, prior warnings, insubordination
<i>McDonald v. Montgomery County Bd. of Educ.</i>		February 1, 2011	209	Transfer	Transfer upheld.	Y	Reduction in force
<i>Parham v. Huntsville City Bd. of Educ.</i>		February 18, 2011	207	Termination	Termination upheld.	Y	Employment history, progressive discipline, profanity, threats
<i>Miller v. Phenix City Bd. of Educ.</i>	10-04796	February 19, 2011	229	Termination	Termination upheld.	Y	Rape of student, immorality, criminal arrest, felony
<i>Carter v. Ala. Dep't of Youth Services</i>	10-04847	February 22, 2011	322	Termination	Termination upheld.	Y	Sufficiency of evidence, just cause
<i>Harrison v. Geneva County Bd. of Educ.</i>	10-04131-3	February 24, 2011	264	Partial termination and transfer	Partial cancellation and transfer upheld.	Y	Reduction in force, deference to Board
<i>Love v. Opelika City Bd. of Educ.</i>	11-00496	April 13, 2011	163	Termination	Five day suspension without pay, a reprimand, and Love placed on notice that any future serious infection may result in termination.	N	Progressive discipline, warning of last chance
<i>Nicholdson v. Bd. of School Com'rs of Mobile County</i>	11-00119	April 18, 2011	238	Transfer	Transfer upheld.	y	Reduction in force, Board deference

(table continues)

Parties	FCMS#	Date of Decision	Days Decision	Disciplinary Action	Disposition	For the Board?	Keywords
<i>Moon-Williams v. Montgomery County Bd. of Educ.</i>		May 3, 2011	155	Major Suspension	Suspension reversed.	N	Labor law, forgery, IEP
<i>Crutch v. Lawrence County Bd. of Educ.</i>		August 3, 2011	201	Termination	Termination upheld.	Y	Related litigation, incompetence, insubordination, sealed record
<i>Hinds v. Huntsville City Bd. of Educ.</i>	08-02465			Termination	Termination upheld.	Y	Mental illness, compliance with medication, severity of behavior, accommodation
<i>Pettway v. Bullock County Bd. of Educ.</i>				Termination	Termination upheld.	Y	Athletics, grade change, eligibility, deference to Board
<i>Staten v. Huntsville City Bd. of Educ.</i>	07-02515			Termination	Termination upheld.	Y	Coach, poor character, sufficiency of evidence, sex with prostitute, previous allegations of sexual abuse of students
<i>Stallworth v. Wilcox County Bd. of Educ.</i>				Termination	Placed on probation and if Stallworth is absent for more than a set number of days, she will be terminated.	N	Progressive discipline, no prior warning, excessive absenteeism
<i>Outland v. Greene County Bd. of Educ.</i>				Transfer	Transfer upheld.	Y	Sufficiency of evidence

## Boards

A total of 42 different Alabama county and city boards of education had TTA cases reviewed by hearing officers. Of those boards, six had three or more cases reviewed. Montgomery County had 18 cases reviewed, Mobile County had 16 cases, Birmingham City had 9, Huntsville City had 8, the Alabama Department of Youth Services had 4, and Jefferson County had three. Unsurprisingly, with the exception of the Alabama Department of Youth Services, these Boards represent some of the largest school systems in the state. Twelve other Boards had two cases reviewed: Bullock County, Butler County, Cherokee County, Florence City, Greene County, Lowndes County, Madison County, Phenix City, Sumter County, Talladega City, Tuscaloosa County, and Walker County. Twenty-four school systems had one case reviewed. Table 5 contains a listing of each case sorted by the board of education.

Table 5

### *Cases Sorted by Board of Education*

Parties	FCMS#	Date of Decision	Disciplinary Action	For the Board?
<i>Shoemaker v. Ala. Dep't of Youth Services</i>	10-03012	November 19, 2010	Major Suspension	N
<i>Shivers v. Ala. Dep't of Youth Services</i>	07-03934-3	February 14, 2008	Termination	N
<i>Carter v. Alabama Dep't of Youth Services</i>	10-02342	January 29, 2011	Major Suspension	Y
<i>Carter v. Ala. Dep't of Youth Services</i>	10-04847	February 22, 2011	Termination	Y
<i>Johnston v. Baldwin County Bd. of Educ.</i>	05-04807	December 13, 2005	Termination	N
<i>Priget v. Birmingham City Bd. of Educ.</i>	08-01705	July 8, 2008	Termination	Y
<i>Jackson v. Birmingham City Bd. of Educ.</i>	06-03411	October 18, 2006	Termination	Y
<i>Evans v. Birmingham City Bd. of Educ.</i>	05-0351	April 15, 2006	Termination	Y
<i>McClanahan v. Birmingham City Bd. of Educ.</i>		September 16, 2006	Transfer	Y
<i>Thomas v. Birmingham City Bd. of Educ.</i>		November 21, 2007	Termination	Y

*(table continues)*

Parties	FCMS#	Date of Decision	Disciplinary Action	For the Board?
<i>Howard v. Birmingham City Bd. of Educ.</i>		November 4, 2010	Termination	Y
<i>Bishop v. Birmingham City Bd. of Educ.</i>		November 14, 2008	Termination	Y
<i>Henderson v. Birmingham City Bd. of Educ.</i>		October 18, 2007	Termination	Y
<i>Todd v. Birmingham City Bd. of Educ.</i>	07-00798	November 26, 2007	Termination	N
<i>Pettway v. Bullock County Bd. of Educ.</i>			Termination	Y
<i>Kemp v. Bullock County Bd. of Educ.</i>	08-01089	June 22, 2008	Termination	Y
<i>Taylor v. Butler County Bd. of Educ.</i>	06-03867	December 11, 2006	Termination	N
<i>Taylor v. Butler County Bd. of Educ.</i>	06-04719	December 18, 2006	Minor Suspension	Y
<i>Miller v. Cherokee County Bd. of Educ.</i>	07-03792	October 1, 2007	Transfer	N
<i>Hyche v. Cherokee County Bd. of Educ.</i>		October 17, 2009	Transfer	Y
<i>Young v. Clay County Bd. of Educ.</i>	06-04782	December 30, 2006	Transfer	Y
<i>Hodge v. Crenshaw County Bd. of Educ.</i>	06-03412	January 16, 2007	Termination	N
<i>Watkins v. Dekalb County Bd. of Educ.</i>	08-04127	November 7, 2008	Transfer	Y
<i>Baker v. Eufaula City Bd. of Educ.</i>	08-039446	October 7, 2008	Transfer	Y
<i>Allen v. Florence City Bd. of Educ.</i>		October 3, 2005	Transfer	Y
<i>Rickard v. Florence City Bd. of Educ.</i>	09-0360	November 25, 2010	Termination	Y
<i>Hornsby v. Gadsden City Bd. of Educ.</i>		December 9, 2008	Termination	Y
<i>Harrison v. Geneva County Bd. of Educ.</i>	10-04131-3	February 24, 2011	Partial termination and transfer	Y
<i>Eatman v. Greene County Bd. of Educ.</i>	09-01085	July 13, 2009	Termination	N
<i>Outland v. Greene County Bd. of Educ.</i>			Transfer	Y
<i>Hinds v. Huntsville City Bd. of Educ.</i>	08-02465		Termination	Y
<i>Thomas v. Huntsville City Bd. of Educ.</i>	09-04048	January 21, 2010	Termination	Y
<i>Bradford v. Huntsville City Bd. of Educ.</i>	05-04204	November 21, 2005	Termination	Y
<i>Staten v. Huntsville City Bd. of Educ.</i>	07-02515		Termination	Y
<i>Montgomery v. Huntsville City Bd. of Educ.</i>	07-02927	September 8, 2007	Minor Suspension	Y
<i>Parham v. Huntsville City Bd. of Educ.</i>		February 18, 2011	Termination	Y

(table continues)

Parties	FCMS#	Date of Decision	Disciplinary Action	For the Board?
<i>Roberts v. Huntsville City Bd. of Educ.</i>	09-04093	February 19, 2010	Termination	Y
<i>Ellis v. Huntsville City Bd. of Educ.</i>	08-04064	November 17, 2008	Minor Suspension	N
<i>Petitt v. Jefferson County Bd. of Educ.</i>	10-52678	July 22, 2010	Termination	Y
<i>Isaacs v. Jefferson County Bd. of Educ.</i>	10-10250-3	August 5, 2010	Termination	Y
<i>Colson v. Jefferson County Bd. of Educ.</i>		May 26, 2009	Termination	Y
<i>Wright v. Lauderdale County Bd. of Educ.</i>	06-01835	October 3, 2006	Termination	Y
<i>Crutch v. Lawrence County Bd. of Educ.</i>		August 3, 2011	Termination	Y
<i>White v. Limestone County Bd. of Educ.</i>		August 16, 2006	Termination	Y
<i>Turks v. Lowndes County Bd. of Educ.</i>	07-03851	April 29, 2008	Termination	N
<i>McKinnis v. Lowndes County Bd. of Educ.</i>	08-55586-3	December 9, 2008	Minor Suspension	Y
<i>Wilson v. Madison County Bd. of Educ.</i>	05-03316	November 18, 2005	Termination	N
<i>Helton v. Madison County Bd. of Educ.</i>		August 28, 2009	Transfer	Y
<i>Williams v. Marshall County Bd. of Educ.</i>	05-06066	February 23, 2006	Termination	N
<i>Webster v. Bd. of School Com'rs of Mobile County</i>	05-01882	July 30, 2005	Termination	N
<i>Hasan v. Bd. of School Com'rs of Mobile County</i>	08-04371	May 19, 2009	Partial termination and transfer	Y
<i>Barnes v. Bd. of School Com'rs of Mobile County</i>	05-04501	February 5, 2006	Termination	N
<i>Cooley v. Bd. of School Com'rs of Mobile County</i>	06-00077	March 1, 2006	Termination	N
<i>Reinhart v. Bd. of School Com'rs of Mobile County</i>	10-00095	January 15, 2011	Termination	Y
<i>English v. Bd. of School Com'rs of Mobile County</i>	05-03711	October 30, 2005	Termination	N
<i>Winston v. Bd. of School Com'rs of Mobile County</i>	05-04250-3	November 10, 2005	Partial Termination	Y
<i>Glenn v. Bd. of School Com'rs of Mobile County</i>	08-04313	June 4, 2009	Partial termination and transfer	N
<i>Dunn v. Bd. of School Com'rs of Mobile County</i>	05-01608	April 30, 2005	Termination	N
<i>Alvarez v. Bd. of School Com'rs of Mobile County</i>	06-01872	June 24, 2006	Major Suspension	N
<i>Brooks v. Bd. of School Com'rs of Mobile County</i>	05-01477	April 20, 2005	Termination withdrawn	Y

(table continues)

Parties	FCMS#	Date of Decision	Disciplinary Action	For the Board?
<i>Robinson v. Bd. of School Com'rs of Mobile County</i>	05-04420	November 25, 2005	Termination	Y
<i>Fuqua v. Bd. of School Com'rs of Mobile County</i>	09-04368	April 1, 2010	Transfer	Y
<i>Danzy v. Bd. of School Com'rs of Mobile County</i>	08-04487	March 2, 2009	Transfer	Y
<i>Nicholson v. Bd. of School Com'rs of Mobile County</i>	11-00119	April 18, 2011	Transfer	Y
<i>Haynes v. Bd. of School Com'rs of Mobile County</i>	05-02904	August 1, 2005	Termination	N
<i>Tyler v. Montgomery County Bd. of Educ.</i>	09-03461	December 30, 2009	Termination	N
<i>Mizell v. Montgomery County Bd. of Educ.</i>	09-03946	January 4, 2010	Transfer	Y
<i>Browder v. Montgomery County Bd. of Educ.</i>	08-0084-3 and 08-0084-4	June 6, 2008	Partial termination and transfer	Y
<i>Granger v. Montgomery County Bd. of Educ.</i>	09-01218	November 2, 2009	Termination	N
<i>Moon-Williams v. Montgomery County Bd. of Educ.</i>		May 3, 2011	Major Suspension	N
<i>Perdue v. Montgomery County Bd. of Educ.</i>	08-01570	November 15, 2008	Termination	Y
<i>Bolding v. Montgomery County Bd. of Educ.</i>	05-01211	August 30, 2005	Termination	Y
<i>Montgomery County Bd. of Educ.</i>	070710-3450-3	October 26, 2007	Minor Suspension	N
<i>Webb v. Montgomery County Bd. of Educ.</i>	07-02131	January 15, 2008	Termination	N
<i>Calhoun v. Montgomery County Bd. of Educ.</i>	07-0822-04359-3	April 14, 2008	Transfer	N
<i>Nelson v. Montgomery County Bd. of Educ.</i>	07-03874	June 2, 2008	Partial termination and transfer	Y
<i>Davis v. Montgomery County Bd. of Educ.</i>	07-03874	June 2, 2008	Partial termination and transfer	Y
<i>Powell v. Montgomery County Bd. of Educ.</i>	07-03874	June 2, 2008	Partial termination and transfer	Y
<i>McDonald v. Montgomery County Bd. of Educ.</i>		February 1, 2011	Transfer	Y
<i>Coleman v. Montgomery County Bd. of Educ.</i>	09-03949	October 30, 2009	Transfer	N
<i>Menefee v. Montgomery County Bd. of Educ.</i>	05-02699	October 7, 2005	Termination	N
<i>Holt v. Montgomery County Bd. of Educ.</i>	08-00458	February 15, 2008	Transfer	Y
<i>Tompkins v. Montgomery County Bd. of Educ.</i>	09-0360	December 30, 2009	Termination	Y
<i>Bowling v. Morgan County Bd. of Educ.</i>	09-02283-3	August 29, 2009	Termination	N
<i>Fuller v. Muscle Shoals City Bd. of Educ.</i>	05-57147-3	September 24, 2005	Transfer	Y
<i>Love v. Opelika City Bd. of Educ.</i>	11-00496	April 13, 2011	Termination	N

(table continues)



Parties	FCMS#	Date of Decision	Disciplinary Action	For the Board?
<i>Barry v. Oxford City Bd. of Educ.</i>	08-01816	June 16, 2008	Termination	Y
<i>Stapleton v. Ozark City Bd. of Educ.</i>	10-04075	October 10, 2010	Transfer	Y
<i>Brooks v. Phenix City Bd. of Educ.</i>	080702-037623	January 8, 2009	Termination	Y
<i>Miller v. Phenix City Bd. of Educ.</i>	10-04796	February 19, 2011	Termination	Y
<i>Nelson v. Russell County Bd. of Educ.</i>	10-1006-00023-3	June 25, 2010	Termination	N
<i>Muhammad v. Selma City Bd. of Educ.</i>	070705-58186-3	December 14, 2007	Termination	N
<i>Thomas v. Sumter County Bd. of Educ.</i>	08-04850-3	September 8, 2009	Transfer	Y
<i>Crooks v. Sumter County Bd. of Educ.</i>	06-00497	September 5, 2006	Termination	N
<i>Paris v. Talladega City Bd. of Educ.</i>	08-01678-3	June 15, 2008	Termination	N
<i>Smith v. Talladega City Bd. of Educ.</i>	06-04690	October 23, 2006	Transfer	Y
<i>Oglesby v. Talladega County Bd. of Educ.</i>	10-01168-3	May 17, 2010	Minor Suspension	N
<i>Bell v. Tallassee City Bd. of Educ.</i>	10-04550	January 4, 2011	Transfer	N
<i>Wall v. Tarrant City Bd. of Educ.</i>	10-04174	November 5, 2010	Partial termination	Y
<i>Alvis v. Trussville City Bd. of Educ.</i>	08-03293-3	August 20, 2008	Transfer	Y
<i>Cagle v. Tuscaloosa County Bd. of Educ.</i>		June 26, 2008	Minor Suspension	Y
<i>Mims v. Tuscaloosa County Bd. of Educ.</i>	10-58476-3	January 7, 2011	Termination	Y
<i>Gum v. Walker County Bd. of Educ.</i>	06-60094	May 15, 2007	Termination	Y
<i>Frye v. Walker County Bd. of Educ.</i>		November 17, 2009	Termination	Y
<i>Smith v. Washington County Bd. of Educ.</i>	06-04359	June 1, 2007	Termination	N
<i>Stallworth v. Wilcox County Bd. of Educ.</i>			Termination	N

## Hearing Officers

Sixty-five different hearing officers decided the 106 TTA cases analyzed. One hearing officer, Jim Sandefer, decided a total of 12 cases, although three were consolidated. Of the 12 cases heard, Sandefer held for the board in all but one case. That case involved the transfer of a veteran teacher and Sandefer found that the decision to transfer was part of a culmination of events that arose from a personal issue between the teacher and the instructional coach, resulting

in personal animus for the transfer (*Calhoun v. Montgomery County Bd. of Educ.*, FMCS 07-0822-04359-3 (April 14, 2008)). In total, Sandefer ruled for the board in five terminations, two transfers, one minor suspension, and three partial terminations/transfers. The second highest total cases heard by one arbitrator was Roger Williams who heard five cases and decided four in favor of the board. Although Williams did not uphold the termination of a central office attendance administrator, he did impose a 30-day suspension without pay in the one case he decided against the board.

Five hearing officers heard three cases each. Joseph Battle, Daniel Feinstein, and James Odom found in favor of the Board in all three cases. Mitchell Goldberg held for the board in two of the three cases and Robert Hoffman held for the board in one of the three cases. Thirteen hearing officers decided two cases each. Seven hearing officers - Barry Baroni, Patrick Hardin, Robert Moberly, Abigail Modjeska, Kenneth Simon, and Don Williams – found for the board in both cases. Trevor Bain and Michael Pecklers split on the cases they heard. Jack Clarke, Jay Goldstein, Joe Harris, and Bryan Kennedy held for the employees in both cases. The remaining cases were decided by different hearing officers, with 30 deciding in favor of the Board and 21 deciding in favor of the employee. Table 6 contains a list of each case by hearing officer.

Table 6

*Decisions by Hearing Officer*

Hearing Officer	Parties	FCMS#	Date of Decision	Days Decision	For the Board?
Ahrens, Frederick	<i>Tyler v. Montgomery County Bd. of Educ.</i>	09-03461	December 30, 2009	223	N
Bahakel, Roberta	<i>Hinds v. Huntsville City Bd. of Educ.</i>	08-02465			Y
Bain, Trevor	<i>Bell v. Tallassee City Bd. of Educ.</i>	10-04550	January 4, 2011	170	N
Bain, Trevor	<i>Gum v. Walker County Bd. of Educ.</i>	06-60094	May 15, 2007	250	Y
Baroni, Barry	<i>Mizell v. Montgomery County Bd. of Educ.</i>	09-03946	January 4, 2010	178	Y
Baroni, Barry	<i>Brooks v. Phenix City Bd. of Educ.</i>	080702-037623	January 8, 2009	237	Y
Battle, John	<i>White v. Limestone County Bd. of Educ.</i>		August 16, 2006	92	Y
Battle, Joseph	<i>Allen v. Florence City Bd. of Educ.</i>		October 3, 2005	113	Y
Battle, Joseph	<i>Frye v. Walker County Bd. of Educ.</i>		November 17, 2009	140	Y
Bird, John	<i>Wright v. Lauderdale County Bd. of Educ.</i>	06-01835	October 3, 2006	406	Y
Brundige, Eugene	<i>Muhammad v. Selma City Bd. of Educ.</i>	070705-58186-3	December 14, 2007	213	N
Byars, Lloyd L.	<i>Webster v. Bd. of School Com'rs of Mobile County</i>	05-01882	July 30, 2005	221	N
Caldwell, William	<i>Taylor v. Butler County Bd. of Educ.</i>	06-03867	December 11, 2006	229	N
Clarke, Jack	<i>Turks v. Lowndes County Bd. of Educ.</i>	07-03851	April 29, 2008	348	N
Clarke, Jack	<i>Smith v. Washington County Bd. of Educ.</i>	06-04359	June 1, 2007	381	N
Dennis, Rodney	<i>Shoemaker v. Alabama Dep't of Youth Services</i>	10-03012	November 19, 2010		N
Dinneen, Edith	<i>Miller v. Phenix City Bd. of Educ.</i>	10-04796	February 19, 2011	229	Y
Donnelly, Peter	<i>Hasan v. Bd. of School Com'rs of Mobile County</i>	08-04371	May 19, 2009	378	Y
Dunn, Sr., John	<i>Shivers v. Ala. Dep't of Youth Services</i>	07-03934-3	February 14, 2008	266	N
Edington, Robert	<i>Barnes v. Bd. of School Com'rs of Mobile County</i>	05-04501	February 5, 2006	279	N
Feinstein, Daniel	<i>Hornsby v. Gadsden City Bd. of Educ.</i>		December 9, 2008	221	Y
Feinstein, Daniel	<i>Thomas v. Huntsville City Bd. of Educ.</i>	09-04048	January 21, 2010	185	Y
Feinstein, Daniel	<i>Petitt v. Jefferson County Bd. of Educ.</i>	10-52678	July 22, 2010	232	Y
Fernandez, Don	<i>Eatman v. Greene County Bd. of Educ.</i>	09-01085	July 13, 2009	193	N
Gold, Charlotte	<i>Paris v. Talladega City Bd. of Educ.</i>	08-01678-3	June 15, 2008	143	N

*(table continues)*

Hearing Officer	Parties	FCMS#	Date of Decision	Days Decision	For the Board?
Goldberg, Mitchell	<i>Cooley v. Bd. Of School Com'rs of Mobile County</i>	06-00077	March 1, 2006	197	N
Goldberg, Mitchell	<i>Reinhart v. Bd. Of School Com'rs of Mobile County</i>	10-00095	January 15, 2011	590	Y
Goldberg, Mitchell	<i>Browder v. Montgomery County Bd. Of Educ.</i>	08-0084-3 and 08-0084-4	June 6, 2008	357	Y
Goldstein, Jay	<i>English v. Bd. Of School Com'rs of Mobile County</i>	05-03711	October 30, 2005	380	N
Goldstein, Jay	<i>Granger v. Montgomery County Bd. Of Educ.</i>	09-01218	November 2, 2009	350	N
Gordon, William	<i>Pettway v. Bullock County Bd. Of Educ.</i>				Y
Grossman, Mark	<i>Priget v. Birmingham City Bd. Of Educ.</i>	08-01705	July 8, 2008	201	Y
Gutman, Edward	<i>Moon-Williams v. Montgomery County Bd. Of Educ.</i>		May 3, 2011	155	N
Hales, Edward	<i>Stapleton v. Ozark City Bd. Of Educ.</i>	10-04075	October 10, 2010	105	Y
Hammer, Lawrence	<i>Wilson v. Madison County Bd. Of Educ.</i>	05-03316	November 18, 2005	252	N
Hardin, Patrick	<i>Winston v. Bd. Of School Com'rs of Mobile County</i>	05-04250-3	November 10, 2005	195	Y
Hardin, Patrick	<i>Fuller v. Muscle Shoals City Bd. Of Educ.</i>	05-57147-3	September 24, 2005	138	Y
Harris, Joe	<i>Hodge v. Crenshaw County Bd. Of Educ.</i>	06-03412	January 16, 2007	321	N
Harris, Joe	<i>Oglesby v. Talladega County Bd. Of Educ.</i>	10-01168-3	May 17, 2010	167	N
Hoffman, Robert	<i>Jackson v. Birmingham City Bd. Of Educ.</i>	06-03411	October 18, 2006	441	Y
Hoffman, Robert	<i>Glenn v. Bd. Of School Com'rs of Mobile County</i>	08-04313	June 4, 2009	366	N
Hoffman, Robert B.	<i>Dunn v. Bd. Of School Com'rs of Mobile County</i>	05-01608	April 30, 2005	130	N
Jay, Sara	<i>Smith v. Talladega City Bd. Of Educ.</i>	06-04690	October 23, 2006	95	Y
Kennedy, Bryan	<i>Miller v. Cherokee County Bd. Of Educ.</i>	07-03792	October 1, 2007	110	N
Kennedy, Bryan	<i>Williams v. Marshall County Bd. Of Educ.</i>	05-06066	February 23, 2006	245	N
Keyl, Mark	<i>Alvis v. Trussville City Bd. Of Educ.</i>	08-03293-3	August 20, 2008	134	Y
Kilroy, Robert	<i>Alvarez v. Bd. of School Com'rs of Mobile County</i>	06-01872	June 24, 2006	187	N
Lockwood, Robert	<i>Bradford v. Huntsville City Bd. of Educ.</i>	05-04204	November 21, 2005	209	Y
McPherson, George, Jr.	<i>Carter v. Alabama Dep't of Youth Services</i>	10-02342	January 29, 2011	379	Y
McReynolds, Michael	<i>Brooks v. Bd. of School Com'rs of Mobile County</i>	05-01477	April 20, 2005	183	Y
Mills, William	<i>Johnston v. Baldwin County Bd. of Educ.</i>	05-04807	December 13, 2005	207	N

(table continues)

Hearing Officer	Parties	FCMS#	Date of Decision	Days Decision	For the Board?
Moberly, Robert	<i>Robinson v. Bd. of School Com'rs of Mobile County</i>	05-04420	November 25, 2005	196	Y
Moberly, Robert	<i>Perdue v. Montgomery County Bd. of Educ.</i>	08-01570	November 15, 2008	354	Y
Modjeska, Abigail	<i>Staten v. Huntsville City Bd. of Educ.</i>	07-02515			Y
Modjeska, Abigail	<i>Thomas v. Sumter County Bd. of Educ.</i>	08-04850-3	September 8, 2009	435	Y
Moffett, Kenneth	<i>Baker v. Eufaula City Bd. of Educ.</i>	08-039446	October 7, 2008	140	Y
Oberdank, Lawrence	<i>Fuqua v. Bd. of School Com'rs of Mobile County</i>	09-04368	April 1, 2010	323	Y
Odom, Jr., James	<i>Isaacs v. Jefferson County Bd. of Educ.</i>	10-10250-3	August 5, 2010	215	Y
Odom, Jr., James	<i>Bolding v. Montgomery County Bd. of Educ.</i>	05-01211	August 30, 2005	320	Y
Odom, Jr., James	<i>Barry v. Oxford City Bd. of Educ.</i>	08-01816	June 16, 2008	273	Y
Pate, Lenora	<i>Helton v. Madison County Bd. of Educ.</i>		August 28, 2009	114	Y
Pecklers, Michael	<i>McKinnis v. Lowndes County Bd. of Educ.</i>	08-55586-3	December 9, 2008	238	Y
Pecklers, Michael	<i>Crooks v. Sumter County Bd. of Educ.</i>	06-00497	September 5, 2006	363	N
Pierson, J. J.	<i>Hyché v. Cherokee County Bd. of Educ.</i>		October 17, 2009	150	Y
Popular, John	<i>Montgomery County Bd. of Educ.</i>	070710-3450-3	October 26, 2007	154	N
Ray, Phillip	<i>Danzy v. Bd. of School Com'rs of Mobile County</i>	08-04487	March 2, 2009	300	Y
Reynolds, James	<i>Young v. Clay County Bd. of Educ.</i>	06-04782	December 30, 2006	220	Y
Rice, Richard	<i>Nicholdson v. Bd. of School Com'rs of Mobile County</i>	11-00119	April 18, 2011	238	y
Rutherford, Len	<i>Webb v. Montgomery County Bd. of Educ.</i>	07-02131	January 15, 2008	378	N
Sandfer, Jim	<i>Evans v. Birmingham City Bd. of Educ.</i>	05-0351	April 15, 2006	389	Y
Sandfer, Jim	<i>McClanahan v. Birmingham City Bd. of Educ.</i>		September 16, 2006	88	Y
Sandfer, Jim	<i>Thomas v. Birmingham City Bd. of Educ.</i>		November 21, 2007	225	Y
Sandfer, Jim	<i>Howard v. Birmingham City Bd. of Educ.</i>		November 4, 2010	441	Y
Sandfer, Jim	<i>Montgomery v. Huntsville City Bd. of Educ.</i>	07-02927	September 8, 2007	152	Y
Sandfer, Jim	<i>Parham v. Huntsville City Bd. of Educ.</i>		February 18, 2011	207	Y
Sandfer, Jim	<i>Colson v. Jefferson County Bd. of Educ.</i>		May 26, 2009	249	Y
Sandfer, Jim	<i>Calhoun v. Montgomery County Bd. of Educ.</i>	07-0822-04359-3	April 14, 2008	290	N
Sandfer, Jim	<i>Nelson v. Montgomery County Bd. of Educ.</i>	07-03874	June 2, 2008	374	Y
Sandfer, Jim	<i>Davis v. Montgomery County Bd. of Educ.</i>	07-03874	June 2, 2008	374	Y
Sandfer, Jim	<i>Powell v. Montgomery County Bd. of Educ.</i>	07-03874	June 2, 2008	374	Y

(table continues)

Hearing Officer	Parties	FCMS#	Date of Decision	Days Decision	For the Board?
Sandefer, Jim	<i>McDonald v. Montgomery County Bd. of Educ.</i>		February 1, 2011	209	Y
Sergent, Stanley	<i>Taylor v. Butler County Bd. of Educ.</i>	06-04719	December 18, 2006	185	Y
Shaw, Sue	<i>Love v. Opelika City Bd. of Educ.</i>	11-00496	April 13, 2011	163	N
Simon, Kenneth	<i>Bishop v. Birmingham City Bd. of Educ.</i>		November 14, 2008	555	Y
Simon, Kenneth	<i>Henderson v. Birmingham City Bd. of Educ.</i>		October 18, 2007	583	Y
Starr, Kenneth	<i>Coleman v. Montgomery County Bd. of Educ.</i>	09-03949	October 30, 2009	155	N
Staudter, Donald	<i>Menefee v. Montgomery County Bd. of Educ.</i>	05-02699	October 7, 2005	234	N
Sweeney, Donald	<i>Holt v. Montgomery County Bd. of Educ.</i>	08-00458	February 15, 2008	140	Y
Tidwell, Carol	<i>Carter v. Ala. Dep't of Youth Services</i>	10-04847	February 22, 2011	322	Y
Williams, Cary	<i>Roberts v. Huntsville City Bd. of Educ.</i>	09-04093	February 19, 2010	229	Y
Williams, Don	<i>Rickard v. Florence City Bd. of Educ.</i>	09-0360	November 25, 2010	145	Y
Williams, Don	<i>Tompkins v. Montgomery County Bd. of Educ.</i>	09-0360	December 30, 2009	230	Y
Williams, Robert	<i>Ellis v. Huntsville City Bd. of Educ.</i>	08-04064	November 17, 2008	147	N
Williams, Roger	<i>Todd v. Birmingham City Bd. of Educ.</i>	07-00798	November 26, 2007	409	N
Williams, Roger	<i>Harrison v. Geneva County Bd. of Educ.</i>	10-04131-3	February 24, 2011	264	Y
Williams, Roger	<i>Wall v. Tarrant City Bd. of Educ.</i>	10-04174	November 5, 2010	155	Y
Williams, Roger	<i>Cagle v. Tuscaloosa County Bd. of Educ.</i>		June 26, 2008	405	Y
Williams, Roger	<i>Mims v. Tuscaloosa County Bd. of Educ.</i>	10-58476-3	January 7, 2011	187	Y
Wolfson, Jerome	<i>Bowling v. Morgan County Bd. of Educ.</i>	09-02283-3	August 29, 2009	156	N
Wolfson, Jerome	<i>Stallworth v. Wilcox County Bd. of Educ.</i>				N
Wood, Jeanne	<i>Nelson v. Russell County Bd. of Educ.</i>	10-1006-00023-3	June 25, 2010	336	N
Woodward, Joe D.	<i>Haynes v. Bd. of School Com'rs of Mobile County</i>	05-02904	August 1, 2005	144	N
Yancy, Dorothy	<i>Kemp v. Bullock County Bd. of Educ.</i>	08-01089	June 22, 2008	226	Y
	<i>Watkins v. DeKalb County Bd. of Educ.</i>	08-04127	November 7, 2008	140	Y
	<i>Outland v. Greene County Bd. of Educ.</i>				Y
	<i>Crutch v. Lawrence County Bd. of Educ.</i>		August 3, 2011	201	Y

## Issues

### Appellate Standard of Review

One of the first teacher disciplinary actions challenged under the TTA involved an appeal of the Hearing Officer's decision to impose a 30-day suspension without pay instead of termination. *Dunn v. Bd. of School Com'rs of Mobile County*, FMCS 05-01608 (April 30, 2005). The Board terminated Dunn, a teacher and basketball coach, for allowing players to punish other players by hitting and kicking them while Dunn timed the punishment. Nine players received this punishment over a six-week period. A student who was going to be punished twice in one practice, tried to quit, but when Dunn stated that there was no quitting, the team was allowed to punish him in Dunn's presence. The player was hit at least 15 times by his teammates and was bruised. When considering the facts, the Hearing Officer focused on the 13 years of experience the teacher had coaching and teaching, particularly highlighting his work while employed at a Title I school. The Hearing Officer clearly believed that Dunn's conduct was very wrong, including allowing his players to buy into a "street justice" of punishment (p. 9). The Hearing Officer was also troubled by Dunn's efforts to "somehow downplay the seriousness of his misconduct . . . [by] testifying that at worst it happened only once a week is a weak effort to somehow cover-up what instead was a six-week long parade of innocent players being trampled while he stood by and timed these cruel beatings" (p. 10). The Hearing Officer did not question that the Board reasonably and substantially proved that Dunn engaged in serious misconduct. Nonetheless, the Hearing Officer was swayed by Dunn's spotless employment record, the testimony of students and parents/guardians, as well as colleagues, in reversing Dunn's termination as a teacher and imposing a 30-day suspension. In short, the Hearing Officer found

that there was no evidence to suggest Dunn was not a good teacher and that it was his separate duties as a coach that formed the foundation for the Board's action.

Following the Hearing Officer's favorable ruling towards Dunn, the Board appealed, arguing that the Hearing Officer's decision was arbitrary and capricious. In *Bd. of School Com'rs of Mobile County v. Dunn*, 962 So. 2d 805 (Ala. Civ. App. 2006), the Court of Civil Appeals reversed the decision of the hearing officer and remanded the contest for a new hearing. The court noted that "in all but the most egregious cases, [the court would] defer to a hearing officer's decision. The fact that reasonable people could differ as to the wisdom of a hearing officer's decision invariably means that the decision is not arbitrary" (p. 809). The court stated, "If the decision-maker has examined the relevant data and articulated a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made,' its decision is not arbitrary" (p. 810). Nonetheless, despite the Hearing Officer's lengthy reasoning in his decision why he determined that Dunn should not be terminated, the court found that the Hearing Officer's decision was arbitrary and capricious. The court stated:

[To] hold otherwise would effectively condone the actions of a teacher who allowed a group of students to assault another student while he observed and timed the brutal act; this we cannot do. Surely the legislature would not have provided for an appeal to this court in a teacher-tenure case if its intent was to simply rubber stamp the decision of the hearing officer. (p. 813).

Dunn petitioned the Supreme Court of Alabama for certiorari review to determine whether the Court of Civil Appeals erred in concluding that the hearing officer's decision was arbitrary and capricious. (*Ex parte Dunn*, 962 So. 2d 814 (Ala. 2007)). The Court stated that the TTA requires that "[t]he decision of the hearing officer shall be affirmed on appeal unless the Court of Civil Appeals finds the decision arbitrary and capricious. On certiorari review, this Court accords no presumption of correctness to the legal conclusions of the intermediate court.



Therefore, we must apply *de novo* the standard of review that was applicable to the Court of Civil Appeals” (p. 816).

Although the Court of Civil Appeals held that the Hearing Officer’s decision was both arbitrary and capricious because his conclusions regarding Dunn’s actions as a basketball coach and his employment record as a teacher were inconsistent, the Alabama Supreme Court disagreed. In reversing the appellate court’s decision, the court stated:

In this case, the hearing officer’s decision reflects his careful consideration of Dunn’s entire employment history, including the good as well as the indefensible. Only after doing so did the experienced hearing officer determine what he considered to be the appropriate sanction for Dunn’s misconduct. Although we may disagree with the wisdom of that decision, we may not substitute our judgment of that of the hearing officer. In our opinion, the hearing officer’s decision is not arbitrary, because it is clear that he examined all of the facts, articulated a satisfactory explanation for his action, and stated a rational connection between the facts and the discipline he imposed. (pp. 823-824)

### **Sufficiency and Weight of the Evidence**

One of the first appeals challenging the sufficiency and weight of the evidence was *Ex Parte Dunn*, 962 So. 2d 814 (Ala. 2007). On appeal to the Alabama Supreme Court, the Board argued that the Hearing Officer “placed too much emphasis on mitigating factors, considering the egregious nature of the misconduct itself” (p. 824). However, the Alabama Supreme Court stated that it is the hearing officer’s responsibility to weigh the evidence and that the court would not substitute its judgment for that of the hearing officer.

At the hearing officer level, almost all cases involved some discussion of sufficiency of the evidence. However, this was a more significant issue in some cases than others. One of these cases was *Henderson v. Birmingham City Bd. of Educ.*, FMCS None (October 18, 2007).

Henderson, a tenured teacher, had a pattern of turning in lesson plans late, if at all, during one school year and did not submit any the next school year. In addition, he kept his grade books in

Wal-Mart bags with a number of other disorganized papers. Not surprisingly, Henderson also struggled with classroom management. At one point, an administrator was in his classroom for an entire period without Henderson realizing she was there. During that observation, no instructional content was offered to the class and students were all over the classroom, including 20 students who were not supposed to be there. The Board offered assistance to Henderson, resulting in short term improvement. As time progressed, Henderson's administrators noted "a deterioration in his personal appearance, inappropriate behavior, poor judgment, failure to follow through on assignments, and confusion" (p. 7). The Board recommended his termination after Henderson had a confrontation with a student and went into a state of severe mental distress, rambling excessively "about his manic depression, hospitalization at UAB, military experience in Desert Storm, suicide missions, Secret Service agents trying to get him, and people in white vans looking for him" (p. 10). The Hearing Officer found that the evidence was sufficient to terminate his employment. Henderson's failure to submit lesson plans after being directed to do so constituted incompetency, insubordination, neglect of duty, the failure to perform duties in a satisfactory manner, and other good and just cause. The evidence was also overwhelming that Henderson could not manage his classroom or provide effective instruction.

There were also cases where the hearing officers found that the evidence was sufficient to support disciplinary action, but was not sufficient to support termination. In *Paris v. Talladega City Bd. of Educ.*, FMCS 08-01678-3 (June 15, 2008), the Hearing Officer found that there was evidence to support the Board's decision to terminate Paris for dishonesty, ethics violations, and conversion of school property. However, there was no previous discipline taken against Paris. As a result, the Hearing Officer held that the evidence, although present, was insufficient to terminate Paris given the lack of prior discipline. A similar result was found in *Crooks v. Sumter*

*County Bd. of Educ.*, FMCS 06-00497 (September 5, 2006). The Hearing Officer held that the Board did not provide sufficient evidence to terminate Crooks. Although the Board argued that Crooks needed to improve her instructional and classroom management skills, her evaluations conducted over nine years previously indicated that she was performing her duties at or above an average level.

Oglesby was suspended for seven days without pay for physically grabbing a student after prior warnings not to have physical contact with students and for using profanity around and towards students. *Oglesby v. Talladega County Bd. of Educ.*, FMCS 10-01168-3 (May 17, 2010). The incident that triggered the suspension occurred when a student was disrespectful to Oglesby and Oglesby took the student by the arm and walked him to the principal's office. The Hearing Officer stated:

The evidence was not sufficient to support such a punishment in the context of a teacher trying to hold on to his authority under very difficult circumstances, and was not sufficient for the Board to determine that there was just cause for the action, based upon what Oglesby was responding to . . . and that this teacher is dealing with high school students, nearly adults, and in my view, nobody can command any group of students' respect and attention or maintain control over the classroom, if he is absolutely prohibited from even touching a student--especially once the students find out about it. (p. 24)

Therefore, the Hearing Officer held evidence was not sufficient to support the suspension.

In one very brief decision, *Pettway v. Bullock County Bd. of Educ.* (No FMCS or Date), the Hearing Officer deferred to the decision of the Board as to the sufficiency of the evidence. Pettway was a guidance counselor who changed a student-athlete's grades, without the permission of his teachers, to make him eligible for basketball. The Hearing Officer stated, "I find the Board's decision to terminate Pettway's employment is supported by the evidence and proper; and there is no reason for the hearing officer to substitute his judgment for that of the Board" (p. 1).

### **Lack of Process or Improper Procedure**

There were three cases specifically dealing with lack of process or improper procedure. One case resulted in the reversal of a termination. The Board notified Williams on September 2, 2005, that he would be terminated from his position as an instructor when the system abolished its Building Trades Program. *Williams v. Marshall County Bd. of Educ.*, FMCS 05-06066 (February 23, 2006). Prior to that decision, Williams, a 10-month employee, was offered a transfer to a 12-month position in the maintenance department, but Williams did not agree to the transfer. The Hearing Officer held that although the Board had a legitimate reason for abolishing the Building Trades Program because of declining student enrollment, the notice to terminate Williams was not provided in a timely manner because it was not given to Williams on or before the last day of school.

Thomas challenged her transfer, claiming that the Board failed to send her a written notice that her transfer hearing was postponed. *Thomas v. Sumter County Bd. of Educ.*, FMCS 08-04850-3 (June 30, 2008). The teacher's Alabama Educator Association representative entered into a "gentleman's agreement" to postpone the hearing and a letter was sent from the Board to the representative. The teacher did not attend the rescheduled hearing and the Board approved the Superintendent's recommendation to transfer her. The Hearing Officer held that there was no violation of the TTA as the Board acted reasonably in assuming that the Alabama Educator Association representative was acting on behalf of the teacher and was not responsible for his failure to notify her of the postponement. Furthermore, even if there was a lack of due process, it was cured through the arbitration process. Finally, the transfer was made because of program needs and funding. To retain her as a teacher meant that her transfer was the Board's only option.

In *Cagle v. Tuscaloosa County Bd. of Educ.* (June 26, 2008), Cagle argued that the Board did not comply with the TTA's notice requirements because she was not provided written notice of the Board's decision to suspend her within the two days of her conference. The Board argued, and the Hearing Officer agreed, that because Cagle had actual notice of the decision as she was present when the Board announced its decision, she was not denied due process or otherwise prejudiced by the few days' delay.

### **Arbitration Principles or Law Applied in Decision**

Several decisions involved either the application of arbitration or labor law to the actual holding or a discussion of these principles as part of Hearing Officer's reasoning. In addition, a large number of the cases were styled using arbitration terms, including referring to the employee as the "Grievant" and the Board as "Management."

*Legal Standard for "Just Cause" in Arbitration.* In one of the first cases reviewed by a Hearing Officer under the TTA, *English v. Bd. of School Com'rs of Mobile County*, FMCS 05-03711 (October 30, 2005), the Hearing Officer, in his reasoning for reducing English's discipline from termination to a three-week suspension without pay, quoted arbitration principles in determining whether "just cause" existed to terminate English. The Hearing Officer wrote, "Arbitrator Carroll Daugherty listed seven tests of 'just cause' in a now famous arbitration award, *Enterprise Wire Co.* [46 LA 359]. From that flows the principle that any discipline must have been taken for 'just cause,' i.e. requiring a fair and provable justification for discipline, frequently divided into six sub-questions. If any one of these is not answered affirmatively, the discipline is typically found to be lacking in just cause" (p.12). The Hearing Officer asserted that the TTA is "founded upon these principles, including especially here, due process. This concept

starts with a presumption that an employer has the right to expect certain behavior from and be able to enforce certain standards from its employees.”

Similarly, in *Wilson v. Madison County Bd. of Educ.*, FMCS 05-03316 (November 18, 2005), the Hearing Officer applied the seven tests of “just cause” from labor law. Prior to determining whether the Board had just cause, in addressing each charge individually, the Hearing Officer appeared to consistently view the facts in a light most favorable to Wilson. Wilson’s termination involved a variety of charges, including that she violated board policy in handling school funds as a coach and that she used school property for personal gain.

The Hearing Officer stated:

The fact that one or more of the enumerated reasons to terminate [an employment] contract does not automatically constitute ‘just cause.’ The issue as agreed upon by the parties started with the question: ‘Did the Board of Education have Just Cause to terminate the employment contract of Laura Wilson?’ Whether or not the basic teacher-district employment contract states that discipline can be imposed only ‘for just cause’ is immaterial. Most arbitrators (the Hearing Officer herein is in essence an arbitrator) once appointed, usually by consent, to determine which party to a dispute is correct, generally look to determine whether there exists a reasonable justification to terminate the employee. While no one can really define or set standards for what is considered ‘reasonable or just cause’ it certainly is for more than termination ‘for any reason’. Many years ago, back in the 1980’s arbitrator Carroll R. Daugherty put forth a set of seven tests to determine whether or not ‘just cause’ did or did not exist. The seven tests, all of which required an affirmative answer in order to establish ‘just cause’ has become the standard under which most arbitrators operate. Said questions take the following form: 1. Did the employer give the employee forewarning of possible or probable consequences of the employee’s conduct? 2. Was the employer’s rule or managerial order reasonably related to the orderly, efficient and safe operation of the employer’s business and the performance that the employer might properly expect of the employee? 3. Did the employer, before administering the discipline, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management? 4. Was the employer’s investigation conducted fairly and objectively? 5. At the investigation was substantial evidence or proof obtained that the employee was guilty as charged? 6. Has the employer applied its rules, orders and penalties even-handedly and without discrimination to all employees? 7. Was the degree of discipline administered by the employer in a particular case reasonably related to the seriousness of the employee’s proven offenses and the record of the employee in his service to the employer? A ‘NO’ answer to any or more of the questions was considered that just cause either was not satisfied or at least was weakened in that some arbitrary, capricious or discriminatory

element was present. All of Daugherty's questions could reasonably be answered 'Yes' except for questions 6 and 7. (pp. 37-39)

The Hearing Officer dismissed most of the charges against Wilson, including that she hired an assistant coach without authorization, finding that the administration knew about the other coach and even acquiesced to allowing her to assist Wilson. In addition, although the Hearing Officer found that Wilson's use of the gym for private cheerleading lessons violated the Code of Alabama prohibiting the private business use of public facilities by public employees, he found that she did not hide such use of the gym and that others employed by the Board were doing so as well. As for the charges she altered checks made payable to the school, Wilson, who had given a child private lessons but received two checks payable to the school, testified that the parent gave her permission to change the payee on one check and that the other check was returned to the parent to make the correction to Wilson as payee. The parent was not called to testify to refute Wilson's testimony. The arbitrator stated, "Should Wilson have accepted verbal permission to alter the payee on the first check...or accepted the [second] check knowing that someone other than the maker thereof did the altering? Probably not! Is it, however, sufficient to warrant disciplinary action to the extent sought herein by the [Board]? To answer in the affirmative would be a miscarriage of justice" (p. 19). Likewise, the Hearing Officer noted that the testimony was that Wilson, after being given a directive to take her students to lunch every day, did take her students to lunch. He stated, "At no point does it appear that cheerleaders were denied an opportunity to go to the lunchroom. That school records indicate that not too many cheerleaders purchased lunch proves nothing. Admittedly such records only indicate when full \$1.75 lunches are purchased. A la carte purchases are not shown. One can almost take judicial notice of the fact that cheerleaders tend to watch what they eat so as not to gain weight" (p. 20). The remainder of the charges were addressed similarly by the arbitrator. In addition, the Hearing

Officer found that other cheerleading coaches employed by the Board use many of the same procedures followed by Wilson, but only Wilson faced discipline.

In reversing her termination, the Hearing Officer held that “just cause” was missing because Wilson’s actions did not constitute insubordination, her actions did not prove true negligence in the performance of her duties, and the fact that she had an unblemished record with the school system until a parent filed a lawsuit (noting that this was not the first time this parent had sued a school system).

*Wilson*, however, was reversed and remanded on appeal to the Alabama Court of Civil Appeals. *Madison County Bd. of Educ. v. Wilson*, 984 So. 2d 1153 (Ala. Civ. App. 2006), *aff’d Ex parte Wilson*, 984 So. 2d 1161 (Ala. 2007). In affirming the Alabama Court of Civil Appeals, the Alabama Supreme Court quoted *Ellenburg v. Hartselle City Bd. of Educ.*, 349 So. 2d 605, 609-610 (Ala. Civ. App. 1977) and subsequent case law, stating “‘good cause’ in a statute of this kind [the Teacher Tenure Act] is by no means limited to some form of inefficiency or misconduct on the part of the teacher dismissed, but includes any ground put forward by a school committee in good faith and which is not arbitrary, irrational, unreasonable, or irrelevant to the committee’s task of building up and maintaining an efficient school system. Limited only by the statutory provision that they must be good and just causes, the jurisdiction and discretion to determine what these causes may be rests in the hands of the school authorities” (p. 1168). While agreeing that the Hearing Officer had broad authority under the TTA, the Alabama Supreme Court held that the Hearing Officer did not have the authority to apply employment law from collective-bargaining cases to establish a new standard of “just cause” for teacher termination, including “certain principles such as like discipline of co-employees and ‘forewarning of possible or probable consequences of the employee’s conduct,’ which are not



required by either the old Act or the new Act” (p. 1170). As a result of the Hearing Officer’s application of “just cause standards” from collective bargaining cases, the Alabama Supreme Court affirmed the Court of Civil Appeals holding that the decision was arbitrary and capricious.

The parties disagreed on the meaning of other good and just cause in *Hodge v. Crenshaw County Bd. of Educ.*, FMCS 06-03412 (January 16, 2007). Hodge advocated a more expansive use of the phrase adapted from the seven steps of “just cause” developed under previous arbitration decisions rendered under collective bargaining agreements, specifically, that used in *Wilson*. The Hearing Officer declined to use that definition because Alabama case law “precludes the use of more expansive or differing precedents established in the common law of the labor arbitration filed which are at variance with Alabama case law,” citing *Madison County Bd. of Educ. v. Wilson*, 984 So. 2d 1153 (Ala. Civ. App. 2006) (p. 4). Similarly, the teacher in *Taylor* argued that the “seven tests” for just cause be used to determine whether the discipline imposed by the Board satisfied the just cause standard set forth by Carroll R. Daugherty in *Grief Bros. Cooperage Corp.*, 42 LA 595 (1964). *Taylor v. Butler County Bd. of Educ.*, FMCS 06-04719 (November 26, 2007). The Hearing Officer, however, also cited *Wilson*, finding that Alabama courts had expressly rejected the “seven tests” and that the Hearing Officer must apply Alabama law.

Despite *Wilson*, in *Kemp v. Bullock Co. Bd. of Educ.*, FMCS 08-01089 (June 22, 2008), the Hearing Officer, in upholding Kemp’s termination, used a modified version of the seven tests for “just cause” from labor arbitration to determine whether there was just cause. The Board terminated Kemp for forging a parent’s signature on an IEP and lying to his supervisors when confronted with the forgery, for missing meetings, for writing identical IEPs for multiple students, for failing to timely re-evaluate three special education students, and for allowing a

student assistant to access confidential special education records. Specifically, the Hearing Officer affirmatively answered the following questions: 1) Did the employee have notice of misconduct and what actions could lead to discipline? 2) Was the rule reasonable? 3) Did the employer make an effort to discover whether the employee did in fact violate the rule? Was the investigation fair? 4) Did the Board obtain substantial proof that the employee was guilty as charged? 5) Were the rules applied evenhandedly? and 6) Was the Board's discipline reasonably related to the seriousness of the offense?

In *Wright v. Lauderdale County Bd. of Educ.*, FMCS 06-01835 (October 3, 2006), the Hearing Officer deliberately avoided addressing whether other good and just cause was proved by the Board. Instead, the Hearing Officer held that although the Board did not prove that Wright engaged in immoral acts, specifically sexual advances towards a female student, the Hearing Officer found that the Board proved neglect of duty and failure to perform duties in a satisfactory manner. The Hearing Officer stated that Wright abused his position as a club advisor through his many phone calls, voice mails, and text messages sent to the female student. In fact, Wright "reminded her each night to take her birth control pills. And he insisted there was nothing wrong in such communication" (p. 23). There were numerous examples of misconduct cited by the Board and the female student. While on the field trip, as they traveled alone together, the female student alleged that Wright stopped at a package store. After stopping, he smelled of alcohol and tried to kiss her. At school after the field trip, while alone in a classroom with Wright, she claimed that he locked the door to the classroom, kissed her, grabbed her buttocks, and fondled her breast. After being informed of the female student's allegations and investigation, Wright informed other students of her allegations, creating a hostile environment for the female student.

The Board provided numerous text messages from Wright, a 47-year-old man, to the 16-year-old female student, that were clearly of a personal, not professional, nature.

Despite all of this evidence supporting the existence of an inappropriate relationship, the Hearing Officer took great pains to minimize the female student's testimony, stating that she "and Wright exchanged many phone calls, and she shared intimate details of her sex life...she attended a [club meeting] and pool party at Wright's home. Her behavior was not that of a teenager who resisted his unwelcome sexual advances" (p. 14). The Hearing Officer called this a "he said, she said" situation and stated that, since the Board did not prove that Wright engaged in sexual misconduct, Wright "had the right to speak freely in response to the [student's] allegations of his sexual advances" to other students (p. 21). So, despite text messages that indicate a close relationship, and Wright's own admission that he saw nothing wrong in talking to the female student about her sex life or reminding her to take her birth control pills, the Hearing Officer was not willing to find Wright guilty of the alleged sexual advances or to address whether this evidence constituted "good and just cause" to terminate Wright. The Hearing Officer did, however, state that Wright's taking the female student with him during the field trip, without the other students, not only left the students unsupervised, but created an air of impropriety. Using the 15-passenger van for the field trip, without disclosing to the Board that he intended to do so, violated federal and state laws for transporting students and subjected the Board to liability. For this reason, the Hearing Officer determined that the Board's decision to terminate Wright should be upheld.

**Two-pronged "Just Cause" Test and workplace double-jeopardy.** Two cases involved the application of labor law principles to the appropriateness of disciplinary action. Moon-Williams, a special education teacher, was given instructions to complete all IEPs by the

end of the school year for the next school year. *Moon-Williams v. Montgomery Co. Bd. of Educ.*, FMCS--None (May 3, 2011). The system's special education director issued a letter of reprimand to Moon-Williams that stated that Moon-Williams had created a major violation of IDEA by forging signatures on an IEP; that she had denied the child FAPE by not holding an IEP meeting, but documenting that it was held; and that she caused the school system to be in non-compliance of federal and state guidelines. Moon-Williams did not acknowledge the letter or respond to it. Once the letter was forwarded to Human Resources, the Human Resources director for the system recommended to the Superintendent that Moon-Williams be suspended without pay for 20 days. The specific reasons for the recommendation for the suspension was that forgery is a criminal offense, that Moon-Williams had exposed the system to legal liability, that the system's progressive discipline guidelines allowed for suspension on a first offense for falsification of records, and that another teacher who forged signatures on an IEP was suspended for 20 days. The Board adopted the Superintendent's recommendation to suspend Moon-Williams in November 2010.

The Hearing Officer applied a two-pronged "just cause" test as part of his review, stating, "Just cause' is an employment law concept that hearing officers experienced in employment law regularly interpret and apply. They commonly parse 'just cause' into two segments--one substantive; the other procedural. The substantive requires proof that the employee, in fact, engaged in the behavior for which, in this case, suspension was recommended" (*Montgomery County Bd. of Educ v. Moon-Williams.*, 107 So. 3d 205, 209 (Ala. Civ. App. 2012)). The Hearing Officer found that the Board had established "substantive just cause" for suspending Moon-Williams because it had proven and Moon-Williams admitted that she had forged signatures on

an IEP and that there was no excuse for her falsification of signatures on a document required by federal law.

The Hearing Officer then proceeded to consider “procedural just cause,” explaining that procedural just cause examines “whether discipline is administered fairly and even-handedly; whether similarly situated employees are treated the same; whether the employee knows or should reasonably have been expected to know that engaging in her behavior would likely result in disciplinary action; and whether there was a reasonable relationship between the behavior and the punishment imposed” (p. 209). In addressing whether Moon-Williams was treated fairly when she was suspended for the same conduct she was previously reprimanded for, the Hearing Officer concluded that she had not. He then concluded that the Board had violated a principle of “workplace double jeopardy” by suspending Moon-Williams based on the same misconduct for which she had previously been reprimanded and reversed the 20-day suspension. The Board appealed.

On appeal, the Alabama Court of Civil Appeals reversed the Hearing Officer’s decision and remanded the case for another hearing. *Montgomery County Bd. of Educ. v. Moon-Williams*, 107 So. 3d 205 (2012). The Board argued, and the court agreed, that “the hearing officer’s decision is due to be reversed as arbitrary and capricious because it failed to follow Alabama law (a) by segmenting the ‘just cause standard’ into substantive and procedural elements and (b) by relying on a doctrine of ‘workplace double jeopardy.’” *Moon-Williams*, 107 So. 3d at 209. The Board argued that the hearing officer failed to follow applicable law by applying a two-pronged “just-cause” standard to the review of Moon-Williams’s suspension.

In its decision, the court found that the hearing officer applied a “just cause” test very similar to that rejected by the Alabama Supreme Court in *Ex Parte Wilson*, 984 So. 2d 1161

(Ala. 2007). Based upon *Wilson*, the court concluded that Alabama law does not recognize the procedural “just cause” standard applied by the hearing officer in this case. In addition, Alabama law does not recognize a principle of workplace double jeopardy. Double jeopardy, at least in Alabama, does not apply to civil proceedings, “including state administrative proceedings related to employment termination.” See *Colburn v. Tuscaloosa Cnty. Bd. of Educ.*, 688 So. 2d 881, 883 (Ala. Civ. App. 1997)” *Moon-Williams*, 107 So. 3d at 210.

A similar “workplace double-jeopardy” issue existed in *Ellis v. Huntsville City Bd. of Educ.*, FMCS 08-04064 (November 17, 2008). Towards the end of the school year, an email was sent to all staff members reminding them to enforce specific rules in the days remaining. In an act of insubordination, Ellis posted the rules on his door and then proceeded to violate a number of them, including pulling a student from another teacher’s class and allowing that student to eat food he brought in for the student. He then interrupted another teacher’s class, calling a student a “faggot” in the presence of another teacher and students and slamming the classroom door. He received a written reprimand for this behavior in May 2008. Less than one month later, the Alabama State Department of Education issued Ellis a letter of reprimand for his conviction of Theft of Property, Third Degree in 1986. Upon receipt of the state department’s reprimand, the Superintendent notified Ellis of her intention to recommend his suspension for seven days without pay. Prior to this suspension, Ellis had received multiple written reprimands and suspensions with and without pay. The Hearing Officer reversed the suspension, holding that the May 2008 reprimand given to Ellis by the Board at the end of the school year was a final decision for his misconduct and could not be used to support subsequent disciplinary actions.

**Hearing officer acting outside scope or exceeding authority.** Three cases examined whether the Hearing Officer exceeded the scope of his review or authority in his decision.

The Board terminated Webb based upon two charges. *Webb v. Montgomery County Bd. of Educ.*, FMCS 07-02131 (January 15, 2008). The first charge was that Webb directed profanity at a student and then assaulting the student by intentionally tossing liquid on the student from a cup Webb was drinking from. The second charge related to eleven disciplinary actions in Webb's employment history where Webb was given written warnings, letters of concern, written reprimands, a five-day suspension and a 10-day suspension.

The Hearing Officer held that whether or not Webb cursed the student was not conclusively proven, and not punishable, although losing his temper and throwing water in the direction of the student was actionable. In addition, the Hearing Officer allowed a *de novo* review of each of the eleven previous disciplinary actions and determined that only one charge, disrespect towards his principal, merited discipline (although Webb had already received a written reprimand for his conduct). The Hearing Officer ordered 9 of the 11 disciplinary actions expunged from Webb's personnel file because the actions either did not warrant disciplinary action or because the actions resulted from personal animus against Webb and reduced Webb's termination to two 10-day suspensions without pay--one for the incident in the first charge and the second for disrespecting his principal, a disciplinary action included in the second charge.

The Board appealed to the Alabama Court of Civil Appeals. The court held that the Hearing Officer erred in allowing the previous disciplinary actions to be reviewed and substituted his judgment of that of the Board and that he exceeded his authority in ordering the Board to expunge nine instances of employee misconduct from Webb's personnel record. In addition, the court held--and the Board agreed--that the Hearing Officer did not have the authority to impose upon Webb a greater punishment--a 10-day suspension without pay--for a

prior incident for which he had already been punished with a written reprimand. *Montgomery County Bd. of Educ. v. Webb*, 53 So. 3d 96 (Ala. Civ. App. 2008).

On appeal to the Alabama Supreme Court, Webb raised an issue of first impression based upon the following language of the TTA: “[T]he hearing officer may consider the employment history of the teacher, including, but not limited to, matters occurring in previous years” (*Ex parte Webb*, 53 So. 2d 121, 130, citing *Ex parte Dunn*, 962 So. 2d 814, 823-824 (Ala. 2007)). The court held that the Hearing Officer did not err in allowing evidence to be introduced concerning Webb’s previous disciplinary actions and that the statutory language grants broad authority to the Hearing Officer to consider evidence concerning the teacher’s employment history, both good and bad. However, the court held that the statutory “language does not grant the hearing officer authority, as part of the determination whether a teacher’s employment was properly terminated, to alter prior disciplinary actions or to expunge such actions from the teacher’s employment records” (p. 131). Therefore, “the hearing officer exceeded his authority under the [TTA] by altering the prior disciplinary actions against Webb and ordering that his employment records be expunged” (p. 131). The case was remanded to the hearing officer to vacate the parts of his order altering Webb’s employment history and expunging his disciplinary records. *Ex parte Webb*, 53 So. 2d 212 (Ala. 2009).

*Glenn v. School Com’rs of Mobile County*, FMCS 08-04313 (June 4, 2009) provides another case where the Hearing Officer exceeded the scope of his review. In May 2008, Glenn, a supervisory School Improvement Specialist in her second contract year, was notified of the Board’s intent to transfer her to a teaching position and was also notified that her contract for the next school year would be partially cancelled. The Hearing Officer’s decision conferred tenure on Glenn in her School Improvement Specialist position by finding that the transfer notice given



to Glenn was not the same notice given to other non-tenured employees on the same date – those employees were notified the Board approved a motion not to renew their contracts. Absent using the same notice provided to the non-tenured employees, the Hearing Officer concluded that Glenn’s employment in her School Improvement Specialist position continued. Furthermore, the Hearing Officer reasoned that Glenn was tenured in her position because contract cancellation involves tenured employees and the notice given to Glenn that her contract would be partially terminated was clearly directed to someone in a tenured contract. Although the Board clearly sent the wrong notice, the Hearing Officer held that the improper notice left Glenn with a presumption of reemployment. The Hearing Officer was unwilling to conclude that the transfer letter meant she would no longer be employed as a School Improvement Specialist and the partial contract cancellation of a tenured contract really meant that the Board wanted to end her School Improvement Specialist position and to appropriately recognize her tenured rights, previously earned while she was in another position, to contest her transfer. The Hearing Officer also ignored the fact that Glenn did not have a tenured contract to partially cancel, rendering the Board’s action null and void.

The Alabama Court of Civil Appeals reversed and remanded. *School Com’rs of Mobile County v. Glenn*, 70 So. 3d 340 (Ala. Civ. App. 2010). Citing *Ex parte Odom*, 495 So. 2d 664, 665 (Ala. 1986), regarding the tenure of teachers and other supervisory educational personnel, the court discussed the difference in Glenn’s tenure as a teacher and whether she had attained “second-level tenure” in her School Improvement Specialist position (*School Com’rs of Mobile County v. Glenn*, 70 So. 2d at 341-344). The court held that the Board’s use of two different forms of notice to inform Glenn of her rights under the TTA, including a notice used for tenured employees:

Is in no way indicative of an intent to confer a second level of tenure upon [Glenn], and the Hearing Officer, by effectively conferring such tenure by applying a virtual estoppel doctrine against the Board, acted outside the scope of the Teacher Tenure Act. *See Madison County Bd. of Educ. v. Wilson*, 984 So. 2d 1153, 1160 (Ala. Civ. App. 2006) (hearing officer in teacher-tenure case may not deviate from existing Alabama law), *aff'd*, 984 So. 2d 1161 (Ala. 2007)” (p. 344). The notice given to Glenn that she would not be retained in her supervisory position for the 2008-2009 school year was adequate. Therefore, the proper scope of review by the Hearing Officer should have been solely that of a teacher transfer case, specifically whether the evidence was sufficient for the Board to take action, that the decision was neither politically nor personally motivated, and that the decision was not arbitrarily unjust. (p. 344)

One case that raises the issue as to whether the Hearing Officer exceeded his authority, but was not appealed (or possibly the appeal was not granted) was *Eatman v. Greene County Bd. of Educ.*, FMCS 09-01085 (July 13, 2009). Eatman was hired under an alternative certification process. This certification approach is used for teachers who have a college degree, but do not hold a teaching certificate. Three years of employment are required along with passage of the Praxis exam in a specific content area. When Eatman took the Praxis exam in general social science in April 2007, he earned a score of 152. At that time, a passing score was 151. However, his application was not sent to the Alabama State Department of Education until after June 1, 2007. A rule change by the Alabama State Department of Education effective June 1, 2007, changed the passing score to a 153. As a result, the Alabama State Department of Education denied Eatman’s certification. The Board employed Eatman an additional year to allow him time to improve his score. He was not able to obtain the required score and he was terminated. Eatman enrolled in a master’s program in physical education and passed the Praxis in that content area.

In reversing Eatman’s termination, the Hearing Officer reasoned that if Eatman’s application for certification had been received by the Alabama State Department of Education before June 1, 2007, his score of 152 would have been sufficient for certification and he would

not have been terminated. Although Eatman “should have followed up on his application, he was operating on the premise that he had obtained a passing score and that only the necessary administrative process had to take place for him to receive his certification” (p. 9). The Hearing Officer also stated that the Alabama State Department of Education had the right to change a required passing score, but that it did not have the right to change it retroactively for those who had already taken the exam. However, the Hearing Officer went further than simply examining the circumstances concerning Eatman’s original certification, and also held that since Eatman “also obtained a passing score for his Praxis exam in physical education, he should be dually certified in both social studies and physical education” (p. 10).

If Eatman could not obtain a passing Praxis score, he could not receive a teaching certificate and cannot be employed as a teacher. Boards of Education do not certify teachers - only the Alabama State Department of Education does. Therefore, the question raised by *Eatman* is whether a Hearing Officer has the authority to order the Alabama State Department of Education to alter its rules for certification, particularly as the State Department of Education was not a party to this contest? (Note: A certificate search under Alabama Teacher Certification indicates that the Alabama State Department did not agree with the Hearing Officer as Eatman did not obtain a certification in physical education until 2012 and does not hold certification in social science).

**Final warning, one more chance, and second chance doctrine.** The “One More Chance” Doctrine, or forewarning of possible consequences of an employee’s conduct, was recognized in *Ex Parte Wilson* (Ala. 2007) as a tenet of employment law grounded in collective-bargaining cases. This arbitration-based principle was specifically mentioned by the Alabama Supreme Court as a legal principle that a Hearing Officer was not authorized to apply to

Alabama teacher tenure cases. In addition, this principle was closely related to a Hearing Officer's review of a teacher's employment history and whether or not progressive discipline had been applied to determine whether to uphold the Board's disciplinary action or to impose a different penalty, if any.

In *English v. Bd. of School Com'rs of Mobile County*, FMCS 05-03711 (October 30, 2005), decided before Wilson, the Hearing Officer expressly adopted the "One More Chance" doctrine in reducing English's termination to a suspension. The Hearing Officer stated:

After two similar unpleasant instances of poor judgment, Mr. English could have been, and now should be reminded one last time of the following. [He] has corrected his behavior for short periods of time and then reverted back to exercising poor judgment. He should now have one final opportunity to demonstrate he is capable of learning from two instances where his judgment lapsed. He must demonstrate his understanding that despite good motives or the best of intentions; his brand of creativeness - attention gathering, positive re-enforcement of proper class-room discipline and behavior, and well-intentioned 'borrowing' of supplies to benefit his students is neither welcome, nor will similar actions be tolerated in future. That if similar activities should occur again, there will be no more, 'last chance'." The Hearing Officer continued, "He [English] has now stepped up to the line of demarcation - to either keep his job or throwing caution to the wind, fail again to exercise common sense and good judgment - in one, final opportunity. (pp. 15-16)

In *Webster v. Bd. of School Com'rs of Mobile County*, FMCS 05-01882 (July 30, 2005), also decided before Wilson, the Hearing Officer held that termination was too harsh for a long-term employee with no formal disciplinary record, the nature of the alleged misconduct, and lack of progressive discipline. The Hearing Officer appeared to be focused on the actions of the principal, stating that "reasonable action by the Principal would have been 'at the very least' a clear warning that [Webster's] behavior in gambling with a student on a basketball game would not be permitted and would result in serious disciplinary action if continued" (p. 9).

In *Taylor v. Butler County Bd. of Educ.*, FMCS 06-03867 (December 11, 2006), the Hearing Officer reduced Taylor's termination to a 30-day suspension without pay despite

evidence of letters and conferences with Taylor with directives given for grading, lesson planning, instruction, classroom management, and professionalism, because Taylor was never explicitly informed that she would be subject to termination if her inadequate performance continued. Although Taylor had failed to perform her duties in a satisfactory manner for some time, she was never given notice of her deficiencies. Moreover, her evaluations indicated that she was performing her duties in a satisfactory manner. Therefore, the Hearing Officer reasoned that “basic fairness and due process” precluded affirming Taylor’s termination (p. 9).

Failure to warn an employee that her job was in jeopardy was also a factor in the Hearing Officer’s decision to suspend, rather than terminate, another teacher. *Crooks v. Sumter County Bd. of Educ.*, FMCS 06-00497 (September 5, 2006). Similarly, in *Stallworth v. Wilcox County Bd. of Educ.*, FMCS--None (2009), the Hearing Officer held that Stallworth should have been warned, prior to the Board’s action to terminate her, that her continued absences would result in disciplinary action.

A failure to explicitly warn a teacher that a prior suspension was her “last chance” resulted in a reduction of a termination in *Love v. Opelika City Bd. of Educ.*, FMCS 11-00496 (April 13, 2011). In 2009, Love received a suspension after grabbing a student by the neck and using profanity. She also received a one-year probation by the State Board of Education. In 2010, Love told a student, “I don’t owe you shit” when a student said something to Love about owing him money (p. 7). Love admitted making the statement and was placed on administrative leave. On the whole, Love’s evaluations were satisfactory and only two personnel issues, the use of the word “shit” and the choking incident, were used by the Board in its notice of intent to recommend termination. Love’s termination was reduced to a five-day suspension without pay, a reprimand, and Love was placed on notice that any future serious infraction might result in her

termination. The reason the Hearing Officer declined to uphold Love's termination was because she was never notified that her suspension in 2009 for grabbing a student by the neck was her "last chance" for progressive discipline and that any further problems, such as the use of profanity, would result in her termination.

In *Shoemaker v. Alabama Dep't of Youth Services*, FMCS 10-30312 (November 13, 2010), the Hearing Officer found that the agency did not provide any evidence of what disciplinary actions might flow from the use of corporal punishment in violation of agency policy. In other words, Shoemaker was not forewarned as to what the consequences would be if he violated the policy. As a result, the Hearing Officer reduced his suspension from 20-days to five days. Finally, although the case involved a termination following an on-the-job injury and exhaustion of available leave, failure to warn an employee of consequences for violating Board policy was a factor in the Hearing Officer's decision to reverse the Board's decision in *Cooley v. Bd. of School Com'rs of Mobile County*, FMCS 06-00077 (March 1, 2006). The Hearing Officer in *Cooley* found that the Board did not advise Cooley that she was in violation of any Board policy requiring her to continually update the Board regarding her medical status.

A "second chance" was granted in *Shivers v. Alabama Dep't of Youth Services*, FMCS 07-03934-3 (February 14, 2008). The Hearing Officer, in reducing Shivers's termination to a 30-day suspension without pay, stated:

Discharge from employment is economic death in the work force. To say that discharge is too severe a penalty to impose upon [Shivers] is not to minimize the gravity of his action. He violated a major principle of the juvenile punishment and rehabilitation program of the State of Alabama. Just as most infractions to the wrongful actions of the inmates would be met with punishment and a second chance, [Shivers] is entitled to another opportunity to redeem himself in view of all the evidence presented. (p. 12)

Unlike cases where there was no warning or opportunity for another chance considered as a mitigating factor in upholding a Board's disciplinary action, the Hearing Officer in *Evans v.*

*Birmingham City Bd. of Educ.*, FMCS 05-0351 (March 22, 2005) specifically noted that Evans was already given his “second chance” by the Board. In upholding Evans’s termination for being heavily intoxicated at work, the Hearing Officer noted that this was Evans’s second time to be under the influence of alcohol at school. Likewise, the Hearing Officer in *Roberts v. Huntsville City Bd. of Educ.*, FMCS 09-04093 (February 19, 2010) rejected the teacher’s “second chance” plea. Roberts was terminated in 2009 for failure to perform duties in a satisfactory manner, neglect of duty, incompetency, insubordination, or other good and just cause. By her own admission, Roberts should not have been in the classroom because her drug addiction had rendered her incompetent as a teacher. Although Roberts argued that she should be given a second chance, subject to random drug testing, the Hearing Officer stated that “the Board would still be obligated to expend time and resources to cancel Roberts’ contract a second time and there is insufficient evidence to support taking this gamble” (p. 16-17).

The Hearing Officer modified the “One More Chance Doctrine” in *Menefee v. Montgomery County Bd. of Educ.*, FMCS 05-02699 (October 7, 2005) to add sufficiency of the evidence as a component of the principle by stating, “If there is any doubt/question with respect to an employee’s termination, that employee must be given another opportunity” (p. 30). The Board terminated Menefee, a special education teacher, for failure to perform duties in a satisfactory manner, insubordination, neglect of duty and other good and just cause. Specifically, the board found that Menefee failed to complete his IEP’s in a timely manner, despite directives given to him by his principal as well as the district level special education administrator. Additionally, during a conference to address concerns with his IEP’s, Menefee walked out of the conference, using profanity. He also engaged in intimidating and threatening conduct towards his principal, resulting in school security being called, and sexually harassed a co-worker. The

Hearing Officer reduced Menefee's discipline from a termination to a written warning. The Hearing Officer stated that "Discharge has been referred to as the economic capital punishment and the final (sic)" (p. 9). The Board did not provide any IEPs completed by other teachers for comparison, there was no evidence of previous disciplinary actions, and there was conflicting testimony. Because the Hearing Officer held that the evidence was not sufficient to terminate Menefee, he reduced Menefee's discipline to a written warning.

**Role of the hearing officer.** In the conclusion section of the opinion in *Johnston v. Baldwin County Bd. of Educ.*, FMCS 05-04807 (December 13, 2005), the Hearing Officer noted that at the time of his ruling, no court decisions had been rendered concerning the TTA, specifically as to the specific role, function, and authority of a hearing officer in conducting a hearing and rendering a decision under the Act. He stated:

In their brief, Mr. Johnston's counsel argue that general principles of labor arbitration jurisprudence should be applied in this proceeding. [The TTA] does not explicitly address this subject. However, Section 16-24-20 of [the TTA] provides for appointment by the Federal Mediation and Conciliation Services Office of Arbitration Services from its roster of arbitrators as an optional method for selecting hearing officers. Such arbitrators are customarily engaged in labor arbitration, a fact the Legislature obviously knew when it enacted [the TTA]. Section 16-24-209(b) of [the TTA] refers to a preference for a hearing officer 'who is experienced in employment law'. From these provisions, it must be concluded that the Legislature contemplated, or at least recognized, that labor arbitration jurisprudence has some part in the resolution of disputes by hearing officers. (p. 13)

The Hearing Officer then went to compare the TTA with the previous tenure law, including how the proceedings and procedures had changed. The arbitrator concluded that the nature of the proceeding under the TTA was an adversarial proceeding with the hearing officer acting in a judicial or quasi-judicial role. Specifically, the Hearing Officer stated that the TTA "appears to create a circumstance comparable to an appeal from a district court or probate court to a circuit court for a trial *de novo*" with no deference given to what the employing board may



have done (p. 17). The Hearing Officer, stating that the TTA appears to recognize labor arbitration jurisprudence, found that “unless an explicit contract provision provides otherwise, the employer has the burden of proof in establishing a factual basis for disciplinary action against an employee” (p. 22).

Similarly, in *Danzy v. Bd. of School Com’rs of Mobile County*, FMCS 08-04487 (March 2, 2009), the Hearing Officer explained that the background of arbitrators was expressly considered by the Alabama legislature as part of the TTA, stating that “because all arbitrators on the FMCS roster of arbitrators must be experienced in labor arbitration, the system established by the [Alabama] Legislature calls for review of transfer decisions by hearing officers experienced in labor arbitration and preferably employment law as well” (p. 9).

**Reduction in force/transfer in arbitration law.** In *Miller v. Cherokee County Bd. of Educ.*, FMCS 07-03792 (February 19, 2011), the Hearing Officer, who styled the case “In the Matter of Arbitration,” cited arbitration law for a number of principles throughout the opinion reversing Miller’s transfer, specifically arbitration law related to a reduction in force. He first stated, that “arbitrators often have recognized the right of management, unless restricted by the agreement, to eliminate jobs where improved methods or other production justification exists and management otherwise acts in good faith” (p. 5). He also cited arbitration law for the proposition that “supervisory positions not only carry a higher status than other positions at the same pay and grade level but they also carry more responsibility for success or failure of the organizations where they perform their supervisory duties” (p. 6). In addition, he stated that “a transfer is a ‘shift of an employee from one job to another within a company. A lateral transfer is a change in an employee’s job within a department, to another machine or to very similar duties’” (p. 6).

Similar labor law principles concerning the right to transfer were quoted in *Mizzell v. Montgomery County Bd. of Educ.*, FMCS 09-03946 (January 4, 2010). Although Mizell argued that the Board violated its reduction in force policy when it placed less senior employees into positions for which she was certified, the Hearing Officer found that those positions were supervisory in nature, were not parallel to her position as an educational specialist and that others selected for positions were better qualified than she. The Hearing Officer cited a lengthy amount of “arbitration precedent” in upholding Mizzell’s transfer:

Arbitrators have consistently upheld management’s right to transfer employees, unless, as arbitrator Wolff stated (in *Chrysler Corp.*, at 6 LA 276, 281), ‘the right is restricted by agreement, law, custom, practice ‘This right is a necessary element in the operation of an employer’s business, and is included within the employer’s right to direct its workforce. (See: *Bruno’s, Inc.*, 81 LA 382, 383, (Foster, 1983); *Gas Service Co.*, 33 LA 219, 223 (Stockton, 1959); and *Lewisburg Chair Co.*, 24 LA 399, 400 (Donnelly, 1955)). Some agreements, and the statute herein, explicitly recognize the employer’s right to transfer; and, any restrictions on the right must be ‘clearly stated.’ (See: *Adams Business Forms*, 76 LA 516, 519 (Eisler, 1981); *Giant Stores*, 74 LA 909, 910 (Larney, 1980); and, *Kollmorgen Corp.*, 44 LA 111, 113-114 (Fallon, 1965). Many justifications have been accepted by arbitrators in upholding transfers, to include ‘personality clash,’ in *Madison Metro School District*, 69 LA 1138 (Weisberger, 1977), and, ‘need for more supervision,’ in *Brown Shoe Co.*, 40 LA 1025 (Holly, 1963). Finally, as to seniority, arbitrators have held that if the contract (or statute in this case) does not require seniority be the only criteria (as in an ‘exclusive’ seniority clause), ‘management may consider skill, ability, and experience along with seniority’ in making transfer and/or promotion decisions. (See: *Interstate Power & Light Co.*, 120 LA 1130 (Kossoff, 2004)). And, if an employer considers a junior employee to be more qualified than a senior employee, the employer’s transfer decision must be supported by information as to the criteria used. (See: *Safetran System Corp.*, 119 LA 616, 620 (Duff, 2004)). The ‘objective criteria’ standard, referred to in section 16-1-33 of the statute, is an ‘inclusive’ seniority provision. It is one which permitted the Board to consider seniority, together with other criteria, (such as, ‘qualification by certification in particular disciplines’; ‘competence to teach the position and/or discipline’; ‘effectiveness’; ‘professional education and work experience’, and ‘earned degrees,’), in arriving at its decision to reassign Grievant. (pp. 7-8)

**Intentional false claim by employee in arbitration.** Robinson was terminated for falsely reporting her income on her son’s free and reduced lunch form for four years. *Robinson v. Bd. of School Com’rs of Mobile County*, FMCS 05-04420 (November 25, 2005). Although

Robinson argued that she should be allowed to repay the program because of her 19 years of service with excellent evaluations and no prior discipline, the Hearing Officer upheld the termination. The Hearing Officer cited “Norman Brand, Ed., Discipline and Discharge in Arbitration 229-30 (BNA 1998):

When an employee intentionally submits a false claim..., employer-employee trust is impaired. When the employee engages in these activities to gain some economic or personal benefit from the employer, these acts are considered serious offenses akin to theft. When an employee is found to be willfully dishonest in this context, arbitrators uphold stiff penalties, including discharge, although some will consider mitigating circumstances. In contrast, when discipline relates to innocent or inadvertent misrepresentations that are not intended to deceive and cause no loss to the employer, arbitrators tend to view discharge or other severe discipline unfavorably. (pp. 8-9)

The Hearing Officer found that Robinson’s falsifying of the forms was intentional and that her testimony was not credible.

**Unity of command.** Another labor law principle was applied in *Menefee v. Montgomery County Bd. of Educ.*, FMCS 05-02699 (October 7, 2005). The board terminated Menefee, a special education teacher, for failure to perform duties in a satisfactory manner, insubordination, neglect of duty and other good and just cause. Specifically, the board found that Menefee failed to complete his IEP’s in a timely manner, despite directives given to him by his principal as well as the district level special education administrator. Although the opinion was difficult to read, it appears that the Hearing Officer believed that the Menefee could not be insubordinate for failing to adhere to directives given to him by the Board’s special education coordinator in addition to those directives given to him by his principal. The Hearing Officer wrote, “It is a well-established principle that a subordinate may have only one supervisor” (p. 9). The next sentence states, “The ‘Unity of Command’ states that orders should originate from one source. Thus, only one supervisory (sic) in the organization shall give a subordinate orders” (p. 9). As a result,

Menefee could not be insubordinate both to his principal and the system's special education coordinator.

**Arbitration law used in weight given to hearsay evidence.** In *Hodge v. Crenshaw County Bd. of Educ.*, FMCS 06-03412 (January 16, 2007). Hodge advocated a more expansive use of the phrase adapted from the seven steps of "just cause" developed under previous arbitration decisions rendered under collective bargaining agreements. The Hearing Officer declined to use that definition because Alabama case law "precludes the use of more expansive or differing precedents established in the common law of the labor arbitration filed which are at variance with Alabama case law," citing *Madison County Bd. of Educ. v. Wilson*, 984 So. 2d 1153 (Ala. Civ. App. 2006) (p. 4). Despite this recognition, however, the Hearing Officer relied heavily on labor law opinions to determine how much weight to give to the hearsay statements of the students over the direct testimony of Hodge. The Hearing Officer quoted Hodge's brief as follows: "The Board did not call the student who claimed to be victimized, did not take his written statement, did not audio record his statement, did not call any witnesses to the event and did not have any witnesses write out a statement. In short, the Board offered nothing through actual witnesses to the event that was in the witnesses' actual words" (p. 10). Because the Board has the burden of proof by the preponderance of the evidence, the Hearing Officer found that this type of hearsay evidence is prejudicial to Hodge. Although the rules of evidence do not apply to such hearings, the Hearing Officer noted that there is an increased concern that the proceedings could be unfair to the teacher under some circumstances. Prior to her termination, Hodge had over thirty-four years of service, free of any disciplinary action for thirty-three of those years. "Not only does the Board's hearsay evidence lack in weight, it creates real problems concerning fundamental notions of fairness and due process as announced by the Alabama courts" (p. 15).

In *Muhammad v. Selma City Bd. of Educ.*, FMCS 070705-5186-3 (December 14, 2007), Muhammad argued that the Board relied heavily on hearsay evidence. The Hearing Officer stated, “It is a commonly held practice in arbitration that the rules of evidence need not be strictly applied. *How Arbitration Works*, by Elkouri and Elkouri is considered to be one of the most authoritative texts on the practice of arbitration” (p. 17) The Hearing Officer went on to cite passages from this text prior to concluding that the hearsay evidence was properly weighted as to its relevancy.

*Causes of Action from Arbitration Law.* In *White v. Limestone County Bd. of Educ.*, (2006 – unpublished opinion), a 36-page singled-spaced opinion, the Hearing Officer cited a great deal of arbitration law, including whether an employer can terminate an employee who viewed pornography on the Internet (p. 26) Specifically, the Hearing Officer quoted *Disciplining Sexual Harassers in the Unionized Workplace: Judicial Precedent is Influencing Arbitrator Attitudes, Awards*, 77 Chicago-Kent Law Review 823 and a multitude of cases from the Labor Arbitration Reporter and the APR Dispute Resolution Journal.

*Closed Hearing and Unpublished Decision--Application of FMCS Rules.* In *White v. Limestone County Bd. of Educ.*, (2006--unpublished opinion), White’s attorney petitioned that the hearing be closed and the decision unpublished. Because the TTA was silent as to whether a hearing is open or closed, the Hearing Officer applied arbitration precedent to decide this issue. Specifically, the Hearing Officer noted that the Alabama State Department of Education published “Alabama Tenure and Fair Dismissal Guidelines for Arbitrators” on its website and these guidelines are exactly the same as the Federal Mediation and Conciliation Service website guidelines. For this reason, the Hearing Officer decided to apply FMCS Rules and Code to this case, specifically, that White did not consent to publish this decision, the hearing was closed and

the decision was not to be public at the hearing officer level (p. 4). Another TTA case record was sealed, *Crutch v. Lawrence County Bd. of Educ.* (August 3, 2011), and was located from the appellate decision. No reason was given in the appellate decision as to why the record was sealed.

### **Employment History and Progressive Discipline**

**Employment history.** A teacher's employment history, positive or negative, and/or the presence or absence of progressive discipline were the main considerations in whether or not a hearing officer mitigated a disciplinary action.

The Hearing Officer considered the 13 years of experience Dunn had in teaching and coaching, particularly his work while employed at a Title I school, in reducing Dunn's termination to a 30-day suspension. *Dunn v. Bd. of School Com'rs of Mobile County*, FMCS 05-01608 (April 30, 2005). Even where a teacher had a history of disciplinary action, including several written warnings, letters of concern, letters of reprimand and suspensions, the Hearing Officer in *Webb*, after allowing Webb to challenge prior disciplinary actions, found that most of the prior actions were without basis and refused to consider those actions as support for Webb's termination. *Webb v. Montgomery County Bd. of Educ.*, FMCS 07-02131 (January 15, 2008).

Similarly, in reversing Webster's termination, the Hearing Officer noted that Webster had a long-time employment history with the Board with no formal disciplinary history. *Webster v. Bd. of School Com'rs of Mobile County*, FMCS 05-01882 (July 30, 2005). In declining the request by the Board to suspend Webster without pay, the Hearing Officer further considered Webster's employment history, stating, "Although an award without back pay penalizes an employee, its primary intent is to prevent an employee benefitting at the expense of the employer when the employee's behavior is clearly wrong, but for one reason or another did not justify

termination action. The primary purpose of discipline is to correct unacceptable behavior, not necessarily to penalize the employee. It is reasonable to conclude that a long-term employee with a good record will heed the warning intended” (p. 9).

Likewise, the Hearing Officer considered positive performance evaluations as a mitigating factor in reducing a teacher’s termination to a suspension in *Muhammad v. Selma City Bd. of Educ.*, FMCS 070705-58186-3 (December 14, 2007). Termination was also found too harsh for a teacher with a 20-year history of being an excellent teacher with a reputation of going the extra mile for her students, but who had failed to timely post grades despite specific directives and deadlines. *Smith v. Washington County Bd. of Educ.*, FMCS 06-04359 (June 1, 2007).

The Hearing Officer found that while inappropriate behavior was proven, mitigating factors--specifically Granger’s employment record - made termination too harsh a penalty in *Granger v. Montgomery County Bd. of Educ.*, FMCS 09-01218 (November 2, 2009). Granger was terminated after making threats. Other teachers and students overheard Granger stating that if he had a gun, it would be like Columbine all over again. Over his twenty years of employment, Granger’s performance was satisfactory and he had never received any form of discipline. Although the Board presented evidence of serious misconduct, the Hearing Officer stated that “it does not automatically follow that the choice of penalty [i.e., termination of a teacher’s contract] was appropriate if there is evidence also of mitigating and/or explanatory circumstances. Termination under such circumstances would be a ‘draconian’ decision” (p. 13). Specifically, the Hearing Officer found that the Board rushed to judgment in this matter and attempted to raise an ‘incident’ to a charge of ‘violence’ in terminating Granger (p. 13). Instead, the Hearing Officer ordered the Board to provide outside psychological testing and treatment for anger management

and, if Granger found fit for duty, he be offered and reinstated to a teaching position. However, once reinstated, Granger would be suspended without pay for 30 days with a one-year probationary period.

Where a teacher had an inappropriate relationship with a student, by showing poor professional judgment through email exchanges with a student, a Hearing Officer reduced the teacher's termination to a one-week suspension without pay, almost solely based upon her prior employment history. *Tyler v. Montgomery County Bd. of Educ.*, FMCS 09-03461 (December 30, 2009). The Hearing Officer found that Tyler "blurred the line between teacher, student and friend" in her relationship with the student (p. 4). However, although Tyler made mistakes and admitted to using poor judgment, the Hearing Officer stated that Tyler's "long tenure, spotless disciplinary record, numerous awards for excellence in education, and her earned respect from fellow education professionals and students, deserve consideration and thus the penalty of termination is not appropriate" (p. 5).

In both *Dunn v. Bd. of School Com'rs of Mobile County*, FMCS 05-01608 (April 30, 2005) and *Wilson v. Madison County Bd. of Educ.*, FMCS 05-03316 (November 18, 2005), the Hearing Officers also considered the role of the employee as a coach as a distinctly different role than teacher in making the decision whether or not the teachers should be terminated. In *Dunn*, the Hearing Officer was swayed by the evidence that Dunn had a spotless employment record, viewing his role as a coach separate than his employment as a teacher. In *Wilson*, the Hearing Officer noted, "All of the charges levied against Laura Wilson grow out of her action, not as a physical education teacher, but as the school's cheerleading coach, an extra-curricular compensated position" (p. 37).



However, the Hearing Officer in *Tompkins v. Montgomery County Bd. of Educ.*, FMCS 09-0360 (December 30, 2009) declined to use Tompkins's unblemished employment history as a mitigating factor in his termination. Tompkins videotaped the students in his classroom and those videos were broadcast by a local news station and clips were emailed throughout the school system. Board policy stated that "the institution may not release information without the authority of the student, parents, or guardian" and the Board argued that there was just cause to terminate Tompkins's employment for violating board policy relating to student privacy rights. Specifically, the Board's policy was designed to enforce the provisions of FERPA. Tompkins's exemplary employment history was not a mitigating factor to impose a discipline other than termination.

In another case, the Hearing Officer also refused to consider prior employment history in upholding a teacher's termination in *Robinson*. Although Robinson argued her 19 years of service with the Board, excellent evaluations, and lack of prior discipline should mitigate her discipline where the Board terminated her for falsifying four years of her son's free and reduced lunch forms, the Hearing Officer found that her willful dishonesty justified her termination. *Robinson v. Bd. of School Com'rs of Mobile County*, FMCS 05-04420 (November 25, 2005). *Progressive discipline*. In *English v. Bd. of School Com'rs of Mobile County*, FMCS 05-03711 (October 30, 2005), the Hearing Officer found that the Board had essentially adopted a progressive discipline policy through its practices, noting that while such policies are not required by the TTA, they are in accord with well-established labor relations practice. The Hearing Officer quoted the progressive discipline principle from a text, *The Common Law of the Workplace: The Views of the Arbitrators* (1992) that was produced by the National Academy of Arbitrators, "Unless otherwise agreed, discipline for all but the most serious offenses must be

imposed in gradually increasing levels. The primary object of discipline is to correct rather than to punish. Thus, for most offenses, employers should use one or more warnings before suspensions, and suspensions before discharge” (p. 14-15). In determining that upholding English’s termination would violate statutorily required due process rights, the Hearing Officer found, “After two similar unpleasant instances of poor judgment, Mr. English could have been, and now should be reminded one last time of the following. The Appellant has corrected his behavior for short periods of time and then reverted back to exercising poor judgment. He should now have one final opportunity to demonstrate he is capable of learning” from his previous mistakes (pp. 15-16).

In *Webster v. Bd. of School Com’rs of Mobile County*, FMCS 05-01882 (July 30, 2005), the Hearing Officer held that termination was too harsh for a long-term employee with no formal disciplinary record and lack of progressive discipline given the nature of the allegations. In addition, the principal did not take action, not did the principal recommend Webster’s termination, testifying that Webster was a “dependable, good employee.” The Hearing Officer also was swayed by Webster’s employment history with the Board. In response to the request by the Board to suspend Webster without pay, the arbitrator stated:

Although an award without back pay penalizes an employee, its primary intent is to prevent an employee benefitting at the expense of the employer when the employee’s behavior is clearly wrong, but for one reason or another did not justify termination action. The primary purpose of discipline is to correct unacceptable behavior, not necessarily to penalize the employee. It is reasonable to conclude that a long-term employee with a good record will heed the warning intended. (p. 2)

In *Johnston v. Baldwin County Bd. of Educ.*, FMCS 05-04807 (December 13, 2005), the Hearing Officer found a lack of progressive discipline to be a mitigating factor in his decision to reduce Johnston’s termination to an 18-month suspension. The Hearing Officer found that there was clear and convincing evidence that Johnston violated test security policy relating to

standardized tests and was guilty of neglect of duty and failure to perform duties in a satisfactory manner, as well as other good and just cause to terminate Johnston's contract. However, despite the fact that test scores for Johnston's class were invalidated in two subject areas of the SAT, the Hearing Officer did not find that this "gravely affected or frustrated" the purpose of standardized testing. More importantly, because there was no previous disciplinary action taken against Johnston by the Board, the Hearing Officer was not convinced that a deterrent effect on the same or similar conduct in the future could not be achieved by a lesser disciplinary action than termination.

Following a teacher's refusal to discuss a plan for improvement after four unsatisfactory Alabama Professional Educator Performance Evaluation (PEPE) observations, difficulty with classroom management and poor attendance, the teacher was terminated. *Crooks v. Sumter County Bd. of Educ.*, FMCS 06-00497 (September 5, 2006). The Hearing Officer stated that progressive discipline is effective because by "progressively increasing penalties, employees have the opportunity to conform their performance and conduct to the employer's reasonable expectations," quoting *The Common Law of the Workplace, The Views of Arbitrators*, Second Ed., National Academy of Arbitrators, St. Antoine, The Bureau of National Affairs, Inc., Washington D.C. 2005 (p. 186). PEPE was designed to be a formative evaluation designed to improve a teacher's instructional practices by identifying weaknesses and providing professional development to improve in those areas. Although the Alabama State Department allowed individual school systems the opportunity to use PEPE in a summative manner to be used for decisions such as termination, the board did not adopt PEPE for this purpose. Even if it had, the principal did not comply with PEPE requirements. Evaluations conducted over nine years previously indicated that Crooks was performing her duties at or above an average level. Finally, at no point was Crooks informed that her employment was in jeopardy. As a result, the Hearing

Officer reduced Crooks' termination to a seven-day suspension without pay, reasoning that this was not a case that warranted termination over progressive discipline.

In reducing a teacher's termination to a 60-day suspension, the Hearing Officer in *Muhammad v. Selma City Bd. of Educ.*, FMCS 070705-58186-3 (December 14, 2007), stated that "the concept of 'just cause' encompasses the concept of progressive discipline" (p. 19). While his behavior was serious, the Hearing Officer found that it was not serious enough to warrant termination. In *Stallworth v. Wilcox County Bd. of Educ.*, FMCS – None (2009), the teacher had a history of excessive absenteeism. Finding that progressive discipline required the Board to notify Stallworth that she would be subject to disciplinary action for continued absences prior to terminating her, the Hearing Officer ordered Stallworth to be placed on probation with the condition that if she was absent more than a set number of days, she would be terminated. Termination was also deemed too harsh a penalty where there was no previous discipline in *Paris v. Talladega City Bd. of Educ.*, FMCS 08-01678-3 (June 15, 2008). (See also *Todd v. Birmingham City Bd. of Educ.*, FMCS 07-00798 (November 26, 2007) holding that the teacher's misconduct was not sufficiently serious to be just cause for his termination, particularly since there was no progressive discipline. Therefore, termination would be inappropriately severe).

In *Shoemaker v. Alabama Dep't. of Youth Services*, FCMS 10-03012 (November 19, 2012), the Hearing Officer stated that "employee discipline applied in a unionized environment should be progressive in nature. It should be severe enough to get the employee's attention, but at the same time be corrective, serving to educate the individual in regard to his or her behavior in the future" (p. 8-9). In reducing his suspension from 20-days to five days, the Hearing Officer stated that a five-day suspension "is the proper level of penalty to instruct Shoemaker that his

handling of the matter [in paddling his students and allowing them to paddle one another] was unacceptable” (p. 9).

Shivers, a teacher at a DYS facility, was terminated by the Board based upon neglect of duty and failure to perform duties in a satisfactory manner. *Shivers v. Alabama Dep’t of Youth Services*, FMCS 07-03934-3 (February 14, 2008). Specifically, Shivers transferred contraband in the form of a cell phone to a student. He was also charged with failing to properly supervise students, resulting in the assault of one student. He was also charged with failing to truthfully participate in an official administrative investigation into these incidents. In reducing Shivers’s termination to a 30-day suspension without pay, the Hearing Officer stated, “discharge from employment is economic death in the work force. It stigmatizes an individual with a brand of one who was found unworthy or being able to continue to work in the employment of his choice. Discharge is the final step in disciplinary action and should be resorted to only when all else fails” (p. 12).

Just as the lack of progressive discipline was a factor in reducing discipline in several cases, a history of progressive discipline was a significant factor in the Hearing Officer’s decision to uphold a teacher’s termination in *Frye v. Walker County Bd. of Educ.*, FMCS – None (November 17, 2009). Frye was given a written reprimand and transferred to another school in 2002. The discipline was given because of inappropriate comments. This progressive discipline, although it had occurred several years’ prior to his termination, was considered as part of Frye’s employment history. Prior to his termination, Frye had been warned about inappropriate conduct involving sexual comments directed towards students and adults and complaints of sexual harassment. Even if, as Frye contended, the comments were made jokingly, the conduct on its

fact was inappropriate and showed a lack of judgment. Remediation was not a possibility because Frye continued his misconduct, even after written and verbal warnings.

A teacher's prior disciplinary history also supported termination in *Parham v. Huntsville City Bd. of Educ.*, FMCS--None (February 18, 2011). There was substantial and overwhelming evidence that showed Parham was incompetent, insubordinate, and that he neglected his duties. Parham's misconduct included directing profanity towards his emotionally conflicted special needs students, putting his hands around the neck of a student, threatening to "beat the hell" out of a student, and allowing his students to be unsupervised (p. 7). Even when he performed his duties, he did so in an unsatisfactory manner. Parham had previously received a 10- day suspension without pay for dragging a female student down the hallway by her arm and had received numerous written reprimands. He was provided with feedback through progressive discipline as to areas where he needed to improve, but he did not do so.

Even where a teacher argued that the Board should accommodate a health condition to excuse him from excessive tardiness, progressive discipline supported termination. *Rickard v. Florence City Bd. of Educ.*, FMCS 09-0360 (November 25, 2010). Rickard was terminated for excessive tardiness despite repeated warnings. The Hearing Officer found that Rickard's administrators had made numerous attempts to correct his behavior, with no improvement from Rickard. The Hearing Officer stated that, although Rickard has health conditions, "It is difficult to fathom how the medication or ill health prevented Rickard from rising just a few minutes earlier to arrive to work on time" (pp. 13-14).

In *Carter v. Alabama Dep't of Youth Services*, FMCS 10-02642 (January 29, 2011), Carter had repeatedly been disciplined for unprofessional conduct prior to the incident that resulted in this disciplinary action. She was suspended for 10-days after she hung up the phone

on her supervisor because she was angry at him for giving her a directive with which she did not wish to comply. In addition, testimony showed that Carter “constantly argued with her colleagues and supervisors throughout her tenure in the program” (p. 3). Carter argued that she had already been previously disciplined for unprofessional conduct and that those incidents should not be considered in her discipline in this case. However, the Hearing Officer held that these previous warnings provide the foundation for more severe discipline.

Documentation in support of progressive discipline took an interesting turn in *Webb v. Montgomery County Bd. of Educ.*, FMCS 07-02131 (January 15, 2008). Even though Webb had previously received several written warnings, letters of concern, written reprimands, and two suspensions, the Hearing Office found that the Board did not conclusively prove that Webb directed profanity at a student. In addition, the Hearing Officer allowed a *de novo* review of each of Webb’s eleven previous disciplinary actions and found only one merited discipline. As a result, the Hearing Officer ordered the Board to expunge nine disciplinary actions from Webb’s personnel file.

In *Bradford v. Huntsville City Bd. of Educ.*, FMCS 05-04204 (November 21, 2005), the Hearing Officer refused to consider Bradford’s argument that the Board failed to use progressive discipline. The Board recommended cancellation of Bradford’s contract for incompetency, insubordination, neglect of duty, failure to perform duties in a satisfactory manner or other good and just cause. Despite numerous efforts to provide the teacher with assistance and documentation of her weaknesses in her evaluations, Bradford did not improve. The principal testified that had “never seen as bad a teacher in her 28 years of education experience” while the consultant who was assigned to work with the teacher testified that Bradford was the worst teacher she had ever observed in her 37 years in educational experience (p. 5). Bradford argued

that the Board failed to follow the principle of progressive discipline and that her termination should be rescinded. The Hearing Officer upheld Bradford's termination, finding that the Board made "Herculean efforts" to improve Bradford's performance, particularly with her classroom management deficiencies. The Board made "countless efforts, running the gamut from consultations, classroom visits, specific written recommendations, weekend hours of counseling, visits to other schools, and even shopping with Grievant for classroom supplies" to improve her performance as a teacher (p. 20). Given those efforts, with no improvement by Bradford, the Hearing Officer stated that he was "in no position to take issue with the Board's termination decision in this matter" (p. 20). He agreed with the Board's position that a suspension or lesser disciplinary action would be fruitless since no amount of assistance had helped Bradford improve her performance.

### **Inconsistency in Decisions**

There are several cases that illustrate consistency concerns between cases where teachers were disciplined for similar misconduct or where other action, such as transfer, was taken based upon a similar fact pattern. The Hearing Officer's reversal of the partial termination and transfer in *Glenn v. Bd. of School Com'rs of Mobile County*, FMCS 08-04313 (June 4, 2009) when compared to the Hearing Officer's upholding of the partial termination and transfer in *Hasan v. Bd. of School Com'rs of Mobile County*, FMCS 08-04371 (May 18, 2009) is one example of the challenges the Board and the employee faced when attempting to predict the outcome in a case under the TTA. Both cases had identical facts in that both employees were tenured as teachers, but not as School Improvement Specialists. Faced with proration, the Board implemented its reduction in force policy. Both employees received the same letter, on the same day, notifying them that they were being transferred out of the Central Office and that their contracts were



being partially cancelled. Two different results were obtained from two different hearing officers, including the misapplication of Alabama law in *Glenn* resulting in the Alabama Court of Civil Appeals reversal.

**Alcohol.** In *Barnes v. Bd. of School Com'rs of Mobile County*, FMCS 05-04501 (February 5, 2006), the Hearing Officer declined to uphold the termination of a teacher who had previously admitted to using alcohol while supervising students and was suspected of using alcohol while at work on at least two previous occasions. In 1999, Barnes transported a group of students to a baseball game and consumed beer. On the way home, she struck a curb and had a flat tire as a result. Barnes self-reported the incident to her principal, who documented the conversation. Barnes agreed to seek treatment, to refrain from drinking, and was notified that failure to do so would jeopardize her job. In December 2004, Barnes's principal sent her a letter of concern about classroom management, including concerns that the principal had smelled what she believed was the odor of alcohol coming from Barnes on several occasions and that a parent had sent her an anonymous letter concerning suspicions of alcohol use. The principal expressed an offer to help Barnes, including the possible referral to the EAP for help. In February 2005, two months later, the principal notified Barnes that colleagues had informed her that Barnes appeared to be under the influence of alcohol while at a workshop. In April 2005, Barnes arrived late to that day's standardized testing. The principal testified that she smelled alcohol in Barnes's breath and that she was having difficulty walking. The principal drove Barnes to be tested and her blood alcohol level was 0.178. Barnes was placed on administrative leave pending Board action.

Upon receipt of the notice for her termination, Barnes offered to resign if the letter of termination was withdrawn and any reference to it was removed from her file. She also notified

the Board that she was undergoing treatment. The Board declined to accept Barnes's conditions for resignation, but reassigned Barnes to a different school and grade for the 2005-2006 school year. The Hearing Officer found that the Board had a legitimate concern in ensuring the safety and well-being of the school children in its care. However, the Hearing Officer was concerned that the Board reassigned Barnes for the next school year. Furthermore, Board policy provided for random testing of employees who previously test positive for drugs or alcohol. Finally, the Hearing Officer was troubled by the lack of action by the Board based upon Barnes' previous admitted and suspected alcohol use at school. The Hearing Officer reduced termination to probationary status with random testing through the 2007-2008 school year.

In comparison, the Hearing Officer upheld the termination of a teacher for alcohol use in *Evans v. Birmingham City Bd. of Educ.*, FMCS 05-0351 (April 15, 2006). Evans tested positive for alcohol use in 2003. At that time, he was advised that if he were found to test positive for alcohol use in the future, he would be terminated. The Human Resources Officer also recommended that Evans contacted the Employee Assistance Coordinator to seek professional assistance. In November 2004, he again tested positive for alcohol. He was placed on administrative leave for violating Board policy on alcohol use. The Hearing Officer was heavily persuaded by evidence that indicated that Evans had to be highly intoxicated while at school, contradicting Evans's claims that he stopped drinking around 10:00 p.m. the night before both positive tests. His breath alcohol level was .079 at 1:50 p.m. the first instance and was .110 at 3:01 the second instance. In both cases, well over 16 hours had passed since the time Evans claimed he had his last drink. More importantly, the Hearing Officer held that Evans had already had one chance to remain alcohol-free at work.

**Substance abuse.** The Hearing Officer in *Bowling v. Morgan County Bd. of Educ.*, FMCS 09-02283-3 (August 29, 2009), reduced Bowling's termination to a 10-day suspension with pay.

Bowling, a principal, had to be driven home because he was having difficulty speaking, was lethargic, and fell asleep at his desk. A few weeks after that incident, Bowling wrote a letter to a teacher requesting that her physician spouse, who was not his own doctor, provide a prescription to him for Fentanyl patches, a Class 2 narcotic. The Board terminated Bowling because it found that he was addicted to drugs, but refused to admit to it or seek treatment. Bowling claimed he experiences severe back pain and that he suffered reactions to his prescribed medication, including Fentanyl patches.

The Hearing Officer engaged in a lengthy discussion of "pseudoaddiction" to explain Bowling's actions, stating, "For more than the past twenty years' physicians have studied and written extensively on the subject of drug seeking behavior caused by under-treatment of pain. The medical condition has come to be known and accepted as Pseudoaddiction" (p. 7). The Hearing Officer then concluded that pseudoaddiction, which did not appear to be raised as a defense by Bowling, could not be ruled out as a cause of Bowling's behaviors. In addition, the Hearing Officer also examined whether Bowling's contract was cancelled for political reasons, specifically because Bowling campaigned against his elected Superintendent two years prior. While finding the evidence fell short of substantiating any claim that political reasons were involved, the Hearing Officer struck the testimony of two witnesses for having "unreliable adversarial testimony [that] was colorfully slanted and opinionated towards the Employer and overly supportive of the position of the Superintendent" (p. 10). In short, the Hearing Officer was

convinced that Bowling was an addict in need of treatment, rather than an addict who was actively seeking painkillers from subordinates at his work.

In comparison, a teacher's termination for drug addiction was upheld in *Roberts v. Huntsville City Bd. of Educ.*, FMCS 09-04093 (February 19, 2010). In 2006, struggling with loss of a parent and her own divorce, Roberts's principal referred her to the Board's EAP. She was diagnosed with depression and began seeing a professional counselor. Unfortunately, she began a sexual relationship with him and began abusing drugs. During her own testimony, Roberts admitted that due to her drug addiction, she was not a competent teacher and should not have been in the classroom. After receiving her notice of termination, Roberts sought outpatient drug rehabilitation. By her own admission, Roberts should not have been in the classroom. Although Roberts argued that she should be given a second chance, subject to random drug testing, the Hearing Officer stated that "the Board would still be obligated to expend time and resources to cancel Roberts' contract a second time and there is insufficient evidence to support taking this gamble" (p. 16-17).

Also, in *Thomas v. Birmingham City Bd. of Educ.*, FMCS-None (November 21, 2007), the Hearing Officer upheld the termination of a teacher who testified positive for cocaine after his students were left unattended in his classroom. Board policy strictly prohibited the use of controlled substances that may result in impaired work performance or harm to the Board's image. Thomas was clearly under the influence of cocaine while at school. He was notified of his suspension with pay and given information concerning the Board's employee assistance program. He never submitted to a drug test to return to work, despite numerous directives to do so.

**Privacy in proceedings.** Two additional cases illustrate problems with consistency among the Hearing Officers, even in procedural matters related to the privacy of the proceedings. In *White v. Limestone County Bd. of Educ.*, (2006 – unpublished opinion), White’s attorney petitioned that the hearing be closed and the decision unpublished. Because the TTA was silent as to whether a hearing is open or closed, the Hearing Officer applied arbitration precedent to decide this issue. After FMCS Rules and Code to this case, the hearing was closed and the decision was not to be public (p. 4). Meanwhile, in comparison, the Hearing Officer in *Menefee v. Montgomery County Bd. of Educ.*, FMCS 05-02699 (October 7, 2005), reproduced in his decision IEP records from Menefee’s special education caseload, including un-redacted student names, social security numbers, dates of birth, and exceptionalities. Therefore, in one case, the Hearing Officer ruled on the teacher’s right to privacy in the appeal process, but in another, the Hearing Officer (along with others) violated the students’ privacy rights while reversing the termination of their case manager.

**Dishonesty.** In *Robinson v. Bd. of School Com’rs of Mobile County*, FMCS 05-04420 (November 25, 2005), the Hearing Officer upheld the termination of a teacher who misstated her gross income on her child’s free and reduced lunch form, regardless of her 19 years of service and no prior disciplinary record. However, in *Paris v. Talladega City Bd. of Educ.*, FMCS 08-01678-3 (June 15, 2008), a termination was reduced to a suspension, where there was evidence to support the allegations of conversion of Board property, dishonesty, and violations of the Alabama Code of Ethics, because there was no previous disciplinary action taken.

**Notice of contract termination.** The Board notified Williams on September 2, 2005, that he would be terminated from his position as an instructor when the system abolished its Building Trades Program. *Williams v. Marshall County Bd. of Educ.*, FMCS 05-06066 (February 23,

2006). The Hearing Officer held that although the Board had a legitimate reason for abolishing the Building Trades Program because of declining student enrollment, the notice to terminate Williams was not provided in a timely manner because it was not given to Williams on or before the last day of school. In contrast, in *Jackson v. Birmingham City Bd. of Educ.*, FMCS 06-03411 (October 18, 2006), where a teacher contended that her termination was untimely because she was not notified at the end of the school year, the Hearing Officer held that there is nothing that prohibits a Board from cancelling a teacher's contract during a school year.

### **Specific Causes of Action**

**Insubordination.** Insubordination was one of the primary reasons stated in the four-day suspension of a teacher in *Taylor v. Butler County Bd. of Educ.*, FMCS 06-04719 (December 18, 2006). During the 2005-2006 school year, Taylor had a series of disciplinary problems, including failure to follow standardized testing procedures, failure to provide appropriate instruction, unprofessional conduct, and tardiness. The Hearing Officer in this matter held that Taylor refused to comply with numerous directives from her Superintendent, "which, by any commonly accepted definition, constitutes insubordination" (p. 16). In addition, yelling at students and verbally abusing them, as witnessed by the instructional specialists, is evidence of her violation of the Alabama Educator Code of Ethics. Finally, Taylor's disciplinary record was not unblemished and that she continued a "pattern of misbehavior" that continued for many years.

A minor suspension was also upheld in *Montgomery v. Huntsville City Bd. of Educ.*, FMCS 07-02927 (September 8, 2007). Montgomery had already been told verbally and in writing to notify the office when students were disruptive, but did not do so. Instead, she threw a chair to get the attention of the class. Montgomery's actions were disruptive enough that a teacher in an adjacent room stepped into Montgomery's classroom and called the office. The

classroom was in disarray when the principal entered. Because Montgomery did not follow previous directives on how to handle a disruptive situation, the evidence was sufficient to uphold her suspension. A minor, two-day suspension for insubordination was also upheld in *McKinnis v. Lowndes County Bd. of Educ.*, FMCS 08-55586-3 (December 9, 2008), where the teacher refused to call her principal when she needed to be absent from work.

A minor suspension was also upheld in *Cagle v. Tuscaloosa County Bd. of Educ.* (June 26, 2008). Cagle was suspended for five days for being disrespectful to her principal in a manner described by teachers who witnessed her conduct as “highly inappropriate and disrespectful.” Cagle was upset over her child’s report that the principal had yelled at her earlier that day. Cagle argued that the confrontation occurred after school, when she had signed out for the day, and while she was acting in her role as a parent. The Hearing Officer said that even if Cagle was acting as a parent, she was still required to treat her supervisor with respect.

A major suspension for insubordination was upheld in *Carter v. Alabama Dep’t. of Youth Services*, FMCS 10-02342 (January 29, 2011). Carter, a teacher who worked with students in the juvenile court system, was suspended for ten days without pay, for hanging up the phone on her immediate supervisor because she was angry at him for giving her a directive she did not want to comply with.

The Hearing Officer upheld a teacher’s termination for insubordination in *Jackson v. Birmingham City Bd. of Educ.*, FMCS 06-03411 (October 18, 2006). Jackson, a veteran teacher with over 16-years of experience, defied numerous directives from her principal, specifically by missing numerous required faculty meetings, not performing required assigned supervision, sleeping in front of the class, and leaving early on several occasions. The Hearing Officer found that there “no question Jackson engaged in the conduct described in detail” by her principal (p.

15). Her conduct, including failure to attend mandatory faculty meetings and failure to monitor students continued despite numerous conferences where she was given clear and direct orders from her principal as well as verbal and written warnings. She “loudly proclaimed that she would not follow any of his directives and openly refuse[ed] to do so, suggest[ing] a teacher who clearly was not deserving of continuing her employment’ (p. 18).

The Hearing Officer in *Isaacs* held that the Board had good and just cause for termination. *Isaacs v. Jefferson County Bd. of Educ.*, FMCS 10-10250-3 (June 5, 2010). He exhibited a pattern of unprofessional conduct unacceptable for a teacher. The Board documented 12 instances of unprofessional conduct by Isaacs demonstrating his “unacceptably defiant and challenging attitude with school authorities” (p. 20). For example, Isaacs told his administrator to “get this kid the fuck out of my class,” then proceeded to taunt the student when he was removed from his classroom (p. 16). Another example illustrating his unprofessional behavior occurred after Isaac’s assistant principal wrote him a letter of concern after several late arrivals to school. Isaac’s confronted his administrator, calling him a “liar,” saying “this is bullshit,” and then, as he left the office, asked the administrator, “Would you ever come to school with a gun and shoot somebody?” (p. 20). In regard to the last incident, the hearing officer found that statement to be a threat and “in a school setting, the remark is about as unacceptable as [he] could imagine” (p. 22).

In *Petitt v. Jefferson County Bd. of Educ.*, FMCS--None (July 22, 2010), the Hearing Officer upheld Petitt’s termination. Petitt had previously been warned to avoid having physical contact with students, yet went into the dugout during a baseball game and slapped a student in the face. Although the Hearing Officer found that the student likely exaggerated the physical



contact, at the least, Pettitt's conduct constituted insubordination as he had been instructed not to have physical contact with students.

Similarly, a partial termination and transfer was upheld in *Browder v. Montgomery County Bd. of Educ.*, FMCS 08-0084-3 and 08-0084-4 (June 6, 2008). The Hearing Officer found that the evidence supported the need for the Board's action based upon Browder's inability to take directives from her supervisor. The Hearing Officer found Browder to be intelligent and able to perform the duties of her job, but that she had no right to be insubordinate. As a result, the relationship between Browder and her supervisor had created a climate of mistrust and impacted the efficiency of the department. The Hearing Officer compared Browder's relationship with her supervisor to that of an employee in a factory or manufacturing facility with respect to her insubordination, stating that "employees are required to follow orders except in certain defined situations where a safety issue is involved. They are expected to 'obey now and grieve later'" (p. 15).

Even though insubordination was proven by the Board in *Todd v. Birmingham City Bd. of Educ.*, FMCS 07-00798 (November 26, 2007), the Hearing Officer held that the teacher's misconduct was not sufficiently severe to justify termination and reduced Todd's termination to a 30-day suspension without pay. Todd was employed by the Board for more than 30 years, serving as a teacher, school administrator, director of schools, and director of human resources. Todd voluntarily transferred into his position as a supervisory attendance hearing officer, but there was a disagreement concerning Todd's position as described at the time of transfer and his actual job duties. Todd was placed on administrative leave following a recommendation from his supervisor that he be fired for insubordination because he refused her requests to attend daily

meetings, write class III hearing reports that supported his decisions, conduct hearings within 10 days of suspensions, attend training sessions, and assist in the office.

A teacher's insubordination was mitigated by the Board's investigation in *Burkette v. Montgomery County Bd. of Educ.*, FMCS 00710-3450-3 (October 26, 2007). The Board proved that Burkette used profanity towards a teacher in the hallway and that he was insubordinate to the administrators who escorted him to the principals' office, telling one that he better "turn his ass around." However, the Hearing Officer found cause for disciplinary action, but found that due process was tainted because the investigation performed by a Central Office was incomplete and did not allow the Board to all information needed for its decision, resulting in a modification of the Board's disciplinary action from a five-day suspension to a three-day suspension without pay.

**Incompetency.** While competency to teach was a consideration in a few cases, incompetency as the predominant reason for termination in only three cases: *Thomas v. Huntsville City Bd. of Educ.*, FMCS 09-004048 (January 1, 2010); *Reinhart v. Bd. of School Com'rs of Mobile County*, FMCS 10-00095 (January 15, 2011); and *Bradford v. Huntsville City Bd. of Educ.*, FMCS 05-04204 (November 21, 2005). In all three cases, the hearing officers upheld the teacher's termination as the only appropriate disciplinary action. Also in all three cases, the Hearing Officer noted that the Board had provided significant, individualized assistance to help the teacher improve and that the teacher failed to improve. Because of this documented, intensive assistance, the Hearing Officers reasoned that progressive discipline would not be effective in improving the teacher's performance.

**Physical and verbal abuse of students and colleagues.** In several of the cases involving students, the Hearing Officer appeared to go through great lengths to excuse the behavior of the

teacher. The decision in *Oglesby v. Talladega County Bd. of Educ.*, FMCS 10-01168-3 (May 17, 2010) is one example. Oglesby was suspended for seven days without pay for physically grabbing a student after prior warnings not to have physical contact with students and for using profanity around and towards students. In holding that the evidence was not sufficient to support Oglesby's suspension and, therefore, ratifying the appropriateness of Oglesby's conduct, the Hearing Officer stated:

The evidence was not sufficient to support such a punishment in the context of a teacher trying to hold on to his authority under very difficult circumstances, and was not sufficient for the Board to determine that there was just cause for the action, based upon what Oglesby was responding to . . . and that this teacher is dealing with high school students, nearly adults, and in my view, nobody can command any group of students' respect and attention or maintain control over the classroom, if he is absolutely prohibited from even touching a student--especially once the students find out about it. (p. 24)

Another case like *Oglesby* where the Hearing Officer appears to justify a teacher's physical contact with a student is *Alvarez v. Bd. of School Com'rs of Mobile County*, FMCS 06-01872 (June 24, 2006). In *Alvarez*, the Hearing Officer found that just cause did not exist in the Board's decision to suspend Alvarez, an elementary teacher with 25 years of service. A fifth grade student alleged that Alvarez verbally and physically abused him by grabbing him by the collar, screaming at him, dropping him to the floor, and isolating him from other students. Alvarez contended that the student attempted to take his money clip away from him and, as the student turned away from him and stumbled, Alvarez grabbed the student by his shirt, reprimanded him for attempting to steal from him, and directed the student to sit away from other students. The Hearing Officer found Alvarez's version of the incident to be the most credible and that Alvarez's conduct was proper as a teacher to maintain order and discipline, as well as to correct inappropriate behavior.

The Board terminated Nelson for physically assaulting a student by placing his hands around the child's neck. *Nelson v. Russell County Bd. of Educ.*, FMCS 10-1006-0023-3 (June 25, 2010). Nelson also directed profanity towards the student in the presence of other students. The student, RGM, was disrespectful to Nelson and Nelson, in his written statement, responded, "You don't come into my MF'ing class and tell me what to do" (p. 4). Nelson directed RGM to the office but RGM ignored his directives and went into the gym and climbed to the top of the bleachers. Nelson followed and a struggle ensued. Following the altercation, Nelson had bruises on his arms and elbows and RGM had scratches on his neck.

The Hearing Officer reversed Nelson's termination and ordered a 15-day suspension without pay after holding that there was not sufficient evidence to prove that Nelson choked RGM. RGM did not testify at the hearing and his written statement only said that Nelson grabbed him by the throat. The only adult witness testified that she thought Nelson choked RGM, but she was sitting behind a table at the bottom of the bleachers and could not hear what was said. The Hearing Officer also discounted the testimony of a student witness who testified that he saw Nelson choking RGM. The Hearing Officer stated this witness testified that "RGM was screaming for help which corroborates Nelson's testimony about RGM screaming the entire time he was restraining him. Screaming is inconsistent with the ability of someone that is being choked" (p. 11). Furthermore, when RGM refused to go to the office as directed, "It was a perfectly reasonable response to restrain the student by taking him down to the floor between the bleachers. A teacher stands in Loco Parentis while a student is in school. A parent may very well reach for his own child in the same manner in order to obtain compliance with his instruction" (p. 12). In determining what disciplinary action should be taken, the Hearing Officer considered Nelson's prior employment record as well as the mitigating factor of RGM's significant

disciplinary history, stating “it appears [Nelson’s] lapse in judgment was provoked by the student’s abject disrespect” (p. 15).

In *Hodge v. Crenshaw County Bd. of Educ.*, FMCS 06-03412 (January 6, 2007), the Board failed to establish by a preponderance of the evidence that Hodge “‘grabbed [a student] by his cheeks, shook him, and accidentally spit in his eye’” (p. 25) The Hearing Officer went on to state that while he believed that there were some instances where Hodge was too aggressive with a student, that he was convinced that some students - and their parents - were out to “get” Hodge, resulting in any confrontation between Hodge and a student being greatly exaggerated. In short, the Hearing Officer found that there was a “concerted effort among some of the students and parents” to end Hodge’s career and that the administration and the Board simply “began to grow weary” of dealing with the increased number of complaints (p. 18).

In contrast to *Oglesby, Alvarez, Nelson, and Hodge*, in *Petitt v. Jefferson County Bd. of Educ.*, FMCS--None (July 22, 2010), the Hearing Officer upheld Petitt’s termination, holding that the Board had just cause to terminate Petitt’s employment. Petitt had previously been warned to avoid having physical contact with students, yet went into the dugout during a baseball game and slapped a student in the face. Although the Hearing Officer found that the student likely exaggerated the physical contact, he stated:

Any reasonable adult should know that engaging in a verbal and physical altercation with a child would likely lead to discipline. That a teacher would think it a good idea to go to the dugout, mock the team calling them ‘bat boys,’ invade the players’ bench area during a school sanctioned game, walk up to a student and reach towards his face, even in a lighthearted and joking manner and exhibit no regret or remorse simply befuddles [the] hearing officer. (p. 16)

As to whether a lesser disciplinary action should have been taken, the Hearing Officer stated, “An authority figure should not jokingly slap a child” and that “no discipline short of termination [would] suffice” (p. 17).

In *Bolding v. Montgomery County Bd. of Educ.*, FCMS 05-01211 (August 30, 2005), the Hearing Officer upheld the termination of a teacher who inflicted corporal punishment on his second grade students by taking them to the bathroom and hitting them with a yardstick, for hitting a student on the hand with a ruler, for using profanity, and for calling students derogatory names. Although Bolding argued that his principal disliked him and set out to get him fired, the Hearing Officer found that Bolding made the principal's job easier by his continuous infractions. Furthermore, Bolding's explanation that the incidents were accidents or did not happen were contradicted by student accounts that were too similar and numerous to dismiss.

Termination for the physical and verbal abuse of a student was also upheld in *Perdue v. Montgomery County Bd. of Educ.*, FMCS 08-01570 (November 15, 2008). Video evidence showed Perdue, a special education teacher, slapping a wheelchair-bound nonverbal student in the face and pictures were taken of the inappropriate restraints used by Perdue--the student's support hose was used to secure her arms. Similarly, another special education teacher was terminated for screaming at her students, banding books on tables, hitting students, and spanking students. *Howard v. Birmingham City Bd. of Educ.*, FMCS--None (November 4, 2010). The Hearing Officer held that the evidence indicated that Howard's students were subjected to physical and verbal abuse, stating, "These children are special needs children, several of which cannot even communicate verbally. A teacher of such children should be protective of these children while providing them with a classroom conducive for educating them. The Board, as well as the parents of such children, rely on teachers to ensure the safety and wellbeing of these students while providing them with the best education possible" (p. 12). See also *Parham v. Huntsville City Bd. of Educ.*, FMC--None (February 18, 2011), holding that there was overwhelming evidence to support allegations of physical and verbal abuse and *Hornsby v.*

*Gadsden City Bd. of Educ.*, FMCS--None (December 9, 2008), holding that confining a student in a locker was sufficient to uphold termination.

In *Priget v. Birmingham City Bd. of Educ.*, FMCS 08-01705 (July 8, 2008), the Hearing Officer held that there was just cause to terminate Priget for assaulting a colleague. After a verbal altercation with a female colleague, Priget grabbed her around the waist tightly. Even when she asked him to let her go, he refused and squeezed her harder. She suffered a non-displaced rib fracture and missed nine days of work. The Hearing Officer concluded that Priget grabbed his colleague in an “aggressive and hurtful way. There was no doubt that the squeezing was done in a hurtful manner and was not done playfully” (p. 10).

**Immorality, moral character and moral turpitude.** Five cases dealt directly with terminations based upon either immorality, moral character, and/or moral turpitude (good and just cause). In *Brooks v. Phenix City Bd. of Educ.*, 080702-037623 (January 8, 2009), the Superintendent received an anonymous package in the mail from “concerned parents.” The package contained pages from pornographic websites showing nude images of Brooks and describing sexually explicit acts. The Hearing Officer held that the evidence showed that Brooks engaged in “hard core” Internet immorality making her unfit to teach (p. 15). The Hearing Officer explained that teachers are held to a heightened level of scrutiny because of their position in the public trust, even when it comes to off-duty conduct. In upholding the Board’s termination of Brooks’s, the Hearing Officer found that the Board established a nexus between the teacher’s conduct and her duties as a teacher, specifically her fitness and capacity to discharge her position under Alabama’s line of immorality case law.

The nexus between a teacher’s off-duty conduct and his or her duties as a teacher was also considered in *Berry v. Oxford City Bd. of Educ.*, 08-07816 (June 16, 2008) Berry was

arrested for possession of marijuana and pled guilty to misdemeanor possession. Berry argued that there was no nexus between the reason stated by the Board for its action (immorality) and Berry's ability to perform his work as a teacher. The Hearing Officer held that Berry's "contract of employment [was] due to be cancelled, that the facts demonstrate[d] a lack of moral certitude that is not only expected of, but demanded of an individual in the unique position that a teacher holds" (p. 8). The Hearing Officer reasoned that once Berry's conviction became known, it would have been unacceptable to the parents of the 9 to 12 year-old students in his class for him to continue as their teacher. The Hearing Officer stated, "There is an easily recognized nexus between a teacher's morality and his or her competence as a teacher" and it is a reasonable inference that his conviction makes Berry morally unfit to teach young children (p. 8)

In *Miller v. Phenix City Bd. of Educ.*, 10-04796 (February 19, 2011), Miller admitted that he had sexual intercourse with a 15-year-old student in his classroom and was charged with rape. The Hearing Officer found that the evidence was sufficient to prove Miller's immoral conduct, rendering him unfit and incompetent to serve as a teacher.

Moral character formed the foundation for "good and just cause" in *Staten v. Huntsville City Bd. of Educ.*, 07-02515 (2008). In 2004, Staten faced criminal charges based upon allegations of sexual abuse made by four students. Pending the outcome of the criminal proceedings, Staten was allowed to continue teaching. A mistrial was declared in September 2006. In December 2006, Staten was arrested for having sex with a prostitute at a public car wash and was convicted of public lewdness. Staten was terminated in March 2007. The Board argued, and the Hearing Officer agreed, that his recent conviction showed poor judgment and that those who work with children must be of strong moral character.



In *Colson v. Jefferson County Bd. of Educ.*, FMCS – None (May 26, 2009), the Hearing Officer upheld Colson’s termination, finding her acts of moral turpitude constituted good cause for termination. The Board terminated Colson for committing and pleading guilty to bankruptcy fraud, for causing her 18-year-old daughter to commit perjury for her, and by failing to acquit herself in a manner becoming a Board employee. The Hearing Officer stated that, “Good cause not only means for some kind of inefficiency or misconduct on the teacher’s part, but ‘includes any ground put forward by a school committee in good faith and which is not arbitrary, irrational, unreasonable, or irrelevant to the committee’s task of building up and maintaining an efficient school system. Limited only by the statutory provision that they must be good and just causes, the jurisdiction and discretion to determine what these causes may be rests in the hands of school authorities’” (p. 17-18). By pleading guilty to two perjury charges and by requesting that her daughter lie and commit perjury, “it seems obvious that [Colson’s] behavior is not appropriate for a Board employee” (p. 18). These crimes of perjury and suborning and procuring her daughter to commit perjury are acts of moral turpitude. All educators should have high moral standards. Given that teachers and others in the school community were aware of her conviction, she would not be able to command respect from those aware of her conviction, including students.

## **Trends**

### **Use of Arbitration Law Language in Opinion**

When a hearing officer’s opinion was heavily infused with arbitration language and law, this was a predictor of which party would prevail. In half of the cases decided against the board (19 of 38), the hearing officers applied labor law principles or reasoning in the decision. In

comparison, in only seven of 68 cases decided for the board did the hearing officers apply labor law principles or reasoning in the decision.

### **Patterns in Decisions For or against the Board**

Of the types of board actions, minor and major suspensions were disciplinary actions where the board lost more than 50% of the challenged actions when the two types of suspensions were combined (the boards lost 6 of 11 cases). Next to suspensions, boards only prevailed in 55% of termination cases, with eight of the cases resulting in an outright reversal of the termination. In comparison, boards prevailed 83% of the time in transfer cases, 100% in partial terminations and 86% of partial termination and transfer cases.

For suspensions, the hearing officers in only five cases of the 11 cases involving major and minor suspensions held that there was sufficient evidence of just cause to uphold the suspension. In one of the four cases reversed outright, the hearing officer held that the board did not have just cause to suspend a teacher in addition to the teacher's written reprimand from the Alabama State Department of Education (*Ellis v. Huntsville City Bd. of Educ.*, 08-04064 (November 17, 2008)). In two cases, the hearing officers held that the boards did not have just cause to suspend two teachers charged with physically grabbing students. Both hearing officers essentially excused the teachers' behavior as necessary to maintain order, discipline and to correct inappropriate student behavior (*Oglesby v. Talladega County Bd. of Educ.*, 10-01168-3 (May 17, 2010) and *Alvarez v. Bd. of School Com'rs of Mobile County*, 06-01872 (June 24, 2006)). The final suspension reversed outright was *Moon-Williams*, the special education teacher who forged signatures on IEPs, and that decision was reversed by the Alabama Court of Civil Appeals. *Moon-Williams v. Montgomery County Bd. of Educ.* (May 3, 2011) (rev'd and remanded by *Montgomery County Bd. of Educ. v. Moon-Williams*, 107 So. 3d 205 (Ala. Civ.

App. 2012)). In one of the two cases where the suspension was reduced, the hearing officer found that there was just cause for disciplinary action, but held that the investigation by the Central Office was incomplete and tainted the teacher's due process rights. As a result, the Hearing Officer reduced the suspension. *Burkette v. Montgomery County Bd. of Educ.*, 070710-3450-3 (October 26, 2007). A teacher's suspension was also reduced when the hearing officer held that there was no evidence that employees were notified about potential disciplinary action if they did not follow policy. *Shoemaker v. Alabama Dep't. of Youth Services*, 10-03012 (November 19, 2010).

For terminations, the number of cases where progressive discipline was a factor in the hearing officer's decision whether to uphold the termination or order another form of disciplinary action appears to be one explanation for the lower percentage of success. In addition, many hearing officers also considered the teacher's employment history, particularly a positive employment history, in making a decision whether to uphold a termination or to mitigate the termination to another form of discipline.

Boards fared far better with transfers, partial terminations and partial terminations/transfers, largely because in most cases, the boards justified the action based upon funding and the hearing officers seemed to give fiscal decisions deference. Even the one partial termination/transfer case that was originally decided against the board by the hearing officer was reversed and remanded on appeal. (*Glenn v. Bd. of School Com'rs of Mobile County*, 08-04313 (June 4, 2009), rev'd and remanded by *School Com'rs of Mobile County v. Glenn*, 70 So. 3d 340 (Ala. Civ. App. 2010)).

## **Length of Time between Board Decision and Hearing Officer Decision**

Partial terminations and transfers took, on average, almost one full year from board decision to hearing officer decision. The shortest time to decision was 88 days while the longest time to decision was 435 days. During that time, the teacher remained in his or her position. Given that funding was the predominant reason for this action, this further confounded board attempts to save money. Although the school boards prevailed in all cases (including *Glenn* following appeal), surprisingly few partial termination and transfer cases were challenged under the TTA, particularly when proration was declared in 2008, significantly impacting Alabama public school funding and local school system budgets.

Unsurprisingly, terminations took the second longest average time from board decision to hearing officer decision, with 17 of the decisions taking 350 days or more, with three of those taking over 555 days. The shortest time to decision was 92 days with the longest taking 590 days. Two of the lengthiest cases involved incompetent teachers and the other involved a teacher who converted over \$10,000 in school funds for personal gain, and a teacher who physically and verbally abused students (*Reinhart v. Bd. of School Com'rs of Mobile County*, *Henderson v. Birmingham City Bd. of Educ.*, and *Bishop v. Birmingham City Bd. of Educ.*). In all three cases the board prevailed. However, the time from board hearing to the hearing officer upholding the termination was very costly given that boards were only prevailing in slightly over half of the cases.

Compounding the difficulties with the length of time from board decision to hearing officer decision was the possibility of appeal. *Wilson v. Madison County Bd. of Educ.*, FCMS 05-03316 (November 18, 2005) was one of the first TTA cases appealed, but was appealed by the board. The Alabama Court of Civil Appeals reversed the decision of the hearing officer to

reverse Wilson's termination and remanded the case for a new hearing. *Madison County Bd. of Educ. v. Wilson*, 984 So. 2d 1153 (Ala. Civ. App. 2006). The Alabama Supreme Court affirmed the lower court's decision in *Ex parte Wilson*, 984 So. 2d 1116 (Ala. 2007). By this time, almost two years had passed since the date of the hearing officer's decision and 902 days had passed from the time of the board decision to terminate Wilson.

Unfortunately, *Wilson* did not end at that point. The parties disagreed as to whether or not §16-24-10(b), *Code of Alabama* (1975), which permits the Alabama appellate court to remand a case under the TTA for a new hearing, required a new hearing officer to be selected. The statute states that "another hearing" could be ordered, but is silent as to "with another hearing officer." Needless to say, the board, who lost with the original hearing officer, insisted that a new hearing officer be selected while Wilson argued that the original hearing officer should hear the case on remand. When Wilson refused to consent to a new hearing officer, the board deemed that she waived her right to the new hearing and stopped paying her salary (over 900 days from the date of the original board decision to terminate her). Wilson filed a direct appeal to an administrative law judge, who dismissed the case for lack of jurisdiction. Wilson then filed a "Motion for Clarification of Order" with the Alabama Court of Civil Appeals to answer the question to clarify whether a new hearing officer is required on remand. The court set a hearing *ex mero motu* (on its own accord without a request from the parties), but then withdrew its order for a hearing. *Madison County Bd. of Educ. v. Wilson*, 14 So. 3d 157 (Ala. Civ. App. 2008). Wilson then petitioned the Alabama Supreme Court to issue a writ of certiorari to the Court of Civil Appeals (an order to the lower court to deliver the record to the higher court for review) or, in the alternative, a writ of mandamus (an order to the lower court to retain the matter on rehearing *ex*

*mero motu* and respond to Wilson’s request for clarification). The Alabama Supreme Court denied the writ, per curiam, without opinion. *Ex parte Wilson*, 14 So. 3d 158 (Ala. 2009).

Following that decision, Wilson attempted to have the original hearing officer conduct a new hearing and the hearing officer sent a letter in February 2009 to confirm he would hold a new hearing in June 2009. The board contended that it did not receive the letter with the new hearing date until May 2009. As a result, the hearing was not held. Wilson then filed another petition for a writ of mandamus to direct the hearing officer to hold the hearing and to award her back pay. 70 So. 3d 335 (Ala. Civ. App. 2009). The Court of Civil Appeals finally answered the question as to whether the original hearing officer should hear a new hearing on remand and answered the question in the affirmative, comparing this to remanding a case from from circuit court back to the same trial judge. The court cited its decision in *Bishop State Community College v. Williams*, 4 So. 3d 1152 (Ala. Civ. App. 2008), involving an appeal of a hearing officer’s decision under the Fair Dismissal Act (TTA’s companion law for classified employees who had continuing service status). In that case, the court ““reverse[d] the hearing officer’s decision and remand[ed] the cause to the original hearing officer.’ 4 So. 3d at 1162 (emphasis added)” *Wilson*, 70 So. 3d at 339. However, because Wilson did not show that the original hearing officer had refused to hold the hearing, the court denied her petition. By the date of this decision, December 20, 2009, 1,590 days had passed from the board’ decision to terminate Wilson.

Because *Wilson* was one of the first cases decided under the TTA, attorneys for the Alabama Association of School Boards and the Alabama Education Association filed amicus curiae briefs. As a result, both organizations were well-informed as to the specific implications of *Wilson* and its subsequent appeals, motions, and petitions for writ. In addition, *Wilson* was

still ongoing when the TTA began to attract the attention of the legislature, which had made Republican gains in 2008. Where cases were appealed, boards could expect the process to take at least two years from board decision to appellate decision.

### **Partial Contract Terminations and Transfers**

In several cases, boards proposed the partial termination of an employee's contract based upon loss of funding. The two main reasons for such a loss of funding were a change or loss of a grant-funded position or, particularly after 2008, when the Alabama Education Trust Fund was greatly affected by a reduction in funding and proration was declared. As a result, boards were forced to examine personnel assignments as a cost-saving measure, often resulting in a reduction in force as boards terminated non-tenured teachers and reassigned other employees as cost-saving measures.

Transfers and partial contract terminations resulted in 22 of the board decisions reviewed by a hearing officer. Of those, only five cases resulted in a decision that was unfavorable to the board. Of those five cases, two transfers involved a loss of status, resulting in the hearing officers' decision to reverse the transfer. In another case, the teacher was not notified of her need to apply for positions as part of the reduction in force. In the fourth cases, the hearing officer found that personal animus was a factor in the transfer. Finally, the fifth case, *Glenn*, was reversed on appeal. As none of the transfers or partial terminations were held to be arbitrarily unjust, this indicates that the hearing officers were more willing to defer to the board's judgment, at least in regard to budgetary considerations, even in a *de novo* review of contested transfers and partial terminations.

In *Winston v. School Com'rs of Mobile County*, FMCS 05-04250-3 (November 10, 2015), Winston had a 12-month contract as the coordinator of a grant funded program and was

reassigned as a 9-month contract employee because the Board was notified that the grant funds could only be used to fund student contact positions, not coordinator positions. Winston applied for other 12-month positions, but was not selected. The Hearing Officer deferred to the budgetary discretion of the Board and upheld Winston's partial termination. Similarly, the Hearing Officer in *Young v. Clay County Bd. of Educ.*, FMCS 06-04782 (December 30, 2006), held that, for sound fiscal reasons, the Board needed to eliminate locally funded assistant principal positions, resulting in Young's transfer from an assistant principal position to a teaching position.

In *Hyché v. Cherokee County Bd. of Educ.*, FMCS No. None (October 17, 2009), the Board proposed to transfer Hyché from a locally funded administrative position to one that was partially funding by the State. The Hearing Officer held that "the preponderance of the evidence" supported that the transfer was made for the reasonable administrative function of saving money, specifically that Hyché's salary and benefits were fully funded by local funds and that his transfer would reduce that amount by half. Moreover, there was no loss of status as part of the transfer. In addition, the Board created a budgetary plan that resulted in 45 transfers during the 2009-2010 school year to shift funding from local to state funding sources. Of the 45 transfers, 44 were voluntarily accepted. Similarly, in *Mizell v. Montgomery County Bd. of Educ.*, FMCS 09-03946 (January 4, 2010), the Hearing Officer held that Mizell's transfer was proper where the Board reduced the number of central office staff in her position from eight to four. Like Mizell, these employees were reassigned to assistant principal positions, displacing non-tenured assistant principals. Those reassigned were also given the opportunity to apply for newly-created positions in compliance with the Board's reduction in force policy.



*Nelson v. Montgomery County Bd. of Educ.*, *Davis v. Montgomery County Bd. of Educ.*, and *Powell v. Montgomery County Bd. of Educ.*, FMCS 07-03874 (June 2, 2008) were consolidated because the fact patterns involving Davis, Powell, and Nelson were identical. Following a budget-driven system reorganization, their positions as Curriculum Specialists were eliminated. All three employees contested the change. After acknowledging that the notice given to the three did not allow for sufficient due process, the three were placed School Improvement Specialist positions working with Title 1 schools in need of improvement. This was done specifically to amicably resolve the insufficient notice that their Curriculum Specialist positions were eliminated. After one year, all three were given proper notice of partial cancellation of their contracts, taking them from a 209-day contract to a 187-day contract and requiring them to transfer to different positions. In declining to reverse the decision of the Board, the Hearing Officer held that the Board's determination that the Title 1 office was overstaffed and that Title 1 funds could be more effectively spent in other areas was a reasonable administrative function. The Hearing Officers in *Harrison v. Geneva County Bd. of Educ.*, FMCS 10-04131-3 (February 24, 2011), *McDonald v. Montgomery County Bd. of Educ.*, FMCS No. None (February 1, 2011), *Mims v. Tuscaloosa County Bd. of Educ.*, FMCS 10-58476-3 (January 7, 2011), *Wall v. Tarrant City Bd. of Educ.*, FMCS 10-04174 (November 5, 2010), and *Nicholson v. Bd. of School Com'rs of Mobile County*, FMCS 11-00119 (April 18, 2011), all similarly deferred to the Board's employment decisions based upon budgetary considerations.

Even where there were no budgetary or financial considerations involved in a partial termination or transfer, in at least one case a Hearing Officer held that if a Board articulated satisfactory reasons for its actions, the action was not arbitrarily unjust. *Smith v. Talladega City Bd. of Educ.*, FMCS 06-04690 (October 23, 2006). Smith argued that a better way to reduce her

colleague's caseload as stated by the Board for its action would be to transfer another counselor to the elementary school. However, the Hearing Officer found that even when there is another action that arguably might be a better action, as long as the transfer was not for political or personal reasons, it would defer to the decision of the Board.

In 2008, all public schools across the state were impacted significantly by proration. In *Hasan v. Bd. of School Com'rs of Mobile County*, FMCS 08-04371 (May 1, 2009), the Board implemented its reduction in force policy, with only central office administration selected for its reduction in force. Hasan, who was a tenured teacher prior to her promotion to school improvement specialist in 2006, was one of the specialists selected. As a tenured teacher, she was advised by letter that she was being transferred out of the Central Office and that her contract as a Central Office employee was partially cancelled. Hasan argued she had more tenure in the system as a teacher and had more system-wide seniority than the specialists who were not selected for the reduction in force. The Hearing Officer found that Hasan's reliance on the TTA was misplaced as the TTA provides that a teacher obtains "continuing service status" with three plus years of service plus reemployment for a fourth. Even with tenure, a teacher's contract may be cancelled. The Hearing Officer held that the TTA has no application to a reduction in force in Central Office administration except to the extent that Board policy provides some employment security for former teachers selected for a reduction in force. The Hearing Officer stated that the Board has the discretion to apply position-function seniority, not just years in the system, in selecting employees for a reduction in force.

Likewise, the Hearing Officer in *Danzy v. Bd. of School Com'rs of Mobile County*, FMCS 08-04487 (March 2, 2009), upheld Danzy's transfer from an Area School Improvement Coordinator position to an Area School Improvement Specialist position within federal

programs. Less tenured Specialists were returned to the classroom, so the result was everyone was returned to their last tenured position. The Hearing Officer held that the reduction in force was necessary because of a major budgetary shortfall, it was properly implemented, and not taken for personal or political animus.

In strong contrast to *Hasan* and *Danzy*, the Board's decision to partially terminate and transfer a teacher was not upheld in *Glenn v. Board of School Com'rs of Mobile County*, FMCS 08-04313 (June 4, 2009) (reversed by *Board of School Com'rs of Mobile County v. Glenn*, 70 So. 3d 340 (Ala. Civ. App. 2010)). The Board's reduction in force policy provided, "If identified to be cut, an employee with a valid teaching certificate who had achieved tenure as a teacher prior to being assigned to Central Administration shall be returned to another vacant teaching position is such employee is legally qualified for that position." In May 2008, Glenn, a school improvement specialist in her second contract year, was notified of the Board's intent to transfer her to a vacant teaching position, resulting in a partial termination of her contract. Glenn challenged her transfer and partial termination of her contract on due process and procedural grounds. In his opinion, the Hearing Officer essentially conferred tenure rights on Glenn in her supervisory position.

One problem with the Hearing Officer's decision was his determination that Glenn became tenured as a school improvement specialist as a result of the improper notice. Glenn, like at least two of her colleagues from Mobile County who were part of the Board's reduction in force, was a tenured teacher when she was promoted to school improvement specialist in June 2006. She was employed in that position for the 2006-2007 and 2007-2008 school year. Even if she was re-employed for the 2008-2009 school year, that would have been her tenure year and she must have been employed again in that position for 2009-2010 to be tenured. Section 16-24-

2(b), *Code of Alabama* (1975) provided that teachers who are promoted to supervisor “shall serve for three consecutive school years before attaining continuing service status.” Glenn had not even completed two full years before the Board’s attempt to transfer her partially cancel her contract. However, the Hearing Officer was persuaded that working two years and a day provided Glenn with continuing service status. In addition, another school improvement specialist, who began that position nine days before Glenn, was protected from the reduction in force. The Hearing Officer quoted §16-24-12, *Code of Alabama* (1975) to support his reasoning: “Any teacher in the public schools, whether in continuing service status or not, shall be deemed offered reemployment for the succeeding school year at the same salary unless the employing board of education shall cause notice in writing to be given said teacher on or before the last day of the term of the school year in which the teacher is employed.” Therefore, the Hearing Officer found Glenn was tenured in the school improvement specialist position and found that she had overall seniority rights over other school improvement specialist tenured employees who were not part of the reduction in force. In addition, because of Glenn’s appeal, the Board had to retain her through the 2008-2009 school year and the Hearing Officer’s opinion, dated June 4, 2009, did not provide the Board the opportunity to non-renew her as she tenured in the school improvement specialist position in June 2008, the third anniversary of her employment in that role. *Glenn* was later reversed on appeal to the Alabama Court of Civil Appeals.

In *Miller v. Cherokee County Bd. of Educ.*, FMCS 07-03792 (February 19, 2011), the Hearing Officer declined to give the Board’s fiscal judgment deference in a transfer decision. Although the Board argued that the transfer of Miller from an Alabama Reading Initiative (ARI) specialist to a reading coach was necessary to reduce the number of positions funded from local funds, the Hearing Officer held that moving Miller from the position of ARI specialist, a system-

wide supervisory position, to reading coach would result in a loss of status. The Hearing Officer, who styled the case “In the Matter of Arbitration,” cited arbitration law for a number of principles throughout the opinion, specifically related to a reduction in force. First, that “arbitrators often have recognized the right of management, unless restricted by the agreement, to eliminate jobs where improved methods or other production justification exists and management otherwise acts in good faith” (p. 5). He also cited arbitration law for the proposition that “supervisory positions not only carry a higher status than other positions at the same pay and grade level but they also carry more responsibility for success or failure of the organizations where they perform their supervisory duties” (p. 6). In addition, he stated that “a transfer is a ‘shift of an employee from one job to another within a company. A lateral transfer is a change in an employee’s job within a department, to another machine or to very similar duties’” (p. 6). Nonetheless, the Hearing Officer noted that his decision to reverse Miller’s transfer would not restrict the Board from abolishing the position of ARI specialist and placing her in another position for which she is qualified.

In reversing the Board’s decision in *Coleman v. Montgomery County Bd. of Educ.*, FMCS 09-03949 (October 30, 2009), the Hearing Officer found that the Board violated its own reduction in force policy by failing to notify Coleman of her need to apply for positions for which she was qualified prior to unilaterally transferring her to a position she did not desire. The Board argued that Coleman was offered a position of Curriculum Coordinator for a new GED/credit recovery program that she declined, that many non-tenured employees were terminated and the only ones who were retained were uniquely qualified for a specific position, and that Coleman never applied for any vacant position for which she might have been qualified prior to her transfer. However, Coleman argued that the decision to eliminate her position was

for political reasons; specifically that the Board's decision not to apply for federal funds was politically motivated and such decision would adversely impact her position. Although the Hearing Officer stated that the "elimination of the Adult and Community Education programs may have been politically motivated, that is legally insufficient" to find that the transfer violated the TTA (p. 9). However, because Coleman was not notified of her need to apply for open positions while other employees were informed of the need to do so, the Hearing Officer reversed the Board's decision to transfer Coleman.

Similar procedural deficiencies resulted in the Hearing Officer denying the Board's transfer in *Bell v. Tallassee City Bd. of Educ.*, FMCS 10-04550 (January 4, 2011). Following a reduction in funding, the Board transferred Bell from her position as a ten-month guidance counselor to nine-month kindergarten teacher. Bell argued that the notice of transfer was deficient because she was never given written reasons for the transfer and that the Board's action was not a transfer, but was a partial cancellation of her contract from a ten-month to a nine-month position. The Board argued that any deficiency in the notice was harmless because Bell was provided the reasons for her transfer and that she waived her right to contest the proposed transfer on based on such deficiency when she notified the Board of her contest to the transfer. The Hearing Officer held that Bell's transfer resulted in a loss of status and that the Board should have considered her length of service in the school system. More importantly, however, the Hearing Officer also held that Bell's transfer should have been designated a transfer/partial cancellation as her contract would change from a ten-month to a nine-month contract resulting in a loss of income.

**Other Litigation Related to Decisions (in lieu of appeal or following hearing officer's decision)**

In one case identified through a Westlaw search, three assistant principals were able to circumvent the TTA by seeking a declaratory judgment, a writ of mandamus, and injunctive relief. *Bd. of School Com'rs of Mobile County v. Weaver*, 99 So. 3d 1210 (Ala. 2010). In 2009, the plaintiff filed suit alleging that she had been partially terminated or demoted from her position as an assistant principal pursuant to a reduction in force policy, but that she was entitled to a one-time right to recall for a position she was certified and legally qualified for. The Plaintiff alleged several assistant principals with less seniority were placed into available assistant principal positions. Two additional individuals intervened as Plaintiffs with the same claims, questions of law and facts. The Defendants, the Board and superintendent, argued that the reduction in forced policy only applied to certain central office employees and that the Plaintiff's claims should have been brought in an arbitration proceeding pursuant to the TTA.

The case proceeded to trial and a judgment was entered in favor of the Plaintiffs. Plaintiffs were awarded back pay and the Board was ordered to offer the Plaintiffs assistant principal positions as they became available. The Defendants appealed. The Board argued that as an agency of the State of Alabama, it is entitled to absolute immunity. The court agreed, holding that the trial court lack jurisdiction over those claims, rendering its judgment void. The court also held that the superintendent was entitled to absolute immunity in his official capacity as a state officer, also rendering the trial court's judgment void.

*Belton v. Russell County Bd. of Educ.*, 2012 WL 2065528 (M.D. Ala. 2012) is another example of a teacher's attempt to circumvent the TTA. Belton filed suit in 2010, asserting claims under the Age Discrimination Act of 1975, violations of federal procedural due process rights, retaliation against her in violation of her first amendment rights, violations of the Civil Rights

Act, violations of the TTA and other state tort actions. Belton alleged that she was not given proper notice under the TTA for numerous transfers. However, the Plaintiff did not avail herself of the due process protections of the TTA by contesting the transfers nor did she – or could she – establish that the procedural due process protections of the TTA were constitutionally inadequate.

Five TTA cases involved related litigation in state or federal court. First, after the Hearing Officer reversed her termination in *Cooley v. Bd. of School Com'rs of Mobile County*, FMCS 06-00077 (March 1, 2006), Cooley was given just over a year (March 1, 2006 until July 1, 2007) to return to work after her extended leave or the Board could terminate her. On June 6, 2007, Cooley notified the Board that she would not be able to return to work and asked for additional time to receive treatment as a reasonable accommodation (*Cooley v. Bd. of School Com'rs of Mobile County*, 2009 WL 424593, 2-3 (S.D. Ala. 2009). On August 10, 2007, Cooley was notified that the Board terminated her based upon her physician's statement that she was permanently disabled and unable to perform the necessary and essential functions of her job. Cooley filed suit in federal court, claiming violations of the Equal Protection Clause of the Fourteenth Amendment through 42 U.S.C. §1981 and §1983; a claim for violation of the Family Medical Leave Act, 29 U.S.C. §2600; a claim for violation of the Americans with Disabilities Act, 42 U.S.C. §12111, *et seq.* (ADA); a claim for retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* (Title VII) and 42 U.S.C. §1981; and a state law claim for breach of contract. In dismissing all of Cooley's claims, the court extensively discussed whether or not Cooley was a qualified individual pursuant to the ADA and held that attendance is an essential function of Cooley's duties as a teacher. Her request for an indefinite leave of absence was not reasonable, particularly as she had already been on leave for five years.



After Tompkins was terminated for violating student privacy rights (*Tompkins v. Montgomery County Bd. of Educ.*, FMCS 09-0360 (December 30, 2009), Tompkins filed a Complaint, *pro se*, on November 30, 2010 in federal court. He raised claims pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq; Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 et seq.; and 42 U.S.C. §§1983 and 1985. He named the Board, board members, certain board employees, his AEA attorney who represented him in his termination contest, and the hearing officer who presided over his administrative hearing as defendants. All named defendants filed motions to dismiss and all claims were dismissed except for Tompkins's Title VII claim against the Board. See *Tompkins v. Barker*, 2011 WL 3583413 (M.D. Ala. 2011). The Board, as the sole remaining defendant, filed a Motion for Summary Judgment (*Tompkins v. Montgomery County Bd. of Educ.*, 926 F.Supp. 1274 (M.D. Ala. 2013). The court granted the motion, holding that there was no evidence of discrimination in the Board's decision to terminate Tompkins.

A third case involved a teacher termination case where the hearing officer's opinion was sealed and the teacher did not appeal the hearing officer's decision. As a result, this decision would not have been available to review. However, the facts surrounding the teacher's termination were able to be obtained from *Crutch v. Lawrence County Bd. Of Educ., et al*, 2014 WL 3889898 (N.D. Ala. 2014). After her termination was upheld by a hearing officer, Crutch filed suit in federal court, claiming that her termination was racially discriminatory in violation of 42 U.S.C. §1983. Crutch also asserted claims under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and Alabama law. Those claims were dismissed early in litigation. The court granted summary judgment for the Board, finding that Crutch did not meet her burden of showing that she was similarly situated to white teachers that

she claims were not disciplined as harshly as she was. “The Board made its decision to terminate Crutch’s employment based on her documented history of poor performance and her failure to admit wrongdoing.” (p. 5).

*Nelson v. Russell County Bd. of Educ.*, 2012 WL 218232 (M.D. Ala. 2012) was filed in federal court. Nelson, a tenured teacher whose termination was reduced to a 15-day unpaid suspension, claimed that his temporary termination violated his procedural due process rights. He also filed a First Amendment retaliation claim, brought defamation claims against all defendants as well as state claims. The court granted summary judgment to the defendants on all claims.

A final example of related litigation involving the TTA is *Haynes v. Coleman*, 30 So. 3d 420 (Ala. Civ. App. 2009). Haynes sued his principal, Coleman, asserting claims of malicious prosecution and abuse of process related to the initiation of termination proceedings against him under the TTA. The circuit court dismissed all claims and Haynes appealed. In affirming the judgement of the circuit court, the court held that malicious-prosecution claims in Alabama were based on judicial, not administrative, proceedings. In addition, Coleman, as the principal, could not initiate the termination proceeding. Furthermore, Haynes did not plead the necessary elements for an abuse of process claim.

## CHAPTER 5

### SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

#### **Introduction**

The purpose of this research study was to examine Alabama Teacher Tenure Act hearing officer decisions. 106 cases hearing officer decisions under the TTA from 2004 through 2011 were the primary sources used in the research, along with any appellate or related litigation court opinions. This chapter provides a summary of the research with reference to the research questions, recommendations for further study, and summary and conclusions.

#### **Research Questions**

The following questions guided the data collection:

1. What were the statutory rights of teachers and certified staff involved in adverse employment decisions under the 2004 TTA?

Under the TTA, teachers were provided procedural due process for certain board actions. As the board action became more severe, the due process protections increased. For minor suspension of seven days or less, the teacher had the right to a conference with the board prior to a board vote on the suspension. If the board voted to suspend the teacher, the teacher had the right to request a review of the suspension by a hearing officer, who reviewed written submissions by the parties and determined whether there was sufficient evidence for the suspension. The hearing officer's decision was final.

Like minor suspensions, a teacher facing a major suspension of more than seven days had the right to a conference with the board. However, if the board voted to suspend the teacher for

more than seven days, the teacher was entitled to a full *de novo* hearing with a hearing officer to determine whether there was just cause for the suspension. The hearing officer could also impose other disciplinary action. The hearing officer's decision could be appealed to the Alabama Court of Civil Appeals.

The TTA did not provide for a hearing officer's *de novo* review of a board's decision to transfer a teacher. Instead, if a teacher contested a transfer, a full hearing was held before the board. After the hearing, if the board voted to effectuate the transfer, the teacher could obtain a review of the transfer by a hearing officer. The hearing officer reviewed the record of the proceedings from the board level and the board and teacher presented facts and law to the hearing officer. The hearing officer determined whether the evidence was sufficient for the transfer, whether the transfer was taken for political or personal reasons, or whether the transfer was arbitrarily unjust. The hearing officer's decision was final.

The TTA provided the greatest procedural protections for terminations. A teacher had the right to a conference with the board prior to a board vote. If appealed, a hearing officer held a *de novo* hearing and rendered a decision based upon the evidence submitted. The hearing officer also determined what disciplinary action, if any, should be taken based upon the evidence. Like major suspensions, the hearing officer's decision could be appealed to the Alabama Court of Civil Appeals.

Appeals for major suspensions and terminations were a matter of judicial discretion, not by right, and would only be granted where the Alabama Court of Civil Appeals determined that "special and important reasons for granting the appeal" existed (§16-24-11, *Code of Alabama* (1975)). In addition, the hearing officer's decision was to be affirmed on appeal unless the appellate court found the decision to be arbitrary and capricious.

2. What were the outcomes of adverse employment actions for teachers and certified staff in arbitration-adapted hearings under the 2004 TTA? (a) How many cases were appealed to a hearing officer during the period of 2005 through 2011? (b) What types of cases were heard during that period? (c) How many cases were brought each year during that period?

There were 106 hearing officer decisions analyzed under the TTA. The types of cases appealed to hearing officers under the TTA included terminations, transfers, partial terminations, partial terminations/transfers, major suspensions and minor suspensions. Section 16-24C-6, *Code of Alabama* (1975) provides that “tenured teachers may be terminated at any time because of a justifiable decrease in the number of positions or for incompetency, insubordination, neglect of duty, immorality, failure to perform duties in a satisfactory manner, or other good and just cause.” In the 63 cases involving termination, one or more of these grounds formed the basis for board action. The number of cases appealed each year peaked in 2007, where 21 cases were appealed to a hearing officer, with 11-7 cases heard in 2005, 2006, 2008, 2009, and 2010.

3. What trends developed as part of the hearing officer process? (a) What types of cases were heard during the time period studied? (b) Were there certain grounds or combination of grounds that were more likely to result in a favorable decision for the board? (c) What procedural errors were the most common in unfavorable decisions for the board? (d) Did the arbitral-type hearing process provide the expedited process intended by the law? (e) To what extent did the hearing officers apply prior Alabama teacher tenure law in their decisions? (f) Was there a difference in the types and number of adverse employment actions taken each year during the period the TTA was in effect?

During the time period studied, the following trends developed. A total of 106 cases were appealed to hearing officers and the board decision was adopted by the hearing officer in 63% of

the cases. Cases heard by hearing officers involved terminations, transfers, partial terminations, partial terminations/transfers, major suspensions and minor suspensions. For terminations, major suspensions, and minor suspensions, hearing officers decided cases involving at least one of Alabama's statutory reasons for disciplinary action. Trends were found in the type of case heard based upon disciplinary action. Boards prevailed in only five of 11 suspension cases (45%) reviewed under the TTA. Boards fared far better in partial terminations and partial terminations/transfers, prevailing in eight of the nine cases (89%) reviewed. Similarly, Boards prevailed in 19 of 23 cases (82%) of the transfers appealed to a hearing officer. Finally, in termination cases, the Boards prevailed at a lower rate, with hearing officers upholding 45 of 63 cases (71%). In 20 of the termination cases decided in favor of the teacher, hearing officers reduced termination to another form of discipline while in eight of the termination cases, the Board's decision was reversed outright.

Certain grounds or combination of grounds were more likely to result in a favorable decision for the board. Specifically, where incompetence was the primary ground for termination, hearing officers were willing to uphold the board's decision. In each of the three cases dealing primarily with incompetence, the hearing officers noted the efforts of the board to assist the teacher in improving his or her instruction. Similarly, where progressive discipline had previously been taken against a teacher, hearing officers were far more likely to uphold disciplinary action than where no previous disciplinary action had been taken. Finally, where budgetary concerns were the impetus for board action, hearing officers were more likely to give deference to the board's decision.

There were very few cases involving procedural matters where the board provided insufficient or untimely notice to the teacher as required by the TTA. Two hearing officers

reversed board action after finding the board did not provide notice to the teacher of the proposed adverse employment action in a timely manner. In both cases, however, the hearing officers effectively ignored the provisions of the TTA that allowed a board to terminate a teacher's contract at any time. In contrast, there were two cases where there was a lack of timely notice. In one case, the hearing officer upheld a minor suspension where the teacher claimed the board did not provide her with timely written notice of its decision to suspend her. Although the teacher was technically correct with her claim, the hearing officer held that because she had actual notice of the decision as she was physically present when the board announced its decision to suspend her, she was not prejudiced by the board's late written notice of same. Similarly, where a teacher claimed that the board did not comply with the TTA's procedural requirements to postpone her hearing, the hearing officer held that if there was a lack of procedural due process, the appeal to the hearing officer--which obviously occurred--was the cure for any deficiency by the board.

The arbitral-type hearings did not provide for an expedited process as originally envisioned by the TTA. While the time from board action to hearing officer decision varied depending on the type of case, very few cases were decided in a reasonable amount of time. Although there were only 11 total cases involving suspensions, three of those cases took over 350 days to decide. Transfers took, on average, 181 days--roughly the equivalent to the number of days in one contract year for a teacher--to decide. Fifteen transfers took less than 200 days. For terminations, the average length of time from board action to hearing officer decision was 267 days. In cases such as *Dunn*, *Wilson*, and *Glenn* where the teacher prevailed and the board appealed, decisions took two years or more to become final. In the meantime, a teacher facing termination still received pay and a teacher contesting a transfer remained in his or her same position.

Hearing officers did not extensively cite prior Alabama teacher tenure law in their decisions. In a majority of the decisions, however, the hearing officer quoted or cited relevant TTA provisions. In a handful of cases, neither the TTA nor Alabama case law was either quoted or cited by the hearing officer as part of the written opinion (*See, e.g., Bradford v. Huntsville City Bd. of Educ.*, FMCS 05-04204 (November 21, 2005)). However, no Alabama case law was relied upon in 59 of the decisions reviewed. There was no discernable pattern in holdings for or against the Board based upon the hearing officer's legal citations, except for when the hearing officer cited arbitration law principles extensively in his or her decision.

Over the time the TTA was in effect, the number of cases heard declined. Specifically, terminations declined greatly prior to the repeal of the TTA. In 2005, there were 13 board decisions to terminate a teacher. There were 11 such board actions in 2007 and in 2009. In 2006 and 2008, there were eight board actions to terminate a teacher in each year. In 2010, that number declined to five board decisions to terminate a tenured teacher, likely because boards were aware of legislative efforts to repeal the TTA. Transfer decisions were not made in 2005, but increased in 2008 and 2009, likely because many boards were faced with proration and had to make staffing decisions based upon student needs. However, even board actions to transfer a teacher declined over the period studied, likely because of the lengthy duration of a contested transfer. Similarly, and also likely based upon proration, board action in partial termination cases took place predominantly in 2007 and 2008. Interestingly, minor suspensions were only decided in 2007 (3 cases) and 2008 (2 cases). Major suspensions were only appealed from decisions in 2006 (2 cases), 2009 (1 case) and 2010 (three cases). It is possible that the low percentage of decisions upholding a board's decision to impose a suspension, along with the time and expense



involved should the suspension be contested, had a chilling effect on boards to use suspensions for disciplinary purposes.

4. How were the hearing officers' decisions treated on appeal? (a) How many decisions were subsequently appealed to the Alabama appellate courts? (b) What were the trends, if any, in appellate decisions?

A small number of TTA decisions involving tenured teachers were appealed to the Alabama appellate courts. However, it is important to note that because whether or not an appeal would be granted was a matter of discretion by the appellate court, it is unknown whether a case was appealed, but declined to be heard. Five decisions were reported as decided by the Alabama appellate courts: three terminations, one major suspension and one partial termination/transfer.

Several issues were identified in the appellate decisions. First, in two of the cases appealed, *Wilson* and *Moon-Wilson*, the decision of the hearing officer was reversed. In both cases, the appellate courts held that the hearing officer's use of the "just cause" test from arbitration law rendered the decision to reverse the board action arbitrary and capricious. In short, the appellate courts did not allow the hearing officers to create new legal standards in lieu of Alabama law. Second, in *Dunn*, the Alabama Supreme Court held that where the hearing officer provided reasons for his or his decision, the decision was not arbitrary and capricious. Therefore, the court could not substitute its judgment. Third, in *Webb*, the Alabama Court of Civil Appeals held that the hearing officer did not have the authority to alter Webb's employment record by ordering the expungement of previous disciplinary actions. Finally, in *Glenn*, the Alabama Court of Civil Appeals held that the hearing officer erred in applying a narrow and technical construction of the notice provisions under the TTA. Based upon this small sample of cases, it is difficult to identify whether these issues would constitute trends in the

appellate decisions, but it appeared that where a hearing officer did not follow Alabama law or extended Alabama law to include labor law principles, the appellate courts were more likely to reverse the decision.

5. Are there any applicable legal principles and procedures for school administrators and school districts to consider before taking adverse employment action against a teacher, even under the Students First Act of 2011? The following principles for school boards were identified among the TTA teacher tenure cases:

- The purpose of progressive discipline is to improve employee conduct or performance (*Crooks v. Sumter County Bd. of Educ.*, FMCS 06-00497 (September 5, 2006)).
- Where a teacher has an excellent work history and reputation, carefully weigh such when determining what disciplinary action should be taken (*Smith v. Washington County Bd. of Educ.*, FMCS 06-04359 (June 1, 2007)).
- If a teacher is incompetent, the board should provide immediate, specifically-targeted intervention and remediation prior to termination (*Thomas v. Huntsville City Bd. of Educ.*, FMCS 09-04048 (January 21, 2010)).
- If a teacher is given multiple opportunities to improve and the support to do so, but does not improve, progressive discipline is not needed prior to termination (*Bradford v. Huntsville City Bd. of Educ.*, FMCS 05-04204 (November 21, 2005)).
- Only documentation that a teacher has had the opportunity to review and refute should be placed in a personnel file and considered as part of a teacher's prior

employment history (*English v. Bd. of School Comr's of Mobile County*, FMCS 05-03711 (October 30, 2005)).

- Prior to imposing disciplinary action for policy violations, ensure that the teacher is aware of the policy and that there is supporting documentation (*Johnston v. Baldwin County Bd. of Educ.*, FMCS 05-04807 (December 13, 2005); *Shoemaker v. Alabama Dep't of Youth Services*, FMCS 10-03012 (November 19, 2010)).
- Warn an employee that he or she is in violation of policy (where possible) and that continued violation of the policy will result in disciplinary action (*Cooley v. Bd. of School Comr's of Mobile County*, FMCS 06-00077 (March 1, 2006); *Taylor v. Butler County Bd. of Educ.*, FMCS 06-03867 (December 11, 2006)).
- Treat employees who engage in similar misconduct similarly – no disparate treatment (*Turks v. Lowndes County Bd. of Educ.*, FMCS 07-03851 (April 29, 2008); *Moon-Williams v. Montgomery County Bd. of Educ.* (May 3, 2011)).
- Boards should ensure that teacher evaluations are a true reflection of teacher performance and carry out the evaluation process with fidelity (*Crooks v. Sumter County Bd. of Educ.*, FMCS 06-00497 (September 5, 2006)).
- Where possible, more than one administrator should be involving in documenting a teacher's misconduct or incompetency. This will either eliminate or minimize any argument by the employee that the disciplinary action is being taken because of personal animus (*Bolding v. Montgomery County Bd. of Educ.*, FMCS 05-01211 (August 30, 2005)).
- Any investigation into employee misconduct should be unbiased and thorough, allowing the board to have all of the information needed to make an informed

decision (*Burkette v. Montgomery County Bd. of Educ.*, FMCS 070710-3450-3 (October 26, 2007)).

- If an employee is suspected of abusing drugs or alcohol at work, require drug/alcohol testing, make offer of EAP, and clearly set out conditions for continued employment (random drug/alcohol testing for a period of time and consequences for non-compliance) (*Barnes v. Bd. of School Comr's of Mobile County*, FMCS 05-04501 (February 5, 2006); *Evans v. Birmingham City Bd. of Educ.*, FMCS 05-0351 (April 15, 2006); *Roberts v. Huntsville City Bd. of Educ.*, FMCS 09-04093 (February 19, 2010)).
- Where misconduct arises from a teacher's dual role as a coach or other extracurricular position, consider any misconduct in the extracurricular position as separate from the teacher role unless there is a direct connection between the two or if there is evidence that the misconduct has an adverse impact on the ability of the teacher to be effective (*Dunn v. Bd. of School Comr's of Mobile County*, FMCS 05-01608 (April 30, 2005)).
- Use hearsay evidence in board hearings with caution to prevent any later argument that the use of such evidence violated fundamental notions of fairness and due process (*Hodge v. Crenshaw County Bd. of Educ.*, FMCS 06-03412 (January 16, 2007)).
- When a teacher engages in off-campus immoral conduct or conduct that reflects poorly on his or her moral character, disciplinary action may be taken where a nexus is proven between the teacher's conduct and fitness/capacity to perform

duties as a teacher (*Brooks v. Phenix City Bd. of Educ.*, FMCS 080702-037623 (January 8, 2009)).

- Above all, always have legitimate, non-discriminatory reasons for disciplinary action as an employee may file a civil lawsuit in response (*Tompkins v. Montgomery Bd. of Educ.*, FMCS 09-0360 (December 30, 2009), *Tompkins v. Baker*, 2011 WL 3583413 (M.D. Ala. 2011), *Tomkins v. Montgomery County Bd. of Educ.*, 926 F. Supp. 1275 (M.D. Ala. 2013) and *Crutch v. Lawrence County Bd. of Educ.*, 2014 WL 3889898 (N.D. Ala. 2014)).

### **Recommendations for Further Study**

From the information gathered as part of this research study, the following recommendations are made for future study.

1. The Alabama Teacher Tenure Act had a companion statute, the Fair Dismissal Act (FDA), for classified employees (bus drivers, custodians, support staff, etc.). Provisions of the FDA were very similar to the TTA. Case briefs and analysis of FDA cases, along with TTA cases, may yield more patterns and trends than the TTA cases alone.

2. Research on the outcomes, issues, and trends of cases decided under the Students First Act that replaced the TTA should be conducted to determine whether the SFA has addressed the well-publicized concerns over the TTA as professed by legislators and school boards.

3. A comparative study of the TTA and SFA should be conducted to see if any of the same issues, specifically with termination, can be identified.

4. Comparative studies should be conducted of case law, hearing officer decisions, or arbitration awards from jurisdictions that have, or have had, comparable arbitration-adapted due process procedures in place for tenured teachers to compare results.

5. Research should be performed to determine whether the TTA had a “chilling effect” on boards that had not specifically been through the process that impacted decisions whether to take an adverse employment action against a teacher, specifically in terms of the time and expense.

6. Research into the backgrounds of the hearing officers should be performed to determine whether the arbitrator’s background was a factor in a decision for the board or for the teacher.

7. Research into the actual status of teacher tenure and continuing service status laws in each state, specifically a comparison of when changes in states’ tenure laws, if any, occurred.

8. Research into the specific state political impetus for changing state tenure laws or abolishing tenure altogether.

9. Research into the role that teacher unions and associations have had in recent state tenure reforms.

10. Research into whether value-added evaluation models as a reform measure have impacted student achievement while removing ineffective teachers from the classroom.

11. Research into training that administrators receive in utilizing value-added evaluation models.

12. Research into how important tenure or other due process protections are to those who select teaching as a profession compared to other other factors (compensation, benefits, smaller class sizes, mentoring and induction programs, teaching conditions, etc.).

### **Summary and Conclusions**

From 2004 through 2011, 106 cases dealing with adverse teacher employment actions were challenged under the TTA. With various states changing teacher tenure laws that either

greatly limit or eliminate tenure altogether, a legal framework should be developed that allows states to promote substantive education reform that focuses on the retention of effective teachers, while allowing for an efficient process to identify and remove ineffective teachers. Because tenure was initially established to protect teachers against arbitrary dismissal by providing due process of law, it is typically the type of process due to a teacher that has become the target of political attack and legislative reform. The repeal of the TTA in 2011 was one simply one example, but the eradication of tenure in Florida is another. However, New Jersey is one example of a state that, even while watering-down the due process protections afforded by tenure during recent legislative reform, continued to integrate procedural safeguards within its legislation that protects teachers from arbitrary and capricious dismissal through the arbitration process.

In Alabama, the TTA certainly had its own strengths and weaknesses. The due process provisions of the TTA virtually ensured that any adverse employment action taken by the board would take a great deal of time and expense. Even minor suspensions took a minimum of 147 days to obtain a hearing officer's decision, with one minor suspension case taking over one year. The TTA's "stay put" provision for transfers also frustrated boards attempting to shift personnel to meet the needs of the students. During the time a transfer was contested, the teacher remained in the same position. For terminations, the teacher continued to draw a paycheck. For boards facing serious financial constraints after 2007, the transfer and termination provisions of the TTA had to be a determining factor when making personnel decisions. On the other hand, offering a teacher an opportunity to be heard before an impartial hearing officer provided protections against disciplinary action or termination for arbitrary and capricious reasons – the very purpose of Alabama's original tenure law when the ASTC was first created. The fact that the boards

prevailed in 55% of the cases decided provides support for proponents of the TTA who claimed the TTA balanced the interests of teachers and school boards.

The Students First Act of 2011 repealed the TTA and made major changes to the due process provisions and procedures given to Alabama's tenured teachers. Although the SFA, like the TTA, includes the provision that no board action may be proposed or approved if based upon personal or political reasons, very little about the SFA's other provisions provides for how an employee would be able to redress any violation of this provision. For example, board action taken to transfer or suspend a teacher for 20 days or less are no longer subject to review by an arbitrator or hearing officer (the TTA provided for up to 7 days). Instead, the procedures only provide minimal due process before the board (a conference for suspensions and transfers within the same feeder pattern/same pay and a *Loudermill* hearing when a teacher is transferred outside his or her feeder pattern). As a result, a tenured teacher can now lose a full month of pay without any right to have the board's decision reviewed by an impartial hearing officer. Reduction in force and partial contract cancellations are specifically exempted by the SFA for contest, leaving a teacher with no right to be heard by the board. For terminations, after a full evidentiary hearing before the board, a teacher may elect to appeal the board's decision to a retired Alabama judge who holds a hearing based upon the evidentiary record at the local board level. However, unlike the TTA where the hearing officer heard the case *de novo*, the judge must give the board's decision deference. What that means in practice will become clearer as more teacher terminations proceed under the SFA, but at least two of the SFA's appellate decisions indicates that courts will uphold local level employment decisions under the SFA (*See Boaz City School Bd. v. Stewart*, \*2150582 (Ala. Civ. App. 2016) and *Escambia County Bd. of Educ. v. Lambert*, \*2150548 (Ala. Civ. App. 2016)).



Administrators, central office personnel, superintendents, board attorneys, and teacher attorneys and representatives should be familiar with the patterns and trends from the TTA cases to identify potential roadblocks to a successful challenge to dismissal, regardless of what statutory scheme is in place. Although the TTA was repealed by the Alabama legislature in 2011, there are still a number of insights that can be useful. More importantly, however, administrators should be well-trained in whatever evaluation model is used to determine teacher effectiveness. The reason for this is two-fold. First, evaluations, properly designed and implemented, can be a useful tool in identifying teacher weaknesses for remediation. Then, when efforts to remediate a teacher do not result in improvement, removing the teacher from the classroom becomes a straightforward matter, even under the TTA. Second, if tenure laws were enacted to provide teachers with procedural due process protections against arbitrary and capricious adverse employment actions, it follows that any teacher evaluations would not be performed in a manner that could be challenged as arbitrary and capricious. There needs to be a balance to allow boards to remove ineffective teachers while protecting the rights of effective teachers (McNeal, 2013). With evaluation at the heart of many of the most recent state tenure reforms, it is vital that administrators be thoroughly trained in the evaluation process.

Finally, teacher tenure continues to come under fire, largely in part because of the perpetuation of a myth that tenure protects ineffective teachers for life. Simply do a Google® search for “Teaching Profession under Attack” or “Teachers under Fire” and a wealth of legitimate news articles, along with some profoundly articulate social media bloggers, and you can read the myriad reasons why teachers – and teacher tenure – is being blamed for our students’ poor educational outcomes. In fact, for practically any broad societal problem, even if external to the school environment, odds are you can find a news article or blog placing the

blame on our educators with a quick Internet search. In Alabama specifically, but likely generalizable to many other states, trends related to the teacher dissatisfaction with administrative support, the proliferation of standardized assessments, burgeoning charter schools, teacher pay raises reduced by increased health care premiums, and retirement terms for new employees greatly altered, changes that weaken tenure protections or increase job insecurity add the reasons why fewer individuals are entering the profession and why more teachers are leaving before retirement (Sutcher L., Darling-Hammond, L, & Carver-Thomas, D., 2016). This further exacerbates the teacher quality gap between Alabama's wealthy and impoverished school systems, disproportionately impacting students of color. If teachers continue to leave the profession, whatever the reason, whether or not teachers have tenure will be irrelevant.

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APPENDIX A  
ALABAMA TEACHER TENURE ACT

## Alabama Teacher Tenure Act

Alabama Teacher Tenure Act, §§16-24-1 through 16-24-22, *Code of Alabama* (1975) (Act 2004-566, §1 and §2) (Repealed by the Students First Act, §§16-24C-1 through 16-24C-14, *Code of Alabama* (1975) (Act 2011-270, §14)).

### §16-24-3 Contract in force unless new contract or cancelled

The contract of employment of any teacher who shall attain continuing service status shall remain in full force and effect unless superseded by a new contract signed by both parties, or cancelled as provided in Section 16-24-9 or 16-24-10; provided, that the Legislature or, in the absence of legislation, the employing board of education may provide for the retirement of teachers at certain ages.

### §16-24-5 Transfer of Teacher

Any teacher on continuing service status may be transferred for any succeeding year from one position, school, or grade to another by being given written notice of such intention to transfer by the employing board. Such transfer shall be without loss of status or violation of contract, and such transfer may not be for political or personal reasons. Upon recommendation of the superintendent, the employing board shall determine if it intends to make such transfer. The superintendent shall give written notice of the employing board's intention to effectuate such transfer. Such notice shall state the reasons for the proposed transfer, shall state the time and place for the board's hearing on the proposed transfer, and shall state the teacher's right to demand a hearing before the board by filing with the superintendent a written demand for a hearing within 15 days after the receipt of such notice.

### §16-24-6 Transfer of Teacher – Contesting; Hearing

After receiving the notice required in Section 16-24-5, the teacher may obtain a hearing before the employing board by filing with the superintendent a written demand for such hearing within 15 days after the receipt of such notice. If the teacher does not file with the superintendent such demand within 15 days after receipt of the notice to transfer, the transfer shall be final. If the teacher does file a demand for a hearing before the board, the board shall hold such hearing within 30 days after receipt of the notice to transfer. At the hearing, which shall be public or private at the discretion of the teacher, each party may appear with or without counsel and may be heard and present the testimony of witnesses and other evidence and/or information bearing upon the reasons for the proposed transfer and may cross examine the adverse witnesses. The board, or its authorized representative, may administer oaths and issue subpoenas to compel the attendance of witnesses and production of papers necessary as evidence and/or information in connection with the dispute or claim. If requested, the board shall issue subpoenas for witnesses to testify at the hearing, under oath, either in support of the charges or on behalf of the teacher. In case a person refuses to obey such subpoena, the board, or its authorized representative, may invoke the aid of the circuit court in order that the testimony, evidence, or information be produced. Upon proper showing, the court shall issue a subpoena or order requiring the person to appear before the board or its representative and produce evidence and/or information and give testimony relating to the matter at issue. A person failing to obey the court's subpoena or order shall be punishable by the court as for contempt. It shall be the duty of the board to employ a competent court reporter to keep and transcribe a record of the proceedings at such hearing, the

costs of which shall be paid by the State Department of Education. After each party has presented its case at the hearing, the employing board of education may determine the question of the transfer by a majority vote, or it may defer action regarding the decision for a period not to exceed five days. Its action and vote, whether taken immediately following the hearing or within five days thereafter, shall be evidenced by the minute proceedings of the board and shall be only after full compliance with this section. If the employing board determines that the transfer shall be effectuated, the superintendent shall give notice to the teacher of the board's action by providing notice by personal service, by United States Postal Service registered or certified mail with postage paid thereon to the teacher's last known address, or by private mail carrier for overnight delivery, signature required, with postage paid thereon to the teacher's last known address within 10 days of the board's action. Such notice shall be in writing and shall inform the teacher of the right to contest the transfer by filing with the superintendent a written notice of contest of the action within 15 days of the receipt of the notice.

#### §16-24-7 Transfer of Teacher - Review

No transfer shall be effected until the time for filing notice of contest has expired and, if notice of contest is filed, not until the hearing officer has approved the transfer. The teacher may obtain a review by a hearing officer of the board's decision. Such contest shall be taken by filing a written notice of contest with the superintendent within 15 days after the receipt of the notice of the decision of the employing board. If the contest is not timely filed, the board's decision shall be final. If notice of contest is filed, the hearing officer shall be selected as provided in subsection (b) of Section 16-24-20. Upon selection, the hearing officer shall immediately cause notice to be given to the parties of the date and time for a hearing, which hearing shall be held no less than 30 days and no more than 60 days following the appointment of the hearing officer. The parties shall agree as to the location of the hearing, and, if the parties are unable to agree, the hearing officer shall determine the location within the jurisdiction of the employing board. Within 10 days of the appointment of a hearing officer, the board shall cause to be made a copy of the record of proceedings for the hearing officer and the teacher. The record shall consist of all notices given to the teacher, all papers filed with the board by the teacher in compliance with this chapter, a transcript of testimony before the employing board, other evidence and/or information, and the findings and decisions of the board. At such hearing, the teacher and employing board shall make presentations on the facts and the law, but no witnesses shall be called. The hearing officer shall consider the case on the record of the proceedings before the board and the arguments at such hearing. The hearing officer shall determine whether the evidence was insufficient for the board to take the action, whether such action was taken for political or personal reasons, or whether such action was arbitrarily unjust. The hearing officer shall render a written decision, with findings of fact and conclusions of law, within 30 days after its hearing. The decision of the hearing officer shall be final. Expenses of the hearing officer shall be paid by the State Department of Education.

#### §16-24-8, Cancellation of Contracts - Grounds

Cancellation of an employment contract with a teacher on continuing service status may be made for incompetency, insubordination, neglect of duty, immorality, failure to perform duties in a satisfactory manner, justifiable decrease in the number of teaching positions or other good and just cause, but cancellation may not be made for political or personal reasons.

§16-24-9, Cancellation of Contracts – Procedure; Notice

(a) An employment contract with a teacher on continuing service status may be cancelled only in the following manner: The superintendent shall give written notice to the employing board and the teacher of the superintendent's intention to recommend a cancellation as provided in Section 16-24-8. Such notice shall state the reasons for the proposed cancellation, shall contain a short and plain statement of the facts showing that the cancellation is taken for one or more of the reasons listed in Section 16-24-8, and shall state the time and place for the board's meeting on the proposed cancellation, which meeting shall be held no less than 20 days and no more than 30 days after the receipt of such notice by the teacher. The notice shall inform the teacher that in order to request a conference with the board, the teacher shall file a written request with the superintendent within 15 days after the receipt of such notice. At such conference, which shall be public or private at the discretion of the teacher, the teacher, or his or her representative, shall be afforded the opportunity to speak to the board on matters relevant to such cancellation. The teacher shall have the right to counsel and to have a court reporter record his or her statement, both at the expense of the teacher. Thereafter, the board shall determine whether such cancellation shall be effectuated.

(b) Regardless of whether or not the employee elects to have a conference with the employing board, if the board votes to cancel the teacher's contract, the superintendent shall give notice to the teacher of the board's action by providing notice by personal service, by United States Postal Service registered or certified mail with postage paid thereon to the teacher's last known address, or by private mail carrier for overnight delivery, signature required, with postage paid thereon to the teacher's last known address within 10 days of the board's action. Such notice shall be in writing and shall inform the teacher of the right to contest the board's decision by filing with the superintendent a written notice of contest of the action within 15 days of the receipt of the notice. Such contest shall be taken by filing a written notice of contest with the superintendent within 15 days after receipt of the notice of the decision of the employing board. If the contest is not timely taken, the board's decision shall be final. No cancellation shall be effected until the time for filing notice of contest has expired and, if notice of contest is filed, not until the hearing officer has issued an opinion.

§16-24-10 Cancellation of Contracts – Hearing Officer; Hearing; Appeal

(a) If notice of contest is filed pursuant to Section 16-24-9, the hearing officer shall be selected as provided in subsection (b) of Section 16-24-20. Upon selection, the hearing officer shall immediately cause notice to be given to the parties of the date and time for a hearing, which date shall be no less than 30 days and no more than 60 days following the appointment of the hearing officer. The parties shall agree as to the location of the hearing and, if the parties are unable to agree, the hearing officer shall determine the location within the jurisdiction of the employing board. No less than 30 days before such date, the parties shall submit to the hearing officer, with a copy to the opposing party, documents supportive of, or in contravention to, the action, as well as a list of witnesses to be called at such hearing. The witness list and documentary submissions may be amended at any time prior to five days before such hearing. The State Department of Education shall bear the expense of having a court reporter present at such hearing. The hearing officer shall have power to administer oaths, and issue subpoenas to compel the attendance of witnesses and production of papers necessary as evidence and/or information in connection with the dispute or claim. If requested, the hearing officer shall issue subpoenas for witnesses to testify at the hearing, under oath, either in support of the charges or on behalf of the teacher. In

case a person refuses to obey such subpoena, the board, or its authorized representative, may invoke the aid of the circuit court in order that the testimony, evidence, or information be produced. Upon proper showing, such court shall issue a subpoena or order requiring such person to appear before the board or its representative and produce evidence and/or information and give testimony relating to the matter at issue. The hearing officer shall conduct a de novo hearing and shall render a decision based on the evidence and/or information submitted to the hearing officer. The hearing officer shall determine which of the following actions should be taken relative to the employee: Cancellation of the employment contract, a suspension of the employee, with or without pay, a reprimand, other disciplinary action, or no action against the employee. The hearing officer shall render a written decision, with findings of fact and conclusions of law, within 30 days after its hearing. Expenses of the hearing officer shall be paid by the State Department of Education.

(b) All appeals of a final decision of the hearing officer shall lie with the Alabama Court of Civil Appeals. 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 21 days after the receipt of the final written decision of the hearing officer. Failure to file a timely notice of appeal shall render the decision of the hearing officer final, in which case the employing board shall take possession of the record of the hearing and shall maintain such record for a period of three years. The Court of Civil Appeals shall have discretion to refuse to hear appeals of final decisions of a hearing officer pursuant to this article. Review by the Court of Civil Appeals pursuant to this article is not a matter of right, but of judicial discretion, and an appeal may be granted only when the court determines there are special and important reasons for granting the appeal. Within 30 days after an appeal is granted, the hearing officer shall transmit the record to the clerk, with the appealing party bearing the costs associated with the preparation and transmission of the record and transcript of the hearing. The decision of the hearing officer shall be affirmed on appeal unless the Court of Civil Appeals finds the decision arbitrary and capricious, in which case the court may order that the parties conduct another hearing consistent with the procedures of this article.

#### §16-24-12 Teacher Deemed Reemployed for Succeeding School Year Unless Notified

Any teacher in the public schools, whether in continuing service status or not, shall be deemed offered reemployment for the succeeding school year at the same salary unless the employing board of education shall cause notice in writing to be given said teacher on or before the last day of the term of the school in which the teacher is employed; and such teacher shall be presumed to have accepted such employment unless he or she shall notify the employing board of education in writing to the contrary on or before the fifteenth day of June. The employing board of education shall not cancel the contract of any teacher in continuing service status, nor cause notice of nonemployment to be given to any teacher whether in continuing service status or not except by a vote of a majority of its members evidenced by the minute entries of said board made prior to or at the time of any such action.

#### §16-24-13 Effect of Leave of Absence on Continuing Service Status

Leave of absence for a period of one year for good cause may be granted to a teacher by the employing board of education without the impairment of the continuing status of a teacher; provided, that for valid reason the board may extend the leave of absence for one additional year; and provided further, that upon the request of a teacher who has heretofore or who shall hereafter enter the military service of the United States at a time when there is an existing state of war

between the United States of America and any other country, leave of absence shall be granted to such teacher for the duration of the war and until the beginning of the school year next succeeding the date on which said teacher is released from said military service; and, on or before such date, said teacher must give written notice to the employing board of education whether or not he desires to be reemployed by said board. If such notice is not received by the employing board of education, or if the teacher notifies the employing board on or before the date specified above that he does not desire reemployment, the employing board has no further responsibility with respect to reemployment of said teacher. The term "military service of the United States," as used herein, shall include the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, the Army Specialist Corps, the Women's Army Auxiliary Corps and the Women's Volunteer Reserve of the United States Navy, those persons commissioned in the public health service or those persons entering into the service of any similar organization heretofore or hereafter formed by the government of the United States. A teacher entering the military service of the United States, who is not on continuing service status but who has accumulated one or more years of teaching experience with an employing board of education immediately prior to entering military service, shall be given credit for such experience with the employing board of education in attaining continuing service status, if such teacher is reemployed by said board of education within one year after the release of that teacher from military service.

#### §16-24-14 Major Suspensions of Teachers – Authorized Notice; Conditions

A teacher on continuing service status may be suspended for more than seven days without pay for just cause. Such suspension shall not be made for political or personal reasons. The superintendent shall give written notice to the employing board and the teacher of the superintendent's intention to recommend a long-term suspension. Such notice shall state the reasons for the proposed suspension, shall contain a short and plain statement of the facts showing that the suspension is for just cause, and shall state the time and place for the board's meeting on the proposed suspension, which meeting shall be held no less than 20 days and no more than 30 days after the receipt of such notice by the teacher. The notice shall inform the teacher that in order to request a conference with the board, the teacher shall file a written request with the superintendent within 15 days after the receipt of such notice.

#### §16-24-15 Major Suspensions of Teachers – Procedure; Hearings

(a) At the conference provided in Section 16-24-14, which shall be public or private at the discretion of the teacher, the teacher, or his or her representative, shall be afforded the opportunity to speak to the board on matters relevant to such suspension. The teacher shall have the right to counsel and to have a court reporter record his or her statement, both at the expense of the teacher.

(b) Regardless of whether the teacher elects to have a conference with the board, if the employing board votes to suspend the employee, the superintendent shall give notice to the teacher of the board's action by providing notice by personal service, by the United States registered or certified mail with postage paid thereon to the teacher's last known address, or by private mail carrier for overnight delivery, signature required, with postage paid thereon to the teacher's last known address within 10 days of the board's action. Such notice shall be in writing and shall inform the teacher of the right to contest the action by filing with the superintendent a written notice of contest of the action within 15 days of the receipt of the notice. The teacher



may obtain a review by a hearing officer of the board's decision. Such contest shall be taken by filing a written notice of contest with the superintendent within 15 days after receipt of the notice of the decision of the employing board. If the contest is not timely taken, the board's decision shall be final. No such suspension shall be effected until the time for filing notice of contest has expired and, if notice of contest is filed, not until the hearing officer has issued an opinion.

#### §16-24-16 Major Suspensions of Teachers - Contests

(a) If notice of contest is filed pursuant to Section 16-24-15, the hearing officer shall be selected as provided in subsection (b) of Section 16-24-20. Upon selection, the hearing officer shall immediately cause notice to be given to the parties of the date and time for a hearing, which date shall be no less than 30 days and no more than 60 days following the appointment of the hearing officer. The parties shall agree as to the location of the hearing and, if the parties are unable to agree, the hearing officer shall determine the location within the jurisdiction of the employing board. No less than 30 days before such date, the parties shall submit to the hearing officer, with a copy to the opposing party, documents supportive of, or in contravention to, the action, as well as a list of witnesses to be called at such hearing. Such witness list and documentary submissions may be amended at any time prior to five days before such hearing. The State Department of Education shall bear the expense of having a court reporter present at such hearing. The hearing officer shall have power to administer oaths and issue subpoenas to compel the attendance of witnesses and production of papers necessary as evidence and/or information in connection with the dispute or claim. If requested, the hearing officer shall issue subpoenas for witnesses to testify at the hearing, under oath, either in support of the charges or on behalf of the teacher. In case a person refuses to obey such subpoena, the board, or its authorized representative, may invoke the aid of the circuit court in order that the testimony, evidence, or information be produced. Upon proper showing, such court shall issue a subpoena or order requiring such person to appear before the board or its representative and produce evidence and/or information and give testimony relating to the matter at issue. The hearing officer shall conduct a de novo hearing and shall render a decision based on the evidence and/or information submitted to the hearing officer. The hearing officer shall determine which of the following actions should be taken relative to the employee: A suspension of the employee, with or without pay, a reprimand, other disciplinary action, or no action against the employee. The hearing officer shall render a written decision, with findings of fact and conclusions of law, within 30 days after its hearing. Expenses of the hearing officer shall be borne by the State Department of Education.

(b) All appeals of a final decision of the hearing officer shall lie with the Alabama Court of Civil Appeals. 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 21 days after the receipt of the final written decision of the hearing officer. Failure to file a timely notice of appeal shall render the decision of the hearing officer final, in which case the employing board shall take possession of the record of the hearing and shall maintain such record for a period of three years. The Court of Civil Appeals shall have discretion to refuse to hear appeals of final decisions of a hearing officer pursuant to this article. Review by the Court of Civil Appeals pursuant to this article is not a matter of right, but of judicial discretion, and an appeal may be granted only when the court determines there are special and important reasons for granting the appeal. Within 30 days after an appeal is granted, the hearing officer shall transmit the record to the clerk, with the appealing party bearing the costs associated with the preparation and transmission of the record and transcript of the hearing. The decision of the hearing officer shall be affirmed on appeal unless the Court of Civil Appeals

finds the decision arbitrary and capricious, in which case the court may order that the parties conduct another hearing consistent with the procedures of this article.

#### §16-24-17 Minor Suspensions of Teachers – Authorized; Notice; Conditions

A teacher on continuing service status may be suspended for seven days or less without pay for just cause. Such suspension shall not be made for political or personal reasons. The superintendent shall give written notice to the employing board and the teacher of the superintendent's intention to recommend a short-term suspension. Such notice shall state the reasons for the proposed suspension, shall contain a short and plain statement of the facts showing that the suspension is for just cause, and shall state the time and place for the board's meeting on the proposed suspension, which meeting shall be held no less than 20 days and no more than 30 days after the receipt of such notice by the teacher. The notice shall inform the teacher that in order to request a conference with the board, the teacher shall file a written request with the superintendent within 15 days after the receipt of such notice.

#### §16-24-18 Minor Suspensions of Teachers – Procedure; Hearings

(a) At the conference provided in Section 16-24-17, which shall be public or private at the discretion of the teacher, the teacher, or his or her representative, shall be afforded the opportunity to speak to the board on matters relevant to such suspension. The teacher shall have the right to counsel and to have a court reporter record his or her statement, both at the expense of the teacher.

(b) Regardless of whether or not the employee elects to have a conference with the employing board, if the board votes to suspend the teacher, the superintendent shall give notice to the teacher of the board's action by delivering the notice within two days of the board's action. Such notice shall be in writing and shall inform the teacher of the right to contest the action by filing with the superintendent a written notice of appeal of the action within 15 days of the receipt of the notice. The teacher may obtain a review by a hearing officer of the board's decision. Such contest shall be taken by filing a written notice of contest with the superintendent within 15 days after receipt of the notice of the decision of the employing board. If the contest is not timely taken, the board's decision shall be final. No such suspension shall be effected until the time for filing notice of contest has expired and, if notice of contest is filed, not until the hearing officer has issued an opinion.

#### §16-24-19 Minor Suspensions of Teachers - Contest

If notice of contest is filed pursuant to Section 16-24-18, the hearing officer shall be selected as provided in subsection (b) of Section 16-24-20. Upon selection, the hearing officer shall immediately cause notice to be given to the parties of the date for submission of written materials relevant to such action, which date shall be no less than 30 days and no more than 60 days following the appointment of the hearing officer. No less than 30 days before such date, the parties shall submit to the hearing officer, with a copy to the opposing party, evidence, information, and/or other documents supportive of, or in contravention to, the action. No later than such date, the parties shall submit written briefs on the factual and legal issues relevant to the action. The hearing officer shall consider the case on the written submissions. The hearing officer shall determine whether the evidence was sufficient for the board to take the action and shall render a written decision, with findings of fact and conclusions of law, within 30 days after the deadline for submission of materials. The decision of the hearing officer shall be final. Expenses of the hearing officer shall be paid by the State Department of Education.

§16-24-20 Code of Alabama (1975) Procedures applicable to tenure disputes in general

(a) Notices which are required to be given to the teacher shall be served by personal service, by United States registered or certified mail with postage prepaid thereon to the teacher's last known address, or by private mail carrier for overnight delivery, signature required, with postage prepaid thereon to the teacher's last known address.

(b) If a teacher should timely file a contest from a decision as provided in this article, the employing board and the teacher shall, within seven days of such filing, either (1) mutually agree upon a person to hear the teacher's contest, or (2) submit a joint request for a panel of arbitrators to the Federal Mediation and Conciliation Services' Office of Arbitration Services (FMCS). The joint request shall specify that the parties prefer a hearing officer who is experienced in employment law. Thereafter, FMCS shall submit to each party an identical list of names of persons chosen to serve as a hearing officer in such matter. Each party shall have 10 days from the date of receipt of the list to strike any name to which it objects, number the remaining names in the order of preference, and return the list to FMCS. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, FMCS shall invite the acceptance of a hearing officer to serve. If the parties fail to agree upon any of the persons named, if those named decline, or if for any other reason the appointment cannot be made from the submitted lists, FMCS shall make the appointment from among other members of the panel. FMCS will formally appoint the hearing officer, who shall be known for purposes of this article as the "hearing officer."

(c) During all hearings conducted before a hearing officer pursuant to this article, the hearing officer may consider the employment history of the teacher, including, but not limited to, matters occurring in previous years. Testimony and exhibits shall be admitted into evidence at the discretion of the hearing officer. The hearing officer shall also have the authority and discretion to exclude or limit unnecessary or cumulative evidence.

(d) No action shall lie for the recovery of damages for the breach of any employment contract of a teacher in the public schools.

§16-24-21 Direct Appeal by Certain Teachers Denied Hearing Before Local Board of Education

(a) A teacher who has attained continuing service status and has been denied a hearing before the local board of education as required by Section 16-24-6, 16-24-9, 16-24-15, or 16-24-18 shall have the right to appeal directly to the Chief Administrative Law Judge of the Office of Administrative Hearings, Division of Administrative Law Judges, Office of the Attorney General for relief. The Chief Administrative Law Judge shall appoint an administrative law judge to address the issue raised in the appeal. The appeal shall state facts sufficient to allow the judge to determine tentatively whether or not the local board of education has complied with Section 16-24-6, 16-24-9, 16-24-15, or 16-24-18. The local board may answer or deny in writing the facts set out in the teacher appeal and, if it fails to so deny, the facts set out in the appeal must be taken as true. The judge shall review the teacher's request and the local board's answer or denial and shall determine, with or without a hearing, whether or not the local board of education has complied with Section 16-24-6, 16-24-9, 16-24-15, or 16-24-18. Based upon its findings, the judge shall do one of the following: (1) Order a hearing before the local board, (2) determine that the teacher has been transferred, suspended, or dismissed in violation of the law and rescind the

action taken by the local board, or (3) sustain the action taken by the local board.  
(b) Action taken by the administrative law judge under this section shall be final.

APPENDIX B

COMPARISON OF THE TERMINATION OF A TENURED TEACHER

*Comparison of the Termination of a Tenured Teacher: Pre-2004 Alabama Teacher Tenure Act (Appeals to the Alabama State Tenure Commission), the 2004 Alabama Teacher Tenure Act, and the 2011 Students First Act*

	Pre-2004 TTA (Alabama State Tenure Comm'n (ASTC))	2004 TTA (Federal Mediation and Conciliation Services' Office of Arbitration Services (FMCS))	2011 Students First Act (Retired Alabama Judges)
<i>Board Notice</i>	Notice of proposed termination, including grounds for termination. Notice contains a hearing date scheduled 20-30 days from the date after the notice mailed. Teacher must notify the Board no later than 5 days prior to the date of the hearing that he/she wishes to contest and hearing will go on as scheduled.	Notice of proposed termination, including the grounds for termination and a short, plain statement of facts in support. Notice includes a date and time for the board meeting scheduled 20-30 days from the day after receipt of the notice by the teacher. Teacher has 15 days to file written request for a conference with the Board.	Notice of proposed termination, including the grounds for termination and a short, plain statement of facts in support. Teacher has 15 days to request hearing. If a hearing is requested, the Superintendent sends the teacher written notice of date and time for hearing.
<i>Board Hearing</i>	<b>Full evidentiary hearing held by Board.</b> Allows for witnesses to be subpoenaed (up to 10 paid by Board) and proceedings transcribed.	The teacher is allowed to have a court reporter record statement to board at his/her expense.	<b>Full evidentiary hearing held by Board.</b> Witnesses and documents may be subpoenaed.
<i>Board Decision</i>	The Board votes to retain or terminate the teacher within 5 days of hearing.	The Board votes to retain or terminate the teacher and provides notice of its action within 10 days.	The Board may impose a lesser punishment than termination. The Board votes to retain or terminate the teacher and provides notice of its action within 10 days.
<i>Appeal</i>	15 days to appeal to the ASTC.	15 days to file a notice of contest.	15 days to file a notice of appeal.
<i>Administrative Proceedings and Standard of Review</i>	ASTC schedules hearing within 30-60 days. The ASTC considers the record of proceeding at the Board level.	A hearing officer is selected from a panel of FMCS Arbitrators or by mutual agreement of the parties. Once selected, the hearing officer schedules a hearing within 30-60 days. <b>Full evidentiary hearing held before hearing officer.</b> The hearing is <i>de novo</i> and the hearing officer's decision is based upon the evidence presented at the hearing and issues a written decision within 30 days. The hearing	A hearing officer is selected by mutual agreement of the parties or from a panel of retired judges. The entire evidentiary record is provided to the hearing officer within 20 days of the notice of appeal. The parties are afforded a hearing which is more of a review of the evidentiary record and arguments before the hearing officer. The hearing officer is required to give the Board's decision deference (arbitrary and

		officer may also impose a lesser punishment than termination, including no discipline at all.	capricious standard) and is only allowed to affirm or reverse the Board's decision. A written decision is issued within 5 days of the hearing.
<i>Appeal from Administrative Ruling</i>	Within 45 days of the ASTC's decision, a writ of mandamus can be filed in the circuit court of the county where the Board is located. The teacher must show that the ASTC did not follow the law or that its decision was arbitrarily unjust.	Either party may appeal to the Alabama Court of Civil Appeals within 21 days. The appellate court will only grant appeals when "special and important" reasons exist and will uphold the hearing officer's decision on appeal unless the decision was arbitrary and capricious.	Either party may appeal to the Alabama Court of Civil Appeals. The appellate court does not give the hearing officer's decision any presumption of correctness and reviews the Board's decision as if the initial appeal had been brought to the appellate court directly (defers to the Board's decision).

APPENDIX C

PROCEDURAL STEPS FOR ADVERSE EMPLOYMENT ACTIONS  
UNDER THE 2004 ALABAMA TEACHER TENURE ACT



*Procedural Steps for Adverse Employment Actions under the 2004 Alabama Teacher Tenure Act*

	Transfer	Termination	Major Suspension	Minor Suspension
<p><i>Board Notice</i></p> <p>Note: An explanation of the teacher's rights to contest or appeal any decision is included in all written communication throughout process</p>	<p>Timeline same as for termination. The Board includes reasons for the transfer in the notice, except provides specifically that the teacher may request a hearing before the board, rather than a conference (important distinction). Transfers may not be made if results in a loss of status or violation of contract or for political or personal reasons.</p>	<p>Notice of proposed termination, including the grounds for termination and a short, plain statement of facts in support. Notice includes a date and time for the board meeting scheduled 20-30 days from the day after receipt of the notice by the teacher. Teacher has 15 days to file written request for a conference with the Board. Terminations cannot be for political or personal reasons.</p>	<p>Same as termination, including the use of the word "conference."</p> <p>Major suspensions are those over seven days for "just cause."</p>	<p>Same as termination.</p> <p>Minor suspensions are those for seven days or less for "just cause."</p>
<p><i>Board Hearing</i></p>	<p><b>Full evidentiary hearing held before the Board</b> (court reporter paid for by State Dep't of Educ.).</p>	<p>The teacher is allowed to have a court reporter record statement to board at his/her expense.</p>	<p>Same as termination.</p>	<p>Same as termination.</p>
<p><i>Board Decision</i></p>	<p>Board votes on whether or not to transfer the teacher and provides notice of its action within 10 days.</p>	<p>The Board votes to retain or terminate the teacher and provides notice of its action within 10 days.</p>	<p>Board votes on whether or not to suspend the teacher and provides notice of its action within 10 days.</p>	<p>Board votes on whether or not to suspend the teacher and provides notice of its action within 10 days.</p>
<p><i>Appeal</i></p>	<p>15 days to file notice of contest</p>	<p>Same</p>	<p>Same</p>	<p>Same</p>

<p><i>Administrative Proceedings and Standard of Review</i></p>	<p>The hearing officer schedules a hearing within 30-60 days. Within 10 days of hearing officer appointment, the Board provides the hearing officer and the teacher with a record of the proceedings from the Board hearing. The hearing officer considers the record of proceedings at the Board level and arguments based upon facts and law presented at hearing. The hearing officer determines whether the evidence was sufficient for the Board to transfer, whether it for political or personal reasons or whether it was arbitrarily unjust. A written decision is issued within 30 days of hearing.</p>	<p>A hearing officer is selected from a panel of FMCS Arbitrators or by mutual agreement of the parties. Once selected, the hearing officer schedules a hearing within 30-60 days. <b>Full evidentiary hearing held before hearing officer.</b> The hearing is <i>de novo</i> and the hearing officer's decision is based upon the evidence presented at the hearing and issues a written decision within 30 days. In addition, the hearing officer may also impose a lesser punishment than termination, including no discipline at all.</p>	<p>Same as termination, including a <b>full evidentiary hearing held before hearing officer.</b></p>	<p>The hearing officer considers the written submissions of the parties.</p>
<p><i>Appeal from Administrative Ruling</i></p>	<p>None. The hearing officer's decision is final.</p>	<p>Either party may appeal to the Alabama Court of Civil Appeals within 21 days. The appellate court will only grant appeals when "special and important" reasons exist and will uphold the hearing officer's decision on appeal unless the decision was arbitrary and capricious.</p>	<p>Same as termination.</p>	<p>None. The hearing officer's decision is final.</p>