

A PRACTICAL GUIDE TO EMPLOYEE TERMINATIONS UNDER THE STUDENTS FIRST ACT

Taylor P. Brooks
Shareholder

Lanier Ford Shaver & Payne, P.C.

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Overview of the presentation

- We will discuss how to prepare for a termination hearing before the board of education.
- We will discuss issues which might arise during the termination hearing.
- We will discuss how to handle an appeal.



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Considerations in advising client whether to pursue termination

- Is the conduct at issue sufficient without anything more to justify termination?
- If not, does the employee have a history of reprimands or suspensions which combined with current conduct justify termination?
 - Review personnel file.
 - Review principal/school file.
 - Request e-mails or other communications.
- Do you have witnesses willing and able to testify at the hearing?
 - Personally meet with witnesses – Will they support allegations?
 - Explain nature of hearing to witnesses and seek commitment to testify.
- Are there any employees with same or similar conduct and disciplinary history who were not terminated or recommended for termination?



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Drafting notice of proposed termination

- Due process requires that the notice of proposed termination must advise employee of the cause for termination in sufficient detail to fairly enable him or her to show any error that may exist. *Bishop State Community College v. Archible*, 33 So. 3d 588 (Ala. Civ. App. 2009).
- Describe reasons for termination and attach written reprimands and pertinent communications to the notice of proposed termination.
- Superintendent may use reprimands or other materials even if not in employee's personnel file. *Huntsville City Board of Education v. Jacobs*, 194 So.3d 929, 943-44 (Ala. Civ. App. 2014).
- Cite provisions of Board policy or law which the employee's conduct violated.
- Advise the employee of the right to hearing if he or she submits a notice of contest to the superintendent within 15 calendar days from the date of service of the notice of proposed termination.



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Service of notice of proposed termination

- Under the SFA, an employee may be served by personal service, certified mail, private mail carrier for next day delivery, or physical delivery to last known address. Alabama Code § 16-24C-6(k).
- Personal service is best. Have the employee sign for receipt.
- If employee cannot be personally served, overnight mail carrier such as FedEx is the next best option. Chose the option where employee is not required to sign for delivery. Therefore, employee cannot avoid service.
- Certified mail is not advisable. It permits employee to avoid service by not signing for receipt. While there is a presumption of service when sent by certified mail, this presumption can be overcome by evidence of non-delivery. See *Taylor v. Huntsville City Board of Education*, 143 So.3d 219 (Ala. Civ. App. 2013).



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Setting the termination hearing

- After the superintendent receives a notice of contest, SFA requires a notice of hearing date to be served on employee.
- This notice must contain the date of the hearing, hearing time, and hearing location. Alabama Code § 16-24C-6(c).
- The date of the hearing shall be not less than 30 and not more than 60 days from the date the written notice of hearing date is issued to the employee. *Id.*
- Before setting the hearing date, check with board members and with witnesses to ensure they are available. Every board member absent is effectively a “no” vote.
- Make every attempt to set hearing at a time where it can be completed at a reasonable hour.



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Pre-hearing preparation

- Provide list of witnesses and copies of exhibits to employee or employee's attorney. While not required by the SFA, this is required as a matter of due process. *Frizzell v. Autauga County Board of Education*, 972 F.Supp. 564 (M.D. Ala. 1997).
- Due process requires production to employee of those documents the superintendent intends to use at the hearing. *Huntsville City Board of Education v. Jacobs*, 194 So.3d 929 (Ala. Civ. App. 2014).
- Prepare witnesses for the hearing.
- Prepare a script for the Board Chair/President. AASB has excellent sample scripts.
- Prepare a written recommendation for the superintendent to provide to the board of education.



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Dealing with pre-hearing requests of employees

- The SFA does not grant an employee the right to discovery prior to the termination hearing. *Huntsville City Board of Education v. Jacobs*, 194 So.3d 929, 943 (Ala. Civ. App. 2014).
- Employee can request documents under Open Records Act.
- Superintendent is required to issue subpoenas for witnesses at request of employee. Alabama Code § 16-24C-6(c).
- Failure to issue subpoenas is cause for a hearing officer to remand to board of education for new hearing. *Calhoun Community College v. Hudson*, 200 So.3d 1175 (Ala. Civ. App. 2015).
- No requirement that superintendent or board of education serve the subpoenas. See Alabama Code § 16-24C-6(c).



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Ensuring due process during the termination hearing

- Board members must not be biased. Prior to hearing, do not discuss facts with or provide evidence to members of the board of education. Instruct superintendent and other employees likewise.
- However, standard for bias is very high. Board members are presumed to perform duties with honesty and integrity. *Hortonville Joint School Dist. v. Hortonville Educ. Assoc.*, 426 U.S. 482, 493 (1976).
- “In order to sustain a due process violation, the evidence must show that the risk of bias is intolerably high or that there is a substantial temptation to prejudice the case.” *State Tenure Comm’n v. Randolph County Board of Education*, 523 So.2d 1076, 1077 (Ala. Civ. App. 1988).
- Mere knowledge of facts or friendship with witnesses is not sufficient to establish bias on behalf of board member.
- Board of education’s attorney may prosecute the case for the superintendent so long as the attorney is not also acting as a legal advisor to the board. *Huntsville City Board of Education v. Jacobs*, 194 So.3d 929, 944-45 (Ala. Civ. App. 2014).



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Strategies for termination hearing

- Have all exhibits you intend to use bound and tabbed and have enough copies for all board members, defendant, and court reporter.
- Include procedural documents in evidence; i.e., notice of proposed termination, request for hearing, notice of hearing date.
- Have all page numbers bates stamped for ease of reference.
- Have superintendent as last witness to explain all violations of policy or law which has been demonstrated by previous evidence. Have superintendent give opinion that employee has neglected duty, has failed to perform duties in satisfactory manner, or has engaged in conduct sufficient to meet other statutory reasons for termination
- Emphasize the support or help which has been give to the employee to no avail, and the harm to the students if the employee is not terminated.
- When cross examining employee, confront with written reprimands and testimony of witnesses and ask why is everyone else lying about you.



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Rules of evidence for hearing

- The Alabama Rules of Evidence do not apply to a termination hearing under the SFA. *J.F. Ingram State Technical College v. Carter*, 227 So.3d 499, 510 (Ala. Civ. App. 2017).
- The board of education has wide discretion in what evidence it chooses to allow.
- However, there must be legal evidence to support the decision of the board of education. *Id.*
- Hearsay evidence is permissible. However, a decision of the board of education may not be based **solely** on hearsay evidence. *Id.*



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Decision of the board

- Make sure to present the superintendent's written recommendation to board of education before deliberation.
- This recommendation should refer to the reasons stated in the notice of proposed termination and should have an effective date of immediately or next day.
- After deliberation, a board member can make motion to approve written recommendation.
- The board of education is not required to provide a written decision. *Escambia County Board of Education v. Lambert*, 2016 WL 5338669, *7 (Ala. Civ. App. 2016).
- However, board of education can only cut off pay immediately if termination is based on an act of moral turpitude, immorality, abandonment of job, incarceration, or neglect of duty. Alabama Code § 16-24C-6(m).



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What to do after board votes to terminate employee

- The superintendent must provide written notice to the employee of the termination decision within 10 calendar days of the hearing. The written notice must inform the employee of his or her appeal rights under the SFA. Alabama Code § 16-24C-6(d).
- In order to ensure compliance with the notice requirement, I recommend that the notice should say that any appeal must be provided to State Superintendent of Education within 15 days of receipt of the notice and list the address for the State Superintendent. It should be served on the employee in one of the manners as provided in Alabama Code § 16-24C-6(k).
- If the written notice of the termination decision is not served within 10 calendar days, the superintendent can still serve the notice outside the 10 day period so long as the delayed notice does not prejudice the employee. *Cox v. Mobile County Board of School Commissioners*, 157 So.3d 897 (Ala. Civ. App. 2013).
- You should also draft, or at least review, the minutes of the board hearing to ensure that it properly reflects the proceedings, including the votes of each member. It is important that the minutes are correct in the event there is a dispute about how each member voted. Court reporters can make mistakes.



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What do you do if employee appeals termination decision

- Immediately order the transcript of the hearing from the court reporter.
- Select a hearing officer in accordance with Alabama Code § 16-24C-6(g).
 - Research the five retired judges on your panel.
 - You can submit names to Jayne Williams and/or ask directly for feedback from other attorneys on acsba googlegroup e-mail
- Provide record to hearing officer which should include:
 - Transcript of hearing.
 - The procedural documents if not part of your hearing exhibits.
 - The written notice of the board of education's decision to the employee. The failure to include the written notice of the board's decision in the record precludes the hearing officer from having jurisdiction over the appeal. *Dailey v. Monroe County Board of Education*, 238 So.3d 657 (Ala. Civ. App. 2017).
 - The meeting minutes of the termination hearing.
 - Documents demonstrating that, prior to the termination hearing, the superintendent gave the employee or the employee's attorney a list of witnesses and copies of documents intended for use at the hearing.



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Arguing the case to the hearing officer

- Remember that the hearing officer may not have ever heard an SFA appeal.
- Ask for an initial phone conference with the hearing officer and the employee's attorney. Inform the hearing officer that this appeal is a review of the record, not a new hearing. Request a briefing schedule and a hearing date for oral argument. Insist that the employee submit first brief and that you respond.
- In drafting brief, you should:
 - Explain the deferential standard of review. Decision of the board of education may only be overturned if arbitrary and capricious. See *Ex parte Lambert*, 199 So.3d 761, 768 (Ala. 2015). Highlight the specific instances where the Alabama appellate courts have overruled hearing officers for failing to apply this standard correctly. Put this section first in your brief for emphasis.
 - Provide a detailed statement of facts with specific cites to the transcript and hearing exhibits. Make sure the hearing officer can specifically locate the facts which support the termination decision.
 - Address the legal arguments raised by the attorney for employee.
- At oral argument, have command of facts and highlight standard of review.



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Authority of hearing officer

- Hearing officer can do one of three things:
 - Affirm/uphold the decision of the board of education.
 - Reverse the decision of the board of education and order that no penalty be imposed. The hearing officer only has this authority if the decision of the board of education is arbitrary and capricious or if the due process rights of the employee have been violated. *Huntsville City Board of Education v. Jacobs*, 194 So.3d 929 (Ala. Civ. App. 2014).
 - Remand the case to the board of education with instructions to the board of education to impose a lesser penalty. The hearing officer only has this authority if the penalty imposed by the board of education is arbitrary and capricious. *Ex parte Lambert*, 199 So.3d 761, 769 (Ala. 2015).



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Appeal to court of civil appeals

- Either the employee or the board of education may appeal the decision of a hearing officer to Alabama Court of Civil Appeals. Alabama Code § 16-24C-6(f).
- If there is an appeal, assist the hearing officer in preparing the record provided to Court of Civil Appeals to ensure everything is properly before that court.
- If the hearing officer decides in favor of employee, the employee is entitled to reinstatement and any pay and benefits lost. Alabama Code § 16-24C-6(f). The board of education should ask for a stay of the decision of the hearing officer while the appeal is pending before the Court of Civil Appeals. The board of education must first ask the hearing officer for a stay. If the stay is denied or hearing officer refuses to make a decision, the board should then file a motion for a stay with the Court of Civil Appeals.
- In SFA cases, the Alabama Court of Civil Appeals has been very receptive to arguments of boards of education that the hearing officer did not properly apply the “arbitrary and capricious” standard of review. See e.g., *Boaz City Board of Education v. Stewart*, 233 So.3d 986 (Ala. Civ. App. 2016); *Escambia County Board of Education v. Lambert*, 2016 WL 5338669 (Ala. Civ. App. 2016); *Huntsville City Board of Education v. Jacobs*, 194 So.3d 929 (Ala. Civ. App. 2014); *Chilton County Board of Education v. Cahalane*, 117 So.3d 363 (Ala. Civ. App. 2012).



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Taylor P. Brooks

Shareholder

Lanier Ford Shaver & Payne, P.C.

2101 West Clinton Avenue, Suite 102

Huntsville, AL 35805

256-535-1100

TPB@LanierFord.com

www.LanierFord.com



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