REL: February 28, 2020

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180844

Shelby Dockery

v.

City of Jasper

Appeal from Walker Circuit Court
(CV-03-706.80)

PER CURIAM.

Shelby Dockery appeals from a judgment of the Walker Circuit Court ("the trial court") dismissing his purported damages claims against the City of Jasper ("the City") and affirming a decision of the Jasper Civil Service Board ("the

Board") regarding the termination of his employment as a police officer for the City.

The City hired Dockery as a police officer on May 6, 2002. On June 9, 2003, the City's police chief, Robert Cain ("Chief Cain"), served Dockery with a letter ("the termination letter") that stated:

> "Following our conversation concerning your recent activities, and my consideration of the events raised in my letter to you dated June 5, 2003, I have determined that your employment relationship with the Jasper Police Department is due to be terminated, effective immediately. Please return any property of the Jasper Police Department or the City ... which is currently in your possession.
>
> "If you are dissatisfied with this decision, you are vested with the right to appeal it to the ... Board .... There are time limits and other rules pertinent to this appeal, and you are advised to closely adhere to them in the event you choose to seek a further hearing in this matter.
>
> "In accordance with the provisions of Act 65-113, Acts of Alabama, a copy of this letter is being sent to the ... Board ..., advising them of my decision in this matter. If you have any questions, please contact the Board or myself."

A copy of the termination letter was sent to the Board.

The conversation referenced in the termination letter was a purported pretermination hearing that occurred in Chief Cain's office on June 4, 2003, following an alleged incident

involving Dockery and a female citizen that occurred during Dockery's shift on June 3, 2003. Dockery attended that hearing with his attorney, although he thereafter retained a different attorney for purposes of the present case.

After receiving the termination letter, Dockery timely appealed Chief Cain's decision to the Board. The record does not include a copy of the document that Dockery filed notifying the Board of his appeal. See § 14(a) of Act No. 113, Ala. Acts 1965 (1st Spec. Sess.), the City's Civil Service Act ("the Act").[1]

Section 14(a) of the Act states, in part:

> "The governing body of the city, any member of the governing body, or the head of any department ... can remove, discharge, or demote any employee ... of the city who is subject to the provisions of this Act and who is directly under such governing body, member thereof, or department head, provided that within five days a report in writing of such action

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[1]Section 11-43-180 et seq., Ala. Code 1975 ("Article 9"), was "enacted to assure that every municipality in this state shall be provided an acceptable civil service merit system governing the appointment, removal, tenure, and official conduct of its law enforcement officers." § 11-43-180, Ala. Code 1975. However, § 11-43-190(a), Ala. Code 1975, states that Article 9 "shall not apply to any municipality with an established civil service or merit system already in existence on August 23, 1976, so long as the said civil service or merit system continues in full force and effect." See also Ala. Code 1975, § 1-1-10.

> is made to the Board, giving the reason for such removal, discharge, or demotion. The employee shall have ten days from the time of notification of his discharge, removal, or demotion in which to appeal to the Board. The Board shall thereupon order the charges or complaint to be filed forthwith in writing and shall hold a hearing de novo on such charges. No permanent employee, officer, or official of the city whose employment comes within the jurisdiction of this Act, and whose probationary period has been served, shall be removed, discharged, or demoted except for some personal misconduct, or fact, rendering his further tenure harmful to the public interest, or for some cause affecting or concerning his fitness or ability; and if such removal, discharge, or demotion is appealed to the Board, then the same will become final only after a hearing upon written charges or complaint has been had and after an opportunity has been given him to face his accusers and be heard in his own defense. Pending a hearing on said appeal, the affected employee may be suspended; and after such hearing the Board may order said employee reinstated, demoted, removed, discharged, or suspended, or take such other disciplinary action as in their judgment is warranted by the evidence and under the law."

Section 14(a) contains additional provisions regarding the procedures applicable to charges against an employee filed by a citizen:

> "Charges may be filed by any resident citizen of the city as follows: the charges must be in writing, must set forth succinctly the matters complained of, and must be sworn to before any member of the Board or before any person authorized to administer oaths. Upon the receipt of such charges, the Board, after due consideration, shall determine whether in its opinion it considers that the good of the service

> will be served by a trial thereon; and, if not, such charges may be dismissed by the Board. If in the judgment of the Board such charges are of a minor nature, such charges may be referred by the Board to the proper department head who shall make an investigation of the charges and make his recommendation to the Board within such time as the Board may prescribe, as to what disciplinary action, if any, should be taken. After such recommendation is made by the department head and after due notice is given to the affected employee of the receipt of such recommendation and the contents thereof, the Board may, in its direction, adopt and order executed the action recommended by the department head or any part thereof. However, if the complainant or the affected employee, or both of them, objects to the recommendation of the department head, the Board shall hold a public hearing de novo on the charges, and take such disciplinary action as in their judgment is warranted by the evidence and under the law."

Section 14(a) further provides as follows:

> "All hearings before the Board shall be open to the public. All testimony given in all hearings before the Board shall be taken down in shorthand by a stenographer. In all cases, the decision of the Board shall be reduced to writing and entered in the record of the case. <u>In all proceedings before the Board, the city attorney may appear and prosecute all charges instituted by the city governing body or any member thereof or by any department head</u>, when requested or directed to do so by such city governing body. It shall not be the duty of the city attorney to prosecute any charges brought by a private citizen. In all proceedings before the Board, the city attorney may appear and represent the interests of the city, and he shall also give such legal advice and legal assistance to the Board as may be requested by it.

> "The Board and its specially authorized representatives shall have the power to administer oaths, take depositions, certify official acts, and issue subpoenas to compel the attendance of witnesses and production of papers necessary as evidence in connection with any hearing, investigation, or proceeding within the purview of this Act."

(Emphasis added.)

The record reflects that counsel for the City sent Dockery's counsel a letter dated July 29, 2003, that stated:

> "Please find enclosed the requested copies of ... Dockery's employment file and the audiotape of the pretermination hearing between [Dockery] and Chief Cain. The audiotape is at a very low volume, but is otherwise of decent quality, and is as good as the original in any event. If you need further information, please let me know of the same.
>
> "It also appears that ... Dockery may not have been served with notice of the charges concerning his conduct at the Waffle House this past spring, wherein Officer Bryan Carlton was involved in a fight with a suspect and he did not assist Officer Carlton. I mistakenly believed that this was one ground for Chief Cain's decision, but I understand now that he did not know of this matter until following his decision to terminate ... Dockery. This may be the subject of a further notice and prediscipline hearing, at ... Dockery's option, and I will provide you with notice of the same prior to any such undertaking.
>
> "Thank you for your time and consideration in this matter. If we may provide further information,

> or if you propose any further resolution, please do not hesitate to contact me at your convenience."[2]

The record does not reflect that Dockery sought any further information from the City before the hearing before the Board.

On August 29, 2003, the Board conducted a de novo, ore tenus proceeding regarding the termination of Dockery's employment. See § 14(a), supra. At the beginning of the August 2003 hearing, the Board noted that the City was the

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[2]It is undisputed that Dockery did not receive the June 5, 2003, letter referenced in the termination letter, and the record contains no copy of the June 5, 2003, letter. At the hearing before the Board, Dockery's counsel mentioned his lack of receipt of the June 5, 2003, letter. The City's counsel acknowledged to the Board that the June 5, 2003, letter was not sent to Dockery and further stated, apparently referencing the alleged incident at the Waffle House restaurant referenced in the July 29, 2003, letter, that Dockery's counsel was aware of what issue the June 5, 2003, letter concerned. According to the City's counsel, the June 5, 2003,

> "letter involved a second incident. It doesn't involve what he was terminated for. It involved some conduct that came to the attention of [Chief Cain] after he had made the decision to terminate. I don't know whether that conduct will be the subject of future proceedings or not. And a lot of that might depend on what happens here. But if it is, notice will be given. And there's not a problem."

At the hearing before the Board, the City made no attempt to use the alleged Waffle House incident as a basis for supporting any decision to terminate Dockery's employment.

plaintiff for purposes of Dockery's appeal and that the City had the burden of proof. Before the Board received any testimony, Dockery's counsel made an oral motion to set aside the termination of Dockery's employment:

> "The ... Act sets out the rules that have to be followed when the city or a supervisor for the city makes a decision to fire someone or even to suspend someone, for that matter. And basically what the Civil Service Rules [promulgated by the Board] and the Act say is that once the decision to terminate is made, the employee has a right to challenge or to request an appeal before this [B]oard. We did that. The decision to terminate was made by Chief Cain on or about June 9, 2003.
>
> "Now, after that decision was made, of course, we made a written request for a hearing to the [B]oard within the ten-day period. Now, once we made that request, the Act says that the [C]ity ... has to come before this [B]oard and file a complaint in order to uphold or to defend or to proceed with its decision to suspend or to fire. And in that complaint, the Act specifically says that they have to state what decision they made as it related to terminating an employee. And they also have to give an explanation as to the basis for the decision that was made. They have failed to do that as of this day. The [C]ity has failed to do it. And I attached a copy of the pertinent portion of the rule that explains what's supposed to be done."

The Civil Service Rules ("the rules") that Dockery referenced are apparently sections 7, 11, and 13 of rules promulgated by the Board pursuant to § 9 of the Act. See discussion, infra. Dockery's counsel continued:

> "And the [C]ity has simply stated they fired this employee. And they've never specified the basis for the termination to him. They've never specified the basis for the termination to this [B]oard. And the Act -- the rule says they have to do it within five days prior to this hearing, when you said 'the hearing,' they have to submit that complaint to you within five days prior to the hearing in order for them to proceed with the suspension or the termination. And simply stating, they have failed to do so. So based on the [C]ity's failure to do what is necessary to support its decision, we request that this [B]oard enter an order saying that they failed to comply with the requirements of the Act. And, hence, that ... Dockery is due to be reinstated.
>
> "And I will just point one thing out. The Act says that once the decision was made to fire my client, he had ten days to request a hearing. If he had failed to request that hearing within ten days, and we had came in on the 11th day, we wouldn't have been able to proceed. And if we've got to follow -- if an employee has got to follow the Act, the [C]ity should have to follow the Act, also. And they haven't done it. So we request that ... Dockery be reinstated based on the [C]ity's failure to comply with the Act."

Dockery also filed with the Board a written motion to set aside the termination of his employment, attaching a copy of the three rules referenced above. The written motion states, in pertinent part:

> "1. That on or about June 9, 2003, the City ... served ... Dockery ... with the letter attached hereto, notifying [him] that he was terminated from his employment as patrolman with the City ....

> "2. That on June 12, 2003, [Dockery] sent his notice appealing said termination in accordance with the ... Act.
>
> "3. That the ... Act requires that upon making a decision to terminate an employee covered under said Act, ... the City ... submit a report to the Board within five (5) days from the decision to terminate setting out the reasons for termination in the letter.
>
> "4. The ... rules also require that the City file written charges setting out its decision and the basis for its decision five days prior [to] the hearing on the appeal.
>
> "5. That the City ... has failed to comply with the ... Act and [the] rules.
>
> "6. That as of the date of the hearing scheduled in this cause, the City ... has failed to file any type of complaint specifying the bases for its action and as such, has not properly complied with [the] Act[']s requirements and ha[s] denied [Dockery] due process of law.
>
> "7. That based on the City's failure to comply with the ... Act, the City has not properly preserved any claim or complaint for misconduct against [Dockery] in this cause."

Dockery's written motion requested that the Board reinstate Dockery and order the City to pay him backpay.

At the August 2003 hearing, counsel for the City responded as follows to Dockery's oral motion to set aside the termination of Dockery's employment:

> "On June 9, 2003, ... Dockery was hand-delivered a letter signed by Chief Cain that advised him of his termination based on the matters addressed in the hearing that Chief Cain had already held with him, a full adversary -- you know, full-blown deal at which he had an attorney present, it wasn't [Dockery's present counsel]. But he had an attorney that's licensed to practice law in Alabama representing him at that hearing.
>
> "Chief Cain's letter advises ... Dockery and I was planning to put it into evidence anyway -- and we can offer it at any time. But it says, 'I have determined that your employment relationship with the Jasper Police Department is due to be terminated, effective immediately.' It says the reason for that was following our conversation concerning your recent activities. That letter was sent to the ... [B]oard. And y'all have a copy of it as required by the [A]ct. There are some provisions in the [A]ct that are separate from the provisions concerning employment discipline where any citizen ... may press charges ... against an employee.
>
> "And there's no dispute that those charges are required to be set out in writing. However, this is a different situation. ... [W]e bear the burden of proof at this hearing, [but] the [C]ity did not initiate this hearing. This is not a proffering of charges against ... Dockery. The [C]ity has made its decision. This is ... Dockery's appeal."

The City's counsel added: "[T]he [B]oard should not read into the [A]ct a requirement that we comply with provisions concerning other proceedings for his appeal of his employment decision." The City's counsel further stated:

> "Dockery has had notice that employment discipline was being considered.
>
> "He had a hearing with Chief Cain and witnesses, at which he was represented by counsel. The charges -- or lack of a better term -- are not a secret to ... Dockery. They were presented in a hearing, which, by the way, has been reduced to a tape recording and can be provided to y'all if y'all wish. I have a copy of it. The hearing has been reduced to a recording, it was held. ... Dockery had an opportunity to present his side of the story.
>
> "And the [C]ity made a decision to terminate him. Y'all were notified of that decision, which is what the [A]ct requires, within the five-day period. ... Dockery decided to appeal. And we're not here on the [C]ity proffering charges against Officer Dockery. We're here on him appealing the [C]ity's employment decision, before which he was granted a hearing by Chief Cain."

After hearing the aforementioned arguments, the Board decided "to proceed with the hearing. And, obviously, we'll have a -- there will be written findings at the conclusion of the hearing. ... [W]e'll take this under advisement ...."

During the August 2003 hearing, City Police Captain Charles Flemming ("Captain Flemming") testified that he was the captain for the third shift, which was the shift on which Dockery worked. The third shift began at 10:00 p.m. and ended at 6:00 a.m. Captain Flemming testified on direct examination that, before the June 3, 2003, incident, he had told the

third-shift officers, "on numerous occasions," "not to spend time, you know, consulting, you know, just talking, you know, wasting time, you know, associating with females while on duty." Captain Flemming testified on cross-examination that merely talking with a female was not a violation of any rule, but, Captain Flemming said, Dockery violated "an unwritten policy where he's walking, shaking his doors in the performance of his duty, being accompanied ... by a female. ... [W]e walk by ourselves, if not with another officer, which we don't walk with another officer to shake the doors." Upon further questioning by Dockery's counsel, Captain Flemming added: "I don't know if it's written. No. It's not written where a female -- just more common sense issue." On redirect examination, Captain Flemming testified that obeying the orders of a superior officer was a written rule, and Captain Flemming affirmed that he had given the third-shift officers, including Dockery, "a pretty direct order concerning consorting with females on duty." Captain Flemming also testified that he had received a complaint from the Walker Baptist Medical Center through the dispatcher and that he had

thereafter warned the third-shift officers "about the hospital."

City Police Sergeant James Bennett ("Sergeant Bennett") testified that, in May 2003, he had become aware of a problem on third shift based on a conversation that Sergeant Bennett had with the police dispatcher. According to Sergeant Bennett,

> "the following night at roll call, ... I made it a point to put it out as a general directive to everybody present that there would be no malingering or unnecessary trips to the emergency room or the hospital -- unless they were dispatched there for a reason, in line of duty. ... Dockery was present. After roll call, and during the shift that night, I informed ... Dockery that the basis for that directive was because of a complaint that was made to me about his going to and hanging out at the emergency room on duty. And I didn't want to hear of it anymore."

Dockery's counsel objected to the above-quoted testimony on the ground of hearsay, adding:

> "I've made a request of [the City's counsel] if there are some folks out there who have accused my client of something, I would like to know what their names are so that I can subpoena them to this hearing. And I have been told that they don't know the folks who supposedly made these statements. So I submit that it's improper for ... hearsay testimony from somebody we don't even know who it is to be admitted."

The City's counsel responded to the objection by stating that the City was offering the testimony to establish that Sergeant Bennett had warned Dockery "to quit hanging out with women while he was working," not for the truth of what might have occurred at the hospital and resulted in a complaint about Dockery. When the Board indicated that it would allow Sergeant Bennett to testify about his conversation with the dispatcher, the following colloquy occurred:

> "[DOCKERY'S COUNSEL]: For what purpose for clarification for the record? Because, again, we have a right to cross-examine anyone who is accusing us of misconduct. And ... if you all are considering this as evidence of any wrong conduct on my client's part, then I would like to request a ruling to that effect in the record.
>
> "[CITY'S COUNSEL]: I think that the right to cross-examination would extend to anything that was relevant to the scope of this hearing. The scope of this hearing concerns his consorting with women downtown -- or a woman -- downtown on duty after prior warning not to do so. It doesn't concern what may or may not have happened at the hospital because, frankly, that's not why he's disciplined. That isn't --
>
> "[DOCKERY'S COUNSEL]: And see that's part of the problem.
>
> "THE [BOARD]: Well, let's --
>
> "[DOCKERY'S COUNSEL]: We don't have a specific reason stated to us as to why we're here today because they haven't filed a complaint. And so now

> they want to tell about something that supposedly happened at the hospital. But that's not why we're here today. But they want to put it before you. They haven't filed a complaint.
>
> "THE [BOARD]: You have a right to cross him ....
>
> "[DOCKERY'S COUNSEL]: Right.
>
> "THE [BOARD]: Let's proceed.
>
> "[DOCKERY'S COUNSEL]: But, again, can I get a specification as to are we defending against this issue as far as the Board's ruling is concerned? Or are we simply -- is this being allowed for some other purpose, for which I'm not clear what it would be? Because I need to know what I'm defending here today. And I don't think it's fair for me -- him to bring stuff about the hospital up. I hadn't been told about it. And then if it's considered as evidence against my client, that's why I objected to not being given a complaint so that I know what the issues are so I can determine what's relevant and what's not on ... Dockery's behalf because I can't say anything. Is it being allowed as evidence for some other purpose?
>
> "THE [BOARD]: It's being allowed as conversation that [Sergeant] Bennett had with the police dispatcher. So let's continue."

Sergeant Bennett then testified that no one on the third shift had indicated that he or she did not understand what Sergeant Bennett was talking about when he issued the directive about unnecessary trips to the hospital.

On cross-examination, Sergeant Bennett testified that, at one time, the third-shift officers were responsible for

performing "walk-throughs" at the hospital but that the walk-throughs had ended at some point. The colloquy on cross-examination continued:

> "Q: Now, after you all terminated the walk-throughs [at the hospital] -- or the federal law said you didn't have to do them anymore -- has there been any complaint that ... Dockery had been to the hospital when you told him not to go?
>
> "A: Well, this -- in fact, these complaints or these incidents occurred after the termination of the walk-throughs.
>
> "Q: When?
>
> "A: Somewhere in mid-May. ...
>
> "....
>
> "Q: Now, do you know who the person is who supposedly made some sort of complaint or statement at the hospital?
>
> "A: No, sir, I don't."

City Police Captain Benny Hyche ("Captain Hyche") testified that, on June 3, 2003, after leaving work, he observed a female walking along the sidewalk with Dockery while he was on duty checking the doors of downtown businesses. Captain Hyche stated that he was aware that the third-shift officers had been warned about females accompanying an officer on duty and that he had informed Chief

Cain of his observation of Dockery. Captain Hyche further testified that having a female accompanying an officer on duty is "a problem because it puts the [C]ity in a liability situation because you never know what you're going to run into when you're out there on the streets. If he's walking up checking the door and someone's in it, they might come out shooting."

Chief Cain also testified at the hearing before the Board. The following colloquy occurred near the beginning of the direct examination of Chief Cain:

> "Q: ... [S]ometime in May or June of this year, did you become aware of some problems on third shift?
>
> "A: Yes, sir, I did.
>
> "Q: Tell the [B]oard about those.
>
> "A: I had a previous problem with another officer on third shift. Action was taken against him. I received some complaints about ... Dockery hanging around the emergency room talking to a particular girl.
>
> "[DOCKERY'S COUNSEL]: And, again, aware of problems was the question. And he's saying that somebody told him something about ... Dockery. Unless we can get some specification as to who the person was, when it was said and what they said so that we can get this person here -- or at least test the credibility of what's being said about that person making the complaint -- we object to it.

> It's hearsay. We don't have an opportunity to cross-examine these folks that have not been identified. We object to it.
>
> "THE [BOARD]: It's noted."

Chief Cain testified that, before the alleged June 2003 incident involving Dockery, he had met with Captain Flemming, Sergeant Bennett, and another third-shift supervisor "and told them that messing around with females on the third shift is going to stop. I wouldn't tolerate it." Chief Cain also testified that, after Captain Hyche contacted him on the night at issue and told him "that ... Dockery ... had a female escorting him while he was walking the beat, checking doors," Chief Cain drove downtown and observed Dockery and a female "part company at the courthouse square." According to Chief Cain, he then confronted Dockery:

> "I asked him ... what the problem was, why he had the girl with him. And he told me she was just walking with him for company. And I explained to him, you know, that you just don't do that. It's not only the public's perception of what goes on out there at night. It's a matter of safety for the officer and the person that's with him."

Chief Cain testified that the public-perception issue was about an officer "not doing his job. He's out there fooling around." Chief Cain testified that he told Dockery that he

was suspended that night, with pay, and that a hearing would be held the next morning in Chief Cain's office. Chief Cain testified that he had suggested that Dockery have an attorney present at the hearing, and, he said, Dockery and his attorney attended the hearing on June 4, 2003, in Chief Cain's office, after which Chief Cain sent Dockery the termination letter. Chief Cain stated that he was aware that Captain Flemming and Sergeant Bennett had warned the third-shift officers about being in the company of a female while on duty, and, he said, that was a factor in his decision to terminate Dockery's employment. Also, on cross-examination, Chief Cain testified regarding the disciplinary measures he had taken regarding other police officers who had been accused of policy violations involving fraternizing with females.

After the close of the City's case-in-chief, Dockery's counsel renewed his motion to set aside the termination of Dockery's employment, and the City's counsel responded:

> "[I]f this [B]oard determines that ... Dockery is prejudiced in any way by the lack of some written document, over and above the hearing that he's already been given, ... the [C]ity will gladly comply with whatever the [B]oard directs concerning doing that and give him an opportunity to present -- in response to that -- whatever he chooses to present. I stand on what we previously discussed

> concerning the hearing that he's already had on this matter. But as a supplement to that, if y'all direct us to provide some information and give him an opportunity to respond further, we'll be glad to do that, too."

The Board denied Dockery's renewed motion. Thereafter, Dockery testified at the August 2003 hearing.

Dockery testified that he was 26 years old, that he had a bachelor's degree from the University of Alabama, and that he began work as a police officer in August 2002, after he completed training at the police academy. According to Dockery, he graduated first in his class from the police academy. Dockery denied that he had been "written up or reprimanded for any reason" before the June 2003 incident. Regarding that incident, Dockery testified that he

> "got to the businesses over here [at] ... maybe 10:15 [p.m.]. But I think it was before that. I received a call on my cell phone from the person who I was walking with saying -- just as I was getting out of my car. She said that she was upset and needed to talk to someone and asked if she could talk to me. I said that I was about to be walking doors. And if she really needed to, she could come talk to me. She said that she would.
>
> "And she -- well, I imagine she was at the hospital until that time. So I started walking. I noticed her about the time that I got to Downtown Foods. I walked in the parking lot up to the glass doors there. As I was walking out to continue down towards Walker High school, I noticed her walking up

on the sidewalk. She walked to my -- to the outside of the street. As I walked to doors, I would go up to the door. She would stay on the sidewalk. I would go up to the door, pull on the door, continue on. And we turned around about -- it's been so long since I've worked here. We turned around about Birmingham Avenue, I believe, somewhere along in there and come back up to go to the back side of the courthouse [to] make sure those doors are closed.

"And then, you know, go -- I -- she talked with me while I was doing that. Never held hands or anything like that. There was no contact between us. And as I finished -- it takes maybe 15, 20 minutes to do -- to walk the buildings. I walked across the street back to my patrol car. And she stopped -- she had parked on the side facing the courthouse. And she got in her vehicle. I was walking up to my vehicle and I was about to call out that I was back in service and a vehicle sped up and stopped in front of me. And I recognized after a second that it was Chief Cain, so I stood where I was.

"....

"Chief Cain exited his vehicle and said, 'I'm fed up with you, boy.' And then asked me if I wanted to be a playboy or a policeman. I responded that I would rather continue being a policeman. And he said, 'Not if I have anything to do with it. You won't. Not in my town.' He then asked if I was still married. And I said yes that I was. And that that person across the street was merely a friend. He had me to stand on that side of the street. Captain -- I'm sorry. Captain Hyche pulled up, also. I don't know if it was right after Chief Cain did because I was focusing on Chief Cain at that time.

"And Captain Hyche pulled up across the street to, I imagine, stop [the female at issue] from

> leaving the scene. But after Chief came and talked to me for a minute, he crossed the street and talked with [her]. And he -- and I wasn't sure what to do, so I started to cross the street. And he -- told me to stay over there. So I did. Then he recrossed the street. Said that we would have a hearing about it at 8:30 in the morning. And that if I wanted to bring a lawyer to load him up. So he sent me home at that time."

Dockery denied that he had "ever been notified of any police policy or rule that said you couldn't have a citizen walking with you as you were walking your beat downtown checking doors"; Dockery denied receiving "any direct order from any supervisor telling [Dockery] not to have a person walking with [him] or talking to [him] while [he was] walking, checking doors"; and Dockery denied that Sergeant Bennett "individually said to [Dockery] anything of that sort." On cross-examination, the following colloquy occurred between Dockery and the City's counsel:

> "Q. Does the policy and procedure manual that you received say anything about obeying the orders of the supervisors?
>
> "A. Yes, sir, I believe it does.
>
> "Q. And were you warned as a member of the third shift not to be spending time hanging out with females on duty?
>
> "A. Sir, we were told not to be hanging out in public, yes, sir.

> "Q. Do you consider the downtown Jasper square to be public?
>
> "A. Absolutely.
>
> "....
>
> "Q. Did you say that Sergeant Bennett did not individually advise you that the warning about fraternizing with women was directed at you?
>
> "A. Yes, sir, that's what I said.
>
> "Q. So Sergeant Bennett basically had just come in and lied to this board?
>
> "A. I'm not sure if that's the case, sir. But he never pulled me aside individually and said this is a complaint about you. You need to not be anywhere."

On redirect examination, Dockery testified that he did not consider himself to have been "hanging out with a woman or lollygagging around," he was "walking doors." The colloquy continued:

> "Q: Ha[ve] any of your superior officers put you on notice that you did something inappropriate while you were walking, checking doors that night as far as you being with this -- or having this woman out there and walking?
>
> "A: The only thing that they made mention of it at the hearing was that it was wrong.
>
> "Q: Did they tell you what in particular you had done wrong as far as what rules you had violated or exactly what it was that you did that was wrong?

> "A: No, sir. Never given a specific policy that I was to have violated."

On September 9, 2003, the Board issued an order ("the September 2003 order") stating that the City

> "met its burden of proof in this cause and the ... Board upholds the employment termination of ... Dockery."
>
> "IT IS THEREFORE THE ORDER of the ... Board ... that the employment termination of ... Dockery is affirmed."

On October 3, 2003, Dockery filed a notice of appeal in the trial court. See § 14(b) of the Act (providing that a "person aggrieved by a decision of the Board" may appeal the Board's decision to the trial court and that "[r]eview by the court shall be without a jury and be confined to the record, and to a determination of the questions of law presented; the Board's findings of fact shall be final and conclusive"). Other than docketing the appeal, no substantive action was taken by the trial court on Dockery's appeal for several years.

On October 21, 2009, the trial court entered an order setting the case for a trial to be held on January 26, 2010. However, no trial was held on that date. At some point, the trial court held a pretrial conference, and, on February 1, 2011, the trial court entered a pretrial order that, among

other things, set the case for a trial to be held on July 26, 2011. The pretrial order also purported to "supersede[] all previous pleading by agreement of the parties" and to summarize Dockery's "position" as including, in addition to his appeal of the September 2003 order, claims for wrongful termination of employment, breach of contract, violation of Dockery's right to due process under the United States Constitution and the Alabama Constitution, violation of Dockery's right to equal protection (presumably under the United States Constitution), and violation of the Act and the rules promulgated by the Board. The pretrial order also addressed the pertinent periods for completing discovery and for the filing of a motion for a summary judgment by Dockery and provided that a hearing on any motion for a summary judgment was to be held on July 5, 2011.

Dockery filed no summary-judgment motion, and no trial was held on July 26, 2011. On September 26, 2011, the trial court entered an order setting the case for a trial to be held on November 29, 2011. No trial was held on November 29, 2011.

On December 23, 2011, Dockery filed what purports to be an "amended complaint" in the trial court. In addition to

seeking review of the September 2003 order, the amended complaint included claims against the City pursuant to 42 U.S.C. § 1983 for allegedly unlawfully terminating Dockery's employment without giving him pretermination or posttermination notice of the specific charges against him or providing him with an opportunity to be heard. Dockery also asserted that the failure to provide him with notice and an opportunity to be heard violated his right to due process under the Alabama Constitution of 1901, and Dockery alleged claims of negligence, of a purported breach of his employment contract with the City, of violation of the Act and the rules promulgated by the Board, and of violation of Dockery's right to equal protection in light of the lesser discipline that purportedly had been given to other officers who had violated a police-department rule or policy. The foregoing claims are hereinafter referred to as the "damages claims" in order to distinguish them from Dockery's appeal seeking a review of the September 2003 order. Dockery also continued to contend that his termination from employment was void because the City had violated the Act and the rules promulgated by the Board regarding the notice he was due. In the amended complaint,

Dockery's requested relief included reinstatement, backpay, apparently consequential damages based on his having to pay student loans that would have otherwise been satisfied if he had remained employed as a police officer, damages for mental anguish and emotional distress, punitive damages, and attorney's fees. The City filed an answer to Dockery's amended complaint, denying the pertinent allegations thereof and asserting numerous affirmative defenses to the damages claims.

The case was eventually set for a trial to be held on January 23, 2017. Counsel for the parties appeared on January 23, 2017, but no evidence was received at that time regarding the damages claims or the City's purported defenses to those claims, and the trial court never called upon either party to present any evidence. Instead, counsel for the parties and the trial court engaged in an extended colloquy regarding the history of the case and the parties' positions regarding the appeal and the damages claims. That colloquy ended with the trial court directing Dockery's counsel as follows:

> "[I]t keeps sticking in my mind, well, there's an issue here about whether or not this man was given the requisite written notice of the charges against

> him and without which he may not have been able to adequately respond.
>
> "So prepare an order for me to get it back down there, order the City to make the written charges. And it'll run its course, but it may be back up here before me again, and I understand that. But that's what we're going to do."

Also on January 23, 2017, Dockery filed a motion requesting a judgment as a matter of law regarding most of his damages claims and his appeal, and Dockery submitted several depositions in support of that motion.[3]

Counsel for the parties each eventually submitted respective orders to the trial court, some of which purported to address the merits of Dockery's damages claims and the City's defenses, rather than merely remanding the appeal to the Board. On June 18, 2018, the trial court held a status conference regarding the proposed orders, after which it entered a judgment that allegedly restated the most recent order that the City had submitted to the trial court. The June 2018 judgment states that the trial court "entertained oral arguments on the legal issues from both [Dockery's] and [the City's] counsel. No evidence was taken." The June 2018

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[3]Dockery's motion for a judgment as a matter of law was denied <u>sub silencio</u>.

judgment also states that the trial court "was of the opinion that there are not material facts which are in dispute in this matter," and, after discussing the damages claims and some of the City's alleged defenses to those claims, the trial court entered a judgment in favor of the City and against Dockery regarding the damages claims. As to those claims, Dockery correctly notes that the City filed no dispositive motion and that no evidence was received by the court at the scheduled January 2017 trial, although the City had made a general argument that it should prevail regarding the appeal and the damages claims. Regarding the appeal, the June 2018 judgment states: "[T]his Court, having reviewed the transcript of the hearing conducted by the ... Board, finds that the decision of the ... Board below was not erroneous and is due to be affirmed."

On July 19, 2018, Dockery filed a postjudgment motion, arguing, in part, that the trial court had erred in concluding that no issue of material fact existed and by not allowing him an opportunity to present evidence in support of the damages claims. Dockery's postjudgment motion was denied by operation of law. See Rule 59.1, Ala. R. Civ. P.

On November 2, 2018, Dockery timely filed a notice of appeal to the Alabama Supreme Court. See Ala. Code 1975, § 12-22-2 and § 12-22-6. On July 22, 2019, the supreme court transferred the appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975.

Dockery argues that the trial court erred in affirming the September 2003 order because no written charges or a written complaint were filed before the August 2003 hearing as required under § 14(a) of the Act. "[T]he legislature intended to give broad quasi-judicial powers to the Jasper Civil Service Board." Guthrie v. Civil Serv. Bd. of Jasper, 342 So. 2d 372, 375 (Ala. Civ. App. 1977). Section 14(a) of the Act requires the Board to enter an order that "is warranted by the evidence and under the law." "It is well settled law that due process must be observed by all boards, as well as courts." Katz v. Alabama State Bd. of Med. Exam'rs, 351 So. 2d 890, 892 (Ala. 1977); see also, e.g., Alabama Power Co. v. City of Fort Payne, 237 Ala. 459, 464, 465, 187 So. 632, 636, 637 (1939) ("We do not think it can be doubted that the proceedings authorized to be had before, and by, the [Public Works] Board [of Alabama] are of a character

quasi judicial, in which due process must be observed, and preserved to all persons whose legal rights may be involved ...."; the Board proceedings "have the character of a quasi judicial proceeding, in which the right of due process must not be ignored ... and ... the findings and order of the Board are subject to judicial review to determine whether, in making its determination, it departed from applicable rules of law, and whether its findings had a basis in substantial evidence, or was arbitrary and capricious.").

Section 14(b) of the Act states that an aggrieved person may appeal the Board's decision to the circuit court and that "[r]eview by the court shall be without a jury and be confined to the record, and to a determination of the questions of law presented; the Board's findings of fact shall be final and conclusive." On appeal from the Board's decision,

> "the circuit court's review is in the nature of a certiorari review, i.e., the review is limited to the record made before the Board and the questions of law presented. Accordingly, 'this court's review is also based on a review of the record made before the Board ....' Guthrie v. Civil Service Board of City of Jasper, 342 So. 2d 372, 375 (Ala. Civ. App. 1977)."

City of Jasper v. Civil Serv. Bd. of Jasper, 677 So. 2d 761, 764 (Ala. Civ. App. 1995). "[T]he [reviewing] court is

restricted to examining ... the external validity of the proceeding." Guthrie, 342 So. 2d at 375; see also City of Birmingham v. Southern Bell Tel. & Tel. Co., 203 Ala. 251, 252, 82 So. 519, 520 (1919). Such review includes consideration whether

> "'"the fundamental rights of the parties, including the right to due process, had not been violated." [Evans v. City of Huntsville, 580 So. 2d 1323, 1325 (Ala. 1991).] "Questions of fact or weight or sufficiency of the evidence will not be reviewed on certiorari." Personnel Bd. of Jefferson County v. Bailey, 475 So. 2d 863, 868 (Ala. Civ. App. 1985).
>
> > "'"'"[A] common-law writ of certiorari extends only to questions touching the jurisdiction of the subordinate tribunal and the legality of its proceedings. The appropriate office of the writ is to correct errors of law apparent on the face of the record. Conclusions of fact cannot be reviewed, unless specially authorized by statute. The trial is not de novo but on the record; and the only matter to be determined is the quashing or the affirmation of the proceedings brought up for review."'"
>
> "'G.W. v. Dale County Dep't of Human Res., 939 So. 2d 931, 934 n.4 (Ala. Civ. App. 2006) (quoting City of Birmingham v. Southern Bell Tel. & Tel. Co., 203 Ala. 251, 252, 82 So. 519, 520 (1919)).'"

Wiggins v. City of Evergreen, [Ms. 1170833, Sept. 20, 2019] __ So. 3d __, __ (Ala. 2019) (quoting Hicks v. Jackson Cty. Comm'n, 990 So. 2d 904, 910 (Ala. Civ. App. 2008) (plurality

decision)); see also Evans v. City of Huntsville, 580 So. 2d 1323, 1325 (Ala. 1991) (concluding that a petition for the common-law writ of certiorari could be used to review whether an employee's right to due process was violated during the hearing before the city council at issue); Ex parte City of Tuskegee, 447 So. 2d 713, 715, 716 (Ala. 1984) (agreeing with the City of Tuskegee's argument that the review at issue was limited to "whether or not the employee was given due process of law" and stating that, on remand, the trial court should "review the record of the dismissal proceeding to determine whether the law, substantive and procedural, was properly applied, and whether the ruling complained of by plaintiff was supported by legal evidence"); Taylor v. Huntsville City Bd. of Educ., 143 So. 3d 219, 226 (Ala. Civ. App. 2013) (stating that certiorari review includes consideration of whether the right to due process has been violated); Johnston v. State Pers. Bd. of Alabama, 447 So. 2d 752, 756 (Ala. Civ. App. 1983) (reviewing due-process issue on appeal from the denial of a petition for a writ of certiorari and citing Simpson v. Van Ryzin, 289 Ala. 22, 265 So. 2d 569 (1972), a case discussing constitutional, procedural due process, in support

of the proposition that "the charges given [must] be sufficient to warrant dismissal [from employment] and specific enough to apprise the employee of the allegations against him"); and Guthrie, 342 So. 2d at 376 (addressing a discharged employee's due-process argument and noting that the hearing before the Board must satisfy procedural due-process requirements). See, e.g., Medical Servs. Admin. v. Duke, 378 So. 2d 685, 686 (Ala. 1979) (noting that "due process must be observed by all boards" and affirming a circuit-court judgment determining that an administrative hearing "was unconstitutionally conducted and of no effect" because Henry Patrick Duke "was not given adequate notice of the 'fair hearing[]' [and] was not adequately informed of the charges made against him"); Katz, 351 So. 2d at 892-93 ("It is well settled law that due process must be observed by all boards, as well as courts. ... Procedural due process requires: '... an orderly proceeding appropriate to the case or adapted to its nature, just to the parties affected, and adapted to the ends to be attained; one in which a person has an opportunity to be heard, and to defend, enforce, and protect his rights before a competent and impartial tribunal legally constituted

to determine the right involved; representation by counsel; procedure at the hearing consistent with the essentials of a fair trial according to established rules which do not violate fundamental rights, and in conformity to statutes and rules, conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed; revelation of the evidence on which a disputed order is based and opportunity to explore that evidence, and a conclusion based on the evidence and reason. ...' 2 Am. Jur. 2d, Administrative Law, § 353."); Barber Pure Milk Co. of Montgomery v. Alabama State Milk Control Bd., 275 Ala. 489, 156 So. 2d 351 (1963); White Way Pure Milk Co. v. Alabama State Milk Control Bd., 265 Ala. 660, 664, 93 So. 2d 509, 513 (1957); and Alabama Power Co., supra.

This Court has addressed the notice requirements of § 14(a) before, and we have noted that "[§] 14(a) clearly reflects the legislative intent that the hearing before the Board be a new proceeding, to be conducted as if nothing had occurred prior to the hearing relative to the termination of a city employee's services, for the statute provides that the hearing before the Board is to be 'de novo,'" and that the

Board "'is free to take such action as in its judgment is warranted by the evidence.'" Guthrie, 342 So. 2d at 375, 376 (quoting Edmondson v. Tuscaloosa Cty., 48 Ala. App. 372, 377, 265 So. 2d 154, 158 (Civ. App. 1972)). We further stated in Guthrie:

> "The long-standing rule in Alabama is that a permanent employee can be summarily discharged without a prior hearing as long as a post-discharge hearing is provided. Simpson v. Van Ryzin, 289 Ala. 22, 265 So. 2d 569 (1972); Pool v. Williams, 280 Ala. 337, 194 So. 2d 87 (1967). In the instant case Section 14(a) of Act No. 113, supra, specifically provides that a permanent employee cannot be finally discharged -- if the review procedure is requested by the employee -- until a de novo hearing is conducted, the employee given an opportunity to face his accusers and be heard in his own defense, and a board decision made. If an appeal is filed, the discharge by the appointing authority or the authorized supervisory employee merely triggers the review process, and the ultimate decision is made by the Board after the due process hearing has been held. In the case at bar Guthrie had a full-blown due process hearing before his final discharge by the Civil Service Board, all in accordance with the statute and civil service rules. We find no error here."

342 So. 2d at 376.

Section 14(a) is clear regarding what is to occur after an employee files an appeal from "charges instituted by the city governing body or any member thereof or by any department head": "The Board shall thereupon order the charges or

complaint to be filed forthwith in writing and shall hold a hearing de novo on such charges. ... [I]f such removal, discharge or demotion is appealed to the Board, then the same will become final only after a hearing upon written charges or complaint has been had ...." (Emphasis added.) Thus, unlike in Guthrie, in the present case error clearly exists regarding the conduct of the hearing before the Board without the Board's first requiring the filing of written charges or a written complaint.

Based on our review of the record, the Board's error in not requiring the City to file written charges or a written complaint was reversible error. See Gadsden Civil Serv. Bd. v. Phillips, 447 So. 2d 749, 752 (Ala. Civ. App. 1983); cf. Berryman v. Civil Serv. Bd. of Muscle Shoals, 571 So. 2d 1122, 1125 (Ala. Civ. App. 1990) (determining that a police officer who was charged with "illegal gambling activity" was "entitled to demand, pursuant to [Act No. 494, § 13, Ala. Acts 1978], that the Board more specifically set forth the charges against him"). Accordingly, the June 2018 judgment is due to be reversed and the case remanded to the trial court for remand

to the Board for proceedings consistent with this opinion as to Dockery's appeal.[4]

Regarding the judgment against Dockery as to his damages claims, we would normally conclude that the trial court's adjudication of those claims on the merits was premature in light of our remand of his appeal. See Gadsden Civil Serv. Bd., 447 So. 2d at 752 ("It remains to be determined if his dismissal would have been justified if proper procedure had been granted. It must follow that if discharge is determined justified by the Board after extending proper procedural due process, Phillips has suffered no injury from such discharge."). However, because it appeared that a jurisdictional defect might exist regarding the invocation of the trial court's jurisdiction to adjudicate the damages

[4]Dockery argues that the lack of specificity in the termination letter rendered the proceedings before the Board void, asserting the same jurisdictional argument he made before the Board and invoking certain of the rules in support of that argument. We find this argument to be without merit, and we will not further address it. See Newman v. Town of Falkville, 652 So. 2d 757, 758 (Ala. 1994); see also City of Mobile v. Lawley, 246 So. 3d 147, 151 (Ala. Civ. App. 2017); cf. Fowler v. Johnson, 961 So. 2d 122, 133 (Ala. 2006) (indicating that procedural due-process violations may sometimes be cured as part of a later proceeding).

claims, we requested letter briefs from the parties addressing that issue.

The adjudication of an independent cause of action against the City is not within the jurisdiction of the Board, see, e.g., Ex parte Boyette, 728 So. 2d 644, 645 (Ala. 1998), and Dockery's appeal to the trial court from the Board's decision invoked only the limited appellate jurisdiction of the trial court to review the September 2003 order, not the original jurisdiction of the trial court. See Blue Cross & Blue Shield of Alabama, Inc. v. Butler, 630 So. 2d 413, 416 (Ala. 1993); see also Ala. Const. 1901, § 142(a). The appellate jurisdiction of the circuit court "'may not be enlarged by pointing to that court's original jurisdiction.'" Blue Cross & Blue Shield of Alabama, 630 So. 2d at 416 (quoting Rojas v. Kimble, 89 Ariz. 276, 279, 361 P.2d 403, 406 (1961)); see also Ex parte City of Tuskegee, 447 So. 2d 713, 716, 715 (Ala. 1984) (stating that the circuit court would "assume a jurisdiction it does not possess" by considering claims on certiorari review that were outside the "questions of law" within the jurisdiction of the Tuskegee City Council and that were of record before that council); cf. Ex parte

Smith, 438 So. 2d 766, 768 (Ala. 1983) (concluding that claims otherwise within the exclusive original jurisdiction of the circuit court could not be considered as part of a proceeding under its appellate jurisdiction).

The damages claims asserted in Dockery's amended complaint request the adjudication of an independent cause of action against the City. Such an adjudication, however, requires the proper invocation of the trial court's original jurisdiction by satisfying the requirements for instituting a collateral action -- i.e., a separate action -- in that court. Those requirements include the filing of an original complaint and the payment of the proper filing fee for such action, in the absence of a showing of substantial hardship. See Ex parte Barrows, 892 So. 2d 914, 918 (Ala. 2004); see also Ala. Code 1975, § 12-19-70(a) (requiring the payment of the filing fee for an action "at the time a complaint is filed in circuit court"); Johnson v. Hetzel, 100 So. 3d 1056, 1057 (Ala. 2012); Ryals v. Lathan Co., 77 So. 3d 1175, 1181 (Ala. 2011); Ex parte McWilliams, 812 So. 2d 318, 321 (Ala. 2001); Hall v. Hall, 122 So. 3d 185, 192 (Ala. Civ. App. 2013); De-Gas, Inc. v. Midland Res., 470 So. 2d 1218, 1222 (Ala. 1985). Even if

we were to assume that the amended complaint could be construed as satisfying the requirement of filing an original complaint for purposes of initiating a collateral action, an issue that we do not decide, Dockery admittedly did not pay a filing fee for purposes of invoking the original jurisdiction of the trial court regarding such a collateral action, and he cannot use the filing fee he paid for invoking the trial court's limited appellate jurisdiction to satisfy the filing-fee requirement for invoking the trial court's original jurisdiction as to claims that must be filed as a collateral action.

Dockery contends that cases such as Ex parte Jackson, 733 So. 2d 456, 458 (Ala. Civ. App. 1999), and Covin v. Alabama Board of Examiners in Counseling, 712 So. 2d 1103, 1107 (Ala. Civ. App. 1998), support the conclusion that a collateral action requiring the invocation of the circuit court's original jurisdiction and a review invoking the circuit court's limited appellate jurisdiction may be the subject of a single complaint. However, Dockery's notice of appeal in the present case included no assertion of the damages claims that are the subject of, and that require the filing of, his

collateral action. Also, the cases upon which Dockery relies do not discuss the requirements for invoking the circuit court's original jurisdiction for purposes of a collateral action, and, thus, those cases do not stand for the proposition that the requirements for the invocation of jurisdiction are inapplicable in such a case. Instead, the cases that Dockery relies upon are silent regarding the issues of whether and what filing fees were paid; thus, for all that appears, the proper filing fees might have been paid in those cases. Further, in those cases, the required filing fee for initiating an action was presumably paid in conjunction with the filing of the complaint that included both the collateral-action claims and the appeal seeking review of the underlying board decision. Thus, the circuit court's original jurisdiction arguably was properly invoked as an initial matter, particularly because, in the absence of statutory language to the contrary, the payment of a filing fee is not a jurisdictional prerequisite for purposes of invoking the limited appellate jurisdiction of the circuit court. See Alexander v. Estate of Bethea, 239 So. 3d 1170, 1172 (Ala. Civ. App. 2017), and cases discussed therein, including Finch

v. Finch, 468 So. 2d 151 (Ala. 1985); De-Gas, Inc., supra; and Rubin v. Department of Indus. Relations, 469 So. 2d 657, 658 (Ala. Civ. App. 1985).

Dockery also relies on the rules governing liberal pleading, joinder of claims, and consolidation of cases in the Alabama Rules of Civil Procedure in an effort to buttress his argument that his appeal and the damages claims could be joined in a single action. The issue in the present case, however, is not merely the joinder of claims or the issue whether a properly filed appeal and a properly filed collateral action thereafter may be consolidated, the issue is whether a properly filed appeal, which invokes only the limited appellate jurisdiction of the circuit court, may be used to invoke the original jurisdiction of the circuit court without satisfying the requirements for filing a collateral action. Based on the authorities cited above, we conclude that it cannot and that the trial court erred by adjudicating the damages claims on the merits; those claims should have been dismissed, without prejudice. See A.S. v. W.T.J., 984 So. 2d 1196, 1203 (Ala. Civ. App. 2007) (reversing a judgment "insofar as it purport[ed] to adjudicate the merits" of a

claim over which the juvenile court had no jurisdiction and remanding the cause for the juvenile court to vacate that portion of its judgment); see also Ex parte Safeway Ins. Co. of Alabama, Inc., 990 So. 2d 344, 353 (Ala. 2008) (concluding that an order adjudicating a claim over which the circuit court lacks jurisdiction is due to be vacated and the claim dismissed without prejudice).

Based on the foregoing, the June 2018 judgment is reversed and the case is remanded to the trial court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Hanson, J., concurs.

Edwards, J., concurs specially.

Thompson, P.J., and Donaldson, J., concur in the result, without writings.

Moore, J., concurs in part and dissents in part, with writing.

EDWARDS, Judge, concurring specially.

I concur in the main opinion. I write separately to express my concerns about a potential conflict in our precedents regarding the jurisdiction of the Jasper Civil Service Board ("the Board") and about the sources for the purported jurisdictional prohibition regarding the legal issues that the Board may consider in making its decisions. As the supreme court noted in Ex parte Boyette, 728 So. 2d 644, 645 (Ala. 1998), "administrative agencies ordinarily have limited authority to decide allegations of constitutional and statutory violations, and appellate review of agency decisions has been limited to the questions within the agency's authority." See also Ex parte Smith, 683 So. 2d 431, 434-36 (Ala. 1996). The limitation of authority has been determined to be particularly important when the decision of an administrative agency or board is not governed by the Alabama Administrative Procedure Act, Ala. Code 1975, § 41-22-1 et seq. See, e.g., Ex parte Boyette.

There is a distinction between (1) the authority of a personnel board to consider issues of law in determining its own actions as to the remedies that are within its

jurisdiction, such as whether the evidence and applicable law require it to uphold a municipality's order dismissing an employee or to reverse that dismissal and order the employee reinstated with backpay and (2) the lack of authority of a personnel board to adjudicate an action regarding its or another person's actions, see, e.g., Ex parte Boyette, supra (holding that the Jefferson County Personnel Board had no authority to adjudicate an employee's claim under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.); Ex parte Averyt, 487 So. 2d 912, 913-14 (Ala. 1986) (stating that "constitutional issues" were not within the jurisdiction of the Mobile County Personnel Board; as described in Averyt v. Doyle, 456 So. 2d 1096, 1098 (Ala. Civ. App. 1984), those issues allegedly included the employee's claims alleging "violation of § 21-7-8, Code of Alabama 1975, which [involved] an independent cause of action based upon constitutional questions ...," purportedly including "constitutional issues such as equal protection rights and arbitrariness"). Thus, as reflected by the precedents cited in the main opinion, the Board must consider issues of procedural due process in making its decision regarding an employee's dismissal, an issue of

the former type, but the Board has no jurisdiction to adjudicate that employee's § 1983 claim for violation of the employee's right to due process, absent some statutory authorization to the contrary.

Our precedents have not always acknowledged the distinction between a personnel board's consideration of a constitutional issue that is relevant to the decision that must be made by that board and the adjudication of an action based on an alleged violation of a constitutional right. Specifically, as to the issue of procedural due process, this court has stated that consideration of that constitutional issue is not within the jurisdiction of a personnel board. See City of Mobile v. Lawley, 246 So. 3d 147, 149 (Ala. Civ. App. 2017); Wright v. City of Mobile, 170 So. 3d 656 (Ala. Civ. App. 2014). But see Taylor v. Huntsville City Bd. of Educ., 143 So. 3d 219, 226 (Ala. Civ. App. 2013) (stating that, on certiorari review, the circuit court was to consider whether the right to due process had been violated). The rationale for cases such as Lawley and Wright appears to be attributable to the "constitutional issues" language from Ex parte Averyt, which the supreme court stated was not an

"ordinary case." 487 So. 2d at 914. However, that rationale is at least in potential conflict with the due-process precedents cited in the main opinion, including cases such as Taylor. Some of the difficulty in discerning the nature of the conflict may have been further exacerbated by the ambiguity of the term "due process," particularly when more complicated constitutional issues than procedural due process have been couched in terms of due process. See City of Mobile v. Robertson, 863 So. 2d 117, 120 (Ala. Civ. App. 2003) (concluding that the Mobile County Personnel Board had no jurisdiction to consider a claim based on a purported violation of the employee's First Amendment rights that was couched as a due-process issue).

I question whether the progeny of Ex parte Averyt have correctly understood that case as standing for the proposition that a personnel board, such as the Board in the present case, has no jurisdiction to consider the import of a relevant constitutional provision when making its decision on a matter that is within its jurisdiction, such as the dismissal of an employee. As to the Board, such a holding is contrary to the plain language of § 14(a) of Act No. 113, Ala. Acts 1965 (1st

Spec. Sess.), the City's Civil Service Act ("the Act"): the Board must enter an order "as in [its] judgment is warranted by the evidence and under the law" pertinent to the dismissal of the employee at issue.[5] Because consideration of the law, and its proper application to the matter the Board must decide, are within the jurisdiction of the Board, it necessarily follows that the Board's decision regarding such an issue could be reviewed by the circuit court on appeal -- "[r]eview by the court shall be ... confined to the record, and to a determination of the questions of law presented," § 14(b) -- independent of any bases for review by analogy to the principles of certiorari review that are reflected in the precedents cited in the main opinion.

Further, in light of the Board's obligation to follow the law in making its decisions, I see no basis for distinguishing among the "constitutional issues" that the Board might

[5]How can the law require the Board, which is charged with making its decision in accordance with the law, to ignore the supreme law that is applicable to a specific matter to be decided? Not only is such an understanding of the law self-contradictory, it essentially means the members of the Board must ignore the United States Constitution when making their decisions, a position that would appear to have implications in determining whether, or what type of, immunity might be applicable for purposes of actions under federal law.

consider in making its decision, so long as those issues are pertinent to a matter within the Board's limited jurisdiction. Both the issue whether the Board should uphold or reverse a department head's decision to terminate a nonprobationary employee without providing the employee any notice or opportunity to be heard and the issue whether the Board should uphold or reverse a department head's decision to terminate an employee because of the employee's race appear to be equally within the Board's "jurisdiction" for purposes of the Board's own decision. This observation is not intended to minimize the difficulty that the Board might have in evaluating the pertinent law, even with the assistance of the Board's legal counsel, but such a concern cannot form the legal basis for a jurisdictional prohibition against considering pertinent law. Also such a concern would appear to be adequately addressed by the availability of the City's legal counsel to the Board, by the availability of appellate review on any issue of law presented to the Board, and by the prudential application of principles of issue preclusion for purposes of any collateral action that the employee might file in court. See Ex parte Smith, 683 So. 2d at 433 (stating that the elements of issue

preclusion include whether "'"(3) the parties had an adequate opportunity to litigate the issues in the administrative proceeding; (4) the issues to be estopped were actually litigated and determined in the administrative proceeding; and (5) the findings on the issues to be estopped were necessary to the administrative decision"'" (quoting Ex parte Shelby Med. Ctr., Inc., 564 So. 2d 63, 68 (Ala. 1990), quoting in turn Pantex Towing Corp. v. Glidewell, 763 F.2d 1241, 1245 (11th Cir. 1985))).

Finally, it appears that our courts may have invoked a jurisdictional prohibition in response to complications in addressing (1) whether issue preclusion might or should apply in a collateral action based on the issues presented to a personnel board or administrative agency, compare Ex parte Smith, supra (discussing elements of issue preclusion), with Ex parte Boyette, supra (limiting the holding of Ex parte Smith to cases under the Alabama Administrative Procedure Act and purporting to distinguish it from Ex parte Averyt and City of Homewood v. Caffee, 400 So. 2d 375 (Ala. 1981)), and (2) the application of the doctrine of exhaustion of administrative remedies, see City of Homewood, which was

relied upon in Ex parte Averyt, relying on Watson v. Norris, 283 Ala. 380, 217 So. 2d 246 (1968). Regarding the former issue, there arguably has been some confusion based on a conflation of the limited jurisdiction of a personnel board or administrative agency with whether such a board or agency has competently and adequately addressed an issue in the administrative proceeding. Regarding the latter issue, exhaustion of remedies, an additional complication exists. In City of Homewood, the court addressed, arguably in dicta,[6]

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[6]It is not clear why the City of Homewood court addressed the purported lack of jurisdiction of the City of Homewood Board of Zoning Adjustments in light of the court's conclusion that it agreed with

> "Watts v. City of Wiggins, 376 So. 2d 1072 (Miss. 1979), ... that a property owner 'may not seek a change in a classification of property under a zoning ordinance and at the same time [and in the same proceeding] attack [the constitutional] validity.' In Watts, supra, the petitioner sought to bring his request for a variance and his constitutional claims in the same proceeding. In rejecting this attempt, the Watts Court stated that if the claimant wished to attack the constitutional validity of the ordinance, he should do so in a subsequent, independent proceeding. Here, the property owner has heeded the Watts [court's] admonition."

400 So. 2d at 378.

whether the City of Homewood Board of Zoning Adjustments ("the zoning board") had the authority to consider

> "claims of discrimination, denial of due process and equal protection as well as the alleged unconstitutionality of the Homewood ordinance as applied to Appellee. In Watson v. Norris, 283 Ala. 380, 217 So. 2d 246 (1969), it was stated that an administrative body has no power to declare an ordinance unconstitutional. The powers of the board are specifically limited to those contained in [Ala.] Code 1975, [§] 11-52-80.
>
> "We conclude, therefore, that, because the Board of Zoning Adjustments was without authority to consider any constitutional attack on the Homewood ordinance, Caffee's constitutional challenge to that ordinance in the circuit court was not precluded by the City's claims of 'identical issues' in both proceedings. Consequently, the circuit court did not err by assuming jurisdiction of this cause during the pendency of Caffee's appeal from the action of the Board of Zoning Adjustments."

400 So. 2d at 378 (emphasis added). The rationale makes no attempt to distinguish between the types of claims at issue or to discuss why the zoning board might not consider, in making its decision, whether that decision might result in illegal discrimination or a denial of due process. And, as to the purported prohibition on the zoning board's consideration of an "as applied" challenge, the City of Homewood court's citation to Watson is curious. The relevant discussion in Watson states:

"The doctrine of [Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926)], is to the effect that if one attacks an ordinance in its entirety on constitutional grounds, then he may go directly to the courts without resort to administrative remedies, since an ordinance invalid in toto constitutes a present invasion of his rights. An administrative body has no power to declare an ordinance unconstitutional. See in accord Reynolds v. Vulcan Materials Co., 279 Ala. 363, 185 So. 2d 386 [(1966)].

"On the other hand, it seems to be the doctrine of the heavy preponderance of the decisions, both state and federal, that where a complainant attacks the constitutionality or reasonableness of specific provisions of a zoning ordinance as it applies to a particular property, he must exhaust the available administrative remedies before resorting to court action. For a full analysis of the above doctrine, together with the authorities in support thereof, we refer interested parties to Metzenbaum, Law of Zoning, 2nd Ed., Vol. 1, Chapter IX-e(1) and (2). See also Davis, Administrative Law Text, Chapter 20.

"As observed in Metzenbaum, supra, at page 713:

> "'In each state, there are many thousands of buildings and many thousands of parcels of land.
>
> "'If each plaintiff were permitted to engage the courts with proceedings attacking the constitutionality or the unconstitutional-unreasonableness of each zoning ordinance as it applies to such complainant's own property, without first seeking relief by the available administrative remedies, would not the courts of every state be clogged with such

actions virtually to the exclusion of other matters?

"'Would there not be so great a flood of such proceedings as to overwhelm the courts?'

"It would appear that another well settled principle of law as it pertains to mandamus would also necessitate an affirmance of the action of the Chancellor in sustaining the demurrer to the petition. This principle is that mandamus lies only when there is no other adequate remedy. See Ala. Dig., Vol. 14, Mandamus, [Key No.] 3(1), for innumerable citations of authorities. In the present case the appellants had an adequate remedy to review the decision of the Zoning Administrator by way of appeal to the Board of Zoning Adjustment, unless we assume, without any basis therefor, that the Board would not properly perform the duties cast upon it.

"We further observe that should the contentions of the appellants be approved, then public hearings at which the views of the protagonists and the antagonists could be effectively aired and presented, as contemplated in the appeal sections of the zoning laws, would be rendered meaningless."

283 Ala. at 384, 217 So. 2d at 248-49.

Notwithstanding the foregoing concerns, I concur in the main opinion.

MOORE, Judge, concurring in part and dissenting in part.

I concur that the judgment of the Walker Circuit Court ("the trial court") addressing Shelby Dockery's appeal of the termination decision of the Jasper Civil Service Board ("the Board") is due to be reversed and the cause remanded, but I dissent as to that part of the main opinion addressing the constitutional and damages claims asserted by Dockery.

The Board violated § 14(a) of Act No. 113, Ala. Acts 1965 (1st Spec. Sess.), the City of Jasper's Civil Service Act ("the Act"), when it conducted a de novo review of the termination of the employment of police officer Shelby Dockery by the City of Jasper ("the City") without first ordering and receiving written charges or a written complaint alleging the reasons for Dockery's discharge. Section 14(a) unambiguously provides, in pertinent part, that, within five days of the discharge of an employee, a written report regarding the termination shall be provided to the Board setting forth the reasons for the discharge. When an employee appeals the discharge to the Board, the Board "shall ... order the charges or complaint to be filed forthwith in writing and shall hold a hearing de novo on such charges." § 14(a). Citing the Act

and the rules promulgated pursuant to the Act, Dockery's counsel objected to proceeding with a hearing before the Board without the Board's first ordering the filing of written charges or a written complaint setting forth the specific reasons for Dockery's discharge. The City's attorney argued that Dockery had been previously informed of the reasons for his discharge and offered to provide the charges in writing as a pro forma matter, but the Board proceeded without the required written charges or written complaint.

In a similar situation, our supreme court held in Ex parte Soleyn, 33 So. 3d 584 (Ala. 2009), that, when an act regulating the termination of a public employee unconditionally requires written notification specifying the reasons for the termination, the omission of that writing cannot be excused on the ground that the employee had been notified of the reasons through "surrounding circumstances." According to Ex parte Soleyn and the cases cited in the main opinion, the receipt of specific written charges by the Board is not merely a formal, technical requirement, but an integral part of the process due a public employee. In the present case, the Act requires a "hearing upon written charges" filed

with the Board, not a hearing on charges made by the employing entity through other means or format.

The Board clearly erred in conducting the hearing "on such charges" without first ordering and receiving those charges in writing. That error did not divest the Board of jurisdiction over the appeal, as Dockery argues, see ___ So. 3d at ___ n.4, but it did render the subsequent proceedings before the Board ineffective. The trial court should have quashed the proceedings of the Board for failing to comply with the written-notice requirement of § 14(a) of the Act. The judgment of the trial court as to Dockery's appeal is therefore due to be reversed.[7]

The trial court also erred in adjudicating the damages claims brought by Dockery. The record shows that Dockery appealed the Board's determination to the trial court on October 3, 2003. On December 23, 2011, Dockery purported to "amend" the notice of appeal to state claims for damages arising from his alleged wrongful termination. However, §

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[7]The main opinion remands the case to the trial court "for remand to the Board for proceedings consistent with this opinion as to Dockery's appeal." ___ So. 3d at ___. I express no opinion as to the appropriate actions to be taken by the Board because that matter is not now before this court.

14(b) of the Act provides that "[r]eview by the court shall be without a jury and be confined to the record, and to a determination of the questions of law presented; the Board's findings of fact shall be final and conclusive," a form of certiorari review. See City of Jasper v. Civil Serv. Bd. of Jasper, 677 So. 2d 761, 764 (Ala. Civ. App. 1995). In certiorari proceedings, a circuit court has jurisdiction only to review matters within the authority of the board whose decision is under review. Constitutional and damages claims, which the board could not have adjudicated, may be raised only in a separate, collateral action. See Ex parte Averyt, 487 So. 2d 912 (Ala. 1986); Ex parte Boyette, 728 So. 2d 644, 645 (Ala. 1998). In Wright v. City of Mobile, 170 So. 3d 656 (Ala. Civ. App. 2014), this court held that Alabama law does not allow joinder of such constitutional and damages claims with an appeal of a personnel board's decision. Accordingly, Dockery's purported amendment of the notice of appeal to add the constitutional and damages claims did not give the trial court jurisdiction over those claims, even if Dockery had paid the appropriate filing fee. To the extent that the final judgment adjudicated those claims, that part of the judgment

is void, and, thus, due to be vacated. See Alabama Dep't of Public Health v. Noland Health Servs., Inc., 267 So. 3d 873, 875 (Ala. Civ. App. 2018). Therefore, because I would dismiss the appeal insofar as it addresses the trial court's judgment as to Dockery's constitutional and damages claims, I dissent in part.