Rel: March 8, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1161044

Sarah S. Swindle et al.

v.

Sheila Hocutt Remington

Appeal from Montgomery Circuit Court
(CV-16-315)

BOLIN, Justice.

Sarah S. Swindle, Bill Newton, Young Boozer, Philip Cleveland, Susan Williams Brown, Richard Brown, Joe Ward, Luke Hallmark, Susan Lockridge, Russell Twilley, John R. Whaley, Charlene McCoy, C. Ray Hayes, and Donald L. Large, Jr., in

their official capacities as board members of the Public Education Employees' Health Insurance Program ("PEEHIP"), appeal from a summary judgment entered by the Montgomery Circuit Court in favor of Sheila Hocutt Remington, acting personally and as then president of the Alabama Education Association ("the AEA"). Specifically, the members of the PEEHIP Board ("the Board") challenge the circuit court's determination that they violated the Alabama Open Meetings Act, § 36-25A-1 et seq., Ala. Code 1975, and its judgment granting Remington declaratory and injunctive relief.

I. Facts and Procedural History

A. Background

PEEHIP is a self-funded group-health-insurance plan that provides benefits to participating teachers and public-education employees ("the insureds"). The Board is responsible for maintaining the health plan. See Ala. Code 1975, § 16-25A-4. As a self-funded health plan, PEEHIP's annual budget must pay all covered health costs for the insureds during each fiscal year.

At times relevant to this appeal, the Board conducted biannual meetings, one in the fall and one in the spring.[1] The usual practice for PEEHIP staff members ("staff") during the spring meeting was to present the Board with a proposed annual budget for the upcoming fiscal year, which begins on October 1. Since April 2014, staff has also presented financial reports and updates, including information regarding PEEHIP's projected budget shortfalls, if any, for the following three fiscal years (e.g., in April 2014, these were fiscal years 2015, 2016, and 2017), during the meeting.

B. The April 2016 Meeting

At some point during the week before the scheduled spring Board meeting, Swindle, the chair of the Board, along with Diane Scott, chief financial officer for the Retirement Systems of Alabama ("RSA") and PEEHIP, and other PEEHIP officials collectively decided to schedule a training session before the open meeting.

On April 22, 2016, Don Yancey, a PEEHIP staff member, via Tisha Woodhan, another PEEHIP staff member, sent an e-mail to Board members advising that an "education session" was set for

[1]In 2018, the Board began having quarterly meetings.

9:30 a.m. on the morning of the April 27, 2016, Board meeting, which was scheduled for the afternoon. Yancey also advised that "attendance at this education session will be limited to board members and PEEHIP staff only" and that "[i]t was vitally important that we make this educational session as productive as possible and that as many questions as possible be dealt with so that the board meeting can be as short as possible, as there are some board members who need to leave early due to travel schedules."

According to Scott, on April 27, 2016, staff conducted a closed training session for the Board in the morning, which was followed by a luncheon and then an open meeting in the afternoon. Specifically, Scott stated in her affidavit:

> "At 9:30 a.m. on April 27, 2016, prior to the PEEHIP Board's public meeting that afternoon, PEEHIP staff conducted a non-public training session for the PEEHIP Board in the training room of RSA's offices at 201 South Union Street, Montgomery, Alabama 36104. The sole purpose of the training session was for PEEHIP staff members to make educational presentations about various matters including recommended options that Board members needed to understand in order to deliberate them at the afternoon Board meeting. These recommendations were different actions the Board could take to meet a projected $141.5 million deficit in PEEHIP funding for FY 2017, and a projected $220 million deficit in FY 2018. The recommendations included proposed increases in the amounts paid monthly by PEEHIP

> members for their health insurance. The Board members present at the training session listened to the staff reports and presentations about numerous matters, including PEEHIP's financial situation, projected budget shortfalls, a proposed transition to a Medicare Advantage Prescription Drug Program (projected to save PEEHIP $55 million in FY 2017), and staff recommendations to increase premiums and spousal surcharges, and asked questions as necessary so that they could better understand the matters about which the staff was presenting. These matters were complex and technical and needed careful explanation by staff members to be sure that Board of Control members understood and could deliberate these issues at a public meeting scheduled for later the same day."

Scott also stated in her affidavit that, at the beginning of the morning session, Leura Canary, PEEHIP's general counsel, instructed the Board on the requirements for complying with the Open Meetings Act as follows:

> "Canary explained that the Board members could not 'deliberate' with one another prior to the open meeting and ... that 'deliberation' is defined by the Open Meetings Act as an exchange of information or ideas among a quorum of a governmental body intended to arrive at or influence a decision as to how to vote on a specific matter. She also told the board members that they could question PEEHIP staff about the presentations so that they could fully understand the presentations, but she specifically instructed that they should limit their comments to those questions and that during the training session, at the lunch, or at any time outside the public meeting they should not discuss the presentations or any matter which might come before the Board for a vote."

Attorneys Canary and Jared Morris remained present during the morning session.

During the session, several Board members "asked questions as necessary so that [they] could better understand the issues about which the staff was presenting, including the proposed increases in the amount paid monthly by PEEHIP members for their health insurance."[2] According to those Board members, no one engaged in any deliberation during the morning session.

The recollection of Board members Susan Brown and Ward, however, is markedly different from that of the other Board members. Both Susan Brown and Ward objected to the morning session on the basis that no notice was provided to the public and that the session was closed to the public. They both alleged:

[2]The following Board members attested that they posed questions without "deliberation" to staff: Swindle, a retired educator and chair of the Board; Boozer, Treasurer for the State of Alabama; Large, executive vice president of Auburn University; Newton, then acting Director of Finance for the State of Alabama; Hallmark, a public-school superintendent; Hayes, executive vice chancellor and chief operating officer of the University of Alabama System; Richard Brown, a public-school principal; and Whaley, a public-school teacher.

> "Before the lunch break and before the public was allowed to enter the meeting, [the Board was] provided information concerning proposed health insurance increases related to PEEHIP. That information was provided in a way that was designed to suggest that the Board should adopt the proposed premium increases. There was deliberation concerning this specific matter, which later in the day was coming up for a vote. Various members shared thoughts and views on the proposed increases, through discussion, questioning and otherwise."

In addition, Ward stated that, although staff recommended the proposed increases, he advocated that the Board should take the additional funds necessary to cover the shortfall from the trust fund itself.

At noon, the Board and staff remained in the training room for a luncheon, which included a farewell presentation for Lee Hayes, a retiring PEEHIP official, and for Swindle as a long-term Board member and chair of the Board.

After the luncheon, the Board and staff moved from the training room to the boardroom of the RSA building. The open Board meeting, which was publicly noticed with the Alabama Secretary of State, began at 1:00 p.m. The meeting was conducted by Swindle and attended by the press and members of the public. During the open meeting, staff presented a financial report concerning PEEHIP's projected budget

shortfall of $141.5 million for fiscal year 2017 and $220 million for fiscal year 2018. Staff also presented various proposals to fill the projected shortfall for fiscal year 2017, including a federal program. During the three-hour open meeting, the Board openly deliberated regarding the recommendations. According to the appellants, all the information presented during the morning session, as well as additional information, was presented during the open meeting.[3]

The Board voted on several matters during the afternoon meeting. They approved staff's recommendation to adopt the Medicare Advantage Prescription Drug Plan, a new retiree health plan. The Board also voted seven to six against a member's proposal to take the maximum allowable amount from

[3]Both Swindle and Ward stated that, at some point that morning, the Board learned of a Senate resolution conveying the Senate's suggestion that an increase in PEEHIP premiums would be inappropriate in light of recent legislation providing a raise for public-education employees. The resolution, adopted by the legislature with both houses concurring, declared that "the legislative intent of House Bill 121 of the 2016 Regular session [was] to provide a net increase in take-home pay for all public education employees" and "urged [staff] to find other ways to address any cost issues, including the use of trust funds authorized by statute, that do not include an increase in out-of-pocket costs for plan members."

the Alabama Retired Education Employees' Health Care Trust to help fill the projected shortfall for fiscal year 2017. In addition, they voted seven to six in favor of increasing spousal surcharges and premiums effective October 1, 2016.

C. The Lawsuit

On May 17, 2016, Remington filed the underlying action in her individual capacity and in her capacity as the then president of AEA's board of directors, asserting a violation of the Open Meetings Act and seeking declaratory and injunctive relief, including an order invalidating the premium and surcharge increases. On May 27, 2016, the Board filed a motion to dismiss the action. After the court conducted a hearing on the motion to dismiss, the parties agreed to a briefing schedule on their respective motions for a summary judgment.

On September 23, 2016, the court signed a proposed order submitted by Remington that directed PEEHIP to hold the April 27, 2016, premium and surcharge increases in escrow until the conclusion of the litigation. In October 2016, the parties filed their motions for a summary judgment.

D. The December 2016 Open Meeting

During an open meeting held on December 6, 2016, Ward moved to rescind the Board's April 27, 2016, decision to increase PEEHIP premiums and spousal surcharges effective October 1, 2016. Recognizing that the topic was not on the agenda, the Board first voted in favor of waiving notification of the matter.[4] The Board then voted eight to seven to deny the motion to rescind the April 2016 decision.

E. The Additional Court Proceedings

On December 20, 2016, the Board filed a motion to supplement its summary-judgment motion with additional evidentiary materials in support of the new argument that Remington's claims were rendered moot by the action taken at the December 6, 2016, open meeting rejecting the motion to rescind. On December 21, 2016, the circuit court conducted oral argument on the motions for a summary judgment.

The trial judge, on August 20, 2017, entered a written order granting Remington's request for relief. In its order, the circuit court found that the morning session was part of a "meeting" within the Open Meetings Act and that, therefore, the Board violated §§ 36-25A-1(a) and -3, Ala. Code 1975, by

[4]The "ayes carried" in favor of waiving notification.

failing to give notice and by holding the morning session in private. Specifically, the circuit court found:

> "1. Defendants violated the Open Meetings Act.
>
> "The Board gathered together by prearrangement for the whole day of April 27. But the public was given notice of, and was allowed to attend, only part of that day's prearranged gathering: the afternoon portion. The public was given no notice of, and was not allowed to attend, the morning portion of the day's gathering.
>
> "The court finds that the morning portion of the gathering either constituted or was part of a 'meeting' within the meaning of the Open Meetings Act; therefore the Defendants violated § 36-25A-1(a) and -3 by failing to give notice and by holding the morning portion of the gathering in private. This is actionable under § 36-25A-9(b)(1) and (2)[, Ala. Code 1975].
>
> "The Act defines 'meeting' in § 36-25A-2(6)(a)[, Ala. Code 1975]. The subparts of that definition that are most pertinent here are the second and third provisions:
>
> > "'2. The prearranged gathering of a quorum of a governmental body ... during which the full governmental body ... is authorized, either by law or otherwise, to exercise the powers which it possesses or approve the expenditure of public funds.
> >
> > "'3. The gathering, whether or not it was prearranged, of a quorum of a governmental body during which the members of the governmental body deliberate specific matters that, at the time of the exchange, the participating members expect to come before the full governmental body at a

> later date. [In this case in only a matter of hours.]'

"The Act's definition of 'meeting' also contains some exclusions, of prearranged gatherings that are not 'meetings.' Defendants have claimed that their conduct falls within one of those exclusions, § 36-25A-2(6)(b)(1), [Ala. Code 1975,] as they claim that the morning portion of the gathering was a 'training session.' That subsection provides that the term 'meeting' does not include:

> "'1. Occasions when a quorum of a governmental body ... attends social gatherings, conventions, conferences, training programs, press conferences, media events, association meetings and events or gathers for on-site inspections or meetings with applicants for economic incentives or assistance from the governmental body, or otherwise gathers so long as the ... full governmental body does not deliberate specific matters that, at the time of the exchange, the participating members expect to come before the ... full governmental body at a later date.'

"Defendants have also invoked § 36-25A-2(6)(b)(2), [Ala. Code 1975,] which says that the term 'meeting' does not include '[o]ccasions when a quorum of a subcommittee, committee, or full governmental body gathers, in person or by electronic communication, with state or federal officials for the purpose of reporting or obtaining information or seeking support for issues of importance to the subcommittee, committee, or full governmental body.'

"The Court concludes that the morning gathering constituted, or was part of, a 'meeting' within the meaning of the Act for each of the three following reasons, any of which alone would be sufficient. Therefore, Defendants violated the Act by holding

that meeting, beginning at 9:30 a.m., without public notice and without allowing public attendance.

"A. First, the entire day's gathering constituted a meeting, and Defendants violated the Act by holding a portion of that meeting in private without public notice.

"Defendants gathered by prearrangement all day long on April 27. On that day, they could (and did) deliberate and exercise their powers. The primary subject of the morning part of the gathering was the same as the primary subject of the afternoon part of the gathering: i.e., whether to adopt member cost increases recommended by PEEHIP staff. Thus the day's gathering constituted a 'meeting' within the definition of § 36-25A-2(6)(a)(2) and (3)[, Ala. Code 1975].

"Defendants contend that this was not one gathering, but two and that only the second part was a 'meeting.' But that contention does not fit within the language of the Open Meetings Act itself, or with the common understanding of that language. The Act does in fact recognize that a single 'meeting' can have different 'portion[s],' which is a very apt description of what happened here, see, § 36-25A-2(2), -2(7). The Act recognizes that a meeting can be separated into different 'portions' -- and that one 'portion' can take place in private when permitted by the parts of the Act dealing with executive sessions. (The member cost increases at issue here would not have been a proper subject for an executive session, and Defendants implicitly conceded that point.) But simply holding one part of a gathering in a different room, and excluding the public, does not make that part of the gathering a different 'meeting.' The reasonable conclusion is that when a covered entity meets all day on the same topic, there is one meeting rather than two or more.

"B. Second, the morning portion of the gathering, even if taken alone, constituted a 'meeting' under Ala. Code [1975,] § 36-25A-2(6)(a)(2), and it was neither a 'training program' under § -2(6)(b)(1) nor a meeting with 'state or federal officials' of the sort that is excepted under § -2(6)(b)(2).

"The morning portion of the gathering was a 'meeting' even if taken in isolation because the Board had the authority to exercise its powers there. This definition (under § 36-25A-2(6)(a)(2)) does not ask whether the Board did exercise its powers in the morning session; it asks instead whether it could have. 'By law,' id., there is no limitation on when or how often the PEEHIP Board can meet and exercise the powers which it possesses. On the contrary, the law governing PEEHIP's Board simply gives that Board the authority to exercise the powers which it possesses whenever it meets (so long as there are at least six votes). Ala. Code [1975,] § 16-25A-2(d). And a body cannot exempt a meeting from the coverage of the Open Meetings Act simply by deciding that it will take no actual votes in that meeting; if the law were that simple, then there would be no need for the detailed definition of 'meeting, and exceptions to it, in the Act.

"The Board argues that the morning session was not a 'meeting' because no deliberation took place in the morning. (The premise is incorrect, as shown in the next subsection, but the Court will accept it for purposes of this present part of the discussion only.) In this, the Board relies on § 36-25A-2(6)(b)(1), and in particular on a broad reading of the phrase 'otherwise gathers' in that subsection, to suggest that no gathering is a 'meeting' unless there is deliberation. But that is a misreading of [-2(6)](b)(1). It ignores two important canons of statutory interpretation: the canon against surplusage, Ex parte Ward, 89 So. 3d 720, 727-28 (Ala. 2011), and the canon of ejusdem generis when

interpreting phrases such as 'otherwise gathers,' State Superintendent of Educ. v. Ala. Educ. Ass'n, 144 So. 3d 265, 274 (Ala. 2013). The phrase 'otherwise gathers' refers to gatherings without deliberation that are materially like the other types of gatherings-without-deliberation specifically listed in that provision. It does not refer to a situation like the one in this case, where the Board met by prearrangement to hear a presentation by its own staff that was specifically designed to advocate for a particular vote on a particular matter to be taken up by the Board on that very day.

"The Board also contends that the morning gathering was not a meeting because it was a 'training program' excluded under § 36-25A-2(6)(b)(1). But the Court does not agree. The ordinary meaning of the phrase 'training program' can readily encompass events in which members of a body are trained as to how to do their jobs -- e.g., how to prepare or read a budget, how to follow rules of parliamentary procedure, or generally how to follow relevant law in employment matters that will come before them. It does not encompass a situation like the one in this case, where the Board met by prearrangement to hear a presentation by its own staff that was specifically designed to advocate for a particular vote on a particular matter to be taken up by the Board on that very day. That is not a 'training program' in normal language usage. Cockrell v. Pruitt, 214 So. 3d 324 (Ala. 2016) (words to be given their ordinary meaning).

"The Board also contends that the morning gathering was not a meeting because it was a gathering of the sort excluded under § -2(6)(b)(2): ('Occasions when a quorum of a ... governmental body gathers ... with state or federal officials for the purpose of reporting or obtaining information or seeking support for issues of importance to the ... governmental body'). The ordinary, natural and

common meaning (Cockrell, supra) of the phrase 'state or federal officials' in this context does not include a body's meeting with its own subordinates, its staff. The ordinary meaning refers to inter-governmental or inter-departmental meetings, not intra-entity meetings. Had the Legislature meant to exempt meetings with an entity's own staff from the Open Meetings Act, 'state or federal officials' is certainly not the phrase that would have been used. Moreover, reading the [-2(6)](b)(2) exception to include meetings with staff would create a bizarre anomaly: that state-level government bodies can meet in private with their own Staff at will, while local-level government bodies cannot. (After all, the exception is for 'state or federal officials,' not 'local or state or federal officials.') There is no reason to believe that the Legislature intended that anomalous and important disparity. This is all the more reason to read the phrase 'state or federal officials' according to its ordinary meaning, as not including an entity's meeting with its own staff.

"C. Third, the morning portion of the gathering, even if taken alone, constituted a 'meeting' under either section -2(6)(a)(2) or (3), and there was deliberation. Under § 36-25A-2(1), 'deliberation' is an 'exchange of information or ideas among a quorum of members of a ... governmental body intended to arrive at or influence a decision as to how any members of the ... governmental body should vote on a specific matter that, at due time of the exchange, the participating members expect to come before the ... body.' Here, at the very least, there was deliberation in that the Board Chair exchanged information with others, which the Board Chair intended to influence their votes. The Board Chair called the meeting so that the others would be given information advocating their adoption of proposed member cost increases. And, as the evidence shows, other Board members reacted at the very least with questions. The very nature of those questions was,

of necessity, to test the reliability of the information and the wisdom of the proposal that was being fed to them; there is no other conceivable purpose. As anyone who has ever attended an oral argument knows, any question conveys information too: information about what the questioner believes to be the weak spots in the argument, or information about what more persuasion the questioner would need in order to accept the argument. All of this is deliberation, and therefore again the morning session (even if standing alone) was a meeting that should have been open to the public.

"2. Declaratory and injunctive relief are appropriate.

"As to appropriate relief, the court begins with a declaration (as authorized by Ala. Code [1975,] § 36-25A-9(e)) that Defendants violated the Act by not giving public notice of the 9:30 am gathering, and by excluding the public from that gathering.

"The Court also finds it appropriate to issue injunctive relief, as also authorized by section -9(c). This is not simply a matter, as Defendants would have it, of enjoining them to 'follow the law.' It is an injunction to enforce the law in a particular recurring type of scenario, where Defendants have -- until this very moment -- been operating under an incorrect view of their legal obligations. Therefore the Court orders that Defendants and their successors shall give the public notice set forth in the Act and shall allow public attendance whenever a quorum of the Board gathers to hear a presentation by PEEHIP staff on any specific matter that is expected to come before the Board. If such matters are permissible subjects of the Act's provisions on executive sessions, the Board may follow those provisions on executive sessions.

"3. Invalidation of the vote is also appropriate, leading to further relief.

"Finally, the Court decides in its discretion to exercise the authority conferred in § 36-25A-9(f), [Ala. Code 1975,] to invalidate the challenged actions taken on April 27 (i.e., the vote(s) raising member costs). The statute allows the Court to take such action if suit was promptly filed (it was) and if the violation was not the result of 'mistake, inadvertence, or excusable neglect' (it was not, and Defendants implicitly concede point) and if 'invalidation of the governmental action taken would not unduly prejudice third parties who have changed their position or taken action in good faith reliance upon the challenged action of the governmental body.' There is no evidence in this case that anyone actually changed their position or took action in reliance on the votes in question. Defendants urge that PEEHIP members and vendors rely on the Board to keep PEEHIP financially afloat, and that may be true; but this Court is not in any position to conclude that this is the same as saying that anyone took action or changed their position because of the votes taken on April 27.

"Defendants also urge that this relief is barred by the provision which states that 'any action taken at an open meeting conducted in a manner consistent with this chapter shall not be invalidated because of a violation of this chapter which occurred prior to such meeting.' But that argument depends on the premise that there were multiple separate meetings on April 27. The premise is wrong, as has been discussed above. There was one meeting (a day-long gathering, both morning and afternoon, both primarily focused on the same question of whether to increase member costs), though that meeting was broken up into different 'portion[s]' to use the Act's terminology. As discussed above, the full-day meeting was not conducted in a manner consistent with the Open Meetings Act, as the public was given

> notice of only part of it and was allowed to attend only part of it. Moreover, the actions taken by the Defendants evidence an intention to violate the 'spirit' if not the letter of the law. The position advanced by the Defendants would render the Open Meetings Act meaningless and nullify the legislative protection intended for the public.
>
> "Finally, Defendants rely on the fact that at a subsequent meeting there was a failed motion to rescind the increased member costs. But the Court concludes that invalidating the challenged April 27 votes is still appropriate. If the failure of that motion is practically nearly equivalent to a ratification of the April 27 vote -- as Defendants urge -- then Defendants will be able to hold another vote promptly, and will be able to affirmatively adopt the member cost increases so long as they follow the Open Meetings Act and any other applicable law. Such an affirmative vote would remove any question about whether a failure of a motion to rescind is exactly the same as a ratification.
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> "It is Ordered, Adjudged, and Decreed that the actions of the Defendants taken on April 27, 2016, are invalidated as a violation of the Alabama Open Meetings Act, Section 36-25A-1 et seq., Code of Alabama 1975, as amended. Meanwhile, the amounts now held in escrow must be distributed by the Defendants back to the PEEHIP members who contributed those amounts."

On August 24, 2017, the Board filed a notice of appeal. On September 8, 2017, this Court granted a stay of the summary judgment pending appeal.

F. The March 2018 Open Meeting

During the pendency of this appeal, the Board conducted an additional open meeting. On March 6, 2018, the Board voted to approve a new premium structure that eliminated spousal surcharges for participants and reduced the total monthly costs for participants with a covered spouse and no other covered dependents effective May 1, 2018.[5]

II. Standard of Review

In Pittman v. United Toll Systems, LLC, 882 So. 2d 842 (Ala. 2003), this Court set forth the standard of review applicable to summary judgment:

> "This Court's review of a summary judgment is de novo.
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> > "'In reviewing the disposition of a motion for summary judgment, "we utilize the same standard as the trial court in determining whether the evidence before [it] made out a genuine issue of material fact," Bussey v. John Deere Co., 531 So. 2d 860, 862 (Ala. 1988), and whether the movant was "entitled to a judgment as a matter of law." Wright v. Wright, 654 So. 2d 542 (Ala. 1995); Rule 56(c), Ala. R. Civ. P. When the movant makes a prima facie

[5]We recognize that the March 2018 meeting occurred after the filing of the underlying action in state court. Nonetheless, this Court may take judicial notice of a matter of public record. See, e.g., Rimpsey Agency, Inc., v. Johnston, 218 So. 3d 1242, 1243 n. 1 (Ala. Civ. App. 2016) (noting that an appellate court "may take judicial notice of the matters of public record").

> showing that there is no genuine issue of material fact, the burden shifts to the nonmovant to present substantial evidence creating such an issue. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989). Evidence is "substantial" if it is of "such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." Wright, 654 So. 2d at 543 (quoting West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989)). Our review is further subject to the caveat that this Court must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant. Wilma Corp. v. Fleming Foods of Alabama, Inc., 613 So. 2d 359 (Ala. 1993) [overruled on other grounds, Bruce v. Cole, 854 So. 2d 47 (Ala. 2003)]; Hanners v. Balfour Guthrie, Inc., 564 So. 2d 412, 413 (Ala. 1990).'
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> "Hobson v. American Cast Iron Pipe Co., 690 So. 2d 341, 344 (Ala. 1997)."

882 So. 2d at 844.

Additionally,

> "[u]nless a motion for summary judgment challenges the existence of evidence to support an essential element of the nonmoving party's case, the motion does not shift to the nonmoving party any burden to produce evidence supporting that essential element, and the motion will not support a summary judgment grounded on an absence of supporting evidence or the existence of undisputed countervailing evidence on that essential element. Kennedy v. Western Sizzlin Corp., 857 So. 2d 71, 78 (Ala. 2003); Tanner v. State Farm Fire & Cas. Co., 874 So. 2d 1058, 1068 n.

> 3 (Ala. 2003); Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003); Fountain v. Filson, 336 U.S. 681, 683, 69 S.Ct. 754, 93 L.Ed. 971 (1949)."

Ex parte McCord-Baugh, 894 So. 2d 679, 683 (Ala. 2004).

Furthermore, when no oral testimony is presented to the circuit court and the "'"judgment is based entirely upon documentary evidence,"'" the Court reviews the matter de novo. Weeks v. Wolf Creek Indus., Inc., 941 So. 2d 263, 268-69 (Ala. 2006)(quoting Padgett v. Conecuh Cty. Comm'n, 901 So. 2d 678, 683 (Ala. 2004), quoting in turn Alfa Mut. Ins. Co. v. Small, 829 So. 2d 743, 745 (Ala. 2002)). See § 12-2-7(1), Ala. Code 1975 ("[I]n deciding appeals, no weight shall be given the decision of the trial judge upon the facts where the evidence is not taken orally before the judge, but in such cases the Supreme Court shall weigh the evidence and give judgment as it deems just.").

The parties do not dispute that the applicable standard of appellate review is de novo on the question whether the Board violated the Open Meetings Act. Remington, however, asserts that the circuit court's decision to invalidate the cost increases and to return the funds in escrow to the

insureds is to be accorded a deferential review. Citing Ex parte Mobile City Board of School Commissioners, 61 So. 3d 292 (Ala. Civ. App. 2010), Remington argues that the use of the word "may" in § 36-25A-9(f), Ala. Code 1975, connotes discretion.

> "Ordinarily, the use of the word 'may' indicates a discretionary or permissive act, rather than a mandatory act. American Bankers Life Assurance Co. v. Rice Acceptance Co., 739 So. 2d 1082, 1084 (Ala. 1999). See also Bowdoin Square, L.L.C. v. Winn-Dixie Montgomery, Inc., 873 So. 2d 1091, 1098-99 (Ala. 2003) (stating that our supreme court has long recognized that the word 'may' denotes a permissive alternative rather than a mandatory restriction)."

61 So. 3d at 294.

This Court, however, cannot view the word "may" in isolation. See Hanover Ins. Co. v. Kiva Lodge Condominium Owners' Ass'n, Inc., 221 So. 3d 446, 452 (Ala. 2016). A plain reading of § 36-25A-9(f) indicates that the statute is restrictive, rather than permissive. Section 36-25A-9(f) provides:

> "The court may invalidate the action or actions taken during a meeting held in violation of this chapter, provided that the complaint is filed within 21 days of the date when the action is made public, the violation was not the result of mistake, inadvertence, or excusable neglect, and invalidation of the governmental action taken would not unduly prejudice third parties who have changed their

> position or taken action in good faith reliance upon the challenged action of the governmental body; provided further, however, that any action taken at an open meeting conducted in a manner consistent with this chapter shall not be invalidated because of a violation of this chapter which occurred prior to such meeting."

(Emphasis added.)

Although the statute provides that the court "may invalidate the action or actions taken during a meeting," it affords a trial court no discretion to invalidate actions taken during a meeting because of a violation that occurred prior to the open meeting conducted in a manner consistent with the Open Meetings Act. The primary issue in this case is whether the morning session was part of one full-day meeting (with a closed session in the morning and an open session in the afternoon) or was merely a morning training session that occurred before the open afternoon meeting (i.e., two meetings in one day). Thus, our review of the circuit court's decision on this matter is de novo.

III. Discussion

A. Mootness

The Board asserts that two subsequent meetings -- one in December 2016 and one in March 2018 -- in which the members

voted and revised the premium rates have rendered moot the circuit court's order granting injunctive relief by ordering the reduction of premiums that were raised by action taken at the April 2016 meeting.

"'The general rule in this state is that if, pending an appeal, an event occurs which makes determination of the case unnecessary, the appeal will be dismissed.'" Slawson v. Alabama Forestry Comm'n, 631 So. 2d 953, 957 (Ala. 1994) (quoting Adams v. Warden, 422 So. 2d 787, 790 (Ala. Civ. App. 1982)). In South Alabama Gas District v. Knight, 138 So. 3d 971 (Ala. 2013), we summarized the law as follows:

> "Events occurring subsequent to the entry or denial of an injunction in the trial court may properly be considered by this Court to determine whether a cause, justiciable at the time the injunction order is entered, has been rendered moot on appeal. '[I]t is the duty of an appellate court to consider lack of subject matter jurisdiction ....' Ex parte Smith, 438 So. 2d 766, 768 (Ala. 1983). '[J]usticiability is jurisdictional.' Ex parte State ex rel. James, 711 So. 2d 952, 960 n.2 (Ala. 1998). A justiciable controversy is one that 'is definite and concrete, touching the legal relations of the parties in adverse legal interest, and it must be a real and substantial controversy admitting of specific relief through a decree.' Copeland v. Jefferson Cnty., 284 Ala. 558, 561, 226 So. 2d 385, 387 (1969). ...
>
> "....

"We have previously dismissed appeals when events occurring subsequent to the entry of the order or judgment being appealed rendered the controversy moot. After granting a petition for a writ of mandamus that provided the same relief sought in a pending appeal, this Court dismissed the appeal, noting that '[a]n action that originally was based upon a justiciable controversy cannot be maintained on appeal if the questions raised in it have become moot by subsequent acts or events.' Case v. Alabama State Bar, 939 So. 2d 881, 884 (Ala. 2006). This Court thus took notice of a fact occurring six months after entry of the trial court's judgment to dismiss the appeal as moot. In Woods v. Suntrust Bank, 81 So. 3d 357 (Ala. Civ. App. 2011), the court held as alternative grounds for dismissing an appeal from the denial of an injunction to prevent a foreclosure that the matter was moot as a result of occurrence of the foreclosure '[a]fter the trial court entered its order.' Id. at 363. The court thus took cognizance of an event occurring subsequent to entry of the order being appealed to hold that the appeal had become moot.

"In Employees of Montgomery County v. Marshall, 893 So. 2d 326 (Ala. 2004), based on a fact first disclosed in a footnote in the appellant's opening brief, this Court dismissed as moot an appeal from the denial of an injunction. 'This Court will dismiss an appeal from the denial of an injunction,' the Court stated, 'when an event occurring after the denial of the injunction renders the appeal moot.' 893 So. 2d at 330. Similarly, in Masonry Arts, Inc. v. Mobile County Commission, 628 So. 2d 334 (Ala. 1993), this Court dismissed an appeal as moot based on the award of a contract after the entry of the order being appealed. See also Morrison v. Mullins, 275 Ala. 258, 259, 154 So. 2d 16, 18 (1963) ('[I]f an event happening after hearing and decree in circuit court, but before appeal is taken, or pending appeal, ... renders it clearly impossible

> for the appellate court to grant effectual relief, the appeal will be dismissed.' (emphasis added)). Thus, events occurring subsequent to an order granting or denying an injunction in the trial court may properly be consulted by this Court to determine whether a cause, justiciable at the time of entry or denial of the injunction, has been rendered moot on appeal. ..."

138 So. 3d at 975-76.

1. The Effect of the March 6, 2018, Open Meeting

The Board argues that Remington's claims for injunctive relief to invalidate the premium increases approved on April 27, 2016, are moot and no longer justiciable based on the Board's vote during an open meeting held on March 6, 2018, to approve a new premium structure that would be effective May 1, 2018.

Remington first argues that this Court should not consider evidence related to the March 6, 2018, meeting or the new May 1, 2018, premium structure because those matters occurred after this appeal was filed and are not properly before this Court. She argues that, because the circuit court has not been presented with the March 2018 vote, there is nothing for this Court to review in that regard. However, "'"because mootness is a jurisdictional issue, we may receive facts relevant to that issue; otherwise there would be no way

to find out if an appeal has become moot."'" Aliant Bank v. Carter, 197 So. 3d 981, 984 (Ala. 2015)(quoting South Alabama Gas Dist. v. Knight, 138 So. 3d at 976, quoting in turn Clark v. K-Mart Corp., 979 F.2d 965, 967 (3d Cir. 1992)). The PEEHIP member handbook and other publicly available publications indicate that the new premium structure either adjusted or eliminated the PEEHIP rate increases at issue.[6] Specifically, the Board's March 6, 2018, adoption of the new premium structure superseded the Board's prior premium and spousal-surcharge rates. As a result of the superseding rate adjustments, which became effective on May 1, 2018, the injunctive relief ordered by the circuit court beginning from the effective date of the new premium rate structure and proceeding prospectively is now moot.

Remington, however, asserts that her prospective claims concerning premium rates are not moot because other claims

[6]Those documents are published on the RSA Web site. See https://www.rsa-al.gov. Because PEEHIP is available through the RSA, we do not question the accuracy of the source of the information. See Rule 201(b), Ala. R. Evid. ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

concerning past premium rates remain in controversy. Specifically, she argues that the Board's request for a modification of part of the circuit court's order does not render the injunctive relief moot. Remington, however, cites no authority to support her position that specific claims or issues cannot be rendered moot where others remain justiciable. "'"'A moot case or question is a case or question in or on which there is no real controversy.'" Case v. Alabama State Bar, 939 So. 2d 881, 884 (Ala. 2006) (quoting American Fed'n of State, County & Mun. Employees v. Dawkins, 268 Ala. 13, 18, 104 So. 2d 827, 830-31(1958))."' Irwin v. Jefferson Cty. Pers. Bd., [Ms. 1161145, April 20, 2018] ___ So. 3d ___, ___ (Ala. 2018)(quoting Chapman v. Gooden, 974 So. 2d 972, 983 (Ala. 2007)). To the extent the circuit court ordered injunctive relief, it is clear that, beginning May 1, 2018, and going forward, any controversy was no longer present after the Board voted during an open meeting to reduce the premium rates effective May 1, 2018. Thus, the need for injunctive relief occurring on or after May 1, 2018, is moot.

2. The December 6, 2016, Vote not to Rescind

Next, this Court must decide whether the claims for

invalidation and refund of the premium and spousal-surcharge rates in effect between October 1, 2016, and May 1, 2018, remain before us for our consideration. The matter concerning whether the Board should rescind its previous vote regarding the increase in premiums and surcharges was not placed on the agenda of the December 2016 open meeting. Nonetheless, the Board voted in favor of waiving notification of the matter and voted against the motion to rescind the April 2016 decision.

The Board asserts that the December 6, 2016, vote not to rescind the Board's April 27, 2016, decision to increase PEEHIP premiums and spousal surcharges effectively "mooted" the court's order granting injunctive relief from the date of the December 2016 meeting prospectively. As support for its argument, the Board cites one case from the Nevada Supreme Court, O'Brien v. State Bar of Nevada, 114 Nev. 71, 952 P.2d 952 (1998). In O'Brien, the Board of Governors of the State Bar of Nevada met to consider applicants for an appointment to the Nevada Commission on Judicial Discipline. Two applicants, Ms. FitzSimmons and Mr. O'Brien, were nominated for the appointment. During the discussion, a board member indicated that someone had advised him that Mr. O'Brien had a serious

disciplinary complaint pending against him. The Board of Governors subsequently reappointed Ms. FitzSimmons to the Commission by a vote of six to five. Later, it was discovered that the accusations against Mr. O'Brien were false. No disciplinary complaint had been filed against him at any time. Mr. O'Brien was an accomplished lawyer, a former president of the Nevada State Bar, and a former United States Magistrate Judge.

Mr. O'Brien filed a petition before the Nevada Supreme Court challenging the board's action. After the petition was filed, the Board of Governors conducted an open meeting. The first matter on the agenda was to "consider [a] motion to rescind [the] previous vote of the Board of Governors." During this meeting, members of the board, the Bar, and the applicants were afforded an opportunity to express their views regarding whether the reappointment process was fair. At the close of the discussion, the board voted seven to six not to reconsider its appointment of Ms. FitzSimmons to the Commission.

The Nevada Supreme Court subsequently entered an order to show cause why Mr. O'Brien's petition should not be dismissed

as moot. Mr. O'Brien argued that the petition was not moot because, he argued, the board did not engage in a new selection process. The Nevada Supreme Court, however, found that Mr. O'Brien's argument was no more than a "semantic distinction" and that the board "voted not to rescind its prior action, knowing full well that this meant that its appointment of Ms. FitzSimmons would stand." 114 Nev. at 75, 952 P.2d at 955.

The Board, however, does not point to any Alabama precedent establishing that a board's vote not to rescind a prior decision renders a challenge to that prior decision moot. Moreover, the facts in the Nevada case are distinguishable from those in this case. There is no dispute that, before the December 2016 open meeting, the matter was not initially placed on the agenda and the public did not receive notice that the matter would be reconsidered by the Board.

Remington likewise provides little support for her argument that the December 2016 meeting did not moot her claim challenging the Board's decision to increase premiums. In her response, Remington argues that "voting not to undo something

is not the same as voting to do it." Remington's brief, p. 47. Remington turns to 1 J. Smith, Commentaries on the Modern Law of Municipal Corporations § 380, p. 358 (1903), as support for her argument that "a vote not to rescind certain doings does not give them any efficacy."

The Board, however, contends that Remington's argument is not properly before this Court because she did not file a response to their supplement to the motion for a summary judgment, in which they argued that the decision not to rescind the prior decision rendered any request for injunctive relief moot. The record, however, does not indicate that the court granted the motion to supplement the summary-judgment motion. Although the Board filed its motion to supplement the summary-judgment motion on December 20, 2016, the circuit court did not enter a specific order granting the request. At that time, it was unclear whether the supplement itself was before the court, and therefore Remington did not have an opportunity to provide a written response to the supplement. Moreover, when the parties attempted to argue the matter during oral argument on the summary-judgment motions, the trial judge refused to allow the parties to argue the

rescission issue, finding that the argument "was a red herring [and he was] not going to take up any time with that."

In its order denying the motion for a summary judgment, the circuit court, however, did address the Board's contention, as set forth in the supplemental motion, that the issues were rendered moot by the December 6 meeting. The court specifically found that, "[i]f the failure of [the] motion [to rescind] is practically nearly equivalent to a ratification of the April 27 vote -- as Defendants urge -- then Defendants will be able to hold another vote promptly, and will be able to affirmatively adopt the member cost increases so long as they follow the Open Meetings Act and any other applicable law [and that] [s]uch an affirmative vote would remove any question about whether a failure of a motion to rescind is exactly the same as a ratification."

In the absence of any Alabama precedent on point, this Court cannot conclude that the Board's vote to deny a motion to rescind a prior decision involving the insurance rates of numerous insureds throughout the State, which was not placed on the agenda or otherwise noticed to the public, renders a challenge to the prior vote to increase insurance premiums

nonjusticiable. Thus, the issues related to the premium and surcharge increases between October 1, 2016, and May 1, 2018, remain ripe for review.

B. The Open Meetings Act

The Board asserts that the circuit court erred in determining that the morning session was a violation of the Open Meetings Act. Specifically, it argues that the morning session was not a meeting.[7] Remington, however, asserts that there was one meeting, which lasted all day. Specifically, she asserts that the Board meeting began in the morning, broke for lunch, and continued through the afternoon.

[7]In its brief, the Board did not specifically discuss whether the morning session met the general definition of "meeting" as set forth in § 36-25A-2(6)a, Ala. Code 1975. Nonetheless, in her responsive brief, Remington pointed out that the Board did not present specific argument on the general definition of "meeting" as set forth in § 36-25A-2(6)a. She then presented her own argument about why the general definition of "meeting" as set forth in both § 36-25A-2(6)a.1 and 2 is applicable in this case. In reply to Remington's argument, the Board contended that the general definition of a "meeting" as set forth in § 36-25A-2(6)a is not applicable. Thus, to the extent the Board presents argument in reply to Remington's response, this Court will consider whether the morning session meets the general definition of "meeting" as set forth in § 36-25A-2(6)a when discussing whether the circumstances in this case fall within one of the listed exceptions in § 36-25A-2(6)b.

1. The Statutory Definition of "Meeting"

In this case, we must determine whether the morning session was part of a "meeting" as defined in the Open Act Meetings Act. Section 36-25A-2(6), Ala. Code 1975, sets forth what does and does not constitute a "meeting," in pertinent part, as follows:

> "a. Subject to the limitations herein, the term meeting shall only apply to the following:
>
> "....
>
> "2. The prearranged gathering of a quorum of a governmental body or a quorum of a committee or subcommittee of a governmental body during which the full governmental body, committee, or subcommittee of the governmental body is authorized, either by law or otherwise, to exercise the powers which it possesses or approve the expenditure of public funds.
>
> "3. The gathering, whether or not it was prearranged, of a quorum of a governmental body during which the members of the governmental body deliberate specific matters that, at the time of the exchange, the participating members expect to come before the full governmental body at a later date.
>
> "....
>
> "b. The term 'meeting' shall not include:
>
> "1. Occasions when a quorum of a governmental body, committee, or

> subcommittee attends social gatherings, conventions, conferences, training programs, press conferences, media events, association meetings and events or gathers for on-site inspections or meetings with applicants for economic incentives or assistance from the governmental body, or otherwise gathers so long as the subcommittee, committee, or full governmental body does not deliberate specific matters that, at the time of the exchange, the participating members expect to come before the subcommittee, committee, or full governmental body at a later date.
>
> "2. Occasions when a quorum of a subcommittee, committee, or full governmental body gathers, in person or by electronic communication, with state or federal officials for the purpose of reporting or obtaining information or seeking support for issues of importance to the subcommittee, committee, or full governmental body...."

(Emphasis added.)

Section 36-25A-2(1), Ala. Code 1975, defines "deliberation" as:

> "An exchange of information or ideas among a quorum of members of a subcommittee, committee, or full governmental body intended to arrive at or influence a decision as to how any members of the subcommittee, committee, or full governmental body should vote on a specific matter that, at the time of the exchange, the participating members expect to come before the subcommittee, committee, or full body immediately following the discussion or at a later time."

In its appellate brief, the Board limits its argument to whether the morning session falls within one of the listed exceptions set forth in § 36-25A-2(6)b. Specifically, the Board argues that the morning session of its members was a "training program" and did not involve "deliberation" as set forth in § 36-25A-2(6)b.1. In addition, the Board asserts that the morning session was not a "meeting" because, they say, the session was solely for the purpose of "obtaining information" as contemplated by § 36-25A-2(6)b.2.

a. The "Training-Program" Exception -- § 36-25A-2(6)b.1

Remington argues that the Board violated the Open Meetings Act by gathering for the morning portion of its full-day meeting with staff on April 27, 2016, outside the presence of the public. The Board, however, argues that there were two separate gatherings that day. Specifically, the Board asserts that the morning session was merely a training session and that no deliberation occurred but that the afternoon session was an open meeting of the Board. Remington disagrees, arguing that there was one meeting, which lasted all day. She asserts that the morning session was part of the "meeting" because staff advocated for increased rate adjustments and

presented the same evidence to the Board that was presented during the open meeting. In addition, Remington asserts that the Board members either posed persuasive questions or otherwise deliberated among themselves during the morning session.

The Board argues that the purposes of the morning session were training and education. Specifically, it alleges that a "training program" was necessary to educate the Board members about the complex financial matters set forth in the materials they would consider that afternoon.

The term "training program" is not defined in the Open Meeting Act. Thus, we must engage in statutory construction. In Slagle v. Ross, 125 So. 3d 117 (Ala. 2012), a case that interpreted another section of the Open Meetings Act, we held:

> "Although we agree that we must liberally construe the terms of the [Open Meetings] Act so as to accomplish its purpose, the fact remains that we are limited by those terms. The judiciary cannot undertake to aid the legislature in its task by treating the Act as if it uses some different terms. Indeed, it is only in the terms of the Act that we know what 'task' the legislature truly undertook. If the meaning of those terms is plain and unambiguous, we are not free to derive from them some different meaning.
>
> "'The cardinal rule of statutory interpretation is to determine and give

> effect to the intent of the legislature as manifested in the language of the statute. Gholston v. State, 620 So. 2d 719 (Ala. 1993). Absent a clearly expressed legislative intent to the contrary, the language of the statute is conclusive. Words must be given their natural, ordinary, commonly understood meaning, and where plain language is used, the court is bound to interpret that language to mean exactly what it says.'
>
> "Ex parte State Dep't of Revenue, 683 So. 2d 980, 983 (Ala. 1996). '"'If a statute is not ambiguous or unclear, the courts are not authorized to indulge in conjecture as to the intent of the Legislature or to look to consequences of the interpretation of the law as written.'"' Ex parte Morris, 999 So. 2d 932, 938 (Ala. 2008) (quoting Gray v. Gray, 947 So. 2d 1045, 1050 (Ala. 2006), quoting in turn Ex parte Presse, 554 So. 2d 406, 411 (Ala. 1989))."

125 So. 3d at 123.

Although "training program" is not specifically defined in the Open Meetings Act, the term has been used in conjunction with governmental bodies that may be, on certain occasions, subject to the Act. For example, § 36-25-4.2, Ala. Code 1975, requires that, at the beginning of each legislative quadrennium, the State Ethics Commission shall administer "training programs" on State ethics law for members of the legislature and state constitutional officers, as well as county commissioners and members of local boards of education.

In addition, the School Board Governance Improvement Act provides that local school-board members must attend "training programs that promote quality boardsmanship." § 16-1-41.1(d)(1)g, Ala. Code 1975. Section 16-1-6, Ala. Code 1975, provides that the State Superintendent, the State Department of Education, and the local boards of education are "authorized to cooperate with the Alabama Association of School Board Members in its in-service training program for school board members." Consequently, a "training program" includes training for board members on topics such as ethics, governance, or the general manner in which a board member is expected to conduct himself or herself during meetings. In this case, staff did not, in the morning session, train the Board on ethics, governance, general board etiquette, or other similar topics. Moreover, when reviewing the term "training program" as used in the statute and giving the "[w]ords ... their natural, ordinary, [and] commonly understood meaning," Ex parte State Dep't of Revenue, 683 So. 2d 980, 983 (Ala. 1996), we cannot conclude that the morning session was merely a "training program." It is clear that the staff presentation regarding the same matters that would be considered for a vote

later in the day and that included proposals to increase insurance premiums does not fall within the "training-program" exception.[8]

b. The "Otherwise-Gathers" Exception -- § 36-25A-2(6)b.1

The Board also asserts that the morning session meets the exception set forth in the final part of § 36-25A-2(6)b.1 because, they say, its members "otherwise gather[ed]" and no "deliberation" occurred. Remington, however, contends that the morning session does not meet the exception because, she says, the Board engaged in some "deliberation" of "specific matters that, at the time of the exchange, [the Board members] expect[ed] to come before" the Board that afternoon.

In this case, all the Board members attended the prearranged morning session, which began at 9:30 a.m., as well as the afternoon session, which began at 1:00 p.m. Thus, a "quorum of members" of the "full governmental body" were present during both sessions. Although the Board asserts that there is no evidence of anyone "advocating" for a particular

[8]Because we conclude that the morning session was not a "training program," it is unnecessary to decide whether the Board engaged in deliberation during a training session.

position during the morning session, the record is replete with references indicating that staff made "recommendations" to the Board about proposed increases in monthly health-insurance premiums and spousal surcharges throughout the session. For example, in her deposition, Swindle stated that the "topic [of the morning session] was the recommendations that the staff was presenting on PEEHIP" and that "they made recommendations on ways to remedy the financial situation." During Swindle's deposition, the following exchange occurred:

> "Q. And the recommendation was to increase the rates that participants would pay.
>
> "A. On premiums.
>
> "Q. On premiums.
>
> "A. And increase the surcharge for spouses.
>
> "Q. And was that the only recommendation being made, or were there alternatives being recommended by the staff?
>
> "A. I'm not sure I can answer that. I'm not sure, because in the book was only what the staff was recommending. That's what they got, was what the staff was recommending.
>
> "Q. What was the staff recommending in the binder?
>
> "A. On premiums or what? I mean, a lot of recommendations in there.

> "Q. I think -- although your testimony will reflect what it was, I think what I heard was that there was a recommendation to increase premiums and surcharges that the staff was making?
>
> "A. That was two of them, yes.
>
> "Q. Those two things [were] a recommendation that the staff wanted to see happen?
>
> "A. Right.
>
> "Q. Did the binder contain that same recommendation?
>
> "A. Yes.
>
> "Q. Did it contain any other recommendations?
>
> "A. I would have to look at the binder. I think Joe said increase in tobacco surcharge, and I don't really remember the rest. I would have to go back and look. Those were the two biggest."

Swindle, however, also testified that staff did not "emphasize anything in particular" and that "they went straight through [the binder materials] in the book." She maintained that, during the afternoon session, "the only difference [between the sessions] was that Joe Ward made a motion to take the money out of the retiree trust fund, take all the money from the trust fund and use it." She further testified:

"Q. Was it your understanding, that morning of April 27th, that the material that was being covered would be up for a vote later that afternoon?

"A. Yes, in the board meeting.

"Q. What did the staff tell you with regard to what would happen if their proposal was voted down?

"A. They didn't tell me. They just told me how much in the hole we would be.

"Q. You understood it would be bad if it was voted down?

"A. Bad, really bad.

"Q. And it was presented that way, that 'We've got to do this or here's the bad situation there will be'?

"A. No, they didn't present it to me like that. They presented black-and-white the figures and showed what we had, what we had to spend, what we had spent, and what we needed to do to meet our obligation. It's not presented in any like, 'We're going to cave in,' or anything like that."

In his deposition, Ward testified that both the morning and afternoon sessions involved the same topics and the same Board members and were held in the same building. He also provided testimony concerning the recommendations proposed by staff during the morning session as follows:

"Q. Let me ask you, what was discussed when the board met that morning?

"A. We were given information concerning PEEHIP and what we would have to do to make the program sound, how much money we were short, how much money the legislature had provided us and what the difference was, and the recommendations the staff would make for us to make up that shortfall.

"Q. And did the staff make recommendations to you in regard to making up the shortfall?

"A. Yes, they did.

"Q. What was the staff's recommendation?

"A. We were going to raise the surcharge on spousal, spousal surcharge; I think we were going to raise surcharge on tobacco. There was some premium increase, if I remember correctly in like co-pays and that kind of thing.

"Q. If you recall, what was the staff's recommendation to the board?

"A. To accept those kinds of changes.

"Q. Were there any alternative proposals with regard to how to deal with --

"A. To my knowledge, the staff did not offer any alternatives or different proposals. It was a straight shot.

"....

"Q. When it was being presented and discussed that morning, did you understand that it was going to come up for a vote that same day?

"A. Yes."

Ward also provided testimony regarding discussion among members:

> "Q. And did the binder contain the staff's recommendations that were being presented that morning?
>
> "A. Yes, my recollection is it did.
>
> "Q. Did board members that morning have questions concerning the recommendation?
>
> "A. Yes.
>
> "Q. And did the board members ask questions to the staff?
>
> "A. Yes.
>
> "Q. Did the board members ask questions among each other?
>
> "A. Yes.
>
> "Q. Then those questions were being asked aloud?
>
> "A. Yes, sir.
>
> "Q. And did the board members have any sort of debate concerning those questions that morning?
>
> "A. I don't know whether you would call it a debate. There was discussion; and I made an alternate proposal at that time, but I don't know that that would be called a debate."

Ward acknowledged that he "[c]ould ... tell by [the staff's] presentation how they wanted [him] to vote," that the staff's presentation "was pointed toward specific items," and that,

"[i]n [his] opinion, ... the staff advocate[d] for the proposed increases." Ward stated that he was opposed to the premium increases and that he specifically advocated removing money from the trust fund during both the morning session and the afternoon session. We therefore conclude that, during the morning session, staff recommended the Board's adoption of the proposed increases.

The primary question, however, is whether the Board engaged in any specific "deliberation" regarding the staff's recommendations. In this case, the same material that was presented by staff during the closed morning session was presented during the open afternoon session before the entire Board. Before discussing whether any deliberation occurred, we must note there are risks involved in conducting a gathering of board members in this manner. The holding of a closed session immediately before an open session where the same materials are presented to a board for its consideration provides an opportunity for board members to ask the more controversial questions of a presenter outside the presence of the public. In addition, there is the possibility that a member may ask persuasive questions to influence those around

him or her to vote a certain way, such as when Ward specifically advocated for an alternative proposal during the morning session. It is well settled law that a question, by itself, may be posed to persuade others to lean one way or another. See Bradford v. Stanley, 355 So. 2d 328, 331 (Ala. 1978) ("It is true that a leading question is one which suggests the answer sought ...."(citing Williams v. State, 34 Ala. App. 603, 42 So. 2d 500 (1949))).

We now turn to the question whether the Board deliberated during the morning session. Citing Lambert v. McPherson, 98 So. 3d 30 (Ala. Civ. App. 2012), the Board asserts that Ward's or another Board member's questions do not necessarily establish that a member "advocate[d] a position on the proposed solutions to the projected budget shortfall" during the morning session. Board's brief, pp. 31-32. The situation in Lambert, however, is distinguishable from this case. In Lambert, a board member sent an e-mail to other board members in which he declared his opinion on a policy matter. The Court of Civil Appeals concluded that, because the e-mail was a unilateral declaration of one member's opinion and was not

an exchange of information or ideas among a quorum of board members, no "meeting" occurred.

In this case, the record indicates that, during the staff's presentation to the entire Board, Board members asked questions about the proposals and that at least one member openly disagreed with the recommendations and advocated for an alternative solution. Unlike the circumstances in Lambert, it is obvious that Ward's opinion was not followed by silence from other Board members or staff. Both Susan Brown and Ward stated that the members shared their "thoughts and views" on the proposed increases and that there was discussion about the staff's recommendations. Although the other Board members provided statements alleging that they did not exchange information or ideas during the meeting, it is evident that the opinions of some of the Board members were expressed during the morning session. During both the morning and afternoon sessions, Ward advocated for the use of the trust fund to fill the economic shortfall.[9] In this case, the chair

[9]In its brief, the Board argued that Ward merely advocated against the premium increases during the luncheon to a small number of Board members consisting of less than a quorum. The record, however, indicates that Ward also advocated for use of the trust fund during both the morning and afternoon sessions

of the Board, along with PEEHIP officials, scheduled the morning session with general knowledge of the proposals to be presented by staff, and Board members asked questions regarding the staff's proposals to increase premiums, an item the members knew would be considered for a vote later that day. In addition, during the morning session, Swindle read and "someone mentioned" a recently enacted Senate resolution that suggested that an increase in PEEHIP premiums would be inappropriate in light of recent legislation providing an increase in public-education employees' salaries. This Court therefore must conclude that, under these particular circumstances, "deliberation" occurred during the morning session. Consequently, the "otherwise-gathers" exception set forth in § 36-25A-2(6)b.1 is not applicable.

c. The "Gathering-of-State-Officials" Exception -- § 36-25A-2(6)b.2

The Board argues that the morning session did not constitute a meeting because, it says, the purpose of the morning session was to gather with state officials "for the purpose of reporting or obtaining information." Remington,

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before the Board in its entirety.

however, asserts that the exception is not applicable to the board of an organization meeting with the organization's own staff for the purpose of hearing proposed recommendations on how its members should resolve a financial problem, which recommendations will be considered for a vote later in the day.

As previously discussed, it is clear that one of the purposes of the morning session was for staff to present its specific financial proposals and/or recommendations to the entire Board before the Board met in public for a vote on the proposals later that afternoon. There is no dispute that the same subject matter was presented in both the morning session and the afternoon session.

There is no instructive caselaw interpreting the specific provisions of § 36-25A-2(6)b.2. Nonetheless, it is obvious that the Open Meetings Act, when read in its entirety, differentiates between "officials" and "employees." Section 36-25A-2(9) defines a "public employee" as "[a]ny person employed at the state, county, or municipal levels of government or their instrumentalities, including governmental corporations and authorities, who is paid in whole or in part

from state, county, or municipal funds." Thus, a PEEHIP staff member is a "public employee" for purposes of the Open Meetings Act. In addition, § 36-25A-2(11) defines a "public official" as "[a]ny person elected to public office, whether or not that person has taken office, by a vote of the people at state, county, or municipal levels of government or their instrumentalities, including governmental corporations, and any person appointed to a position at the state, county, or municipal levels of government or their instrumentalities, including governmental corporations." This Court therefore concludes that the "state-official" exception set forth in § 36-25A-2(6)b.2 does not apply to a gathering of the Board with staff.

2. The § 36-25A-9(f) Invalidation Provision

The Board argues that, even if the Court were to hold that the morning session was a meeting for purposes of the Open Meetings Act, any request for injunctive relief related to any alleged violations that took place during the morning session before the properly noticed afternoon meeting is foreclosed by § 36-25A-9(f), Ala. Code 1975, for two reasons. First, the Board asserts that, because any violation occurred

before the open meeting, the action of the Board cannot be invalidated. Secondly, it asserts that the insureds and third parties relied in good faith on the Board's decision and that invalidation of the premium and surcharge increases would result in undue prejudice. Specifically, it alleges that the projected budget deficits would jeopardize the future stability of the PEEHIP health plan, which could affect its insureds, as well as third-party administrators with whom PEEHIP has contracted for fiscal years 2017-2019. Remington, however, asserts that the invalidation provision is inapplicable because, she says, the meeting was one meeting that lasted all day, beginning in the morning and ending late that afternoon. In addition, she argues that the Board has failed to overcome its burden of demonstrating that any third parties have changed their position and will suffer undue prejudice as the result of the invalidation of the Board's vote to increase premiums.

Section 36-25A-9(f) provides:

> "The court may invalidate the action or actions taken during a meeting held in violation of this chapter, provided that the complaint is filed within 21 days of the date when the action is made public, the violation was not the result of mistake, inadvertence, or excusable neglect, and <u>invalidation</u>

> of the governmental action taken would not unduly prejudice third parties who have changed their position or taken action in good faith reliance upon the challenged action of the governmental body; provided further, however, that any action taken at an open meeting conducted in a manner consistent with this chapter shall not be invalidated because of a violation of this chapter which occurred prior to such meeting."

The § 36-25A-9(f) invalidation provision is applicable only to actions taken prior to a meeting. In this case, we agree with Remington's assertion that the full-day Board meeting began in the morning and continued, with a break for lunch, in the afternoon. The Act itself recognizes that, at least with respect to executive sessions, there may be different "portion[s]" of one meeting. See § 36-25A-2(2) (defining an "executive session" as "[t]hat portion of a meeting of a subcommittee, committee, or full governmental body from which the public is excluded for one or more reasons prescribed in Section 26-25A-7(a)"); § 36-25A-2(7) (defining an "open or public portion of a meeting" as "that portion which has not been closed for executive session in accordance with this chapter"); § 36-25A-7(a)(3) ("[T]he executive session shall be concluded and the deliberation shall be conducted in the open portion of the meeting or the

deliberation shall cease ...."); and § 36-25A-7(a)(6) ("[T]he material terms of any contract to purchase, exchange, or lease real property shall be disclosed in the public portion of a meeting ....").

In this case, it cannot be disputed that the Board was required to attend both the morning and afternoon sessions, that the same topics and recommendations were presented in both sessions, that the same documentary materials were provided in binders, and that the topics were presented and discussed in the same building, albeit in different rooms. We also conclude that there was "deliberation" as defined in the Act during both the morning and afternoon sessions. Thus, the full-day Board meeting was a prearranged gathering of the full governmental body during which particular Board members deliberated specific matters that, at the time, its members expected to come before them during the afternoon portion of the meeting. During this prearranged full-day meeting, the Board was authorized to consider the staff's proposals and to exercise its powers by voting, at least during the open portion of the meeting, on the staff's proposed recommendation to increase premiums. We therefore conclude that the full-day

gathering meets the general definition of "meeting" set forth in § 36-25A-2(6)a.2 and 3. Because the meeting was a full-day meeting and the Board held the morning portion of the meeting outside the presence of the public in violation of the Open Meetings Act, the invalidation provision set forth in § 36-25A-9(f) is inapplicable. Moreover, to apply the invalidation provision in the manner urged by the Board under the particular circumstances of this case would contravene the expressed purpose of the Open Meetings Act, specifically "the policy of this state that the deliberative process of governmental bodies shall be open to the public during meetings as defined in Section 36-25A-2(6)." § 36-25A-1, Ala. Code 1975.

We further conclude that the Board has failed to demonstrate that the circuit court's invalidation of the Board's action would result in any undue prejudice to specific third parties or that parties relying in good faith upon the challenged action would have detrimentally changed their position. In her affidavit, Scott stated:

> "The increased premium and spousal surcharge rates are an essential component of PEEHIP's budget for fiscal year 2017 and beyond, comprising approximately $71.4 million of that budget. If

> PEEHIP does not receive the funds associated with the premium and spousal surcharge increases approved by the PEEHIP Board at its April 27, 2016 public meeting, PEEHIP projects that it will have a $71.4 million deficit in FY 2017, which would be truly catastrophic for the members of the plan: PEEHIP would face a greater risk of its budget coming up short, which would mean that PEEHIP would not be able to pay for members' covered health benefits through the end of the fiscal year. This would effectively mean that PEEHIP members would lose their health insurance for this period."

Scott further stated:

> "During PEEHIP's open enrollment period from July 1, 2016 through September 10, 2016, approximately 152,000 PEEHIP members selected or continued PEEHIP hospital medical coverage in good faith reliance on PEEHIP's ability to pay covered health benefits for them and (for many) their families during the next year. In addition, vendors with whom PEEHIP contracts for its administrative services, such as Blue Cross Blue Shield of Alabama and MedImpact Healthcare Systems, Inc., have performed their contractual obligations in good faith reliance on PEEHIP having funds to pay the administrative fees and/or reimbursement of claims payments for which the terms of their respective contracts provide."

The passage of time, however, has indicated that the circumstances have not been as dire as anticipated. The funds from the increased premiums and surcharges at issue have remained is escrow during the pendency of this case. As previously discussed, after the filing of the appeal, the Board conducted an additional open meeting in which it voted

to approve a new premium structure that eliminated the questionable spousal surcharges for participants and reduced the total monthly costs for participants with a covered spouse and no other covered dependents effective May 1, 2018. Under these circumstances, we conclude that the circuit court did not err in determining that the third-party-reliance provision of § 36-25A-9(f) is not applicable.

IV. Conclusion

In sum, we conclude that, at least to the extent the circuit court ordered injunctive relief beginning from the effective date of the superseding rate adjustments on or after May 1, 2018, and proceeding prospectively, Remington's request for injunctive relief is moot. The issues related to the premium surcharge increases between October 1, 2016, and May 1, 2018, however, remained ripe for review.

To the extent the circuit court determined that the Board violated the Open Meetings Act by conducting the morning session in private, we agree. Under the circumstances of this case, it is clear that there was only one "meeting" as that term is defined by § 36-25A-2(6)a, which began during a closed morning session and continued during the open afternoon

session. We further conclude that the closed morning session of the meeting did not meet exceptions to the definition of a meeting required to be open to the public set forth in § 36-25A-2(6)b. Specifically, it is clear that the closed session was neither a "training program" as set forth in § 36-25A-2(6)b.1 nor a "gathering of state officials" for the purpose of "obtaining information" as set forth in § 36-25A-2(6)b.2. Moreover, the invalidation provision of § 36-25A-9(f) does not apply, because it is clear that the violation occurred during the full-day meeting and there is no genuine issue demonstrating that the invalidation of the Board's action would unduly prejudice third parties who have relied upon the challenged action. Accordingly, with respect to the issues that remain ripe for review, we affirm the circuit court's judgment.

AFFIRMED.

Parker, C.J., and Shaw, Wise, Bryan, Mendheim, and Stewart,* JJ., concur.

Sellers, J., recuses himself.

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*Although Justice Stewart was not present at oral argument in this case, she has listened to the audiotape of the oral argument.