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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

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Ex parte GASP

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS**

(In re: GASP

v.

Jefferson County Board of Health et al.)

**(Montgomery Circuit Court, CV-17-901677;
Court of Civil Appeals, 2170489)**

MENDHEIM, Justice.

GASP, an Alabama nonprofit corporation, filed a petition for a writ of certiorari with this Court challenging the decision of the Court of Civil Appeals in GASP v. Jefferson County Board of Health, [Ms. 2170489, Aug. 10, 2018] ___ So. 3d ___ (Ala. Civ. App. 2018). The Court of Civil Appeals affirmed the Montgomery Circuit Court's dismissal of GASP's petition challenging a decision of the Jefferson County Board of Health ("the Board") to amend its rules under the Alabama Air Pollution Control Act of 1971, § 22-28-1 et seq., Ala. Code 1975 ("the Air Control Act"). We granted GASP's petition for a writ of certiorari in order to evaluate, among other things, whether the Court of Civil Appeals correctly concluded that the rule-making procedures of the Air Control Act preempt any other rule-making procedures potentially applicable to the Board, particularly the rule-making procedures of the Alabama Administrative Procedure Act, § 41-22-1 et seq., Ala. Code 1975 ("the AAPA"). We affirm the judgment below, but on a different ground than that propounded by the Court of Civil Appeals.

I. Facts

The Board is a county board of health established pursuant to § 22-3-1 et seq., Ala. Code 1975.¹ Pursuant to the Air Control Act, the Board established the Jefferson County Department of Health Air Pollution Control Program ("the Air Program") in 1972. Section 22-28-23(d) of the Air Control Act provides the Board with the authority to "adopt and enforce any ordinance, regulation, or resolution requiring the control or prevention of air pollution"²

On February 19, 2017, The Birmingham News published a "Notice of Public Hearing" before the Board regarding proposed revisions to Chapter 12 of the Jefferson County Air Pollution Control Rules and Regulations ("Chapter 12"). The Board conducted a public hearing on March 21, 2017. On April 19, 2017, at a Board meeting, the Board adopted revised rules and

¹The Board is an entity created by statute and is not incorporated.

²The Air Control Act provides that "each county board of health shall have the authority to establish, and thereafter administer, within their jurisdictions, a local air pollution control program." § 22-28-23(b), Ala. Code 1975. These local programs are part of a "coordinated statewide program of air pollution prevention" through the implementation of local air-pollution-control programs. § 22-28-3(c), Ala. Code 1975; see also, generally, § 22-28-23, Ala. Code 1975.

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regulations in place of Chapter 12. More specifically, the Board deleted Chapter 12 in its entirety and incorporated by reference the "Rules of Procedure for Hearing Appeals of Administrative Actions of the Alabama Department of Environmental Management," which were adopted by the Alabama Environmental Management Commission ("the AEMC") and are contained in Chapter 335-2-1 of the Alabama Administrative Code.³

On July 26, 2017, GASP submitted a petition to the Board seeking an administrative decision that the repeal of Chapter 12 and the adoption of new rules by the Board were invalid because the Board did not comply with the notice and hearing requirements of the AAPA.

On September 6, 2017, the Board denied GASP's petition. As a basis for the denial, the Board found that the AAPA did not apply because the Board and the Air Program are not state agencies as defined by the AAPA but, instead, are local governmental units not subject to the AAPA. The Board also found that it had substantially complied with the rule-making

³It appears that GASP's core substantive objection to the new rules is that the new rules provide for a hearing before a hearing officer rather than a hearing before the Board itself.

procedures set forth in the Air Control Act in repealing and replacing Chapter 12. GASP filed with the Board a notice of intent to appeal and filed a petition in the Montgomery Circuit Court seeking judicial review of the Board's decision pursuant to §§ 41-22-11(b) and 41-22-20 of the AAPA. In its petition, GASP named as defendants the Board and various board members in their official capacities.

The Board filed a motion to dismiss GASP's petition or, in the alternative, to transfer the action to Jefferson County. The Air Program filed a motion to intervene, alleging (1) that it is composed of the group of individuals who enforce and apply the [Jefferson County Air Pollution Control Rules and] Regulations and (2) that it has specific interests that are distinct from those of the Board. ABC Coke also filed a motion to intervene. On January 4, 2018, the circuit court granted the motions to intervene filed by the Air Program and ABC Coke.⁴

After a hearing, the circuit court entered an order granting the Board's motion to dismiss. The circuit court found (1) that the Air Program and the Board are not state

⁴ABC Coke did not file a brief with this Court.

agencies subject to the provisions of the AAPA and (2) that the declaratory-judgment provision of the AAPA is not the proper procedural avenue for the relief sought by GASP. GASP filed a notice of appeal to the Court of Civil Appeals.

The Court of Civil Appeals affirmed the judgment of the circuit court. See GASP v. Jefferson Cty. Bd. of Health, [Ms. 2170489, Aug. 10, 2018], ___ So. 3d ___ (Ala. Civ. App. 2018). The Court of Civil Appeals held that the AAPA does not apply to the Board when it is performing its rule-making function under the Air Control Act because "the Air Control Act preempts the field" of air-pollution control and that, therefore, the "specific rule-making procedures provided for in § 22-28-23(b)(2) of the Air Control Act ... control." GASP, ___ So. 3d at ___. The Court of Civil Appeals pretermitted consideration of whether the Board is a State agency subject to the AAPA.

II. Standard of Review

"In reviewing the Court of Civil Appeals' decision on a petition for the writ of certiorari, 'this Court "accords no presumption of correctness to the legal conclusions of the intermediate appellate court. Therefore, we must apply *de novo* the standard of review that was applicable in the Court of Civil Appeals.'" Ex parte Exxon Mobil Corp., 926 So. 2d 303, 308 (Ala. 2005) (quoting

Ex parte Toyota Motor Corp., 684 So. 2d 132, 135 (Ala. 1996))."

Ex parte Wade, 957 So. 2d 477, 481 (Ala. 2006). The Court of Civil Appeals explained its standard of review as follows:

"As we have previously explained, this court reviews the judgment of a circuit court reviewing a decision of an administrative agency 'without any presumption of its correctness, since that court was in no better position to review the order of the [agency] than we are.' State Health Planning & Res. Dev. Admin. v. Rivendell of Alabama, Inc., 469 So. 2d 613, 614 (Ala. Civ. App. 1985) (citing Vann Express, Inc. v. Bee Line Express, Inc., 347 So. 2d 1353 (Ala. 1977)).

"More particularly, GASP appeals from the dismissal of its petition for judicial review of the Board's decision. It is well settled that

"'[a] ruling on a motion to dismiss is reviewed without a presumption of correctness. Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993). [An appellate court must accept the allegations of the complaint as true. Creola Land Dev., Inc. v. Bentbrooke Housing, L.L.C., 828 So. 2d 285, 288 (Ala. 2002). Furthermore, in reviewing a ruling on a motion to dismiss we will not consider whether the pleader will ultimately prevail but whether the pleader may possibly prevail. Nance, 622 So. 2d at 299.]'

"Newman v. Savas, 878 So. 2d 1147, 1148-49 (Ala. 2003)."

GASP, ___ So. 3d at ___.

III. Analysis

A. Does The Air Control Act Preempt the AAPA?

The Court of Civil Appeals affirmed the judgment of the circuit court based on a conclusion that the Air Control Act preempts the AAPA. The Court of Civil Appeals explained:

"Section 22-28-23(a) of the Air Control Act provides that 'it is the intention of this chapter to occupy by preemption the field of air pollution control within all areas of the State of Alabama.' Accordingly, based on the determination by the legislature that the Air Control Act preempts the field, the specific rule-making procedures provided for in § 22-28-23(b) (2) of the Air Control Act, and by extension § 22-22A-8, control, and the Board was not required to comply with the rule-making provisions of the AAPA under the facts of this case."

GASP, ___ So. 3d at ___ (footnote omitted).

We disagree with the Court of Civil Appeals' interpretation of § 22-28-23(a), Ala. Code 1975. That section specifically states that it is the legislature's intention for the Air Control Act "to occupy by preemption the field of air pollution control within all areas of the State of Alabama."

(Emphasis added.) The preemption at issue concerns rules and regulations that address air-pollution control. Section 22-28-23(a) says nothing about preempting administrative procedures for challenging agency actions.

The failure to include administrative procedures in the statement of preemption in the Air Control Act is crucial because the AAPA requires specific preemption of its requirements, providing that it takes precedence over other statutes with regard to administrative procedures unless there is an express provision to the contrary in the AAPA or in the pertinent statute. Specifically, § 41-22-25(a), Ala. Code 1975, provides:

"(a) This chapter [i.e., the AAPA] shall be construed broadly to effectuate its purposes. Except as expressly provided otherwise by this chapter or by another statute referring to this chapter by name, the rights created and the requirements imposed by this chapter shall be in addition to those created or imposed by every other statute in existence on the date of the passage of this chapter or thereafter enacted. If any other statute in existence on the date of the passage of this chapter or thereafter enacted diminishes any right conferred upon a person by this chapter or diminishes any requirement imposed upon an agency by this chapter, this chapter shall take precedence unless the other statute expressly provides that it shall take precedence over all or some specified portion of this named chapter."

(Emphasis added.)

The Commentary to § 41-22-25 explains:

"'[T]he burden should be on those seeking an exemption from the general principles embodied in the [Act] to demonstrate clearly the necessity for an exemption, and to have their claim for any such

exception embodied in unmistakable statutory language indicating that the Legislature has actually considered the question of an exemption and determined that it is warranted.'"

(Quoting Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process, 60 Iowa L. Rev. 731, 756 (1975) (emphasis added).)

In Forest Manor, Inc. v. State Health Planning & Development Agency, 723 So. 2d 75, 78 (Ala. Civ. App. 1998),⁵ the Court of Civil Appeals held:

"By enacting [§ 41-22-25(a)], the legislature has indicated an intent to abrogate, in the limited area of administrative procedure, the generally applicable rule of statutory construction whereby specific matter is deemed to take precedence over general matter. In other words, the legislature intended that the 'general' provisions of the AAPA will control unless (1) the AAPA itself expressly limits its application, or (2) the specific agency statute expressly provides that it will take precedence over the AAPA as to a particular matter."

(Emphasis added.)

This Court has confirmed the primacy of the AAPA as to matters of administrative procedure, observing that "the rights created by the AAPA shall be in addition to rights

⁵Forest Manor was abrogated by statute on other grounds. See Colonial Mgmt. Grp., L.P. v. State Health Planning & Dev. Agency, 853 So. 2d 972 (Ala. Civ. App. 2002).

created by any other statute" and that ""the AAPA shall take precedence over any other statute which diminishes the rights created by the AAPA, unless that statute expressly provides otherwise."'" Ex parte Varner, 571 So. 2d 1108, 1009 (Ala. 1990) (quoting with approval the dissenting opinion of Judge Robertson in Varner v. Allen, 571 So. 2d 1106, 1108 (Ala. Civ. App. 1989), quoting in turn State Health Planning & Dev. Agency v. AMI Brookwood Med. Ctr., 564 So. 2d 54, 57 (Ala. Civ. App. 1989)).

Furthermore, § 22-22A-8, Ala. Code 1975, which governs the adoption and promulgation of rules by the AEMC, does not contain an express exemption from the AAPA. At one time, § 22-22A-14, Ala. Code 1975, exempted the Alabama Department of Environmental Management ("ADEM"), and therefore the AEMC, from the AAPA. However, that provision was repealed by Act No. 86-472, § 3, Ala. Acts 1986, effective April 30, 1986. Subsequently, this Court has applied both the AAPA and § 22-22A-8 to the rule-making function of the AEMC. See Ex parte Legal Env'tl. Assistance Found., Inc., 832 So. 2d 61, 66-67 (Ala. 2002) (implementation procedures regarding water quality

are "rules" that required ADEM to comply with the rule-making provisions of the AAPA and § 22-22A-8).

From the foregoing, it is clear that the Air Control Act does not preempt the administrative procedures provided in the AAPA. Accordingly, pursuant to § 41-22-25(a), the AAPA takes precedence in matters of administrative procedure. Therefore, the Court of Civil Appeals erred in affirming the trial court's judgment on the basis of preemption.

B. Is the Board a State "Agency" or a "Local Governmental Entity"?

Even though the administrative procedures of the AAPA are not preempted by the procedural provisions of the Air Control Act, we still must determine whether the Board is an "agency" of the State subject to the AAPA or an agency of a "local governmental unit," which is expressly exempt from the AAPA.

The AAPA was designed "to provide a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public." § 41-22-2(a), Ala. Code 1975 (emphasis added). Section 41-22-2(d), Ala. Code 1975, provides that "[e]very state agency having express statutory authority to promulgate rules and

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regulations shall be governed by the provisions of" the AAPA.
(Emphasis added.)

Section 22-28-23(b), Ala. Code 1975, provides, in part, that

"each county board of health shall have the authority to establish, and thereafter administer, within their jurisdictions, a local air pollution control program which:

"(1) Provides, subject to subsection (d) of this section, by ordinance, regulation, or resolution, for requirements for the control or prevention of air pollution consistent with, or more strict than, those imposed by this chapter or the rules, regulations, and standards promulgated by the [AEMC] under this chapter [i.e., the Air Control Act]"

Accordingly, the Board has express statutory authority to promulgate rules and regulations. Therefore, the only question that remains with regard to the applicability of the AAPA to the Board is whether the Board is a "state agency" as defined by the AAPA.

Section 41-22-3(1), Ala. Code 1975, of the AAPA defines an "agency" as:

"Every board, bureau, commission, department, officer, or other administrative office or unit of the state, including the Alabama Department of Environmental Management, other than the Legislature and its agencies, the Alabama State Port Authority,

the courts, the Alabama Public Service Commission, or the State Banking Department, whose administrative procedures are governed by Sections 5-2A-8 and 5-2A-9[, Ala. Code 1975]. The term shall not include boards of trustees of postsecondary institutions, boards of plans administered by public pension systems, counties, municipalities, or any agencies of local governmental units, unless they are expressly made subject to this chapter by general or special law."

(Emphasis added.) The phrase "local governmental unit" is not defined in the AAPA. Section (1) of the Commentary to § 41-22-3 does state, however, that "[t]his act encompasses state agencies and has no application to schools, counties, cities or their agencies."

In arguing that the Board should be subject to the AAPA, GASP relies in part on ABC Coke v. GASP, 233 So. 3d 999 (Ala. Civ. App. 2016). GASP describes the facts in ABC Coke as follows: "ABC Coke and the Board appealed a circuit court judgment holding that GASP was entitled to a hearing before the Board to contest the issuance of an air pollution permit to ABC Coke by the Jefferson County Department of Health Air Pollution Control Program." GASP's brief, p. 34. After detailing what it describes as the Court of Civil Appeals' holdings in ABC Coke, GASP concludes by arguing: "[T]he Court

of Civil Appeals considered the Board to be an 'agency' of the State subject to the AAPA." Id. at 35.

GASP reads too much into the ABC Coke decision.⁶ The Court of Civil Appeals in ABC Coke did state that "[t]his court has held that [the Board] is a state agency," citing Smith v. Smith, 778 So. 2d 189, 191 (Ala. Civ. App. 1999). ABC Coke, 233 So. 3d at 1001. However, that court's citations to the AAPA were for background reference as to how Alabama's appellate courts review decisions from administrative agencies. The heart of the ABC Coke decision focused on Chapter 12 and what its provisions required GASP to show in order to have "standing" to challenge the Board's issuance of the permit in question. The Court of Civil Appeals did not in any way hold in ABC Coke that the Board is subject to the administrative procedures of the AAPA.

GASP also argues that the Board should be considered a State agency under the AAPA because "air pollution control programs adopted by county boards of health implement State policy for air pollution control." GASP's brief, pp. 31-32.

⁶GASP neglects to mention in its appellate brief that ABC Coke was a plurality opinion in which two judges concurred in the main opinion, two judges concurred in the result, and one judge dissented.

GASP says this is apparent because the Board provides "requirements for the control or prevention of air pollution consistent with, or more strict than, those imposed by ... the [AEMC] under" the Air Control Act. § 22-28-23(b)(1), Ala. Code 1975. More generally, GASP notes, the Board has a duty "[t]o supervise the enforcement of the health laws of the state" § 22-3-2(1), Ala. Code 1975. GASP also notes that the Board operates "under the general supervision and control of the State Board of Health," § 22-3-1, Ala. Code 1975, and that the State Health Officer "exercise[s] general supervision over county boards of health and county health officers." § 22-2-8, Ala. Code 1975.

Citing the foregoing statutory provisions, the Court of Civil Appeals in Williams v. Madison County Board of Health, 523 So. 2d 453, 455 (Ala. Civ. App. 1988), concluded that the Madison County Board of Health was "a local agency of the State of Alabama and not an agency of the county" in the course of determining that Madison County's board was entitled to State immunity. In reaching this conclusion, the Williams court also declared that county health boards "execute a state function and not a county function." Id. Relying on

Williams, the Court of Civil Appeals in Smith v. Smith, 778 So. 2d 189, 191 (Ala. Civ. App. 1999), concluded that an employee of the Board was entitled to what we now refer to as State-agent immunity because "a county board of health is a state agency."

GASP relies heavily on the statements in Williams and Smith to support its argument that the Board is a "state agency" under the AAPA. However, as the Air Program observes in its brief, GASP's argument conflates State-immunity law with the law concerning the AAPA. Whether an entity is a State agency for purposes of State immunity does not determine whether the same entity is a "state agency" under the AAPA. As we have observed:

"This Court considers several factors in determining whether an entity is 'an immediate and strictly governmental agenc[y]' and thus entitled to protection from suit under [Art. I,] § 14, [Ala. Const. 1901,] including factors related to '(1) the character of the power delegated to the body; (2) the relation of the body to the State; and (3) the nature of the function performed by the body.' Rodgers v. Hopper, 768 So. 2d 963, 966 (Ala. 2000) (citing [Armory Comm'n of Alabama v. Staudt, 388 So. 2d [991,] 993 [(Ala. 1990)])".

Ex parte Troy Univ., 961 So. 2d 105, 109-10 (Ala. 2006). The generalized nature of the factors involved in an immunity

determination dictates that a wide range of entities may be considered governmental agencies that are entitled to protection from suit under Art. I, § 14, Ala. Const. 1901.

In contrast, our understanding of what constitutes a "state agency" under the AAPA is circumscribed by the definition provided in § 41-22-3(1) and the purpose of the AAPA to "to provide a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public." § 41-22-2(a). The statutory definition of "State agency" and the purpose of the AAPA reflect that entities that qualify for State immunity might not fall under the ambit of the AAPA.

The foregoing fact is readily demonstrated by a couple of examples in the area of education. "This Court has extended the restriction on suits against the State found in § 14 'to the state's institutions of higher learning' and has held those institutions absolutely immune from suit as agencies of the State." Ex parte Troy State Univ., 961 So. 2d at 109 (quoting Taylor v. Troy State Univ., 437 So. 2d 472, 474 (Ala. 1983)). In contrast, the text of § 41-22-3(1) expressly states that "[t]he term ['agency'] shall not include boards of

trustees of postsecondary institutions" In keeping with this command, our courts have ruled that State colleges and universities are exempt from the AAPA. See, e.g., Tatum v. Freeman, 893 So. 2d 1213, 1220 (Ala. Civ. App. 2004) (noting that "the AAPA does not apply" to Trenholm State Technical College); King v. Calhoun Cnty. Coll., 742 So. 2d 795, 796 (Ala. Civ. App. 1999) (holding that "§ 41-22-3 exempts [Calhoun Community] College from the application of the AAPA").

Similarly, "[f]or purposes of § 14 immunity, county boards of education are considered agencies of the State. Louviere v. Mobile County Bd. of Educ., 670 So. 2d 873, 877 (Ala. 1995) ('County boards of education, as local agencies of the State, enjoy [§ 14] immunity.')". Ex parte Jackson Cty. Bd. of Educ., 4 So. 3d 1099, 1102 (Ala. 2008). Despite the immunity protection afforded to county boards of education, however, they have been held not to be subject to the AAPA.

"The Board [of School Commissioners of Mobile County] is a local agency; it is not a state agency subject to the application of the AAPA. Accordingly, the AAPA, which governs state agencies, does not apply to the Board or to disputes arising from action taken by the Board or proceedings before the Board. The Board is 'excluded from the AAPA's

coverage.' Tatum v. Freeman, 893 So. 2d [1213,] 1220 [(Ala. Civ. App. 2004)]."

Board of Sch. Comm'rs of Mobile Cty. v. Biggs, 939 So. 2d 942, 947 (Ala. Civ. App. 2006). This conclusion is supported by the commentary quoted above stating that "[t]his act encompasses state agencies and has no application to schools, counties, cities or their agencies." § 41-22-3, Ala. Code 1975, Commentary, Section (1) (emphasis added).

GASP attempts to refute the Board and the Air Program's reliance upon Biggs by arguing that Biggs was wrongly decided because this Court has stated that "[c]ounty boards of education are not agencies of the counties, but local agencies of the state, charged by the legislature with the task of supervising public education within the counties. . . . They execute a state function -- not a county function -- namely, education." Hutt v. Etowah Cty. Bd. of Educ., 454 So. 2d 973, 974 (Ala. 1984).

The language in Hutt is echoed by the Court of Civil Appeals in Williams with regard to county boards of health. But, as with Williams, GASP neglects to mention that the Hutt Court was discussing the issue whether the Etowah County Board of Education was entitled to State immunity, not whether it

was a "state agency" for purposes of the AAPA. Even in the immunity context, the language used in Hutt and Williams -- describing county boards of education and county health boards as "local agencies of the state" -- indicates the mixed nature of those entities. Indeed, with regard to county boards of health, this Court in an early case commented on the unique structure of Alabama's regulation of public health:

"This legislative agency or set-up for the administration and enforcement of public health laws is somewhat original in legislative concept.

"....

"We have something of a federated system with county boards of health and county health officers, with defined powers and duties, subject to the supervision and control of the state board of health."

Hard v. State ex rel. Baker, 228 Ala. 517, 519-20, 154 So. 77, 78-79 (1934).

In a "federated system" we would expect to see state oversight and local autonomy mixed together, and that is exactly the case with county boards of health.

County boards of health are constituted under § 22-3-1, Ala. Code 1975, which provides:

"The boards of censors of county medical societies in affiliation with the Medical

Association of the State of Alabama ... are constituted county boards of health of their respective counties, ... but shall be under the general supervision and control of the State Board of Health. ... The presiding officer of each county commission shall be a member of the county board of health in his county."

(Emphasis added.)

Section 22-3-2, Ala. Code 1975, prescribes various duties of the county boards of health. Those duties, which are limited to the relevant county, and which are subject to the general supervision of the State Board of Health, include:

"(1) To supervise the enforcement of the health laws of the state, including all ordinances or rules and regulations of municipalities or of county boards of health or of the State Board of Health ... and to adopt and promulgate, if necessary, rules and regulations for administering the health laws of the state and the rules and regulations of the State Board of Health, which rules and regulations of the county boards of health shall have the force and effect of law and shall be executed and enforced by the same bodies, officials, agents and employees as in the case of health laws;

"....

"(5) To elect a county health officer, subject to the approval of the State Committee of Public Health, who shall devote all of his time to the duties of his office The jurisdiction of such officer shall extend to all parts of the county, including all incorporated municipalities; and should the health officer so elected neglect or fail faithfully to perform any of the duties which are lawfully prescribed for him or if he fails or

refuses to observe or conform to the rules, regulations or policies of the State Board of Health, the State Health Officer shall remove said county health officer from office."

(Emphasis added.)

Section 22-3-5, Ala. Code 1975, sets forth the duties of county health officers, all of which are limited to the pertinent county. Those duties include:

"(8) To be present at all meetings of the county board of health for the purpose of keeping that body fully informed as to health conditions prevailing in the county; and to likewise keep the county commission informed on such matters as said commission may deem proper;

"....

"(11) To occupy an office to be provided by the county commission, and the county commission shall appropriate from the revenue of the county such sums as are found necessary to furnish and equip the office of the county health officer with all necessary supplies and furnish all necessary staff, transportation and other expenses of the county health officer and shall appropriate, from the revenues of the county, money for the prosecution of public health work which has been recommended by the county health officer and endorsed by the county board of health and approved by said county commission;

"....

"(13) To inspect the schools of the county at least once annually

"....

"(17) To attend meetings of the county commission, from time to time or whenever so requested, for the purpose of giving said commission all desired information as respects the public health interests of the county; and

"(18) To prepare and file for permanent record with the county commission an annual statement of receipts and disbursements of his unit"

(Emphasis added.)

As the foregoing excerpts from the relevant statutes indicate, county boards of health and county health officers perform local functions and have jurisdiction only within their relevant counties, albeit under the general supervision of the State Health Officer.⁷

The local scope of the Board's responsibilities is, if anything, even more pronounced in the specific program at issue here, the Air Program. Section 22-28-3(b), Ala. Code 1975, provides that "local air pollution control programs are to be provided for to the extent practicable as essential instruments for the securing and maintenance of appropriate

⁷GASP contends that because counties "can exercise only that authority conferred on them by the Legislature," for "the Board to be an agency of Jefferson County, the Legislature must have conferred on Jefferson County the authority to establish the Jefferson County Board of Health as an agency of the county." GASP's reply brief, pp. 14-15. But the fact that counties are creatures of statute does not prohibit the legislature from itself creating county agencies.

levels of air quality." More specifically, § 22-28-23, Ala. Code 1975, provides, in part:

"(b) Subject to the provisions of this section, ... each county board of health shall have the authority to establish, and thereafter administer, within their jurisdictions, a local air pollution control program which:

"(1) Provides, subject to subsection (d) of this section, by ordinance, regulation, or resolution, for requirements for the control or prevention of air pollution consistent with, or more strict than, those imposed by this chapter [i.e., the Air Control Act] or the rules, regulations, and standards promulgated by the commission under this chapter;

"(2) Provides for the enforcement of such requirement by appropriate administrative and judicial process, including a process for the administrative assessment of penalties substantially equivalent to that provided in subdivision (18) of Section 22-22A-5, provided however, that no person subject to the jurisdiction of the ... county program shall be subject to the administrative assessment of penalties by the ... county program if the department has issued an order that assesses a penalty or if the department or Attorney General has commenced a civil action to recover a penalty for the same violation pursuant to subdivision (18) of Section 22-22A-5. Each ... county board of health establishing a program under this section may advertise and adopt all rules and regulations in accordance with the same procedure provided in this chapter for the adoption of rules, regulations, and

standards by [AEMC], and all judicial remedies provided by this chapter and Chapter 22A of this title shall be available and enforceable ... by the county board of health; and

"(3) Provides for administrative organization, staff, financial, and other resources necessary to effectively and efficiently carry out its program. The county commission of each county ... within the jurisdiction of a local air pollution control program established by a county board of health may appropriate such sums as they may determine necessary and desirable for the establishment, administration, and enforcement of the program.

"(c) No county board of health shall have the authority to exercise air pollution control jurisdiction within the bounds of any incorporated municipality or the police jurisdiction thereof having an air pollution control program as authorized. ..."

(Emphasis added.)

In accordance with the foregoing statutory framework, the Air Program operates only within Jefferson County, and the regulations that it implements and enforces are local regulations adopted by the Board. Moreover, the regulations at issue here apply by their terms only in Jefferson County. GASP offers no substantive explanation as to why a truly local regulation from a program that operates solely within the

confines of a county should be subject to the statewide procedural requirements of the AAPA. Cf. State Bd. of Health v. Greater Birmingham Ass'n of Homebuilders, 384 So. 159 (Ala. 1980) (pursuant to a local act, the Jefferson County Health Officer had the sole authority over approval of plans relating to sewage collection and treatment, subject to the overall direction of the State Health Officer and the County Board of Health; plans were not required to be submitted to the State Health Department for its approval).

The fact that the Board's jurisdiction is limited to a single county also renders many of the provisions of the AAPA superfluous or futile. GASP contends that the Board violated the AAPA by failing to publish notice of the proposed amendments in the Alabama Administrative Monthly, pursuant to § 41-22-7(f), Ala. Code 1975. However, § 41-22-7(g) provides that the Legislative Services Agency, Legal Division, may omit from the Alabama Administrative Monthly and the Alabama Administrative Code rules that apply to only one county. Thus, that specific relief sought by GASP was not required by the AAPA.

Furthermore, as one court has observed, "[t]he Alabama Code appears to give substantial financial autonomy to each county board of health." Outlin v. Jefferson Cty. Bd. of Health, No. 2:06-CV-147-VEH, Aug. 21, 2006 (N.D. Ala. 2006) (not selected for publication). Section 22-3-10, Ala. Code 1975, authorizes the county commission of each county to levy a special annual tax sufficient to maintain the county health officer and the county health department. As the text of § 22-3-5(11), Ala. Code 1975 (which we quoted above), details, county commissions are required to fund the needs of county health officers from the revenues of the counties. Section 22-3-6, Ala. Code 1975, also provides that "[t]he salary of the county health officer shall be fixed by the appropriate merit system, and shall be payable from funds available to the county for this purpose"

Finally, the Board is different from many other county boards of health with respect to personnel matters. Unlike many other county boards of health, the Board's employees were removed from the state merit system by Ala. Acts 1945, Act No. 248; instead, they were placed under the Jefferson County merit system. See also § 36-26-82, Ala. Code 1975 (employees

of county health departments are to be covered by the state merit system); § 36-26-83, Ala. Code 1975 (providing that § 36-26-82 does not apply to any county health department whose employees are covered by a county-wide personnel system).⁸ The Board's absence from the state merit system also weighs in favor of finding it to be a local governmental unit.

Taking the totality of the foregoing into consideration, we conclude that the Board is a "local governmental unit" rather than a "state agency" for purposes of the AAPA. Accordingly, it was unnecessary for the Board to comply with the notice and hearing requirements of the AAPA when it repealed Chapter 12 and adopted new rules for the Air Program.

IV. Conclusion

The Court of Civil Appeals erred in concluding that the Air Control Act preempts the administrative procedures provided in the AAPA. However, the Board is not an "agency" of the State as defined in § 41-22-3(1), Ala. Code 1975, of

⁸GASP cites Ala. Code 1975, § 22-3-4, with respect to the employees of county health departments being subject to the "appropriate merit system." That statute does not support GASP's argument because the "appropriate merit system" in this case is the Jefferson County merit system.

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the AAPA, and therefore the Board is not subject to the procedural requirements of the AAPA. Thus, although we rely on different rationale than the Court of Civil Appeals, that court's judgment affirming the judgment of the circuit court is, nevertheless, affirmed.

AFFIRMED.

Parker, C.J., and Bolin, Wise, Bryan, Sellers, and Stewart, JJ., concur.

Mitchell, J., recuses himself.