CIVIL SERVICE UPDATE

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I.
INTRODUCTION

My approach in this paper will be the same as the last time: to review case law developments and selected decisions by arbitrators or hearing examiners during 2008 and up to the current date. I will address some developments in the last legislative session. I have added some areas for study and discussion beyond the recent developments context of the overall presentation.

I have tried to make this paper short and to the point. The paper will focus on developments, so that you can follow up on issues which are relevant in your city. We have attempted to provide a functional and workable practice tool. This paper will be posted on the TML website and is on our Rampage! flashdrive. The disciplinary and arbitration awards discussed are available upon request, in order to magnify the value of the paper to you as a practice tool.

II.
IMMUNITY FROM SUIT IN LITIGATION OVER EMPLOYEE RIGHTS

After the Texas Supreme Court's decisions on immunity from suit in *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006) and *Reata Construction Corp*. *v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006), the Court was not long in applying the rules to recovery of pay claims under state law, including Chapters 142 and 143. In *City of Houston v. Williams,* S.W.3d, 2007 WL 549745 (Tex. Feb. 23, 2007) (per curiam), the Court held that there was no waiver of immunity from suit under the statutes involved, and remanded for consideration of Chapter 271. My prediction that the Court would find that statute inapplicable did not come true. The Houston Court of Appeals decided *Williams v. City of Houston*, ---S.W.3d---2009 WL 838571, Tex.App—Houston [14th Dist.], on remand from the Supreme Court's decision at 216 S.W.3d 827. The Court of Appeals reviewed the record and concluded that a contract for services was created within the terms of Chapter 271 of the Government Code. The court applies private sector case law defining a "unilateral contract" formation. Once the terms and conditions of the applicable city ordinances have been met by employee performance, the executory contract becomes a written agreement which complies with the terms of 271.151 through 271.160. The court rejects the argument that the Meet and Confer and CBA between the parties constitute a contract for the payments in issue. The court concludes that firefighters lack standing to sue for violation of the Meet and Confer or Collective Bargaining Agreements. The court also recognizes that the labor agreements, to the extent that they preempt statutes or city ordinances, may actually cancel the very basis for waiver immunity established under this case. Firefighters would have to allege and prove a breach of duty of fair representation against the association if suing on the agreement without the association.

City of El Paso v. Heinrich, ---S.W.3d---2009 WL 1165306 (Tex.)

This is the Supreme Court's most recent decision on immunity from suit. It involved an effort to recover pension benefits. The court reviews its many recent decisions on the subject of immunity and its cases applying the declaratory judgment statute as a waiver of immunity from suit. Declaratory and injunctive relief are allowed prospectively and do not violate the city's immunity from suit. Those actions are equitable remedies directed at state or public officials to require their compliance with the law and are is not barred by immunity. A lawsuit for damages would be barred. Suits to enforce and apply contracts or to recover payments are barred by immunity. In order to obtain prospective relief the plaintiff must allege that an official acted without legal authority or failed to perform a non-discretionary ministerial act. The court refers to its prior decision in *Williams* recognizing limits on available remedies. The decision appears to say that a judgment for money damages and not be permissible, under other equitable theories. Some of these finer details still not ultimately decided. However if I was a Plaintiff's lawyer I would not take that type of case on a contingency.

III.
ELIGIBILITY LISTS AND PROMOTIONS

City of Round Rock v. Whiteaker, 241 S.W.3d 609, (Tex.App.—Austin, 2007)

Eleven new captain positions were created by the City Council. Whiteaker was number eleven. He was offered a promotion into a forty hour assignment, but turned it down. Whiteaker insisted that he remained on the eligibility list. He had been required to sign a letter evidencing his rejection of the offered promotion.

About two months later Whiteaker was informed that he had been promoted. He was told that he would have to accept the promotion and face discipline if he failed to perform the new position, or in the alternative he could seek a voluntary demotion. Again protesting the dilemma offered to him, he signed the necessary correspondence and claimed that he was still on the promotional eligibility list. Whiteaker filed suit to obtain his promotion and back pay. The city asserted its defense of immunity. The court's analysis appears to track the eventual and recent analysis in *El Paso v. Heinrich*, ---S.W.3d--- 2009 WL 1165306. The court engages in a review of arguments about equitable back pay as an exception to the immunity defense. The decision limits the outcome in *City of Waco v. Bittle*[1] to the context of an appeal from a proceeding where back pay was expressly authorized. The court finds that the back pay claim is barred by immunity. It leaves open the question as to equitable back pay if an open promotional position had not been filled. The court rejects the argument that exhaustion of administrative remedies before the Commission was required. The court concludes that Whiteaker is entitled to the opportunity to amend his pleadings, and affirms denial of the City's Plea to the Jurisdiction.

[1] *City of Waco v. Bittle*, ---S.W.3d--- 2004 WL 2584656

Carr v. City of Fort Worth, 266 S.W.3d 116, (Tex.App.—Fort Worth, 2008)

This is a promotional case but results from a vacancy caused by suspension of another firefighter. The chief failed to file a notice with the commission of the suspension within 120 hours, in accordance with Chapter 614. Carr claims that the suspension was immediately effective in that his right to the promotion to the vacancy occurred within the 120 hour period.

The hearing examiner concludes that the suspension of the firefighter created a vacancy in the rank of fire engineer. Although the hearing examiner refers to the current provisions in 143.021 the court indicates that a vacancy would have existed prior to the amended statute. This observation doesn't make sense, since the current provisions in 143.036 distinguish between police officers and firefighters, and the legislature obviously contemplated a different result by virtue of the current language. In any event the Court of Appeals holds that the first candidate on the list was entitle to promotion. That individual should have been promoted, and then would be demoted when the failure to file the notice vitiate the proposed suspension. Carr would have gone onto the reinstatement list under Subsection (f), and would have been waiting in the wings for his promotion at the point of the next vacancy. The advantage to him in this situation is that it insulates him from the expiration of the eligibility list.

IV.
DUE PROCESS AND PROPERTY RIGHTS

Jackson v. City of Texas City, 2008 WL 4792662 (Tex.)

This case upholds a non-disciplinary termination for failure to meet a condition of employment included in initial hiring standards.

City of Sweetwater v. Geron, 380 S.W.2d 500 (Tex. 1964) held that mandatory retirement age was a condition of employment, that termination of an employee under that provision was not a disciplinary matter. The commission had no jurisdiction to consider an appeal. The court holds that the jurisdiction of the commission (and a hearing examiner) are limited to the circumstances set forth in the statute. *Grote v. City of Mesquite* upheld a similar career obligation to maintain paramedic certification. *See also Cantu v. Perales* which involved a resignation and attempted appeal.[2]

The Court of Appeals in *Jackson* concluded that the condition of employment language in the collective bargaining agreement expressed the parties intention that maintaining paramedic certification was a condition of employment and was outside the disciplinary process. The contract said, among other provisions: "The qualifications, standards, and/or terms and conditions of employment set forth in the Conditions of Employment Contract in effect at the completion of the one year probationary status shall become permanent. Any future modifications, amendments, or changes shall only be made

[2] *Grote v. City of Mesquite*, ---S.W.3d---2001 WL 180260, *Cantu v. Perales*, 97 S.W.3d 861, Tex.App.—Corpus Christi 2003

through the collective bargaining process by mutual consent of the Union and City for that employee." The firefighters attempted to create an issue based upon the civil service rules and regulations, and conflicts in the documentation concerning the duty to maintain certification, the court relied upon prior case law and contractual preemption to sustain the loss of employment with no right of appeal.

City of Santa Fe v. Boudreaux, 256 S.W.3d 819, (Tex.App.—Houston [14th Dist.], 2008)

Under its labor agreement, the City of Santa Fe had established a citizen commission to make decisions on fire and police discipline cases. The court reviews the principles for delegation of legislative authority under *City of Garland v. Byrd*, 97 S.W.3d 601, (Tex.App.—Dallas, 2002) and *The Texas Boll Weevil Eradication Foundation v. Lewellen*, 952 S.W.2d 454, (Tex. 1997). The court concludes that the delegation of authority to the citizen commission was unconstitutional. There were no provisions for review, such as those applicable to the civil service commission and hearing examiners under the Act. There were no procedural protections such as those provided in Chapter 143. The court relied substantially on the committee's authority to make its own rules and to change them on an ad hoc basis. The selection and the obligation of the members of the committee were insufficiently defined to provide for fundamental due process and procedural protections.

Seals v. City of Dallas, 249 S.W.3d 750, (Tex.App.—Dallas, 2008)

Firefighters filed suit over the promotion of other individuals not qualified for positions under department standards and rules. These promotions occurred under the City of Dallas Charter Civil Service provisions. The trial court granted the City's Plea to the Jurisdiction and this appeal followed. The court considers initially whether the ordinances and rules of the City of Dallas constituted a contract. In spite of written policies and personnel procedures, the rules expressly disavowed a contract or personal right of action.

The Court of Appeals concluded the declaratory judgment claim was not permitted by virtue of governmental immunity and there was no constitutional property interest.

V.
TEMPORARY SUSPENSION

Garcia v. City of Killeen, ---S.W.3d---2009 WL 349161, (Tex.App.—Austin)

This case involves the application of Chapter 143.056 and the postponement of disciplinary action during the pendency of criminal proceedings. Garcia filed suit against the City of Killeen seeking a declaratory judgment concerning the date he was "officially charged" under Section 143.056. The court concludes that the application for an issuance of an arrest warrant was not an official charge. The official charge did not occur until information was filed against the officer in the County Court for a Class A Misdemeanor. The justice court issuing the original arrest warrant had no jurisdiction

over the primary offense. Under the decision in this case, the officer was entitled to recover 32 days of back pay. He did not dispute the disciplinary action, just the length of the temporary suspension.

City of Fort Worth
And
Police Officer J. D. Carter
AAA No. 70 390 00310 07
AAA No. 70 390 00357 07
Decision by Harold Moore, Hearing Examiner

Officer indefinitely suspended for sexual contact with a juvenile prisoner arrested for DWI. The Officer's Motion to Dismiss for procedural defect under 614 was denied. Chapter 614 did not apply to City of Ft. Worth until Sept 2005, and the incident was prior to that time.

After being informed of complaint by the juvenile's mother, he spoke to her for 45 minutes on the phone and arranged to have the subject's (parent's) vehicle released for free, and did not report the complaint to his supervisors. City's evidence and argument relied on officer's failure to use procedures and methods to avoid frivolous complaints, no dispatcher contact on the need to readjust the seat belt, and the failure to convey the complaint to his supervisors.

Officer defends on the basis of unreliable, intoxicated complainant who made false statements during the arrest process, and attacks her testimony about the time frames in the incident and the travel time records. He points to his excellent record, no prior discipline, and claims that the rules and expectations in the Ft. Worth PD about transporting juveniles and use of video cameras had been vague, spotty, and inconsistent.

Hearing examiner admits that although the burden of proof is preponderance, as a practical matter, examiners apply a clear and convincing standard. Officers must meet a high standard, which includes taking the steps to remain above reproach. An experienced officer must know to follow the procedures and this case was one where a knowledgeable officer would know to take precautions and follow the rules to the letter. Examiner does not believe the officer's claim that he thought the mother's notice to the jail supervisor (another agency) satisfied the rule about notice to his chain of command.

Progressive discipline is not necessary in serious misconduct cases. Indefinite suspension sustained.

VI.
DECISIONS BY ARBITRATORS/HEARING EXAMINERS IN APPEALS FROM DISCIPLINARY PROCEEDINGS

Commander Larry Oliver
And
City of Austin
AAA No. 70 390 00254 08
Decision by Norman Bennett, Hearing Examiner

This case involved comments referring to the sexual orientation of another police officer heard by Commander Oliver, which he failed to report. Oliver refused to accept a 30 day suspension by agreement and the Chief imposed an indefinite suspension. Issues were raised concerning the comparative treatment of other officers, including an Assistant Chief, in connection with other comments or remarks on race, gender and sexual orientation. The Police Chief testified that he had a policy of imposing greater discipline in the upper ranks because of the example and accountability involved. Since prior discipline had been imposed on lower ranking officers for 10 to 15 days, the Chief had no option but to impose an indefinite suspension on the higher ranking commander.

The hearing examiner found that the failure to waive an appeal on the proposed 30 day agreed suspension did not make it properly a dischargeable offense. The Chief testified that he never believed more than 30 days was reasonable for the conduct in question only 20 days had been imposed on the officer who actually made the comments. The hearing examiner found the City's distinctions unpersuasive finding that it made no sense to have greater punishment for the one that failed to report it than for the one that made the remarks.

City of Austin
And
CLEAT
Officer Robert Bohanon
AAA No. 70 00586 07
Charles Overstreet, Hearing Examiner

Officer backed into citizen's vehicle while off duty. He wrote a note accepting responsibility but failed to pay for the damage. He was given a 10 day suspension for violation of the safety responsibility provisions of State law and violating the department rule against acts that bring discredit upon the department.

The defense claimed the acts were beyond the 180 day rule, and that the APD had notice of the events when a citizen complaint was made to the Police Monitor. The hearing examiner rejected the City's agency defense, and found that the Police Monitor was City department designated as the primary location for complaints against officers. The City and the Chief was charged with such knowledge. The acts that brought discredit on the department did not occur when the complaint was filed, but when the

incident happened. There was no proof of the remainder of this rule about loss of confidence in the department.

The suspension was set aside and all back pay was restored.

City of Austin, Fire Department
And
Lt. Christopher Giberson
Decision by John B. Barnard, Hearing Examiner

Lt. Giberson was indefinitely suspended for computer misuse, access and use of pornography and dating websites, sexual harassment of female employees and crew members, false testimony and inappropriate advice to an employee at a DWI accident scene, and retaliation against his crew for providing testimony against him. The first defense was based on the 180 day limitations rule. Some of the acts listed were beyond 180 days; the hearing examiner concluded that consideration of a pattern is appropriate, provided there are actionable events within 180 days.

This firefighter attempted to say that looking at his personal email on the City computer was not a violation of the policy because it was his personal email. The City's computer access policy was fatal to his privacy expectation claims. The hearing examiner found that he had displayed pornography in his locker at the station, and accepted the testimony that female firefighters saw it and heard his comments about the pictures. They were repeated sexual innuendos, anatomical references, derogatory references on race, religion and gender, as well as performance related gender comments. This firefighter had previously been counseled in his evaluations about comments on gender and race; he had previously been reprimanded and ordered to apologize. The union defended on the basis that Giberson was an experienced firefighter that the paramedics could not identify him at the DWI scene, that bias and personal conflicts should result in disregarding co-employee testimony that his Battalion Chief had a vendetta for him and that the City was looking to set him up on his computers. Training sessions on City computer use recognized some inadvertent access to inappropriate materials. The defense claimed that the alleged conduct was vague and in exact with respect to the 180 day rule. This is a classic nit picking, complaining about everything and then say you don't even have a dog defense. The hearing examiner concluded that the charges were true and sustained the discipline.

Police Officer Tony Smith
And
City of Austin
AAA No. 70 390 00602 08
Decision by Norman Bennett, Hearing Examiner

Officer Smith used City computers to look up historical information concerning Chief Acevedo in a sexual harassment dispute in California. That was precipitated by an indefinite suspension of another APD officer for sexual harassment. Smith posted a

copy of a blog dealing with the California issues on the bulletin board. Smith had previously been disciplined for his involvement with a woman who was a methamphetamine addict, and was implicated in her illegal activities. He had been given a 60 day suspension, and the charges included insubordination. The internal affairs investigation on the new case recommended discipline on criticism of the Chief and on violation of the rules on computer utilization. At the Disciplinary Review Board an additional charge of insubordination was also added and considered. The Chief offered an opportunity for resignation and then proposed an agreed 30 day suspension with waiver of appeal which Smith rejected. Smith was then indefinitely suspended. The defense raised violations of the Meet and Confer agreement provisions on 48 hour notice, by virtue of the late insubordination charge. They took issue with a number of factual aspects, including a semantic argument over Smith calling the Chief a hypocrite. They complained about the lack of access in the disciplinary proceeding to a memorandum by Sgt. Hightower, which was a part of the investigation.

The hearing examiner concluded that Sgt. Hightower's memo should be excluded from evidence, and that the only evidence for progressive discipline is the 60 day prior suspension theory. He concluded that the officer had notice of the insubordination claim prior to the disciplinary review board and that no other information is required. The contract provision for 48 hour notice does not require notice of the actual rules or infractions, but merely of the factual allegations involved. The hearing examiner found that the officer's conduct overall, and his comments, did accuse the Chief of hypocrisy by reference to the California incident. He sustained the criticism and computer utilization issues. The hearing examiner found that the prior suspension for computer use and insubordination demonstrated adequate, progressive discipline and justified the indefinite suspension.

Austin P.D. v. Thomas

Officer Thomas was indefinitely suspended for multiple false statements in connection with a domestic violence incident with his girlfriend. There were communications first to his sergeant then to internal affairs and then to the disciplinary review board. He was also charged with failure to notify his supervisor of involvement in the altercation with his girlfriend. This officer had a history of multiple prior disciplinary matters involving his girlfriends.

The defense urged exclusion of the officer's statements to the sergeant prior to the formal investigation. The department rules and regulations imposed a duty upon the sergeant to investigate the conduct of his subordinate, which would include disciplinary issues. They attempted to construct a "fruit of the poisonous tree" model based on the sergeant's initial communications and in the eventual investigative findings before the Discipline Review Board. They urged that the failure to provide a copy of the complaint, the failure to provide a 48 hour notice of investigation, and the failure to provide 3 hours of access to review investigative materials (pursuant to the Meet and Confer Agreement) were fatal to the investigation.

The hearing examiner concluded that there was no complaint of misconduct at the time of the sergeant's investigation. The sergeant was not conducting an internal administrative investigation of misconduct nor acting for internal affairs. The hearing examiner also declined to require a new 48 hour notice when the allegation changed from a criminal charge to the lesser administrative charge. The issues of truthfulness and the lesser charge of failure to notify his supervisor were sufficiently covered. He concluded the investigation was not tainted by the original allegation of family violence assault. The hearing examiner did not find the officer credible in his denial of knowledge of a 911 call by his girlfriend, or his other explanation about his communications and failure to report to his supervisor. This officer's progressive disciplinary history and 5 prior instances of similar misconduct were fatal to his case. The indefinite suspension was confirmed.

Police Detective Mason Feinartz
And
The City of Austin
Decision by Chuck Miller, Hearing Examiner

This detective was indefinitely suspended for working on a financial unit crimes case. He had previously been disciplined for working on cases outside the scope of his unit. At that time he had completed a personal improvement plan after a 5 day insubordination suspension. In addition he had been given a direct order by a prior Chief of Police not to work on financial unit cases. The detective took a case by phone and created an intake form. He checked the box assigning the case to himself, which he later claimed was inadvertent. He arranged to go with a female officer to interview the female complainant at a jail facility outside the Austin Police Department, and took a statement, filing a supplemental report.

Officer Feinartz claimed that he was only "technically" assisting in the case and that he was not going to file it, therefore he was not working the case. He claimed that he had personal curiosity about the identity theft components and wanted to obtain that information for teaching purposes. The defense urged that this officer was a commended detective, was highly capable and had successfully investigated many cases, including recent commendations by the Chief. The hearing examiner concluded that the new Police Chief was entitled to adopt a policy of firm discipline on second offense insubordination. The Chief had adopted a disciplinary matrix increasing the punishment for such cases. This decision is a good example of using transition from one administration to another to support a change in disciplinary policy and attitude. The hearing examiner applies the just cause standard, and cites the case law preventing him from substituting his judgment for that of the Police Chief. He noted that the officer continued his course of conduct over a period of several days, and that his disciplinary history made this insubordination inexcusable. The indefinite suspension was upheld.

Police Officer B.M. Stuart
And
City of Fort Worth
AAA No. 70 390 00436 08
Decision by William E. Hartsfield, Hearing Examiner

This officer was under close supervision for sick leave abuse. An altered doctor's note was turned in after several absences. The officer admitted to other officers that he was in Tyler on that sick day and was tired from driving in the night before. In the investigation he denied any knowledge of the doctor's note or travel to Tyler. An untruthfulness allegation was then added to the sick leave abuse. In his investigative interview on those issues he admitted responsibility for the doctor's note, and admitted making the comment about his trip to Tyler, but denied that he actually traveled to Tyler that day. This case deals with application of Chapter 614.021, 614.022, 614.023 The hearing examiner reviews other authorities including Don Hays' decision in Love v. Wichita Falls, and in the other Ft. Worth case, Elgin v. Fort Worth. The hearing examiner finds that 143.010 requires at least substantial compliance with the elements in Chapter 614. He concludes that the signature on the notice of allegation by one of the two officers involved was sufficient. The portions of the investigation concerning the trip to Tyler were not included in the notices signed by the officer filing the charges. Those portions were excluded from consideration even in the absence of that evidence the hearing examiner upheld the decision on the remaining charges to find them true. On the comparative discipline arguments by the defense, the hearing examiner notes that other discipline by another chief is not comparable; he disregarded the agreed discipline cases where there was a waiver of appeal. The indefinite suspension was upheld.

Police Officer Jessie Hernandez
And
City of Corpus Christi
AAA No. 70 390 00046 08
Decision by Don Hayes, Hearing Examiner

Officer Hernandez appealed his indefinite suspension for a series of allegations of sexual misconduct. He was charged with inappropriate communication and contact with a student on an off duty job, a faculty member in the same school on off duty work, and with on duty involvement with a stripper at the Cheetah Club. His involvement with the stripper also included access to the department's data base to inquire into warrant status for her. The case before the hearing examiner started with a stipulation of facts on the issues before the arbitrator. However, after that stipulation, the officer's defense attacked jurisdiction of the hearing examiner by virtue of 180 day rule violations. The Corpus Christi CBA contract limits the discovery rule to felonies or Class A Misdemeanors, but has a general reference to Chapter 143 time periods. The City argued that the general language essentially trumped the limitation to Felony or Class A Misdemeanors. The additional issue dealt with by him was the off duty nature of the officer's conduct. The decision talks about limitation on the employer's authority over an

officer's private life and the requirement of a nexus to on duty responsibility. The hearing examiner does recognize the special uniformed status, and the application of department rules, even off duty.

The hearing examiner found charged conduct true within 180 days from discovery, and did not really analyze the contract provision. He did not distinguish the criminal punishment categories. He concludes that acts outside the permitted time frame do not matter as long as they are limited to evaluating the charged conduct within the 180 day period. The hearing examiner concludes that off duty work in the context of multiple occasions of on duty and off duty misconduct were sufficient to sustain the indefinite suspension. Some of the discussion of sexual harassment, privacy and intentional torts are not accurate or relevant, but they do emphasize in the hearing examiner's award the severity of the pattern of misbehavior shown by the facts. Defensive allegations of a double standard or disparate treatment were found not to be proven on this record. The indefinite suspension was sustained.

The Corpus Christi Police Officers' Association (J. Vesely)
And
The City of Corpus Christi
AAA No. 70 390 00728 07
Decision by Raymond Britton, Hearing Examiner

Vesely was indefinitely suspended for purchasing vehicles from their owners in the impound lot. He was charged with use of public information and his position for personal advantage. These acts involve criminal provisions. He had a history of prior purchases that predate the recent incidents for which he was charged. As noted above, the Corpus Christi contract limits the discovery rule to felony and Class A Misdemeanors. It also says that no administrative action can occur if that the applicable criminal statute of limitations has expired. The officer defended on the basis that the action taken was not timely, and under the theory that his prior purchases were known to the department. The defense argued that no criminal offenses occurred and that punishment was excessive. The hearing examiner finds that limitations have run on the criminal case of misuse of official information. The City sought to use the longer statute of limitations under a federal criminal statute but the hearing examiner finds no evidence of the necessary *men's rea* under that statute. The complainants that brought this issue to the department testified about duress or coercion by Vesely, but the testimony of the investigator and the transcript of the interviews did not reflect these facts. The hearing examiner found the complainants to be untrustworthy, and the officer to be trustworthy. The hearing examiner relied on prior reports that complaints had been made about purchases in the past and that no action was taken.

The hearing examiner reinstated Vesely with back pay.

Police Officer J.A. Miller
And
City of Fort Worth
AAA No. 70 390 00202 07
Decision by Don Williams, Hearing Examiner

Officer Miller appeals a two day suspension for excessive force and other policy violations. He stopped a citizen for speeding. The citizen failed to pull over promptly, and there was an extended time until the citizen stopped in a parking lot and his arrest occurred. The citizen turned out to be deaf. The cruiser video camera recorded the interaction of the citizen with the officer. The officer struck the citizen in the back of the head with his forearm twice. The second whack broke the subject's nose on the rear window of the car. The officer failed to follow procedure in several particulars. The defense argued that the officer had sound reasons to be tense and concerned about an intention to evade. The officer testified that the citizen continued not to comply with the officer's control. The officer explained that he sensed muscle tension in response to his efforts to control the citizen and his instruction. The officer's story about the need to strike the citizen a second time was disproved by the video. The hearing examiner concluded the officer did not give the citizen the chance to comprehend and comply with his lawful objectives. A two day suspension was upheld.

City of Waco
And
Joe Neal
Decision by Elvis Stephens, Hearing Examiner

The Chief imposed a 2 day suspension for arresting a passenger in the back seat. The officer stopped the subject vehicle believing that the inspection sticker was expired. Once the stop was made he realized it was current. He asked each of the individuals in the car for identification. Part of his stated reason for the arrest was the need to correctly identify the passenger, which could be accomplished by placing him under arrest and booking him. There is a cloud concerning potential racial profiling in this case. The officer was required by policy to notify its supervisor if he made a arrest for a traffic offense, but he did not do so.

In addition, the Chief imposed a one day suspension for racial comments and terminology used about illegal aliens. The officer made those comments to jail personnel, one of whom was Hispanic and took personal affront. The jailers testified that officer Neal seemed to arrest ore Hispanics than other officers.

Officer Neal defended on the basis of confusion in training programs about the seatbelt law. The hearing included a reconstruction of the training materials. Astonishingly, 9 out of 11 officers who testified said they thought it was illegal not to have a seatbelt in the back seat. Officer Neal made an effort to justify his remarks about illegal aliens by virtue of his experience with a high level of criminal of activity from the illegal aliens he had dealt with on duty.

The hearing examiner found that making an illegal arrest was a serious issue, and confusion about the training standard did not impair the legitimacy of a 2 day suspension for that conduct, especially in the absence of properly notifying his supervisor. The hearing examiner also sustained the one day suspension on the racial remarks, becausxe of the need for avoiding the public appearance of bias, and the continuing instances of the officer conduct, demonstrating a lack of good judgment.

VII.
JUDICIAL REVIEW OF ARBITRATOR'S/HEARING EXAMINER'S AWARDS ON APPEAL

City of Houston v. Clark, 252 S.W.3d 561, (Tex.App—Houston [14th Dist.], 2008)

This is the decision of the Court of Appeals on remand from the Supreme Court's decision. 197 S.W.3d. In that prior decision the Supreme Court upheld the City's right to appeal from a decision by a hearing examiner, even though the statutory language only mentions an appeal by an officer.

The firefighter originally contended that an acting fire chief was not the department head, and the suspension he received was therefore void. The hearing examiner agreed. The court concludes that there is no jurisdiction to review a decision where a hearing examiner ignored or misinterpreted a controlling law. The hearing examiner has the same authority as the commission, which includes interpreting relevant statutes. This opinion uses strong language about the scope of a hearing examiner's authority to interpret the law, and appears to say that even abuse of discretion in statutory application does not create jurisdiction for judicial review.

City of Waco v. Kelley was handed down the same day as *City of Houston v. Clark,* and was reversed and remanded per curiam for the reasons explained in the *Houston* case.

City of Waco v. Kelley, S.W.3d, 2007 WL 1297158 (Tex. App.—Waco, May 2, 2007) Pet. Granted.

Like *City of Houston v. Clark*, Kelley stands for the proposition that cities may appeal from the decision of an independent hearing examiner to the extent of the limited appeal set forth in 143.1016(j) and 143.057(j). The City is now before the Supreme Court on round two, arguing that the longstanding practice in many cases of reducing an indefinite suspension to a temporary reinstatement and awarding partial back pay, is not authorized by 143.053, which gives three exclusive options. The City also argues that the provision in Section 143.014 controlled the hearing examiner's decision because Kelley was an appointed assistant chief when he was suspended. The City claims that there is no statutory authority for back pay and benefits which are only authorized when an officer is "restored to the position or class of service from which he was suspended." The City contends that no attorney's fees are authorized in decisions by hearing examiners.

In the proceeding before the hearing examiner, the examiner reached the following conclusions: (1) the indefinite suspension was reduced to 180 day temporary suspension; (2) Kelley was reinstated at the rank of sergeant; and (3) Kelley should be made whole subject to the normal principles of mitigation. The decision reinstating Kelley at the rank of sergeant deprived him of the status immediately prior to his disciplinary action, which would have been commander. The hearing examiner expressly found that Kelley should not be reinstated as commander by virtue of his conduct, which the examiner found to be true.

Kelley argues that the law is clear on the right to reduction and the award of back pay and fees. He contends that the constitutional issues and application of 143.014 were not timely raised, which may or may not matter if the Supreme Court sees these as issues of jurisdiction.

Strouse v. City of Houston, ---S.W.3d---2008 WL 2261788, Houston 14th Court of Appeals.

A Police Sergeant was indefinitely suspended appealed to a hearing examiner, who set aside the suspension and imposed a demotion, and awarded Strouse back pay for the last two years of the six year suspension period. The hearing examiner had found no just cause for the indefinite suspension, but decided instead to demote the sergeant to an officer's rank, reinstate him and give him back pay and benefits at the lower rank. Both the City and the officer sought to set aside the hearing examiner's decision in the trial court. The City did not move for summary judgment. The district court entered an order purporting to grant the officer's Motion for Summary Judgment, in part, and remand to the hearing examiner. The officer argued that the district court had no jurisdiction or authority to remand to the hearing examiner. The Court of Appeals concludes that the district court could not grant relief not requested in a motion for summary judgment. The officer had not requested the relief ultimately granted, and the City had not filed a motion. The Court of Appeals remands to the district court.

Athens v. MacAvoy, 260 S.W.3d 676, (Tex.App.—Tyler 2008)

The City of Athens appealed a hearing examiner's decision reinstating police officer MacAvoy. The City claims that the hearing examiner misapplied the procedural protections in Chapter 614 of the Texas Local Government Code. The case was dismissed by the trial court on the officer's Plea to the Jurisdiction. The court concludes that failure to properly apply the statute does not state a cause of action for a hearing examiner exceeding his/her statutory jurisdiction.

A hearing examiner has jurisdiction to apply statutes that are within the scope of his authority, as defined by the disciplinary case. Chapter 614 applies to internal investigations based on an outside source but without an outside complaint. At issue is the provision in 614.023(b) requiring that a signed complaint be provided to a police officer before discipline can be imposed. The officer had sexual relations with a female on duty and her husband reported it. The police chief had named himself as the

complainant, and did not provide the statements of the woman and her husband before imposing discipline. The hearing examiner determined that the complainant was the female participant and that the discipline must be set aside.

The court concludes that the hearing examiner's interpretation and application of the law was not unreasonable, and that the hearing examiner did not exceed his jurisdiction. For a statutory interpretation to be a jurisdictional issue, the decision has to be more than a statutory misinterpretation, must be clearly unreasonable and somehow constitute an abuse of authority.

City of De Soto v. White, 232 S.W.3d 379, (Tex.App.—Dallas, 2007)

Officer White appeals from a hearing examiner's decision upholding his suspension. The officer contended that the mandatory notice provisions in Section 143.052 concerning the waiver of a right to appeal from the decision of a hearing examiner defined the jurisdiction.

The court agrees the hearing examiner had no jurisdiction because of a defective notice. Substantial compliance was not enough. Attorneys' fees were allowed under the theory that a prevailing party on appeal to the commission can receive an attorneys' fee award, by analogy to the statutory authorization for such fees before the civil service commission.

City of Lancaster v. Clopton, 246 S.W.3d 837, (Tex.App.—Dallas, 2008)

This is an appeal by declaratory judgment to set aside a hearing examiner's award reinstating Firefighter Clopton. Clopton was found guilty of marijuana use, but reinstated with a reduced punishment. The summary judgment was granted for the firefighter sustaining the award. The City claimed that a fact question prevented the summary judgment. The Court of Appeals reviewed the evidence before the hearing examiner, including the City's contentions about a zero tolerance policy and found that the hearing examiner's decision was reasonable based upon the evidence. There was no fact question that prevented summary judgment for the firefighter. The City's contention that 143.057 is unconstitutional as an undefined delegation of authority to a private entity was raised for the first time on appeal and was rejected by the court.

Kuykendall v. City of Grand Prairie, 257 S.W.3d 515, (Tex.App.—Dallas, 2008)

Firefighter Kuykendall appealed from the decision of a hearing examiner imposing a 30 day suspension, instead of the demotion from which the firefighter had appealed. The hearing examiner found the firefighter did not commit the misconduct alleged, but essentially punished the firefighter for other misconduct. The hearing examiner found that firefighter did not expose himself as charged, but found inappropriate behavior and horseplay and concluded that discipline other than the Chief's proposed double ranked demotion was appropriate. The City did not appeal the hearing examiner's decision against them on discipline. The Court of Appeals set aside the hearing examiner's

decision as arbitrary and an abuse of his authority. The court concludes the hearing examiner has no jurisdiction to modify punishment unless the charged misconduct is found. This case raises a practice issue about the practice/strategy issue of inclusion of multiple elements of misconduct in a charge. It is always a challenge to determine how many acts of misconduct should be included. The court awards attorney's fees.

VIII.
DISCRIMINATION

Woods v. Galveston, ---S.W.3d---2008 WL 2520802

This case involves an attempt by a firefighter to return to the department after a disability retirement. Multiple efforts to assert a Chapter 21 Texas Commission on Human Rights case ultimately failed. The court recognizes a distinction between Woods and other firefighters because Woods failed to apply for recertification by the Texas Commission on Fire Protection. He was therefore not qualified for rehire. This prevented any comparison to any other firefighters who had applied and proceeded with recertification and returned to employment in the department. This case concerns the evidentiary standard for comparing other employees on a pretext case after the city's legitimate business justification has been established.

David Johnson v. City of Denton, Case No 4:07-cv-449, In the Eastern District of Texas

African American applicant to the Denton fire department sued when he was not hired. The City defended on the basis that the authorization for release of background information for further investigation was not witnessed, and therefore his application was not processed. The City sought summary judgment in the District Court on this defense. Plaintiff claimed that a Battalion Chief had promised to witness his application and turn it in, and that he called the Chief for progress reports. The Chief denies that claim. The Magistrate's recommendation to grant the City's MSJ was adopted. The absence of any evidence of pretext or racial bias by the Battalion Chief was fatal to Plaintiff's attempts to overcome the City's defense.

IX.
EDUCATION/CERTIFICATION PAY

Alexander v. City of Austin,
345TH District Court Austin
In the Austin Court of Appeals

This case is on appeal from the decision by the District Court. Firefighters claim that 143.041 and 143.044authorizes education and certification pay to be implemented by the governing body, but does not permit an "either/or" provision. According to the firefighters the statutes require that the governing body establish criteria and apply those equally to each firefighter. A required election to receive either certification or education pay results in an unequal application. The City won its Motion for Summary

Judgment on the argument that City ordinances specify clearly the criteria for both certification and education pay, and included the provision requiring election between the two. The City argued that the court was bound to seek a fair and reasonable construction of the statute in order to harmonize it with the home rule ordinances of the City of Austin. The court found no lack of equal treatment under the circumstances. The pay claim in this case is essentially the same as in *City of Austin v. Castillo*, 25 S.W.3d 309, (Tex.App.—Austin, 2000) where the court held that bilingual pay provisions were not authorized by Section 143.042(b, c) and therefore every member of the department was entitled to receive the additional pay increment in order to accomplish the equal pay within each rank required by statute.

X.
ARBITRATION AWARDS ON APPEAL FROM PROMOTIONAL BYPASS

Kelly Metz
And
City of San Marcos
AAA No. 70 390 00721 07
Decision by Louise Wolitz, Hearing Examiner

Fire Lieutenant Robert Zook
And
City of San Marcos
Decision by Chuck Miller, Hearing Examiner

The reorganization of the department had occurred and Battalion Chief positions had been created. A job description was prepared and a test was given. Zook was number one and Metz was number two. The Chief bypassed both of those individuals and appointed three others to the Battalion Chief positions. His bypass was a “fell swoop” decision. In other words, he bypassed both Zook and Metz and simultaneously appointed the other three. He did meet with Zook and Metz to explain and discuss his valid reasons, and filed in writing the justification for his valid reasons with the commission. Both Zook and Metz appealed to separate hearing examiners. Both of the hearing examiner’s awards discussed previous case law. The original 1269(m) provisions used the word “valid reason” but required it to state why the chief was appointing number two instead of number one. In addition the prior language required the explanation to explain the “good and sufficient reasons” to the commission. The hearing examiners both conclude that the valid reason must meet the original language, since the current codification was non substantive in nature. The standard applied in these two bypass cases does not resemble the case law in the following cases. Stanford v. City of Lubbock, Crawford v. City of Houston, Heard v. City of Houston, and

Cash v. City of Houston.[3] It is a challenge to square the legal standard for review by promotional bypass from these cases with the decisions in these two awards. Prior case law has indicated that a logical or rational decision which is well grounded and justifiable will be upheld. Case law indicates that a bypass that is not arbitrary, capricious, unreasonable, or fraudulent will stand. The Byrd case indicates that the chief has a great deal of discretion as the ultimate person in charge of the qualifications within the department.

On the other hand, the complaints heard that were made involved the process and participation in the testing process for these new potions. The job descriptions and examination process provided for education and certification requirement to be met within 24 months. The chief's stated reasons were subjective conclusions about the abilities of the individuals, together with his objective preference for certification and degrees that his chosen candidates possessed. The chief testified that the individuals with degrees and certifications had prepared themselves better for their role at the chief's level and that they were superior in their certifications, degrees and college study. He concluded they had better abilities to coordinate work, better supervisory skills, and had displayed more initiative.

The hearing examiner concludes that candidate Zook had college degrees relevant to the work, although it was not specifically in fire science and that the chief's command presence was purely subjective. The hearing examiner concludes that all of the decisions encompassed in the preference for certifications or education could have been included in the proposed study materials and testing process. It is especially troublesome in the Metz case that the hearing examiner suggests the right to successive promotional bypass choices, and the conclusion of each successive appeal, prior to the next promotional bypass.

City of Waco
And
Joe Neal
Decision by Daniel Jennings, Hearing Examiner

This is a promotional bypass, one of two. The other one has not been decided yet. The Chief's decision was based in part on the disciplinary matters reviewed above where the officer's one and two day suspensions were upheld. The Chief also criticized the officer's lack of leadership potential in the context of his poor judgment, including not only the arrest but his failure to follow policy about supervisory notification on traffic arrests. The Chief believes the recent incidents show he is not ready to serve as a first line supervisor. His conduct shows a lack of consistency, poor example, and an appearance of bias toward racial groups.

[3] Stanford v. City of Lubbock, 279 S.W.3d 795, Tex.App.—Amarillo, 2007; Crawford v. City of Houston, 260 Fed.Appx. 650, C.A.5 (Tex. 2007); Heard v. City of Houston, 529 S.W.2d 560, Tex.App.—Houston [1st Dist.] 1975; Cash v. City of Houston, 426 S.W.2d 624, Tex.App.—Houston [14th Dist.] 1968

The hearing examiner reviews the legal standards for a promotional by pass, and finds procedural compliance and that the Chief has established a "valid reason" under the applicable law. The appeal is denied.

City of Austin
And
Austin Firefighters' Association
AAA No. 70 390 00294 06
Jeffrey Pine
Decision by John B. Barnard, Hearing Examiner

This case was reviewed two years ago, but I have included it here for the context of comparative evidence in arguments over a valid reason. It also dealt with events before and after a transition at the Chief's level, like some of the discipline cases above.

Jeffrey Pine was denied a promotion to Battalion Chief. Pine claimed that unequal treatment of others with similar past behavior required the bypass to be set aside. The relevant portions of Pine's promotional and employment history included an earlier bypass for a Captain's position in 1998. He was promoted in March 2002. In 2005 he was suspended for 15 calendar days as a result of an incident that year involving an assault of another firefighter at the fire station, although Pine was off duty at the time. He eventually apologized and did not contest the imposition of that suspension. He had 2 counseling memorandums in his file. Another battalion chief was charged with off duty theft, and was retained at the Battalion Chief level. Another was actually promoted by Chief Adame to the Division Chief level after pleading guilty to a misdemeanor assault, but unlike Pine (who apologized, etc.), that officer continued to insist that his conduct was not wrongful.

The arbitrator agreed that Captain Pine's behavior was inappropriate, and that he has had several counseling session regarding unprofessional conduct. However, prior counseling pre-dated his promotion to captain from lieutenant. Although the arbitrator rejected one of the disparate treatment contentions, he found the other one involving an assault between members of the fire department to be persuasive. The arbitrator's decision required the grievant to complete an anger management class, and upon successful completion to be promoted to battalion chief. The arbitrator's decision does not address the meaning or standard for review under 143.036(f) concerning a "valid reason" which is distressing. This case is a good example of an arbitration decision in the nature of de novo review.

Several principles can be stated, either derived from this decision or which are consistent with it: (1) departments which minimize the use of promotional bypass of the promotional bypass option under the statute make it less likely that bypass decisions will be sustained when they are utilized. In this case the union used the historic infrequency of promotional bypasses to argue unfairness; (2) conclusions concerning how a prior disciplinary record affects the suitability of a particular employee need to be made in the context of a careful analysis of the prior history in the department; (3) where

a new fire chief comes into a department, it would be especially difficult to begin making a change of philosophy concerning promotion; (4) evaluation of a promotional bypass by a fire chief or police chief should take into account feedback from individuals within the chain of command of the promotional prospect, and perhaps from subordinates as well as supervising officers.

In order for a fire or police chief to exercise promotional prerogatives under this provision of the statute, it is recommended that the chief establish, in advance of the promotional examination, a specific list of criteria that will be considered as valid reasons under the statute. The longer the lead time given to potential promotional candidates the better. If the valid reasons are items that the individual applicant can actually change or address in pursuing their promotional goals, it is so much better. Having a specific basis in the law or in the literature of the discipline for the chief's criteria is an added advantage. For example, if you take a particular approach capability from the FBI National Academy Training Curriculum, and include that in advance in the short list of issues which will be considered for promotional purposes, it will have a strong level of credibility. Ad hoc identification of "valid reasons" for promotional bypass is far less likely to succeed. In the event that a change of policy or approach is going to take place between one administration in the department and the next, a clear announcement and specific criteria are even more important.

If your department is going to pursue the use of the chief's discretion for promotional bypass, an early commitment should be made to enforce the decision on appeal, to seek judicial review of the arbitrator's decision if it exceeds his/her jurisdiction, and in the event of a reversal to demote the individual actually promoted. Many cities don't like the inherent unfairness of bumping the chief's selection as a result of an adverse result in arbitration, and will make accommodations to allow both parties to retain the promoted rank. The culture that exists in most departments that promotional bypass decision are inherently bad and that they should almost never occur is a part of the problem. If the department culture is changed to where promotional bypass are predictable, based on consistent criteria, and occur on a fairly regular basis, it is my opinion that hearing examiners will be less likely to reverse them and interfere in the chief's legitimate decisions about who is best promoted into those positions. This is especially true in the upper management ranks where the chief has the greatest interest in applying discretionary distinctions between individuals that may be virtually identical from a ranked basis on the list.

XI.
ATTORNEY GENERAL'S OPINIONS

Attorney General Opinion 0678 GA

This request concerns 143.014(c) concerning a chief's right to appoint upper level officers. The TAFF has argued for years that provision is eliminated when there is a Collective Bargaining Agreement. Cities have urged that subpart (c) concerns the subsection, and does not impair 143.014 (a & b) just because there is a collective

bargaining system in place. The attorney general rejects the statutory construction that would eliminate the right and concludes that only the subsection limiting the number of appointments becomes inapplicable in the event of a collective bargaining system.

XII.
JUDICIAL REVIEW OF CONTRACT GRIEVANCE ARBITRATION AWARD

Although it is no longer a recent case, it is essential for everyone in the field to be familiar with the decision and analysis in *City of Beaumont v. IAFF Local 399*, 241 S.W.3d 208, (Tex.App.—Beaumont 2007). The Beaumont Court of Appeals reversed the decision of the district court upholding the contractual pay award in an interest arbitration. The arbitration panel was to apply contract terms and conditions and determine the employee's pay raise after a negotiation impasse. The Court of appeals concluded that the arbitration panel exceeded its authority by considering an issue for which proper notice was not given, by arbitrating an issue that was not in dispute, and by proceeding to arbitrate without enforcing all of the provisions which the parties had agreed would apply to their dispute. This is the road map for any attack on a grievance arbitration award where contract terms have been disregarded and misapplied. The factual situation in this case is probably unique. The collective bargaining agreement adopted a specific set of standards for determining an appropriate wage rate for firefighters. The neutral arbitrator on the interest arbitration panel decided that the contractual provisions purporting to change or depart from the statutory standard for pay under Chapter 174 was ineffective and proceeded to render an award based on the statutory standard for prevailing wages in the public sector.

The Court of Appeals noted the standard for review of this type of award under 174.253. It found that the contractual provisions were in enforceable, that the arbitrator's rejection of the contract provisions departed from the authority of the arbitration panel, and was an action outside the arbitrator/panel's jurisdiction to award. This is a question of law. The severability clause did not save the award, since the agreement to arbitrate in the first place was a dependent promise essential to the agreement to arbitrate the impasse.

During the course of these proceedings the City of Beaumont had recognized that its contractual evergreen clause did not contain any finite ending date, and was therefore a contract terminable at will under the Clear Lake Municipal Utility District Doctrine. The city unilaterally terminated the contract during the course of the arbitration and was in a position to limit any pay increase to a single fiscal year.