TEXAS CIVIL SERVICE LAW UPDATE

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I. JUDICIAL REVIEW OF HEARING EXAMINER AUTHORITY

City of Waco v. Kelly, S.W.3d , 2010 WL 571974 (Tex. 2010).

Larry Kelly, the appointed assistant chief of the Waco Police Department, was arrested for driving while intoxicated, for which he was indefinitely suspended by the chief. Kelley appealed to a hearing examiner. After a hearing, the examiner found that the chief's charges against Kelley were proven true, but that the punishment of indefinite suspension, equivalent to dismissal from the department, was excessive. The examiner believed, however, that the conduct deserved some form of discipline, so he ordered that Kelley be reinstated as a sergeant, a demotion of three ranks, and that he be suspended for a period of 180 days.

The decision satisfied neither party, and both filed appeals to district court. The city claimed that the hearing examiner exceeded his jurisdiction by demoting Kelley and reinstating him with a backpay award. Kelley also claimed the hearing examiner had no jurisdiction as a result of the city's failure to follow certain statutory procedures. Kelley did not claim that the hearing examiner had no jurisdiction to demote him, and in fact, specifically asserted that if the hearing examiner had jurisdiction, he did not exceed it. The district court sided with Kelley's jurisdictional argument, ruling that the city had no statutory right to appeal a hearing examiner's decision, and awarded Kelley attorney fees.

The city appealed this decision and the Waco Court of Appeals dismissed the appeal for lack of jurisdiction, holding that §143.057(j), Tex. Local Gov't Code (TLGC) granted the right of appeal only to civil service employee, not a city. After the Waco Court issued that decision, the Texas Supreme Court decided in *City of Houston v. Clark*, that despite the absence of a reference to a city's appellate rights in the statute, municipalities could appeal hearing examiner awards on the same limited grounds enjoyed by employees. The Supreme Court then reversed the Waco Court's dismissal of the city's appeal and remanded the case to the Court of Appeals.

On remand, the Waco Court of appeals substantively addressed the City's argument that the hearing examiner exceeded his jurisdiction in ordering Kelley's reinstatement. The city's argued that the statute governing the appointment of assistant chiefs, TLGC §143.014, allowed the hearing examiner to reinstate only if the charges were determined to be untrue. The Court rejected this argument on statutory interpretation principles, finding that it would put employees who accepted the appointment to assistant chief in a worse position than lower ranking employees.

The city also argued the hearing examiner had no jurisdiction to order a demotion, and here the Court of Appeals agreed. Ironically, this resulted in the Court vacating only the portion of the examiner's award ordering the demotion, arguably the more severe form of punishment. In other words, the city prevailed on its legal argument, and ended up with a weaker disciplinary decision against Kelley, a fact that was highlighted by the dissent. The city sought review.

The Supreme Court's decision resulted in a mixed bag for the city. It held:

1) the hearing examiner, once he found charges against assistant police chief to be true, was not limited to upholding his indefinite suspension, thereby rejecting the city's contention;

2) the hearing examiner did not exceed his jurisdiction by reducing Kelley's indefinite suspension to a one of a period of days, but such a reduction was limited to a suspension of 15 days or less, thus further weakening the disciplinary award of 180 days;

3) the hearing examiner exceeded his jurisdiction when he demoted assistant chief to rank of sergeant, thus agreeing with the city, but weakening the award;

4) Kelley was not entitled to attorney fees on city's appeal under §143.057(j); and

5) the appropriate remedy for the hearing examiner's excess of jurisdiction, in part, was to vacate the examiner's decision in its entirety and remand the case to the hearing examiner.

Rationale:

The Court addressed each of the City's issues in turn, first tackling the issue of the authority of a hearing examiner to reduce an indefinite suspension to a suspension of a period of days. The Supreme Court rejected, as did the Waco Court, the city's contention that the language of §143.014(h) permitted reinstatement only in the event that the charges are found to be untrue. The Court noted that §143.014(h) did not address what a hearing examiner may do if the charges are found to be true, and instead only provided what an examiner must do if the charges were untrue. It failed to recognize a corollary, as urged by the city, that if the charges were true, the only remedy available to a hearing examiner was to uphold whatever suspension was imposed. Instead, the Court found that the general remedial provisions contained in §143.053 governed the remedies available in the event of a true finding. Thus, a hearing examiner is empowered to (1) permanently dismiss an employee; (2) temporarily suspend the employee; or (3) restore the employee to his former position.

Next, the Court addressed the range of options available to a hearing examiner upon choosing the remedy of suspending the employee for a period of days. The Court noted that §143.052(e)(2) did not impose any limit on the length of suspension that an examiner could impose. However, the Court found that this authority to temporarily suspend must be construed in context with other limitations in the statutes on the imposition of involuntary suspensions. Specifically, the Court grafted the limitation applicable to department heads contained in §143.052, that of imposing a temporary suspension of 15 days or less, onto the authority of the hearing examiner. The Court found no legislative intent to authorize examiners to impose longer suspensions than could the department head. The Court implied that an examiner's ability to suspend without time limits would violate the non-delegation doctrine. *See City of Pasadena v. Smith, below*. Therefore, the Court held that the hearing examiner exceeded his jurisdiction by imposing a suspension of 180 days, because he was limited to a 15 suspension by the Act.

On the issue of demotion, the parties seemed to have agreed, in their arguments before the Supreme Court, that the hearing examiner exceeded his jurisdiction by order a demotion. The Court analyzed the issue anyway. The Court cited to a separate disciplinary provision

of the Chapter 143 for demotions contained in §143.054. Providing for a slightly different process from that of suspensions, §143.054 allows a department to recommend demotion to the civil service commission, with the recommendation then being heard by the commission or an examiner at the employee's option. In this case, the police chief had not followed that process, and so the Court determined that the hearing examiner was not permitted to craft a remedy utilizing it.

On the issue of attorney fees, the Court briefly reasoned and held that while fees were authorized in a district court appeal of a commission order under §143.015, there was no such authorization in a in a district court appeal of a hearing examiner order under §143.057(j). Absent statutory or contractual authority for a fee award, the trial court had no authority to award fees.

Finally, on the issue of relief from a hearing examiner's excess of jurisdiction, the Supreme Court determined that the Waco Court's approach – to vacate the offending portions of the award and leave the rest intact - was incorrect. The Court applied case law analyzing review of arbitration decisions under the Texas General Arbitration Act. Under this analysis, invalid portions of an award are only severable if doing so will truly express the will of the arbitrator. In this case, the Court expressed no doubt that the invalidation of the 180 day suspension and demotion, leaving only Kelley's reinstatement remaining in the award, would not result in an award expressing the will of the hearing examiner. It was evident to the Court that the hearing examiner believed that Kelley should receive some discipline. Therefore, the Court reasoned, the entire award must be vacated and the case remanded to the hearing examiner so that he could fashion a valid award that expressed his will.

***City of Pasadena v. Smith*, 292 S.W.3d 14 (Tex. 2009).**

City of Pasadena Police Chief M.A. Massey suspended police officer Richard Smith indefinitely, and Smith appealed to a hearing examiner. At the start of the hearing, Smith immediately moved that the suspension be overturned because Chief Massey was not present to present his case. The city offered to prove the case through Chief Massey's assistant chief but the hearing examiner dismissed the charges. The entire hearing lasted less than half an hour, and neither side presented any evidence. The examiner later submitted a written opinion citing the Chief's failure to appear as the sole ground for dismissal of the disciplinary charges, relying on §143.1015(k), a statute not applicable to Pasadena.

The city appealed to district court claiming that the hearing examiner exceeded his jurisdiction, and Smith filed a jurisdictional plea challenging the timeliness of the appeal. The district court sustained the plea and the city appealed. The Houston Court of Appeals [1st District] affirmed. Although the appeals court did not address the timeliness issue, it determined that the city had not raised a true jurisdictional challenge. Instead, according to the Houston Court, the city's complaint amounted only to a claim of misapplication of the law - the examiner's resort to an inapplicable statute - and, therefore, did not amount to a jurisdictional challenge. The city petitioned for review and the Supreme Court reversed, holding the hearing examiner exceeded his jurisdiction by summarily reversing the discipline.

Rationale:

The case turned on the Supreme Court's analysis of one of the *Boll Weevil* non-delegation doctrine factors - whether a hearing examiner's actions are subject to meaningful review by a state agency or other branch of state government. The Court noted that Civil Service Act's delegation of disciplinary review to hearing examiners furthers the purpose of the Act. But the Court also observed that without binding and definite standards for hearing examiners, the hearing examiner process would raise constitutional concerns. If hearing examiners had broad latitude to determine not only facts but also applicable law, they would become not merely independent arbiters but policy makers - a non-delegable legislative function. Conversely, if a city can invoke judicial review to require that a hearing examiner's decision be made according to law, the non-delegation doctrine is satisfied. Thus, the Supreme Court held that the hearing examiner's resort to an inapplicable statute was an appropriate basis for the city's challenge under §143.057(j).

The Supreme Court also found other aspects of the hearing examiner's ruling to be in excess of his authority. Affirming again the long-standing principle that hearing examiners possess the same duties and powers of a statutory civil service commission, the Court cited the examiner's refusal to hear evidence as violative of the statutory requirement upon commissions to consider only evidence submitted at the hearing in rendering a decision. See TLGC §143.010. The Court also ruled that even the inapplicable statute relied upon by the examiner did not permit default judgment as a penalty for non-compliance. The Court rejected Smith's arguments that these were merely mistakes of law as opposed to jurisdictional deficiencies.

The Court also address Smith's waiver argument - that the City had not argued at the hearing that §143.1015 was inapplicable - by reaffirming that failure to object to a jurisdictional deficiency cannot expand the jurisdiction of a hearing examiner, any more than it could expand the jurisdiction of a court of law.

Of procedural importance, the Supreme Court held that in the absence of a certified mailing, a city's deadline for an appeal under §143.057(j) begins to run when received by the city.

Observations:

Pasadena represents a continuing willingness of the Supreme Court to impose meaningful standards on the arbitral authority of hearing examiners, as well as continued recognition that statutory appeals to examiners are not true arbitrations. This is not a stance with which some hearing examiners, who frequently also serve as arbitrators, agree or are used to. *Pasadena* and *City of Houston v. Tones*, below provide useful comparisons on the issue of whether legal error, typically not a ground for overturning an arbitration decision, can be a basis for a challenge to a §143.057(j) hearing examiner.

II. POTENTIALLY FATAL PROCEDURAL PITFALLS TO INTERNAL AFFAIRS INVESTIGATIONS AND DISCIPLINE

***Treadway v. Holder*, S.W.3d , 2010 WL 1507788 (Tex.App. Austin 2010, no pet.).**

Comal County corrections officer Treadway was terminated for dishonesty and falsification of official documents. Treadway sued the county, seeking a declaration that her termination violated Government Code Chapter 614, subchapter B, relating to disciplinary procedures against certain law enforcement and firefighter employees. Subchapter B provides generally that a covered employee may not be disciplined unless first served with a copy of a complaint. Treadway claimed she was not aware of the nature of the allegations of misconduct against her until after she was terminated, and never received a copy of a complaint. The county asserted in a motion for summary judgment that subchapter B did not apply because Treadway was not terminated based on a complaint. Rather, she was terminated based on the direct observations of misconduct by the chain of command responsible for the decision to terminate her. The trial court granted summary judgment for the county and Treadway appealed. The Austin Court of Appeals reversed, holding that the allegations of misconduct against Treadway by her supervisors constituted a complaint, regardless of the fact that they originated within her chain of command, and remanded the case.

Rationale:

The Austin Court relied on its construction of subchapter B by referring to Local Gov't Code §143.123, a tactic employed once before in *Guthery v. Taylor* by the Houston Court of Appeals in one of only two other cases substantively interpreting the requirements of Chapter 614. According to the Court, the absence of a definition for "complaint" in Chapter 614 required a resort to TLGC §143.123, a provision only applicable to the City of Houston, for guidance. Even though §143.123 does not define "complaint" either, the Court noted that the statute provides that a Houston civil service employee may not be interrogated unless a complaint against her is verified, unless the complainant is a peace officer. Because §143.123 distinguishes between complaints by peace officers and other types of complaints, and Gov't Code §614.022 does not, the Court reasoned that this indicated legislative intent that there be no such distinction. Finding no legislative intent to differentiate between complaints coming from outside the department and those generated within the chain of command, the Court held that a "complaint" under subchapter B was *any* allegation of misconduct that could give rise to disciplinary action.

Observations:

The Court appears to place great importance on the distinction between external and internal complaints. It does not appear that this was the distinction the county intended to make. Rather the county appeared to highlight the distinction between disciplinary actions that were based on complaints (which could be internal or external) and discipline that the chain of command could impose in the absence of a complaint, such as direct violations of a supervisor's order, committed in the presence of the supervisor. As the dissent points out, the majority's construction requires a disciplinary decision-maker who personally observes misconduct to write the

allegations down and file them with himself. The dissent is correct in that if the Austin Court's decision stands, it will create an more onerous requirement in the investigation and discipline of matters that traditionally do not arise from complaints, such as direct observations of performance deficiencies by supervisor personnel and insubordination.

This is the first case since 2003 to analyze the specifics of the service requirements of Chapter 614, and is one of only three cases to do so. If there is a positive angle to the case, it is that practitioners can now point clients to bright line rule to uniformly apply in all discipline cases, and avoid the analysis of when and if a written complaint is necessary.

***City of Houston v. Tones*, 299 S.W.3d 235 (Tex.App. Houston [14 Dist.] 2009, no pet.).**

Houston Police Officer Tones was suspended for five days without pay for charges of dereliction of duty. Police Chief Harold Hurtt, delivered the notice of suspension first to the civil service commission and then to Tones three days later. On appeal to a hearing examiner, Tones argued that the suspension was void for violating TLGC §143.117(c), providing that a department head must file a notice of suspension with the commission within 120 hours after the officer is notified of the suspension. She argued that because the statute uses the word "after," it was impermissible to serve the notice on the commission before it was served on her. The hearing examiner agreed and overturned the suspension. The City appealed to district court claiming the hearing examiner exceeded his jurisdiction by improperly applying §143.117(c). Tones filed a motion for summary judgment asserting that the examiner properly applied the statute, but did not assert that the district court lacked jurisdiction over the city's appeal.

The Houston Court of Appeals [14th District] held that the city had not raised a proper jurisdictional challenged to the hearing examiner's decision, vacated the district court's judgment, and dismissed the city's case for lack of jurisdiction.

Rationale:

The city relied heavily on the recently decided *Pasadena* case, arguing that the examiner's misapplication of §143.117(c) amounted to an excess of authority. The appeals court engaged in a substantial analysis of *Pasadena*, but ultimately concluded that the city's contention was not like that raised in *Pasadena*. The hearing examiner in *Pasadena* applied an unquestionably inapplicable statute, whereas here, the city simply claimed that the examiner misinterpreted an otherwise applicable statute. The Court found that this did not amount to a jurisdictional attack, and therefore dismissed the city's district court challenge.

Observations:

Although the legal issue addressed by the Houston Court had to do with the scope of a hearing examiner's authority and a city's appeal therefrom, this case will almost certainly be used as authority for the interpretation given §143.117(c), and hence §143.052(c), by the hearing examiner. The practitioner's view of the requirement of §143.052 has traditionally been that as long as the notice to the commissioner is *no later than* 120 hours after notification to the officer, the statute is satisfied. Since serving the commission earlier than the officer ensures

that the notice will not be late, it has not been considered an unsound practice. Often, a department will have to track down an officer to effectuate service of the notice, whereas service on the commission may only involve walking the notice to a nearby city building. *Tones* may force practitioners to tighten the practice to ensure delivery of the notice within a window commencing with the delivery of the notice to the officer.

Section 143.052(c) reads differently from §143.117(c), instead requiring the commission to be served "within 120 hours after the hour of suspension." In light of *Tones*, the practice of issuing notices indicating that a suspension will commence in the future must also be carefully considered. It appears now that the best practice, until further clarification of *Tones*' effect on §143.052, is to serve an officer with the notice of suspension at or near the commencement of the suspension period, and then serve the commission within 120 hours of that.

III. THE OUTER LIMITS OF REASON

Alexander v. City of Austin, 302 S.W.3d 885 (Tex.App. Austin 2009, pet. denied).

In this non-disciplinary civil service case, numerous Austin firefighters sued the city claiming that a city ordinance imposing restrictions on the payment of certification and educational incentive pays violated TLGC §§ 143.041 and 143.044. The ordinance in question set forth criteria for earning these types of pay, but restricted firefighters to earning one type or the other, at the firefighters' election.

At issue were two provisions of §143.044. Subsections (b) and (c) permissively authorize a city to establish qualifications for and grant certification pay and educational incentive pay, respectively. The firefighters did not dispute that the city had discretion whether to offer such types of pay. Each subsection used the phrase, "the municipality's governing body *may* authorize ..." in describing the authority to grant such pay. The firefighters claimed, however, that once the city authorized such payments, it was obligated to pay the firefighters who met the requirements for the pay without exception.

The Austin Court of Appeals disagreed, finding it significant that the statute uses "may" instead of "shall," and holding that the statute grants cities discretionary authority to impose conditions resulting in the award of each type of pay to some firefighters and not others. Since the statute authorized the city to set criteria for receiving the pay, it was within the city's authority to set the criteria that to receive one form of pay, a firefighter must not also be receiving the other. The Court affirmed the trial court's summary judgment in favor of the city.

City of San Antonio v. Lopez, 2009 WL 4140702 (Tex.App. San Antonio 2009, pet. denied).

San Antonio Firefighter Lopez was one of a group of top-scoring candidates on a promotional list. He scored a 95 on the written exam and received 10 bonus points for his seniority in the department, pursuant to statute, for a total score of 105. Four other firefighters also scored a total of 105, but with higher written exam scores and fewer bonus points for overall seniority. Two other firefighters had scores identical to Lopez's in

every way, but had less seniority in rank. The candidate placed at the top of the list scored a 98 on the written exam, with 7 seniority points. Lopez sued the city, claiming that he should have been placed at the top of the list because, of all the candidates scoring a total of 105, he possessed the highest seniority in rank, as distinguished from seniority in the department. The trial court granted Lopez's motion for summary judgment, and the city appealed. The San Antonio Court of Appeals reversed and rendered judgment for the city, holding that the city properly applied the rule for breaking ties in identical total scores promulgated by the civil service commission.

Rationale:

The Court relied on an interpretation of the combined effect of civil service commission rules, definitions in the collective bargaining agreement between the city and its firefighters, and statute. To begin with, TLGC §143.033 provides that a promotional candidate's grade on an eligibility list is comprised of the applicant's written exam score plus points for overall seniority in the department. The statute further provides that the civil service commission shall determine a method to break ties. The San Antonio Civil Service Commission adopted a tie-breaking rule that provided that in the case of ties on the *written exam*, seniority in rank would determine the candidate's ranking on the list. Thus, the rule did not address tie-breaking in the event of a tied total score. Finally, the collective bargaining agreement provided the definition for seniority in rank.

The city asserted that commission rule only came into play when the written exam scores were used as a measure of ranking on the list, which could only occur if the written scores and total scores were tied. The city argued that the rule presupposed that ranking of tied total scores would first look to the written exam score. Then, if a tie still occurred, the rule would look to seniority in rank. The Court ultimately agreed with this method, as best giving effect to the entire rule and statutory requirements.

Lopez argued that the rule's reference to ties in the "written promotion examination score" actually referred to the total score and therefore required a resort to seniority in rank in his case. The Court rejected this argument, noting that in the context of the entire set of rules, "written promotion examination score" was intended to refer to the written exam score, not the total score. Lopez also asserted that since a preamble to the civil service rule specified that the collective bargaining agreement contained provisions for ranking candidates with identical scores, the such method must be the agreement's definition of seniority in rank. The Court found that the definition of seniority in rank by itself, despite being contained in the agreement's article relating to promotions, did not provide any express method for breaking ties. In fact, the agreement contained no such method, despite the reference in the rule's preamble. The court speculated that the preamble may have been referring to some earlier version of the agreement, but in any event, the current agreement contained no such method. Therefore, there was nothing in the agreement overriding the commission's ability to establish a tie-breaker by rule.

Observations:

It is difficult to read *Alexander* and *Lopez* and not feel that the results were foregone conclusions, given the relatively clear language of the statutes or rules at issue. Yet

the cases provide examples of how far even weak statutory interpretation cases can go. Notice that both cases resulted in petitions for review. The authors would also cite these cases as illustrative of a common observed difference in the substance of the claims arising a fire service as opposed to a police service. The other cases discussed in this paper arise from the law enforcement side of civil service, and deal with disciplinary issues. The focus of *Alexander* and *Lopez* is instead on the intricacies of the civil service mechanism. This difference mirrors the authors' own experience with contested civil service issues.

IV. OTHER IMPORTANT CASE FOR PRACTITIONERS

City of DeSoto v. White, 288 S.W.3d 389 (Tex. 2009).

The DeSoto police chief indefinitely suspended police officer Justin White for various rules violation. The notice of indefinite suspension delivered to White met the statutory requirements for such notices in all respects except one – it did not advise White that if he chose to appeal to a hearing examiner, instead of the civil service commission, his appellate rights would be limited.

White chose to appeal to a hearing examiner, and then as soon as the hearing began, he asserted that the hearing examiner lacked jurisdiction to hear the case because the suspension letter failed to notify him of the limitation of his appellate rights caused by his election. The hearing examiner offered White an abatement and an opportunity to change his election. White refused, and the hearing examiner proceeded with the case, finding that the city had substantially complied with the notice requirements. After the hearing, the examiner upheld the suspension.

White pursued his jurisdictional argument in a district court appeal. The district court agreed with White and ordered his reinstatement, and on the City's appeal, the Dallas Court of Appeals affirmed, holding that the notice requirements of TLGC §143.057 were jurisdictional, and that substantial compliance did not suffice.

Upon the City's petition, the Texas Supreme Court held that the notice requirements were not jurisdictional.

Rationale:

The Supreme Court began its analysis by noting that statutory notice requirements are presumptively non-jurisdictional, absent clear legislative intent. The Court determined that the notice requirements of §143.057 were indeed mandatory, but this did not necessarily make them jurisdictional. Observing that Chapter 143 was silent as to the consequences for non-compliance with the notice requirements, while specifically mandating reinstatement of officers for a city's failure to comply with other procedural requirements, the Court found no legislative intent that the notice provisions were jurisdictional.

The Supreme Court also addressed White's contention that the Court's holding in *City of Temple Firemen's and Policemen's Civil Service Commission v. Bender* provided that notice requirements in Chapter 143 were jurisdictional. *Bender* presented the opposite situation to *White* - a disciplined officer's notice of appeal failed to meet all the statutory requirements, omitting the specific grounds for the appeal required by §143.010.

However, in *Bender* the Court held that the officer had failed to invoke the civil service commission's jurisdiction. The Supreme Court distinguished the two situations, stating that when it comes to proper invocation of the commission's jurisdiction, and hence the hearing examiner's, the focus was on the officer's actions, not the city's. The city's disciplinary letter does not serve to invoke the jurisdiction of the tribunal hearing a disciplinary appeal. Rather, the officer must invoke the jurisdiction by filing a proper notice of appeal.

Observations:

White provides an important and useful proposition in recognizing the distinction between an employee's and a city's duties to invoke the tribunal's jurisdiction. Employees frequently make challenges to the "jurisdiction" of the hearing examiner for some alleged procedural fault, but in actually, what they seek is summary recision of the disciplinary charge. Characterizing their challenges as jurisdictional also conveniently sets up employs to circumvent the limitation on appellate rights from hearing examiner decisions. But if an employee argues that a hearing examiner has no jurisdiction to hear his appeal, would that not mean that he has no appellate remedy, and therefore, the discipline must stand? *White* helpfully clarifies that it is not incumbent upon the city to invoke the tribunal's jurisdiction, and should serve to head off jurisdictional challenges brought by employees to their own disciplinary appeals. The practitioner should keep in mind, however, that *White* does not foreclose the ability of a hearing examiner to penalize a city for non-compliance with procedural requirements.

***Steubing v. City of Killeen*, 298 S.W.3d 673 (Tex.App. - Austin 2009, pet. filed).**

Killeen police officer Juneth Steubing was indefinitely suspended from the Killeen Police Department and appealed her suspension to a third party hearing examiner under TLGC §143.057. The hearing examiner upheld the indefinite suspension. In his decision, the hearing examiner stated that he *sua sponte* considered various psychological studies not offered by either party.

Steubing appealed the decision to district court arguing that the court had jurisdiction to here the appeal because the hearing examiner's decision was procured by "unlawful means." See §143.057(j). The unlawful means cited were that the hearing examiner considered evidence other than the evidence offered at the hearing - in the form of the psychological studies - in violation of §143.053(d).

The district court agreed that the hearing examiner should not have considered the extraneous material, and reversed the hearing examiner's order in part. But the court did not order that Steubing be reinstated. Instead the court remanded the case to the hearing examiner for reconsideration without the extraneous material. The court also denied he attorney fee claim.

Steubing appealed, arguing that once the court agreed that the decision had been procured by unlawful means, it had no choice but to reinstate her, as opposed to merely remanding the case. She also challenged the denial of attorney fees, claiming she was automatically entitled to them as the prevailing party. The court of appeals affirmed, holding that the trial court did not abuse its discretion in remanding the case, or in denying the attorney fees.

Rationale:

The Austin Court utilized standard code construction principles in deciding that the legislature's intended a broad grant of authority to district courts hearing appeals of disciplinary decisions to fashion appropriate remedies. The Court points to the language in §143.015(b), stating that the district court's remedy "may include reinstatement," as an indication of legislative desire to give district courts discretion when deciding whether to order reinstatement.

Having decided that the statute authorized relief other than reinstatement, the Court specifically addressed whether the district court possessed the authority to remand. Here, the Court noted that remand by the district court, sitting essentially as an appellate court over a disciplinary case, was consistent with the appellate practice of remanding a case back to a trial court when the court improperly admits evidence.

On the issue of fees, the Court again cited to the discretionary nature of the language authorizing a fee award in §143.015(c). Although it considered Steubing to have technically prevailed in that the district court partially overturned the hearing examiner's decision, the Court held that the district court had discretion whether to award fees. Noting that the City did not introduce the extraneous material into the hearing examiner case, the Court could not conclude that the trial court abused its discretion.

Observations:

The Supreme Court should have little difficulty in denying review of this case in light of *Kelley*, as that case confirms remand as an appropriate remedy. It is unfortunate that *Steubing* did not provide more analysis of "unlawful means." The parties seemed to agree that considering evidence outside the record violated §143.053 and was therefore unlawful. However, the prohibition against a decision procured by "unlawful means" may not be that inclusive. Section 143.057(j) reads "A district court may hear an appeal of a hearing examiner's award only on the grounds that the arbitration panel was without jurisdiction or exceeded its jurisdiction or that the order was *procured by fraud, collusion, or other unlawful means*." There was no discussion in Steubing of the principle of *ejusdem generis*. The authors might have argued that "fraud, collusion, or other unlawful means" limited the meaning of "unlawful means" to acts akin to fraud or collusion, thereby not including the hearing examiner's mere failure to limit himself to record evidence.