

## CIVIL SERVICE UPDATE

Texas City Attorneys Association  
Summer Conference  
June 9-11, 2010

Ricardo J. Navarro  
Alan T. Ozuna  
**Denton, Navarro, Rocha & Bernal, P.C.**  
Rio Grande Valley Office  
701 E. Harrison Ste 100  
Harlingen, Texas 78550  
956/421-4904  
956/421-3621 (fax)  
www.rampagelaw.com



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



Supreme Court defines the test for excess of jurisdiction under 143.057(j):

Hearing examiner exceeds jurisdiction when acts are not authorized by the Act or are contrary to it, or when they invade the policy-setting realm protected by the non-delegation doctrine.

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



*Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen, 952 S.W.2d 454 (Tex. 1997):*

The Texas Legislature may delegate its powers to agencies established to carry out legislative purposes, as long as it establishes reasonable standards to guide the entity to which the powers are delegated.

*Pasadena* Court focused on whether hearing examiner's actions are subject to meaningful review by a branch of state government.

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



If Act does not bind hearing examiners to definite standards for reaching decisions and instead gives them broad latitude to determine not only facts but also applicable law, then they invade the policy-making realm, raising non-delegation concerns.

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



Court distinguishes between arbitration and hearing examiner process:

Arbitrator derives power from an agreement to arbitrate; agreements are usually broad and review usually narrow.

Hearing examiner's jurisdiction is created by the Act and comes with significant constraints.

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



For appointed assistant chiefs: hearing examiner has full range of remedies available to any appealing employee

Hearing examiner may not demote on a suspension case

Remand to hearing examiner is appropriate remedy for examiner's error; probably not so for CSC appeal

No attorney fees under 143.057(j)

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



*City of Laredo v. Leal*, 161 S.W.3d 558 (Tex.App.-San Antonio 2004, pet. denied).

Section 143.053(f) of the Texas Local Government Code provides that, “[i]f the commission finds that the period of disciplinary suspension should be **reduced**, the commission may order a reduction in the period of suspension.” So far as we have been able to determine, this authority is not limited by any statutory provision; and it has not been limited by any court decision.

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



Section 143.053(e):

In its decision, the commission shall state whether the suspended fire fighter or police officer is:

- (1) permanently dismissed from the fire or police department;
- (2) temporarily suspended from the department; or
- (3) restored to the person's former position or status in the department's classified service.

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



Supreme Court views the assignment of the number of days in the suspension period as not merely a **reduction** of a suspension but as an **imposition** of a suspension.

Court held that hearing examiner's and CSC's authority under 143.053(e)(2) must be construed in the context of the remainder of the disciplinary subchapter.

Court found no legislative intent to allow hearing examiner or CSC to **impose** a suspension longer than one that could be imposed unilaterally by the chief under 143.052(b).

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



- Significant impact in indefinite suspension cases
- Forces an all-or-nothing approach
  - 15 day suspension is not viewed as satisfactory discipline for a termination-worthy offense
- Major change in charging theory
- Impact on hearing examiner selection criteria

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



## Texas Gov't Code Chapter 614

Sec. 614.023. COPY OF COMPLAINT TO BE GIVEN TO OFFICER OR EMPLOYEE.

(a) A copy of a signed complaint against a law enforcement officer of this state or a fire fighter, detention officer, county jailer, or peace officer appointed or employed by a political subdivision of this state shall be given to the officer or employee within a reasonable time after the complaint is filed.

(b) Disciplinary action may not be taken against the officer or employee unless a copy of the signed complaint is given to the officer or employee.

(c) In addition to the requirement of Subsection (b), the officer or employee may not be indefinitely suspended or terminated from employment based on the subject matter of the complaint unless:

- (1) the complaint is investigated; and
- (2) there is evidence to prove the allegation of misconduct.

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



*Guthery v. Taylor*, 112 S.W.3d 715 (Houston [14th] 2003, no pet.)

*Fudge v. Haggard*, 621 S.W.2d 196 (Texarkana 1981, writ ref'd n.r.e.)

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



Internal vs. external distinction is highlighted.

More important distinction:

Discipline necessarily arising from a complaint because the decision-maker has no knowledge but for the complaint

vs.

Discipline arising from personal, first-hand observation by the decision-maker or chain of command

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



Every incident of misconduct must be reduced to a written complaint.

Source of observation of misconduct does not matter: supervisors and chiefs must complain to themselves

The document must be given to the employee reasonably promptly after the misconduct.

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



Sec. 143.052. DISCIPLINARY SUSPENSIONS.

(c) If the department head suspends a fire fighter or police officer, the department head shall, within 120 hours after the hour of suspension, file a written statement with the commission giving the reasons for the suspension. The department head shall immediately deliver a copy of the statement in person to the suspended fire fighter or police officer.

Sec. 143.117. DISCIPLINARY SUSPENSIONS.

(c) If the department head suspends a fire fighter or police officer, the department head shall, within 120 hours after the fire fighter or police officer is notified of the suspension, file a written statement of action with the commission.

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



*Tones* will most certainly be used as support for a strict sequence of events in cases under §143.117 and §143.052

Safe practice:

- notice to officer
- commencement of suspension, very quickly thereafter
- service on CSC within 120 hours



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



Failure to include mandatory notice is not jurisdictionally fatal to disciplinary action.

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



Who bears the burden to invoke the tribunal's jurisdiction?

“...focus must always be on the officer's actions.”

What does it mean if department fails to invoke jurisdiction?

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



Consider the result in *Tones*. Just because requirement is not jurisdictionally fatal doesn't mean that hearing examiner can't make it procedurally fatal. If hearing examiner does so, it is probably not an excess of his jurisdiction, and therefore lies beyond review.

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



Another endorsement of remand to the hearing examiner as an appropriate remedy.

Court applied abuse-of-discretion standard to attorney fee question. But fees should no longer be allowed under *City of Waco v. Kelley*.

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



Section 143.057(j):

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*.