

NO. 08-0723

IN THE SUPREME COURT OF TEXAS

ANTHONY JACKSON and JAMES NUNEZ
Petitioners/Plaintiffs

v.

**CITY OF TEXAS CITY, TEXAS, and DEBBIE LESCO, TEXAS CITY CIVIL
SERVICE DIRECTOR**
Respondents/Defendants

RESPONDENTS' BRIEF ON THE MERITS

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STATEMENT OF JURISDICTION

This Court does not need to exercise jurisdiction because the First Court of Appeals' ruling did not conflict with this Court's precedent or the holdings of other appellate courts. In fact, the First Court of Appeals expressly relied on *City of Sweetwater v. Geron*, 380 S.W.2d 550 (Tex. 1964), *Cantu v Perales*, 97 S.W.2d 861 (Tex. App.—Corpus Christi 2003, no pet.), *Corbitt v. City of Temple*, 941 SW.2d 354 (Tex.App.—Austin 1997, writ denied), and *Grote v. City of Mesquite*, 2001 WL 180260 (Tex.App.—Dallas, February 26, 2001, pet. denied) (not designated for publication).

Secondly, the First Court of Appeals' opinion did not make a statutory interpretation that is “important to Texas Jurisprudence.” Rather, the Court of Appeals' holding applied existing precedent and statutory interpretations to the undisputed facts of this case.

Finally, this Court should not exercise jurisdiction because the dissenting justice's opinion did not disagree with the majority on an important point of law. Rather, the dissenting justice disagreed with the majority's application of law to the undisputed facts before it. The dissenting justice's opinion (on which Petitioners wholly rely in this Petition For Review) ignored the Collective Bargaining Agreement and re-characterized Petitioners' terminations as disciplinary in nature, including inserting her opinion as to what the Fire Chief *should* have cited as rules violations. Plainly, none of these reasons support this Court's exercise of discretionary jurisdiction.

ISSUES PRESENTED

Respondents contend that the issues this Court should consider, should this Court determine to exercise jurisdiction, are:

- (1) Whether Petitioners have a right to an administrative appeal under Chapter 143, Municipal Civil Service, when their terminations were not disciplinary in nature, and thus, not subject to appeal under the Civil Service Act?
- (2) Whether Petitioners, subject to the Collective Bargaining Agreement governing the parties before this Court, waived or relinquished any right to an administrative appeal when they failed to meet their Conditions of Employment as stated in their executed Conditions of Employment Agreements?
- (3) Whether the First Court's ruling properly affirmed dismissal of Petitioners' claims because Petitioners' claims are, in reality, claims for money damages, and, as such, are barred by the Respondents' sovereign immunity?
- (4) Whether the First Court's ruling properly affirmed dismissal of Petitioners' lawsuit because, even if Petitioners were entitled to judicial review, they did not file their lawsuit within ten days of their terminations, as is required by Chapter 143 of the Texas Local Government Code?

TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondents, City of Texas City, Texas and Debbie Lesco, acting in her official capacity as Civil Service Director for the City of Texas City Civil Service Commission, submit this Response to Petitioners Anthony Jackson and James Nunez' Petition for Review. Respondents file this document to demonstrate to this Court that it does not need to exercise jurisdiction because the First Court of Appeals correctly interpreted the applicable statutes, applied those to the undisputed facts before it, and properly affirmed the trial court's dismissal of Petitioners' lawsuit.

STATEMENT OF FACTS

The First Court of Appeals correctly stated the nature and factual underpinnings of the case. Respondents set forth this Statement to refute Petitioners' characterizations of some of the underlying facts, as follows.

Respondent City of Texas City (the "City") is a home-rule city. At all times relevant to this lawsuit, the City has been subject to the requirements of the Fire Fighters and Police Officers Civil Service Act (the "Civil Service Act"), found in Chapter 143 of the Texas Local Government Code. (CR 17). Section 143.010 of the Civil Service Act establishes a procedure whereby a fire fighter who wants to appeal from an action "for which an appeal or review is provided by this Chapter" may do so. TEX. LOC. GOV'T CODE §143.010(a).¹ The Civil Service Act provides a civil service commission or third party hearing examiner with jurisdiction to hear *only* those actions for which appeal is

¹ All references to "Civil Service Act," are to Chapter 143 of the Texas Local Government Code. All references to sections are to Chapter 143 of the Texas Local Government Code, unless otherwise noted.

expressly provided: temporary disciplinary suspension, indefinite suspension,² demotion, and promotional bypass. §§ 143.034, 143.036, 143.052, 143.053, 143.054, and 143.056. Except for these relevant portions of Chapter 143, no other section gives the civil service commission, a third-party hearing examiner or a court jurisdiction to consider an appeal of a termination of employment.

Pursuant to the Civil Service Act, a district court's jurisdiction may be invoked only under limited circumstances. Specifically, the Civil Service Act authorizes an appeal to the district court if the fire fighter is dissatisfied with the decision of the civil service commission *or* if the hearing examiner was without jurisdiction or exceeded his jurisdiction, if the order was procured by fraud, collusion, or other unlawful means. §§143.015(a) and 143.057(j). The Civil Service Act provides *no other* statutory right of appeal to State district court.

More significant for this Court's review, at all times relevant to this lawsuit, Respondent City has also been subject to the requirements of sequential Collective Bargaining Agreements ("CBAs") into which it entered with its fire fighters' exclusive bargaining representative, the Texas City Professional Fire Fighters Association, Local 1259 of the International Association of Fire Fighters, AFL-CIO-CLC, (the "Association"). These CBAs have, in numerous respects, pre-empted provisions of the Civil Service Act. (CR 41 ¶¶9 - 10, CR 70).

² Chapter 143 identifies the *specific* acts of misconduct for which an employee may be suspended or discharged. TEX. LOC. GOV'T CODE §143.051.

Each of these CBAs has contained a provision that Respondent City had the right to establish pre-employment qualifications, standards, and/or terms and conditions of employment. (CR 41). Respondent City has accomplished this through Conditions of Employment Agreements that fire fighters sign upon employment with the City. The CBAs also have stated that “[t]he qualifications, standards, and/or terms and conditions of employments set forth in the Conditions of Employment Agreement in effect at the completion of the one year probationary status become *permanent*.” (CR 69)(emphasis added) (Tab A). After their one-year probationary term, Petitioners became “full-fledged civil servants,” (pg. 3, Pet. For Rev.) *who had accepted their employment with Respondent City subject to the permanent Conditions of Employment* to which they agreed to on an individual basis, and the Association agreed with on a Department-wide basis. (Tab A).

At all times relevant to this lawsuit, the CBAs contained an acknowledgement between Respondent City and the Association that by entering into the CBA, the CBA took precedence over the applicable Local Government Code (*i.e.*, Civil Service Act) and the City’s Local Civil Service Rules and Regulations, whenever the provisions of the Agreement are in conflict therewith. (CR 70) (Tab A).

SUMMARY OF THE ARGUMENT

The Supreme Court should not grant this Petition for Review. Petitioners overstate the holding of the First Court of Appeals’ ruling to entice this Court to exercise jurisdiction. The First Court of Appeals’ ruling did not wipe away due process rights for

civil service fire fighters; the Court of Appeals applied the facts of *this* case to the applicable law, including this Court's precedent on non-disciplinary terminations of civil service employees, as stated in *City of Sweetwater v. Geron*, 380 S.W.2d 550 (Tex. 1964). Nothing in the First Court's ruling impacted fire fighters' rights in general; this ruling affirmed the trial court's finding that Petitioners had signed pre-employment contracts, "Conditions of Employment," that acknowledged Petitioners were required to comply with certain conditions, *throughout their employment*. (Tab A).

Respondent City and the fire fighters' Association *collectively bargained* for management to retain the right to establish and enforce these conditions of employment. (Tab A). If the parties to the CBA had contemplated or agreed to the fact that, no matter what the reason, every termination was "disciplinary" and thus entitled to an administrative appeal process, there would have been no need for the parties to the CBA to have reached the bargained-for exchange that the "Employer's Rights" section encompassed. (Tab A).

The First Court of Appeals thoroughly analyzed all of the facts in the record before it and applied existing precedent to those facts. Petitioners here want to rebut the factual findings by re-characterizing the First Court's holding so as to create conflicts jurisdiction and/or to create other bases for this Court to exercise its discretionary review.

ARGUMENT

A. Petitioners Recharacterize the First Court of Appeals' Holding As a "Deprivation of a Property Interest."

1. Petitioners Assert A Footnote Trumps Explicit Holding.

Petitioners ignore the *holding* of the First Court of Appeals:

We hold that Jackson's and Nunez's [Petitioners'] terminations *do not fall within the scope of the Act, and therefore the procedural requirements for the disciplinary suspensions in section 143.052 of the Act do not apply to them.*

Jackson, at 646.(emphasis supplied). Rather than relying on the plain and unambiguous language that the First Court of Appeals stated above, Petitioners instead pluck Footnote 6 out of obscurity, declare that "footnotes matter," and then declare that the First Courts' inclusion of the *City of Amarillo v. Hancock*³ decision requires a complete reversal of its decision. Petitioners rely on pure hyperbole in their Brief:

The gravest error in the majority's decision, negatively affecting fire fighters and police officer statewide, is its conclusion that Petitioners lacked a property interest in their employment.

(Petitioners' Brief, pg 19). It is clear that a thorough reading of the *entire* decision shows that the First Court *never* suggested that fire fighters were not entitled to extensive due process rights when facing *disciplinary* terminations. It is likewise obvious that the First Court of Appeals found, both factually and legally, that Petitioners' terminations were non-disciplinary in nature:

We likewise disagree that Jackson's and Nunez' [Petitioners] argument that the fire chief should have classified their dismissals as incompetence

³ 239 S.W.2d 788 (Tex.1951)

or shirking of their duty and were, therefore, within the scope of disciplinary suspensions under subsection 143.051(3) or 143.051(11) of the Act. The evidence here demonstrates that neither Jackson nor Nunez committed a specific act of incompetency that caused him to be dismissed. . . .We also disagree with Jackson’s and Nunez’ claim that the Conditions of Employment agreement should be considered a special order of Texas City so that their failure to attain the required level of EMT certification violated subsection 143.051(12) of the Act. . . . Failure to qualify for state certification as an EMT was not a specific act of misconduct that violated a rule or order—it was a failure to meet the contractually agreed upon conditions of employment as a fire fighter. See Geron v. City of Sweetwater [citations omitted.]

Jackson, at 646-7. (emphasis added). *Nothing* in the body of the First Court’s ruling held that civil service fire fighters, who were or are terminated for *disciplinary reasons*, are not or would not be entitled to an administrative appeal.

The footnote regarding the *City of Amarillo v. Hancock* decision contained a general statement that civil service law (as it existed in 1951) did not permit a fire fighter to appeal a demotion to district court. Therefore, civil service law, as it existed at that time, did not consider the occupation of a rank to be a “vested” right. Neither the facts nor the holding of that case are comparable to the current issue before these parties. Clearly, Petitioners are grasping for something—anything—upon which to base their claims for this Court’s review.

2. Petitioners Wrongly Assert They Were Deprived of a Property Interest.

Because the cases decided under Chapter 143 (municipal civil service) do not support their Petition for Review before this Court, Petitioners’ briefing contains several citations to county civil service cases to support their argument that *all* civil service employees are entitled to constitutional due process. Thus, their argument continues,

every instance of termination necessarily deprives every civil servant of a property interest. See *County of Dallas v. Wiland*, 216 S.W.3d 344 (Tex. 2007)(deputy constables)(pg 14, 22, 23, 25 of Petitioners' Brief); *County of Dallas v. Walton*, 216 S.W.3d 367 (Tex.2007) (deputy constable) (pg. 22, 26, 27, 28, 31 of Petitioners' Brief); and *Bexar County Sheriff's Civil Service Commission v. Davis*, 802 S.W.2d 659 (Tex. 1990) (Captain terminated for sexual harassment)(pg. 21, 28 of Petitioners' Brief).

To bridge from the county civil service cases (that are inapplicable here), Petitioners cite the first case interpreting municipal civil service, *Fire Department of City of Fort Worth v. City of Fort Worth*, 217 S.W.2d 664 (Tex. 1949). They cite this case to support their general argument that Chapter 143 grants municipal civil servants permanent employment tenure (and thus, a "vested property interest.") Notwithstanding that contention, even the quotation that Petitioners include in their Brief limits the applicability of the "permanent employment tenure" argument only to disciplinary actions:

This statute confers upon an employee the right to continue in his employment so long as his conduct meets the stipulated standards. By providing a complete and exclusive list of *acts of misconduct* which may constitute cause for removal, the legislature has taken pains to withhold *from the commission* an unlimited discretion in dismissing or suspending employees.

Id., at 665, Petitioners' Brief, pg 22)(emphasis added.) Clearly, as the italicized portions of this Court's ruling denote, the civil service act only restricted the *disciplinary* reasons for removal from the civil service.

This Court recognized that municipal civil service employees were not entitled to *permanent* tenure as public employees in *City of Sweetwater v. Geron*, 380 S.W.2d 550 (Tex. 1964):

Section 16a, which states the purpose of the Act, does not grant any additional power to the Civil Service Commission. While a statement by the Legislature of the purpose of an act is helpful in construing it, nevertheless the provisions designed to accomplish that purpose must fairly and reasonably do so. *We must look elsewhere in this Act for authority of the Civil Service Commission to bring about permanent tenure of employees in the absolute sense. We do not find it elsewhere.* While a rigid and fair enforcement of the rules and regulations promulgated by the civil Service Commission within the limits prescribed by the Act *may tend to create permanent tenure for classified employees, it does not accomplish that purpose without limitations.* Although the broad powers granted to home rule cities by the Constitution, Article XI, Section 5 may be limited by the acts of the Legislature, it seems that should the Legislature decide to exercise that authority, *its intention to do so should appear with unmistakable clarity.*

At 552. This Court has thus particularly rejected the contention that *municipal* civil service employees were entitled to permanent tenure, and similarly discarded the claim that the Legislature set out the *exclusive* grounds for termination. *Id.* This Court expressly recognized that the Act's prohibitions applied only to *disciplinary* suspensions or terminations, and continued,

While the disciplinary causes for discharge set out in said section are *exclusive* in so far as the Civil Service Commission has the power to dismiss, the Act does not prevent the City from legislating *in other fields which may cause the dismissal of employees.*

Id. (emphasis supplied). This Court affirmed that, unless the Texas Legislature expressly prohibits it (which it has not done), a civil service city can terminate a classified employee for other, non-disciplinary reasons.

3. Chapter 143 Limits Petitioners' Rights to Administrative Appeals.

As stated *supra*, Petitioners were not terminated from their employment because of disciplinary rules violations; their dismissals were non-disciplinary in nature. As the First Court properly recognized, Texas courts have historically found that Chapter 143 (and its predecessor article 1269m) expressly authorizes a right of appeal for civil service employees to the civil service commission or hearing examiner to hear appeals only from *disciplinary* indefinite and temporary suspensions, demotions, and promotional bypasses under the Civil Service Act. *City of Sweetwater v. Geron*, *Cantu v Perales*, 97 S.W.2d 861, 863 (Tex. App.—Corpus Christi 2003, no pet.); *Corbitt v. City of Temple*, 941 SW.2d 354, 355 (Tex.App.—Austin 1997, writ denied). *Also see*, TEX. LOC. GOV'T CODE §§ 143.034, 143.036, 143.052, 143.053, 143.054, 143.056 and 143.057.

Section 143.051 lists the specific *disciplinary* grounds for indefinite or temporary suspension, for which an appeal or review is available. §143.051. Except for acts of misconduct that are specifically enumerated in Section 143.051, the Civil Service Act does *not* provide for an administrative appeal of every possible disciplinary action or dismissal taken against employees. *See*, *City of Sweetwater v. Geron*, *supra*, *Corbitt v. City of Temple*, 941 SW.2d 354, 357(Tex.App.—Austin 1997, writ denied)(“The statute does not provide for [sic] administrative appeal of every possible disciplinary action taken by the Chief, **only those that are specifically enumerated.**”); *Cantu v Perales*, 97 S.W.2d 861, 863 (Tex. App.—Corpus Christi 2003, no pet.) *also see*, §143.010(a).

Although an unreported case, the Dallas Court of Appeals has addressed this issue in *Grote v. City of Mesquite*, 2001 WL 180260 (Tex.App.—Dallas, February 26, 2001, pet. denied) (not designated for publication).⁴ Grote was hired by the City in 1983 as a firefighter who signed a document entitled “Memorandum of Understanding” when he was initially hired, and executed another “Memorandum” as part of his continued employment with the City’s Fire Department in 1995. *Id.*, at * 1-2. When he signed these agreements, Grote accepted the conditions and qualifications required, including his understanding that he was required to maintain his EMT/Paramedic certification. *Id.* at *2. Grote also understood when he signed the agreement, that if he were unable to qualify as a paramedic and be accepted to perform paramedic responsibilities, the City would have cause to terminate his employment. *Id.*, at *1.

Grote worked for the City for over 10 years; however, in 1994, he failed the re-certification exam, and thus, he lost his EMT/Paramedic certification. *Id.* Because he was no longer able to perform the paramedic functions required in his position, Mesquite discharged him for that non-disciplinary reason in 1997. *Id.*, at *2. The Dallas Court of Appeals found that Grote’s failure to qualify as a paramedic meant that he could not fulfill a specific condition of his employment:

Termination for a failure to qualify to perform the functions of one’s position cannot be considered disciplinary. Section 143.051 solely concerns specific acts of misconduct for which an employee may be suspended or discharged. *See City of Sweetwater v. Geron, [supra]*, Tex.Loc.Gov’t. Code 143.051. **The record reflects no specific acts of**

⁴ The voters of the city of Mesquite have adopted Chapter 143 to govern the fire and police departments. However, Mesquite was not and is not subject to Chapter 174, collective bargaining.

misconduct concerning Grote’s inability to meet the qualifications of his employment. Absent a disciplinary action, Grote was not entitled to appeal to an independent third party hearing examiner. We find that Grote’s inability to maintain the required state certification [sic] **not a disciplinary action as reflected in Section 143.051**, which would entitle him to an appeal under Chapter 143.

Id., at *3, *4. (emphasis added), citing *City of Sweetwater, supra*, and *Corbitt v. City of Temple*, 941 S.W.2d 354, 355 (Tex.App.—Austin 1997, writ denied)).

Here, Petitioners were terminated for a reason that is not enumerated in the statute—for their failure to comply with their Conditions of Employment Agreements. Because the reasons for Petitioners’ terminations were not any of the grounds that are enumerated in Section 143.051, the Civil Service Act does not provide Petitioners a right to appeal their non-disciplinary terminations. Thus, as the First Court correctly held, they were not entitled to an administrative appeal process. Petitioners’ claims must be rejected.

4. The County Cases Cited by Petitioners Are Inapposite.

Notably, the employers in all three cases cited by Petitioners in their Brief (*County of Dallas v. Wiland, supra*, *County of Dallas v. Walton, supra*, and *Bexar County Sheriff’s Civil Service Commission v. Davis, supra*) were counties, *not* home-rule municipalities. That distinction makes a difference, as home-rule municipalities have very broad powers under Article XI, Section 5, Section (A)(2) *supra*. As this Court recognized in *Geron*, if the Legislature decided to pre-empt the entire field of civil service employment from a home-rule municipality, it must limit cities’ authorities with

“unmistakable clarity.” *supra*, *Geron, supra*, at 552. Clearly, as the First Court of Appeals recognized, the Legislature has never done so.

Moreover, the two Dallas County cases cited by Petitioners involved claims for violations of procedural due process in that it was found that a County ordinance, coupled with a Manual, created a property interest in employment. In *Wiland*, this Court undoubtedly did not intend to create a bright-line, permanent employment status for every civil servant in the State; rather, it took care to use language which limited its holding to the facts of that case:

On balance, we think that such a limitation in the Manual is more than an inference, and that the fair import of the Manual’s provisions, taken as a whole, is that covered employees are not to be discharged without being given a reason they can contest.

Id., at 354. This Court’s ruling in *Walton* was based on similar facts. Respondents fail to see the similarity(-ies) between the employment of Dallas County deputy constables and the Petitioners who have been afforded, not only the full protections of Chapter 143, municipal civil service, but also of Chapter 174, collective bargaining. This Court should not consider these cases persuasive on the matter before it.

Bexar County Sheriff’s Civil Service Commission v. Davis, supra, is likewise dissimilar. This case involved a procedural due process claim made by an employee who was terminated because of violations of the sexual harassment policies. Davis claimed that he was entitled to prehearing notification of the names of the victims who were going to testify in the hearing against him. Notably, in this case, the parties “agreed that Davis ha[d] a constitutionally protected property interest in continued employment with the

Sheriff's Department." *Id.*, at 661. *No such stipulation exists here.* Ultimately, when resolving this procedural due process claim against Davis, this Court held that,

Given these considerations [which are "strong in sexual harassment cases," to-wit: further harassment, ridicule, or retaliation from other employees even after primary offender is terminated, and the fears of future harassment may "chill reporting."], we hold that the government's interests in flexibility, informality, and economy in this case outweighs Davis' interest in receiving advance notice of the names of the witnesses against him.

Id., at 664. In *Davis*, this Court found that the County employer had complied with the requirements of due process, when balancing the interests. This Court found that Bexar County did not violate the employee's due process rights. Even though the parties did not dispute Davis' alleged entitlement to "due process," Bexar County was still vindicated by this Court. Here, Petitioners' and Respondent City's employment relationship was governed, at all relevant times, by the operation of two distinct State statutes, Chapter 143 (municipal civil service) and Chapter 174 (collective bargaining). These statutes provide a great level of protection to them and to all Texas City fire fighters, and Respondent City complied with all procedural requirements. All of the cases cited by Petitioners are completely dissimilar to the issues before this Court.

B. Petitioners Negotiated A Waiver of Administrative Appeals Through The Collective Bargaining Agreement (Issue 2).

1. The First Court of Appeals Correctly Applied The Law.

The First Court of Appeals correctly reasoned that the Conditions of Employment Agreements "did not specifically refer to disciplinary actions under the Act." *Jackson, supra*, at 645. As recognized by the First Court of Appeals, §174.006 of the Texas Local

Government Code provides that the Civil Service Act (“CSA”) prevails over a collective bargaining agreement *unless* the agreement specifically provides otherwise. Furthermore, §174.009 states that the collective bargaining agreement is final and binding on the parties. During Petitioners’ employment with Respondent City, they were bound by the CBA that their union had negotiated.

In *City of San Antonio v. Scott*, 16 S.W.3d 372 (Tex.App.—San Antonio 1999, review denied), the San Antonio Court of Appeals recognized that a collective bargaining agreement can vary the terms of the CSA. *Id.*, at 376; *accord*, *City of San Antonio v. Baer*, 100 S.W.3d 249 (Tex.App.—San Antonio 2001, no pet.). It is clear that the First Court of Appeals properly interpreted applicable law when it found that the Petitioners had been afforded the protections of Chapter 143 (municipal civil service) and Chapter 174 (collective bargaining). Its decision should not be disturbed.

2. Petitioners’ Legal Authorities Are Distinguishable.

Yet Petitioners argue, as they must, that the First Court of Appeals Court erred legally. In their Brief, Petitioners first return to the *County of Dallas v. Walton*, *supra*, for the proposition that a constitutional right to due process can never be waived (and thus, presumably, that any agreements that Petitioners executed here are not lawful.) As stated previously, *Walton* is not similar to this case in any meaningful manner. Walton was apparently required to execute a blanket waiver of any and all employment claims at the time of hire.

Here, in stark contrast, Petitioners were members of a collective bargaining unit, who presumably benefitted from the negotiating efforts of their local association. Unlike *Walton*, Petitioners here negotiated specific provisions relating to distinct issues relating to their scope of employment. There are no meaningful comparisons that can be drawn between *Walton* and this case.

Petitioners, on page 29 of their Brief, set forth several cases which they assert supports their proposition that collective bargaining implicitly affirms civil service rights. However, two of those cases did not involve civil service (*Kierstead v. City of San Antonio*, 643 S.W.2d 118 (Tex. 1982) and *City of Brownsville v. Salazar*, 712 S.W.2d 577 (Tex.App.—Corpus Christi, 1986, no writ)(superseded by statute as recognized by *Tijerina v. City of Tyler*, 846 S.W.2d 845 (Tex. 1993)(these cases involved the statutory predecessor to *Chapter 142* provisions); and *Harrison v. City of San Antonio*, 695 S.W.2d 271 (Tex. App.—San Antonio, 1985, no writ)(promotional assessment center process was improperly amended by the union). When examining the underlying principles relating to Petitioners’ arguments, it is obvious that this proposition of law is far from “well-settled.” Petitioners should be held to the terms of the Conditions of Employment Agreements that they executed, because the local union and Respondent City collectively bargained for this result: that fire fighters who sign these agreements are held to their word.

3. The Parties Negotiated Conditions of Employment Agreements to Pre-empt Chapter 143 Disciplinary Appeals.

Here, the parties *specifically agreed* that the Fire Chief retained the right to determine and establish pre-employment qualifications, standards and/or terms and conditions of employment. (CR 69). The parties specifically agreed that:

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 through the collective bargaining process by mutual consent of the Union and City for that employee;**

(CR 69) (Tab A). Thus, as the CBA specifically provides, the remedies provided to Petitioners for issues arising under a Condition of Employment Agreement was through the negotiations process. The CBA mutually established a specific avenue, the Conditions of Employment Agreement, which is outside of the Civil Service Act, and has also established a specified remedy for addressing any modifications. Petitioners did not pursue that avenue; rather, they proceeded directly to court claiming they were deprived of a “right” to an administrative appeal.

Clearly, when they entered into the CBA, the parties agreed that its provisions would take precedence over the applicable sections of the Texas Local Government Code, whenever the provisions of the Agreement were in conflict. (CR 70) (Tab A). Accordingly, any disputes or claims Petitioners may allegedly have with the Conditions of Employment Agreement are waived and pre-empted by the CBA, as there is no

provision in the CBA stating that any violation of the Conditions of Employment would be deemed disciplinary in nature.

The local Association [Union] agreed to the establishment of the Conditions of Employment, and the CBA set forth the remedies for each individual employee, which is “through the collective bargaining process.” (Tab A). Now, because Respondent City has held Petitioners to the terms of their Conditions of Employment *and* the CBA, they want this Court to exercise its discretionary jurisdiction to “protect” their “rights” by ignoring these two written documents.

That argument belies the facts that underlie this lawsuit. Respondent City and the local Association spent resources negotiating a right to establish *permanent* Conditions of Employment. Those contractual provisions would be surplusage if the intent had been that every termination founded on an employee’s failure to comply with his Conditions of Employment contract would mean Respondent City would have to comply with the disciplinary appeals provision as set out in Chapter 143. If that indeed had been the intent, there is no purpose for the parties to have agreed that every individual employee must negotiate through the collective bargaining process if he wanted to alter his conditions of employment contract.

The First Court of Appeals answered these issues in its opinion and properly found that the only reasonable construction of the contractual language was that the parties clearly intended to bypass the administrative appeal process when an employee failed to meet the conditions of employment. Surely the Fire Chief is aware (as the Union

undoubtedly is), that *disciplinary* terminations require the parties to follow an exhaustive administrative appeals process. The presence of this bargained-for exchange in the CBA's language—that the Fire Chief retains the ability to establish permanent, non-disciplinary conditions of employment—makes it obvious that the parties contemplated that this CBA provision pre-empted Chapter 143's disciplinary appeals process.

The First Court of Appeals here reached the only logical conclusion: Petitioners agreed that the Conditions of Employment contracts, as allowed under the CBA, permitted the Fire Chief to terminate fire fighters who failed to comply with the terms and conditions of their individual contracts, *for non-disciplinary reasons*. As all guiding precedent recognizes, (as did the First Court of Appeals), cities have always possessed and retained the right to terminate a civil service employee for non-disciplinary reasons; when an employee is terminated for a non-disciplinary reason, he or she is not entitled to the administrative appeal process outlined in Chapter 143, Subchapter D, "Disciplinary Actions." The First Court of Appeals properly dismissed Petitioners' lawsuit.

C. Petitioners Claims Are Barred By Governmental Immunity. (Issue 3)

Assuming *arguendo* that Petitioners' claims are justiciable (which they are not), the Court still lacks jurisdiction over Petitioners' claims, because Respondent City has sovereign immunity from the allegations raised by Petitioners.

1. Sovereign Immunity Prohibits an Award of Monetary Damages.

“[S]overeign immunity, unless waived, protects the State of Texas, its agencies and its officials from lawsuits for damages, absent legislative consent to sue the State.”⁵ *Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401, 405 (Tex.1997) (emphasis added); see also *Ebarb*, 88 S.W.3d at 720 (citing *General Servs. Comm’n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 594 (Tex. 2001)). “This court has long recognized that it is the legislature's sole province to waive or abrogate sovereign immunity.” *Tex. Nat’l Resource Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). An express waiver by the Legislature must be clear and unambiguous. See *General Svcs. Comm’n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 594 (Tex. 2001); see also *Denver City Indep. Sch. Dist. v. Moses*, 51 S.W.3d 386, 390 (Tex.App. - Amarillo 2001, no pet.). “Whether sovereign immunity is waived is a matter for the consideration of the legislature, and the instances of waiver are narrowly defined and must be accomplished by **clear and unambiguous language.**” *Gendreau v. Medical Arts Hosp.*, 54 S.W.3d 877, 878 (Tex. App. - Eastland 2001, pet. denied) [emphasis added].

A city is deemed an agent of the state for sovereign immunity purposes. See *Ebarb*, 88 S.W.3d at 720 (citing *City of Galveston v. Posnainsky*, 62 Tex. 118, 127 (1884)). Therefore, the sovereign immunity protection accorded a municipality, as a political subdivision of the state, is no different.

⁵ Suits against a government employee in his or her official capacity are just another way of pleading a suit against the governmental entity of which the official is an agent. See *Bexar County v. Giroux-Daniel*, 956 S.W.2d 692, 695 (Tex.App.-San Antonio 1997, no pet.).

The "clear and unambiguous" requirement was codified during the 2001 legislative session, at Texas Government Code § 311.034, which states:

In order to preserve the legislature's interest in managing state fiscal matters through the appropriate process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language.

TEX. GOV'T CODE § 311.034. The Texas Supreme Court further directed, "when construing a statute that purportedly waives sovereign immunity, we generally resolve ambiguities by retaining immunity." *Wichita Falls St. Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003).

Accordingly, Petitioners must establish that there is a clear, unambiguous waiver of sovereign immunity in order for the court to maintain jurisdiction over their claims. Otherwise, sovereign immunity from suit defeats a trial court's subject matter jurisdiction and dismissal of Petitioners' claims is mandatory.

2. This Court Has Held That Chapter 143 Does Not Waive Respondents' Immunity.

Petitioners' claims must also be dismissed because there is no waiver of immunity in Chapter 143 for the types of claims raised here. Significantly, this Court has spoken on sovereign immunity for cities that have adopted Chapter 143, in *City of Houston v. Jackson*, 192 S.W.3d 764 (Tex. 2006). In *Jackson*, a fire fighter who was denied a transfer filed a grievance and appealed it to a grievance examiner, rather than the Civil Service Commission. The grievance examiner made a recommendation on his behalf, which the City did not implement. He filed a second grievance and then a lawsuit,

seeking \$798,000.00 in statutory penalties against the City for failure to implement this hearing examiner's recommendation. When refusing to create a statutory penalty in the grievance process and dismissing the trial court's award of \$477,000.00 for want of jurisdiction, this Court stated:

We see nothing that would indicate the Legislature intended to abrogate municipalities' sovereign immunity in such a haphazard manner. To discover such an intent in this case, in direct opposition to the statutory language, would run afoul of **long-held statutory construction principles that compel strict construction of penal statutes and statutes waiving sovereign immunity and governmental immunity.**

Id., at 773. (emphasis added). Thus, this Court has continued to affirm adherence to a strict construction of *any* waiver of a municipality's sovereign immunity, and in particular, under Chapter 143.

Most importantly, *City of Houston v. Williams*, 216 S.W.3d 827 (Tex. 2007), clearly establishes that claims for money damages cannot be pursued without implicating governmental immunity. This case directly supports Respondents' contention that this request for a "statutory interpretation" is nothing more than a subterfuge to avoid sovereign immunity and obtain money damages.

In *City of Houston v. Williams*, *supra*, the fire fighters sued the City to recover money that was improperly deducted from overtime payments, and also claimed the City improperly calculated the amounts it paid out in accrued leave benefits, when the firefighters' employment was terminated. Houston filed a plea to the jurisdiction based upon sovereign immunity, which was denied by the trial court and the court of appeals.

The court of appeals permitted the suit to continue because the firefighters sought “declaratory relief.”

However, this Court cited *Texas Natural Resources Conservation Commission v. IT-Davy*, 74 S.W.3d 849, 856 (Tex. 2002), for the proposition (as previously recognized) that *parties cannot circumvent immunity by recasting a suit for money damages as a claim for a declaratory judgment*, and noted:

The only injury the retired firefighters allege has already occurred, leaving them with only one plausible remedy—an award of money damages. . . . *governmental immunity does not spring into existence when a damages award is finally made; it shields governments from the costs of litigation leading up to that goal.*

Id., at 829. (emphasis added). Here, Petitioners do not make a *specific* request for money damages. Yet, if Petitioners are successful in this appeal, Petitioners are highly likely to assert a claim for money damages, in the form of back pay and benefits, for their dismissals. Thus, Petitioners are attempting to circumvent Respondents’ governmental immunity by characterizing a suit for money damages as a declaratory judgment action, injunctive relief, and writ of mandamus for violating the Civil Service Act. *See Tex. Natural Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 856 (Tex.2002); *Ebarb* at 721). Accordingly, Respondents are protected from the relief sought by Petitioners, as Respondents have not waived sovereign immunity in this instance.

3. Other Texas Courts of Appeal Have Properly Interpreted *City of Houston v. Williams*.

Several Texas Courts of Appeal have addressed the arguments made by Petitioners in this case, to-wit: that they are seeking only declaratory, injunctive, and mandamus

relief (Petitioners' Brief, pg 36). The Texas appellate courts have uniformly rejected these claims to the extent they implicate back pay. Moreover, all have recognized that *City of Houston v. Williams, supra*, clearly bars recovery of money damages (*i.e.*, retrospective monetary relief.) *Cassidy v. City of Balch Springs*, 223 S.W.3d 612 (Tex. App.—Dallas, 2007, pet. granted, judgment vacated, w.r.m.); *Lowell, et al., v. City of Baytown*, 264 S.W.3d 31 (Tex.App.—Houston [1st Dist.] 2007, pet. filed); and *Whiteaker v. City of Round Rock, et al.*, 241 S.W.3d 609 (Tex. App.—Austin, 2007, pet filed.).

Chronologically, the first Court of Appeals to interpret and apply *City of Houston v. Williams, supra*, was the Dallas Court of Appeals. The Dallas Court upheld a city's sovereign immunity in a case brought under Chapter 143. *Cassidy v. City of Balch Springs*, 223 S.W.3d 612 (Tex. App.—Dallas, 2007). *Cassidy* upheld Balch Springs' sovereign immunity against a claim by police officers for pay allegedly owed them pursuant to Chapter 143 of the Texas Local Government Code. Specifically, the police officers claimed an ordinance enacted by the City Council required certain wage increases to be paid. "Based on recent Texas Supreme Court rulings, we are compelled to conclude that both the City and Hubert [City Manager] are immune from Petitioners' claims for compensation." *Id.* at 163.

The *Cassidy* court addressed whether there was a general waiver of immunity under Chapter 143 of the Local Government Code and upheld sovereign immunity, relying on the recent Texas Supreme Court case, *City of Houston v. Williams, supra*. The

Court interpreted *Williams* to impliedly recognize the *absence* of a general waiver of immunity in the civil service statutes. *Cassidy*, at 614-5.

Lastly, the Court was unpersuaded that the legislative purpose of the civil service statutes precluded sovereign immunity, in light of *Williams*:

Despite the fact that governmental immunity from claims under the civil service statutes is not generally supported either by historic precedent or the legislature's state purpose of the statutes, we are compelled by the supreme court's opinion in *Williams* to conclude that the City in this case is immune from Petitioners' suit for compensation brought under these provisions.

Cassidy, at 615. Accordingly, the *Cassidy* court followed this Court's ruling in *Williams* and upheld sovereign immunity.⁶

In *Lowell, et al., v. City of Baytown, supra*, to the extent that the complaining fire fighters sought back pay (money damages), the First Court of Appeals concisely concluded: "We read *Williams* and *Waddell* to foreclose any award of monetary damages under the Civil Service Act unless the Legislature gives to firefighters and police officers, for whose benefit this act was passed, permission to sue." *Id.*, at 36.

The Austin Court of Appeals in *Whiteaker v. City of Round Rock, et al., supra*, considered the reasoning of its sister courts to be sound, and followed their lead. *Whiteaker* involves a promotional vacancy and a fire fighter's claims that the City acted improperly when it appointed another fire fighter to that vacancy. *Whiteaker* sought a declaratory judgment, injunctive relief and a mandamus against the City. The Austin Court recognized the application of *Williams* to these facts:

⁶ The Dallas Court of Appeals also ruled similarly in *Bell v. City of Grand Prairie*, 221 S.W.3d 317, 321 (Tex.App.—Dallas 2007, no pet.), *Seals v. City of Dallas*, 249 S.W.3d 750 (Tex.App.—Dallas 2008, no pet.) and *Anderson v. City of McKinney*, 236 S.W.3d 481 (Tex.App.—Dallas 2007, no pet.)

. . . *Williams*' holding is logically inconsistent with the existence of a general waiver of governmental immunity for claims arising under chapter 143, [citing *Cassidy*] . . . and [s]econd, *Williams* holds that a declaration of statutory rights concerning an alleged underpayment of accrued vacation and sick leave owed under chapter 143—a form of back pay—is a claim for “money damages” that implicates governmental immunity.

Whiteaker, supra, at 633. In *Whiteaker*, the Austin Court recognized that Fire Fighter Whiteaker is, in substance, seeking recompense for his “losses caused by the City’s actions. This is a claim for money damages that implicates the City’s governmental immunity.” *Id.*, at 637. The Austin Court then concluded that Whiteaker’s claims for relief, to the extent that Whiteaker sought back pay and benefits and other retrospective monetary relief (*i.e.*, amounts that accrue prior to judgment) was barred by governmental immunity. *Id.*, at 637-8.

Moreover, there is no split in the Texas appellate courts regarding the applicability of the *City of Houston v. Williams, supra*, case in non-employment law settings. In *City of Aspermont v. Rolling Plains Groundwater Conservation District*, 258 S.W.3d 231 (Tex.App.—Eastland 2008, pet. filed), the Eleventh Court of Appeals reiterated *Williams* and this Court’s jurisprudence regarding immunity from suit for money damages:

The supreme court has held that a suit against a sovereign for monetary damages is not transformed into a viable suit by the request for a declaratory judgment and that, if the sole purpose of a declaration concerning contractual or statutory rights is to obtain a money judgment, immunity is not waived. *Sovereign immunity from suit cannot be circumvented “by characterizing a suit for money damages, such as a contract dispute, as a declaratory-judgment claim.”*

Id., at 235, citing *City of Houston v. Williams, supra*. (emphasis added). Accordingly, the First, Third, Fifth, and Eleventh Texas Courts of Appeal have properly applied and

interpreted this Court’s recent jurisprudence regarding sovereign immunity. No review is necessary.

4. Petitioners Are Engaging in Subterfuge To Thwart Governmental Immunity Jurisprudence.

Petitioners contend that Respondents are “simply wrong” to assert that this lawsuit necessitates payment of money damages. (Petitioners’ Brief, pg. 37). Petitioners’ disingenuous argument ignores the reality of the circumstances in a Chapter 143 context.

Petitioners are fully aware, as are Respondents, that should this Court order Respondent City to go forward with a disciplinary appeal, Respondent City will not be able to do so, because of the strict requirements of disciplinary notices contained in Chapter 143. Chapter 143 contains specific, jurisdictional prerequisites to issuing a disciplinary notice to employees in the classified service. Moreover, Respondent City is prohibited by Chapter 143, specifically §143.053(c), from amending or supplementing a “disciplinary notice.” *City of Carrollton v. Popescu*, 806 S.W.2d 268 (Tex.App.—Dallas 1991, writ denied). Respondent City, relying on the fully executed Conditions of Employment Agreements (as permitted by the negotiated collective bargaining agreement with the local union) did not issue either Petitioner a “disciplinary notice” that complied with §§143.010, 143.052, 143.053, and 143.057, because neither dismissal was disciplinary in nature.

However, were this Court to overturn the First Court of Appeals’ ruling and order the City to hold a “disciplinary hearing,” Petitioners would likely be successful in thwarting this Court’s jurisprudence regarding governmental immunity. Petitioners

would accomplish this feat through the following actions: (1) Respondent City would be forced to either issue “disciplinary notices” or rely on the Fire Chief’s earlier letters to Petitioners which dismissed them for non-disciplinary reasons; (2) Petitioners would immediately file another lawsuit, declaring that Respondent City either (a) illegally amended or supplemented a disciplinary notice, and such is not allowed under Chapter 143; or (b) “indefinitely suspended” them without providing all of the appeal notifications that are required in Chapter 143. *City of Carrollton v. Popescu, supra*. Regardless of which route the Respondent City would attempt, in the ensuing litigation, Petitioners would most certainly assert claims for reinstatement *and back pay* under §143.053(f). Since Respondent City is not allowed to amend or supplement (or change in any way) a “disciplinary notice,” Petitioners would demand immediate reinstatement *and back pay*, under §143.053. Thus, sovereign immunity, and this Court’s jurisprudence, would be subverted.

Petitioners should not be permitted to engage in this subterfuge. Existing precedent from this Court demonstrates that Petitioners are not allowed to recast their claims for money damages as declaratory relief. Because Petitioners are shrouding their claims for money damages as claims for declaratory, injunctive and mandamus relief, this Court must reject this subterfuge.

5. Petitioners’ Authorities Cited In Support of Enforcement of Statutory Rights Should Be Disregarded.

Contrary to Petitioners’ assertions, the cases that Petitioners submit are not persuasive authority on the issue of sovereign immunity for back pay/money damages.

The cases are easily distinguishable because either they grant back pay under a specific statutory right (*City of Waco v. Bittle*, 167 S.W.3d 20 (Tex.App.—Waco, 2005, review denied); or they involve vested rights under *pension plans* (*City of Houston v. Houston Fire Fighters' Relief and Retirement Fund*, 196 S.W.3d 271 (Tex.App. —Houston [1st Dist.] 2006, no pet h) and *City of El Paso v. Heinrich*, 198 S.W.3d 400 (Tex.App.—El Paso 2006, pet filed)).

In *City of Waco v. Bittle*, *supra*, Bittle had been indefinitely suspended by the City, and following an appeal of that suspension, the hearing examiner ordered him reinstated to his former position. Under §143.053(f), the Legislature specifically stated that when an officer or fire fighter is improperly suspended, he or she is owed the “full compensation” and benefits lost during the time he or she was improperly suspended from work. This result is statutorily and specifically conferred (in clear and unambiguous terms) when a reinstatement is ordered. In short, it is a *vested* right. The ultimate result of *Bittle* was that the City was entitled to an offset of the amounts that it had already paid Bittle for his accumulated leave benefits, and the City did not owe him any money. *Id.*, at 31-2. The issues under consideration here do not involve a *disciplinary suspension*, and thus do not implicate §143.053(f).⁷

City of Houston v. Houston Fire Fighters' Relief and Retirement Fund, *supra*, does not include claims for back pay or implicate Chapter 143 in any way. Rather, this

⁷ See Section(C)(2), *supra*. Petitioners claim on Page 37 of their Brief that “Neither form of relief necessitates the payment of money damages.” Should Petitioners be successful in recasting their claims for money damages as “declaratory, injunctive and mandamus relief,” and thereby cause their claims to be resurrected, Petitioners will certainly utilize §143.053(f) in the later litigation.

case involves an interpretation of the legislation regarding the establishment and operations of a fire fighter *pension fund*, which was established pursuant to Article 6243e.2 of the Texas Revised Civil Statutes. The statutory scheme requires a governmental body, the Fund, to decide whether a Houston fire fighter has earned prior service credit. If the Fund's board decides to grant the prior service credit to the fire fighter, then the City (the employer) is required to pay the underlying monetary amounts (the percentage of the individuals' compensation) into the Fund's treasury. Houston refused to pay, in part because it did not agree with the Fund's decision in granting the prior service credits, and raised sovereign immunity as a supplemental basis for supporting its refusal to pay. In effect, the City of Houston was challenging the propriety of the statutory scheme and the Fund's application/operation within this scheme. This case is not persuasive on the issues before this Court, and Respondents fail to see any relevance.

City of El Paso v. Heinrich, 198 S.W.3d 400 (Tex.App.—El Paso 2006, pet filed) is another pension case, one in which the plaintiff was not even a City employee (and thus is not seeking back pay), and that does not involve Chapter 143. The widow sued the pension fund, alleging a violation of Article 6243b of the Texas Revised Civil Statutes. The El Paso Court of Appeals circumvented the obvious claim for money damages, by finding that the claimant had a *vested right* to pension benefits. Importantly, this Court has granted review, and it has yet to determine whether the El Paso Court of Appeal's analysis of the sovereign immunity doctrine was proper.

Ultimately, the authorities relied on by Petitioners are not persuasive and should be disregarded by this Court. The Texas Courts of Appeal have uniformly and properly applied this Court's sovereign immunity jurisprudence, so this is not a "Supreme Court case." The First Court of Appeals correctly interpreted and applied the law and the facts to the parties here, and their ruling should stand.

D. No Jurisdiction Exists Because Petitioners Failed to Comply With the Requirements of the Civil Service Act. (Issue 4)

As the First Court of Appeals properly noted, Petitioners' "dismissals for failure to fulfill the conditions of employment do not fall under any of the specifically enumerated actions for which the Act provides a right to administrative appeal." *Jackson, et al v. City of Texas City, et al., supra*, at 648. The trial court properly ruled that it lacked jurisdiction over Petitioners' claims. Even if the Petitioners were entitled to an administrative appeal, because they failed to file a suit in district court within ten days of the date of the action to which they complain about (and thus failed to comply with Section 143.015 of the Texas Local Government Code), no court has jurisdiction to hear their complaint.

Section 143.015 states that if a fire fighter is dissatisfied with any commission decision, the fire fighter may file a petition in district court within 10 days after the date of the decision. Although there is not Commission decision here, Respondent Lesco "stands in the shoes" of the Commission. In other words, as Director of Civil Service, Lesco was designated as the Commission's (and Hearing Examiner's) representative

under the City's Local Civil Service Rules and Regulations and is responsible for all administrative matters under the Civil Service Act. (CR 56-7).

Accordingly, Petitioners had 10 days from the date Respondent Lesco advised them that their appeal had been denied to file a claim with the Court. Because Petitioners did not file their suit until August 16, 2006, well beyond the Civil Service Act's ten-day statute of limitations, Petitioners failed to comply with the statutory requirement. Accordingly, this Court must affirm the trial court's ruling on this basis, because Petitioners' claims are untimely and barred by the statute of limitations.

CONCLUSION

Petitioners overstate the importance of this case. Undoubtedly, there are thousands of fire fighters in the State covered by Chapter 143, and those fire fighters are entitled to due process in accordance with the provisions of Chapter 143 for *disciplinary* terminations. Texas City Fire Fighters are among the few fire fighters in this State who are blessed with a double layer of "protection" against their employer: they are entitled to *both* civil service protections *and* collective bargaining. Therefore, it is unlikely that this issue will recur.

The First Court of Appeals followed all applicable law when it found that Petitioners were terminated for a non-disciplinary reason, and thus, were not entitled to an administrative appeal. *City of Sweetwater v. Geron, supra*, (mandatory retirement age resulted in termination); *Cantu v. Perales, supra*, (resignation submitted by fire fighter was not subject to appeal); *Grote v. City of Mesquite, supra*, (failure to obtain/maintain

paramedic certification was failure to meet job requirements; constituted a non-disciplinary termination and no right of appeal), and *Corbitt v. City of Temple, supra*, (no right of appeal revocation of off-duty working privileges). The First Court properly applied the law to this limited circumstance.

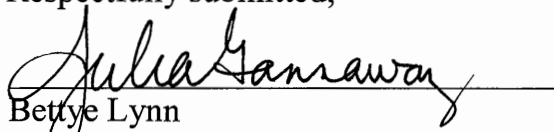
In this case, Petitioners could not find it within themselves to comply with their word; they signed binding contracts, agreeing that these Conditions of Employment were permanent. The ability to impose these Conditions of Employment on newly-hired fire fighters was a bargained-for provision in the CBA, negotiated between Respondent City and the local Association. This Court should not exert itself to assist Petitioners when they themselves did not bother to pass a paramedic course, *when it was a known requirement in order for them to retain employment*. This Court should not rescue Petitioners from their non-compliance with their contractual obligations. There is a negative consequence to granting the sought-after remedy. The Texas City Fire Department would be “stuck” with two employees who cannot perform the essential EMS functions of their jobs. They are not authorized by State law to respond to a medical emergency call, which is the linchpin function of all modern fire departments in Texas, including Texas City. This Court should deny Petitioners’ requests for relief.

PRAYER

In conclusion, this Court should not exercise jurisdiction on this matter. The First Court of Appeals has properly applied all applicable precedent to the facts before it, and reached the only legal conclusion: Petitioners here do not have a justiciable interest, and

thus the trial court properly dismissed their lawsuit for a lack of jurisdiction. Petitioners here were covered by individual Conditions of Employment contracts, and were also covered by the Collective Bargaining Agreement, and were not deprived of any due process rights. Respondent respectfully requests that this Court deny this Petition for Review and permit the First Court of Appeals' ruling to stand.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Betty Lynn", is written over a horizontal line.

Betty Lynn
State Bar No. 11540500
Julia Gannaway
State Bar No. 00790738

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**ATTORNEYS FOR RESPONDENTS
CITY OF TEXAS CITY, TEXAS**

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document, Response to Petition for Review, has been sent to the following by certified mail, return receipt requested on this 16th day of February, 2009:

B. Craig Deats
Deats Durst Owens & Levy, P.L.L.C.
1204 San Antonio Street, Suite 203
Austin, Texas 78701


Julia Gannaway

Attachment

Tab A

RECEIVED

NOV 16 2005

AGREEMENT

BETWEEN

CITY OF TEXAS CITY

AND

**INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS LOCAL 1259**

October 31, 2005

through

September 30, 2009

EXHIBIT "3"

department who have been hired in substantial compliance with provisions of the Local Government Code, Chapter 143 and does not include civilians or other employees.

ARTICLE IV
EMPLOYER RIGHTS

Except as otherwise specifically provided the management of the City of Texas City shall have a direction of the workforce including, but not limited to:

- the right to hire;
- the right to discipline or discharge for cause deemed sufficient by it;
- the right to decide job qualifications for hiring;
- the right to determine and establish pre-employment employee qualifications, standards, and/or terms and conditions of employment. The right to amend or modify pre-employment qualifications standards, and/or terms and condition of employment prior to completion of first year probationary status. The qualifications, standards, and/or terms and conditions of employment setforth 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 through the collective bargaining process by mutual consent of the Union and City for that employee;
- the right to lay off or abolish positions;
- the right to make rules and regulations governing conduct and safety;
- the right to manage the utilization of sick leave by employees and the right to establish and enforce the methods and processes for control and management of sick leave usage,
- the right to determine schedules of work together with the right to determine the methods, processes and manner of performing work;
- the determination of the size of workforce;
- the assignment of work to the fire fighters within the department;
- the determination of policy affecting the selection of new fire fighters; and
- the right to establish work performance measurement and standards, where no such measurements or standards exist, and the right to revise these or existing measurements and standards and to implement programs to increase the cost effectiveness of department if credible management research indicates the need for such programs.

The enumeration of certain rights of the Employer herein shall not be deemed to exclude or invalidate any other right or rights, which are generally inherent in employers. Failure by the Employer to exercise any right or rights reserved to it shall not constitute a waiver of such right or rights. Except as otherwise specified, nothing in this Agreement shall be construed as delegating to others the authority vested by law in the City and its duly elected or appointed officers or in any way abridging or reducing such authority or infringing upon the responsibility thereof to the

people of the City of Texas City.

The above rights are vested exclusively in the Employer, as are all other rights excluding those rights which are limited or superseded by this Agreement, or provisions of V.T.C.A., Local Government Code, Chapter 174, and/or other similar state statutes.

ARTICLE V

CIVIL SERVICE RULES AND REGULATIONS

Civil Service Rules and Regulations in effect on October 1, 1991 (and those adopted thereafter) shall be a formal part of the Agreement. The adoption of new Civil Service Rules, or changes in the Rules in effect on October 1, 1991 shall be accomplished only after notification to the City and the Union in advance of their adoption giving the City and the Union reasonable time to appear before the Civil Service Commission to provide input to the Commission regarding the proposed Rules and Regulations. Notification as it is defined by this article shall conform to the requirements of the open meeting act. The City and the Union shall endeavor to provide copies of all proposed modifications to Civil Service Rules in advance of public meeting notice by delivering a copy to all parties of interest.

By entering into this Agreement, the parties recognize and agree that the provisions of this collective bargaining agreement shall take precedence over the applicable section of V.T.C.A., Local Government Code, or Local Civil Service Rules and Regulations whenever the provisions of the contract are in conflict therewith.

ARTICLE VI

PAYROLL DEDUCTION OF DUES

Section 1. The Employer agrees to deduct, once each month, dues and assessments in the amount certified to be current by the Treasurer of Local 1259 from the pay of those fire fighters who individually request in writing that such deductions be made. This authorization shall remain in full force and effect during the term of this Agreement

Section 2. It is understood that said authorization is completely voluntary and may be terminated by the fire fighter in writing at any time.

ARTICLE VII

SERVING UNDER SUBPOENAS

Section 1. Any fire fighter called for jury service shall not suffer loss of his regular pay for the period he is required to be present for such duty, and for a period of two hours preceding reporting time and one hour following time of release from same.

Section 2. Any fire fighter subpoenaed to serve as a witness shall not suffer loss of his regular pay for the period he is required to be present, under the following conditions:

A. If subpoenaed to appear in Galveston County, Texas, the fire fighter will be compensated for time commencing two hours preceding reporting time to the Court and continuing to one hour following release from same.