

NO. 09-0770

IN THE SUPREME COURT OF TEXAS

THE CITY OF HOUSTON,

Petitioner,

V.

STEVE WILLIAMS, ET AL.,

Respondents.

**On Appeal From the Fourteenth Court of Appeals
and the 80th Judicial District Court,
Harris County, Texas
Trial Court Cause No. 2002-22690-A**

**RESPONDENTS' REPLY IN SUPPORT OF
CROSS-PETITION FOR REVIEW**

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STEVE WILLIAMS, ET AL.**

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REFERENCES TO PARTIES AND DOCUMENTS AND APPELLATE OPINIONS

Respondents/Cross-Petitioners Steve Williams, et al. are referred to as “the Retired Fire Fighters.”

“Williams I” refers to the opinion of the Fourteenth Court of Appeals in City of Houston v. Williams, 183 S.W.3d 409 (Tex. App.–Houston [14th Dist.] 2005), rev’d o.g., 216 S.W.3d 827 (Tex. 2007).

“Williams II” refers to the opinion of the Fourteenth Court of Appeals in City of Houston v. Williams, 290 S.W.3d 260 (Tex. App.–Houston [14th Dist.] 2009, pet. requested).

The City of Houston’s “Response” refers to the City of Houston’s Response to Respondent’s Cross-Petition for Review filed on January 20, 2010.

APPENDIX

Pages 18-24 of Defendant The City of Houston’s Brief
and Evidence in Support of its Plea to the Jurisdiction
(3 CR 784-90) and pages xiv and 16-19 of City of
Houston’s Brief of Appellant reflecting that City of
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of execution” Tab “1”

TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondents/Cross-Petitioners the Retired Fire Fighters file this reply in support of their cross-petition for review filed on November 30, 2009, as follows:

NO FACTS WERE OMITTED

In their cross-petition for review challenging the adverse sovereign immunity rulings with respect to the state Civil Service statutes, 1995 and 1997 Meet and Confer Agreements (MCAs) and the 2005 Collective Bargaining Agreement (CBA), the Retired Fire Fighters focused on the actual grounds described in the Court of Appeals' opinion. Williams II, 290 S.W.3d at 267, 270-272. On page 1 of its response, the City of Houston claims – falsely – that the Retired Fire Fighters “omit some dispositive facts from the Statement of Facts in their cross-petition for review.” The Retired Fire Fighters did not omit dispositive facts. The City relies upon facts relating to defenses and arguments that the Fourteenth Court of Appeals never reached.¹

For example, on page 1 of its response, after the false accusation of omission by the Retired Fire Fighters, the City refers to Civil Service grievance procedures and argues that none of the Retired Fire Fighters pursued the Civil Service grievance procedures as required by the MCAs.² The Fourteenth Court of Appeals previously concluded in Williams I that the Retired Fire Fighters could not utilize Civil Service grievance procedures once

¹See City of Houston's "Issues Presented" on pages vi-vii of response to cross-petition for review identifying by asterisk 5 issues that were "briefed in the court of appeals but not decided by that court." The Court of Appeals never reached the majority of the trial court arguments made by the City of Houston because it concluded that there was no waiver of sovereign immunity with respect to the state Civil Service statutes because they were not "executed" by the City of Houston and that the Retired Fire Fighters lacked standing to assert claims under the MCAs and the CBA. Williams II, 290 S.W.3d at 267, 270-272.

²In Williams II, the Court of Appeals never addressed this grievance argument under the MCAs because it concluded that the Retired Fire Fighters had no standing to assert claims under the MCAs in the first instance. Williams II, 290 S.W.3d at 270-271.

they were retired. 183 S.W.3d at 414-416.³ The City of Houston conceded this fact.⁴ If there is an “omission of facts,” it is the City of Houston’s failure to inform this Court that it has already litigated and lost the Civil Service grievance issue in this case.⁵

With respect to the 2005 CBA, the Court of Appeals concluded that the Retired Fire Fighters had no standing to assert claims under the agreement. Williams II, 290 S.W.3d at 271-272. The Court of Appeals expressly stated that it was not addressing the City’s argument that the Retired Fire Fighters were required to exhaust grievance remedies under the CBA. Id. As explained herein, the grievance procedures within the CBA do not apply to retired fire fighters. They apply only to active, currently employed fire fighters.⁶

³In Williams I, the Court of Appeals stated as follows: “... [T]he fire fighters could not use the grievance procedures while they were employed because the City had not taken any action yet for which the fire fighters could file a grievance. Additionally, once the City took such an action, the fire fighters already had retired, and the statutory provisions do not require non-employees to use the grievance procedures.” 183 S.W.3d at 414. The City of Houston did not challenge this holding when it sought petition for review of the Williams I decision. This failure to appeal constitutes waiver and forecloses any subsequent assertion of the grievance/exhaustion of administrative remedies issue in this case by the City of Houston. See Neeley v. West Orange - Cove Consolidated Independent School District, 228 S.W.3d 864, 867-868 (Tex. App.–Austin 2007, pet. denied).

⁴See Stipulation # 1, ¶ 21; Stipulation # 2, ¶ 15 (2 CR 529-530, 533) In connection with the 2004 bench trial held in this case, the City of Houston (twice) stipulated as follows: “At the time each Plaintiff received their termination pay check, Plaintiffs were no longer subject to the jurisdiction of the Civil Service Commission of the City of Houston, Texas or the grievance procedure in Texas Local Government Code, Chapter 143.” This stipulation was acknowledged by the Williams I Court. Williams I, 183 S.W.3d at 416, n. 4.

⁵The arguments made by the City of Houston on pages 1, 10-11 of its response concerning the 510 Retired Fire Fighters who retired after the claimed expiration of the 1995 and 1997 MCAs were similarly issues that were not reached by the Court of Appeals. As explained herein, there is a disputed issue as to whether the MCAs terminated as contended by the City of Houston and whether the Retired Fire Fighters retained vested contractual rights for work performed under those agreements.

⁶In footnote 9 on page 2 of its response, the City contends that the Retired Fire Fighters have falsely asserted that their “Debit Dock” claim addresses overtime that they received “for time actually worked.” The City claims that the Retired Fire Fighters are really asserting claims for time for which they were “scheduled to work.” The phrase “time actually worked or actual work” is used in the City of Houston Code of Ordinances 34-59(a)(6) and is expressly defined to include time that the employee is on authorized sick leave or vacation leave. Under City ordinance and the corresponding provision of the Texas Local Government Code, Section 142.0017(e), time actually worked includes hours “scheduled to work.” The Retired Fire Fighters have not falsely described their Debit Dock claim.

CIVIL SERVICE STATUTES AS WAIVER OF SOVEREIGN IMMUNITY

There are corresponding state statutes and city ordinances which support the Debit Dock Claim and the Termination Pay claim asserted by the Retired Fire Fighters. The sole basis for the rejection of statutes as a waiver of sovereign immunity under Sections 271.151-.160 by the Williams II Court is its conclusion that the statutes were not executed by the City. See Williams II, 290 S.W.3d at 267.⁷

The Civil Service statutes that are at issue in this case apply to City of Houston fire fighters only because the City of Houston adopted and made those statutes applicable to the City by a written, “executed” ordinance. The written, executed City ordinance by which the City of Houston adopted the state Civil Service Act for policemen and fire fighters and the incorporated state statutory provisions satisfies the execution requirement under Sections 271.151-.160 for the Civil Service statutes.⁸

⁷The City of Houston does not expressly dispute the Retired Fire Fighters’ assertion that the City never asserted in the trial court a “lack of execution” argument. The City simply claims that it asserted that statutes were not written contracts under Sections 271.151-.160. The Retired Fire Fighters attach the pages of the clerk’s record (3 CR 784-90) and the pages of the Brief of Appellant (pp. xiv, 16-19) cited by the City of Houston on page 6, n. 11 & 12 of its response to demonstrate that it never asserted the “lack of execution” argument upon which the Court of Appeals based its decision. See Tab “1” hereto. On pages 4 and 5 of its response, the City of Houston relies upon statute of limitation cases, the same strategy which the Court of Appeals rejected when it held that the city ordinances constituted written contracts within Sections 271.151-.160. Williams II, 290 S.W.3d at 268.

⁸The Texas Legislature conferred upon the City of Houston and other municipalities the right to determine whether the Civil Service Act would govern the municipalities’ employment of fire fighters and police officers. See Tex. Loc. Gov’t Code § 143.002. The City of Houston’s Code of Ordinances acknowledges that these state Civil Service statutes “were adopted by a majority vote” of the January 31, 1948, city election and that upon adoption the state Civil Service statutes “supercede charter provisions or ordinances covering its subject matter.” See Appendix B to City of Houston Code of Ordinances, entitled “Referendum Ordinances Adopted at Elections” and discussing “Policemen’s and Firemen’s Civil Service, State Law, 1947” (now Tex. Loc. Gov’t Code Ann. ch. 143), attached as Tab “D” to Retired Fire Fighters’ Response to City of Houston’s Petition for Review filed on January 20, 2010. State Civil Service statutes relating to compensation of fire fighters constitute part of their employment contracts and for that reason, also satisfy the provisions of Sections 271.151 and 271.152 for waiver of sovereign immunity. See Byrd v. City of Dallas, 6 S.W.2d 738, 740 (Tex. 1928); Wilson v. Andrews, 10 S.W.3d 663, 666, 668 (Tex. 1999); Ward v. City of San Antonio, 560 S.W.2d 163, 165 (Tex. Civ. App.–San Antonio 1977, writ ref’d n.r.e.); Kierstead v. City of San Antonio, 636 S.W.2d 522, 528-529 (Tex. App.–San Antonio 1982), aff’d in part, rev’d in part, 643 S.W.2d 118 (Tex. 1982); City of Corpus Christi v. Herschbach, 536 S.W.2d 653, 657 (Tex. Civ.

THE MEET AND CONFER AGREEMENTS ⁹

The Retired Fire Fighters assert standing to sue for breach of the MCAs because they are aggrieved and have enforceable rights under the MCAs. Since the MCAs were “enforceable and binding upon” the Retired Fire Fighters, they are “personally aggrieved” under both a statutory and common law standing analysis. See Austin Nursing Center, Inc. v. Lovato, 171 S.W.3d 845, 848 (Tex. 2005), citing to, Nootsie, Ltd. v. Williamson County Appraisal Dist., 925 S.W.2d 659, 661 (Tex. 1996) (“A plaintiff has standing when it is personally aggrieved ...”).¹⁰

On page 7 of its response, the City argues that the Retired Fire Fighters were first required to seek resolution through the Civil Service grievance procedures. However, those grievance procedures do not apply to Retired Fire Fighters as the Court of Appeals found in Williams I and as the City stipulated. Williams I, 183 S.W.3d at 414-416.

On pages 9 and 10 of its response, the City makes two arguments claiming that Sections 271.151-.160 do not apply retroactively because sovereign immunity was waived

App.–Corpus Christi 1976, writ ref’d n.r.e.); City of Orange v. Chance, 325 S.W.2d 838, 840 (Tex. Civ. App.–Beaumont 1959, no writ).

⁹The City of Houston erroneously relies upon the decision in Acuff v. United PaperMakers & Paper Workers, AFL-CIO, 404 F.2d 169, 171 (5th Cir. 1968) cert. denied 294 U.S. 987 (1969), to argue that the MCAs and Texas Local Government Code Section 143.206(b) provide standing only for the City and the union to sue under the MCAs. The Acuff case involved non-parties to an arbitration proceeding and award seeking to use a provision under the Federal Arbitration Act, 9 U.S.C.A. § 10. Section 10 permits suit in district court to vacate an arbitration award based on “the application of any party to the arbitration.” The Retired Fire Fighters do not seek judicial review under any specific statutory grant like 9 U.S.C.A. § 10.

¹⁰On pages 8 and 9 of its response, the City of Houston claims that the Retired Fire Fighters do not have common law standing because once a plea to the jurisdiction is supported by evidence showing lack of jurisdiction the plaintiff cannot merely rely on its pleadings. The City of Houston did not present “evidence” to demonstrate lack of jurisdiction with respect to the standing issue. The City of Houston simply argued in a cursory manner that the language of the MCAs and the applicable statute permitted only the City of Houston or the Fire Fighters Association the exclusive right to sue under the MCAs. (3 CR 780-781) There was no disputed factual evidence presented on the jurisdictional issue with respect to standing.

before the effective date of the statute. The Fourteenth Court of Appeals has already rejected one of the arguments.¹¹ The other argument is pure sophistry. The City of Houston claims that Local Government Code Section 143.206(b) vested the local district court with full authority and jurisdiction to adjudicate disputes over the agreement on the application of either party to the agreement. But the City claims Section 143.206(b) applies only to the Fire Fighters Association, not to individual fire fighters and the Court of Appeals agreed with that argument. Williams II, 290 S.W.3d at 270-271. Since the City of Houston claimed (successfully) that Section 143.206(b) allegedly has no application to the Retired Fire Fighters, that provision cannot be a pre-September 1, 2005, waiver of sovereign immunity for the claims asserted in this case so as to preclude the Retired Fire Fighters' reliance on the recently enacted Sections 271.151-.160.¹²

The Court of Appeals did not reach the arguments made by the City of Houston that the MCAs expired on June 30, 2000, and that the Retired Fire Fighters have no vested rights under the MCAs.¹³ The 1997 MCA states in Article 25 as follows:

¹¹First, the City of Houston claims that the Civil Service grievance procedures constitute a prior waiver of sovereign immunity which renders Sections 271.151-.160 unapplicable. But this is the same issue which the Fourteenth Court of Appeals has already resolved against the City of Houston when it held that the Civil Service grievance procedures did not apply to Retired Fire Fighters and were not available to the Retired Fire Fighters in this case. Williams I, 183 S.W.3d at 414-416.

¹²Further, the waiver in Sections 271.151-.160 is retroactive only if there was no pre-September 1, 2005, waiver "with respect to the claim." Tex. Loc. Gov't Code 271.153 (Historical and Statutory Notes). The claim in this case is for money damages, because, according to this Court, the Retired Fire Fighters can assert no other claim. City of Houston v. Williams, 216 S.W.3d 827, 829 (Tex. 2007). Section 143.206(b) does not waive sovereign immunity for damages claims. The statute waives sovereign immunity only in the following respect: "The court may issue proper restraining orders, temporary and permanent injunctions, and any other writ, order, or process, including contempt orders, that are appropriate to enforcing any written agreement ratified by both the public employer and the fire fighters association."

¹³30 Retired Fire Fighters retired while the 1997 MCA was undisputedly in effect. It is undisputed that all Retired Fire Fighters were subject to and covered by the 1995 and 1997 MCAs and accrued sick and vacation leave under such agreements for which they were entitled to payment at retirement. (5 CR 1273-74) The Retired Fire Fighters included with their briefing before the district court, "Termination Pay Worksheets" for every Retired

This Agreement shall remain in full force and effect until the 30th day of June, 2000. It shall automatically be renewed from year to year thereafter, unless either party shall have notified the other in writing, at least sixty (60) days prior to the expiration date that it desires to modify the Agreement.

(4 CR 1186)

The City relies upon a series of letters attempting to “reopen” or “reconvene” “Meet and Confer” in support of its termination argument. (6 CR 1500, 1760, 1763) The MCA contains a provision which recognizes and authorizes “amendments of this Agreement” without terminating it. (4 CR 1185, Article 23) It is obvious the parties agreed to and had the right to negotiate and to seek purported modification of the MCA under Article 23 without terminating it under Article 25. (4 CR 1185, 1186) The only reasonable way to construe the two provisions is to require a specific notice purporting to invoke termination or expiration under Article 25. None of the letters relied upon by the City seek to invoke Article 25.¹⁴

The City of Houston relies upon the decision in Gamble v. Gregg County, 932 S.W.2d 253, 255-56 (Tex. App.–Texarkana 1996, no writ), in arguing that “when an employee continues working after the expiration of an agreement to pay accumulated leave upon termination, the employee retains no vested rights to such pay [because] the

Fire Fighter in this case. (5 CR 1273-1483) These are documents prepared by the City of Houston and given to the Retired Fire Fighters in connection with their retirement from the fire department. (5 CR 1274) These worksheets reflect sick leave amounts owed to the Retired Fire Fighters for the years 1995 to 2000, which are the only years the City of Houston claims the 1995 and 1997 MCAs were in existence. (See e.g. 5 CR 1276).

¹⁴The City first relies upon a letter dated March 21, 2000, which states that “the City is exercising its option to reopen Meet and Confer with the Houston Professional Fire Fighters Association.” (6 CR 1500) This letter does not state that the City actually desires to modify the MCA and does not serve as a termination letter under Article 25 of the 1997 Meet and Confer Agreement. Similarly, the March 7, 2000, letter relied upon by the City of Houston does not refer to a desire or intent to modify the MCA. (6 CR 1760) The letter simply refers to “attempts to reconvene Meet & Confer discussions and schedule meetings in a timely fashion.” Id. The August 28, 2000, letter relied upon by the City of Houston does not reference any intent to modify the MCA and simply “request[s] a meeting with you so we may discuss the current status of Meet & Confer negotiations with the City” and further indicates a “wish to avoid another impasse in negotiations.” (6 CR 1763)

employee is deemed to have accepted the new terms of employment after the agreement's expiration, and ` gives up any right to claim anything other than that provided by the new terms.'"¹⁵

All Retired Fire Fighters in this case are Civil Service Employees, not at-will employees. See Williams II, 290 S.W.3d at 269 (“[T]he firefighters ... argue that, by virtue of their civil service status, they are not at-will employees ... The City does not argue otherwise.”). The MCAs state that the City of Houston will comply with the statutory provisions which mandate that the fire fighters receive on retirement payments for accrued, unused sick and vacation leave based on the full amount of their salary. (4 CR 1161-1163, 1165-1166, 1175-1177, 1182-1184) There was never any change or modification to these statutory provisions, nor was there ever an agreement entered into which modified these statutory rights. None of the Retired Fire Fighters were at-will employees who continued to work under changed or modified contract terms. The same statutory provisions which obligated the City of Houston to pay them for accrued, unused sick and vacation leave remained the same.¹⁶

THE 2005 CBA

In finding no waiver based on the 2005 CBA, the Fourteenth Court of Appeals

¹⁵Gamble involved at-will employment relationships based solely on personnel manuals, where there were material changes made to sick leave benefits provided by the personnel manual. The personnel manuals were subsequently changed to either eliminate sick leave or to provide for payment of such accrued, unused sick leave only to those employees who retired and to exclude it for those employees who were terminated prior to retirement.

¹⁶The arguments made by the City of Houston are contrary to Texas law which holds that termination of a contract does not discharge rights based on prior breach or prior performance. See Millennium Petrochemicals, Inc. v. Brown & Root Holdings, Inc., 390 F.3d 336, 340 (5th Cir. 2004) (applying Texas law) (“We are aware of no Texas authority that provides that the termination of agreements automatically applies retroactively to extinguish vested rights.”). Even assuming that the 1997 MCA expired on July 1, 2000, the Retired Fire Fighters had vested rights in their prior performance under the 1995 and 1997 MCAs and applicable statutes.

expressly stated that “we do not address the City’s contention based on the firefighters’ asserted failure to exhaust grievance procedure remedies.” Williams II, 290 S.W.3d at 271-272. The majority of the City’s response is based on this contention.

The grievance and arbitration provisions in the 2005 CBA apply only to active, employed fire fighters and not to retirees. The 2005 CBA contains the following definitions:

1. “Member”, “Employee”, “Firefighter”, “Member of the Bargaining Unit” means any full time, permanent paid employee of the Houston Fire Department who has been hired in substantial compliance with Chapter 143 of the Texas Local Government Code ...

■ ■ ■

14. “Permanent Employees” means employees hired in substantial compliance with Chapter 143, who are no longer on probation under the statute, or under this agreement.

(4 CR 1193) The Williams I Court held that the above definitions apply only to active, presently employed fire fighters and do not permit or authorize retirees to file statutory grievances. See Williams I, 183 S.W.3d at 416 (“Once the fire fighters retired, they were no longer `fire fighters’ under the definition the Local Government Code provides. See Tex. Local Gov’t Code § 143.003.”). The same reasoning applies to contractual based grievance procedures based on the identical definitions.¹⁷

CONCLUSION

This Court should grant the Retired Fire Fighters cross-petition for review.

¹⁷In footnote 29 on page 15 of the cross-petition for review, the Retired Fire Fighters identified numerous cases which have concluded that grievance procedures within collective bargaining agreements do not apply to retirees. In addition to those decisions, the Retired Fire Fighters identify the opinion in Brewer v. Metropolitan Government of Nashville and Davidson County, 2009 WL 4263680 at * 4-6 (Tenn. Ct. App., November 30, 2009), where the Court of Appeals held that statutory grievance procedures did not apply to retirees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2010, the foregoing document has been served by sending a true and correct copy thereof via the method of transmittal designated to the following counsel of record:

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APPENDIX

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P247

STEVE WILLIAMS, et al.,
Plaintiffs

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IN THE DISTRICT COURT OF

vs.

HARRIS COUNTY, TEXAS

THE CITY OF HOUSTON, TEXAS,
Defendant

80TH JUDICIAL DISTRICT

**DEFENDANT THE CITY OF HOUSTON'S
BRIEF AND EVIDENCE IN SUPPORT OF ITS
PLEA TO THE JURISDICTION**

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant The City of Houston, Texas ("Houston" or the "City") asks the Court to dismiss the Plaintiffs' claims for lack of subject matter jurisdiction.

I. SUMMARY OF ARGUMENT

The Plaintiffs seek to dip into the public coffers of the City of Houston – coffers funded by the taxes of Houston citizens – to be paid at overtime rates for hours which they did not work, and for retirement benefits which Houston never agreed to pay. The Plaintiffs have no standing, however, to sue on the collective bargaining agreements forming the basis of their claims. All three of those agreements required the Plaintiffs to pursue their claims through contractual grievance procedures. Without pleading or proof that the Plaintiffs exhausted those remedies, and then timely filed this action as an appeal, the Plaintiffs cannot establish jurisdiction in this Court.

The Court also lacks jurisdiction, in *this case*, over the claims of the 129 Plaintiffs who *did* file administrative grievances, because those Plaintiffs have appeared the outcomes in separate,

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RECORDER'S MEMORANDUM
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see also *City of Round Rock v. Whiteaker*, ___ S.W.3d ___, 2007 WL 3390867 (Tex. App.– Austin November 16, 2007, no pet. h.) (“*Williams* is logically inconsistent with the existence of a general waiver of immunity under chapter 143.”).

The Plaintiffs in this suit sought such a waiver in the 2007 legislative session, but the legislature refused it.²⁴ While the legislature granted a limited waiver of immunity for *future* claimants seeking damages under Chapters 142 and 143 of the Local Government Code, it explicitly made the waiver applicable only to claims “initially asserted on or after the effective date of this Act.” Act of May 28, 2007, 80th Leg., R.S., Ch 1200, § 3. All of the claims in this suit were asserted before that date. Hence the legislature consciously refused to waive Houston’s immunity from this suit, and the City remains immune from any claims for alleged violations of statutes or ordinances.

G. Houston is Immune from Plaintiffs’ “Implied Contract” Claims

Houston has governmental immunity from suit on any claims that are not based on the 1995, 1997 or 2005 Agreements, because those are the only written contracts actually identified in the Plaintiffs’ pleadings, and only “written contracts” invoke the limited waiver of immunity provided in Local Government Code § 271.152. Moreover, the agreements could not create a waiver of immunity for claims which arose between the expiration of the 1997 Agreement and the execution of the 2005 Agreement, because, during that time, the Plaintiffs’ rights to overtime and termination pay were governed purely by the Civil Service Act and the City’s ordinances, rules and regulations.

1. The limited waiver of immunity for “written contracts.”

The only legislative waiver of immunity pled by the Plaintiffs is found in §§ 271.151-.160 of the Local Government Code. That waiver applies only to claims that are based upon (i) a written

²⁴ The Bill Analysis for HB 1473 shows that Rick Murney, one of the Plaintiffs’ attorneys in this suit, testified in support of the original version of the bill. That version did not exclude the Plaintiffs’ claims. Exhibit “5.”

contract, which (ii) states the essential terms of the agreement, and (iii) is properly executed on behalf of the local governmental entity. TEX. LOC. GOV'T CODE §§ 271.151(2), 271.152. The No Contract Plaintiffs have not pled facts showing the existence of any such contract on which they could base their claims, nor does any such contract exist.

Instead, the No Contract Plaintiffs identify, as their "written contracts," alleged "evidence and arguments made" in other briefs which are not attached to their pleadings. See Plaintiffs' Ninth Amended Petition, ¶ 14(a), (b). If the Plaintiffs ever produce those other briefs, the Court will observe that they do not contain any "evidence" of other written contracts between Houston and the Plaintiffs. Rather, the briefs merely argue that the Civil Service Statutes provide implied terms of employment agreements which can be implied from suggested documents relating to their employment as fire fighters. This is not enough to establish a waiver of immunity.

2. *Immunity is not waived for claims based on implied contracts.*

The plain language of § 271.151 *et seq.* forecloses any argument that the Act waives immunity for claims based on implied contracts, or on implied terms of contracts. The Act's fundamental requirement of a written contract, setting forth its essential terms, would be meaningless if deemed satisfied by allegations of an implied contract with implied provisions.

Indeed, the statute as enacted reflects compromise amendments which *deleted* language which would have allowed suits for breach of an "implied provision of the contract."²⁵ This amendment history shows that the legislature consciously declined to extend the waiver to implied terms of contracts.

²⁵ Compare H.B. No. 2039 as of May 18, 2005 (Exhibit "6" hereto) with Senate and House Amendments to § 271.152, of May 20 and 23, 2005 (Exhibit "7" hereto) and with TEX. LOC. GOV'T CODE § 271.152.

Hence the First Court of Appeals recently concluded that this statute did not waive immunity for a claim based on implied contract, even if the claim related to work done under an express written contract. *City of Houston v. Swinerton Builders, Inc.*, 233 S.W.3d 4 (Tex. App.– Houston [1st Dist.] 2007, no pet.). The plaintiff in *Swinerton*, a construction contractor, sought pay for extra work not covered by its written contract. The court held that § 271.152 did not waive immunity for such a claim, because the statute’s plain language waives immunity only for claims “for breach of the contract,” and for “no other claims, either in law or in equity.” *Id.* at 12.²⁶

This conclusion recognizes that § 271.152 does not ask whether any kind of contract – oral or written, express or implied, quasi or real – could be found to exist under the common law. Rather, the statute waives immunity *only* if a claimant proves a written agreement with express terms showing that the local governmental entity actually agreed to pay the debt alleged. These strict limitations on the scope of the waiver are designed to further the core public policy underlying governmental immunity: the protection of public coffers from un-anticipated liabilities. The limitations reflect the principle that a unit of government should not be subject to suit for an alleged debt unless that entity expressly agreed, in a duly-executed writing, to assume that financial responsibility.

The No Contract Plaintiffs have no such contract. To the contrary, the Plaintiffs seek to *reject* the bargains that the City actually offered them through its ordinances and written employment policies. The Plaintiffs seek to have “premium pay” included in their termination-pay calculations,

²⁶ The court found this conclusion further compelled by bill history which showed that the legislature had expressly refused to use the phrase “arising under a written contract” to describe the scope of claims allowed. The court noted: “The actual wording of the statute appears to have been chosen in response to the concerns of the bill’s opponents, who feared that litigants would attempt to use the waiver of immunity to bring non-contractual claims against local government entities – just as *Swinerton* attempts to do here.” *Swinerton Builders*, 233 S.W.3d at 12-13.

even though the City's ordinances have always specified that premium pay is excluded.²⁷ The Plaintiffs seek to have all missed "debit day" hours included in their overtime calculations, even though the City repeatedly explained to them that the last eight hours of a missed debit day would not be included.²⁸ The Plaintiffs agreed to work under these terms, and the City allocated funds for the fire fighters' salaries on the assumption that they would honor the bargain offered. No reasonable reading of the statutory waiver of immunity could stretch it to encompass liabilities that the City expressly refused to assume.

3. *Statutes are not "written contracts"*

Moreover, the courts have long held that statutory rights do not qualify as "contracts in writing," even for statute of limitations purposes. Specifically, the four-year statute of limitations used to be limited to actions for debt evidenced by or founded upon a "contract in writing." Under that scheme, courts repeatedly held that claims by fire fighters and policemen, for benefits and pay under the civil service statutes, were barred by the general two-year statute of limitations applicable to statutory claims, rather than the four-year statute for contracts in writing. *Creps v. Board of Firemen's Relief and Retirement Fund Trustees of Amarillo*, 456 S.W.2d 434, 439 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.); *Hamilton v. Board of Firemen's Relief and Retirement Fund Trustees of Texarkana*, 408 S.W.2d 781, 784 (Tex. Civ. App.—Texarkana 1966, writ ref'd n.r.e.); *Whitley v. City of San Angelo*, 292 S.W.2d 857, 861 (Tex. Civ. App.—Austin 1956, no writ).

Admittedly, as the Plaintiffs have previously argued, other cases held that such a suit could qualify for the four-year statute of limitations if the fire fighter actually had a written contract, on the theory that the written contract implicitly incorporated the statutory rights. *See, e.g., Kierstead v.*

²⁷ Exhibit "8" (HOUSTON CODE OF ORDINANCES §§ 34-3(c), 14-244(3)).

²⁸ *See*, Exhibit "9" (PX 1(B), 1(C), and 1(D); DX 9, from Exhibits admitted at previous trial of this matter).

City of San Antonio, 643 S.W.2d 118 (Tex. 1982). The *Kierstead* theory does not help the Plaintiffs avoid Houston's immunity here, however, for at least three reasons.

First, the *Kierstead* plaintiffs actually had written contracts – collective bargaining agreements – on which they sued. The No Contract Plaintiffs do not.

Second, for statute of limitations purposes, courts were “liberal in determining what constitutes a ‘contract in writing.’” *Kiel v. City of Houston*, 558 S.W.2d 69, 71 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref’d n.r.e.) (holding, “in light of this rule,” that the writings surrounding a fire fighter’s civil service record were sufficient to constitute a contract in writing). Statutory waivers of immunity, in contrast, are *strictly* construed. *City of Houston v. Jackson*, 192 S.W.3d 764, 770 (Tex. 2006). “Strictly construed” means that the language of the statute may not be extended beyond its precise terms by construction or implication. *See Reece v. First State Bank of Denton*, 566 S.W.2d 296, 297 (Tex. 1978). Hence courts do not find a waiver of immunity unless the statute and its application are “clear and unambiguous,” such that the legislature’s intent to waive immunity is “beyond doubt.” *Tooke v. City of Mexia*, 197 S.W.3d 325, 28-30 (Tex. 2006) (quoting *United States v. Williams*, 514 U.S. 527, 531 (1995) (“Our task is to discern the ‘unequivocally expressed’ intent of Congress, construing ambiguities in favor of immunity.”)).

Third, in enacting § 271.151 *et seq.*, the legislature refused to waive sovereign immunity for claims based on alleged implied terms of a contract, even if the contract was otherwise in writing. *Swinerton Builders*, 233 S.W.3d at 12-13. Accordingly, even if the No Contract Plaintiffs could produce evidence of a written contract with Houston, the City would be immune from suit unless the contract expressly addressed the rights which the Plaintiffs claim here.

4. *Public policy supports Houston's immunity from this suit.*

Enforcement of Houston's immunity from this suit would preserve the expressly codified public policy of this State, which states: "In order to preserve the legislature's interest in managing state fiscal matters through the appropriations 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. Sovereign immunity allows the legislature, rather than individual plaintiffs, to determine which policies will be supported by taxpayer dollars. Subjecting cities to lawsuits without the legislature's consent would "hamper governmental functions by shifting tax resources away from their intended purposes toward defending lawsuits and paying judgments." *Texas Nat. Res. Conserv. Comm'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002). Accordingly, "the legislature is better suited than the courts to weigh the conflicting public policies associated with waiving immunity and exposing the government to increased liability, the burden of which the general public must ultimately bear." *Id.*

The benefit of this policy is particularly evident in this lawsuit. The Plaintiffs' "termination pay" claim would have this Court invalidate Ordinances which have specified the calculation of that pay for decades, without judicial challenge by any individual fire fighters or their union. During that time, the City was *not* immune from a declaratory judgment suit to declare the Plaintiffs' prospective rights. If the Plaintiffs had prevailed in such a suit, the City could have made future fiscal decisions – including those made in negotiating the collective bargaining agreements – in light of such a determination. Instead, the Plaintiffs waited until retirement to claim that the City should recalculate their benefits which, in some cases, may have been accumulating for more than 20 years. Governmental immunity justly protects the citizens of Houston from such a "lay behind the log" attempt to gain a litigation jackpot.

Similarly, Houston implemented the "debit day" work shift at issue to provide increased fire protection for the City in the wake of the terrorist attacks of September 11, 2001. Led by their union president (Steve Williams), over 1500 fire fighters – including 129 of the Plaintiffs here – filed administrative grievances claiming that the City should pay them overtime even if they refused to work the designated overtime hours. The Commission denied their grievances in every instance, based in part on the rule of statutory interpretation which bars reading statutes to reach "foolish or absurd" results. Yet now those fire fighters would have this Court force the City to re-litigate the issue through judicial proceedings. The legislature prudently refused these Plaintiffs' request to subject the City to further litigation on this claim.

In sum, the Plaintiffs have never been without an equitable remedy for the complaints they make. They could have sought a declaratory judgment 20 years ago to invalidate the City's ordinances, and then relied on the political process to determine if the City could afford all of the pay raises that they have since received. They could have sought an injunction against the post-September 11 overtime schedule. Without legislative consent, however, they could not wait until retirement to re-write the rules through a suit for damages.

V. CONCLUSION

The Plaintiffs lack standing to sue for breach of the collective bargaining agreements between the Association and the City. The legislature has not waived Houston's immunity from suit on any other claims. Accordingly, the Plaintiffs have failed to show subject matter jurisdiction over any of their claims, and the City of Houston respectfully asks the Court to dismiss those claims with prejudice. Alternatively, if the Court finds jurisdiction over any Plaintiff's claims, Houston asks the Court to specify which claims, by which Plaintiffs, on what contract, qualify for the exercise of jurisdiction.

NO. 14-08-00059-CV

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS
AT HOUSTON

THE CITY OF HOUSTON,
Appellant,

vs.

STEVE WILLIAMS, ET AL.,¹
Appellees.

On Accelerated Appeal from the
80th Judicial District Court, Harris County, Texas
Trial Court Cause No. 2002-22690-A

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ORAL ARGUMENT REQUESTED

¹ See Appendix, Tab A.

ISSUES PRESENTED FOR REVIEW

Globally, this interlocutory appeal presents a single issue:

Did the trial court err in denying the City's plea to the jurisdiction, where the Plaintiffs lack standing to sue for breach of any written contract which would support a waiver of governmental immunity under Local Government Code §271.152?

More specifically, the principal issues are:

When the legislature waived the City's immunity from suits "for breach" of a "written contract," did it clearly and unambiguously waive the City's immunity from claims asserting only violations of civil service statutes?

Do any Plaintiffs have individual standing to sue for breach of a collective bargaining agreement, where (i) the 2005 agreement provides that only the Plaintiffs' labor union may pursue such claims; (ii) the earlier agreements allowed individuals to bring suit only after pursuing a contractual grievance procedure; and (iii) none of the Plaintiffs pursued the grievance procedures specified in each agreement?

Where no Plaintiffs have standing to sue for breach of any of the identified written contracts, do the claims of any Plaintiffs qualify for the waiver of immunity which applies only to suits for breach of a written contract?

did (while in force) govern termination pay. As the Plaintiffs presented no conflicting evidence, the court can determine as a matter of law that the Plaintiffs have no claims qualifying for Chapter 271's limited waiver of immunity.

In addition, a plaintiff's lack of standing to assert a claim is an independent bar to subject matter jurisdiction. *Bland Indep. School Dist. v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000); see *City of Rockwall v. Hughes*, 246 S.W.3d 621, 631 (Tex. 2008) (finding no jurisdiction where plaintiff had no standing to bring claims based on statute which creates no private right of action). More specifically, a plaintiff's lack of standing to sue for breach of a collective bargaining agreement bars to jurisdiction over such claims, as discussed below.

II. THE CITY IS IMMUNE FROM SUIT ON CLAIMS ARISING IN THE "BETWEEN CONTRACT" PERIOD (2000 TO 2005)

The City is immune from suit by the "Between Contract Plaintiffs" -- those who terminated their employment when no collective bargaining agreement was in force -- because they did not establish the existence of any written contract with the City which qualifies for Chapter 271's limited waiver of immunity.

A. Ordinances and statutes are not "written contracts" subject to Chapter 271's limited waiver of immunity.

Long-standing case law rejects the Plaintiffs' contention that civil service statutes and ordinances are themselves "written contracts" between a city and its employees. While no court has directly addressed this question in the context of Chapter 271, courts have repeatedly held that statutory obligations did not establish "contracts in writing"

under the former law establishing a longer statute of limitations for suits on written contracts.

Specifically, before 1979, a two-year statute of limitations applied to actions for debt “not evidenced by a contract in writing,” while a four-year statute applied to debts founded upon a “contract in writing.” *See Williams v. Khalaf*, 802 S.W.2d 651, 656 (Tex. 1990) (discussing former articles 5526 and 5527 of the Revised Civil Statutes). Under that scheme, firefighters and other civil service employees commonly argued that the longer limitations period applied when they sought additional pay under statutory provisions. The courts uniformly held, however, that absent some additional written contract, such purely statutory claims were not entitled to the longer limitations period for debts based on written contracts. *See Overton v. City of Houston*, 564 S.W.2d 400, 403-04 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref’d n.r.e.); *Creps v. Board of Firemen’s Relief and Retirement Fund Trustees of Amarillo*, 456 S.W.2d 434, 439 (Tex. Civ. App.—Amarillo 1970, writ ref’d n.r.e.); *Hamilton v. Board of Firemen’s Relief and Retirement Fund Trustees of Texarkana*, 408 S.W.2d 781, 784 (Tex. Civ. App.—Texarkana 1966, writ ref’d n.r.e.); *City of Temple v. Brown*, 383 S.W.2d 639, 641 (Tex. Civ. App.—Austin 1964, writ dismiss’d); *Whitley v. City of San Angelo*, 292 S.W.2d 857, 861 (Tex. Civ. App.—Austin 1956, no writ); *see also Muss v. Mercedes-Benz of North America, Inc.*, 734 S.W.2d 155, 161 (Tex. App.—Dallas 1987, writ ref’d n.r.e.) (claims based on statutory right, not found in contract for sale of car, were subject to statute pertaining to debts not in writing).

In *Overton*, the plaintiffs were two former City of Houston employees who, like the Plaintiffs here, sought additional termination pay under city ordinances requiring such pay for accumulated vacation and sick leave. The court rejected the plaintiffs' argument that their claim was based on a "contract in writing." Acknowledging the rule (cited by the Plaintiffs here) that an ordinance which requires certain acts under a contract will be considered an implied term of the contract, the Court explained that:

The ordinances alone, however, cannot form a contract with the plaintiffs in this case. The record must evidence a contract in writing between the plaintiffs and the city into which the ordinances can be read. In the absence of proof of such a contract in writing in this case, plaintiffs' cause of action rests solely on the ordinances and is subject to the two year statute of limitations.

564 S.W.2d at 403-04.

Likewise, the Plaintiffs here presented no evidence of any applicable contract in writing, into which ordinances and statutes could be read as implied terms. They certainly presented no evidence of a contract "stating the essential terms of the agreement" as required by Chapter 271.

The *Overton* court also found no conflict between its holding and that of the Plaintiffs' principal authority here, *Kiel v. City of Houston*, 558 S.W.2d 69 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.). The *Kiel* court, in considering a fireman's claim for additional wages, had held that a plaintiff's civil service record and the writings surrounding it, "taken as a whole," were "sufficient for purposes of the statute of limitations" to supply a contract in writing under the "liberal" rules applied for statute of limitations purposes. *Id.* at 71. In *Kiel*, however, the employees/plaintiffs had

introduced their civil service records and “writings surrounding” them into evidence. The Plaintiffs here did not. Without such evidence of a written contract, ordinances and statutes alone do not establish a “contract in writing.” *Overton*, 564 S.W.2d at 404.

This same fact distinguishes the Plaintiffs’ other principal authority, *Kierstead v. City of San Antonio*, 636 S.W.2d 522 (Tex. App.—San Antonio 1982), *aff’d in part, rev’d in part*, 643 S.W.2d 118 (Tex. 1982). The plaintiffs in *Kierstead* had worked under a series of collective bargaining agreements with the City of San Antonio. Since those agreements were put into evidence, the court followed *Kiel* to hold that the four-year statute applied to claims based on statutory rights incorporated by inference into those written contracts. 636 S.W.2d at 528-29.

Here, however, the Between Contract Plaintiffs did not work under a collective bargaining agreement, and presented no evidence from which this Court could otherwise find a “written contract stating the essential terms of the agreement.” Since such a contract is required to support Chapter 271’s waiver of immunity for the adjudication of claims “for breach” of a qualifying “written contract,” the Between Contract Plaintiffs did not establish the first element required to show a waiver of immunity under Chapter 271.

1. *The required strict construction of Chapter 271 bars statutes from being called “written contracts.”*

Kiel and *Kierstead* are further distinguishable because they found “contracts in writing” under the rule that, in applying the former statutes of limitations, courts were “liberal in determining what constitutes a ‘contract in writing.’” *Kiel*, 558 S.W.2d at 71.