

No. 09-0770

IN THE SUPREME COURT OF TEXAS

THE CITY OF HOUSTON,
Petitioner/Cross-Respondent,

vs.

STEVE WILLIAMS, et al.,
Respondents/Cross-Petitioners.

**RESPONSE BRIEF OF
CROSS-RESPONDENT THE CITY OF HOUSTON**

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RESPONSE TO STATEMENT OF JURISDICTION

The Cross-Petitioners fail to assert valid grounds for independent jurisdiction. While they assert that the court of appeals “holds differently” from a prior decision of another court of appeals, no such conflict appears in the cases cited.

A court “holds differently” from another court only when there is “inconsistency in their respective decisions.” Tex. Gov’t Code §22.225(e), §22.001(e). Nothing in the court of appeals’ decision reflects any inconsistency with the broad and general propositions relied upon by the Cross-Petitioners. Among other things:

- 1) The court of appeals did not address, much less decide, the issue of whether it could (or did) base its reasoning on “legal arguments not made.” Indeed, the Cross-Petitioners never raised that issue. Without such a decision, there can be no conflict with the unremarkable proposition that courts do not consider, on an interlocutory appeal, grounds for jurisdictional attacks which were not raised in a plea to the jurisdiction.
- 2) There is no logical inconsistency between the court of appeals’ decision to use the doctrine of *expressio unius est exclusio alterius* as an aid to determine legislative intent, and the general proposition that the doctrine “is simply an aid to determine legislative intent, not an absolute rule.” *Mid-Century Ins. Co. of Tex. v. Kidd*, 997 S.W.2d 265, 274 (Tex.1999).
- 3) The “standing” cases cited by the Cross-Petitioners addressed taxpayer standing, former inmate standing, estate standing, and political subdivision standing. None of the cases addressed standing to enforce a collective bargaining agreement, the civil service statutes on the enforcement of collective bargaining agreements, or the relationship between such standing and a statutory waiver of immunity that applies only to claims for breach of a written contract.

ISSUES PRESENTED

(The issues marked “*” below are those briefed in the court of appeals but not decided by that court. To the extent that the Court considers the complaints of the cross-petition for review, Cross-Respondent asks the Court to consider such issues or, as appropriate, remand this case to the court of appeals for consideration of those issues. *See* Tex. R. App. P. 53.4.)

1. Local Government Code §271.152 partially waives a city’s immunity from suit for claims for breach of a written contract executed on behalf of that city. Did the court of appeals correctly hold that, through §271.152, the legislature “has not waived governmental immunity from suits in which local government employees recast the employer’s alleged statutory violations as breach-of-contract actions”?

1(a). Did the court of appeals correctly reason that state statutes do not qualify as written contracts subject to §271.152, because statutes are not “executed on behalf of” the City of Houston?

1(b).* Could the court of appeals have further correctly reasoned that state statutes are not “contracts” in the first place?

1(c). Where the City argued in both the trial court and on appeal that alleged statutory violations do not qualify for §271.152’s waiver of immunity, did the court of appeals have jurisdiction to agree?

2. Did the court of appeals correctly hold that the courts lack jurisdiction to hear the Plaintiffs’ claims for breach of 1995 and 1997 “meet and confer” agreements between the City and the Houston Professional Fire Fighters’ Association?

2(a). Did the court of appeals correctly conclude that individual fire fighters have no standing to sue for alleged breaches of the 1995 and 1997 agreements, where the parties to the agreements were the City and the Association, and both the agreements and their authorizing statute allow suit only by “either party” complaining of the “other party”?

2(b).* Could the court of appeals have correctly held that, due to the Plaintiffs' lack of standing to sue for breach of the 1995 and 1997 agreements, those agreements cannot support a §271.152 waiver of immunity?

2(c).* Section 271.152 was enacted in 2005, and applies retroactively only to claims for which immunity had not been previously waived. Long before 2005, other statutes had provided a limited waiver of the City's immunity from suit on claims for breach of the 1995 and 1997 agreements. Could the court of appeals have correctly reasoned that §271.152 did not provide an additional and retroactive waiver of the City's immunity?

2(d).* Could the court of appeals have correctly reasoned that the 1995 and 1997 agreements form no basis for a §271.152 waiver of immunity for the Plaintiffs' "debit day" claims, or for the "termination pay" claims asserted by most Plaintiffs, where the agreements expired well before the events giving rise to any "debit day" claims, and before 95% of the Plaintiffs had any vested right to termination pay?

3. Did the court of appeals correctly hold that the Plaintiffs have no standing to sue for breach of the 2005 collective bargaining agreement?

3(a). Did the court of appeals correctly reason that the Plaintiffs have no standing because they did not satisfy the "indispensable predicate" of pleading and proving that the Association breached its duty of fair representation?

3(b).* Could the court of appeals have further correctly held that jurisdiction is barred by the Plaintiffs' failure to use and exhaust the mandatory grievance and arbitration procedure of the 2005 agreement?

RESPONSE TO CROSS-PETITIONERS' STATEMENT OF FACTS

The lack of any written contract supporting the Plaintiffs' claim is perhaps most clearly evident through their inability to identify any particular contract which allegedly gave them the rights which they claim. Instead, the Plaintiffs admit that they are claiming up to five independent "contracts" as the basis for their claims. *See* Brief of Cross-Petitioners, at pp. 8-9. The most recent Plaintiffs cannot decide whether their claimed rights derive from one of three different collective bargaining agreements, which had been in effect at different times during two different decades; from an ordinance-based "contract"; or from a statute-based "contract." When the Plaintiffs are thus unable to identify their governing "contract," the courts should certainly have doubts as to whether the Plaintiffs have presented a claim "for breach" of a "written contract," as contemplated by Local Government Code §271.152.

SUMMARY OF THE ARGUMENT

The Plaintiffs' claims for violations of state civil service statutes do not qualify for the waiver of immunity provided by Texas Local Government Code §271.152, because that waiver applies only to claims for breach of a "written contract" which has been "executed on behalf of" the City. The court of appeals logically observed that state statutes cannot satisfy the "written contract" requirement of the statute because they are not "executed on behalf of" the City. Moreover, the civil service statutes are not "contracts" at all, and nothing about §271.152 suggest that the legislature intended to waive immunity for statutory claims when it waived immunity for claims asserting breach of a "written contract."

The Plaintiffs have no standing to sue for breach of the 1995 and 1997 agreements between the City and the Fire Fighters Association, because the agreements and their authorizing statute reserve the right to sue to the parties to the agreements; i.e., the City and the Association. By specifically granting this right to the parties, the statute and agreements necessarily excluded suits by individual fire fighters. Moreover, the statute should be strictly limited to the jurisdiction expressly granted, because it is a waiver of immunity. Likewise, the contract language should be strictly construed against finding an individual right to sue, under general labor law. The Plaintiffs' lack of standing to sue on the 1995 and 1997 agreements is a jurisdictional defect in its own right, and also means that the Plaintiffs cannot rely on those contracts as the basis for a waiver of the City's immunity from suit under §271.152.

In addition, the §271.152 waiver of immunity does not apply retroactively to complaints about the 1995 and 1997 agreements because those contracts expired years before the enactment of §271.152. Section 271.152 is retroactive only for claims which had no prior waiver of immunity, and other statutes had always provided limited waivers of immunity for claimed breaches of “meet and confer” agreements like the 1995 and 1997 agreements. The agreements also fail to support a §271.152 waiver of immunity for the vast majority of the Plaintiffs’ claims because those claims arose long after the expiration of those agreements. A §271.152 waiver of immunity cannot be shown by pointing to expired contracts which could not conceivably apply to the rights asserted.

The Plaintiffs also lack standing to sue for breach of the 2005 collective bargaining agreement, because that agreement also reserves to the Association the exclusive right to pursue any contract complaints. The court of appeals correctly held that, under long-settled labor law, the Plaintiffs may not individually sue for breach of such an agreement without pleading and proving the “indispensible predicate” that the Association breached its duty to fairly represent their interests. The Plaintiffs further failed to establish the jurisdictional requirement that they first pursue and exhaust the mandatory grievance and arbitration provisions of the 2005 agreement. As courts in this state and across the country have repeatedly held, former employees seeking additional termination pay under a collective bargaining agreement cannot avoid the agreement’s grievance and arbitration provision just because they are no longer “employees” otherwise subject to the agreement.

ARGUMENT

I. ALLEGED STATUTORY VIOLATIONS ARE NOT SUBJECT TO §271.152’S WAIVER OF IMMUNITY FOR BREACH OF CONTRACT ACTIONS

A. State statutes are not contracts “executed on behalf of” the City.

The court of appeals correctly concluded that claimed violations of state statutes are not subject to the waiver of immunity in Texas Local Government Code §271.152. The court’s reasoning is unassailable: the plain language of §271.151(2) provides that the only contracts subject to §271.152 are those “executed on behalf of the local governmental entity,” and state statutes are not executed on behalf of the City. This reasoning is particularly sound in light of the rule that a statute will not be construed to waive immunity for a claim unless the legislature’s intent to waive immunity is “clear and unambiguous.” *See City of LaPorte v. Barfield*, 898 S.W.2d 288, 296-97 (Tex. 1995).

Conversely, the Plaintiffs cite no authority supporting their novel proposition that a municipality, by adopting the Civil Service Act through a voter election, thereby makes the Act and its amendments a “contract” which is “executed on behalf of” the municipality. The “opt in” provision of the Civil Service Act merely allows the citizens of a municipality to determine whether it will be governed by that state law on the topics which it addresses. *Wilson v. Andrews*, 10 S.W.3d 663, 668 (Tex. 1999). A voter election choosing to be governed by that law is not a general delegation of power for the State to contract on the municipality’s behalf. Indeed, such a delegation of contracting

authority, without provisions for funding such state-made municipal “contracts,” would probably be unconstitutional. *See* Tex. Const. art. 11 §5.

B. Statutes are not otherwise “contracts” subject to §271.152.

The Court could also affirm the ultimate holding below—that alleged statutory violations are not subject to §271.152’s waiver of immunity—on the basis that civil service statutes are not “contracts” in the first place. This Court has repeatedly held that statutory obligations, standing alone, are not contractual obligations. *Cowart v. Russell*, 144 S.W.2d 249 (Tex. 1940); *Rose v. First State Bank of Paris, Texas*, 59 S.W.2d 810 (Tex. 1933); *Shaw v. Bush*, 61 S.W.2d 526, 528 (Tex. Civ. App.—Waco 1933, writ ref’d).

The Civil Service Act does not create an exception to this rule. As an initial matter, the Act does not set forth any of the essential terms of a contract, as required both by general contract law and by Local Government Code §271.151(2). The essential terms of an employment contract include at least duration, compensation, the duties to be performed, and the working hours and conditions. *Henriquez v. Cemex Mgmt., Inc.*, 177 S.W.3d 241, 250-51 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); *see Martin v. Credit Protection Ass’n, Inc.*, 793 S.W.2d 667 (Tex. 1990). The Civil Service Act establishes none of these terms; it merely sets outside limits on some of the terms of employment that a city may offer, such as minimum wage, maximum working hours, minimum leave benefits, and a general requirement of uniform job classifications. It does not establish any fire fighter’s actual wage, hours of work, job duties, classification,

working conditions, benefits, or duration of employment. Accordingly, the Act could not be characterized as an “employment contract” under any recognizable legal principle.

In addition, statutes are not “contracts” subject to §271.152 for the same reasons that ordinances are not contracts, as discussed in the City’s brief in support of its petition for review (filed April 27, 2010), at pages 11-27. Nothing in §271.152 expresses a legislative intent to waive the City’s immunity from suits asserting statutory claims. Neither case law nor common usage would suggest that the legislature, in passing §271.152, understood the term “written contract” to mean “civil service statute.” The 2008 Legislature distinctly refused to waive immunity for these Plaintiffs’ claims, in passing a waiver which would be superfluous under the Plaintiffs’ theory. And nothing in the Civil Service Act expresses an intent to create contractual, as opposed to statutory, rights or obligations.

For their contrary proposition, the Plaintiffs cite only cases standing for the unremarkable proposition that statutes pertaining to employment are “read into” or “incorporated into” employment contracts. *See, e.g., Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. 1928). None of the cited cases hold that statutes themselves constitute contracts. Rather, by describing employment statutes as “incorporated into” contracts, the cases implicitly recognize that the statutes are not themselves “contracts.”

Accordingly, the court of appeals correctly held that the Plaintiffs’ statutory claims do not present claims for breach of a written contract, as required to qualify for §271.152’s waiver of immunity.

C. The court of appeals had jurisdiction to consider all reasons that alleged statutory violations do not qualify for §271.152’s waiver of immunity.

Neither the record nor the rules of procedure support the Plaintiffs’ argument that the court of appeals impermissibly based its state statute ruling on a ground never asserted by the City. The City pled in the trial court that “Plaintiffs’ claims do not qualify for the limited waiver of immunity provided by §§271.151 to 271.160 of the Texas Local Government Code.”¹ The City also specifically denied “that there is a written contract forming the basis of all or some of Plaintiffs’ claims.”² This was as specific as the City could be at the pleading stage, because the Plaintiffs’ never alleged in their pleadings that state statutes were themselves “written contracts” subject to §271.152.³

In the City’s briefing in the trial court, the City broadly asserted that the waiver of immunity found in §§271.151-.160

... applies only to claims that are based upon (i) a written contract, which (ii) states the essential terms of the agreement, and (iii) is properly executed on behalf of the local governmental entity... 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.⁴

The City has further argued at every stage that state statutes are not contracts subject to §271.152, and identified this as one of the principal issues for the court of appeals to

¹ 3CR 000760.

² 3CR 000761.

³ See 1CR 000288-89; 3CR 000770-71

⁴ 3CR 000784-85.

decide.⁵ By denying the existence of a written contract, and specifically denying that statutes are contracts, the City necessarily denied that the civil service statutes were contracts “executed on behalf of” the City or, for that matter, contracts having any other attributes.

The court of appeals agreed with the City’s position, holding that “[t]he legislature has not waived governmental immunity from suits in which local government employees recast the employer’s alleged statutory violations as breach-of-contract actions.” *City of Houston v. Williams*, 290 S.W.3d 260, 267 (Tex. App.—Houston [14th Dist.] 2009, pet. filed). The court was well within its jurisdiction to reach that conclusion by reasoning that state statutes are not “executed on behalf of” the City as required by §271.152, even if the City did not focus its arguments on this obvious fact, because this reason was not a new “ground” beyond those considered by the trial court. It was simply an additional reason that the ground asserted—that statutes are not contracts—was valid.

The court of appeals had jurisdiction to consider any reasons that alleged statutory violations are not subject to §271.152 because courts liberally construe issues on appeal to include all subsidiary questions of law which are fairly included. Tex. R. App. P. 38.1(f). This rule has been said to signal this Court’s intention “to have all appeals judged on the merits of the controversies rather than hypertechnical waiver issues.” *Stephenson v. LeBoeuf*, 16 S.W.3d 829, 843-44 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Accordingly, when an appellant asserts that a particular legal conclusion should be reached for one reason, and the appellate court decides that the same

⁵ 3CR 000785-90; Brief of Appellant at xiv, 16 – 19.

conclusion should be reached on different reasoning, the court *should* decide the issue based on that different reasoning. *See Williams v. Khalaf*, 80 S.W.2d 651, 658-59 (Tex. 1990) (holding that court had jurisdiction to render purely legal decision that 4-year statute of limitations applies to fraud claims, although petitioner had previously argued only that claims were timely under the 2-year statute); *State v. Garland*, 963 S.W.2d 95, 101-02 (Tex. App.—Austin 1998, pet. denied) (holding that, although the State had argued for a particular result based on one theory, “the mere fact that we do not believe it is necessary to use [that] theory to reach the result urged is immaterial.”).

A court of appeals’ use of different reasoning to reach the same result urged by an appellant presents a sharply different circumstance from the “new grounds” addressed in the cases cited by the Plaintiffs.⁶ In those cases, to the extent that the court addressed a “new grounds” issue at all, the appellant attempted to raise an entirely new attack on jurisdiction, unrelated to the attack made in the trial court. *See, e.g., Galveston Independent School District v. Jaco*, 278 S.W.3d 477, 479 (Tex. App.—Houston [14th Dist.] 2009) (where plea to jurisdiction only denied the plaintiff’s ability to establish the elements of a whistleblower claim, on appeal defendant could not argue plaintiff’s failure to exhaust administrative remedies), *rev’d*, 303 S.W.3d 699 (Tex. 2010); *City of Celina v. Dynavest Joint Venture*, 253 S.W.3d 399, 404 (Tex. App.—Austin 2008, no pet.) (addressing effect of a non-jurisdictional statutory amendment made after trial court’s ruling); *Austin Indep. School Dist. v. Lowery*, 212 S.W.3d 827, 833 -834 (Tex. App.—Austin 2006, pet. denied) (where plea to jurisdiction was based on plaintiff’s failure to

⁶ Brief on the Merits of Cross-Petitioners, at 17-18.

exhaust local school district procedures, on appeal defendant could not argue plaintiff's failure to exhaust administrative remedies with EEOC).

Here, the City urged in the trial court that the Plaintiffs' statutory claims did not qualify for §271.152's waiver of immunity. That is exactly what the court of appeals held. The court had jurisdiction to reach that conclusion based on any reasoning that it chose to employ.

II. THE COURTS LACK JURISDICTION TO CONSIDER PLAINTIFFS' CLAIMS FOR BREACH OF THE 1995 AND 1997 "MEET AND CONFER" AGREEMENTS

A. The Association has exclusive standing to sue for breach of the 1995 and 1997 agreements.

The court of appeals correctly held that the individual Plaintiffs have no standing to seek judicial enforcement of the 1995 and 1997 "meet and confer" collective bargaining agreements between the City and the Fire Fighters Association, because both the agreements and their authorizing statute specify that suit may be brought only by "either party" to the agreements, complaining of the "other party."

The 1995 and 1997 agreements specified two options for resolving "disputes concerning the application or interpretation of the agreements": the grievance procedure contained in Texas Local Government Code §§143.127 -.134, or "judicial resolution as provided in Texas Local Government Code §143.206."⁷ With respect to the first option, the contracts did not specify who may use the grievance procedure of §§143.127 -.134, but the statute itself provides that "a fire fighter" may file a grievance.

⁷ 3CR 000871 (1995 CBA, Art. 14); 3CR 000888 (1997 CBA, Art. 17).

With respect to the judicial resolution option, however, the contracts specified that the district court would have jurisdiction over complaints by “either party to this Agreement” aggrieved by an action or omission of “the other party.”⁸ There were only two parties to the 1995 and 1997 agreements: the City and the Association. This is established in the first sentence of each agreement, which states that “This Agreement ... is by and between the Houston Professional Fire Fighters Association ... and the City of Houston”⁹ Therefore, the terms of the agreements provide that the City and the Association are allowed to sue for enforcement. Neither agreement permits, or refers to, a suit by individual fire fighters.

Virtually identical language is contained in the statute allowing judicial enforcement of such “meet and confer” agreements between a municipality and a fire fighters association.¹⁰ That statute, expressly incorporated into the contracts, provides that the local district court has jurisdiction on the application of “either party” aggrieved by an action or omission of “the other party.” Tex. Local Gov’t Code §143.206(b). Accordingly, the statute grants standing for only the City and the Association. *Cf. Acuff v. United Papermakers and Paperworkers, AFL-CIO*, 404 F.2d 169, 171 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969) (finding no jurisdiction over union members’ appeal of arbitration award concerning their individual grievances, where statute allowed suit by

⁸ 3CR 000871, 000888.

⁹ 3CR 000864, 000876.

¹⁰ Both agreements specify that they were entered pursuant to the authority of Local Government Code Chapter 143, Subchapter H, which starts at §143.201. 3CR 000864-865, 000876-877.

“any party” to an arbitration, and only the union and the employer had been parties to the arbitration).

The court of appeals soundly reasoned that this contractual and statutory language on judicial enforcement, specifying suit by only the parties to the agreement and not by individual fire fighters, shows that both the parties and the legislature contemplated suits only by the parties. 290 S.W.2d at 271. In construing a statute, courts presume that every word of the statute was used for a purpose, and that every word excluded was excluded for a purpose. *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535 (Tex. 1981). Thus the purposeful inclusion of certain terms in a statute implies the purposeful exclusion of absent terms. *Steering Comms. v. Public Util. Comm’n*, 42 S.W.3d 296, 302 (Tex. App.—Austin 2001, no pet.). This maxim—*expressio unius est exclusion alterius*—also applies to contract interpretation. *CKB Assoc., Inc. v. Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653, 655 (Tex. 1987). Accordingly, when the parties and the legislature specified that suit could be brought by the City and the Association, they presumably intended to exclude suits brought by the only other class of persons to whom standing might logically have been granted; i.e. individual fire fighters.

While the Plaintiffs correctly point out that the *expressio unius* maxim is merely a rule of logic and common sense, which is not applied if it leads to an unreasonable result, there is nothing unreasonable in allowing only the parties to an agreement to bring suits to enforce the agreement. Indeed, collective bargaining agreements commonly restrict enforcement rights to the employer and the union. This allows the union to advocate uniform interpretations of the agreement without the specter of individual union members

advocating their own self-interested and possibly inconsistent interpretations. When a union is given the exclusive right to act on the complaints of its members, “both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved.” *Vaca v. Sipes*, 386 U.S. 171, 191 (1967). Conversely, “[i]f the individual employee could compel [suit on] his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined ...” *Id.*

The wisdom of excluding individual suits is particularly clear when viewed in light of the Plaintiffs’ claims in this case. The Plaintiffs allege that the City breached the agreements through its uniform method of calculating termination benefits for *all* fire fighters. The uniform application and interpretation of those agreements can be furthered only by requiring that any suit be brought, if at all, by the party who negotiated and executed the agreements, i.e. the Association. Accordingly, there is nothing unreasonable about the legislature’s decision to limit jurisdiction over disputes about the 1995 and 1997 agreements to suits by “either party” to the agreements.

In addition, the court of appeals’ conclusion is bolstered, not weakened, by the specification in Local Government Code §143.206(a) that such agreements are enforceable, and are binding upon all three interested groups, i.e. the City, the Association, and “fire fighters covered by the agreement.” That subsection immediately precedes §142.206(b), which only provides for judicial enforcement by “either party” complaining of “the other party.” The inclusion of individual fire fighters in subsection (a), but not in subsection (b), is further evidence that the legislature purposefully intended

to exclude individual fire fighters from subsection (b)'s grant of standing to seek judicial enforcement.

This construction of §143.206(b) is further supported by the fact that the statute is a waiver of the City's immunity from suit. As such, it is subject to the same rules of strict construction applicable to all waivers of immunity, and should be interpreted to waive the City's immunity only to the extent that the waiver is clearly and unambiguously granted. Under that standard, a waiver of immunity for suits by "either party" to an agreement does not waive immunity for suits by non-parties who happen to be bound to the agreement's terms.

The parties' contractual intent to deny standing to individual fire fighters is also shown by the contractual provision allowing any grievances concerning the application or interpretation of the agreements to be resolved through the civil service grievance procedure described in Local Government Code §143.127 -.134.¹¹ The contracts do not limit that method of resolution to grievances of "either party," and the referenced statute allows grievances by individual fire fighters. Hence the contracts as a whole reflect the intent that individual fire fighters could pursue claims through the grievance procedure, while only the parties to the agreements could seek direct judicial intervention.

Moreover, the Association's exclusive standing to sue is not abrogated by the agreements' use of the word "may" in stating that disputes "may" be resolved through the two options provided. The rule is long established, with respect to labor agreements, that:

¹¹ 3CR 000871, 000888.

Use of the permissive ‘may’ does not itself reveal a clear understanding between the contracting parties that individual employees, unlike either the union or the employer, are free to avoid the contract procedure and its time limitations in favor of a judicial suit. Any doubts must be resolved against such an interpretation.

Republic Steel Corp. v. Maddox, 379 U.S. 650, 658-59 (1965); see *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1226 (11th Cir. 1985) (holding that grievance procedure was mandatory where the collectively-bargained pension plan provided that complaints “may be taken up as a grievance in accordance with the applicable provisions of the Master [Collective Bargaining] Agreement”).¹²

Nothing in the 1995 and 1997 agreements reflect a “clear understanding” that the dispute resolution provisions of those contracts are optional. Both agreements state that grievances and disputes concerning the application or interpretation of the agreements “may be resolved *either* through use of” a specified grievance procedure or through a lawsuit brought by the Association.¹³ The word “may” is used only to indicate that “either” of the two specified procedures is permitted. It does not indicate that individuals are also free to avoid both of those procedures, in favor of a direct lawsuit against the City. Since any doubt about this must be resolved in favor of exclusivity, the Plaintiffs’ direct lawsuit is barred by their failure to take advantage of either of the dispute resolution mechanisms allowed.

¹² See also *Dantin v. Anheuser-Busch, Inc.*, Civ. No. 90-3811, 1991 WL 81729 (E.D. La. 1991) (dismissing wrongful discharge claim for failure to exhaust grievance procedure, under CBA provision that discharge “may be made the subject of” the contractual grievance procedure); *Service Employment Redev. v. Fort Worth Indep. School Dist.*, 163 S.W.3d 142, 146-47, 160 (Tex. App.—Fort Worth 2005) (where statute provides that persons aggrieved “may” appeal to commissioner of education, exhaustion of that procedure is a mandatory jurisdictional prerequisite), *rev’d in part on other grounds*, 243 S.W.3d 609 (Tex. 2007).

¹³ 3CR 000871 (1995 CBA, Art. 14); 3CR 000888 (1997 CBA, Art. 17) (emphasis added).

B. The Plaintiffs have neither statutory nor “common law” standing.

Plain English grammar defies the Plaintiffs’ contention that they acquired “statutory standing” to sue for breach of the 1995 and 1997 agreements through §143.206(a)’s provision that such agreements are “enforceable and binding upon” covered fire fighters. Subsection (a) of that statute does not address *who* may enforce the agreements. That question of standing is addressed in subsection (b), which provides jurisdiction for suits by “either party” complaining of “the other party” to such an agreement.

Nor did the Plaintiffs acquire “common law standing” by simply pleading the existence of a contract and a grievance. As an initial matter, when standing has been statutorily conferred, the statute itself serves as the proper framework for a standing analysis. *SCI Tex. Funeral Serv., Inc. v. Hajar*, 214 S.W.3d 148, 153 (Tex. App.—El Paso 2007, pet. denied). Standing to sue for breach of a meet and confer agreement is granted by Local Government Code §143.206(b), which grants standing only to “either party” complaining of “the other party” to such an agreement. As the statute is a waiver of immunity, it cannot be expanded by inference to extend standing to others. *See also 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).

Moreover, a plaintiff cannot merely rely on his pleadings to establish jurisdiction based on a claimed personal grievance when a plea to the jurisdiction is supported by evidence showing the lack of jurisdiction. When the alleged jurisdictional facts are

contested, the plaintiff must come forward with sufficient evidence of those jurisdictional facts to at least create a fact question. *Texas Dept. of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 227-28 (Tex. 2004). Here, the 1995 and 1997 agreements are the relevant jurisdictional evidence. Plaintiffs concede that this evidence was undisputed. *See* Brief of Cross-Petitioners, at 22. The language of those agreements establishes that the agreements are subject to §143.206(b)'s grant of standing, and further specifies that judicial resolution is only allowed for suits by "either party" complaining of "the other party." Where the uncontroverted evidence establishes the lack of a jurisdictional requirement, such as standing to sue on a contract allegedly supporting a waiver of immunity, then the claims should be dismissed.

To the extent that the Plaintiffs are now asserting standing as third-party beneficiaries of the agreements, that argument cannot overcome the agreements' specifications of who may bring suit. Even when a party would otherwise qualify as a "creditor third-party beneficiary" of a contract, the party has no right to bring suit on the contract "unless the primary parties contemplated that the third party would be vested with the right to sue for enforcement of the contract." *MJR Corp. v. B & B Vending Co.*, 760 S.W.2d 4, 15 (Tex. App.—Dallas 1988, writ denied). The 1995 and 1997 agreements do not demonstrate any contemplation by the parties that individual fire fighters could bring suit to enforce the agreements. To the contrary, the agreements contemplate that suit will be brought only by "either party" complaining of "the other party" to the agreements. Accordingly, the language for the agreements establishes that

the Plaintiffs have no standing to sue for enforcement of the agreements, as third-party beneficiaries or otherwise.

Finally, none of Plaintiffs' "common law standing" authorities addressed standing to enforce a collective bargaining agreement, or the civil service statutes on the enforcement of collective bargaining agreements, or the relationship between such standing and a statutory waiver of immunity that applies only to claims for breach of a written contract. In the context of labor law, courts have long treated a union member's lack of standing to sue for breach of a collective bargaining agreement as a jurisdictional lack of standing. *See McNair v. U.S. Postal Serv.*, 768 F.2d 730, 735, 737 (5th Cir. 1985) (holding that this lack of standing "robs the court of jurisdiction to hear the case"); *Meredith v. Louisiana Fed'n of Teachers*, 209 F.3d 398, 402 (5th Cir. 2000). The court of appeals correctly reached this same conclusion.

C. Section 271.152 does not waive the City's immunity from suit when the plaintiff lacks standing to sue on a contract.

In arguing that they have "common law standing" because they are "personally aggrieved," the Plaintiffs may be suggesting that their lack of a right to sue on the 1995 and 1997 agreements is merely a defect in capacity, rather than a lack of jurisdictional "standing." *See Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005) ("Although courts and parties have sometimes blurred the distinction between standing and capacity, we believe that the issue presented here [(argued as a standing defect)] is more appropriately characterized as one of capacity."); *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 661-62 (Tex. 1996) (noting distinction between

lack of standing and lack of capacity). As discussed above, this is not correct. The Plaintiffs lack jurisdictional standing based on the relevant jurisdictional statute and the law of collective bargaining agreements.

Moreover, relegating the Plaintiffs' lack of standing to an issue of "capacity" would be immaterial, because lack of capacity becomes a jurisdictional defect when, as here, capacity to sue on a written contract is a qualification required to establish a waiver of the City's immunity from suit.¹⁴ The waiver of immunity relied upon by the Plaintiffs, Local Government Code §271.151 *et seq.*, waives immunity only for suits "for breach" of a qualifying "written contract" with the City. The Plaintiffs cannot establish a waiver of immunity under that statute by pointing to a contract on which they have no capacity to sue, because a waiver of immunity for a particular type of claim does not confer jurisdiction over the claim of a plaintiff who has no right to assert the claim. *See State v. Oakley*, 227 S.W.3d 58, 60-62 (Tex. 2007). Hence a written contract does not itself waive the City's immunity if the plaintiff has no legal right to sue for breach of that

¹⁴ This Court may consider the standing argument as a capacity problem, despite the lack of a verified denial of capacity in the trial court, because the City's plea to the jurisdiction plainly raised the issue of the Plaintiffs' lack of a right to sue on the various collective bargaining agreements. An unpleaded affirmative defense may serve as the basis for a plea to the jurisdiction when it is argued as a basis for the plea, and the opposing party does not object to the lack of a supporting pleading. *Cf. Roark v. Stallworth Oil and Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991) (setting forth the similar rule for summary judgment practice). Moreover, by the plain language of Rule 93, no verified denial of capacity is required when "the truth of such matters appear of record." Tex. R. Civ. P. 93. The record evidence in support of the City's plea to the jurisdiction established that the Plaintiffs have no standing to sue on the collective bargaining agreements. This Court has considered capacity issues, although argued as "standing" issues, when the defendant plainly argued in the trial court that the plaintiff was not the proper party to bring a claim. *See, e.g., Coastal Liquids Transp., L.P. v. Harris County Appraisal Dist.*, 46 S.W.3d 880, 884 (Tex. 2001) ("Although the parties have argued the issue before us and below as one of standing, the real issue is Coastal's capacity to sue."); *Lovato*, 171 S.W.3d at 848.

In this case, the City has always argued that the Plaintiffs have no right to sue for breach of the 1995 and 1997 agreements. *See, e.g.*, 3CR 000780-81. The Plaintiffs did not object to the lack of any pleading to support that argument. This is not a case where standing was first argued on appeal, and therefore was waived when the real problem was capacity. Accordingly, the issue is appropriately before this Court.

contract. *See City of Pasadena v. Crouch/KST Enter. Ltd.*, No. 01-07-00133-CV, 2007 WL 2214895 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (not designated for publication) (holding that subcontractor’s suit against city, for breach of a construction contract, did not qualify for §271.152’s waiver of immunity because subcontractor had no right to sue as a beneficiary of the contract). This conclusion is consistent with the general rule that claims do not qualify for a statutory waiver of immunity when the evidence establishes that the plaintiff could not maintain a qualifying claim. *See, e.g., Miranda*, 133 S.W.3d at 228, 232 (finding no waiver under statute waiving immunity for gross negligence claims, where the evidence established that the plaintiff could not prove gross negligence); *State v. Holland*, 221 S.W.3d 639, 644 (Tex. 2007) (finding no waiver of immunity for inverse condemnation claim, where the evidence disproved the State’s requisite intent for such a claim); *City of Kemah v. Vela*, 149 S.W.3d 199, 204-05 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (finding no waiver under statute waiving immunity for injuries arising out of use or operation of a vehicle, where evidence established that injuries did not arise out of such a use or operation).

Accordingly, the Plaintiffs cannot qualify for §271.152’s waiver of immunity by pointing to a contract on which they have no right to sue, whether that defect is characterized as one of “standing” or “capacity.”

D. Section 271.152 does not retroactively apply to the 1995 and 1997 agreements.

The courts further lack jurisdiction to hear claims for breach of the 1995 and 1997 agreements because the enactment of Local Government Code §271.152 in 2005 did not

retroactively waive the City's immunity from suit on claims for breach of those agreements. Section 271.152 applies to claims on contracts executed prior to its 2005 effective date "only if sovereign immunity has not been waived with respect to the claim before the effective date of this Act." Act of May 23, 2005, 79th Leg., R.S., Ch. 604, § 2, 2005 Tex. Gen. Laws 1548, 1549. "If immunity was waived for a claim that arose before that date, [the Act] has no effect." *Tooke v. City of Mexia*, 197 S.W.3d 325, 345 (Tex. 2006).

Long before the effective date of §271.152, two statutes had waived the City's immunity from claims for breach of the 1995 and 1997 agreements. Local Government Code §143.206(b) had vested the local district court with "full authority and jurisdiction" to adjudicate disputes over such agreements, on the application of either party to the agreements. Local Government Code §143.015 granted judicial review of any individual contract grievances pursued through the grievance procedure of Local Government Code §§143.127 *et seq.*, as allowed by the agreements.¹⁵ The Plaintiffs' claims for breach of the 1995 and 1997 agreements were always subject to these waivers of immunity, assuming that they had satisfied the statutory requisites of either pursuing the grievance procedure or convincing the Association to pursue a direct lawsuit. *See State v. Isbell*, 94 S.W.2d 423, 424 (Tex. 1936) (when the state gives its consent to be sued, suit may be brought "only in the manner, place, and court or courts designated.").

The Plaintiffs' failure to satisfy these prerequisites for the "old" waivers of immunity does not, however, allow them to claim the benefit of the "new" waiver of

¹⁵ 3CR 000871 (1995 agreement); 3CR 000888 (1997 agreement, Art. 17).

immunity in §271.152. Section 271.152's enabling act expressly limited its retroactive application to claims for which sovereign immunity had not been previously waived. Nothing in the language of that provision suggests that it was intended to nonetheless benefit claimants who had merely failed to undertake the statutory prerequisites for the previous waiver. *See also* Tex. Local Gov't Code §311.022 (statutes are presumed to be prospective only, except as expressly made retroactive). Accordingly, §271.152 did not retroactively create a new "requisite-free" waiver of immunity for the Plaintiffs' claims for breach of the 1995 and 1997 agreements.

This conclusion is not altered by §143.206(b)'s failure to specify that back pay awards or other damages are permissible remedies under that statute. Section 143.206(b) authorizes the district court to issue injunctions "and any other writ, order or process ... that are appropriate to enforcing" such agreements. When a statute clearly waives sovereign immunity, it is interpreted to at least authorize the "minimal remedy," including back pay, which would address the harm at issue. *Barfield*, 898 S.W.2d at 296-97 (construing a statute to waive immunity for claims of wrongful discharge to the extent of the "minimal remedy" of reinstatement and back pay). Therefore, if this suit had been brought by the Association, the courts likely would have concluded that §143.206 authorizes an award of back pay as a type of "any other order" providing the minimal remedy which is appropriate to enforcing an agreement as to the amount of pay owed.

Moreover, the type of remedy available under a prior waiver of immunity has no bearing on whether Chapter 271 retroactively waived the City's immunity. The only question is whether sovereign immunity had been previously waived "with respect to the

claim asserted” under the 1995 and 1997 agreements. The claim asserted is breach of contract. Section 143.206 clearly allowed suit on that claim (if brought by the Association) long before §271.152 existed. Regardless of the remedy available under that prior waiver, §271.152 did not retroactively add an additional waiver of immunity. Indeed, the obvious purpose of §271.152’s limitation on its retroactivity was to ensure that any limitations on earlier waivers of immunity were not inadvertently superceded by §271.152. Accordingly, to the extent that §143.206 did not allow the remedy of “damages,” that limitation was not removed by §271.152.

Finally, there is neither merit nor relevance to the Plaintiffs’ assertion that the original court of appeals’ opinion in this case addressed whether the Plaintiffs could have brought their breach of contract claims through the grievance procedure of §§143.127 *et seq.* There is no merit to this assertion because, at the time of that first appeal, the Plaintiffs had not even pled breach of contract, much less breach of the 1995 and 1997 agreements. The court only addressed whether the Plaintiffs were statutorily required to use the grievance procedure, not whether contract provisions required or allowed the Plaintiffs to use that grievance procedure. Parties can agree by contract to be bound by statutes which would not otherwise govern their conduct. *See Service Employment*, 163 S.W.3d at 147-48.¹⁶ Accordingly, the Commission had jurisdiction to consider all

¹⁶ *See also Croft & Seally Co. v. M/V Skulptor Vuchetich*, 664 F.2d 1277, 1280 (5th Cir. 1982). The Association and the City were certainly free to agree, by contract, to bestow jurisdiction on the City’s Civil Service Commission to hear all contract disputes. The Civil Service Commission of the City of Houston was created by the City, long before the state Civil Service Act. City of Houston Charter, Art. V-a, §1. The City’s Charter provides that “The city council may by ordinance confer upon the commission such further and additional rights and duties as may be deemed necessary” *Id.* Art. V-a, §2. No statute prohibits the City from agreeing to expand the jurisdiction of the Commission. The city council conferred on the Commission the right and duty of enforcing the 1995 and 1997 agreements, when it passed the ordinances adopting and ratifying those contracts. 4CR 001105-15.

claims for breach of contract, as set forth in the agreements, and its decisions could be enforced in court.

In addition, the Plaintiffs' "no grievance procedure" argument is immaterial, because the grievance procedure remedy was in addition to the Association's option to bring a direct suit for breach of the agreements. Since the Plaintiffs cannot deny that the Association's direct-suit option was available, it does not matter whether the Plaintiffs also had the option of pursuing their grievance through the Civil Service Commission. The judicial option for the Association was a waiver of immunity which existed long before §271.152, and therefore there is no retroactive application of §271.152 to any claims for breach of the 1995 and 1997 agreements.

E. The expired 1995 and 1997 agreements do not apply to the Plaintiffs' claims.

Without even addressing the Plaintiffs' lack of standing, moreover, the 1995 and 1997 agreements could not support a §271.152 waiver of immunity for any of the Plaintiffs' "debit day" claims, or for the "termination pay" claims of 95% of the Plaintiffs, because the agreements had expired long before those claims arose.

The 1995 and 1997 agreements expired by June 30, 2000. The 1997 agreement replaced the 1995 agreement, addressing all of the same issues. The 1997 agreement expired on June 30, 2000, pursuant to its provision that:

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.¹⁷

This language does not require “specific notice purporting to invoke termination,” as argued by the Plaintiffs. It provides a certain expiration date of June 30, 2000, with a possibility of automatic renewal in the event that neither party notifies the other of its desire to modify the Agreement. Once such notification was timely delivered, the automatic renewal provision was forever ineffective.

The City presented uncontroverted evidence establishing that both parties to the Agreement notified the other, in writing, more than 60 days before the expiration date, that they desired to modify the agreement. For example, on March 7, 2000, the Association President wrote of the Association’s request to “reconvene Meet & Confer discussions,” stating that “a number of issue’s [sic] are of priority,” and specifying that these issues included the Association’s desire to modify the agreement with respect to minimum manning of fire trucks and “extra board” funding.¹⁸ On March 21, 2000, the City sent a letter to the Association stating that “the City is exercising its option to reopen Meet and Confer with the [Association].”¹⁹ These letters stopped any automatic renewal of the 1997 agreement because they both clearly notified the other party, at least 60 days prior to the end of the agreement’s term, of the sender’s desire to modify the agreement. No new agreement was reached because, as the Association acknowledged in an August

¹⁷ 3CR 000892 (1997 CBA, Art. 25).

¹⁸ 6CR 001760-61.

¹⁹ 6CR 001498-1500.

2000 letter, the meet and confer negotiations reached an impasse.²⁰ Accordingly, there is no fact issue as to whether the 1997 agreement expired on June 30, 2000.

That expiration means that the 1995 and 1997 agreements could not conceivably apply to any Plaintiffs' "debit day" claim. The debit day claims pertain to a shift schedule that was not implemented until late 2001.²¹ Plaintiffs complaining about that schedule cannot establish a waiver of immunity by claiming breach of a contract which expired over a year earlier. Section 271.152 only waives immunity for claims "for breach" of a qualifying contract, and the City's payment of overtime in 2001 and thereafter could not have breached agreements that were not in effect after June 30, 2000.

The expiration of the agreements also means that, except for the 30 Plaintiffs who terminated their employment before June 30, 2000, the agreements have no bearing on the Plaintiffs' "termination pay" claims.²² The agreements created no vested rights to termination pay for the 510 Plaintiffs who continued their employment after expiration of the agreements, because the agreements were always subject to amendment or expiration. When the payment of accumulated sick leave and vacation upon termination derives from an agreement which can be amended or revoked, no right to such pay vests prior to termination. *Gamble v. Gregg County*, 932 S.W.2d 253, 255-56 (Tex. App.—Texarkana 1996, no writ).²³ Rather, if such an agreement is withdrawn prior to termination, and an

²⁰ 6CR 001763.

²¹ 1CR 000285-87.

²² The termination dates of the Plaintiffs were established by affidavit, 3CR 000793-805.

²³ See also *Reame v. Police Officers' Pension Bd. of City of Houston*, 928 S.W.2d 628, 631-32 (Tex. App.—Houston [14th Dist.] 1996, no writ) (pension laws create a mere expectancy); *Black's Law Dictionary* 1563 (6th ed. 1990) (defining "vested" as "Fixed; accrued; settled; absolute; complete. Having the character or given the

employee chooses to continue working under the new terms, the employee is deemed to have accepted the new terms and “gives up any right to claim anything other than that provided by the new terms.” *Id.* at 256; *see also Werden v. Nueces County Hosp. Dist.*, 28 S.W.3d 649, 651-52 (Tex. App.—Corpus Christi 2000, no pet.) (same).

The inapplicability of the 1995 and 1997 agreements is not logically addressed by the Plaintiffs’ claim that the agreements simply incorporated the statutes on termination pay, which remained unchanged after the agreements expired. First, the assertion is not accurate. The agreements only incorporated three specified statutes on termination pay, and notably did *not* incorporate the statute (Local Government Code §143.110) which the Plaintiffs claim “defines” the amount of “salary” to be included in termination pay, and which the Plaintiffs claim “preempts” the City ordinances expressly incorporated into the 1995 and 1997 agreements. Second, the assertion is irrelevant. Regardless of whether the agreements effectively gave the same rights as the statutes, the rights did not derive from a “written contract” after June 30, 2000. Without such a contract, there is no waiver of the City’s immunity under §271.152.

Similarly, the agreements do not become relevant merely because the calculation of termination pay for some later-terminated Plaintiffs included sick leave which had been accrued prior to June 30, 2000. Any later right to termination pay for that accrued sick leave vested under the laws or agreements in effect at the time of termination, not pursuant to the terms of the expired 1995 and 1997 agreements.

rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent...; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute ‘vested right.’).

Accordingly, the court of appeals could have dismissed all “debit day” claims based on the 1995 and 1997 agreements, and 510 of the Plaintiffs’ “termination pay” claims based on those agreements, on the basis that the agreements had expired and had no colorable relevance to the claims asserted.

III. THE PLAINTIFFS LACK STANDING TO SUE FOR BREACH OF THE 2005 COLLECTIVE BARGAINING AGREEMENT

A. The 2005 agreement gives the Association the exclusive right to sue for breach of the agreement.

The court of appeals correctly followed decades of labor law in holding that pleading and proof of the Association’s breach of its duty of fair representation was an “indispensable predicate” to the Plaintiffs’ standing to bring suit for breach of the 2005 collective bargaining agreement (“2005 CBA”). *Williams*, 290 S.W.3d at 271; *see United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 62 (1981).²⁴ When a collective bargaining agreement reserves to the union the exclusive right to prosecute contract complaints, as here, individuals have no right to prosecute their own complaints unless they show that the union failed to exercise good faith in considering and prosecuting those complaints. *McNair*, 768 F.2d at 735. The only typical exception to this rule occurs if the employee pleads and proves that the union breached its duty of fair representation in handling the employee’s grievance. *See Metropolitan Transit Auth. v. Burks*, 79 S.W.3d 254, 257

²⁴ Texas courts generally apply federal law to resolve disputes involving collective bargaining agreements with public employers, even though public employers are exempt from coverage under the Federal Labor Management Relations Act. *See Roberts v. City of Corpus Christi*, 744 S.W.2d 214, 216 (Tex. App.—Corpus Christi 1987, no writ) (“Although not binding here since it interpreted federal law, [*Republic Steel Corp. v. Maddox* is highly persuasive authority.”); *Flores v. Metropolitan Transit Auth.*, 964 S.W.2d 704, 706-07 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (applying federal law to claim for breach of collective bargaining agreement, even though Defendant was exempt from the FLMRA); *Diaz v. San Antonio Prof’l Fire Fighters Ass’n*, 185 S.W.3d 37, 40-41 (Tex. App.—San Antonio 2005, no pet.) (applying federal statute of limitations to fire fighters’ suit relating to grievance procedure under collective bargaining agreement).

(Tex. App.—Houston [14th Dist.] 2002, no pet.) (evidence of the union’s breach of its duty of fair representation is “an indispensable predicate” to maintaining suit against an employer under a collective bargaining agreement). Absent pleading and proof of an exception to the general rule, the individual employee’s lack of standing “robs the court of jurisdiction to hear the case.” *McNair*, 768 F.2d at 737.

The Plaintiffs could not usurp their union’s exclusive enforcement rights by simply refusing to utilize the mandatory grievance procedures of the 2005 agreement. To the contrary, the rule allowing “hybrid suits,” upon pleading and proof that a union breached its duty of fair representation, is merely an exception to the general rule that employees may not resort to the courts at all when, as here, they have failed to exhaust a collective bargaining agreement’s exclusive grievance and arbitration process. *See Vaca*, 386 U.S. at 184-86); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562-63 (1976).

The 2005 agreement prescribes exactly the type of comprehensive, mandatory and binding grievance and arbitration procedure which led to these settled rules. The agreement mandates the grievance procedure for the resolution of “any dispute, claim, or complaint involving the interpretation, application or alleged violation of any provisions of this Agreement.”²⁵ The agreement gives the Association the sole discretion as to whether to prosecute an employee’s contract grievance. The grievance procedure “has as its last step final and binding arbitration,” and only the Association, rather than an individual employee, has the right to demand such an arbitration.²⁶ When a collective

²⁵ 3CR 000915 (Art. 14, § 1).

²⁶ 3CR 000916-17.

bargaining agreement gives the union this kind of exclusive right to prosecute contract grievances, an aggrieved employee lacks standing to individually sue for breach of the contract absent pleading and proof that the union failed to fairly represent the employee. *McNair*, 768 F.2d at 735, 737.

B. The Plaintiffs' claims under the 2005 agreement are barred by their failure to exhaust the contract's mandatory grievance procedures.

The court of appeals could have additionally reasoned that the Plaintiffs lack standing to sue for breach of the 2005 CBA because they did not exhaust, or even begin, the grievance and arbitration procedures of the contract. When a collective bargaining agreement provides a comprehensive plan for the resolution of disputes, an employee must exhaust those procedures before bringing suit, unless he pleads and proves an exception to this requirement. *Roberts*, 744 S.W.2d at 215 (citing *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965)). Absent such exhaustion of the contractual procedures for redress, or proof of an exception to this requirement, the courts lack subject matter jurisdiction to consider alleged violations of a collective bargaining agreement. *Meredith v. Louisiana Fed'n of Teachers*, 209 F.3d 398, 402 (5th Cir. 2000); *see also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 205 n.1, 220-21 (1985) (holding that complaint "should have been dismissed for failure to make use of the grievance procedure established in the collective-bargaining agreement.").

The 2005 CBA provides that a fire fighter who is aggrieved "must" file a grievance with the Association within 30 days of when he or she should have known of

the facts or events giving rise to the grievance.²⁷ The agreement specifies that the time limits of the grievance procedure “must be strictly observed,” and that failure of the Association or the grievant to comply with those time limits “will serve to declare the grievance settled, and no further action may be taken.”²⁸ If a grievance is timely prosecuted to arbitration, then the decision of the arbitrator shall be “final and binding” with respect to “the application, interpretation and enforcement of the provisions of this Agreement.”²⁹ The scope of this grievance/arbitration procedure is broad, applying to “any dispute, claim, or complaint involving the interpretation, application or alleged violation of any provisions of this Agreement.”³⁰

Moreover, to the extent that there is any doubt about whether a dispute is subject to arbitration, that doubt must be resolved through the grievance/arbitration procedure. An employment dispute is subject the grievance/arbitration clause of a collective bargaining agreement “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *United Steelworkers of Am. v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 582-83 (1960); *see Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896 (Tex. 1995) (applying the same rule to all arbitration clauses). When the arbitration clause applies broadly to all disputes over the interpretation of the contract, as here, arbitration is required whenever the disputed obligation is “arguably” governed by the contract. *Nodle Bros. v. Bakery &*

²⁷ 3CR 000915 (Art. 14, § 2, “Step 1”)

²⁸ 3CR 000918.

²⁹ 3CR 000917-18.

³⁰ 3CR 000915 (Art. 14, § 1).

Confectionery Workers' Union, 430 U.S. 243, 252 (1977). The question of whether a disputed right is in fact covered by the contract is for the arbitrator to decide; “the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.” *Warrior & Gulf*, 363 U.S. at 585.

Accordingly, the Plaintiffs were required to exhaust the 2005 CBA’s grievance procedure before the courts could exercise jurisdiction over any suit for breach of that agreement. None of the Plaintiffs even attempted to use the grievance procedure.³¹ Thus no Plaintiff has standing to sue the City for breach of the 2005 CBA.³²

C. Former employees seeking termination pay are subject to the contract on which they sue.

The Plaintiffs defy four decades of labor law—since the decision in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965)—in arguing that the grievance procedure of the 2005 CBA applies only to “active, employed fire fighters” and not to “retirees” seeking more termination pay. *Republic Steel* addressed the precise circumstance of this case: a former employee seeking severance pay under a collective bargaining agreement containing a grievance procedure which, by its terms, applied only to an “employee.” 379 U.S. at 650-51 & n.1. The court reasoned that “no positive reasons appear” why severance pay claims, when covered by a collective bargaining agreement, should form

³¹ 6CR 001669-70.

³² As discussed in section II(C) above, this lack of standing deprives the courts of jurisdiction whether that lack of standing is itself considered jurisdictional, or is considered a lack of capacity to sue on a contract alleged to support a §271.152 waiver of immunity.

an exception to the general rule binding individuals to the enforcement procedures of such an agreement. 379 U.S. at 656-67. Texas courts have followed this same principal. *See City of Galveston v. Galveston Mun. Police Ass'n*, 57 S.W.3d 532, 534-35 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (holding that Police Officer's Association could compel arbitration of retirees' benefit rights); *Roberts v. City of Corpus Christi*, 744 S.W.2d 214, 215-16 (Tex. App.—Corpus Christi 1987, no writ) (holding that retired police officer was required to exhaust grievance procedure before suing for withheld overtime pay, absent proof of an exception to the general rule) (citing *Republic Steel*).

Other courts across the country have also applied this rule to bar former employees' suits for termination pay under collective bargaining agreements with grievance procedures indistinguishable from the provisions at issue here. *See, e.g., Potter v. Associated Elec. Coop., Inc.*, 56 F.3d 961, 963-64 (8th Cir. 1995) (grievance/arbitration procedure is a jurisdictional prerequisite for a former employee's suit for additional severance pay); *In re City of Gloversville*, 620 N.Y.S.2d 599 (N.Y. App. Div. 1994) (grievance procedure for "employees" applied to former employee seeking lump-sum payment for accumulated sick leave); *Mirkin v. Cintas Corp.*, 538 F.Supp. 145 (E.D. Pa. 1982) (same, regarding former employee seeking payment for accumulated vacation leave); *Lucas v. Legal Aid Society*, 1989 WL 15778 (E.D. N.Y. 1989) (dismissing former employee's claim for accumulated sick leave); *Clark v. County of Cayuga*, 623 N.Y.S.2d 57, 58 (N.Y. App. Div. 1995) ("[T]he issue of plaintiff's right to be paid for accumulated sick leave pursuant to the [collective bargaining] agreement involves an interpretation of the agreement; thus, it is immaterial that plaintiff has since retired."); *White v. Bell*

Atlantic Yellow Pages, 2004 WL 594957, *12 (D. Mass. 2004) (“Grievances relating to the benefits accompanying termination of employment ‘are not so critically unlike other types of grievances’ that they exempt the ex-employee from the requirement of pursuing his claims through union [grievance] process.”); *Ledain v. Town of Ontario*, 746 N.Y.S.2d 760, 766-67 (N.Y. Sup. Ct. 2002), *aff’d and adopted*, 759 N.Y.S.2d 426 (N.Y. App. Div. 2003) (dismissing retired city employee’s claim for additional retirement benefits); *Hope v. Continental Baking Co.*, 729 F.Supp. 1556, 1559 (E.D. Va. 1990) (dismissing former union employee’s claim for vacation pay); *Storck v. Quaker Oats Co.*, 228 N.E.2d 752, 753 (Ill. App. 3rd Dist. 1967) (affirming dismissal of former union employee’s claim for accrued vacation pay).

Many of these courts have specifically rejected the Plaintiffs’ argument that, as former employees, they are no long “employees” as defined in the subject collective bargaining agreement. For example, in *City of Gloversville* the contract specified that its grievance procedure was available to “employees” holding certain enumerated job titles. The court rejected the assertion that the procedure did not apply to former employees seeking payment for accumulated sick leave, even though the plaintiffs were no longer employees with job titles, because the collective bargaining agreement broadly defined a “grievance” as “any claimed violation, misinterpretation, inequitable application, or non-compliance with the provisions of this Agreement.” 620 N.Y.S.2d at 600-01. Likewise, in *Mirkin* the grievance procedure of a collective bargaining agreement applied to any contract disputes of “an employee or the Union.” The court found the plaintiff’s status as a former employee to be immaterial to his claimed exemption from the

exhaustion requirement, when he sought payment for accumulated vacation leave, holding that “it is well established that provisions of a collective bargaining agreement are equally applicable to a discharged employee.” 538 F.Supp. at 148 & n.2. (citing *Republic Steel*).

Similarly, the court dismissed a former employee’s claim to payment for accumulated sick leave under a collective bargaining agreement in *Lucas v. Legal Aid Society*. Finding the case governed by *Republic Steel*, the court further reasoned:

The court cannot ignore the fact that plaintiff is suing for breach of an agreement which he simultaneously argues does not apply to him.... [I]t would be illogical to hold inapplicable to plaintiff’s claim the very agreement terms which governed the sick pay accrued by plaintiff by virtue of his union membership. Where the source of the right concerned in the dispute is the collective bargaining agreement itself, then the resolution will depend on an interpretation of the agreement, and the agreement’s grievance procedures must be followed. In fact, permitting retired employees to circumvent agreed upon grievance procedures could, in effect, create a class of ‘preferred claimants’ who, at their convenience, could bypass those provisions created precisely for resolution of the claims they would be raising.

1989 WL 15778 at *2 (citations omitted); *see also Air Line Pilots Assoc. v. Alaska Airlines, Inc.*, 735 F.2d 328 (9th Cir. 1984) (holding that former employees complaining about retirement benefits are “employees” within meaning of statute providing that disputes between “employees” and carriers, growing out of the interpretation or application of a collective bargaining agreement, are subject to arbitration).

As with each of the contracts at issue in the above-cited cases, the 2005 CBA broadly defines a “grievance” as “*any* dispute, claim, or complaint involving the

interpretation, application or alleged violation of any provisions of this Agreement.” The 2005 CBA Plaintiffs seek additional payments for sick leave and vacation time which they accrued while they were active employees, under a right to payment which vested (if at all) on their last day as active employees. The only claim that they can assert under that contract, for which a §271.152 waiver of immunity might apply, is for breach of contract terms which apply equally to all employees. By definition, such a claim presents a “grievance” subject to the grievance/arbitration procedure of the 2005 CBA, and *Republic Steel* and its progeny dictate that the Plaintiffs cannot avoid that procedure merely because they are not currently employed by the City.

In light of these facts and precedents, the authorities cited by the Plaintiffs are readily distinguished. For example, the Plaintiffs’ principal authority, *Anderson v. Alpha Portland Indus., Inc.*, addressed (i) complaints that the employer cancelled retiree insurance coverage long after the claimant’s retirements, and (ii) an arbitration clause that did *not* contain a broad definition (or any definition) of the types of “grievances” to which it applied. 752 F.2d 1293 (8th Cir. 1985). As one court explained, that situation is materially different from the claims of a retired employee seeking additional payment for accrued vacation time, under a collective bargaining agreement that subjects all contract disputes to arbitration:

Assuming that the *Anderson* case was correctly decided, certain critical facts distinguish this case from that one. In the case at bar, the plaintiff seeks not retirement benefits, but vacation pay that accrued while he was still an employee Furthermore, the collective bargaining agreement covering this relationship, unlike the one at issue in *Anderson*, mandates binding arbitration as the exclusive means of

resolving contractual disputes.... The more appropriate analogy for this case is *Republic Steel* ... where a laid off worker seeking severance pay was required to exhaust his contractual remedies before he could proceed independently against his employer.

Hope, 729 F.Supp.at 1559.

Indeed, the *Anderson* court itself distinguished its facts from those of *Republic Steel*, interpreting later precedent as finding that “a union’s interest in retirement benefits, **unlike its interest in the severance provisions in *Republic Steel***, are much more ‘speculative’” 752 F.2d at 1297 (emphasis added). And the Eighth Circuit later acknowledged again that the *Republic Steel* rule remains the law of the land for severance pay claims, and that exhaustion of the grievance/arbitration procedure remains a jurisdictional prerequisite for a former employee’s suit for additional severance pay. *Potter*, 56 F.3d at 963-64.

Moreover, the *Anderson* court refused to apply the presumption in favor of arbitrability; i.e., the rule that “a court should not deny arbitration unless it can be said with positive assurance that an arbitration clause is not susceptible to an interpretation that would cover the dispute at issue.” *See City of Galveston*, 57 S.W.3d at 536. The *Anderson* court recognized that this position was inconsistent with the position taken by other circuits. 752 F.2d at 1298 n.9. And the *Anderson* court itself did not suggest that the presumption should be ignored for severance pay claims. Rather, *Anderson* had compared retirees complaining of post-retirement changes in insurance benefits to the trustees of multi-employer trusts, who are not presumed to be subject to the grievance procedures of a collective bargaining agreement between a Union and employer. *Id.* at

1298 (referring to the rule of *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984)). The *Hope* court found no difficulty in distinguishing this aspect of *Anderson*, in considering the case of a retiree seeking additional payment for accrued vacation time, holding:

Unlike the retirees in *Anderson*, Mr. Hope's situation is more like that of a laid off employee with a claim for severance benefits, who is presumed to be required to arbitrate his grievance, than that of a trustee of a pension fund, who is not.

729 F.Supp. at 1559.

The *Anderson* court further based its reasoning on the decision in *Allied Chem. & Alkali Workers Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S.Ct. 383 (1971). *Pittsburgh Plate Glass* merely held that a union owes no duty of fair representation to former employees when negotiating changes to the pension benefits offered under a collective bargaining agreement. As other courts have later observed, however, a union's lack of a statutory duty to negotiate a contract on behalf of former employees does not mean that a union lacks a contractual duty to act on behalf of retirees pursuant to the grievance arbitrations procedures contained in the relevant collective bargaining agreement. *See, e.g., Ledain*, 746 N.Y.S.2d at 766, 767 n.5.

The remainder of the Plaintiffs' authorities are equally distinguishable. Most significantly, almost none of the Plaintiffs' authorities address contract language which, as here, broadly defines a "grievance" to include any dispute involving the interpretation or application of the contract. Moreover, none of the Plaintiffs' remaining authorities discuss *Republic Steel's* holding that former employees seeking additional severance pay

are subject to a contract grievance procedure even if the procedure, on its face, applies to “employees.” Indeed, all but one of the courts appear to have been wholly ignorant of *Republic Steel’s* precedent. See, e.g., *Orth v. Wisconsin State Employees Union Council*, 500 F.Supp. 1130, 1134 (E.D. Wis. 2007) (cited by Plaintiffs) (“The [former employer] cites no precedent requiring retirees to exhaust grievance procedures”). The one case which cites *Republic Steel* does not acknowledge the relevant holding of that precedent. See *Carnock v. City of Decatur*, 625 N.E.2d 1165 (Ill. App. 4th Dist. 1993). Indeed, that case does not even acknowledge the contrary precedent from the same state. See *Storck v. Quaker Oats Co.*, 228 N.E.2d 752, 753 (Ill. App. 3rd Dist. 1967) (holding that former employee, seeking payment for accrued vacation, was required to exhaust grievance procedure where “grievance” was defined as “any complaint on the part of the Union or any employee in regard to the interpretation and application of the specific terms and provisions of this Agreement”).

Finally, none of the Plaintiffs’ authorities apply Texas law. Rather, they consist mostly of unpublished trial and intermediate appellate decisions from four states far removed from Texas, in terms of their jurisprudence as well as their physical distance. The law in Texas is well-established, even outside of the labor agreement context, that a litigant who sues for breach of a contract subjects him or herself to the remedial provisions of that contract. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001); see *City of Odessa v. Barton*, 967 S.W.2d 834 (Tex. 1998) (holding that a former city employee cannot sue the city for breach of an employment contract, when the contract limited his remedy to an administrative review proceeding). Accordingly, the court of

appeals could have correctly held that the Plaintiffs cannot establish jurisdiction over their claim for breach of the 2005 CBA without having first exhausted the grievance and arbitration procedures of that contract.

CONCLUSION AND PRAYER

Section 271.152 waives immunity only for suits for breach of a written contract executed by the City. It does not waive immunity for claimed statutory violations, for claims which plaintiffs have no standing to assert, or for claims on contracts which expired long before the plaintiffs' claims arose. Therefore, the City asks the Court to deny the Plaintiffs' cross-petition for review.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be served on the following counsel of record on the 24th day of May, 2010.

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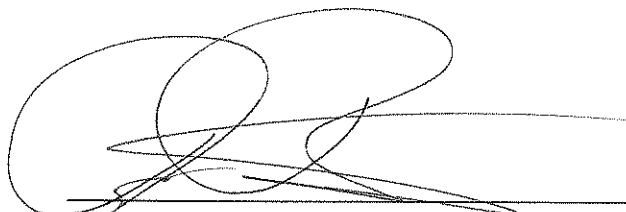
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