

NO. 09-0770

IN THE SUPREME COURT OF TEXAS

THE CITY OF HOUSTON,

Petitioner/Cross-Respondent,

V.

STEVE WILLIAMS, ET AL.,

Respondents/Cross-Petitioners.

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

**REPLY BRIEF IN SUPPORT OF CROSS-PETITIONERS STEVE WILLIAMS,
ET AL.'S (RETIRED FIRE FIGHTERS) BRIEF ON THE MERITS**

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FIGHTERS)**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Cross-Petitioners Steve Williams, et al. (“the Retired Fire Fighters”) file this reply in support of their cross-petition for review as follows:

INTRODUCTION

The cross-petition for review filed by the Retired Fire Fighters challenges the Court of Appeals rulings in Williams II which, while affirming the denial of the City of Houston’s plea to the jurisdiction, held adverse to the Retired Fire Fighters by concluding that (1) State Civil Service Statutes do not waive sovereign immunity under Tex. Loc. Gov’t Code Sections 271.151-.160 because they are not “executed” by the City of Houston, (2) the Retired Fire Fighters lack standing to assert claims under the 1995 and 1997 Meet and Confer Agreements because only the City and Fire Fighters Association (Union), and not the Retired Fire Fighters, may sue for breach of such Meet and Confer Agreements and (3) the Retired Fire Fighters lack standing to sue for breach of the 2005 Collective Bargaining Agreement (CBA) because they did not allege breach of fair representation by the Fire Fighters Association (Union). These three holdings adverse to the Retired Fire Fighters were erroneous. All of the above claims, in addition to the claims asserted by the Retired Fire Fighters under City of Houston ordinance, are viable breach of contract claims and the Retired Fire Fighters should be allowed to prosecute such causes of actions against the City of Houston.

**STATE CIVIL SERVICE STATUTES MAY BE “EXECUTED”
BY A MUNICIPALITY AND MAY BE WRITTEN CONTRACTS
SUBJECT TO SECTIONS 271.151-.160 (Replying to City of
Houston Response Brief on the Merits, pp. 4-6)**

The “execution” requirement contained in Section 271.151(2) of the Texas Local

Government Code is interrelated to the “writing” requirement contained in the same subsection. Sections 271.151-.160 are clearly intended to limit waiver of sovereign immunity to a “written contract ... properly executed on behalf of the local governmental entity” to preclude and foreclose claims based on purported oral or parol contracts and purported contracts for which there has been no formal approval through “proper execution” by the local governmental entity. This makes perfect sense as it avoids litigation over the disputed and unwritten terms of claimed oral “agreements” between a party and an individual government official and claimed agreements which have not been submitted to the governmental entity for formal approval and execution. By limiting the cause of action to “written” and “properly executed” agreements, the Legislature clearly intended to foreclose the assertion of undocumented and “secret” agreements that could not possibly bind a local governmental entity.

This is not a disputed oral or parol contract case – the State Civil Service Statutes are in writing and fully satisfy the writing requirements of Sections 271.151-.160. And, this is not a case where the municipality failed to formally approve the contract. The “execution” element is satisfied because the State Civil Service Statutes apply in this case only because of a written, executed ordinance adopting the State Civil Service Statutes. See Cross-Petitioners’ April 27, 2010, Brief on the Merits, pp. 14-16 (explaining that State Civil Service Statutes are made applicable to a municipality only through adoption by referendum and ordinance). The City of Houston does not actually dispute that State Civil Service Statutes are “written” or that the State Civil Service Statutes are binding on the City solely because the City adopted those statutes by an ordinance executed by the City. Rather, the City primarily relies on statute of limitations cases to argue that “this Court has

repeatedly held that statutory obligations, standing alone, are not contractual obligations.” See City of Houston Response Brief on the Merits, p. 5. The cases cited by the City involve the now repealed two year statute of limitations provision in Vernon’s Ann. Civ. Stat. Article 5526 for “actions for debt where the indebtedness is not evidenced by a contract in writing.”¹ The Court of Appeals addressed and rejected a similar argument based on statute of limitations cases that was made by the City of Houston in connection with the claims asserted by the Retired Fire Fighters under ordinance, stating as follows:

Rather than directly confronting the definition of a “contract” in section 271.151(2), the City primarily relies on a series of statute-of-limitations cases, in which the courts held a four-year period applicable to suits on debts based on written contracts did not apply to suits in which local government employees alleged purely statutory rights to payment.

■ ■ ■

Courts in these limitations cases were rejecting arguments that statutes could constitute contracts and were not construing the definition of a “contract” found in Local Government Code section 271.151(2).

■ ■ ■

The limitations cases, including Overton, are not persuasive authority for holding that a local government’s properly executed ordinances fall outside the definition of a “contract” in section 271.151(2).

Williams II, 290 S.W.3d at 268. The above reasoning is applicable to the statutory claims – the limitations cases relied upon by the City of Houston are not “persuasive authority for holding” that State Civil Service Statutes made applicable to the Retired Fire Fighters by an executed ordinance “fall outside the definition of a ‘contract’ in section 271.151(2).” Id.

¹As discussed in the Retired Fire Fighters’ May 17, 2010, Response Brief on the Merits, pp. 17-18, and as admitted by the City of Houston, Articles 5526 and 5527 have been repealed and there is no longer any distinction between oral or written contracts for statute of limitations purposes. See Tex. Civ. Prac. & Rem. Code Section 16.004(a)(3).

The City of Houston claims that statutes cannot constitute “written contracts” under Section 271.151(2) because they are only read into or incorporated into the Retired Fire Fighters’ employment contracts. See City of Houston Response Brief on the Merits, p. 6. “Contracts may consist of multiple documents.” See City of Houston v. Clear Channel Outdoor, 233 S.W.3d at 445, citing to The Courage Co., LLC v. The Chemshare Corp, 93 S.W.3d 323, 333 (Tex. App.–Houston [14th Dist.] 2002, no pet.). And, a written contract consists of its express, implied and incorporated terms and clearly does fall within the definition of a contract in writing in Section 271.151(2). State Civil Service Statutes are undisputedly part of the Retired Fire Fighters’ employment contract with the City of Houston, which contract includes the City ordinances.

Ordinances and state statutes relating to compensation of fire fighters are considered to constitute and be part of the employment contracts between the fire fighters and the municipality. See Arredondo v. City of Dallas, 79 S.W.3d 657, 667 (Tex. App.–Dallas 2002, pet. denied) (city ordinance constituted implied part of employment contract); City of Galveston v. O’Mara, 146 S.W.2d 416, 419, 421 (Tex. Civ. App.–Galveston 1941), aff’d, 155 S.W.2d 912 (Tex. 1941) (city ordinances are “part” of contract and “read into” contract as fully as if actually incorporated); Byrd v. City of Dallas, 6 S.W.2d 738, 740 (Tex. 1928) (states pension statutes are “necessarily a part of the contract of employment and is read into the contract as fully as though it had been actually incorporated therein”); Wilson v. Andrews, 10 S.W.3d 663, 667-668 (Tex. 1999) (civil service act with amendments, once adopted, became part of employment contract between fire fighters and city); Ward v. City of San Antonio, 560 S.W.2d 163, 165 (Tex. Civ. App.–San Antonio 1977, writ ref’d n.r.e.); City of Corpus Christi v. Herschbach, 536 S.W.2d

653, 657 (Tex. Civ. 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); 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).

The above cases, which state that the State Civil Service Statutes are part of and incorporated into the Retired Fire Fighters' employment contracts, are consistent with numerous cases from this Court which have repeatedly held that statutes that exist at the time and place of the making of a contract form part of that contract. This Court has adhered to that principle for over 125 years. In Smith v. Elliott & Deats, 39 Tex. 201 (Tex. 1873), this Court stated as follows:

That the laws which exist at the time and place of the making of a contract enter into and form part of it, embracing alike those which affect its validity, its construction, its discharge, and its enforcement, forms a rule recognized by numerous authorities of the highest character.

In Langever v. Miller, 76 S.W.2d 1025, 1026-1027 (Tex. 1934), this Court stated as follows:

The laws, at least as to substantial rights of remedies, existing at the time a contract is made, become part of the contract.

This Court continues to adhere to this principle in its recent decisions. See Kierstead, 643 S.W.2d at 121; Wessely Energy Corporation v. Jennings, 736 S.W.2d 624, 626 (Tex. 1987); Central Education Agency v. George West Independent School District, 783 S.W.2d 200, 201-202 (Tex. 1990) (“The protections of the Term Contract Nonrenewal Act were part of McCollough’s 1982 - 83 and 1983 - 84 employment contracts even though these protections were not expressly written into the contracts. ‘[L]aws which subsist at the time and place of the making of a contract ... enter into and form a part of it, as if they were expressly referred to or incorporated in its term’.”).

The City of Houston clearly recognizes in its charter the binding nature of the State Civil Service Statutes and their interrelationship to the ordinances that govern fire fighters as follows:

Article 1269m, Vernon's Texas Civil Statutes, enacted by the 1947 Legislature now codified as Tex. Loc. Gov't Code Ann. ch. 143, provides for civil service system for policemen and firemen under a uniform plan provided by the Legislature. Pursuant to a command contained in the Act, cities were required to submit to popular vote the question of adoption or rejection of the Act, with provision that upon its adoption it would supersede charter provisions or ordinances covering its subject matter.

At an election held in the city January 31, 1948, this Act was adopted by a majority vote of the votes cast at the election. It differs in many important respects from the city's civil service charter provisions (Art. Va of the foregoing charter) and no action should be taken in the matter of civil service, whether pertaining to policemen and firemen or to other employees without first consulting ch. 143, Tex. Loc. Gov't Code Ann., since some of its provisions touch upon the entire subject of composition of the city's civil service commission and of the executive administration of the civil service functions.

Appendix B to City of Houston Charter entitled "Referendum Ordinances Adopted at Elections;" Tab "B" to Appendix to Retired Fire Fighters' Response Brief on the Merits filed on May 17, 2010. (emphasis supplied)

The City also claims that State Civil Service Statutes do not set forth the essential terms of the written contract as required by Section 271.151(2). See City of Houston Response Brief on the Merits, pp. 5-6. This is an argument that the City did not make in the trial court in its plea to the jurisdiction. The City filed three pleadings in the trial court addressed to its jurisdictional arguments and never asserted that the State Civil Service Statutes failed to set forth the essential terms of the contract as required by Tex. Loc. Gov't Code Sections 271.151-.160. (3 CR 767-791; 6 CR 1734-47, 1748-1758) The only arguments made by the City of Houston in its plea to the jurisdiction with respect to State

Civil Service Statutes were the following: (1) statutory rights do not qualify as contracts in writing (3 CR 787-788) and (2) there is no waiver of sovereign immunity for “implied” contracts. (3 CR 783-788; 6 CR 1736) As briefed by the Retired Fire Fighters on pages 17-18 of their April 27, 2010, Brief on the Merits, a reviewing court has no jurisdiction to consider grounds that are not asserted in the trial court in the movant’s plea to the jurisdiction. In any event, the contention that the State Civil Service Statutes do not contain essential or material terms is simply erroneous.

Texas Local Government Code Section 142.0017 expressly provides for payment of overtime, defines the maximum number of hours that can be worked over a work cycle without payment of overtime and defines which hours must be counted in computing the overtime threshold. Texas Local Government Code Sections 143.115(b) and 143.116(a) and (b) expressly require payment of full salary (which includes educational assignment and incentive pay) for accrued and unused sick and vacation leave. These statutes are more fully described and discussed on pages 3-8 of the Retired Fire Fighters’ April 27, 2010, Brief on the Merits and in the Williams I opinion, 183 S.W.3d 417-426. These statutes satisfy any requirements of “essential terms” under Sections 271.151-.160. However, any dispute over whether the statutes define the material or essential terms of the contract would be a merits dispute not properly resolvable as part of the plea to the jurisdiction. See Retired Fire Fighters’ May 17, 2010, Response Brief on the Merits, pp. 25-28.

With respect to the “execution” element in Section 271.151(2), Courts have found waiver of sovereign immunity and applied the waiver provisions of Sections 271.151-.160 even where the contract has not been “executed” by the local governmental entity, so long

as the evidence reflects that the contract was submitted and approved by the local governmental entity.² In City of Houston v. Clear Channel Outdoor, Inc., 233 S.W.3d 441, 446 (Tex. App.–Houston [14th Dist.] 2007, no pet.), the City of Houston argued that a purchase contract with Clear Channel failed to satisfy Section 271.151(2) because it was not executed by the City of Houston mayor and controller.

The City contends that the Purchase Agreement was not “properly executed on behalf of the local governmental entity” because it was not signed by the mayor and the city controller. In support of this argument, the City relies on the following provision of the Houston City Charter:

No contract shall be entered into until after an appropriation has been made therefore, nor in excess of the amount appropriated, and no contract shall be binding upon the city unless it has been signed by the mayor and countersigned by the controller, and the expense thereof charged to the proper appropriation, and whenever the contract charged to any appropriation equals the amount of said appropriation, no further contracts shall be countersigned by the controller.

CITY OF HOUSTON CHARTER, art. II, § 19 (Act of March 18, 1905, 29th Leg., R.S., ch. 17, art. II, § 1, 1905 Tex. Spec. Laws 131, 131, amended Jan. 27, 1968, amended Aug. 14, 1982) (emphasis added).

233 S.W.3d at 446. The Fourteenth Court of Appeals agreed with Clear Channel’s argument that there could be waiver under Sections 271.151-.160 even where there was no formal execution of the contract.

Clear Channel responds that these requirements do not apply to this case, and points to another provision of the City’s Charter:

Every ordinance, resolution or motion of the City Council shall, before it take effect, be presented to the Mayor for its approval and signature. If the Mayor shall fail to sign any ordinance, resolution or motion within five days after adoption, it shall

²The City did not assert a “lack of execution” argument in its plea to the jurisdiction. See Retired Fire Fighters’ April 27, 2010, Brief on the Merits, pp. 16-18.

nevertheless be in full force and effect as if he had signed the same.

Id., art. VI, § 6 (added by amendment August 15, 1942). Here, the City passed the Motion to condemn the property, and although there is no indication that the Motion was signed by the mayor, it was nevertheless in full force and effect as if it had been signed.

The adoption of this Motion was the last step needed to complete the written contract between the parties.

Id.

The Fourteenth Court of Appeals reaffirmed this holding in City of Houston v. Petroleum Traders Corporation, 261 S.W.3d 350, 358 (Tex. App.–Houston [14th Dist.] 2008, no pet.).

This court rejected the City’s argument in City of Houston v. Clear Channel Outdoor, Inc., 233 S.W.3d 441 (Tex. App.–Houston [14th Dist.] 2007, no pet.). In that case, the City asserted immunity from suit in response to a breach of contract action filed against it by Clear Channel. The City argued – as it does here – that the contract was not “properly executed” because it was not signed by the mayor and city controller. Id. at 446. The City relied – as it does here – on the 1905 City Charter. Id.

This court held that a properly executed contract was established by the combination of (1) the contract document; and (2) the City Council’s passage of an accompanying motion that constituted “the last step needed to complete the written contract between the parties.” Id. “The City’s contention that the signatures of the mayor and the city controller are required arguably conflates the issue of whether the contract is binding under the charter – a question that goes to the merits of the case – with the issue of whether it was properly executed on the City’s behalf.” Id.

Clear Channel’s holding applies with equal force here based on the combination of (1) the contract documents; and (2) the passage of Council Motion 2005-0636 approving the PTC contract. Taken together, these documents and actions “constitute a written contract as that term is used in section 271.151.” Id. at 447. The trial court properly overruled the City’s plea to the jurisdiction. Id.

Under the circumstances here – and in conformity with Clear Channel – the contract between the City and PTC was “properly executed” notwithstanding

the absence of the mayor's and city controller's signatures. Therefore, section 271.152 waives the City's immunity from suit on PTC's [breach] of contract claim.

Id.

In the present case, it is undisputed that the City of Houston adopted the State Statutes – the Civil Service Act – through a referendum ordinance held on January 31, 1948. Appendix B to City of Houston Charter entitled “Referendum Ordinances Adopted at Elections;” Tab “B” to Appendix to Retired Fire Fighters’ Response Brief on the Merits filed on May 17, 2010. That ordinance satisfies any “execution” requirement of Section 271.151(2) and under this Court’s reasoning in Wilson v. Andrews, 10 S.W.3d 663, 668 (Tex. 1999), once the citizens of the City of Houston voted to adopt and to be governed by the Civil Service Act, the City continued to be governed by the statutes as they have been amended by the Legislature over time.

THE STANDING ARGUMENT IS FLAWED (Replying to City of Houston Response Brief on the Merits, pp. 10-20)

The Court of Appeals stated that the 1995 and 1997 Meet and Confer Agreements “arguably meet the definition of a ‘contract’ subject to the waiver of immunity in section 271.152,” Williams II, 290 S.W.3d at 271, but then held that the Retired Fire Fighters lacked standing to assert claims for breach of such agreements. The 1995 and 1997 Meet and Confer Agreements (4 CR 1155-1168, 1170-1186) provide, in part, as follows:

1. The Retired Fire Fighters are defined to be employees and the City of Houston is defined to be their employer. (Article 1, p. 2; 4 CR 1159, 1171)
2. The City contractually agreed that “to the extent not expressly or unequivocally preempted by this Agreement, all rights provided to the employees by the Fire Fighter and Police Officer Civil Service Act, TEXAS LOCAL GOVERNMENT

CODE, Chapter 143, other state statutes, and city ordinances, rules and/or regulations, including civil service rules, shall remain in full force and effect.” (Article 4, p. 3; 4 CR 1160, 1172)

3. The Agreement provides for longevity pay, higher classification pay, educational incentive pay, assignment pay, and bilingual pay as specified by Tex. Loc. Gov’t Code §§ 141.033(b), 143.111, 143.112, 143.113 and applicable City of Houston ordinance. (Article 16, pp. 8-9; Article 19, pp. 13-14; 4 CR 1165-66, 1182-1183)³
4. Retiring employees are entitled to receive a lump sum payment for vacation leave, holiday leave and sick leave in accordance with Tex. Loc. Gov’t Code §§ 143.115, 143.1155 and 143.116 and applicable City of Houston ordinances. (4 CR 1166, 1183)⁴

The standing reasoning applied by the Court of Appeals and the City of Houston fails in this case because the parties to the Meet and Confer Agreements and the Legislature could have and would have expressly stated that only the City of Houston and Association were entitled to sue for enforcement of the Meet and Confer Agreements if that was the true intent of those parties. It would have been simple to write the agreements or the statute to exclude all parties from suing to enforce the Meet and Confer Agreements except the City and the Association, if this was the intent of the parties.

This is exactly what the City of Houston and the Houston Police Officers Union (HPOU) did in their Meet and Confer Agreement discussed in the recent opinion in Wheeler v. White, ___ S.W.3d ___, 2010 WL 1790771 (Tex. App.–Houston [14th Dist.] May 6, 2010,

³These are the same statutes and ordinances interpreted and analyzed by the district court and the Court of Appeals in the 2004 Partial Judgment and in Williams I, 183 S.W.3d at 424-425, and relied upon by the Retired Fire Fighters for their claims.

⁴These are the same statutes and ordinances interpreted and analyzed by the district court and the Court of Appeals in the 2004 Partial Judgment and in Williams I, 183 S.W.3d at 424-425, and relied upon by the Retired Fire Fighters for their claims.

no pet. h.), where the Fourteenth Court of Appeals held that the police officer lacked standing to sue under the Meet and Confer Agreement. The Meet and Confer Agreement in that case provided that “a challenge to any term of this Agreement either by interpretation and/or application which applies to an officer or to the MBA [Majority Bargaining Agent], may be filed only by the HPOU, in its capacity as the MBA or the City.” 2010 WL 1790771 at * 4. (emphasis supplied)

There is no comparable language in the 1995 and 1997 Meet and Confer Agreements. In addition, the Meet and Confer Agreements state that grievances and disputes may be resolved through the grievance procedures contained in Tex. Loc. Gov't Code Sections 143.127-143.134. (4 CR 1165, 1182) Those grievance procedures allow the fire fighter to challenge in district court any adverse decision following completion of the grievance procedures. See Watts v. City of Houston, 126 S.W.3d 97, 100-103 (Tex. App.–Houston [1st Dist.] 2003, no pet.) (discussing Four Step grievance procedure and appeal to district court from decision of independent hearing examiner or Civil Service Commission). In the present case, the statutory grievance procedures did not apply and were not available to the Retired Fire Fighters for the reasons explained in Williams I, 183 S.W.3d at 414-416. Because they were not required to pursue the grievance procedures because they were not applicable to them, the Retied Fire Fighters had the right to sue first and directly in district court. It is unreasonable to conclude that because of the unavailability and inapplicability of the statutory grievance procedures expressly described in the Meet and Confer Agreements that the Retired Fire Fighters have no ability to sue for breach of the Meet and Confer Agreements. The more reasonable and logical conclusion is that since the grievance procedures did not apply to the Retired Fire Fighters because

of the reasons stated in Williams I, the Retired Fire Fighters had the right to proceed directly to district court to assert their claims – which is where they would have been if the grievance procedures were applicable to them, they had gone through the grievance process and it was adverse to them.

THERE WAS NO PRE-SEPTEMBER 1, 2005, WAIVER OF SOVEREIGN IMMUNITY FOR BREACH OF THE 1995 AND 1997 MEET AND CONFER AGREEMENTS (Replying to City of Houston Response Brief on the Merits, pp. 20-24)

The waiver of sovereign immunity provided for 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 Section 271.153 (Historical and Statutory Notes). The City makes two arguments asserting that Sections 271.151-.160 do not apply retroactively to the breach of contract claims asserted under the Meet and Confer Agreements because sovereign immunity was waived before the effective date of the statute. First, the City of Houston claims that the Civil Service grievance procedures referenced in the Meet and Confer Agreements constitute a prior waiver of sovereign immunity which renders Sections 271.151-.160 inapplicable. This is an argument that 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. This forecloses and disposes of any argument that there was a pre-September 1, 2005, waiver of the actual claim of the Retired Fire Fighters in this case. Clearly, there was no such waiver.

The City of Houston claims that the 1995 and 1997 Meet and Confer Agreements provided a “contractual” grievance mechanism for individual fire fighters to resolve disputes

under the agreements pursuant to Texas Local Government Code Sections 143.127-143.134 and that the Retired Fire Fighters failed to pursue this remedy. See City of Houston Response Brief on the Merits, pp. 23-24. The “contractual” grievance procedures the City claims are identified in the 1995 and 1997 Meet and Confer Agreements are the same statutory grievance procedures contained in Sections 143.127 through 143.134 of the Texas Local Government Code which the City relied upon in the earlier 2004 Appeal of this case. (Compare 4 CR 1165, 1182 with Williams I, 183 S.W.3d 414-416) The 1995 and 1997 Meet and Confer Agreements define “employee” identically as follows:

“Employee” means all fire fighters, as the term fire fighter is defined in TEXAS LOCAL GOVERNMENT CODE § 143.003(4), in the Houston Fire Department except the head of the department and assistant department heads in the rank or classification immediately below that of the department head.

(4 CR 1159, 1171-72) The Meet and Confer Agreements utilize the statutory definition of “employee” for fire fighters. The Court of Appeals has held in this case that this definition applies only to active, presently employed fire fighters and does not permit or authorize retirees to file grievances. See Williams, 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 ... [T]hey could no longer use the grievance procedures Chapter 143 provides ...”).

The City of Houston has already litigated this issue of alleged availability and failure to exhaust administrative remedies with respect to statutory Civil Service grievance procedures and lost. The Retired Fire Fighters in this case were retired when their termination payments were docked of previously earned and paid overtime and when they were not paid the full amounts for their accrued, unused sick and vacation leave. The

Court of Appeals previously held in Williams I that retired fire fighters cannot file grievances under the Civil Service System or Local Government Code because the grievance system applies only to active, employed personnel. And, the Court of Appeals held in Williams I that prior to retirement, there was no basis for the fire fighters to file grievances.⁵

The City's claim that the statutory grievance procedures (referenced in the Meet and Confer Agreements) applied to the Retired Fire Fighters is even more questionable due to the fact that the City of Houston stipulated that these procedures did not apply to the Retired Fire Fighters as the Court of Appeals explained in Williams I:

Finally, we also conclude that, after they had retired, the fire fighters were not subject to the grievance process outlined in Chapter 143 of the Local Government Code. 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 (defining "fire fighter" as a member of a fire department). Thus, they could no longer use the grievance procedures Chapter 143 provides because only a fire fighter – a member of the fire department – can file a grievance. See id. § 143.127(a) (a "fire fighter" may file a grievance). In fact, the parties stipulated that, at the time the fire fighters received their termination payouts, they were no longer employees and, as such, they were not subject to the jurisdiction of the City's Civil Service Commission or the grievance process of Chapter 143 of the Local Government Code.

■ ■ ■

The City agreed to the following stipulations: "At the time each Plaintiff received their termination pay check, which included the dock of previously paid overtime, they were no longer employees of the City of Houston," and "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

⁵See Williams I, 183 S.W.3d at 414-416 ("The City asserts that the trial court lacked jurisdiction because, according to the City, the fire fighters failed to exhaust the administrative remedies available to them, both as active employees and after their retirement. As we discuss below, the 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.").

Government Code, Chapter 143.”

Williams I, 183 S.W.3d at 416 & n. 4.

The City of Houston did not appeal this grievance/exhaustion of administrative remedies issue to this Court following the Williams I opinion. This failure to appeal constitutes waiver and forecloses any subsequent assertion of this issue based on the grievance provisions 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) (“[T]he State could have properly raised its argument that the Districts could not seek attorneys’ fees under the UDJA on direct appeal to the Texas Supreme Court. Because the State failed to do so, the issue is waived and we need not reach the merits of whether the Districts’ use of the UDJA was appropriate.”).

The City wrongfully claims that the Court of Appeals did not consider its failure to exhaust arguments under the 1995 and 1997 Meet and Confer Agreements because no contractual claims were asserted under those agreements when Williams I was issued in 2005. See City of Houston Response Brief on the Merits, p. 23. The City of Houston’s argument fails because the so-called “contractual” grievance procedures in the 1995 and 1997 Meet and Confer Agreements are the statutory grievance procedures which the Court of Appeals fully addressed in Williams I. Since the Williams I Court determined that the statutory grievance procedures were not available or applicable to the Retired Fire Fighters, it likewise resolved the issue of whether those same statutory grievance procedures were available or applicable as a matter of contract. Those statutory grievance procedures did not become available or applicable to the Retired Fire Fighters simply because they were referenced and incorporated into the 1995 and 1997 Meet and Confer Agreements. The

parties did not and could not agree to a different type of grievance procedure that was somehow intended to preempt the Civil Service Act. The parties incorporated into the Meet and Confer Agreements the same statutory procedures contained within the Civil Service Act. The parties cannot by contract bestow jurisdiction on the Civil Service Commission when the Civil Service Commission does not otherwise have jurisdiction over the Retired Fire Fighters.

The second argument made by the City of Houston is that Local Government Code Section 143.206(b) vested the local district court with full authority and jurisdiction to adjudicate disputes over the Meet and Confer Agreements on the application of either party to the agreement. But, the City also claims that 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 individually, that provision cannot be a pre-September 1, 2005, waiver of sovereign immunity for the claims asserted in this case under the Meet and Confer Agreements so as to preclude the Retired Fire Fighters' reliance on the recently enacted Sections 271.151-.160.

The waiver of sovereign immunity provided for 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 claims in this case are individual Retired Fire Fighter claims 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.” At the time the claims of the Retired Fire Fighters accrued, after they retired, they were relegated to a single remedy according to this Court – damages. That remedy is not described in Section 143.206(b).

**THE CITY OF HOUSTON’S EXPIRATION ARGUMENT IS ERRONEOUS
(Replying to City of Houston Response Brief on the Merits, pp. 24-28)**

The Court of Appeals did not reach the arguments made by the City of Houston that the Meet and Confer Agreements expired on June 30, 2000, and that the Retired Fire Fighters have no vested rights under the Meet and Confer Agreements. 30 Retired Fire Fighters retired while the 1997 Meet and Confer Agreement was undisputedly in effect. And, it is undisputed that all Retired Fire Fighters were subject to and covered by the 1995 and 1997 Meet and Confer Agreements 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 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 Meet and Confer Agreements were in existence. (See e.g. 5 CR 1276)

These “termination” arguments made by the City of Houston are merits defenses which are not properly resolvable through a plea to the jurisdiction. See Retired Fire Fighters’ 5-17-2010 Response Brief on the Merits, pp. 25-28 (briefing issue that defensive arguments relating to “adjudication” of breach of contract claim may not be resolved by plea to the jurisdiction). The 1997 Meet and Confer Agreement states in Article 25 as follows:

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 Meet and Confer Agreement 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 Meet and Confer Agreement 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.

The 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 Meet and Confer Agreement 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 Meet and Confer Agreement. (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 Meet and Confer Agreement 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)

Even assuming that the City of Houston’s expiration or termination contention is correct, its argument that the Meet and Confer Agreement created no vested rights based on work performed prior to July 1, 2000 is erroneous as a matter of law.⁶ The City of Houston relies upon the decisions in Gamble v. Gregg County, 932 S.W.2d 253, 255-56 (Tex. App.–Texarkana 1996, no writ) and Werden v. Nueces County Hospital District, 28 S.W.3d 649, 651-52 (Tex. App.–Corpus Christi 2000, no pet.). Gamble and Werden both 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. All Retired Fire Fighters in this case are Civil Service Employees, not at-will employees. See Williams II,

⁶The City of Houston argues that “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.” See City of Houston Response Brief on the Merits, p. 26. It further claims that “if such an agreement is withdrawn prior to termination, and an 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 pp. 26-27.

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 Meet and Confer Agreements 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.

Both Gamble and Werden state that a personnel manual does not create property interests in the stated benefits and policies unless some specific agreement, statute or rule creates such an interest. In the present case, there are specific agreements and state statutes and ordinances which create such vested property interests, rendering the decisions in Gamble and Werden inapplicable to the Retired Fire Fighters.

Further, the 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. In Millennium PetroChemicals, Inc. v. Brown & Root Holdings, Inc., 390 F.3d 336, 340 (5th Cir. 2004) (applying Texas law), the Fifth Circuit Court of Appeals stated “We are aware of no Texas authority that provides that the termination of agreements automatically applies retroactively to extinguish vested rights.” The Court of Appeals relied upon Section 2.106(c) of the Texas Business & Commerce Code which provides that upon

“termination all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.”⁷

**THE RETIRED FIRE FIGHTERS HAVE STANDING TO SUE FOR
BREACH OF THE 2005 COLLECTIVE BARGAINING AGREEMENT
(Replying to City of Houston Response Brief on the Merits, pp. 28-40)**

The City of Houston asserts that the 2005 Collective Bargaining Agreement contains a broad grievance/arbitration provision which applies to “any dispute, claim, or complaint involving the interpretation, application or alleged violation of any provisions of this Agreement.” (4 CR 1209) None of the arguments made by the City of Houston based on a claimed broad or expansive grievance/arbitration provision are relevant if the grievance/arbitration provision does not apply to the Retired Fire Fighters because of their retired status. Section 1 of the grievance procedure expressly states that “the Association or any bargaining unit Firefighter may file a grievance under the terms of this Agreement.” (4 CR 1209) Similarly, the Step One grievance procedure described in the 2005 Collective Bargaining Agreement on the same page speaks to “a Firefighter who is aggrieved.” (4 CR 1209)

The term “fire fighter” is a defined term in the Collective Bargaining Agreement and it applies only to active City of Houston Fire Department personnel. It does not include retirees. The 2005 Agreement contains the following provisions:

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 excluding municipal employees (civilians),

⁷Section 2.106(c) is part of Article 2 (Sales) of Texas’ Uniform Commercial Code. This provision was applied in Millennium PetroChemicals in construing an indemnity provision in a non-sales maintenance service agreement.

volunteer fire fighters, applicants and the head of the Fire Department (Fire Chief).

■ ■ ■

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)

As previously discussed herein, the above definition utilized in the Collective Bargaining Agreement is the same definition of employee which the Court of Appeals analyzed in Williams I. The Williams I Court held that under the above definition, the Retired Fire Fighters were not subject to statutory grievance procedures. 183 S.W.3d 414-416 The same analysis should apply with respect to grievance procedures under the Collective Bargaining Agreement. Those grievance procedures and the arbitration provision do not apply to retirees.

CONCLUSION

For the reasons explained herein, this Court should grant the Retired Fire Fighters' cross-petition for review.

Respectfully submitted,

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