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City of Waco v. Kelley: The Ten-Year Saga of teh Rights of Civil Servants

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CITY OF WACO V. KELLEY: THE TEN-YEAR SAGA OF THE RIGHTS OF CIVIL SERVANTS

By: Jessica McCurry

ABSTRACT

Chapter 143 of the Texas Local Government Code, known as the "Fire Fighter and Police Officer Civil Service Act," was passed to provide civil servants, valued government employees, with certain rights and protections. A key right enumerated in The Act is a civil servant's right to elect to appeal a disciplinary action. He may appeal the action to the local civil service commission or to an independent hearing examiner not affiliated with the municipality. In 2010, the Texas Supreme Court in City of Waco v. Kelley *held that independent hearing examiners are limited to certain actions when deciding disciplinary appeals. The court held that if a hearing examiner finds that the charges against a civil servant are true, he only has three courses of action. He may (1) uphold an indefinite suspension from the department; (2) impose a temporary suspension of fifteen days or less; or (3) completely restore the civil servant's former position or status within the department.*

Kelley *answered some of the questions about the rights of civil servants under The Act. This Note will examine the general regulations governing civil servants and municipalities in the state of Texas. It will also discuss the impact of* Kelley *and the ten years of litigation leading up to the 2010 decision. This Note will argue that the holding in* Kelley *is sound and based on fundamental legal principles including the nondelegation doctrine. This Note, however, will also argue that the decision in* Kelley *may produce unintended consequences, including negative policy ramifications in the civil service industry. Finally, this Note will urge the Texas Legislature to re-evaluate the authority and jurisdiction of hearing examiners under The Act.*

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I. INTRODUCTION

"Big mistake. Big. Huge," Justice Gray artfully articulated in a recent Texas court of appeals decision.[1] Before 2010, hearing examiners and courts alike were gravely misinterpreting sections of chapter 143 of the Local Government Code, known as the "Fire Fighter and Police Officer Civil Service Act" ("The Act").[2] The Texas Supreme Court sought to rectify those misinterpretations in its 2010 decision, *City of Waco v. Kelley* ("*Kelley II*").[3]

Larry Kelley was a police officer for the city of Waco, Texas.[4] In 2001, while off-duty, he was arrested for Driving While Intoxicated.[5] The arrest resulted in his indefinite suspension from the Waco Police Department, which effectively terminated his employment.[6] Kelley elected to appeal the indefinite suspension to an independent hearing examiner, a right granted to civil servants under The Act.[7] The hearing examiner found in favor of Kelley, reinstating him to the department at the rank of sergeant.[8] Several appeals followed this decision, resulting in ten years of litigation about the rights of the parties to appeal, and the authority and jurisdiction of independent hearing examiners under The Act.[9] In 2010, the Texas Supreme Court held that hearing examiners are limited to certain parameters when deciding appeals from disciplinary actions.[10] *Kelley II* held that if a hearing examiner finds the charges against a civil servant to be true, then he only has three courses of action.[11] He may (1) uphold an indefinite suspension from the department; (2) impose a temporary suspension

1. City of Waco v. Kelley, 226 S.W.3d 672, 682 (Tex. App.—Waco 2007) (Gray, C.J., dissenting), *rev'd*, 309 S.W.3d 536 (Tex. 2010) (citing PRETTY WOMAN (Touchstone Pictures 1990)).
2. *Kelley*, 226 S.W.3d at 682.
3. *See Kelley*, 309 S.W.3d at 541.
4. *Id.* at 539.
5. *Id.* at 540.
6. *Id.*
7. Brief of Amicus Curiae Texas State Association of Fire Fighters at *3, City of Waco v. Kelley, 309 S.W.3d 536 (Tex. 2010) (No. 07-0485), 2008 WL 2033346.
8. *Kelley*, 309 S.W.3d at 539.
9. *See generally id.*; City of Waco v. Kelley, 197 S.W.3d 324, 325 (Tex. 2006) (per curiam); City of Waco v. Kelley, No. 10-03-00214-CV, 2004 WL 2481383 (Tex. App.—Waco Oct. 29, 2004) (mem. op.), *rev'd*, 197 S.W.3d 324 (Tex. 2006).
10. *Kelley*, 309 S.W.3d at 546.
11. *Id.*

of fifteen days or less; or (3) completely restore the civil servant's former position or status within the department.[12]

This Note will thoroughly examine *Kelley II* and its impact on the civil service industry. Part II of this Note will introduce the regulations governing civil servants in Texas, providing context for the remainder of the Note. It will briefly discuss collective bargaining agreements, meet and confer agreements, and The Act. Part III will discuss the state of the law leading up to the decision in *Kelley II*. It will outline the landmark decisions regarding the authority and jurisdiction of hearing examiners in the civil service sector. Finally, it will examine the split of authority in the Texas courts of appeals, which ultimately laid the groundwork for the decision in *Kelley II*. Part IV will discuss *Kelley II* and the ten years of litigation that led to the decision. Finally, Part V will examine the ramifications of *Kelley II*. This Note will argue that the holding in *Kelley II* is sound and based on fundamental legal principles, including the nondelegation doctrine. This Note, however, will also argue that the decision in *Kelley II* may lead to unintended consequences, including negative policy ramifications moving forward in the civil service industry. As Dr. William McKee, an independent hearing examiner, articulated, "[u]nfortunately, the Texas Supreme Court's decision has left Hearing Examiners with very little authority with which to balance the gravity of an offense . . . against mitigating circumstances, no matter how compelling."[13] *Kelley II* essentially tied the hands of independent hearing examiners. This Note will argue that this may potentially cause a ripple effect across the civil service industry that the legislature did not intend. Finally, this Note will urge the legislature to re-evaluate the authority and jurisdiction of independent hearing examiners in order to prevent further unintended consequences.

II. INTRODUCTION TO THE REGULATIONS OF THE CIVIL SERVICE SECTOR

Municipal civil servants in Texas are governed by a myriad of policies and regulations.[14] These regulations, while complex, vary from municipality to municipality. In the state of Texas, the regulations for the majority of municipalities come from one of three sources: (1) a collective bargaining agreement; (2) a meet and confer agreement; or (3) The Act. Municipalities may choose one form of regulation over the other for a variety of reasons, which will be discussed further in the following sections.[15]

12. *Id.* at 546–47.

13. Kelley v. City of Waco, AAA No. 70 390 00217 10, at 5 (July 28, 2011) (McKee, Arb.) (appeal hearing regarding indefinite suspension).

14. *Collective Bargaining or Meet & Confer*, TEX. MUN. POLICE ASS'N, http://www.tmpa.org/TMPAcollectivebargainingvMC.aspx (last visited Feb. 14, 2012).

15. *Id.*

A. *Collective Bargaining Agreements*

A municipality may elect to govern its civil servants through a collective bargaining agreement,[16] depending on the structure and the political workings of that municipality.[17] Chapter 174 of the Local Government Code grants municipalities the authority to enter into a labor contract, the collective bargaining agreement, with its police officers and fire fighters.[18] Typically, the collective bargaining agreement will prescribe the desired policies for regulating civil service.[19] Chapter 174 also outlines the process a municipality must go through to create a collective bargaining agreement.[20] First, an association of civil servants decides that a collective bargaining agreement is the best way to enforce the policies governing civil servants in its municipality.[21] The association must hold a public referendum on whether to allow the civil servants to enter into a collective bargaining agreement.[22] After the public referendum is passed, the association is recognized as the sole and exclusive bargaining agent for the members of the agency.[23] The municipality and the association negotiate the terms of the labor contract for all civil servants in that agency.[24] The terms negotiated may supersede any other state law.[25]

B. *Meet and Confer Agreements*

Another form of regulation for civil servants is the meet and confer agreement. Meet and confer agreements are similar to collective bargaining agreements. Meet and confer agreements are governed by chapter 142 of the Local Government Code.[26] Municipalities with populations of at least 50,000 or municipalities that have adopted The Act are eligible to create meet and confer agreements.[27] No public referendum is required to give the association the right to create a meet and confer agreement, but the municipality must agree to it.[28] After the municipality agrees to it, the local association then seeks recognition as the sole and exclusive bargaining agent for the civil ser-

16. TEX. LOC. GOV'T CODE ANN. § 174.002(b) (West 2008).
17. TEX. MUN. POLICE ASS'N, *supra* note 14.
18. *Id.*
19. *Id.*
20. TEX. LOC. GOV'T CODE ANN. § 174.101–.109 (West 2008); *see also* TEX. MUN. POLICE ASS'N, *supra* note 14.
21. § 174.102.
22. *Id.*; *see also* TEX. MUN. POLICE ASS'N, *supra* note 14.
23. § 174.102; *see also* TEX. MUN. POLICE ASS'N, *supra* note 14.
24. § 174.105; *see also* TEX. MUN. POLICE ASS'N, *supra* note 14.
25. § 174.006; *see also* TEX. MUN. POLICE ASS'N, *supra* note 14.
26. TEX. LOC. GOV'T CODE ANN. § 142.051(a)(1)–(3) (West 2008); *see also* TEX. MUN. POLICE ASS'N, *supra* note 14.
27. § 142.051(a)(1)–(3).
28. TEX. LOC. GOV'T CODE ANN. § 142.055(a)–(e) (West 2008); *see also* TEX. MUN. POLICE ASS'N, *supra* note 14.

vants in the municipality.[29] The municipality officials and the association negotiate the labor employment terms.[30] The city council and a majority of the civil servants in the agency must ratify those terms.[31] If it is ratified, the new contract may supersede any other state law.[32]

C. *The Fire Fighter and Police Officer Civil Service Act*

A municipality may choose to adopt The Act if it has a population of 10,000 or more and has a paid fire or police department.[33] The legislature passed The Act to "secure efficient fire and police departments composed of capable personnel who are free from political influence and who have permanent employment tenure as public servants."[34] The court in *Klinger v. City of San Angelo* further elaborated on the purpose of The Act: "[t]he overall intent of [The Act] is to secure efficient, capable, non-politicized fire and police department personnel by means of a civil service system that establishes promotions based upon demonstrated merit and fitness."[35]

The Act prescribes guidelines for many areas of civil service regulation, including the promotion, demotion, tenure, and seniority of civil servants.[36] It also prescribes the disciplinary procedures for civil servants who are charged with violating a civil service rule.[37] Moreover, it provides guidelines for civil servants seeking review of disciplinary actions for violation of a civil service rule.[38] One may violate a civil service rule if he is convicted of a felony or other crime involving moral turpitude, violates a municipal charter provision, acts incompetently, drinks intoxicants while on duty, or is intoxicated while off duty.[39] Under The Act, the department head may impose one of the following disciplinary actions for a violation of a civil service rule: (1) suspension of the servant for a "reasonable period not to exceed fifteen calendar days" or (2) suspension of the servant for an "indefinite period."[40] According to section 143.052, an indefinite suspension is "equivalent to dismissal from the department."[41]

29. TEX. LOC. GOV'T CODE ANN. § 142.058(a) (West 2008); *see also* TEX. MUN. POLICE ASS'N, *supra* note 14.

30. TEX. LOC. GOV'T CODE ANN. § 142.060(b) (West 2008); *see also* TEX. MUN. POLICE ASS'N, *supra* note 14.

31. TEX. LOC. GOV'T CODE ANN. § 142.064(a) (West 2008); *see also* TEX. MUN. POLICE ASS'N, *supra* note 14.

32. TEX. LOC. GOV'T CODE ANN. § 142.067 (West 2008).

33. TEX. LOC. GOV'T CODE ANN. § 143.002(a) (West 2008).

34. TEX. LOC. GOV'T CODE ANN. § 143.001(a) (West 2008).

35. Klinger v. City of San Angelo, 902 S.W.2d 669, 676 (Tex. App.—Austin 1995, writ denied).

36. *See generally* TEX. LOC. GOV'T CODE ANN. §§ 143.021–.038, 143.041–.047, 143.051–.057, 143.081–.090 (West 2008 & Supp. 2012).

37. § 143.057; TEX. LOC. GOV'T CODE ANN. § 143.010 (West 2008).

38. §§ 143.057, 143.010.

39. § 143.051.

40. § 143.052(b).

41. *Id.*

If a civil servant chooses to appeal his disciplinary action, section 143.057 explains that he must state his appeal of his indefinite suspension, a suspension, a promotional bypass, or a recommended demotion in writing.[42] He may elect to appeal to the local civil service commission or to an independent third-party hearing examiner.[43]

If a civil servant chooses to appeal to the local civil service commission, a hearing is held based on the department head's original written statement of the charges.[44] The commission is given three options under The Act.[45] It can (1) permanently dismiss the servant from the department; (2) temporarily suspend him from the department; or (3) restore him to his former position or status in the department's classified service, allowing for back pay and benefits.[46] The commission can also determine that the disciplinary suspension should be reduced.[47]

Civil servants are likely to elect to appeal to an independent hearing examiner.[48] In *Proctor v. Andrews*, the court even stated "[i]t is likely a perception of bias in favor of the City, on the part of the Civil Service Commission, that prompts officers to request that their appeal be heard under section 143.057."[49] The civil service commission members are appointed solely by the municipality's chief executives,[50] and that is a likely reason why an officer would elect to appeal to a hearing examiner not affiliated with the municipality.[51]

Section 143.057 of The Act describes what happens if an officer chooses to appeal to an independent hearing examiner.[52] The section, however, does not go into the same detail that is described in section 143.053, which describes the procedures for an appeal to the civil service commission.[53] Instead, section 143.057 discusses how an independent hearing examiner is chosen, how he is paid, and the rights to appeal for each party.[54]

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42. § 143.057(a).
43. *Id.*
44. TEX. LOC. GOV'T CODE ANN. § 143.053(c) (West 2008).
45. *Id.* § 143.053(e).
46. *Id.*
47. *Id.* § 143.053(f).
48. City of Pasadena v. Smith, 292 S.W.3d 14, 16 (Tex. 2009).
49. Proctor v. Andrews, 972 S.W.2d 729, 736 (Tex. 1998).
50. TEX. LOC. GOV'T CODE ANN. § 143.006(b) (West 2008).
51. *Smith*, 292 S.W.3d at 15 n.8.
52. *See* TEX. LOC. GOV'T CODE ANN. § 143.057 (West 2012).
53. *Compare* TEX. LOC. GOV'T CODE ANN. § 143.053(e) (West 2008) ("In its decision, the commission shall state whether the suspended fire fighter or police officer is: (1) permanently dismissed from the fire or police department; (2) temporarily suspended from the department; or (3) restored to the person's former position or status in the department's classified service."), *with* § 143.057(f) (stating only that "[i]n each hearing conducted under this section, the hearing examiner has the same duties and powers as the commission, including the right to issue subpoenas," but never describing the parameters of hearing examiner's authority.).
54. § 143.057(i).

Section 143.057(c) states that the decision of the hearing examiner is binding on all parties, with limited exceptions outlined in subsection (j).[55] Subsection (j) provides the following:

> A district court may hear an appeal of a hearing examiner's award only on the grounds that the arbitration panel was without jurisdiction or exceeded its jurisdiction [sometimes referred to as an abuse of authority] or that the order was procured by fraud, collusion, or other unlawful means. An appeal must be brought in the district court having jurisdiction in the municipality in which the fire or police department is located.[56]

Section 143.057 does not prescribe the parameters of a hearing examiner's award.[57] This omission has led to a large amount of litigation about the discretion and jurisdiction of a hearing examiner under The Act.[58] The Texas Supreme Court has ruled on several issues regarding the legislative omissions in this section.[59]

III. THE LAW PRIOR TO *KELLEY*

A. *The Right to Appeal a Hearing Examiner's Award:* City of Houston v. Clark

In *City of Houston v. Clark*, a senior fire alarm dispatcher ("Clark") was suspended for fifteen days without pay.[60] Clark appealed his suspension to an independent hearing examiner pursuant to section 143.1016(a) of The Act.[61] The hearing examiner denied Clark's appeal but granted his motion to dismiss. The city of Houston appealed, arguing that the hearing examiner exceeded his jurisdiction by granting the motion to dismiss.[62] Clark argued that the City had no right to appeal the decision of an independent hearing examiner.[63] The Texas Supreme Court examined section 143.1016(j) of The Act, which stated that "a district court may hear an appeal of a hearing examiner's award."[64] Thus, the right to appeal applies not only to the aggrieved civil servant, but to the City as well.[65] However, the right to appeal is

55. § 143.057(c) ("The hearing examiner's decision is final and binding on all parties."); § 143.057(j).

56. § 143.053(j) (When a hearing examiner "exceeds his jurisdiction," it is sometimes referred to as an "abuse of authority.").

57. § 143.057(a)–(j).

58. City of Waco v. Kelley, 309 S.W.3d 536, 542 (Tex. 2010); City of Pasadena v. Smith, 292 S.W.3d 14, 21 (Tex. 2009); City of Desoto v. White, 288 S.W.3d 389, 392 (Tex. 2009).

59. City of Houston v. Clark, 197 S.W.3d 314, 319 (Tex. 2006); *Smith*, 292 S.W.3d at 17.

60. *Clark*, 197 S.W.3d at 315.

61. *Id.*

62. *Id.* at 316.

63. *Id.* at 317.

64. *Id.* at 319.

65. *Id.*

limited by the scope provided in section 143.1016(j).[66] The right to appeal is dependent on the hearing examiner exceeding his jurisdiction or on whether the decision was procured by fraud, collusion, or other unlawful means.[67]

B. *A Hearing Examiner's Decision Cannot Interfere with the Nondelegation Doctrine:* City of Pasadena v. Smith

In *City of Pasadena v. Smith*, the Pasadena police chief indefinitely suspended Smith, a police officer for the city of Pasadena.[68] Smith appealed to an independent hearing examiner.[69] At the hearing, the police chief was not present.[70] Because of his absence, Smith's attorney moved that the suspension be overturned and Smith reinstated.[71] No evidence was presented at the hearing, and the hearing examiner granted Smith's motion.[72] The City appealed the examiner's ruling.[73] The Texas Supreme Court held that the hearing examiner exceeded the jurisdiction granted to him under The Act by reversing the officer's indefinite suspension.[74] The hearing examiner granted the award in favor of the appealing officer because the officer's department head was not at the hearing and no evidence was presented.[75] The Court held that the hearing examiner's award must be based on evidence and he exceeded his jurisdiction by rendering a decision not based on evidence.[76]

The Court in *Pasadena* was also presented with the issue of the hearing examiner's decision interfering with the nondelegation doctrine.[77] The Texas Constitution, under the nondelegation doctrine, restricts what governmental powers may be delegated to private persons.[78] The court discussed that some areas of delegation may be permissible, referencing *Texas Boll Weevil*: "[t]he Texas Legislature may delegate its power to agencies established to carry out legislative

66. *Id.* at 324.
67. *Id.*; TEX. LOC. GOV'T CODE ANN. § 143.1016(j) (West 2008).
68. City of Pasadena v. Smith, 292 S.W.3d 14, 15 (Tex. 2009).
69. *Id.*
70. *Id.* at 16.
71. *Id.*
72. *Id.*
73. *Id.* at 17.
74. *Id.* at 21–22.
75. *Id.* at 16.
76. *Id.* at 20.
77. *Id.* at 17.
78. *Id.* at 17; *see* Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 469 (Tex. 1997) ("Still, private delegations clearly raise even more troubling constitutional issues than their public counterparts. On a practical basis, the private delegate may have a personal or pecuniary interest which is inconsistent with or repugnant to the public interest to be served. More fundamentally, the basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government.").

purposes, as long as it establishes reasonable standards to guide the entity to which the powers are delegated."[79] The court stated the following:

> A delegation of power without such standards is an abdication of the authority to set government policy which the Constitution assigns to the legislative department. While legislative delegations of authority to other governmental entities can raise constitutional concerns, private delegations clearly raise even more troubling constitutional issues than their public counterparts.[80]

The Court in *Pasadena* held that in order to avoid violating the nondelegation doctrine, the private independent hearing examiners must be subject to meaningful review:

> But if the Act does not bind hearing examiners to definite standards for reaching decisions and instead gives them broad latitude in determining not only factual disputes by the applicable law, they become not merely independent arbiters but policy makers, which is a legislative function. This would raise nondelegation concerns.[81]

The Court stated that a city must be afforded a right to judicial review under certain circumstances in order to alleviate nondelegation doctrine concerns.[82] The Court held that the hearing examiner exceeded his jurisdiction, stating "the most accurate test we can state is that a hearing examiner exceeds his jurisdiction when his acts are not authorized by The Act or are contrary to it, or when they invade the policy-setting realm protected by the nondelegation doctrine."[83]

C. *The Split in Texas Courts of Appeals*

Before *Kelley*, there was a spilt in the Texas courts of appeals regarding the authority and jurisdiction of independent hearing examiners.[84] As this Note has discussed, the Texas Supreme Court decisions in *Clark* and *Pasadena* provided some guidance on the authority of an independent hearing examiner.[85]

Clark and *Pasadena*, however, did not settle all of the problems.[86] There was still a split between the courts of appeals about what ex-

79. *Smith*, 292 S.W.3d at 17.
80. *Id.* at 18; *Texas Boll Weevil*, 952 S.W.2d at 469.
81. *Smith*, 292 S.W.3d. at 18–19.
82. *Id.*
83. *Id.* at 21.
84. Brief of Amicus Curiae Texas State Association of Fire Fighters, *supra* note 7, at *10–11; *see generally* Nuchia v. Tippy, 973 S.W.2d 782, 786 (Tex. App.—Tyler 1998, no pet.); City of Laredo v. Leal, 161 S.W.3d 558, 562–63 (Tex. App.—San Antonio 2004, pet. denied); Lindsey v. Fireman's & Policeman's Civil Serv. Comm'n of Houston, 980 S.W.2d 233, 236 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).
85. *See* City of Houston v. Clark, 197 S.W.3d 314, 319 (Tex. 2006); *Smith*, 292 S.W.3d at 21.
86. Brief of Amicus Curiae Texas State Association of Fire Fighters, *supra* note 7, at *10–11.

actly constituted an abuse of authority or jurisdiction, allowing for an appeal to the district court.[87] Some courts, like the Tyler, San Antonio, and Waco courts of appeals, viewed a hearing examiner's decision that misinterprets, ignores, or incorrectly applies the law to be an abuse of authority, thus giving the parties the right of appeal, and giving the district court the right of review.[88] Other courts, such as the Houston court of appeals, were less willing to label an independent hearing examiner's award that is inconsistent with statutory law an abuse of authority.[89] It was much more likely to consider the award a mistake of law, thus not allowing the parties the right of appeal and the district court the jurisdiction to hear any such appeal.[90]

For example, the court of appeals in Tyler held that a hearing examiner's misapplication of section 143.123(e) allowed for judicial review.[91] In *Nuchia v. Tippy,* an independent hearing examiner overturned the indefinite suspension of a Houston police officer.[92] He found that the city of Houston violated section 143.123(e) when it allowed the complainant to also investigate the allegations against the officer.[93] The City appealed, arguing that the hearing examiner lacked jurisdiction to determine whether the officer's rights were violated during the investigation.[94] The court of appeals in Tyler held that the hearing examiner did have the authority to determine whether a violation of section 143.123(e) had occurred, stating "[c]ertainly the [l]egislature did not create a remedy without providing a means of effecting that remedy."[95] The court held that the hearing examiner did not abuse his authority by reinstating the officer.[96]

The court of appeals in San Antonio held that a hearing examiner's reduction of an indefinite suspension to a 644-day suspension was not an abuse of authority.[97] In *City of Laredo v. Leal,* a Laredo police officer appealed his indefinite suspension to a hearing examiner.[98] The hearing examiner reduced the indefinite suspension to a 644-day suspension without pay.[99] The officer appealed the hearing examiner's award.[100] He argued that the local collective bargaining agree-

87. *Id.*; *see generally Nuchia*, 973 S.W.2d at 786; *Leal*, 161 S.W.3d at 562–63.
88. *Nuchia*, 973 S.W.2d at 786; *Leal*, 161 S.W.3d at 562–63; Brief of Amicus Curiae Texas State Association of Fire Fighters, *supra* note 7, at *10–11.
89. *Lindsey*, 980 S.W.2d at 236.
90. *Id.*
91. *Nuchia*, 973 S.W.2d at 784.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 786.
96. *Id.*
97. City of Laredo v. Leal, 161 S.W.3d 558, 562 (Tex. App.—San Antonio 2004, pet. denied).
98. *Id.* at 561.
99. *Id.*
100. *Id.*

ment and section 143.052(b) only allowed for a thirty-day suspension.[101] The court of appeals rejected the officer's appeal, holding that the hearing examiner did not abuse his authority or exceed his jurisdiction.[102] The court reasoned that the statute only limited the authority of the police chief to impose discipline.[103] The statute, however, did not restrict the authority of the local civil service commission or hearing examiner.[104] The court held that section 143.053(f) permitted the hearing examiner to reduce the period of suspension imposed by the department head, and because there was no express statutory provision limiting that power, the hearing examiner did not exceed his jurisdiction by reducing the indefinite suspension to 644 days.[105] This decision is later contradicted by the decision in *Kelley II.*

Both the courts in San Antonio and Tyler adhere to the view that the court has the jurisdiction to hear an appeal of an award given by an independent hearing examiner that may have misapplied the law in a way that exceeded his jurisdiction granted under The Act.[106] It appears that the court of appeals in Houston views a hearing examiner's misapplication of statutory law in a different way.[107]

In *Lindsey v. Fireman's & Policeman's Civil Service Commission of the City of Houston,* a police officer was investigated for a civil service violation.[108] The city of Houston had 180 days under The Act to take disciplinary action.[109] The City notified the officer of his pending suspension within the permitted time frame, but the suspension did not actually begin until over 180 days after the City learned of the offense.[110] The officer appealed his suspension to an independent hearing examiner, stating that it could not stand because it was not imposed within 180 days of the alleged offense as required by section 143.117(d).[111] The hearing examiner ruled that the suspension was

101. *Id.*
102. *Id.* at 562.
103. *Id.* at 563.
104. *Id.*
105. *Id.* at 563–64.
106. *Id.* at 562–63 ("Accordingly, 'a district court may hear an appeal of a hearing examiner's award only on the grounds that . . . the hearing examiner was without jurisdiction . . . . This 'standard has been interpreted as an 'abuse of authority standard'. . . . 'An abuse of authority occurs when a decision is so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law.'"); Nuchia v. Tippy, 973 S.W.2d 782, 786 (Tex. App.—Tyler 1998, no pet.) ("The ultimate issue before the trial court was whether, as a matter of law, the examiner was empowered to make the determination he made. The City, in its motions and responses, failed to controvert Tippy's position that the hearing examiner did, in fact, have the jurisdiction to determine if a violation of § 143.123(e) had occurred.").
107. Lindsey v. Fireman's & Policeman's Civil Serv. Comm'n of Houston, 980 S.W.2d 233, 236 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).
108. *Id.* at 234.
109. *Id.*
110. *Id.*
111. *Id.*

timely and upheld it.[112] The officer appealed, arguing that the hearing examiner exceeded his jurisdiction by first interpreting section 143.117(d) and then misinterpreting the statute.[113] The court of appeals discussed the hearing examiner's misinterpretation of the statute, stating that "[t]his authority includes applying, interpreting, and enforcing rules adopted by the commission and the procedural rules the legislature has adopted to govern suspensions. The appellate courts should not disturb this authority without a clear showing of an abuse of authority."[114] The court of appeals held that there were not sufficient grounds for appeal because the hearing examiner had the authority to apply section 143.117, and the hearing examiner's alleged misapplication of the statute did not qualify as exceeding his jurisdiction or an abuse of authority.[115] The court stated that a different conclusion would "stymie and completely hobble civil service commissions and independent hearing examiners hearing appeals of suspensions and other disciplinary actions."[116]

The disagreement about what constitutes a hearing examiner exceeding his jurisdiction or abusing his authority is evident among the courts of appeals. This split laid the groundwork for the decision in *Kelley II*, and thus it led to the reason why the Texas Supreme Court heard *Kelley* on two separate issues and on two separate occasions.

IV. A HEARING EXAMINER'S JURISDICTION, A TEN-YEAR SAGA: *CITY OF WACO V. KELLEY*

The city of Waco is a "civil service statute city," meaning that it has adopted the civil service rules outlined in The Act, and it does not have a meet and confer agreement or a collective bargaining agreement.[117] Larry Kelley started working for the Waco Police Department, in Waco, Texas, in the 1970s.[118] In 1999, he was appointed to assistant chief of police, a position that is directly below the head of the department.[119] In 2001, Kelley was off-duty at a convention in Austin, Texas.[120] While in Austin, he was arrested and charged with a Class B misdemeanor of Driving While Intoxicated ("DWI").[121] After his arrest, Kelley immediately contacted his superior, the chief of police.[122] An investigation ensued, and Kelley soon faced disciplinary

112. *Id.*
113. *Id.*
114. *Id.* at 236.
115. *Id.* at 237.
116. *Id.* at 236–37.
117. City of Waco v. Kelley, 309 S.W.3d 536, 539 (Tex. 2010).
118. *Id.*
119. *Id.* at 539–40.
120. *Id.* at 540.
121. *Id.*
122. *See id.*

procedures.[123] Specifically, the chief found that Kelley violated a civil service rule by being arrested for a DWI, and the chief indefinitely suspended him from the police force.[124] Under section 143.052(b) of The Act, an indefinite suspension is essentially equivalent to a termination.[125] The Act allows for an officer to appeal his disciplinary action—either to the civil service commission or to an independent hearing examiner.[126] Kelley chose to appeal his indefinite suspension to an independent hearing examiner.[127] The parties selected an independent hearing examiner, and a hearing was held in November 2001 and March 2002.[128] In June 2002, the hearing examiner issued a written decision.[129]

The hearing examiner determined that the charges against Kelley were true but his punishment was excessive.[130] The hearing examiner's award reduced Kelley's suspension from indefinite to 180 days.[131] The examiner also ordered that Kelley be reinstated in the Waco Police Department, in the rank of sergeant, effectively demoting him two ranks from assistant chief.[132] He also awarded Kelley back pay and benefits, stating that he be "made whole subject to the normal principles of mitigation."[133]

The city of Waco appealed the hearing examiner's award to the district court, stating that the hearing examiner exceeded his jurisdiction by reducing the length of the suspension, awarding back pay and benefits, and demoting Kelley.[134] Kelley moved to dismiss the City's appeal, arguing that the City did not have the right to appeal the hearing examiner's decision and that the district court lacked jurisdiction.[135] Kelley also filed a motion for summary judgment, stating that the hearing examiner did not exceed his jurisdiction by reducing his suspension.[136] The district court denied the motion to dismiss but granted his motion for summary judgment.[137] The City appealed to the court of appeals in Waco, where the case was dismissed for lack of jurisdiction.[138]

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123. *See id.*
124. *Id.* at 540.
125. *Id.*; TEX. LOC. GOV'T CODE ANN. § 143.052(b) (West 2012).
126. *Kelley*, 309 S.W.3d at 539.
127. *Id.* at 540.
128. *Id.*
129. City of Waco v. Kelley, 226 S.W.3d 672, 674 (Tex. App.—Waco 2007), *rev'd*, 309 S.W.3d 536 (Tex. 2010).
130. *Kelley*, 309 S.W.3d at 539.
131. *Id.*
132. *Id.* at 540.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. City of Waco v. Kelley, No. 10-03-00214-CV, 2004 WL 2481383 (Tex. App.—Waco Oct. 29, 2004) (mem. op.), *rev'd*, 197 S.W.3d 324 (Tex. 2006).

A. Kelley I

The City appealed to the Supreme Court of Texas.[139] In the time between the City's appeal to the court of appeals and its appeal to the Texas Supreme Court, the Texas Supreme Court decided *City of Houston v. Clark*.[140] In *Clark*, the Court held that municipalities have the ability to appeal adverse decisions of independent hearing examiners under The Act.[141] Following *Clark*, the Court held that the city could appeal adverse decisions and the district court did have proper jurisdiction to hear the appeal, reversing and remanding the case.[142]

On remand, the court of appeals in Waco held that the hearing examiner did not exceed his jurisdiction when he reduced the length of Kelley's suspension but exceeded his jurisdiction by demoting Kelley to the rank of sergeant.[143] It stated that "apart from this unique situation [referring to when a hearing examiner finds charges to be untrue], an independent hearing examiner has the authority and jurisdiction to reduce the length of an indefinite suspension, even if the charges are found to be true."[144] The court also determined that because a local civil service commission lacked the ability to demote an officer's rank, then an independent hearing examiner did not have the authority to demote him either.[145]

Justice Gray wrote a heated and facetious dissenting opinion.[146] He quoted the motion picture, *Pretty Woman*, stating that the majority made a "Big mistake. Big. Huge."[147] Justice Gray argued that a strict reading of section 143.014(h) reveals that a "person in Kelley's position has the same rights and privileges of a hearing before a [hearing examiner] in the same manner and under the same conditions as a classified employee."[148] He stated that the hearing examiner clearly exceeded his authority by giving Kelley a 180-day suspension, a punishment that is not prescribed in The Act.[149] He also stated that The Act never gave a hearing examiner any kind of discretion to demote an officer, so Kelley's demotion exceeded the hearing examiner's authority as well.[150] Justice Gray stated that the court has no way of knowing what a hearing examiner would determine had he known the proper parameters of his award; thus it was completely arbitrary for

139. City of Waco v. Kelley, 197 S.W.3d 324, 325 (Tex. 2006).
140. *Id.*; *see* City of Houston v. Clark, 197 S.W.3d 314, 319 (Tex. 2006).
141. *Clark*, 197 S.W.3d at 324.
142. *See id.*
143. City of Waco v. Kelley, 226 S.W.3d 672, 681 (Tex. App.—Waco 2007), *rev'd*, 309 S.W.3d 536 (Tex. 2010).
144. *Id.* at 679.
145. *Id.*
146. *Id.* at 682.
147. *Id.*
148. *Id.* at 681.
149. *Id.* at 685.
150. *Id.* at 684.

the majority to reinstate Kelley as assistant chief without a rehearing.[151]

B. Kelley II

The city of Waco appealed to the Texas Supreme Court again on several issues.[152] It argued that when a hearing examiner finds that the charges against an indefinitely suspended officer are true, The Act only gives the hearing examiner the authority to uphold the suspension.[153] The City also contended that even if the hearing examiner had the jurisdiction to reinstate the officer, he had no authority to reduce the officer's suspension to 180 days.[154]

The Court first discussed the parameters of the jurisdiction of an independent hearing examiner.[155] It held that the hearing examiner is not authorized to make rules and must follow the rules prescribed by The Act.[156] The Court quoted *City of Pasadena v. Smith*: "[t]he most accurate test we can state is that a hearing examiner exceeds his jurisdiction when his acts are not authorized by The Act or are contrary to it, or when they invade the policy-setting realm protected by the nondelegation doctrine."[157] The Court in *Kelley II* was faced with deciding whether the hearing examiner exceeded his jurisdiction by awarding relief not authorized or contrary to what was allowed by The Act.[158]

The City argued that section 143.014(h) did not give the hearing examiner the authority to reduce Kelley's suspension, or demote him when the charges against him were found to be true.[159] Kelley argued that the city is prohibited from making that argument because the chief, in his written suspension of Kelley, did not cite section 143.014(h) as a basis for discipline, as prescribed under section 143.052(e).[160] Kelley also argued that the legislature could not have intended to give a hearing examiner no authority to alter the disciplinary action, even if he found the allegations to be true.[161]

The Court examined the authority granted by The Act when the hearing examiner finds the charges to be true.[162] Since section 143.057 did not specifically state the parameters of the hearing examiner's discretion, the Court looked to the intent of the legislature to

151. *Id.* at 685.
152. City of Waco v. Kelley, 309 S.W.3d 536, 541 (Tex. 2010).
153. *Id.*
154. *Id.*
155. *Id.* at 542.
156. *Id.*
157. *Id.*; *see* City of Pasadena v. Smith, 292 S.W.3d 14, 21 (Tex. 2009).
158. *Kelley*, 309 S.W.3d at 542.
159. *Id.* at 543.
160. *Id.* at 544.
161. *Id.*
162. *Id.* at 544–48.

determine what specific relief The Act authorized.[163] Since neither section 143.014(h) nor section 143.057 addressed the authority of a hearing examiner when he finds the charges to be true, the Court examined what a department head could do when making a decision on disciplinary action, because it was the only specifically prescribed route of punishment described in The Act.[164]

Looking at The Act, the Court determined that a department head could impose either voluntary discipline or involuntary discipline.[165] Voluntary discipline is when the officer agrees to the discipline.[166] It can include demotion, suspension for a period of sixteen to ninety days, or uncompensated duty.[167] The department head imposes involuntary discipline, however, whether or not the officer accepts it.[168] Section 143.052(b) describes involuntary discipline to include suspension for a "reasonable period not to exceed fifteen calendar days or for an indefinite period."[169] Involuntary discipline is only an option if the officer violated a civil service rule.[170] Essentially, if a department head feels that a violation warrants involuntary discipline, he has only two choices: (1) indefinitely suspend the officer; or (2) temporarily suspend him, without pay, for fifteen days or less.[171]

The Court stated the following:

> We see no language indicating the [l]egislature intended to allow an independent third party hearing examiner to impose a longer temporary disciplinary suspension than the department head could impose. And we do not believe construing the statute to grant such authority would yield the reasonable result the [l]egislature is presumed to intend.[172]

If an officer chooses to appeal his involuntary discipline, the hearing examiner can only suspend the officer if he finds that (1) the charges against the officer are true and (2) he violated a civil service rule.[173] The hearing examiner, however, does not have to uphold the suspension of the officer.[174] The Court held that The Act clearly laid out that he may uphold the officer's indefinite suspension or restore him to his former classified position with back pay and benefits.[175] The Court held that the hearing examiner also has a third option—to impose a

163. *Id.* at 542.
164. *Id.* at 543.
165. *Id.* at 545.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*; *see* TEX. LOC. GOV'T CODE ANN. § 143.052(b) (West 2008).
171. *Kelley*, 309 S.W.3d at 546.
172. *Id.*
173. *Id.*; *see* TEX. LOC. GOV'T CODE ANN. § 143.053(g) (West 2008).
174. *Kelley*, 309 S.W.3d at 546.
175. *Id.*

temporary suspension.[176] The length of the temporary suspension that the hearing examiner may impose is not clearly prescribed by The Act.[177] The Court stated, "we see no language indicating that the legislature intended to allow an independent third party hearing examiner to impose a longer temporary disciplinary suspension than the department head could impose."[178] Thus, the hearing examiner, if he found the charges to be true and wanted to impose a temporary suspension, could only impose the same fifteen days or less that the department head could have originally imposed.[179]

If a hearing examiner finds the charges of violating a civil service rule against an officer are true, then he only has three courses of action.[180] He may (1) uphold an indefinite suspension from the department; (2) impose a temporary suspension of fifteen days or less; or (3) completely restore the officer's former position or status within the department.[181] The Court cited *City of Pasedena*, stating that if a statute does not give definite standards for decision-making, hearing examiners may become more than independent arbitrators, but policy makers.[182] The Court also discussed how allowing hearing examiners unlimited discretion would have an impractical effect:

> It takes little imagination to envision how suspending officers for lengthy and unpredictable time periods could disrupt operations and schedules of police departments; not to mention the difficulties that allowing unfettered leeway to third party hearing examiners pose to department discipline and morale. Moreover, interpreting Section 143.053(e)(2) to allow suspensions without any time limits invites challenge of the Act as an improper delegation of legislative authority.[183]

The Court held that the hearing examiner exceeded his jurisdiction by acting contrary to The Act when he prescribed disciplinary actions not outlined in it.[184] The Court reversed and remanded the case for a new hearing under the new parameters for hearing examiner discretion.[185]

C. Kelley's *2011 Re-hearing*

The parties met again before an independent hearing examiner in June of 2011, ten years after Kelley's arrest.[186] At the hearing, the

176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at 546–47.
182. *Id.* at 546.
183. *Id.*
184. *Id.* at 552.
185. *Id.*
186. Kelley v. City of Waco, AAA No. 70 390 00217 10, at 1 (July 28, 2011) (McKee, Arb.) (appeal hearing regarding indefinite suspension).

parties stipulated that Kelley was guilty of the offense of DWI.[187] The only contested issue at the hearing was whether the Waco chief of police had just cause to impose the indefinite suspension of Kelley, despite his twenty-two years of virtually spotless service to the city of Waco.[188] The hearing examiner, with limited options under the new guidelines, upheld the indefinite suspension of Kelley:

> Unfortunately, the Texas Supreme Court's decision has left Hearing Examiners with very little authority with which to balance the gravity of an offense such as the one proven here against mitigating circumstances, no matter how compelling. The result of the Court's ruling, it seems, is likely to be awards that are extreme in one direction or another.[189]

The hearing examiner went on to state as follows:

> The City had sufficient cause for the indefinite suspension, but it could have done much better for an employee who, in all other but this situation, had served it well. As such, I strongly encourage, but cannot compel, the City to find a way to re-hire Kelley in some capacity.[190]

Kelley ultimately chose not to pursue an appeal of the hearing examiner's latest decision, stating that he had "fought the good fight."[191]

V. THE AFTERMATH OF *KELLEY II*

Courts have generally supported the *Kelley II* decision. Several subsequent decisions tracked the reasoning in *Kelley II*.[192] The court in *Miller* discussed *Kelley II* in length and adopted its reasoning, stating that "[t]he hearing examiner in this case was authorized to reduce Miller's indefinite suspension to a temporary suspension, but he was not authorized to impose a temporary suspension of more than fifteen days."[193] In *Mathews*, the court also examined the decision in *Kelley II*, stating that "[a] hearing examiner must follow the law set by the [l]egislature" and holding that a hearing examiner who ruled contrary to The Act exceeded his jurisdiction.[194]

Proponents of the decision in *Kelley II* might argue that a hearing examiner's authority must be judicially limited to the confines de-

187. *Id.* at 2–3.
188. *Id.*
189. *Id.* at 5.
190. *Id.* at 6.
191. Tommy Witherspoon, *Ex-Waco Assistant Police Chief Ends Legal Fight with City*, WACO TRIB.-HERALD, Aug. 9, 2011, http://www.wacotrib.com/news/Ex-Waco-assistant-police-chief-ends-legal-fight-with-city.html.
192. *See generally* Miller v. City of Houston, 309 S.W.3d 681, 685–86 (Tex. App.—Houston [14th Dist.] 2010, no pet.); City of Beaumont v. Mathews, No. 09-10-00198-CV, 2011 WL 3847338, at *2 (Tex. App.—Beaumont Aug. 31, 2011, no pet. h.) (mem. op.).
193. *Miller*, 309 S.W.3d at 686.
194. *Mathews*, 2011 WL 3847338, at *2.

scribed in *Kelley II* in order to avoid violating the nondelegation doctrine.[195] As discussed in *Pasadena* and *Kelley II*, the Texas Constitution places strict guidelines on the delegation of government power to private persons.[196] The Court in *Kelley II* clearly kept the nondelegation doctrine in mind when it stated that "interpreting [s]ection 143.053(e)(2) to allow suspension without any time limits invites challenges of [T]he Act as an improper delegation of legislative authority."[197]

Allowing a hearing examiner to have an unrestricted license to fashion his version of justice is likely not desired by either party.[198] There is added scrutiny, as there should be, when the hearing examiner is interpreting and applying statutes that have been passed by elected political representatives.[199] Some scholars agree that judicial intervention is sometimes necessary: "[j]udicial intervention in these cases should be limited to situations in which the arbitrator clearly has misapplied a legislative dictate that influenced the award."[200] In light of the nondelegation doctrine and the judicial acceptance of the decision in *Kelley II*, it was most likely decided correctly.

While the courts seem to adhere to *Kelley II*'s reasoning, there seems to be some backlash among independent hearing examiners.[201] The hearing examiner, Dr. William McKee, in Kelley's 2011 re-hearing candidly discussed his new judicial restraints:

> Unfortunately, the Texas Supreme Court's decision has left Hearing Examiners with very little authority with which to balance the gravity of an offense such as the one proven here against mitigating circumstances, no matter how compelling. The result of the Court's ruling, it seems, is likely to be awards that are extreme in one direction or another . . . . As such, I strongly encourage, but cannot compel, the City to find a way to re-hire Kelley in some capacity and for the requisite months that would allow him to satisfy the period-of-service requirement for a full pension.[202]

This statement from Dr. McKee leads to the conclusion that he might have reinstated Kelley in some capacity had he been given the authority to do so.

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195. City of Waco v. Kelley, 309 S.W.3d 536, 541–42 (Tex. 2010).

196. *Id.* at 546; City of Pasadena v. Smith, 292 S.W.3d 14, 17–18 (Tex. 2009).

197. *Kelley*, 309 S.W.3d at 546.

198. Corrected Brief of Amicus Curiae City of Houston at *8, City of Waco v. Kelley, 309 S.W.3d 536 (Tex. 2010) (No. 07-0485), 2008 WL 2977732.

199. Charles B. Craver, *The Judicial Enforcement of Public Sector Grievance Arbitration*, 58 TEX. L. REV. 329, 349 (1980).

200. *Id.*

201. City of Beaumont v. Mathews, No. 09-10-00198-CV, 2011 WL 3847338, at *2 (Tex. App.—Beaumont Aug. 31, 2011, no pet. h.) (mem. op.); *see generally* Miller v. City of Houston, 309 S.W.3d 681, 685–86 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

202. Kelley v. City of Waco, AAA No. 70 390 00217 10, at 5–6 (July 28, 2011) (McKee, Arb.) (appeal hearing regarding indefinite suspension).

A. *Good Decision, Poor Policy?*

The decision in *Kelley II* was timely and needed because of the disagreement among the Texas courts of appeals regarding the jurisdiction of a hearing examiner under The Act.[203] The courts of appeals were not applying a consistent standard for hearing examiner discretion, leading to unpredictable results in the civil service industry. Furthermore, this Note does not argue that the Texas Supreme Court made the wrong decision in *Kelley II*. The decision was very likely sound, based squarely on The Act and the issues before the Court. It is important to note, however, that the Court in *Kelley II* only looked to what sanctions the chief could give a civil servant who violated a civil service rule because it was the only specifically prescribed route of punishment described in The Act, not because that was what the legislature truly intended or believed would be the most just.[204] The Court presumed that the legislature outlined reasonable guidelines for chiefs, and those guidelines would logically apply to independent hearing examiners. The Court did the best it could in a situation where there was a clear omission in The Act, and the lower courts were demanding clarification.

While *Kelley II* fairly clarified the jurisdiction and authority of hearing examiners under The Act, it is likely that the Court's decision does not comport with an individual civil servant's ideas of fairness and justice. Fairness and justice are at the forefront of the civil service industry: "[t]he issues of fairness and justice are always a concern in any proceeding, including proceedings conducted by IHEs [independent hearing examiners]."[205] This leads to a troubling predicament. After *Kelley II*, more hearing examiners may find themselves in situations where they are conflicted between staying within the confines of their newly judicially-determined authority and rendering decisions that they find are truly equitable in light of the circumstances. It is obvious Dr. McKee did not feel that the new judicial constraints on the authority of a hearing examiner were in the interest of fairness and justice, at least, not as applied to Larry Kelley.[206]

Surely, the legislature did not intend to place hearing examiners and civil servants in such a precarious situation. The legislature has long recognized the sensitive nature of the civil service industry. The governing of civil servants in Texas is a particularized area, one that required legislative action. Local governments are highly political bodies. Civil servants are often unionized, thus leading to further political polarization.[207] The legislature, recognizing this, passed The

203. Brief of Amicus Curiae Texas State Association of Fire Fighters, *supra* note 7, at *6.

204. City of Waco v. Kelley, 309 S.W.3d 536, 542–43 (Tex. 2010).

205. Corrected Brief of Amicus Curiae City of Houston, *supra* note 198, at *8.

206. *See Kelley*, AAA No. 70 390 00217 10, at 5–6.

207. TEX. MUN. POLICE ASS'N, *supra* note 14.

Act to help alleviate some of the political polarization.[208] The legislature passed The Act for the express purpose of "secur[ing] efficient fire and police departments composed of capable personnel who are free from political influence and who have permanent employment tenure as public servants."[209] To further this goal, The Act provided administrative procedures and guidelines by which civil servants could seek review of disciplinary actions.[210] The legislature explicitly provided that an officer may elect to appeal to an independent hearing examiner instead of to the city's appointed civil service commission,[211] thus emphasizing the importance of a fair and impartial review of disciplinary actions. *Kelley II* stripped independent hearing examiners of a level of discretion, causing civil servants to feel that they are deprived of a valuable right under The Act:

> Clearly, this purpose is best served by interpreting the CSA [civil service act] in a way that enables cities to secure the most capable personnel possible, including appointed department heads .... The commission or hearing examiner deciding a discharge appeal loses all authority to reinstate the officer if charges are found to be true, no matter how disproportionate the penalty of discharge might be.[212]

Given the steps the legislature took to ensure that the civil service industry is governed fairly, it seems unlikely that it intended for civil servants to be placed in such difficult situations.

There is also a larger policy issue at play here. The use of binding arbitration has been highly effective for settling disputes in the public sector, usually with both parties accepting the arbitrator's award.[213] Lessened finality in civil service disputes could lead to major ramifications. When judicial intervention into binding arbitral awards is too readily available, disgruntled parties may invoke it too often, thus interfering with the arbitrator's authority and frustrating the purpose of the party who sought binding arbitration to begin with.[214] This is not to say no judicial intervention is needed; almost all jurisdictions provide for a limited right to judicial review of binding arbitration,[215] as there needs to be a way to right egregious arbitrator wrongs.[216] There is general acceptance, however, that the judiciary should not intervene

208. TEX. LOC. GOV'T CODE ANN. § 143.001(a) (West 2011).

209. *Id.*

210. *See generally* TEX. LOC. GOV'T CODE ANN. §§ 143.010, 143.057 (West 2011).

211. *See generally* § 143.057; TEX. LOC. GOV'T CODE ANN. § 143.053 (West 2008).

212. Brief of Amicus Curiae Texas State Association of Fire Fighters, *supra* note 7, at *35–37.

213. Craver, *supra* note 199, at 330.

214. *Id.* at 349.

215. Louis S. Cataland, Note, *Binding Arbitration and the Nondelegation Doctrine: Does Ohio's Collective Bargaining Act Unconstitutionally Delegate Legislative Authority to Administratively Appointed Arbitrators?*, 6 OHIO ST. J. ON DISP. RESOL. 83, 96 (1990).

216. Craver, *supra* note 199, at 349.

when an arbitrator is simply misconstruing legal principles.[217] There must be a balance between judicial intervention and the authority of independent hearing examiners. The decisions in *Pasadena* and *Kelley II* made the final and binding award of the hearing examiner not quite as "binding" and certainly not as "final." This will likely cause valued and respected civil servants to be less willing to step up and serve in civil service positions because they know their rights have been substantially affected.[218]

B. Kelley II: *A Costly Decision*

Not only will extreme judicial intervention in binding awards cause society to suffer from the loss of qualified and reliable civil servants, it will create harsh economic consequences as well. Professor Michael H. LeRoy conducted a study regarding the finality of employment disputes governed by the Federal Arbitration Act.[219] It showed that there is a decline in the number of courts that are upholding arbitrator's decisions, reflecting that there is a "measurable degree of judicial hostility to arbitration in state courts."[220] He found that this led to a drastic increase of expense to parties.[221]

His theory holds true in the situation with *Kelley II.* The city of Waco spent over $250,000 pursing multiple appeals in the ten-year saga.[222] It is likely that the citizens of Waco did not expect the indefinite suspension of an assistant chief of police to cost their city $250,000 in tax dollars and ten years worth of time and energy to ensure he remained terminated.[223]

VI. CONCLUSION

It would be impossible for the legislature to anticipate every potential problem The Act might create. The court in *Proctor v. Andrews* even stated,

> Requiring the legislature to include every detail would defeat the purpose of delegating legislative authority. While the [l]egislature must declare the policy and fix the primary standard, the policy and standards declared may be broad or general, so long as the idea

217. *Id.*

218. Brief of Amicus Curiae Texas State Association of Fire Fighters, *supra* note 7, at *37 ("Given the political nature of jobs at the assistant department head level, it is easy to understand why even very good employees would be unwilling to risk appointment to a position stripped of all civil service protections.").

219. Michael H. LeRoy, *Misguided Fairness? Regulating Arbitration by Statute: Empirical Evidence of Declining Award Finality*, 83 NOTRE DAME L. REV. 551, 556 (2008).

220. *Id.*

221. *Id.*

222. Witherspoon, *supra* note 191.

223. *See id.*

> embodied is reasonably clear and the standards are capable of reasonable application.[224]

The legislature cannot enact a perfect statute, free from unforeseen complications. The legislature, however, can remedy imperfections in its statutes once they have been brought to light. *Kelley II* shed light on areas of The Act that need some clarification from the legislature. It is evident from the jurisprudence leading up to *Kelley II*, and the fallout in its wake, that the legislature should step in and re-examine the authority and jurisdiction of independent hearing examiners under The Act.

Kelley II, although a sound decision, has cast a light on an area of The Act that needs remedying. *Kelley II* severely limited the discretion of hearing examiners and their ability to balance the circumstances of a disciplinary appeal based on fairness and justice. Independent hearing examiners play a vital role in the regulation of municipalities and the civil servants who serve those municipalities. Tying the hands of hearing examiners will only deter civil servants from desiring to take on positions that require added responsibility, out of fear that they will not be fairly protected if their actions are ever questioned. *Kelley II* created instability and unpredictability in an environment that thrives on the stable and fair application of strict rules and guidelines. The effect of *Kelley II* on the civil service industry will hopefully inspire the legislature to re-evaluate the authority and jurisdiction of hearing examiners under The Act. The Act was passed to ensure that civil servants are protected from the political underworkings that are prevalent in so many municipalities; perhaps it is time that the legislature re-examine some of the provisions of The Act and their judicial interpretations to make sure those policy interests remain protected.

224. Proctor v. Andrews, 972 S.W.2d 729, 737–38 (Tex. 1998) (citations omitted) (internal quotation marks omitted).