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Supreme Court of Texas.
The CITY OF HOUSTON, Petitioner,
v.
Robert JACKSON, Respondent.
No. 04-0465.

October 20, 2005

Appearances:

David W. Holman, (argued), Godwin Pappas Langley Ronquillo, Houston, TX, Petitioner City of Houston.

Joan M. Lucci Bain, (argued), Bain & Bain, Houston, TX, for Respondent Robert Jackson.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice Harriet O'Neill, Justice David Medina, Justice Paul W. Green, Justice Nathan L. Hecht, Justice Dale Wainwright, Justice Phil Johnson, Justice Scott A. Brister.

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SPEAKER: O yes, O yes, O yes. The Honorable, the Supreme Court of Texas. All persons having business before the Honorable, the Supreme Court of Texas, are admonished to draw near and give their attention for the Court is now sitting. God save the State of Texas and this Honorable Court.

CHIEF JUSTICE JEFFERSON: Thank you, please be seated. Good morning. The Court has three matters on its oral submission docket. In the order of their appearance they are Docket number 04-0465 City of Houston v. Robert Jackson from Harris County and the First Court of Appeals District. Docket number 04-0641 Nick Digiuseppe D/B/A Southbrook Development Co. and Frisco Master Plan v. Roger Lawler from Collin County in the Fifth Court of Appeals District. Justice Medina will not be sitting in that case. Docket number 04-0692 GuideOne Elite Insurance Company F/K/A Preferred Abstainers Insurance Company v. Fielder Road Baptist Church from Tarrant County in the Second Court of Appeals District. The Court has allotted 20 minutes per side in these matters and the Court will take a brief recess between each argument. We expect to complete all arguments by noon today. These proceedings are being recorded and a link to the argument should be posted on the Court's website by the end of the day. The Court is now ready to hear argument in 04-0465 City of Houston v. Robert Jackson.

SPEAKER: May it please the Court. David Holman will present argument for the petitioner. Petitioner has reserved five minutes for

rebuttal.

ORAL ARGUMENT OF DAVID HOLLMAN ON BEHALF OF THE PETITIONER

MR. HOLLMAN: Mr. Chief Justice, Justices, good morning. May it please the Court. I, together with my co-counsel [inaudible] represent the city of Houston. The city of Houston has raised a number of points in its petition for review. I would like to address three of them: jurisdiction, excessive fines, and no evidence.

I think it's proper to address jurisdiction first because jurisdiction is espoused [inaudible]. That is if the statute does not provide the trial court with jurisdiction to impose a penalty, then judgment has to be reversed already. Now, in this case Jackson complains, he's a firefighter, he complains that he was denied of transfer pursuant to a recommendation from the grievance examiner under Section 143.130 of the Texas Local Government Code. That's [inaudible]. Here it's undisputed that the grievance examiner's recommendation was done pursuant to 143.130 of the Texas Local Government Code. Now, the statute upon which we ask this Court to impose a penalty is 143.134(h) of the Texas Local Government Code. And that statute says that the court can impose a penalty of \$1,000 a day for everyday the fire chief intentionally fails to implement a decision by the commission, Civil Service Commission under 143.131 or a hearing officer's decision under 143.129. Now I'm giving you a lot of numbers but the important point is 143.120 is not mentioned in the statute. The very statute upon which they're seeking to impose liability does not talk about 143.130 and that's the very recommendation that Jackson wishes to have this Court impose a \$1,000 a day penalty.

Now, why do we know that 143.130 is not apt in this statute. It's because this is a penal statute. It's a punitive statute. And this Court has said on many occasions that punitive statutes, penal statutes are strictly construed. Also, it is a statute that waives governmental immunity. This Court has said on many occasions that statutes that waive governmental immunity are strictly construed. Also, this is a statute that's clear and ambiguous. There's no way to read anything else into except for the two situations in which the court said you can impose a penalty 143.131 and 143.129. Those are the only provisions. Now, when a statute is clear and ambiguous, this Court has said we apply the statutes as written. We don't make policy. We don't try to rewrite the statute. We don't even apply the rules of statutory construction. If something is excluded from a statute, the court says that's excluded for a purpose.

JUSTICE MEDINA: Mr. Holman the next statute talks about the knowledge of the chief. How is it or how is it not that knowledge of a subordinate is not directed to the knowledge of the chief in this instance?

MR. HOLLMAN: Well, there's two answers to that, your Honor. First of all, I -- once again, the penal statutes are strictly construed. So, if it says the fire chief intentionally did it, it doesn't mean other folks did it. It means the fire chief did it rather than his delegates or representatives. As we pointed out in the reply brief, there are many provisions in the statute that reply to -- that refers to the department head and his designated representative. The department head and his representative [inaudible] department head's words doesn't

mean. Those statutes indicate that when the legislature wanted to include others besides the fire chief they did. In this particular statute it only talks about the fire chief. Also, we cited many cases in our brief that talked about imposing respondeat superior liability on [inaudible]. And this Court has said on numerous occasions that you cannot impose respondeat superior liability on [inaudible]. And we don't have that situation here anyway because we have a statute that speaks directly to a fire chief's [inaudible]. We have a situation wherein the only way to get to 143.130 which is Ms. Coroy's grievance recommendation. The only way to get to that is to add words into the statute. And this Court has said on many times we don't add words in the statute.

JUSTICE O'NEILL: Well, let me ask you how this works. Here at the Step III grievance stage which the parties were and the grievance examiner enters a decision or a recommendation --

MR. HOLMAN: Correct.

JUSTICE O'NEILL: -- and neither party appeals. And neither party here really had any reason to appeal --

MR. HOLMAN: Correct.

JUSTICE O'NEILL: -- then they accept the agreement --

MR. HOLMAN: Correct.

JUSTICE O'NEILL: And I think it's your argument, that it never gets to the 141 that said --

MR. HOLMAN: True.

JUSTICE O'NEILL: -- penalty. So, the parties accept the agreement. What if one party breaches the agreement? I know you said this but let's just say the city said, we're not gonna follow it. Your argument is H wouldn't kick in but what happens then?

MR. HOLMAN: Well, I believe that there's two things we could do. First of all the grievance could go up to the chain of command. And he's permitted to do that.

JUSTICE O'NEILL: How?

MR. HOLMAN: Well, he can go to a superior, or his superior himself will try and get a relief [inaudible] --

JUSTICE O'NEILL: Informally?

MR. HOLMAN: Informally.

JUSTICE O'NEILL: 'Cause --

MR. HOLMAN: Because this is in --

JUSTICE O'NEILL: He tried to do this formally --

MR. HOLMAN: -- under [inaudible] this inform --

JUSTICE O'NEILL: Right?

MR. HOLMAN: -- under Step III, 143.130, it's an informal administrative procedure. And there's only a recommendation given. It's not final decision --

JUSTICE O'NEILL: So, you go up informally and you say transfer me --

MR. HOLMAN: Right.

JUSTICE O'NEILL: -- please do this, which apparently he did --

MR. HOLMAN: And if he does -- and if they don't do it that way which is you know the way you'd normally approach a problem with the city government then you can file another grievance.

JUSTICE O'NEILL: Which he did.

MR. HOLMAN: Under 127(a) (1) which he did.

JUSTICE O'NEILL: He did.

MR. HOLMAN: And he got his transfer finally, okay. The important point is --

JUSTICE O'NEILL: But --

MR. HOLMAN: -- that's completely removed from the penalty.

JUSTICE O'NEILL: I understand your point. But I guess what I'm trying to figure out here is he seemed a bit whipsawed through the system. He tried informally. He tried formally and his grievance was dismissed. So, what are you left with? I understand --

MR. HOLMAN: Well --

JUSTICE O'NEILL: -- you're saying, you're now left with the penalty but he tried both of those. What do you do? And that seemed to disturb the Court of Appeals in Jackson I.

MR. HOLMAN: I agree that it was observed in the Court of Appeals' judgment. But the way to approach that is not to create a remedy that the legislature did not create.

JUSTICE O'NEILL: I understand --

MR. HOLMAN: And --

JUSTICE O'NEILL: What was he to do?

MR. HOLMAN: Well, as I say he could file another grievance which - and he actually filed a grievance on 72D transfer rather than a grievance to say you didn't give me 11B. But then he did complain in the 72D Step II hearing that because you didn't give me 11B give me 72D as a settlement.

JUSTICE O'NEILL: I understand. But that was dismissed. So, you're saying --

MR. HOLMAN: Right.

JUSTICE O'NEILL: -- he should have then gone to Step III to appeal the dismissal?

MR. HOLMAN: Well, it was dismissed because he didn't file for Step III grievance procedure timely. That's the only reason that grievance was dismissed. And he filed it on the -- it's supposed to be filed within 15 days of the Step II denial. And when he receives it he filed after 16 days [inaudible]

JUSTICE O'NEILL: But I thought it was dismissed. I thought he was told it was dismissed because it was already the subject of another grievance procedure and it couldn't be brought twice.

MR. HOLMAN: That is the other one the chief [inaudible] on. The 72D was the one that allegedly denied and that was dismissed because there was no step -- he hadn't gone on to the Step III procedure properly and timely. But I mean there are provisions to do it. The legislature did not provide for a thousand-dollar-a-day penalty for a Step III grievance procedure.

JUSTICE O'NEILL: I understand you. I'm just trying to figure out -

MR. HOLMAN: Okay.

JUSTICE O'NEILL: -- if you've got an agreement you both accepted after Step III and the other party goes to Step IV, how do you enforce it?

MR. HOLMAN: Well, as I said the only way that you can enforce it is file another grievance that the -- 143.127(a) says that you can file a grievance over a transfer and although it says in 127(a)(1) that you can't file a grievance over any action that's more than a year ago he can file a grievance to complain about the grievance process and that's what he would be doing in filing a grievance complaint about the grievance process which he never did. There are options available to him but the thing is this option of the thousand-dollar penalty is not available. And that's what he seeks to recover. And because it's not available under the statute, there's no jurisdiction, the trial court in no jurisdiction to impose a penalty on the city. Now what --

JUSTICE O'NEILL: So, your enforcement mechanism of something

you've achieved through the system or to enforce is to start over with another grievance for enforcement.

MR. HOLMAN: Let me state this in another way, 129 is the Step II procedure, okay. After you've done the Step II procedure, you can go one of two ways. You can either you go to an arbitration when the hearing is imminent or you go to the Step III procedure, okay. If get to a Step III procedure you can go either accept that, the recommendation -- the grievance examiner's recommendation for solution or you can go to Step IV to get a final decision from the Civil Service Commission. What the statute talks about is a final decision from a hearing examiner, which should be the arbitrator under 129 or a final decision under 131 of the Civil Service Commission. That makes sense. If you have a final decision that's binding on the parties, find anyone binding either by the Civil Service Commission or by an independent hearing examiner then -- and the fire chief intentionally refuses to carry that out then you can penalize \$1,000 a day. But you have a grievance examiner's recommendation the parties informally accepted and there's no provision in the statute for that to trigger the \$1,000 a day [inaudible] penalty then trial court doesn't have jurisdiction. Now --

JUSTICE MEDINA: Why is it the clarification that was written by the hearing officer, why is that not valid? In line with the request as I understand it the request was made by the city.

MR. HOLMAN: The -- Alice Perrenot testified about that, your Honor. And Alice Perrenot is the senior director of Human Resources Department. And she testified that she sought it on her own. She sought it because she's trying to see how to implement it. It wasn't -- the statutes Step III procedure provides that you have 15 days to appeal to the Civil Service Commission. And that wasn't done by the party. This wasn't on appeal with the Civil Service Commission. It was request for clarification. And the Civil Service Commission they weren't acting -- so they -- it never triggered anything under the step -- the four-step procedure. That's four-step grievance procedure.

Now, the -- we have two other arguments. One of them is the excessive fines argument. And one of them is the no-evidence argument. And I believe your Honors can address the no-evidence argument because it's our provision and -- it's our position that if you go through this record, you will find no evidence direct or circumstantial that the fire chief either knew of Ms. Coroys' recommendation or that he intentionally failed to implement. And I -- as this Court said in *City of Keller v. Wilson*, it's not a new or should have known standard. It's a new standard. And it's an intentional standard. You have to have intent to violate the standard -- statute. And you can't create intent where there is none and this statute doesn't talk about what the fire chief did. This -- I mean this record doesn't talk about talk about what fire chief did, doesn't talk about who the fire chief talked to, doesn't talk about any documents that the fire chief ever wrote or reviewed, doesn't talk about anything to do with the fire chief. And it can't get there because the penal -- there's a penal section strictly construed, it can't get there through the acts of representatives. It has to be the fire chief's intent alone.

Now, let's -- let me talk about excessive fines. The operative case that I think that you all should look at is the first case that we've cited in our brief of the merits which is case of *State v. Galveston*. It's a 1906 case from this Court. And the facts of that case were, there was a \$20 fine, daily fine, levying for exemption of taxes. For a year that would amount to \$73,000 in taxes. The taxes that they

were detaining were only \$74,000. The Court looked at that and said, wait a minute, that's grossly disproportioned to the amount of the damages. And, therefore, because it's grossly disproportioned to the amount of damages, it's excessive, and it's void.

Now, there's another case that we have been cited in the brief but I came across in my research and I'd like to give you the cites to that, Missouri Pacific v. Tucker. It's a United States Supreme Court case 230 U.S. 340. It's a 1930 case but I think it's very [inaudible] with the principles governing excessive fine. Here's what the provision -- It was the provision that governs, raised that railroad to be charged. In this particular case it said, that if the railroad doesn't charge you the proper rate, they're automatically hit to \$500 fine. So, this guy was a passenger on the railroad. He got charged \$3 or more than he should have been charged. He tried it off the court and said, "I want my \$500 and I want attorney's fees as well." And the court looked at that said wait a minute. That's grossly -- I'm sorry -- I see my time is up as far as a few minutes [inaudible] --

CHIEF JUSTICE JEFFERSON: Are there any further questions? You can address this in rebuttal --

MR. HOLMAN: Thank you.

CHIEF JUSTICE JEFFERSON: Thank you counsel. The Court is ready to hear argument from the respondent.

SPEAKER: May it please the court. Ms. Joan Bain will present argument for the respondent.

ORAL ARGUMENT OF JOAN BAIN ON BEHALF OF THE RESPONDENT

MS. BAIN: Thank you, your Honor. My name is Joan Bain and my co-counsel [inaudible]. We represent the respondent Robert Jackson. First, I'd like to address some of the court's question from the opening regarding the statute itself 143 -- 134(h). Mr. Holman and the city are incorrect in their interpretation that the grievance examiner's decision in this case is not implicated by Section 131, which is specifically referred to in 134(h). I've given the Court a handout which is attached to my brief and I submitted it again this morning, which is a diagram of the statute of the procedure -- the parallel procedures that are available to a firefighter under the grievance procedures of the statute as a whole and it's important for the court to remember that when you're construing a statute such as the Civil Service Code you're not supposed to look just to that one isolated section. You're supposed to look at the entire statute and give -- of that statute.

What's significant about 134(h) is that it does not reference 129(b) or (d), it references Section 129 in its entirety. It also does not reference 131(a) or (c). It references Section 131 in its entirety. Now, the process through which a firefighter may pursue of grievance split when you get to Step III and that's when you had your choice of going to an independent hearing examiner under Section 143.057 versus the commission's hearing examiner under Section 130 -- 143.130. Once you make that choice you have to follow the appropriate path through that choice. You can't switch back and forth between them. The city has accused the petitioner and the court of adding provision to the statute but really what's happened here is the city's failed to acknowledge that a grievance examiner's decision under Section 130 becomes final by

operation of Section 131(a). That is the operative statutory provision which makes the decision final when no one appeals it. If however someone does appeal --

JUSTICE O'NEILL: What -- but 143.130 makes it final by examiners

MS. BAIN: It deems as accepted but it becomes the decision of the commission by virtue of 131(a). Additionally, in this case, we have testimony from Alice Perrenot that the commission actually adapted the decision.

JUSTICE O'NEILL: Well, what -- show me where in 143.131(a) the commission adopts it as final. It says that if neither one disagree they can follow to Step IV and file it but it doesn't say anything about we accept later becomes our decision.

MS. BAIN: That's correct. It says that 131 is what makes it final. It becomes final by 131 --

JUSTICE O'NEILL: I hear you say that I'm trying to find it in the text.

MS. BAIN: The word final? Is that what you're asking me?

JUSTICE O'NEILL: Well.

MS. BAIN: 131 is the provision that says if no one appeals to Step IV it becomes final.

JUSTICE O'NEILL: Where does it say that?

MS. BAIN: It says that -- it's implied I guess. It's deemed accepted. It becomes the agreement of the party.

JUSTICE O'NEILL: I don't see that anywhere in here. I mean I hear you but all these just says is it if you're gonna appeal it, here's how you do it.

MS. BAIN: Correct and if you don't do it. It's deemed accepted.

JUSTICE O'NEILL: You're implying that?

MS. BAIN: What I'm saying is this is a mandatory provision it says, if you do not want the proposed solution you must go through a Step IV grievance with the director within 15 calendar days. If you don't -- I mean, the natural consequences if you don't, you have not exhausted your administrative remedies.

JUSTICE BRISTER: But that's like saying we've got separate trap rules for court [inaudible] to the Supreme Court and what the trap rule say when a court of appeal judgment is final. You can still appeal but that's like saying well because you didn't appeal, therefore, these rules say that one is final that really follow, does it?

MS. BAIN: It does because when you put that on the context of the law as a whole that cuts off the firefighter's right to take it to the court. And or the city's right to take it to a court because you have not exhausted your administrative remedies. So, if Mr. Jackson for example in this case rejected -- wanted to reject the solution and he did not file the Step IV grievance procedure. He would not be able to appeal to the district court.

JUSTICE O'NEILL: But that's a very different thing than saying the commission approves what happened.

MS. BAIN: Well, it means --

JUSTICE O'NEILL: I mean it's just like if you have a court of appeals' decision stare decisis we're not gonna take it any further that then mean the Supreme Court's approved what they've done, it just means that they're not gonna take anything.

MS. BAIN: But functionally, what happens in the testimony in the case is from Ms. Perrenot and Ms. Cass that what happens when no one appeals it as a matter of a ministerial act it goes to the commission and the commission signs off on it. There's testimony in the record to that effect and that is --

JUSTICE O'NEILL: Well.

MS. BAIN: -- the operative way that it becomes final and that's why I think 134(h) refers to a decision becoming final as opposed to being final, because if you look at 143.057 which is the alternate route, the independent hearing examiner route, that decision is final. That section says the decision of the hearing examiner is final.

JUSTICE BRISTER: Now we're dealing with the penal statute. I mean, how much was Mr. Jackson make in a year?

MS. BAIN: No, your Honor. I don't even honestly know that. That was not even in the record but --

JUSTICE BRISTER: Where -- he's given a penalty award of almost half a million dollars for two-year period, right?

MS. BAIN: Well no, he's given a penalty award of a thousand dollars a day and the person with the control to cut that off was the fire department.

JUSTICE BRISTER: Stop and answer my question.

MS. BAIN: Okay.

JUSTICE BRISTER: He got \$500,000 for a less than two-year period. So, unless he's making \$250,000 a year which is probably not, maybe a years, maybe we should all quit and go work to fire department. Wait -- I mean, does he make anything like that?

MS. BAIN: No.

JUSTICE BRISTER: So, he's -- this looks like a penal statute. He is making multiple times. What if he wouldn't make -- I guess in addition to it. This is an addition to his salary because he kept working. Says the quarter a million of dollar a year bonus that looks rather penal and so we've got to strictly construe this thing. How do we strictly construe what we've got to imply in and takes somebody's oral testimony about what's really done. None of which is in the statute.

MS. BAIN: First of all when you're talking about strictly construing it as a penal statute, I think you have to approach the very first step in and that is of this case the city is asserting excessive fine on its own behalf. It is trying to claim a personal right which it doesn't have and you know the Texas Court's Nuncy and Wilson and Trucker v. Andrews and even in the court of appeal's cases they all recognized the distinction between a municipality coming forward and asserting a constitutional right on its own behalf versus asserting that constitutional right for the purpose of a statute that it's charged with a responsibility to enforce. So, there is -- the first step that we have to address is the cases that Mr. Holman has brought to the court saying that this statute should be strictly construed would be effective if this was a case by a private party against the state or if this was a case by Mr. Jackson against the state or if this was a case but the statute is imposed by the state against the city. The statute clearly says the city shall pay to the firefighter \$1,000 a day if they intentionally disregard our mandate to them to follow the Civil Service Commission --

CHIEF JUSTICE JEFFERSON: Let's talk about that just for a second. 143.134(h) says the penalty is opposed if the department had intentionally failed. Now how is that the case here? There's apparently no evidence that the chief fire -- chief himself intentionally failed to implement. And so how by construing the statute do we arrive as a finding or a holding that there's evidence that the chief intentionally failed.

MS. BAIN: Okay, I think what we've done is we've broken that down into two elements: one, his knowledge of the award; and secondly,

circumstantial evidence of his intent. First of all, we have under -- even under the Keller -- City of Keller v. William's standard, the court recognizes that when there's conflicting circumstantial evidence that it is within the problems of the jury to disregard evidence. We have direct evidence that the chief received a copy of the original award. That is the evidence that Roland Bienvenu in which he testified that he sent a copy to the department head. Additionally, we have the testimony of the chief's attorney Sheryl Cass. She testifies that all people -- all the persons had been involved -- had been notified. Everyone with an interest had been notified. She also testified that it was within the chief's providence to make a decision about the appeal that she would not had made that decision for him or whether to go forward to Step IV grievance. Now, the fact that she doesn't recall specifically talking to him about this particular grievance doesn't mean that that's not no-evidence. It is a logical inference. It's a bridge between the decision coming to the City of Houston's Personnel Office and getting into the chief's hand.

CHIEF JUSTICE JEFFERSON: So, do you agree that the intent has to be the chief's intent and not an agent or designating or someone down the line?

MS. BAIN: I believe that the chief's intent. It has to be the chief's intent but I believe that the chief's intent can be proven by circumstantial evidence. I don't think we have to have a concession that the chief says, I did it. And I think that the case law which is cited in the brief and just it -- its well founded in our jurisprudence that an issue of intent may be established by all kinds of circumstantial evidence and even in the criminal courts where proving intent beyond the reasonable doubt, it can be proven solely on the basis of circumstantial evidence and that can include subsequent acts of the department -- of the chief.

We have -- just to summarize for the Court here. You have Ms. Cass's testimony which I've already referred to it that she wouldn't make the decision and that everyone was aware of the decision. You have the statutory regulation of Chapter 143 itself which says, the chief is the one that has to make the decision on transfers. You have the departmental policy which the record reflects was issued by the chief that says the chief has to make the transfers. You have Ms. Perrenot's testimony that throughout the time that she was seeking the clarification order from the commission and from Ms. Coroy. She was exchanging correspondence with Ms. Cass the chief's attorney. You have a correspondent from Ms. Cass to Ms. Perrenot taking the position that she was aware that Mr. Jackson had requested the transfer to 11D and that -- and she refers to it. And I think that's plaintiff's Exhibit 6. You have the fact that Ms. Perrenot took the language from Ms. Cass's letter and went to the commission on the very day that Mr. Jackson was trying to grieve the fact that he had not had his decision implemented. And told the commission that Mr. Jackson had never asked for the request when in fact Ms. Perrenot's own correspondence that predates that, concedes, that he had ask for 11D and then he was entitled to it and her subordinate had proposed 72D as an alternative as a settlement if you would because someone else had already been given 11D. You have the fact that Mr. Leggio even though he -- Chief Leggio says he never told the chief directly about Mr. Jackson request, he conceded that he told his supervisor the assistant chief about it. Now, there's -- it's a logical inference that within a department like the City of Houston Fire Department information flows up a chain of command.

JUSTICE: Just because they knew it, does it necessarily mean that

they intended not to have admitted it -- there's just been negligence.

MS. BAIN: But you have the subsequent conduct trying to prevent Mr. Jackson from getting his transfer.

JUSTICE MEDINA: Well --

MS. BAIN: Going to the --

JUSTICE MEDINA: I already braced it that he got a transfer just didn't get the transfer that he wanted.

MS. BAIN: He didn't get a transfer. The City founding it or waived it, the jury question that was asked to come which the trial court cut off the penalty was when the chief's intent end it, but the jury also found that Mr. Jackson never got his transfer and the judgment order his transfer. This was the case seeking mandamus relief to enforce his right to 11(d). The Court order the transfer to 11(d) and the city responded and request for admission to the trial court that he had never been given his transfer. There is -- he was not given his transfer until the trial court entered its judgment mandating that he'd be given his transfer and then the queries entered into a Rule 11 agreement substituting a different station for 11(d), because the judgment itself directs that he'd be given the transfer to 11(d) under the original order. So, he was never given the transfer. He was given a transfer after this case was tried.

JUSTICE: What would be the motivation that the fire chief do not want to transfer this kind of --

MS. BAIN: There is testimony in the record reflecting that this was the first time in 30 years that any firefighter had ever been awarded a transfer by the Fire Department -- by the Civil Service Commission. There's also indication in the legislative history of the statute that the reason that it's implemented is there have been a progress with the department not wanting to recognize the interference of the commission and its ability to govern its own affairs. And that's -- there's evidence in this trial that everyone that handle Mr. Jackson's grievance transfer request, etc, in this case violated the Texas Civil Service Law over and over. That in of itself is an indication of an intent to circumvent the authority of the state has over the department.

JUSTICE: You mean --

MS. BAIN: For --

JUSTICE: [inaudible] for having done this.

MS. BAIN: If you trace it back to the -- to the origins of this transfer request, there was a dispute between Mr. Jackson and his supervisors outside of the department on totally nondepartmental issues. That's why back in November, he requested the transfer onto that --

JUSTICE: So that --

MS. BAIN: -- out of that station.

JUSTICE: [inaudible] fire chief intentionally denied in this case.

MS. BAIN: Well, you have to know that the fire chief knew about the transfer request because he has to implement it and you know that the fire chief has to send a designated representative to grievance proceedings and that those statutes says it should be an assistant chief. If the fire chief had followed the statutory mandates and indeed that the mandates of his own policy which he now, then he would not be in a position to know -- to deny that he knew it. But they over and over and over again circumvented the policies of the department and the statute by letting Chief Leggio handle the grievance over 72D. He wasn't qualified under the statute by letting -- by trying to impose on Mr. Jackson according to Chief Leggio the requirement that he submits

on extra form for transfer which he never gave him. That's disputed testimony. Mr. Jackson said, he was never requested to submit a letter. That's exclusively when then the jury's providence to decide that issue. You have directly conflicting testimony about whether or not Mr. Jackson was asked that he submits something else.

JUSTICE O'NEILL: Let me get back to the statute if I can. Under (h), there are two parties to it. If the decision of the commission under 123.131 or the decision of the hearing exam, you're going with the first part, right? You agree that this is not a decision of the hearing examiner under 143.129.

MS. BAIN: Actually, I wouldn't and that was the second part when I got distracted on the evidence because I think that if the -- if the legislature had intended to restrict that provision to an independent hearing examiner then that would've said 143.057 there, because 143.057 is the part of the statute that refers to the independent hearing exam.

JUSTICE O'NEILL: Well, but if you look at the text of 143.129, it says you could either go to independent third party hearing examiner pursuant to 143.057 or go this other around.

MS. BAIN: Right [inaudible].

JUSTICE O'NEILL: And so clearly --

MS. BAIN: [inaudible]

JUSTICE O'NEILL: -- by choosing hearing examiner and not taking the hearing examiner well, it seems to me that you don't follow under that second part of (h).

MS. BAIN: The second part being becoming final?

JUSTICE O'NEILL: No, the second part of (h) being or the decision of the hearing examiner.

MS. BAIN: Well, 129 refers to both hearing examiners and its important to recognize that the grievance examiner under that parallel route is the only hearing that's conductive for a firefighter, even if it goes to the commission under the operation of the statute, the commission cannot conduct an evidentiary hearing. If the firefighter or the department appeals it to the Court Of Appeals, it is a substantial evidence review, it's a question of law, it's not a new hearing, its based upon the hearing --

JUSTICE O'NEILL: Well, the legislature could have easily said or decision under Section 143.129 and they didn't. They said hearing examiner under 143 --

MS. BAIN: They did say 129. They just didn't say 1 -- 057 and that's my point because if they wanted to limit it to an independent hearing examiner, they could've refer to 057 which is the independent hearing examiner --

JUSTICE O'NEILL: Alright, let me just get away from that for one second. The first part, if the decision of the commission under Section 143.131, so we turn to 143.131(a), which we were talking about earlier, neither party appeals, lets say the commission finds out about the decision even though it's not appeal and they don't like the decision. What do they do? They have no authority on their own to think without decision.

MS. BAIN: The commission --

JUSTICE O'NEILL: Unless the -- unless the appeal process has been instituted.

MS. BAIN: They approved the final decision if it's deemed accepted and if they -- if its not, if someone appeals it then they review the transfer of the grievance examiner and they can change it.

JUSTICE O'NEILL: Right.

MS. BAIN: Except to reject the --

JUSTICE O'NEILL: But if nobody appeals it they can't do anything, right?

MS. BAIN: They approved it. They go through and they signed up on it. Basically --

JUSTICE O'NEILL: Then they said in the record to signed up --

MS. BAIN: Yes. That's in the record if they signed up on it, if you give me a second I will tell you exactly where that is.

JUSTICE O'NEILL: [inaudible]

MS. BAIN: It's in Ms. Perrenot testimony and basically she said --

JUSTICE O'NEILL: But there's not a document.

MS. BAIN: No. The second clarification order was not adopted, but the first order was --

JUSTICE O'NEILL: No. I know you're saying her testimony is that the commission adopted it, but is there a document signed up on which you just said, approving it?

MS. BAIN: I do not believe that the exhibit from the commission signing up on this is in the record, there's just a testimony from Ms. Perrenot that they had approved it and you have the exhibit that shows, if you look at the exhibit from when she took it to the commission for the clarification order, it shows the process by which they go through and just signed up on everything that comes before them and basically, she just said that when no one appeals it its just get put on the --

JUSTICE O'NEILL: Okay, but there's no -- there's no docket with the commission has approved it under 130.

MS. BAIN: I don't believe that's on the record.

CHIEF JUSTICE JEFFERSON: Thank you Counsel.

MS. BAIN: Thank you.

REBUTTAL ARGUMENT OF DAVID HOLMAN ON BEHALF OF THE PETITIONER

JUSTICE WAINWRIGHT: Mr. Holman, you were talking about excessive fines and you seem to be indicating, I believe that excessive finds with provision of the Texas constitution clearly hasn't, in your view a substantive element. Do you believe it has a procedural element as well?

MR. HOLMAN: I think it could be. I think in this case we're talking about substantive element. We're talking about [inaudible] is this arbitrary paneling. Is the [inaudible] not capped in any regard? There's no range of penalties provided and it creates a windfall for [inaudible].

CHIEF JUSTICE JEFFERSON: So, if we find that in any statute, I mean there are federal statute and that are penalties per day that are not capped and don't have a range, then as matter of law those are all unconstitutional?

MR. HOLMAN: Well, unfortunately the federal courts have held that the Eight Amendment of the Federal Constitution does not apply to civil penalties. So, we would never get into that, as far as the Texas --

CHIEF JUSTICE JEFFERSON: Or any Texas statute --

MR. HOLMAN: Yeah.

CHIEF JUSTICE JEFFERSON: If -- were those elements that you've just mentioned, there's not -- they're not cut, there's a range -- there is no range of penalty stated then as a matter of all those would not survive.

MR. HOLMAN: As this Court said in Pennington v. Singleton and in

the State v. Galveston. The determination whether to find this excessive was a question of law for the court and it is determined based on the facts of the particular case --

JUSTICE WAINWRIGHT: The US Supreme Court has said that there's a substantive element regulating civil penalties under its due process clause.

MR. HOLMAN: In the due process clause. Correct. And that's the --

JUSTICE WAINWRIGHT: You think our Constitution is different then from this Constitution?

MR. HOLMAN: No. I think we read that the same way.

JUSTICE WAINWRIGHT: But we read the excessive fine provision in your opinion differently from the Federal Constitution.

MR. HOLMAN: Well, no. I didn't mean to say that. I think we, we -- under our jurisprudence, Texas holds that our excessive fine clause applies to civil penalties. Now, we also had a due process [inaudible] --

JUSTICE WAINWRIGHT: That's a difference --

MR. HOLMAN: It is a difference if -- just in -- conceptually, it's very tricky because the Eight Amendment does not apply to civil penalties, but the way the court gets there, for example, on punitive damages and everything is under the due process clause, in the federal courts. That's how they view statutes -- federal statutes under due process. We also apply our due process language to the excessive fines, but we also been looking at it whether it's an excessive fine under our Constitution, and so we have two -- we have two prong that jive. We can look and say whether it's violation of due process by being oppressive and arbitrary, substantively or whether it's an excessive fine but being grossly disproportionate to the damages in harm claims.

Now, there were two points that were raised and I want to clarify them. First of all, I've gone through this record with the fine [inaudible]. I do not see anywhere in this record where anybody testify that the commission signed off on Ms. Coroy's recommendation. Ms. Coroy's recommendation because it was not appealed, it was never taken to the commission. Later on, you know when Ms. Perrenot's signed clarification she put it on the Civil Service agenda document by her own testimony. They took no action of it and it wasn't in appeal. It wasn't the time that we appeal.

JUSTICE O'NEILL: If neither party appealed under 143.130 --

MR. HOLMAN: Right.

JUSTICE O'NEILL: -- and the commission found out about this decision and wanted to do something about it, could they take it up on their own?

MR. HOLMAN: No. They have no jurisdictions unless the people appeal and the way they can do that is by filing a step forward grievance form within 15 days after the decision. If you don't do that the permission has [inaudible] in fact Ms. Perrenot admitted that they didn't really have any jurisdiction to do some clarification could have been one reason why they take no action.

JUSTICE MEDINA: Mr. Holman, can you address the response that the chief's intent can be established by circumstantial evidence in this [inaudible].

MR. HOLMAN: We agree this can be certainly. Most of the time you can't establish some of the intent by direct evidence and you know that, you'll never get the wrongdoer understand and [inaudible] to it admit that he did the wrong. But -- so you have to establish intent by circumstantial evidence but this Court is to clarify what's sort of thing circumstantial evidence that must be. It must be evidence upon

which you can draw a reasonable inference that the conduct was public, that the intent was profit and the way you can do that in this Paul Jerry case Paul Jerry of course is the first in the line with the personal [inaudible] which is the landmark case on intent to defraud. You looked at the person's conduct. You looked if there [inaudible] discussed with that. You looked if what the paper trail was and you determine from that what their intent was.

JUSTICE MEDINA: Is that --

MR. HOLMAN: Here --

JUSTICE MEDINA: Is that a fact issue that that jury to decide on?

MR. HOLMAN: If there's -- if there's circumstantial evidence, if the circumstantial evidence is not speculation, then yes, it's for the jury to decide to hear, if it's complete speculation and suspicion.

JUSTICE WAINWRIGHT: If [inaudible] your view conceptually has it say that excessive fines provision applies [inaudible] civil penalties and you [inaudible] to the Court that, is it also a -- is it also apply ceiling to punitive damages.

MR. HOLMAN: Well, I don't think that Texas would have a ceiling statutorily. In Pennington v. Singleton, the Court said that the DTPA and travel damages supervision was not a violation of excessive fines [inaudible]. The reason it wasn't was because it was proportion to the actual damages.

JUSTICE WAINWRIGHT: Without statutory cap though it could apply.

MR. HOLMAN: Correct.

JUSTICE WAINWRIGHT: In your view?

MR. HOLMAN: I agree.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. The case is submitted and the Court will take a brief recess.

SPEAKER: All rise.

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