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Supreme Court of Texas.
The City of Houston, Petitioner,
v.
Donald Clark, Respondent.
No. 04-0930.

November 16, 2005.

Appearances:

David W. Holman, for petitioner.
Richard C. Mumey, for respondent.

Before:

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

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COURT ATTENDANT: Oyez! Oyez! Oyez! 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.

JUDGE: Thank you, please be seated. Good morning, the Court has two matters on its oral submits in the docket and may ordered their parents they are Docket No. 04-0930 the City of Houston versus Donald Clark from Paris County and Fourteenth Court Appeal District and Docket No. 04- 1023 In re Allied Info. Corporation et al it should in a regional proceeding. The Court is allowed 20 minutes presided this matters and the Court will take a brief recess between the arguments. Please proceeding on your brief recorded and late arguments should be posted on the Court Web site by the end of the day today. Recorded ready to their argument in 04-0930 the The City of Houston versus Donald Clark.

COURT MARSHALL: May it please the Court, Mr. David Holman will done argument of the petitioner. The petitioner has been serve 5 minutes for rebuttal.

ORAL ARGUMENT OF DAVID W. HOLMAN ON BEHALF OF THE PETITIONER

MR. HOLMAN: Good morning, This Chief Justice, Justices, May it please the Court. I together with my co-counsel Tim Heaguien represent

the petitioner City of Houston. There is one issue before his dead, and that is whether the city has the right to Appeal hearing in summary decision, under 143.1016(j) at the local government.

JUDGE: Where do you read that statute Mr. Holman that the city has described?

MR. HOLMAN: The statute says, plain words, these work-- this is, the way with the Court construes things the plain words of the statute. The statute says that "The district court, made hear and appeal from the hearing to the examiners word." As Texas a statute is 1016(j) and we found that top six in our brief. I, the, the very languages statute the certain district court may I hear an appeal. Now doesn't restricted? Here far, doesn't, does have the exclusions of the city of Eastern. This Court have said, the-

JUDGE: Was side did you have an appeal.?

MR. HOLMAN: Yes.

JUDGE: How does your appeal fit with them the structures of subsection (j)?

MR. HOLMAN: There are several cases that have discuss that point. The three cases that we mentioned in the brief. Case of Blair versus Russ, case called "Nuchia versus Tippy," case called "City of Garland versus Byrd." They talk about that standard overview. The standard overview is whether the hearing examiner has abuse his authority.

JUDGE: Well, it says, "Was without jurisdiction?"

MR. HOLMAN: Correct.

JUDGE: And he had jurisdiction?

MR. HOLMAN: Correct.

JUDGE: Have more exceeded his jurisdiction?

MR. HOLMAN: That's, that's -

JUDGE: Is that what you're relying on?

MR. HOLMAN: - that's we we're talk about. And they talk about when he's talk about exceeding his jurisdiction, those Courts all of said, that means abusing his authority. What, what let me going to that some data?

JUDGE: Well, it's sounds like what you saying as if they make a mistake of law that exceeded their authority.

MR. HOLMAN: Here's what the case said, and and the case that is really illustrate by this [inaudible]. There is also case is called "Lindsey versus Farramenson." Comments of a policeman say [inaudible]. But what they say is the hearing examiner has to follow the same duties as a commission and the Civil Service Commission has a duty to apply Texas law. And that [inaudible] applied Texas law is abuse of authority. That's is not every decision that's an abuse of authority, it has to be a clear and prejudicial error of law. That was the Lindsey Court says. And in this case the error of law is that the hearing examiner found without any precedent, that the acting fire chief could not suspend fire fighter.

JUDGE: Well, could obviously subsection (j) was intended to severely limit appeal rights.

MR. HOLMAN: No question.

JUDGE: That's not much of a limit, if you say anytime. Because hearing examiners can be called upon to interpret statute is in law all the time. And that's not much for limitation if we say, if we questioning their interpretation that constitutes exceeding their jurisdiction.

MR. HOLMAN : That the problem is that, the, hearing examiner on the certain constitutional directors. That is you cant have impermissibly delegation of authority to hearing examiner is unchecked.

Where here by some kind of meaningful hearing.

JUDGE: You have the impermissible delegation of authority from the chief some subordinate, and the statute doesn't provide for a subordinate to make that position.

MR. HOLMAN : It actually does not.

JUDGE: Where is that?

MR. HOLMAN : In 143.003 the statute provides that the department head means either the fire chief or that persons equivalent. It's an either or-- it's not only to the fire chief, it could be that persons equivalent. You sent ordinance at 34.-- 34-55 say's that, in the absence of the fire chief then a assistant chief can be appointed to act as the fire chief and have full authority thereof. So that's that persons equivalent. So the acting chief certainly had authority to a, to do a suspension under-- as a department head. And is it the department head under the statutory -

JUDGE: Where did the Fourteenth Court of Appeals go wrong?

MR. HOLMAN : Fourteenth Court of Appeals are actually didn't, didn't addressed that point. Because they s-- they have-- there was no jurisdiction because the city did not direct to appeal. But the a, the were, where did you get hearing examiner may thought. Is the basis relies on the case called "Macra." And the, the, the case of Macra a Macra case of Macra was the cases that wouldn'thear from statute said that, only, only the chief is the department head. But the thing about Macra that you'll have to realize is that, that was issue just 15 days after the statute was amended to include this four persons equivalent language. And so he didn't have the 143.003 language in the statute to considered. That debt an issue is what controls this case.

JUDGE: Now. Let's go back to Justice Medina's original question. When he ask where the statute doesn't provide the Municipality with the right to Appeal -

MR. HOLMAN: Yes.

JUDGE: - point to 143.1016(j).

MR. HOLMAN: And In the, In the very first line ...

JUDGE: Let me ask my question.

MR. HOLMAN: Okay. I'm sorry.

JUDGE: Subsection (c), there Subsection (d) in that provision. Also, 143 point of legal files 7 talks about appeals in commission decisions. Specifically point 2, fire fighters or police officers who decide to Appeal. If the language of (j) is intent to be broad in cover any parties right to Appeal. Why would the legislature filed of necessary to specifically identify fire fighters and police officers. That's, from your point of view surplus each debt, it's a necessary language.

MR. HOLMAN: No, I, I, I, I don't think it doesn't.

JUDGE: And how, how do you reconcile?

MR. HOLMAN: Okay, I, the, the, in this is, this is the also the, a problem that the Court had dwell on here is what, is what the Court said. The Court said, "Because there's no reference to [inaudible] retaliates right to appeal." In all the-- all the references point the fire fighter diminished about should have brought to appeal. That's the wrong analysis, and I tell you why. First of all, most of the references that you talk about in statute. Talk about the fire fighter's right to appeal to the hearing examiners, and they are not talking about the appeal to the district court. Where they are talking about the appeal to the district court is such as time break pointed out on the Waco in the Kelley-- City of Waco versus Kelly case, he pointed out that were they do pointed the right of the fire fighter to

district court to appeal in this Court. Their talking about restrictions on that right, so that shows us that were they wanted to restrict their right to appeal, they could do so. And that's what the City of Garland case points out. Is that no where in (j), 1016(j), doesn't ever restrict their right, in this Court said, that if there are no exclusion, we're not only-- don't read the exclusion into the statute, but we must presume that the legislature didn't intend to exclude them. So therefore is broad enough, we have to presume it's broad enough to, to allow the city to appeal.

JUDGE: This is administrative process created by limit to statute. Correct?

MR. HOLMAN: Correct.

JUDGE: When that happens, the legislature has substantial authority under the law to determine that cantors to that right, the limitation on that right, the limitation statute, the limitations on those rights. This, this is, is this different from a typical common law remedy we're under general jurisdiction that we're just this matter of default the right to appeal with the argument that there must be a define right to appeal in this administrative process for the be-- to be a right to appeal that carry the day.

JUDGE: Yeah, there is no common right to appeal, were the common law right to appeal, that's could be statutory right there is no constitutional right to appeal on that-- you'd say that. If they had to be the statutory right to appeal. But what the Courts have a Wood City Government Court points out, is that were this legislature want it to limit the right to appeal in the statute.

MR. HOLMAN: It's done so. 143.015(a) says, that only the fire fighter can appeal from the decision from the commission. And not make sense because that commission is kind of hired by the city and they, they don't want the city to have to, to bites to that apple because that kind of the city of organization they want to get the fire fighter the opportunity to appeal but not the city. In that situation, In this situation there's a good reason why they did not limit the city's right to appeal, and that is because is an independent third party hearing examiner. The independent third party hearing examiner in order to make that level of point of view then both side have the right to appeal in the, now there's, under the code construction act which is 311021 at the government code. It points out that this couple things of Court has considered construing statutes. And one is complies with the constitution, if this Court were to hold that the, the, there was no right to appeal, the city had no right to appeal, then, this will not has constitution posture.

JUDGE O'NEILL: Let me, let me just clarifies all of that confused. I understand if, if, if there is no right to appeal you got your on constitutional delegation argument. What if they where a right to appeal, but your appeal didn't fit within this restriction. Are you still arguing on constitution delegation or not?

MR. HOLMAN: No, no, we wouldn't be. I mean, I think that the Court said, I think it is so-- city going forth and the blurred wasn't raised. And the Court did address that, and they said that "It doesn't matter to limited you, you stand to have a meaningful [inaudible] and the you know, the without meaningful review than this ...

JUDGE: What you just say if we were to conclude that the exceeding authority is, is not the issue here that you don't give an appeal this for an error, and law or an abuse of authority as you say?

MR. HOLMAN: Right.

JUDGE: Then, there would be no constitutional problem with this

case?

MR. HOLMAN: Correct. I mean, as long as the city has a right to appeal, even though it's a limited right to appeal than as the constitutional posture the thing that the Court below held wasn't there's no right to appeal, there is no meaningful review. The hearing examiner can go off on unchecked and commit whatever arbitrary abuses of power you can do and without any kind of governmental judicial review, and that simply doesn't have constitutional posture.

JUDGE: Counsel, is it true position that subsection (j) each both party is the same right to appeal? that is only, only jurisdiction from no matter said, "Out in next subsection (j)?"

MR. HOLMAN: Yes your Honor that's what we would the frame less ...

JUDGE: If that's, if that's correct. What is the purpose of putting in the sentence, the second sentence of subsection (c) that says, if the fire fighter or police officer appeals to hearing to be exam. Because isn't that surplusage then. And if, if both parties rebound by the limited appeal of (j), why do we even have that [inaudible] about the fire fighter [inaudible]?

MR. HOLMAN: There's-- as you're introduce the statute-- instruction statute your Honor. There a lot of provisions in there, that show what the fire fighters giving up when he asked to go to the hearing examiner. He waste his right to the district court, and he waste his right to appeal exception that goes provisions in the statute. But there's nothing in the statute that says that "The city doesn't authorized the right to appeal." I think what the, what the legislature doing is their are playing out for the fire fighter would his options are. I feel allege to go to the hearing examiner.

JUDGE: But if subsection pre-read that without the second sentence says that "The hearing examiner's decision [inaudible] low part stop right there, and then we go to (j), and both parties get the same right, if to Appeal on jurisdictional matters-- almost matters said, 'Out in (j).'"

MR. HOLMAN: Yes, your Honor. And that's because of the plain language statute the legislation didn't restrict the right.

JUDGE: Understand. But if we read that way and we believe that sentence about the fire fighter or police officer, we don't change the statute many-- so that is surplusage under your interpretation that's senate is surplusage under your interpretation. Is that Correct?

MR. HOLMAN: I think it can be right consistently so I don't think it could surplusage, and I think that the Court doesn't ...

JUDGE: He doesn't add anything.

MR. HOLMAN: The Co-- I, I think it, it may just emphasize what the fire fighters giving up and and and they gave the limited right to appeal.

JUDGE: So she done it?

MR. HOLMAN: Well, every word in statute has to be considered have meaning ...

JUDGE: Oh, just said, "It emphasize is what they says."

MR. HOLMAN: But it certainly, it certainly your Honor. From our prospective does not limit to right to appeal. It, it just emphasize that, that the fire fighter has limited right.

JUDGE: Moment ago you're back to talk by the in constitutionality of the statute if it's interpreted way Court of Appeal asking you address that?

MR. HOLMAN: Yes. An, in, the, the starting point to that analysis is Proctor versus Andrews case and also the [inaudible] cases, and this Court said. And there's an eight fact analysis that determined whether

delegation of legislative authority to a private entity is constitutional or not. And the first factor that analysis is whether there's a meaningful review but the government agency where state or state agents. And that's were this holding below that runs in the trap, because they held that there's city had no right to appeal. And there so than this hearing examiners left unchecked. Now that's not under the co-- constructional that's he, a compliance with the constitution, no were to day just a reason for result nor is it favor to the public interest over the private interest. All of which has begun in considering how properly interpret the statute to private legislative intent, under the code constructional we must presume that's constitution. The legislation intended to the constitutional, and therefore that there will be a right to appeal, right to a meaningful review. Now, this not, there's not the same problem on his delegation Civil Service Commission it's that say governmental-- government delegates [inaudible] like the triple A or the, the federal litigation organization. And then, then you want in to trouble with the constitution [inaudible] constitution. At the, in plain word analysis, I want to point out that, city government has argue on through this analysis. And it pointed out that, when the legislation want it to limit the right to appeal it's certainly has done so.

COURT MARSHALL: Thank you attorney further questions?

MR. HOLMAN: Thank you Kelly.

COURT ATTENDANT: The Court has ready to hear arguments from the respondents.

ORAL ARGUMENT OF RICHARD C. MUMEY ON BEHALF OF THE RESPONDENT

COURT MARSHAL: May it please the Court. Mr Richard Mumey, his the arguments for the respondent.

MR. MUMEY: Chief Justice, Justices. May it please the Court. I think that is true that there's one question before the Court today, that is statutory interpretation about whether 143.1016 specifically (j), grants to explicit or implicit grant the right to appeal hearing examiners ruling to district Court ...

JUDGE: Is there any distinction between facts in your case in a Nuchia case and the Byrd case Garland that inside in the briefs.

MR. MUMEY: Well, the, the Nuchia case was a hearing examiners appeal that action in the claim for statutory appeal base on a recommended demotion. Or it's just say temporary suspension that [inaudible]. But a lot of difference there the Court in, in Nuchia found that they reach that there was a jurisdictional question under that, that act, and that they found out they, they specifically did not reach the, the question does before the Court today about whether there's a statutory appeal under subsection (j) -

JUDGE O' NEILL: What would that said, "Analysis upon here, because there's been a dead act-- accent file right? and a decoration here would resolved the issue just this it wouldn't happen Nuchia."

MR. MUMEY: Well, Here's what I think that the question ask today, is that, further there is no statutory appeal under (j). The real question probably that's more troubles in, in hard question for the Court, is whether there's some means that the city can bring up declaratory judgment to find out that the hearing in examiners did some of those things, either didn't have jurisdiction or exceeded

jurisdiction somehow, and in the, the Nuchia case they did reach that, they found that, there was proper jurisdiction for declaratory judgment. Since that hand though the Court should been very stingy were the fact that declaratory judgment act doesn't grant specific jurisdiction on its own. They has to be some other underlying jurisdiction - basis for jurisdiction. In a case were a hearing examiners goes row. And where the city, would have some worry about this delegation to a private authority. They would-- we believe they would have to rely on a constitutional basis, or a does the property right for underlying basis for jurisdiction on bringing out declaratory judgment action. Under those things I think they could, they could bring-- properly bring out declaratory judgment. They did in this case they do on top of their statutory appeal saying work where exercising the Court's jurisdiction under subsection (j), and we want to decoration on the Court that is hearing examiner exceeded his jurisdiction. One of the, the restrictions by misinterpreting 143 as related to department head.

JUDGE: So there's nothing in 143 that says, "It can be."

MR. MUMEY: There is no specific exclusionary work on it ...

JUDGE: So we're implying, we're implying into the statute that one party can appeal on the other gate.

MR. MUMEY: Well, I think in, in construing the statute, if you look at the statute is in entirety is I think the rules ...

JUDGE: It doesn't stated then we're implying either explicit or implies.

MR. MUMEY: That's right.

JUDGE: So we're implying into them one side as revealed to one set up. Why should we reveal that?.

MR. MUMEY: Because if you, if you look for the specific reference to (j), you look back to subsection (c), where the fire fighter is waiving their right to come to district court as a matter of force as-- it doesn't the commission. And you saying this of the, the restriction that you have to do, if you're going to be able to appeal to the district court from hearing examiner, and they limited ...

JUDGE: What's in-- what is that mean? I mean the only person that does an intentional act in referring to independent examiner is fire fighter? The city takes no intentional act in going to an independent examiner. Right?

MR. MUMEY: The city doesn't. The commission has ...

JUDGE: Cities passive. They just, they just getting drug in right? So since waiver is an intentional act. Why is it imply anything to save the guy who took the intentional act waives particular right, and not to say that the cities. I mean, you couldn't name the city to waive this right by giving sued somewhere they did not taken an intentional act Garland?

MR. MUMEY: No, I don't think that take an intentional act. I think there ...

JUDGE: So why you we impl-- 'cuase one party acts, the other doesn't statute says, "if you take that act you waive it " What is that mean the other party doesn't have the right or ...

MR. MUMEY: Well, I think because it's specifically doesn't grant them an authority. Statute doesn't likewise say the city you have the right under (j), just like it doesn't say only the fire fighter, so it could be ready to waive. If you look at that subsection in isolation, and I think it watching start of what did they have to ...

JUDGE: If you got a personal enter claim, I send you a check, say, "Matthew sign this check." and deposit it you waive your right to sum it, you signed it, deposit it, you waive your right. But if I have a

claim against you, I didn't waive anything.

MR. MUMEY: That's true.

JUDGE: Well, planned. Why you imply-- I mean, into this statute, just says that, one person who does something affirmatively that's an intentional well language but have-- but known right. Why should we imply that, that means the other party has no right's.

MR. MUMEY: I just think that in applying the statutory construction rules reading entirely become to that conclusion by interpreting were this words mean, and so I mean, you can count that the conclusion that-- by reading subsection (j), that it's wide open proposition, but I think once you brought it out, they can't see, and and ...

JUDGE: What do you want to stat-- if, if we were find that both could appeal under (j). What, what's the different's in without jurisdiction and exceeded jurisdiction?

MR. MUMEY: Without jurisdiction would be and and we got a really stretch to find all of those, because the whose process is based on a disciplinary matter, or some other specific Civil Service Provision that the fire fighter's invoking that like to go hearing examiner. Once they do that, I think the hearing examiner under Lindsey and the other cases is that, that hearing examiner has the ability to interpret facts and the statute to apply for the case. So his jurisdiction as decide issue. Exceeding the jurisdiction is much more common, that is a case were is in out-- would grant you that the Nuchia case was probably be right after, because the statute provides and built in a-- the Nuchia case that, that hearing examiner can either approved the demotion or reject. In that case, he said, "I'm on that demoting for a month and then re promote." And that was-- just one of his choices and say, that's exceeding his jurisdiction. There's probably about merely enough whole story it can come up with that, that, the hearing examiners say's "You know, I think they should have fired and I think that should have promoted to the chief". We'll that be why, why beyond this jurisdiction. And I think that the, the city should have to bring that up under some other basis for challenging. But I don't think that's question that we have today, has to whether that particular section grant's on that [inaudible].

JUDGE: Counsel assume you're right. That the statute when specifically says, fire fighter's and police officer's may appeal and that's all. Assuming that you're right about that. What is the cogent rationale underlying, that why would the legislature want to only allow one side to appeal? What make thing's sense of that?

MR. MUMEY: What I think, I think particularly if look at the, the hearing examiners statute is at alternative to what was in place for the first 30 years of this administrative process. And that we've leave under the hearing examiner for 20 years, is that they said, you know we've been take it ease the commission it's been rubbers stand and goes to Court [inaudible] to Court. Let's provide a, a administrative processes for this independent person to come here, and the dissent finale, the dissent efficiency. All of those arguments, I think goes specifically to the first senates in there, where it says that "The, the decision in hearing examiner finding a binding of all parties." And then called out, I believe, and exception for the fire fighter it case, because the originally had this wide open right of de novo review the Court to-- well at the-- hearing examiner said "In reverse of exceeding their jurisdiction." They said, "I don't think that nine days suspension was enough with you. You should be fired." which is not one of this choices. The fire fighter in that case if it have been final

binding period, no more sentences. Then the fire fighter be just had a lot, because the law-- law examiners see the jurisdiction. So I think efficiency of the-- and finality of that administrative process do binding arbitration is been a alternative that the legislature is cannot lay on top of the Civil Service Act to trying provide a lot less intrusion in the, the Court System that was so known before that ...

JUDGE O'NEILL: Where are the hearing examiners powers to find?

MR. MUMEY: They're, they're to find based in both 143057 which the general at Texas' cities to have Civil Service Exercise. In 1016 which specifically is an applicable to Houston, because it sense of racket. Inside there in-- if I believe subsection (f) involve statutes at the subsection. The grant is, the signed authority that commission has, the commissions got this authorities under disciplinary process is in specifically abused within 143170 to 121 which they say, "Here's what you can do for definite suspension, here's what you can do for how you appeal that in definite suspension appeal that." In their choices in like you said, a the demotion they specifically spell out. The commissions authority is to the one of two things, approve it for rejected. In a disciplinary matters such as this, they can reject it all the term that "suspension." They can up hold the revoke, or they can modify somewhere in the middle, they can refuse it.

JUDGE O'NEILL: But is there anything, is anything that authorizes them to say they can't through without higher authority. I mean, are they review to rehearing the merits of the disciplinary action as suppose to whether someone having authority to institute to this.

MR. MUMEY: No. I, I, I don't think that the restricted to do that, and I think there's a entire senate cases since this Court, this Court 1959 for whom prosecute San Antonio Steve Williams case from the fourteenth Court and 2003 which they say, hearing examiners and the commission about have this authority to not only be the fact finders can be [inaudible], but also they have the authority to administrate the statute. They been granted that by the legislature to apply the law that Civil Service Act to the facts to that case, and maybe determination.

JUDGE: The statute gives someone else other than the fire chief authority to promote, demote members statute?

MR. MUMEY: To promote or demote?

JUDGE: Right.

MR. MUMEY: No. I don't believe so.

JUDGE: And what is this?

MR. MUMEY: Specific languages if relates to the department head and it, is it relates to the question that Mr. Holman pleaded earlier, where the city wants to means words about all the equivalent that's no more pledge about. Did they call in the department head, did they call in the superintendent the fire, did they call in the fire chief. There's only one department head under the statute. We believe that, that's detects. And the department head is charge with those responsibility under the Act of promoting, demoting, disciplining those ...

JUDGE O'NEILL: Do, do you have to consider the circumstances herein this is sort of an odd event. What I'm standing was that Chief Tyra was suspended while this investigation happen, and therefore no one could ever demote. What if, what if they found that he had acted improperly and never be insensitive. I mean, your argument no one could ever investigate what happen here, and demote someone.

MR. MUMEY: Well, the facts of this case are the chief that was suspended for one week. In that one week he Chief Tyra had personally

appointed or selected two underlying assistant chief to split that week to take his place to be the fire chief for that week.

JUDGE: To be the head's of the department?

MR. MUMEY: I'm sorry?

JUDGE: To be the heads of the department?

MR. MUMEY: To act that there specific role was acting fire chief. [inaudible].

JUDGE: Why on that [inaudible] to the department?

MR. MUMEY: Well, if we believe that a sort construction interpretation of department head is placing with one person that's Chief Tyra until he's remove. Even though he's absent that's not much different then, if you was on vacation that week can while me. That he put somebody twice, but in this ...

JUDGE O'NEILL: If he's, if he's suspended for 3 month's pending the investigation on the argument, no one can ever be discipline.

MR. MUMEY: Well, in the, in the instance were someone that the department head was somehow make the best stay door or move in a make did not select the replacement. And the, that might be the case, but that's not affects this case. Chief Tyra was suspended for one week, and this was within the first 30 days ...

JUDGE: Was he an alleged fraction, so was he the head of the department while he was suspen-- suspended, is that your position?

MR. MUMEY: He was the department head, while he was suspended.

JUDGE: So his suspension didn't do anything?

MR. MUMEY: It lefting without paycheck for week.

JUDGE: But I mean, you can be suspended whether without pay. What this suspended mean, that scattered me, your not. What this is suspended mean on appointing your acting fire chief other than the acting person is the head of department? Why you're suspended?

MR. MUMEY: Well, I can't ...

JUDGE: That's not, that's not hard. Is it?

JUDGE: No. I, I, I think that for the-- the routine matters that be conducted in the, the business of the department. They pick some assistant chief and that person place at wrong. We think that there a highly-- specific guidelines from the legislature to Civil Services Act as to some of the rules that the chief can take as it relates to disappoint promotion and demotion, because that the access up that these are suppose to be tenure the voice subject to just call standard, and we think that the department head of good rationale. We think that the policy basis by which they say, we had a left one person do that, and not as unused it, where they have a dozen assistant chiefs that come from whatever background, maybe not any supervisory experts. And there will be make a decisions about tenure the Court. What ...

JUDGE O'NEILL: I am sorry. I just back to my original question. Was that he's been suspended for three months, pending an investigation. How would anyone have the authority under your argument? Would the mayor then have to appoint someone with the counsel's authority? and then they will have authority as acting chief?

MR. MUMEY: We believe that if the mayor if-- for some reason he removes that department head fire chief, and the mayor appoints somebody and that's the fact basis in [inaudible]. If that is the case, we believe they have the implicit authority to act. We do believe that that's-- we don't think that a week. We think that's the same as vacation [inaudible].

JUDGE: So the bottom line, the bottom line is your, your point to set the ambulance to the wrong address, so police officers their seriously assured, and there is no in officers at delay, getting to.

And you're guys fault because of this technicality, we should just forget it all. And ...

JUDGE: What is this have to do with justice?

MR. MUMEY: Well, I think there's, there's two things there. One of, one of the other facts to this case is that the, the reason of mayor's suspended Chief Tyra, and that is in put of during it in pair this statute answer faults for merge cause. So ...

JUDGE: So we should punish, so we should punish -

MR. MUMEY: No.

JUDGE: - the chief but not your client, of course.

MR. MUMEY: No. No and if-- a quite frankly there's very little question in this case. If the department head waive one week. In which they had a 180 days to act. They have waited one week if Chief Tyra to showed up the next Monday. He handed at Clark his suspension and the hearing examiner had filed on the mayor's, he would have serve this 15 days [inaudible] rebound.

JUDGE: But then, but then you would be in here arguing. And that, that looks like he is retaliating than that. Because he got punished for doing this, his going to-- and were you got it for-- Neither, the whole reason do you suspend the police-- the chief out of this procedure for week, it because he's implicated it. So what's sense does it make to say? Well, just point of the implicated fact, comes back and that he can retaliate against your client. I mean the reasons is suspended him, was have somebody who wasn't involve discipline your client, was it?

MR. MUMEY: No. I, I don't believe there's anything in the record that indicates, that the mayor suspended Chief Tyra, and take him out the loop, so that one these underlying could suspend down for anything ...

JUDGE: Which your argue for a would, would, would, would that argument and would, would ...

MR. MUMEY: Well, I guess somebody could make their argument, but quite frankly my experience or arbitration of this, this one cases is it's been stand on it's own merits about whether at the hearing examiner find's that Donald Clark violate the rules of the department, and whether the punishment was fitting of the crime, and if it is they Apollo. I mean, the, the, the fact that Chief Tyra was suspended. And the chief merely imposes description. I don't know that, that makes any difference in the appeal that Donald Clark went trough in his-- our objection. He went on argued that he should defense suspended for 15 days. He could appoint that Chief Tyra said, "It's not my fault at all. It's Chief Tyra's fault." And that's-- thar's not what would happen. So I don't know that the fact that Chief Tyra's name is on the paper would have made that issue raise to the top of it, the basis within. I think in issue that-- that the city was trying to dredge up the issue about-- about the constitutionality of the delegation hearing examiners have-- would failed under some illegal analysis, if-- in fact you've find that they don't have the right to appeal statutory on the Civil Services Act. I don't think that, that's question that's before the Court, and I don't think that, even if they wouldn't do that, that, that's doubt come at this early arise to, but don't think that the Court can reach that, so I just want to point that out. It's clear that, that -

JUDGE: Was there-- was that issue raise at the Court of Appeals was in there briefly?

MR. MUMEY: No, no as a matter of fact you know, that the procedure prosecute this case is we both-- we're going after the argue, whether the assistant chief was the department head under statutory

construction, and the Court of Appeals on around to get the jurisdiction issue under subsection (j), and when if their decision. So I, I think that, if you do statutory interpretation construction the statute under the guidelines that before the Court that their established, you come to the conclusion that really-- only the fire fighter has a [inaudible].

COURT ATTENDANT: Thank you counsel.

JUDGE: Mr. Holman how many with one thing. Assumes that is direct to appeal from the city putting the sign back, putting a sign whole revoke. The grounds for that appeal are could find by (j), there is no jurisdiction, there's excessive jurisdiction under strong collusion. This crime that should worn yourself into exceeded jurisdiction, is that right?

MR. MUMEY: Correct.

JUDGE: Help me understand specifically, why that is?

MR. MUMEY: The best case to, to look to-- think the most recent case to look to case of City of San Antonio versus Longoria, it's a one of Justice Green's last opinion through judge panel, just as varying this with the opinion. But it's a memorandum opinion that goes through the bad analysis. And it say's that standard of-- under this-- under this statute. This limited statute, the exceeding authority is when the hearing examiner has abuses his authority, his got to follow the law. He doesn't follow the law. Isn't here in the arbitrary decision here he says, "I am not bound by the Courts." He got is it may, the Courts, the Court say's, Siding other cases, that in abuse of authority exist, when there is a clear and prejudicial error law. In clear prejudicial error of the law would be one like this one, where they, their completely wrong in the law, they, they meet they, they disregarded 143.003, they disregarded they say you are-- and they disregarded the policy of the time having it-- having it attitude. That's the clear prejudicial error of law, that's an ex, exceeding your jurisdiction by acting outside the boundaries of law, and there for its, it's a ...

JUDGE: Do not arguing without jurisdiction. Do not arguing in front of pollution on exceeded jurisdiction.

MR. MUMEY: Yeah. The way that what's you're ...

JUDGE: What you defined as -

MR. MUMEY: Abuse of authority.

JUDGE: - a mistake. If, if I got of wrong -

MR. MUMEY: If -

JUDGE: - that's an a-- obsession or the exceeded their jurisdiction.

MR. MUMEY: - if he was-- it was something wrong on a technical matter and non-material matter. But hear to this positive matter, they, they got of wrong on an issue that's clearly prejudicial and under the ...

JUDGE O'NEILL: In other one that test though, is you going to get review in every single phase, because the arguments can be-- the law is, is relevant, and if we hold well the law that's right. He applied the correctly, then there is no right to appeal but it didn't exceed jurisdiction.

MR. MUMEY: In I, there are cases were the Lindsey cases for example they talk's about-- if just talking about whether is opinion is correct or not, then, then that's not, that's not an exceeding jurisdiction [inaudible]. I know people are talking about whether this correct or not, we're talking about the situation were he is committed prejudicial error of law. This is positive on this issue, that was completely an abuse of his authority, his-- it didn't follow any Texas

law just a person ...

JUDGE O'NEILL: But you're not from the appear on any, any issue of law that's not as positively. It's a bit circular, I think-- I mean, the limitation within the very little limitation at all in (j).

MR. MUMEY: Yeah. I think that the-- it all bellows down to, were the, the, the-- and I think it's 143.10166, where it say's that the hearing examiner has the, the, the duties and powers on the commission. The duties being-- he has to follow the law, so if excee-- if he doesn't follow the law-- if you ask arbitrary and unreasonably than the Court can stepped in. That's what's mean-- meant by meaningful judicial review. And I don't think that there's any inconsistency there. I think it say there's a minor matter something that used to claiming that there's been something legality. I don't think that exceeding his jurisdiction. But you talking about something-- something which he has discretion. I don't think that there-- that would be an abuse of authority, but there's certainly abuse of authority, when he acts outside [inaudible] which is outside those jurisdiction ,and exceeding his jurisdiction to do that. One of point I'd like to-- I'd like to make, my point have said, that they could find by reading (j), the both sides could appeal. I'd like to point out the (j) is the only Section on the statute that talk's about the right to appeal, the views about to appeal. So you can find that [inaudible].

JUDGE: Thank you, counsel that case will be submitted and the Court will not take the brief.

COURT MARSHALL: All rise.

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