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Supreme Court of Texas.
City of Pasadena, Texas, Petitioner,
v.
Richard Smith, Respondent.
No. 06-0948.

September 10, 2008.

Appearances:
Kevin D. Jewell, Chamberlain, Hrdlicka, White, Williams & Martin, Houston, Texas, for petitioner.
Heidi Lee Widell, San Antonio, Texas, for respondent Richard Smith.
Jame C. Ho, for amicus curiae, for the State of Texas.

Before:

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

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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.

CHIEF JUSTICE JEFFERSON: Thank you. Please be seated. Good morning. The Court has three matters on its oral submission docket today and the order their parents, they are docket number 06-0948, City of Pasadena versus Richard Smith from Harris County and the First Court of Appeals District. Docket number 07-0131, John Christopher Franka M.D. versus Stacey Velasquez and others from Bexar County in the Fourth Court of Appeals District and docket number 07-0697, Paul H. Smith and others versus Thomas O'Donnell from Bexar County in the Fourth Court of Appeals District.

Justice Green will not be sitting in the third call. The Court has allotted 20 minutes preside in each argument and expects to complete all arguments well before noon and we'll take a brief recess between in argument. These proceedings are being recorded and a link to the arguments should be posted on the Court's website by the end of the day today. The Court is now ready to hear argument in 06-0948, City of Pasadena versus Richard Smith.

COURT ATTENDANT: May it please the Court. Mr. Jewell will present

argument on behalf of the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF KEVIN D. JEWELL ON BEHALF OF THE PETITIONER

MR. JEWELL: Good morning, your Honors. May it please the Court. In the past, this Court has examined in one respect or another in which of both government code Section 143.057 or it assist a Provision 431016 which are part of Texas as Civil Service Statute applicable to police officers and firefighters. But the Court is never addressed in a fact, as expressing a left open some important statutory construction issues which are presented today.

Statute question here is Section 143.057(j) which allows limited court review of decisions of hearing examiners in three circumstances. Those when the examiner acts without jurisdiction, those where the examiner exceeds his or her jurisdiction and when the result is procured by fraud or other unlawful means. That third scenario is not at issue here. Make a question, the city asked this Court to answer is, "What is the permissible scope of appellate review under Section 143.057(j)?" Or in other words, "What does it mean for an examiner to exceed his jurisdiction thus allowing a court review?"

A second issue depending on we believe how narrowly or how broadly the Court interprets that Section is whether the Section's delegation of authority is constitutional. A third potential issue more facts specific to this case is whether the city's petition in district court was timely filed.

I'd like to talk about the first issue and spend most of my time on that. What does it mean for a hearing examiner under Chapter 143 to exceed jurisdiction?

CHIEF JUSTICE JEFFERSON: Can I interrupt you just for one minute and asked, is it-- it's undisputed that 143.1015 does not apply, everyone agrees on that, is it right?

MR. JEWELL: That is an accurate statement. We certainly agree with that, the respondent has agree with that and the First Court of Appeals agree with that proposition. Currently, pending before this Court is City of Waco versus Kelley which is a decision that involves on appeal under this very statutory provision.

During the argument in Kelley last April, Justice O'Neill asked the city's attorney about the standard under that Section and he responded with two parts to his answer. First, he said that, "Exceeding jurisdiction would include the circumstance where an examiner for these remedies that not-- that are not authorized by statute." But he also said that he believed that, that would not include "clear errors of law." Now, we wholeheartedly agree with the first part of his answer but we do not entirely agree with the second part.

JUSTICE HECHT: Is there a case where there was a "clear error of law" and it was reversed from review?

MR. JEWELL: I believe there, there are in the cases that we've cited in the brief show that whether those decisions ...

JUSTICE HECHT: I don't think they've shown this. They all seemed to say, "Well, it might be but not in this particular case."

MR. JEWELL: But the problem with the standard using the words, "clear error of law" is that it is so broad.

JUSTICE HECHT: Well, but I'm wondering if you have a case in which

that standard or some other resulted in the reversal of the hearing examiner's decision.

MR. JEWELL: I think following into that category of cases would be the legal decision ...

JUSTICE HECHT: To which, which one?

MR. JEWELL: The legal decision. In fact, I believed that Waco versus Kelley itself involves that type of issue. Of course, we don't know the result in that case yet.

JUSTICE HECHT: I saw it in Leal-- that City of Lareda against Leal, is that the one you're referring to?

MR. JEWELL: That's correct, that's correct.

JUSTICE HECHT: I have, I have a note but it held that the hearing examiner had the statutory authority to reduce an indefinite suspension?

MR. JEWELL: Let, let me, let me answer your question by, -

JUSTICE HECHT: Uhm-huh.

MR. JEWELL: - by I was already what I'm talking about it and what we think the standard should be that it applies. We-- those cases in the majority the appellate courts which I have addressed this issue have applied or purported to apply an "abuse of authority" type standard. We think that that's standard should encompassed situations where the examiner acts beyond the scope of the statutory authority he or she possesses, okay? That is a, is an "error of law." We don't think the standard should necessary encompassed all errors of law because by its terms such an 057(j) is necessarily restricted -

JUSTICE HECHT: But ...

MR. JEWELL: - to its situations when they see jurisdiction and when the appellate courts ...

JUSTICE HECHT: You cite these are number of cases, it say that, "The real standard is an abuse of authority." And that, that would encompassed something like this. But I just wonder if any of them have actually reversed the hearing examiner on that standard.

MR. JEWELL: I can go through the decisions that I've cited in the brief and advised the Court as to whether or not the result in those cases was a reversal versus a non-reversal based on the standard that we are advocating but I think for purposes of analyzing those decisions, it's instructive to look at the types of errors that they have analyzed and when you look at those cases you can see-- you can duly categorized those types of complaints into three groups.

You have complaint of errors where the examiner has in fact been alleged to have applied a remedy, a statute that doesn't apply or somehow acted beyond the scope of what the authority was that he or she was vested with. You also have decisions that discussed allegations that the examiner in applying a statute that examiner was authorized to apply made a mistake of law by misinterpreting some part of the statute or something like that. For example, in situations where there's a limitations provisions in the statute and this-- those are misinterpreted and then, a third example is where there's a challenge to whether or not the municipality complied with all pre-requisites to invoked the examiner's jurisdiction such as whether the suspension letter adequately advised the officer of his right to appeal through an examiner, forego commission etc.

I think, under the standard we're proposing an abuse of authority standard, you're looking at the first and third categories being I think fairly assailable on appeal under the, under the statute whereas the second category probably not so much.

JUSTICE HECHT: In this case, if the hearing examiner had said,

"Well, of course, the statute doesn't apply but maybe the rule should be the same here. You could certainly interpret it that way. I don't know what's everybody think. Okay, well, I think I should apply in this case." Would that be the kind of reversible error that you're arguing for?

MR. JEWELL: I think it would be. I-- absolutely. When the examiner reports to apply statute with everyone agrees is outside the scope of his authority that has to come within the fair view of the examiner exceeding his jurisdiction.

JUSTICE BRISTER: Couldn't, couldn't he decide? I think the chief needed to be there. Chiefs did in this even if it been those statute about whether or not chief had to be there.

MR. JEWELL: I think the examiners are constrained by the scope of the statutory guidelines that are included or that to find the scope of authority ...

JUSTICE BRISTER: What I mean, it's a squaring match. They can squaring ma-- one can imagine case where only the chief knows the facts and the chief didn't show up and the examiners says, '$7FYou lose then."

MR. JEWELL: Well, in this particular case have the examiner had the hearing.

JUSTICE BRISTER: I know, I know. But ...

MR. JEWELL: He would know that the chief did not only possessed the fact.

JUSTICE BRISTER: But the, the, the ground that the statute is based on could be used even if the statute wasn't there in some circumstances and then, you-- your argument would be if it is final and binding just like the statute says.

MR. JEWELL: I'm not sure that's true because Section 1015 clearly sets forth the language about the department had presenting the grounds for the suspension and then, only the department had presents the written statement or the grounds presented in the written statement.

JUSTICE BRISTER: You know, you're not taking into account what happens to people when they become judges. When they become judges they say, "I want that day in here." And if that day come in they tend to throw the case out to punish somebody. Why couldn't the hearing examiner? I might happened the hearing examiners too, right?

MR. JEWELL: That's true but I think the hearing examiner's authority is constrained by the statute. And ...

JUSTICE BRISTER: Well, I mean, the judges are, are too the judge might get reversed for doing that kind of thing but would be heart-pressed to say the judge had no jurisdiction.

MR. JEWELL: I, I guess, I don't agree with that completely because the statute has specifically outlined guidelines that are applicable to the situation. Our examiner was selected specifically under the terms of 057 and his authority is constrained to those provisions and those guidelines.

JUSTICE BRISTER: So when the statute says, "The hearing examiner's decision is final and binding," are you saying that applies only to factual findings not to legal findings?

MR. JEWELL: Yes to the factual part and yes, to some of the legal parts. Like I said, like I said ...

JUSTICE BRISTER: Which, which legal findings could a hearing examiner make that would still be ex-- still-- could still be appealed under exceeded its jurisdiction?

MR. JEWELL: And that goes back to the, the categories of types of errors that I was talking about earlier. This case involves a situation

where an examiner has applied a statute which clearly has no applicability here. I think that sort of application or that sort of error of a law it's had to be ...

JUSTICE BRISTER: So it's how long, so it's how long you want? It's not different types of -

MR. JEWELL: Well, ...

JUSTICE BRISTER: - legal rulings. It's just-- if it's really, really wrong then, you can appeal that but it just might be wrong or probably wrong you can't?

MR. JEWELL: I believe for purposes of this case it is sufficient for the Court to hold that an application of the statute that clearly has no application is a sufficient circumstance of exceeding jurisdiction. I don't think it's necessary for the Court in this case to examine all out of parameters.

JUSTICE BRISTER: [inaudible] There will be in the next one.

JUSTICE WAINWRIGHT: And Counsel, it's important to do justice between the parties in this case but-- now this Court we're fashioning rules that hopefully makes sense across the broad spectrum of disputes. So if you're the author of the opinion, you're on the Court. You get to draft the opinion. What conceptually is the rule of law you write that distinguishes between an hearing at examiner getting it wrong on the law versus not having jurisdiction when he got it wrong? Because if a trial judge got it wrong on the law, we've just say, "That was wrong." Not necessarily no jurisdiction. What's the conceptual line you would draw?

MR. JEWELL: I agree and I think the conceptual line is inherit in the abuse of authority standard we're advocating. And I think what ...

JUSTICE WAINWRIGHT: What does that mean?

MR. JEWELL: Well, I think that it means, "An examiner--" I think it can be fairly said that, "An examiner exceeds a jurisdiction when he or she abuses his authority when they purport to act outside the sphere of their permissible authority or when they exercised a power or grant relief that is not authorized under the statutory provisions that applied to them." I think that will include an examiner's use of procedural mechanism that is not available under statute or the examiner is forcing relief that is not available for the statute throughout errors of law and should be assailable through appellate review.

JUSTICE WAINWRIGHT: So then, the determining whether a hearing examiner in your view acted outside his jurisdiction is a different analysis from whether a trial judge acted outside his or her jurisdiction. You would draw that line differently in the hearing examiner context.

MR. JEWELL: Well, I'm not sure it's different because there is precedent from this Court that construes the language exceeding jurisdiction in the way that we suggest. And in particular, I'll cite the Court to a couple of cases.

In Cunningham versus Parkdale which is appears at 660 Southwest 2nd 810, the Court examined that phrase and applied it to a trial court and held that the trial court had exceeded jurisdiction by taking action that was not authorized by statute.

Also, in the case called, "Northline versus Compton at 618 Soutwest 2nd 534, trial court [inaudible] have exceeded its jurisdiction by reinstating a case after he'd-- after he had been dismissed and after his plenary power had expired." I think those cases ...

JUSTICE WILLETT: Your time is closed. Good question. You can

tackle this more on rebuttal but assuming we decide the statute permits no appeal, can you kind of tackle the, the constitutional point for us? You can pick it up again on rebuttal but ...

MR. JEWELL: Allows no appeal?

JUSTICE WILLETT: Right.

MR. JEWELL: I, I think that's a significant constitutional problem. And I can talk more about that on rebuttal and I will but of course, we've, we've said out in the brief how we think the Boll Weevil factors come down. But I think that if the Court interprets such an 057(j) to allow for meaningful review in the sense of an abuse of authority or some comparable standard that maybe sufficient enough under the constitution to survive. But the narrower the scope of appellate review gets, I think the greater constitutional problem exist.

The first factor on the Boll Weevil, I think is the most critical here because that factor goes to whether or not there is meaningful appellate review. And that strikes-- that factor strikes to the heart of what the constitutional inquiry is all about because the driving force behind that issue is, is an, an examiner's arbitrary exercise of power. This Court has acknowledged that concern in Proctor versus Andrews and other cases in which it's examined this constitutional-- the delegations of the Court. I'll pick up with that your Honor on rebuttal.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you Mr. Jewell. The Court is now ready to hear argument from the respondent.

COURT ATTENDANT: May it please the Court. Ms. Widell will present arguments for the respondent. The solicitor general, Mr. Ho, will present argument for the State of Texas. Ms. Widell will open with the first 15 minutes.

ORAL ARGUMENT OF HEIDI LEE WIDELL ON BEHALF OF THE RESPONDENT

MS. WIDELL: Good morning, Mr. Chief Justice and Justices of the Supreme Court. May it please the Court. Officer Smith has two basis upon which-- are two grounds upon which this Court should affirm the First Court of Appeals. The first which I will not discussed this morning unless the Court has questions is whether or not the city timely filed their appeal with the district court. It's our position that they did not. I'll pick that up at the end if, if there are any questions.

With respect to the second ground that requires affirmance, is that the First Court of Appeals was correct in its reading of Section 057(j) of Chapter 143 at the local government code. His interpretation-- that Court's interpretation was reasonable and it comforted with this Court's decision in Houston versus Clark which plainly said, "Errors of law aren't reviewable under 057(j)." And that's speci ...

JUSTICE HECHT: No matter how egregious?

MS. WIDELL: Right. That's what this Court said in of-- in Houston versus Clark. That's my understanding.

JUSTICE HECHT: Well, in case we're weren't so sure, can you just not imagine any error that would be bad enough that it would require reversal? If supposed a hearing examiner said, "Well, I know these are the rules and regulations of the police department but I still I don't agree with them. They shouldn't be. And I'm not going to follow. He was

suspended for doing this and I disagree with that. I'm not going to suspend it."

MS. WIDELL: Okay. Actually, that kind of auto-margin issue is I think picked up under the way the exceeds jurisdiction language has been defined under the arbitration context with respect to manifest disregard of the law which what-- was what I suggested in my brief. Should this Court find that the provisions did the interpretation of 057(j) by the First Court of Appeals does court constitutional problems with respect to the delegation issue. I suggest that that possibly the use of the review standards under the Arbitration Act in Texas might be applicable and might be as-- assist in, in allowing for at, at slightly broader interpretation of what exceeds jurisdiction.

CHIEF JUSTICE JEFFERSON: Well, why wouldn't this be? It seems that all parties agree that the examiner manifestly disregarded the law. It-- so why wouldn't under that standard we reversed?

MS. WIDELL: Okay. Because actually, we do not-- the hearing examiner in this case made a technical mistake. But he listened very carefully to the arguments made to him. I ...

JUSTICE HECHT: Those are not really a technical mistake. I mean, that's -

MS. WIDELL: Well, actually ...

JUSTICE HECHT: - that city can't go forward.

MS. WIDELL: Well, well, in his decision he wrote pursuant to, to 1015. You know, I've-- I see that the law requires that the chief be present. Okay. But he admit listen to an evidentiary argument presented to him by Officer Smith's counsel and a response from the city and that argument was essentially that Officer Smith has the right to confront his accuser and the chief is the person that decided to fire him and the chief is the one that signed the notice of suspension so you know, it's logical to require him to be here. And it would avoid any potential hearsay problems. So that was, that was Smith's counsel's argument. The response by the city was, well, you know, we got this other guy here who was there when the chief signed it. And you know, was involved so he could addressed those questions. But he's not the person that made the decision and this is important. Officer Smith was terminated from his job that he-- that he was good at he enjoyed. And ...

CHIEF JUSTICE JEFFERSON: Is the examiner specifically referenced 1015 and ...

MS. WIDELL: No. During, during the hearing before him, Officer Smith's counsel handed the examiner a copy of 1015 and said, you know, for guidance, this is what the Section, Section 1015 requires that the chief be here which, you know, the underlying basis for that is the same kind of argument that Officer Smith, Smith's counsel was making that, you know, Officer Smith has the right to confront his accuser. He should be here. So the basis underlying 1015 is make sense and comforts with the argument. The hearing examiner listen to it plus, you know, Sections-- Chapters A through F of 143 which actually applied in the City at the size of Pasadena, don't say that the hearing examiner-- don't said out who needs to be present and doesn't say that the hearing examiner can't require people that he thinks are necessary like Justice Brister was a leading to whose, whose necessary to present the case. It doesn't say, "He doesn't have the authority to do that." He's empowered to hear the case and it can decide who he thinks is necessary to do that.

CHIEF JUSTICE JEFFERSON: If that would be the case, would, would the ruling be a dismissal or would it be a ruling on the merits? I, I

understand the examiner here dismissed the case because of the lack of the chief's presence.

MS. WIDELL: Yes, he did that. But, you know, that-- the hearing examiner processes an adversarial proceeding. There were two people in front of them and nobody said, "Well, we understand that you think, you know, the chief needs to be here. And you know, that's a reasonable request. He's not present ..."

CHIEF JUSTICE JEFFERSON: I'm not saying that the, the argument you're making I can understand it that the-- as Justice Brister said, "You know, we need the guide here and if he's not -

MS. WIDELL: Right.

CHIEF JUSTICE JEFFERSON: - here then, you're going to lose." But that's very different from saying, "You know, he's not here and the statute requires his presence as a jurisdictional matter so I cannot hear the case which is everyone agrees is not what the-- that statute doesn't apply to that circumstance."

MS. WIDELL: True. This-- there isn't the statutory admonition under Chapters A through F but he has the authority; Number one, to decide who he needs to have in front of him. Number two, hearing examiners are empowered to grant motions to dismiss like in the Longoria case. You know, that the city-- Mr. Longoria brought a motion to dismiss based on a 180 days requirement under 152(h) and hearing examiner listen to that and said, "You know, you're right." They didn't bring the charges within the period allowed under the statute. And therefore, the statutes hasn't been complied with and you haven't-- your notice of suspension is deficient and he dismissed it right there.

That's the same thing that this hearing examiner did. He had the authority to determine who needed to be in front of him. He's conducting the hearing. Nobody in front of them said, "Well, we understand this is what you think." Could we have a continuance and go get the chief and we'll come back. Nobody did that. So-- and they understood what his position was. So I think the way that hearing was conducted, the arbitrator was clearly explaining his position, the parties understood it. And it's-- the basis was sound because it's an evidentiary issue that's sound.

CHIEF JUSTICE JEFFERSON: So you think it would be a different case if the examiner said, "Fled out, I am applying 1015 to this case. The chief is not here. I'm dismissing it." You think that would be a different case then if there were this discussion of about hearsay and the need to have him in front and be able to confront the witness, that sort of thing. And in the former then, we would have the ability to reverse in the latter it's just a legal error.

MS. WIDELL: Actually, no. Under the standard, no. That's an interpretive issue and that's within the parameters[inaudible] of the hearing examiner that ...

JUSTICE HECHT: But I still don't understand why virtually everything isn't under your position. You say, "manifest disregard" but we can't think of a case.

MS. WIDELL: Well, actually ...

JUSTICE HECHT: And, and if that's the ca-- if that's true, then the hearing examiner is really setting policy and unreviewable policy not even the, not even the commission can do that.

MS. WIDELL: Well, I don't think he's setting policy. He's interpreting the statute. He-- He's limited to the statute in front of them. If he's not proceeding under the statute, I think ...

JUSTICE HECHT: Well, he didn't here.

MS. WIDELL: Well, actually ...

JUSTICE HECHT: I mean that it doesn't apply.
MS. WIDELL: Well, that's within Section 1015. So it is within Chapter 143 but -
JUSTICE HECHT: I mean he could object ...
MS. WIDELL: - Chapter ...
JUSTICE HECHT: The, the, the discipline has to be on blue paper and it's not.
MS. WIDELL: Well, okay.
JUSTICE HECHT: And so I said, "So I'm dismissing it."
MS. WIDELL: That I think would be encompassed by the manifest disregard of the law because that is clearly a bad faith reason for depriving-- in this instance for depriving somebody of their employment. I think, you know, flipping a coin and making a decision that way would be encompassed by the manifest disregard of the, of the -
JUSTICE JOHNSON: One, -
MS. WIDELL: - the law.
JUSTICE JOHNSON: - one. How do we tell the difference?
MS. WIDELL: Because that entails a measure of bad faith and it also entails a measure of failing to render a thoughtful honest judgment when you -
JUSTICE JOHNSON: But [inaudible] ...
MS. WIDELL: - just go outside and flip a coin without any respect to ...
JUSTICE JOHNSON: That's the standard. How do we know this, this hearing examiner didn't just make up his mind that he was going to dismiss the city's ap-- appeal and just say, "Well, this statute applies and I think complies on this given up to in my head on." How do we look into his mind if the standard is bad faith. And we look into the hearing examiner's mind that seems to be pretty nebulous.
MS. WIDELL: Well, ...
CHIEF JUSTICE JEFFERSON: Well, Counsel I want you to answer that question of course but also the SG's time is a, a now ready. But, but please answer the question I don't, I don't want to cut you off.
MS. WIDELL: Okay. Actually, there are lots of standards, statutes that require-- standards of review that require an inquiry into the intent of the individual that made the decision like Title VII. It requires that. It's difficult to prove but it doesn't mean you can't do it and especially if a hearing examiner says something like, "I want it on a blue paper." I think, you know, that's, that's, that's a manifest disregard of the law. That's coming up with-- that's like saying, "I'm going to rule for the persons most attractive." You know, that's a manifest disregard of the law and it's abrogating their, their duty to do something like that. But in this case, because a proctor and, and the statements you made in proctor with respect to the triple A in the FMCS making sure that individuals hearing those cases are qualified and trained to hear them. I don't think we're going to encompass problems like that but if that occurred, I think the manifest disregard of the law would be the appropriate standard. Thank you.
CHIEF JUSTICE JEFFERSON: Thank you, Counsel.

ORAL ARGUMENT OF JAME C. HO ON BEHALF OF THE RESPONDENT

MR. HO: Mr. Chief Justice and may it please the Court.

All arbitration inherently involves the delegation of some measure of governmental power to private parties so as a constitutional matter, Section 057 is really no different than either the Texas Arbitration Act or the Federal Arbitration Act. Determining the appropriate standard of judicial review under any of these laws is strictly an interpreted issue not a constitutional one. In fact, to the depart to, to, to accept the city's position here would essentially require significant and surprising departure from this Court's recent unanimous rulings in Houston versus Clark and, and Proctor versus Andrews. Not to mention a recent ruling of the United States Supreme Court in [inaudible] Associates versus Mattel.

In my limited time, I would like to respond to three of the questions that have been raised this morning. First, I think Justice Hecht mentioned a-- asked there's a matter you know, no matter how egregious, there's absolutely no review or whatsoever. We would submit-- first, not at all. We would submit that the Court certiorari took care of this issue when it enumerated eight factors not just one factor in Boll Weevil and Proctor. Specifically, the factor that requires the selection of qualified delegates of governmental power. We're talking here about triple A that is specifically vested with the power.

In Proctor, this Court not only said that, "The selection itself is not an improper delegation but now acknowledged that selection of this arbitrators, we can, we can respect as qualified individuals to receive governmental delegation to decide this case." This review standard essentially is the same struggle that this Court has, has been saying in the TAA, the Texas Arbitration Act issue which contains remarkably similar language, very restricted judicial review and a specific statement that suggest that other than the statutory standards, you can go no, no further directly not ...

JUSTICE HECHT: But the differ-- but the difference here is that, that absence of review allows the arbitrator to do almost anything he wants. As in, in, in doing so set policy for the government.

MR. HO: Right. I, I think that's the same struggle that we're saying in the TAA context where essentially there's, there's no merits review. There is a struggle about at the auto-margins. What do you do if there is ...

JUSTICE HECHT: But that's between two litigants. That's between two disputers. But here, one of the disputants is the city and the city has policies about how the police department on-- or the fire department ought to be operating and the arbitrator will have to follow us.

MR. HO: We would submit that, perhaps that the auto-margins of, of the word, "jurisdiction," you can imagine a situation where the hearing examiner is essentially saying, "I recognized the laws, acts. I just don't care. I'm going to follow a totally different law." You can imagine the definition of, of jurisdiction that is sufficiently malleable that it would cover at least that much. We would submit that, that is not a merit and it's essentially it's sort of a bad faith, dishonest judgment standard much like the gross mistake come last at that, that, that the Court has talked about.

With regard to this particular case, we would note that on the issue of Section 1015, the state does not fully agree with the parties that, that, that the statute has absolutely no bearing. It is certainly strictly not applicable for the state but as, as I think just like he noted there will be no problem with citing a statute for guidance. The, the right to confront one's accuser is certainly a traditional rule that one, that a hearing examiner could consider sort of a default

principle. This is essentially an evidentiary rule that to the hearing examiner have decided without that particular testimony the hearing examiner was just not going to be convinced of the merits of disputes posses-- position. Perfectly reasonable fact resolution. In fact, the city concedes that there's readily no resolution, no, no, no review of, of fact questions asked here.

Finally, there's a question about whether or not there are any cases dealing with mistake of law. We would submit that this Court has essentially answered that questions certainly in the Clark case where, where the Court unanimously said, "You restricted in your review to just what the statute provides." And clearly, the statute does not provide for review of merely mistake of law.

We also submit that Callahan and CVN Group which are TAA cases submitted admittedly but, but under very similar language into TAA basically the Court indicated no review of pure just sole mistake of law issues. The city relies solely, solely on cases that he do precede or essentially ignore this Court's ruling in Clarkw. Their, their analysis is essentially untattered to the text.

And, and again, we would submit that jurisdiction at a minimum means power. And certainly, the hearing examiner like any court has the power to interpret laws included a power to interpret laws differently than perhaps this Court might. If there are no other questions, your Honor so ...

JUSTICE WAINWRIGHT: If, Counsel, on the constitution on-- constitutional analysis, does the fact that there's an option to go the commission where there is clear judicial review versus going to the hearing examiner where there's very limited review, does that have any impact on the constitutionality of the provision we're, we're looking at today?

MR. HO: It certainly could, your Honor. I mean, that, that is absolutely an option where there would be de novo review. I think our submission would be even under the hearing examiner process that, that is still meaningful review and it certainly factors-- satisfies all eight factors, the remaining factors. It's not just about meaning of review otherwise Proctor would have come out precisely at the opposite if that would be the only issue.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you.

MR. HO: Thank you, your Honor.

REBUTTAL ARGUMENT OF KEVIN D. JEWELL ON BEHALF OF PETITIONER

MR. JEWELL: Very quickly. The response to Justice Hecht's question about whether there has been a case that applies an abuse of authority standard and finds that the examiner exceeds his jurisdiction, I'll cite the Court to recent opinion from Dallas called Kurkendal versus City of Grand-Perry, I do not have the west law cite but the Court of Appeals case number is 05-07788 CV, Kurkendal versus City of Grand-Perry. In that case, the Court examined under 057(j) whether or not an examiner applied a remedy that was outside the scope of its authority held that-- could review that issue under an abuse of authority standard and in fact found that the examiner exceeded his jurisdiction.

Chief Justice Jefferson asked the question about the grounds on which our examiner relied and whether he's specifically referenced Section 1015, he did. You will see in the record the written decision

of the examiner. He references that Section in that decision and it may-- he makes very clear that he is applying that Section. It wasn't just brought up at the hearing. He discussed it in the hearing. He in fact decided the case based on that provision.

JUSTICE HECHT: Do we have any studies or information about how often these hearing examiners are used versus the commission procedure?

MR. JEWELL: I can't point to a study and my answer to that question would be mostly anecdotal. But this comes up quite frequently. Cities deal with this examiner's on a weekly basis and this questions come up repeatedly. So there's a very high frequency. That's why this is so important I think to, to the state.

CHIEF JUSTICE JEFFERSON: How, how they selected?

MR. JEWELL: They were selected from the list of arbitrators under the, under the process under Chapter 143 [inaudible].

CHIEF JUSTICE JEFFERSON: [inaudible] elimination.

MR. JEWELL: [inaudible] We'll give a list of arbitrators and then people go through on this [inaudible].

CHIEF JUSTICE JEFFERSON: Strike when they striking of like three and you get two strikes reside like that on the last should remain. Right.

JUSTICE HECHT: The cities don't have to do this. They have, they have to apt in to this regime.

MR. JEWELL: That's correct.

JUSTICE HECHT: That's in a hundred and forty some half according to your brief.

MR. JEWELL: That's correct.

JUSTICE HECHT: [inaudible]

MR. JEWELL: On the constitutional question, your Honor, given your question assuming that the Court finds there is no review, I think that would implicate several factors under the Boll Weevil test not only the first one which speaks the meaningful court review but also the sixth factor as to whether or not the, the delegation is broad or narrow because if there is in fact no appellate review then that would result in, in a very effective broad delegation of power.

Now, Gone versus Bird when it analyzed the constitutionality issue under 057(j), it concluded that the sixth factor waived neither in favor or against the constitutionality but you recall Bird interpreted Section 057(j) to provide for being for appellate review as it held that an abuse of authority type standard would apply to that and so it acknowledged that there was some appellate review available. But I think that the narrower the Court construes the scope of review the greater the constitutionality problems come into play.

JUSTICE WAINWRIGHT: Even though the officer elected that route and take the arbitration example that was proposed, party can seek to resolve that dispute your arbitration or like to go through the courts given-- depending on the contract that the parties entered in advance if it-- if there was one. And if there wasn't, the parties can still elect arbitration and there's very limited review. Does that the draw into question the constitutionality of arbitration? Analogously here, officer could go through the commission and have clear appellate court review and instead apted to go through the hearing examiner where there's very limited review. So I guess, my question again is, "How does that implicate the constitutionality of this when there's an option to choose no appellate review or very limited appellate review?"

MR. JEWELL: Well, there is of course an acknowledged right to appellate review of arbitration of words and I don't equate it to ...

JUSTICE WAINWRIGHT: It's very limited.

MR. JEWELL: It is limited as our should be limited and Justice Wallace question was assuming there is no appellate review. I don't equate the arbitration process with the examiner process although I think [inaudible].

JUSTICE WAINWRIGHT: And I didn't heard it was equated. I heard that it was analogous.

MR. JEWELL: Right. It was analogous. But I think the Court has to examine the statute on its own independent-- that it whether extends on so independent legs and it can look to the standards in the arbitration process but I think that the Court's decision here ought to be guided by what the appellate courts have done in our case and what this Court has held in terms of construing the phrase exceeding jurisdiction. One point I've like to add to that is I know in the briefing, Smith has, has argued that for common law standards for review arbitrational words should apply. I'm not sure that position helps them because there are cases which should held that under the common law, arbitrational words can be vacated for errors of law or in situations where the arbitrator exceed forward.

CHIEF JUSTICE JEFFERSON: Oh, Justice Willett has pressed the button. I think that means that the argument is over. The case is submitted and the Court will take a brief -

JUSTICE JOHNSON: Could I ask one question regarding -

CHIEF JUSTICE JEFFERSON: - recess after one question.

JUSTICE JOHNSON: - [inaudible] answer on this. Does the city can see that there's some time limit, some number of days that has to appeal from the hearing examiner's decision?

MR. JEWELL: No.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel.

COURT ATTENDANT: All rise.

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