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Supreme Court of Texas.  
CITY OF DESOTO, TEXAS, Petitioner,  
v.  
Justin WHITE, Respondent.  
No. 07-1031.

December 11, 2008.

Appearances:  
Amber L. Slayton, Nichols, Jackson, Dillard, Hager & Smith,  
L.L.P., Dallas, TX, for Appellant.  
Randy Doubrava, Austin, TX, for Respondent.

Before:

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

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CHIEF JUSTICE JEFFERSON: Ready to hear argument now in 071031 City of Desoto, Texas v. Justine White.

SPEAKER: May it please the Court. Ms. Slayton will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF AMBER L. SLAYTON ON BEHALF OF THE PETITIONER

MS. SLAYTON: May it please the Court. Good morning. This case involving the Civil Service Act presents three issues to the court. First, whether the omission of the required notice provided under 143.057-J deprives the hearing examiner of jurisdiction. Secondly, if the statute is a jurisdiction requirement whether substantial compliance or strict compliance is required. And finally, whether or not the statute allows the award of attorney's fees with respect to an appeal involving a hearing examiner.

As a threshold issue, with respect to this notice requirement in the Texas Local Government Code, the issue before the court is whether or not it's jurisdictional in nature and the Fifth Court of Appeals in holding that it was relied on its own precedent that had been handed down from 1991 and 1985 without fully analyzing the court's refinement of this type of issue provided in the Dubai v. Kazi case and its progeny from 2000 until as recent as May of 2008. Under the Dubai analysis, the requirement in the notice letter provided by the police

department is not jurisdictional in nature. Rather it is procedural in nature does not divest the hearing examiner of jurisdiction at all.

In Dubai, the court found that when analyzing statutory requirements like this, we had to look toward a reasonable outcome and consider several factors. The first issue is whether or not the statute actually states that it's jurisdictional in nature. Here you'll find this provision of the Civil Service Act makes no reference whatsoever to this notice element being a judicial -- a jurisdictional requirement. So, that takes us under the factors that had been laid forth by this Court. First --

JUSTICE HECHT: If it's not jurisdictional, what's the penalty for not complying?

MS. SLAYTON: The remedy for that would be taken under consideration by the hearing examiner. This simply because --

JUSTICE HECHT: But what if didn't come up before the hearing examiner rules?

MS. SLAYTON: Well, in that case, Your Honor, I -- I think, it probably would be waived. The election before the hearing examiner is very narrow with respect to the issues that can be appealed. The appealable issues are mainly, jurisdictional. There's another element dealing with fraud and that type thing but we mainly see jurisdictional appeals which is why --

JUSTICE HECHT: It seems like it -- it seems like it might come up a lot after the hearing examiner rules. In an adverse ruling, okay, now, what do I do? Oh, I can appeal. No, I can't be. Maybe that's the first time anybody's noticed it.

MS. SLAYTON: Even in that case, the remedy would be abatement. It would not be to completely throw out any type of review of the disciplinary action whatsoever --

JUSTICE HECHT: Abatement, what do you mean by abatement?

MS. SLAYTON: Abatement, perhaps an opportunity to cure a suspension. In this case, the hearing examiner offered to allow the officer to make an election, another election to go back and elect before the commission.

JUSTICE HECHT: Because the issue came up before the hearing started out.

MS. SLAYTON: It did. It did, and that would have been a proper remedy, and there've been remedies like that that have been applied. Further, if it did come up before the hearing examiner, another remedy would be simply that the examiner could consider the procedural application and whether or not the city had properly done with what it supposed to do in his or her application of the remedy.

CHIEF JUSTICE JEFFERSON: Consider, how? I mean, what would -- what would the -- how would that impact the hearing examiner's decision?

MS. SLAYTON: Well, the hearing examiner could decide whether or not the City fully complied or properly complied --

CHIEF JUSTICE JEFFERSON: And if it did not, then what's the remedy?

MS. SLAYTON: He or she could potentially invalidate the discipline based on -- on the facts below. Here, we know that the officer did have actual notice of the -- of his appellate remedies or the narrowing down of his appellate remedies. We also know he had an attorney at the time of his election, so, in this case, there may not be the -- the type of harm that the hearing examiner would analyze. That would be up to the examiner.

JUSTICE BRISTER: Well, we don't want to -- I mean, who brought this up?

MS. SLAYTON: The --

JUSTICE BRISTER: They -- they did when they objected, right?

MS. SLAYTON: That is correct.

JUSTICE BRISTER: And we don't want to jump from the frying pan into the fire. It sounds to me like you're suggesting if we rule the way you want, then what they should have done is kept silent, had the whole hearing and then they could have thrown it out and start it all over. I mean --

MS. SLAYTON: No, your Honor. That's absolutely not what I'm suggesting. What I'm --

JUSTICE BRISTER: Didn't you just say if they brought it up for the first time after the hearing they can validate the whole thing?

MS. SLAYTON: No, sir. But that's -- or if I said that then I --

JUSTICE BRISTER: I must have misheard.

MS. SLAYTON: then I -- I apologize. Let me clarify what I -- what I intended to present to the Court and that is that if the officer brings up this issue before the hearing examiner, the hearing examiner could consider it in making his or her determination. Meaning, the hearing examiner could consider whether or not the officer received all of the notice that he was entitled to and whether or not the city properly did what it was supposed to do in disciplining the officers. So, that would be to the officer's benefit in that case not to his detriment. To construe this requirement as jurisdictional --

JUSTICE BRISTER: But if they raise it for the first time, hearings done, they get an adverse decision, they come to appeal, then what happens if for -- for the first time, it's raised that they've waived it?

MS. SLAYTON: Well, let me clarify that with respect to appeals of hearing examiner's decision under the Civil Service Act, there is still some lack of clarity. I think the Court, actually is considering another case that deals with that very issue with respect to what the confines of the appeal are in interpreting the statute along those lines. So, that -- that area is -- is a bit unclear. One suggestion that I would make is that the Court could remand it back to the hearing examiner and allow an opportunity to cure the provision or allow another election before the commission once there's time. The remedies, while they're not clear, they're not spelled out in -- in the statute and while the Court may have a better idea of a remedy than what I'm proposing to fail --

JUSTICE BRISTER: Well, when -- when under [inaudible] when would an arbitration panel be without jurisdiction or exceed its jurisdiction?

MS. SLAYTON: Under Section G?

JUSTICE BRISTER: J.

MS. SLAYTON: Oh, the provision in question.

JUSTICE BRISTER: The -- the appeal to the hearing examiner's award to the District Court and the District Court only considers what arbitration panel was without jurisdiction or its exceeded its jurisdiction.

MS. SLAYTON: One situation --

JUSTICE BRISTER: When would it do either one of those?

MS. SLAYTON: One situation when [inaudible] -- with respect to a notice requirement that is set forth in 143.052-F, and just to make sure I'm clear and I'm throwing out these numbers before the Court, that statute is what gives the notice requirements then over in the section in the Justice Brister you just mentioned, it adds the additional requirement, that's at issue in this case. Back under

143.052, notice requirements also include that the department in this notice letter fully set forth in a case of suspension which we had here serious case, the facts and allegations against the officer. But in 143.052-F there is a provision, there is a remedy here that divests jurisdiction because it states that if the department head does not specifically point out in the written statement the notice, the acts of the firefighter or police officer that allegedly violated the Civil Service rules, the commission shall promptly reinstate the person. So, I would submit that if this jurisdictional, this substantive notice requirement is not met, --

JUSTICE BRISTER: [inaudible]

MS. SLAYTON: -- [inaudible] it could divest --

JUSTICE BRISTER: -- after Judge Hecht's hypothetical, the guy does -- the guy or gal doesn't know they're not going to be able to appeal. Nobody tells them, it's not in the notice. They go to the hearing examiner. They think the hearing examiner got -- gets it all wrong and they file appeal and they go to District Court. And District Court, and they start giving the reasons why it's all wrong. And the District Court says, don't want to hear it. You can't appeal on any of those. Now the firefighter says, but nobody told me that. And if the only -- and if that's right, and that's -- they weren't told that and it's kind of unfair, and the only way you can reverse it is on grounds that they were without jurisdiction that not need to be something that takes away their jurisdiction.

MS. SLAYTON: I think, what -- what needs to happen is that or what I would suggest needs to happen is that the court needs to find what the appropriate remedy would be because the statute is silent as the Court has done in other cases applying the Dubai progeny. Here's -- here's the problem --

JUSTICE BRISTER: But if it's procedural, your argument is it's procedural --

MS. SLAYTON: Yes, sir.

JUSTICE BRISTER: -- not jurisdiction.

MS. SLAYTON: That's correct.

JUSTICE BRISTER: The District Court couldn't do a single thing about it.

MS. SLAYTON: The -- the --

JUSTICE BRISTER: The guy would just be out of luck.

MS. SLAYTON: Well --

JUSTICE BRISTER: Because it wouldn't be about fraud collusion --

MS. SLAYTON: Right.

JUSTICE BRISTER: The only grou -- other grounds is without jurisdiction.

MS. SLAYTON: The problem here [inaudible] silent as to the remedy and even [inaudible] statute -- statute silent as to the remedy, I don't believe that it excludes a remedy at some -- at some level. Under Dubai, one of the -- the main requirements of the Court considered and has considered since Dubai is whether or not there's a just and reasonable result that meets the purpose of the statute or whether or not the results is absurd. So, I certainly agree that in the hypothetical presented by you Justice Brister that that sounds unfair. However, I think what the Court has to focus on is, first of all, it's not what happened here. Here, we had a situation that was different so the facts are distinguishable. But second when looking at the purpose of the statute which is to provide for police officers who are not subject to political influence and to provide for competent police officers, that the Court's held that you have to look at the public

versus the individual factors if it gets down to that point.

JUSTICE WILLET: How are we to read or treat Dubai in light of -- as Officer White points out this post Dubai change to the Code Construction Act?

MS. SLAYTON: Well, the Code Construction Act in Section 311.034 applied specifically to a waiver of immunity and suits against a governmental entity which is not at issue here. And if you look at the Court's May 2008 decision in Igal v. Brightstar you'll see that the court also in that case found that wasn't applicable and -- and it wasn't to be considered. And I would submit that's the same here with the -- with the case of Barr. To interpret the statute -- statutory notice requirement, being jurisdictional would mean that in this case and many other cases across the board where a non-lawyer, we're not talking about a criminal prosecutor, chiefs of police, fire chiefs, fail to include one provision, a couple of words in this case a sentence --

JUSTICE O'NEILL: Well, it's an important provision, let's not diminish --

MS. SLAYTON: Yes, ma'am.

JUSTICE O'NEILL: -- the importance of provision but I -- I suppose we could pass a lot of unfair scenarios. I mean, if it were jurisdictional, then someone who had been suspended for ten years could then come back in and say, "Wait a minute you didn't give me that notice and be reinstated," couldn't he?

MS. SLAYTON: That's exactly right, Justice O'Neill. All of those determinations would be subject to void -- being void if there is no jurisdiction, because jurisdiction is an argument that is not waive. That's an excellent point. And that's the point the Court has carried throughout the Dubai progeny. In addition to that you would find that these disciplinary matters would never receive any kind of review whatsoever. It would simply be, well, the department didn't meet the black letter of the law, so let's kick it out. That doesn't meet the purpose of the statute and it doesn't meet the public interest of having officers who are -- are capable beyond their police forces. In this case the Court of Appeals ordered that the department reinstate the officer, remove all issues or all mentions regarding this issue from his record. Despite the fact that he'd been found both by the department and by a very competent hearing examiner to -- to be an officer without integrity. Who had violated portions of the department and Civil Service Act requirements. That certainly does not further the purpose of the Civil Service Act nor does it further public interest in having officers with integrity and a high level of competency on the streets.

JUSTICE GREEN: Is [inaudible] the notice provision also procedural?

MS. SLAYTON: I'm so sorry, your Honor, I can't hear you.

JUSTICE GREEN: The 120-day notice is that also procedural?

MS. SLAYTON: You know, that's an interesting question. And it has not been determined. I -- I would submit that it may be. One thing I find very interesting about this Court's recent decision in the Igal case is that it looks at an administrative jurisdictional document, which in this case would be a notice of appeal and says that the time requirements there are procedural and not substantive, you know. So, I -- I would be interested to see if that issue came up how the Court --

JUSTICE BRISTER: How about if B says the firefighters got to submit a written request along with the notice of appeal if you want to go to the hearing examiner. What if you do the written request the day

after the notice of appeal, is that jurisdictional?

MS. SLAYTON: Before I read the Igal case, I would have submitted that it probably was simply based on a long series of case law from different courts of appeals holding that the notice of appeal that the officer has to file is jurisdictional in nature, is substantive in nature. And even one court held that even being one hour past that ten-day requirement and it was out, there was no jurisdiction. In light of this Court's decision recently in Igal, I'd be interested to see how this Court would apply it to that case. It may very well be decided to be procedural.

JUSTICE BRISTER: You're looking for a help not interest.

MS. SLAYTON: I certainly think that if the Court finds the same statutory impetus here that did in that case, that the Court very well may find that. I certainly believe, what I'm arguing to the Court today what I believe is right under the law what I submit is that the Dubai analysis applies here. And if the Court extends that even to a jurisdictional notice of appeal then it would apply to both sides equally. So -- the San Antonio court, thinks that it does. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, Counselor.

The Court is now ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Doubrava will present argument for the respondent.

ORAL ARGUMENT OF RANDY DOUBRAVA ON BEHALF OF THE RESPONDENT

MR. DOUBRAVA: May it please the Court. There are four reasons why this provision should be jurisdictional. First, if it's not jurisdictional then we're going to turn a mandatory provision that's clearly mandatory into a non-mandatory provision, because the hearing examiner can ignore that a mandatory provision and his decision is not reviewable on appeal. This will render both the appellate [inaudible] and the mandatory provision meaningless and ineffective.

Second, the jurisdictional nature of this provision is further illustrated by 143.052(h) which prohibits, expressly prohibits the department head from disciplining an officer if required notice is not given within a certain time period.

Three, this case is easily distinguishable from this Court's opinion in Dubai v. Kazi because a hearing examiner is a court of extremely unlimited jurisdiction. I don't believe you have the same concern with regard to finality of judgments. And you have a statutory provision that's easy to determine whether or not it was complied with.

And four, I believe if -- if we have some prior precedent the City of Temple Firemen and Policemen Civil Service Commission v. Bender decided in 1990. I think if this Court will determine that this particular provision is not jurisdiction that would effectively overrule the decision in Bender.

JUSTICE HECHT: Is it true that in this case, the officer had the opportunity to withdraw his election and that whole issue was discussed before the hearing started?

MR. DOUBRAVA: Well, actually, that's an illusory statement there, because under previous Supreme Court opinion, specifically Bender, the officer had -- it was jurisdictional, the officer had to have filed his appeal with the commission within ten days. So if they're making an offer now at the hearing examiner within ten days of the discipline -- notice of disciplinary action. That's what that decision ruled. So, now, we're before the hearing examiner and all of a sudden the City

comes in and say, "Okay, we'll let you appeal and change your mind and go over to the Civil Service Commission well he did -- he didn't have that option under [inaudible] in case law at that point in time."

JUSTICE HECHT: Because the time had run.

MR. DOUBRAVA: Because the time had run. And in addition -- I mean, I think that the City never even attempted to comply with the statute. They never issued any type of notice. They came into the hearing and said, "We'll give you an opportunity to go over to the Civil Service Commission," but they never tried to amend the notice or anything else. There's no attempt to the compliance let alone substantial --

JUSTICE GREEN: They -- there weren't any mistake at that point, that -- that those options existed.

MR. DOUBRAVA: I'm sorry?

JUSTICE GREEN: There wasn't any mistake at that point that those options existed.

MR. DOUBRAVA: At the time of the hearing, I believe the officer did know that those options existed because --

JUSTICE GREEN: So, the City's attempted compliance at that point would have been rather meaningless, wouldn't it?

MR. DOUBRAVA: Yes. Just like it's meaningless for the officer to -- they received it that point, because he couldn't have gone over the Civil Service Commission. He had lost that right. He didn't have the ability to do that from this Court's opinion of Bender.

I -- in Dubai this Court put forth the -- this right to go forward approach, and -- as a means of making sure a mandatory provision was still enforced and could be reviewed on appeal. Well, we can't apply that approach here, because even if the hearing examiner takes a look at this in terms of the right to go forward issue it's not appealable. It's not jurisdictional and the District Court can't hear it. And I think that's where you look at this overall statutory scheme. If why -- if the legislature is going to mandate something that happens, then to turn around and say that it's not appealable, that is there's no way to make sure that legislative mandate is enforced, that -- that doesn't --

JUSTICE BRISTER: Well, we've addressed that lots of times. I mean, starting with Hash v. Hines, DT said you've got to send a DTPA notice, but it was 75 days before you file suit. And the argument is, any remedy "Oh, well, and if you don't you lose all your rights." But as we held -- well, if it doesn't -- if the statute doesn't say and if you don't do it you lose all your rights, then we look at what the purpose was and we ended up in that case saying it's an abatement. There's nothing in here that says and if they don't have this notice in the letter, the guy gets reinstated and the department's out of luck.

MR. DOUBRAVA: Right. There's nothing in the statute that --

JUSTICE BRISTER: But where -- so, if the purposes of that is just to give him notice which it clearly is, then why isn't that just like the Hines v. Hash DTPA notice letter if he already knew it, then no harm, no foul.

MR. DOUBRAVA: Well, because if he -- if he knows it, but he knows it ten days after he received the disciplinary action, it doesn't give him any -- it doesn't help him 'cause it's jurisdictional.

JUSTICE BRISTER: It was represented within ten days.

MR. DOUBRAVA: I'm assuming so --

JUSTICE BRISTER: It was represented in the department stuff --

MR. DOUBRAVA: I'm assuming so in this case --

JUSTICE BRISTER: Right.

MR. DOUBRAVA: -- but that doesn't mean that the attorney even knew that that was correct within ten days. I mean, you look -- you look at

this Court's decision in Bender and the -- and the attorney didn't know that he had to provide specific information in his notice of appeal. And he's --

JUSTICE BRISTER: Just -- just by way background on this process. Why -- why do -- do officers normally want to go to the hearing examiner or not and if -- what's -- what's --

MR. DOUBRAVA: What drives part of that, I mean, from normal situation is cost is one thing. It depends on how much they're -- you know, if they're going to have to pay for part of the fee, for the arbitrator. If they go through the Civil Service Commission, there's no fee that they have to pay. Another issue is the appeal issue. If you're looking at a legal issue, that's going to be -- you think you have a good, strong legal issue, you may want to go before the Civil Service Commission because it's appeal -- it's reviewable on appeal that particular legal issue or otherwise you probably want to go before a hearing examiner. So, those basically the factors that are come into consideration for that.

I just want to make reference. In 143.052(h) it says that the department head may not complain of an act if required notice is not given within 180 days. In this Court's opinion in Houston v. Clark from 2006 did analyze this -- this -- had some bill analysis included in there for this particular notice provision on the limited jurisdiction of a hearing examiner. And the bill analysis that's described in that case says that that provision is described as adding requirements to the content of the letter of disciplinary action. So -- so, it's adding contents to this notice letter that has to -- that the Police Chief has to give them. It's clear that the -- if that notice is not given within 180 days, the Police Chief cannot complain about any act beyond that. It makes it clear.

What we're looking at -- this is -- [inaudible] case really. When you're looking at the question as to what entity is the proper authority to hear the dispute. The Chief of Police must first make an initial decision and comply with the statute before anything else can go forward. That is the proper entity that has to give this notice, that has to -- and -- and must do so within 180 days. I believe that also supports the jurisdictional nature of this provision. And -- I want to -- with regard to Dubai, I guess, I want to bring up one of the issues in Dubai is that we have this court of general jurisdiction or state district court. And we're not -- and we overturn [inaudible] as to say we're not going to presume that the district court does not have jurisdiction, we're going to presume that a court of general jurisdiction, the district court, has jurisdiction and then see if there's indications that it should not be there.

Well, here, we have a hearing examiner, a court specifically created by statute. And there's a long line of cases saying when -- in this situation and in administrative agency situations, we're not going to presume that you have general jurisdiction, we're going to presume basically the opposite and start from that approach. And this is in line with well-established Supreme Court precedent in the area of the Civil Service rules. And that City of Sherman v. Arnold from 1950 and Bichsel v. Carver from 1959, both of which stated that the full performance of all conditions precedent to the Civil Service Laws is an essential prerequisite to the jurisdiction of the removing body over the subject of the removal of an officer.

The next concern I'm going to rest and address is this the lack of finality of judgments. I don't think you'll be able to challenge the hearing examiner jurisdiction, you know, a year down the road or ten



years down the road, because I think that challenge has been prescribed by the statute. It may be jurisdictional in nature and it's jurisdictional of a -- of an administrative type court. But the statute says your remedy is limited to an appeal to the district court. So we can't come in and challenge this two years down the road. And in fact, I think the appeal timeline that all officers across the state comply with is set forth in 143.015, 'cause it provides a ten-day deadline from which to appeal to the district court.

JUSTICE BRISTER: That's true of all of jurisdictional defects. You could have appealed. I mean, that's the funny thing about subject matters jurisdiction. You certainly could have raised it at the time and have a right to appeal and say there's no jurisdiction, kick it out, but you don't have to. You can wait 20 years and then say and I agree with you, it says you can appeal if they were without jurisdiction. But if it's subject matter jurisdiction, it doesn't matter that they don't.

MR. DOUBRAVA: In the administrative agency context, I believe there are number of cases -- I don't have -- I have to get the court with those cites that discuss kind of that issue. And that is if you have an agency and then you don't file your appeal from that but then you sue them to say they didn't have authority to do that, that this Court has held you have to go through that process first once you -- you have to file your -- if you miss your 30-day appeal deadline to appeal from the administrative agency to District Court and then you go to sue to challenge that.

JUSTICE BRISTER: Well, the way you do it is a collateral attack. You just keep showing up for work and -- and taking your salary and make the agency do something about it and then you collaterally attack it and say they have no jurisdiction.

MR. DOUBRAVA: They're not -- they're not going to -- but they're not going to pay you [inaudible]. He's already gone, he's out, he's kicked the door, they've taken his badge, his gun, his shield, everything that he has and he doesn't have the opportunity to really come back in --

JUSTICE BRISTER: But I'm troubled --

MR. DOUBRAVA: -- at that point.

JUSTICE BRISTER: But -- I mean, you're -- you're arguing that everything that administrative agencies do isn't subject to the normal subject matter jurisdictional rules.

MR. DOUBRAVA: I think if you go through the process -- I think that I -- I have to go back --

JUSTICE BRISTER: You just said that --

MR. DOUBRAVA: Right. Yeah, I think if you go through the process and you don't file your appeal within the 30 days, yes.

JUSTICE BRISTER: Well, then, that sounds like something other than subject matter jurisdiction.

MR. DOUBRAVA: I think it is, and we -- I think what we're looking at here is the -- this is a different type of subject matter jurisdiction when you're talking about this type of court versus our -- our common law courts or our constitutional courts that we have. It's a different type of jurisdictional issue and it's just basically the question of did they have authority. And under the -- and we look at under the statute, does this person have authority and if they don't we get to challenge it and in a direct appeal. We don't get to challenge it two years later.

JUSTICE WAINWRIGHT: Let -- let me back you up on -- under 143.057, the notice. It's not timely provided when you say the only remedy that

the statute -- statutory scheme allows for in order to enforce that and keep it mandatory is that there'll be no -- no jurisdiction because you can't review or view by the District Court?

MR. DOUBRAVA: Correct.

JUSTICE WAINWRIGHT: So, you're searching for a remedy and -- and it sounds like the only way to have a remedy to enforce this mandatory provision is to say there's no jurisdiction if it's not complied with. That -- that kind of is a different approach to a no jurisdictional argument than we've heard before. Have we ever held that in order to have a remedy, we've got to find that there's no jurisdiction --

MR. DOUBRAVA: Yeah.

JUSTICE WAINWRIGHT: -- for that mandatory provision? Normally, we'd look at it, kind of on a different -- a different approach if there's jurisdiction to do it or not -- not what's the remedy. The only way to have a remedy is to tell there's no jurisdiction. So, conceptually, that's -- have we done it that way before on a jurisdictional issue?

MR. DOUBRAVA: Not putting it in that -- in those words. I think you've done it in terms of looking at what the legislative intent is in trying to make sure we enforced the legislated -- the statutory mandated provisions. I mean here, if the legislature is going to mandate, there's a whole of bunch of -- there are like five different mandates that use the word must for this notice provision. So, if they're going to mandate that and there's no way to make sure -- there's got to -- the overall scheme in looking at this, you think they're going to want to have some way to make sure that their mandate is complied with. Just -- if you're going to make a meaningful, reasonable interpretation of that. And the only way to make sure that their mandates in this statute are complied with is if the provision is jurisdictional because of the limited appeal to District Court.

JUSTICE WAINWRIGHT: Have you cited any cases where we've taken that approach before?

MR. DOUBRAVA: Not that specific approach. I think I've seen other cases where you -- you look at the overall statutory scheme in terms of determining the intent of the provision.

JUSTICE BRISTER: So -- but the effect is if -- if we have a police officer who did something terrible and they kick him out of the Police Department and the letter doesn't have this -- everything's done fine except we didn't tell him that by the way, if you go to the hearing examiner you can't appeal. Then if you don't tell him that, it's all dismissed and he must be reinstated and go back to work. That's what the legislature intended.

MR. DOUBRAVA: I don't know -- I can't address on that particular issue except --

JUSTICE BRISTER: But -- I mean, that's the problem --

MR. DOUBRAVA: -- for only one thing.

JUSTICE BRISTER: -- that's the problem with what you're saying. What if I mean the police -- you know, whatever these guys did in Athens. The police officer shoots a teenager and is riding in the streets and because we left a sentence out of the letter informing of a right that he may have already known about from his lawyer anyway, then the only thing we can do is order him reinstated full pay.

MR. DOUBRAVA: Well you've got two -- two -- two things going there. One is if you allow the City which currently, I don't believe that the City is allowed to do this. If the city can -- can't -- the statute -- there's another provision of the statute that says that the department head cannot amend his notice of discipline, okay. And this

Court in *Bichsel v. Carver* determined that that was mandatory and jurisdictional basically. It could not file their subsequent amendment. And you look at the overall scheme here is we have officers, and the reason why we had the Civil Service provision, as I see it daily, is that officers go to make an arrest. They arrest somebody who's the son of a council member, son of the mayor, friend of somebody who is politically connected. All of a sudden they get in trouble. They start taking heat -- from -- they're -- they're told to change this arrest report, put it in another file, do whatever they do or you're going to get fired. And the Civil Service Statute was designed to protect against that. If you give the leeway to these cities and you give the leeway to the head of the -- the police chiefs and make some gray areas, that provides them with the opportunity to harass an officer --

JUSTICE BRISTER: Well, I'm against all of that --

MR. DOUBRAVA: -- to [inaudible].

JUSTICE BRISTER: I'm against all that but I gather from what you're saying the answer to my question about the case where there's a bad -- really bad police officer and there's riding in the streets because of what he or she did, the only -- because you left a sentence out to mandatory reinstatement, your answer is yes.

MR. DOUBRAVA: Yes, they have to be reinstated. And it's just like how -- what other enforcement mechanism do you have, it's -- we look in the criminal law area and the, you know, in the Miranda cases where you're trying to -- you exclude a lot of evidence.

JUSTICE BRISTER: Okay.

MR. DOUBRAVA: You exclude evidence that -- of somebody who's clearly guilty because you're trying to enforce a particular important provision of, in that case, the Constitution and in this case the statute.

JUSTICE GREEN: Okay. So, the City messes up there and the -- the officer has to be reinstated, full back pay and so forth. Can the -- is the City then entitled to go back and restart the process or is it over?

MR. DOUBRAVA: See, that's where -- I mean, personally, that's where I think the problem is with everything here. Under *Bichsel v. Carver*, the answer would be no. Okay, but if this Court were to go back and look at *Bichsel v. Carver*, I think the answer could be completely different. 'Cause, I mean -- under *Bichsel v. Carver*, what you had was --

JUSTICE BRISTER: Is that us or somebody else?

MR. DOUBRAVA: That was a long -- that was 1959.

JUSTICE BRISTER: Us or somebody else?

MR. DOUBRAVA: That -- that was somebody. That was Texas Supreme Court --

JUSTICE BRISTER: Okay.

MR. DOUBRAVA: -- 1959. What -- what the -- that's exactly what the chief tried to do. He gave a notice, and then it was pointed out it was defective, and then after the ten days, not much after the ten days, he went ahead and -- and reinstated the officer, gave him back pay, so just as is if he still had been employed that whole time and then reissued the notice to go forward. And the court back in 1959 held that you couldn't do that. So that's -- that's kind of the situation that --

JUSTICE GREEN: Same statute, same sort [inaudible].

MR. DOUBRAVA: Same statute, same everything. And then look -- that's where it brings -- it kind of brings us to this --

JUSTICE GREEN: One other thing before you go on. Do I understand you say then that if -- if in the circumstances that happen just like

this except for the fact that nobody raised the -- the question at the hearing today [inaudible] and the examiner, you know, affirmed that the chief's decision and so forth. And -- and then ten years later, you couldn't come back and [inaudible] --

MR. DOUBRAVA: That -- that would be my opinion. And that -- that would be because we have a -- it's -- it's a different type of jurisdictional issue here than I think we're talking about with our Constitutional Courts. And it's a statutorily created type jurisdictional issue with a very limited ability to attack it and it sets forth in the statute how you can attack it.

JUSTICE MEDINA: What else were you going to add before Justice Green asked that question?

MR. DOUBRAVA: Oh, I was going to talk a little bit just about Bender, the case from 1990 in Bender. And -- and just in terms of how -- I think we're at -- basically, if we ruled this as not jurisdictional, we were simply going to overrule Bender too and that's why I'm going to bring it up. Bender was a case where the -- a police officer's attorney sent in a notice but it was -- it is within the ten days of the notice -- for the notice of appeal deadline. But he failed to include this in the notice of appeal one of three statutory items as to basis of the appeal. The court ruled both that the ten-day -- and then it subsequently was pointed out to him within a few days and he resent an amended notice that included those items, the court said both the ten-day timeline and the -- the required provisions that have to be in that notice of appeal, both of those items were jurisdictional so they threw his appeal out rather than having it -- having the -- having an ability to amend your pleadings so to speak after the ten-day timeline. And I can't really see a clear distinction in between the results in that case and the results that will occur here if this was not jurisdictional.

CHIEF JUSTICE JEFFERSON: Thank you.

Any further questions?

Thank you, Counsel.

MR. DOUBRAVA: Thank you.

JUSTICE WILLET: Ms. Slayton, what about -- what about Bender? And we said at 9(d) we required a pretty strict compliance when officers are -- and we -- we said they [inaudible] follow when it says must, must, this must and that's jurisdictional. And is there any kind of unfairness in requiring the strict compliance of officers and a substantial compliance for cities or does Bender sort of give way after Dubai?

REBUTTAL ARGUMENT OF AMBER L. SLAYTON ON BEHALF OF THE PETITIONER

MS. SLAYTON: I think Bender is distinguishable. I do not believe it gives way and I do not believe that -- that the Court were to rule the way we're asking the Court to rule, that it would overrule Bender. And if you're looking at it from a fairness perspective and you make a certain persuasive argument, well the officer has to do more, has to comply in a stricter way than the City does then -- then that -- that might seem unfair. But I think the legal distinction here that's critical is that in Bender and in subsequent case law, the court was analyzing the officer's notice of appeal to a decision maker, to the commission or the examiner in that case. And the Court handed that notice of appeal conferred jurisdiction, much like under the rules of appellate procedure, the notice of appeal that a litigant files with

the trial court is what confers jurisdiction on the appellate court and then the same with respect to the Supreme Court. We're not dealing with that type of issue here. What we're dealing with in cases like the issue -- the case at bar is whether or not a notice letter sent to the officer complied with the procedural requirements set forth in the statute. The notice letter that's in the record you'll see is countless pages long, I would estimate at least ten pages long and includes everything else required by this statute which is quite lengthy. But for -- unfortunately, the provision in question by my count, the city include eight of the nine procedural requirements. And while this statute says for each one of them that the notice must, the word must is used repeatedly, this Court has repeatedly held there's no question that while must creates a condition precedent and is mandatory, the -- the word alone does not make the issue jurisdictional. We do have to look again at the legislative intent here. The legislative intent was certainly to give a meaningful review.

JUSTICE O'NEILL: But you would agree that this is a bit of an unusual situation because of the limited appellate rights, there would be no mechanism to enforce the legislatures could amend that?

MS. SLAYTON: I do agree that makes the consequences more complicated. Absolutely. I don't agree that that foregoes any type of affirmatives --

JUSTICE O'NEILL: So, if the -- the chief didn't put reasons in, if they only hit one of the requirements, then there'll be no way to enforce that statute because of the limited right of appeal?

MS. SLAYTON: Well, the reasons, first of all, are different. The statute specifically allows that with respect to a more serious case like the case of suspension, failure to adequately give notice of the reasons of discipline results in automatic reinstatement. And it -- it does divest the hearing examiner of jurisdiction or the commission of jurisdiction, so that is distinguishable. However, what the statute does -- does not speak to is whether or not there is any type of additional administrative remedy allowed. And I think just -- the justice was right, Justice Wainwright, when he pointed out that when considering jurisdiction, you're not considering remedies and in this case, the officer is trying to hide behind the jurisdictional arguments.

CHIEF JUSTICE JEFFERSON: Well, you say -- you -- and -- and there's a counter to this argument. You say that hearing officer offered to abate the proceeding so that the notice could be cured and -- but the respondent said well, his ten days had already run. He -- I mean, there is no way, that -- that abatement would have had any positive impact on his appellate rights or his choices. What do you -- how do you answer that?

MS. SLAYTON: Well, the hearing examiner offered to allow the claimant to change his election. And --

CHIEF JUSTICE JEFFERSON: How could he --

MS. SLAYTON: -- I don't believe --

CHIEF JUSTICE JEFFERSON: How could he change his election when the ten days were -- had -- were -- were done?

MS. SLAYTON: There's nothing that disallows the examiner from suspending that. The Court has held that the examiners have a lot of authority to say that --

JUSTICE BRISTER: But the statute says you got to appeal to the commission or the hearing examiner in ten days. So, the hearing examiner and you all can all agree, okay, you can go back and go to the commission but what's the commission going to do? They're going to say

this is late.

MS. SLAYTON: They're going to say it's jurisdictional.

CHIEF JUSTICE JEFFERSON: Uh-huh.

MS. SLAYTON: Well, I -- I believe they'd be wrong if they did, Justice O'Neill. I also believe that this type of remedies, I mean, the court has -- has included these type of remedies before like in Loutzenhiser, letting the -- the litigant there go back before the Commission's Court. You know, we have the issues with lack of giving notice in the Texas Tort Claims Act and the -- the Court has also allowed the -- the litigant in those cases to go back and cure that. So, why --

JUSTICE WAINWRIGHT: The legislature fairly quickly said no, that's jurisdictional.

MS. SLAYTON: Well -- and you know -- and that's a good point, Justice Wainwright, because there the legislature clarified its intent. Here, the legislative intent that we have in the statute does -- does not include a jurisdictional mandate at all. So, if the Court --

JUSTICE WAINWRIGHT: Actually, it doesn't include any remedy as you pointed out for failure to comply.

MS. SLAYTON: That is correct.

JUSTICE WAINWRIGHT: So, if we cut right to the chase, the options are create a remedy or let jurisdiction be the remedy.

MS. SLAYTON: And I think that while --

JUSTICE WAINWRIGHT: [inaudible]

MS. SLAYTON: Yes. And if I could just say in 15 seconds briefly if the court would indulge me. I think that that's true. It's important to remember when dealing with this remedy conundrum that we also have to look at the public versus legislative purposes. Public outweighs the Code Construction Act and this would allow no meaningful review of the potential road officer which goes against the legislative intent as expressed in legislative history. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you. This cause is submitted and the court will take a brief recess.

SPEAKER: All rise.

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