ORAL ARGUMENT — 12/3/97
97-0323
CITY OF ODESSA V. BARTON

O'LEARY: It is my privilege today to represent my hometown. In this case, in which the lower courts dismantled a comprehensive administrative scheme set up to determine whether or not there was just cause for terminating a city employee.

This case of course begins with a personnel policy and procedure manual. Because that was where Mr. Barton got his just cause status. But the manual did a lot more than that. The manual defined "just cause." The manual provided an administrative process for resolving issues relating to just cause. And significantly the manual gave the administrative body, called a "hearings panel" the power to remedy the termination, suspension, and disciplinary action. They could restore a discharged employee to his position with all pay and all benefits. They could give an employee the very remedy that an employee could get in court with the exception of future loss of earnings, which he wouldn't have if he was back at work.

The second really significant thing in this manual is it expressly says, "the decision of this hearings panel is not subject to review or appeal. It shall be final."

GONZALEZ: Was there a decision by that body?

O'LEARY: No. There was a final order, but it was not by that body.

GONZALEZ: Whose burden was it? After he was fired, he said, "You fired me because you don't have just cause." You admit that the City had the burden to show that it in fact did have just cause, and it had the burden to show it at that administrative hearing. Do you agree with me so far?

O'LEARY: In part.

GONZALEZ: Where do we disagree?

O'LEARY: They had the burden to introduce evidence supporting the supervisor's termination that is that there was some evidence of just cause for firing the man. But the testimony in the record, and you will find this at pages 739-744, and it's by the only permanent member of that hearing's committee, the Director of Personnel. And with respect to the burden of proof, I think the lower court made too much out of it. But what the director says is, "Well, we listened to the Supervisors, we listened to the employee, and we tried to decide if based on what we heard and saw." Insofar as there being some kind of specific burden preponderance of the evidence or what have you, no. They do go first, the city goes first, and they do have the duty of putting on some sort of evidence to justify.

GONZALEZ: But if the appeal board makes no findings of fact or conclusions supporting the City, and just leaves it open, haven't you failed in your burden?

O'LEARY: I disagree with the premise. You've got to go back a few years to the old substantial evidence rule. And what was reviewed under that was the order. Most of the agencies did not make findings of fact or conclusions. They simply came up with an order. Some did make findings of fact, but most of them did not particularly the oil and gas division of the railroad commission, which was the primary administrative agency in those days anyhow. All they did was make it harder.

GONZALEZ: But here, we're dealing with an individual whose status instead of at-will has been elevated from the at-will category to like a tenured employee that cannot be fired except for just cause. This is different from an oil and gas situation.

O'LEARY: My point is this that we're not reviewing findings and conclusions. We are reviewing the action of the order.

OWEN: Was there an order?

O'LEARY: Yes, but it was by the supervisor that terminated the man. Since Mr. Barton requested the hearing and would not go on with it, the panel concluded the hearing. Rightly or wrongly, they concluded it.

GONZALEZ: They did not conclude the city had just cause in firing him.

O'LEARY: No, they didn't conclude anything. Nothing.

GONZALEZ: Wasn't that your burden to conclude to bring that hearing to a final conclusion of the appeal's board and get a finding that your firing had been justified?

O'LEARY: I don't think so. This thing is a cooperative effort.

ABBOTT: Is that what the manual? Does the manual say it's a cooperative effort?

O'LEARY: No.

ABBOTT: Does the manual say that the supervisor can issue an order?

O'LEARY: Yes.

ABBOTT: Where does it say that in the manual?

O'LEARY: It's in section 9 where it talks about "discrete termination hearing." It's page 124, on page 4 of in section 9. It says, "If an order of termination is issued after the hearing, the employee shall have 5 working days." And then secondly, on page 126, paragraph 5, Order after hearings. "The order should state the date of the order and the date and place of the hearing, the findings of fact made and the basis of the order and the disciplinary action ordered."

GONZALEZ: Findings of fact, and there were none here.

O'LEARY: They were made by the supervisor.

GONZALEZ: I'm talking about the appeals' board.

O'LEARY: No, they did not.

ABBOTT: According to my reading on the post-termination appeals hearing it says that, "A 3-person hearings panel shall conduct that hearing." And I don't see anything in there where it says that, once you get to the post-termination appeals hearing, that you can have an order issued by the supervisor?

O'LEARY: No, it's a two-step process. And you have a pretermination hearing by the supervisor. Now the supervisor is required to issue a formal order that is you're guilty of these crimes because these are the facts and the result is, you are terminated, you are disciplined whatever.

ABBOTT: And we went beyond that.

O'LEARY: Yes. You go to the hearing's panel. Theoretically they are supposed to issue an order if I ask for that hearing.

ABBOTT: And that hearing was asked for?

O'LEARY: It was asked for. But my contention is, that two things: you have a good faith duty to cooperate with that hearing panel. That's the purpose of it.

ABBOTT: He says he didn't have any burden in that hearing. Where is that good faith cooperation requirement?

O'LEARY: That's by applicable law that's cited in the brief that you had a good faith duty to cooperate in administrative hearing. Secondly, that you have an obligation to preclude your administrative remedies to the fullest extent. He didn't. The appeal's panels said, "well he asked for this, he quit, he walked out before barely got started."

GONZALEZ: He gave his testimony and walked out. It's like in a civil case, a plaintiff

doesn't have to be there or a party doesn't have to be there, and the trial proceeds.

O'LEARY: I think that he never got finished with it. They asked him a few questions, and he said, "this is kangaroo court and he left and took some of the evidence with him," is what the record shows.

HANKINSON: If Mr. Barton had not requested that the hearing panel review the supervisor's decision, could he then have had the limited right to judicial review that you say he was entitled to?

O'LEARY: My position is no. They are either under administrative law or contract law, whichever way you go, the administrative procedure layout before he can seek judicial review by whatever means.

HANKINSON: And that's your failure to exhaust the administrative remedy's argument. Then it's your position though that by requesting the hearing, he had done all the steps that he needed to do and that he was entitled to limited judicial review then of the supervisor's work, not a jury trial for breach of contract, but the substantial evidence review that you say?

O'LEARY: But that's not really my position. My position is, not only does he have an obligation to request the hearing, but he has a good faith duty to help them resolve the issue. And secondly, that he has to pursue that, and you don't pursue it by walking out the door.

OWEN: What if find that he did everything he was required to do, and that the post-termination appeal's panel should have reached a decision? It should have heard the evidence and rendered a decision. And what if we hold, they should have done that and didn't do it. Where do we go from there?

O'LEARY: You are still under the substantial evidence rules. Number 1, there is an order, a detailed order of termination, that was in effect. It had concrete adverse consequences. He was fired. He never went back to work. So there is an order that you can review.

ABBOTT: But is that order not wiped out once you go to the post-termination hearing?

O'LEARY: I don't think so. It stays there. What if he goes and says, "I made a mistake?"

BAKER: Let's go back to where you are now, that he's appealing Mr. Cody's order, that particular section doesn't say that if that happens, it's nonappealable does it?

O'LEARY: No.

BAKER: So it's somewhat crucial then to your argument that he didn't exhaust his

administrative remedy to say in effect that he got into the second tier before the hearing. And you can't rely on the Cody order for the same reasons that you rely on what happens after the hearings now?

O'LEARY: What I'm saying with respect to exhaustion, is that if there was a reviewable order, then he's obviously exhausted. If there was not a reviewable order, then he might have ____ it, because 1) he didn't pursue...

BAKER: Well if Mr. Cody's termination order is reviewable, then he's exhausted his administrative efforts?

O'LEARY: I think that's true.

BAKER: So he has right of appeal?

O'LEARY: I believe that's true.

HECHT: On substantial evidence?

O'LEARY: Yes.

BAKER: Based on that, then it's still your view that despite the fact that it changed Mr. Barton's status from at-will to a just cause employee, that all this mechanism is not a contract?

O'LEARY: No.

BAKER: It's nothing more than an administrative procedure?

O'LEARY: No. In the long run, I'm not sure it makes any difference. But let me answer it this way. There are some indications that there was no contract. Number 1, Mr. Barton testified there was no contract, and nobody ever guaranteed him that he would be there for any length of time.

GONZALEZ: What does it mean when you have a just cause that the manual gives you, doesn't that give you a right to a job, that you're going to have a job with the City as long as you do your job, and they cannot fire you except for just cause?

O'LEARY: What I was going to say is there are indications that there was no contract. But on balance, I think there was an agreement for two reasons: 1) he signed a receipt for the policy and procedure manual and he says, "I agreed to abide by this thing."

GONZALEZ: And that gives him certain rights?

O'LEARY: Yes. And number 2, as you pointed out, they made a tremendous change in the general at-will status. But that's not the end of it. They've got the administrative process set up. They've got the finality provision, and they've got this board that can afford to render.

GONZALEZ: A jury heard the reason why he was fired and said, "the reasons were in violate and he's entitled to a _____?"

O'LEARY: The basic issue, yes. The basic issue was: Do you find the City of Odessa had just cause?

GONZALEZ: And the jury said, "no."

O'LEARY; The jury said, "no."

ENOCH: My question is, you haven't argued it here this morning, is there any issue about Mr. Barton abandoning the appeal by the action of walking out during the appellate process? I think there is some great concern that once he requests the appeal, everything is off and the City's got to go forward and on the appeal it's got to meet its burden on appeal. The only issue I have concerns in this case about: Does his actions having requested the appeal after that point create some sort of an abandonment of the appellate process to the extent that maybe he didn't exhaust his remedies?

O'LEARY: I think the answer to that is, yes.

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RESPONDENT

STRODER: As I think is apparent from the City's action here, and you can look in the exhibits as far as the memorandum concerning the events of the day that the final post-termination hearing was determined, the City although under the manual was supposed to enter an order with its findings and conclusions of law, it didn't. When Mr. Barton left they basically thought, "well, got ya, and this is what we're going to do. We're not going to _____ the order.

HECHT: Can't you nonsuit?

STRODER: I think he probably could say, "I don't want to pursue the appeal anymore."

HECHT: Why didn't he in essence say that?

STRODER: I think from the record you can see where he was frustrated. That certainly does not rise to the level of saying, "I nonsuited." And the defendant could ask for an issue to the jury on it, which they did not as the CA passed on. But he did not do anything I believe from the

record that would be tantamount to saying, "I nonsuit my post-appeal right."

ENOCH: This action is just as consistent with, "I think it's a kangaroo court. I'm not going to pay any attention to you. I'm just going to go out and suit it." He hadn't abandoned the appeal, but hasn't he really indicated an intent not to proceed with the administrative remedies and just go out and sue?

STRODER: I think there was some evidence he thought it was a kangaroo court, but I don't know about the rest of his statement about...

ENOCH: If we're looking at exhaustion of the administrative remedy as a requisite to going to court, don't the actions become relevant on going to the hearing, then walking out of the hearing and the next action that happens then is the lawsuit gets filed?

STRODER: I think that would be reading a lot more into his leaving the hearing, because I think as is evident from the personnel manual, all he has to do is ask for the hearing. He can send a lawyer, not send a lawyer, he could have them meet, they can decide on their own what they want to do. He doesn't have to show up. No mandatory attendance is required, and as the CA also pointed out, you have to contrast that with alcohol, drug abuse, and failure to report injuries on the job. Because it says, if you don't show up, you've just waived it.

HECHT: As I understand your position here is, would be that if he doesn't show up, and if the appellant did not show up at all, the City would nevertheless have the obligation to go forward, present their evidence, and get a determination from the _____?

STRODER: Certainly. You send your notice: I want y'all to review this. I'm not going to be there. I think it's wrong, but you get your witnesses in there and you look it over and if you decide that that's what you believe is right, that's right. There is no obligation for him to show up.

PHILLIPS: Do you have language from the manual that supports that type of interpretation?

STRODER: On page 124 in the manual, para. 12: An employee may waive the hearing, and the employee shall waive the right to a hearing if he or she is served with notice as provided herein and fails to appear or seek a continuance with good cause within 5 days in receipt of such a notice.

PHILLIPS: But this wasn't an alcohol related hearing?

STRODER: No, this wasn't an alcohol related hearing. That language is absent from the post-termination _____ hearing that would be relevant to Mr. Barton.

PHILLIPS: And if you delayed it what does the manual say about the duty of the city's review board. I guess we're talking about the second hearing.

STRODER: Order after hearing. It states that the city's duty, the order should state the date of the order, the date and place of the hearing, the findings of fact made the basis of the order, and the disciplinary action ordered.

OWEN: Let's assume that we disagree with you, that this is just a breach of contract case, and that the manual does in fact provide for administrative _____. And assume again with me that your client, Mr. Barton, had gone through the pre-termination hearing and then requested a post-termination hearing. Instead of the City just not reaching a decision they said "no, we're not going to give you a post-termination hearing." What would be his remedy? And assuming again that we read this to be an administrative appeal?

STRODER: Well he's got a vested property right because he's a just-cause employee.

OWEN: What would he go to court and say? What would his remedy be?

STRODER: Fourteenth Amendment, due process claim, basically which would be arbitrary and capricious.

OWEN: But he would say what? What would his remedy be? If he said they didn't give me a hearing, so I am entitled to what?

STRODER: I am entitled to my job back, because they didn't give me a hearing.

OWEN: Would he be limited to getting a hearing, would that be his remedy?

STRODER: No, I don't believe so. He's been deprived of his vested property right. He was in fact, terminated.

BAKER: So your view is that it's also a default situation? If they refuse a hearing, then he's automatically reinstated. What happens about the supervisor's order that's in place? What do you do with that under your theory?

STRODER: Again it's just a pre-termination hearing, and I think under the constitution if you have a vested property right a post-termination hearing. So his pre-termination hearing is nothing.

BAKER: What happens is, he has a due process notice of hearing that they are going to terminate him for some reason, and he has the opportunity pre that order to come in and state his side of the case. So that seems to me to be pretty much due process. But the appellate part of it if

he doesn't like what the supervisor does, he can ask for this panel's hearing. And your view is, that if they refuse the panel hearing, that it's a default situation and he goes back to work?

STRODER: I don't know if it's a default situation. _____ the lawsuit and based upon your 14th amendment, you would have to prove loss of wages up till the time, and he could also argue for reinstatement.

BAKER: But that's based on then the supervisor's order that still in place. He doesn't automatically get to go back to work?

STRODER: No. I think the supervisor order would be gone.

HANKINSON: Can you succinctly state why Mr. Barton has the right to go to court and sue for breach of contract under these circumstances?

STRODER: I think in this situation it is an employment contract. We had the ordinance or contract and we've got the acceptance by the employer receipt of the terms and conditions and succinctly it makes him a just cause employee that he could only be fired for the reasons outlined in §9 of the employee manual. I think under consideration here, he can sue in contract, because this is not a rule or regulation where you're talking about rates of some commission, whether or not you ought to increase insurance rates or how much water ought to go down on whatever river, or what the RR Commission ought to do. But it's quasi judicial in nature, and I think the court has jurisdiction to rule on it. In fact, I think the court has as much expertise and just cause and probably a whole lot more than Mr. Coco and the fire chief.

HANKINSON: But if the manual creates an employment contract that included elevating his status from an at-will to a just cause employee, why didn't it also create a contract between the employer and the employee relating to the administrative proceedings associated with the termination of his employment, as well as the finality provisions that are part of that contract. Aren't you teasing out just a piece of the contract in wanting to ignore the other terms of it?

STRODER: When you look at finality whether the manual talks and says, it's a little ambiguous, it says, "the order of the board is final and may not be appealed." We didn't appeal anything. I am assuming we're talking about appeals within the city administrative structure, not going forward and assuming the contract.

HANKINSON: Why does he get to tease out the part of the contract that he likes, which is the just cause status, and ignore the part of the contract that provides the administrative procedure that is designed to address his termination; and instead, say, "No thank you. I think I'll just go to the courthouse."

STRODER: I don't think he did that. I think he lived up to the administrative process.

HANKINSON: If he lived up to the administrative processes then, what is the appropriate judicial review of the administrative determination? A trial de novo before a jury for just cause to determine whether or not he was fired for just cause, or a review of the administrative decision?

STRODER: We don't have an administrative procedure act to guide us like Texas does.

HANKINSON: No, but we have a home-rule city that has set up an administrative procedure as part of this employment contract, correct?

STRODER: Yes.

HANKINSON: And Mr. Barton is saying, "That you very much, I'll take the just cause status, and I may go through the procedure, but if I don't like the result, I'll just go to the courthouse and pretend like that none of that happened and start over again with the jury." Isn't that what he's doing?

STRODER: Yes, he's suing on contract.

HANKINSON: Why does he get to then adopt a part of the contract that he likes, the just cause provision, but have the administrative procedure have no effect on his remedy?

STRODER: It has a lot of effect. It's much simpler. And I think the City of Odessa has a good idea: It's much simpler to have an administrative grievance procedure you go through and err out your differences. It would be a lot better if you could have gone there and hopefully the City would have said, "well you did not violate any rules under §9, and you've got your job back." There would have had to be no need for a lawsuit.

HANKINSON: Let's say the hearing panel concludes the proceeding, upholds the decision of the supervisor, and does not reinstate him. Does Mr. Barton then get to say, "Gee thanks for that opportunity, but I don't like that result, let's forget it ever happened and go to the courthouse?"

STRODER: Sure.

HANKINSON: Why should he be able to do that given his employment contract in the manual?

STRODER: Nowhere in there does it say that he waives any right to bring that action, I don't believe. You've got some language in there that's a little bit ambiguous about _____ procedure and legal action. Then in the next breath they will say, "we have an independent right to sue employees and bring criminal actions against them," so we don't know what they really meant. But I don't see anywhere in there that says that by accepting the benefits of being a just cause employee and us getting used to the administrative rights, you waived your right to come into court and sue on a contract. I just don't see it.

HANKINSON: And that's a full right to sue on the contract, not a limited judicial remedy that would involve a review of the results of the administrative procedure?

STRODER: That's correct. Again, I am saying because I think the court said under the primary jurisdiction doctrine, automatically that doesn't mean the courts can't on a quasi judicial matter actually try the lawsuit. I don't think they are constrained from doing that.

HANKINSON: So in other words, the administrative proceedings is not really part of this contract then?

STRODER: No. The administrative procedures are something that he agreed to go through.

HANKINSON: And they have no binding and effect then?

STRODER: I don't believe they have any binding and effect.

GONZALEZ: Let me follow-up on that question. If the appeal's panel had proceeded with the hearing in his absence and made findings of fact and conclusions of law concluding that there was just cause for the City of Odessa to fire him, there would not be any basis for you to file a cause of action for breach of court would there? Aren't you going to be bound by the determination by the appeal's panel, which concluded that there was just cause? Wouldn't that end it?

STRODER: No. I don't believe so.

GONZALEZ: That didn't happen here. They left it open.

STRODER: It didn't happen here, but there is a provision in there that it says, "that _____ of the board is final and is not subject to appeal." My reading of the manual is we're talking about the appellate process within the city, not going to court and sue under contract, on your agreement not to be discharged absent just cause.

The CA didn't reach our, the question I had at least, is Mr. O'Leary and the City of Odessa came into court on the day of trial and filed a motion in limine and alleged you really can't prove a contract case. You've got to prove some sort of substantial evidence type of case. I believe under Rule 94 that should be something that's at least pled, some sort of notice given prior to going to trial.

HANKINSON: What was in his answer?

STRODER: He did plead _____ result's remedies. I think he pled official immunity...

OWEN: Why isn't failure to exhaust remedies put you on notice of what they are claiming?

STRODER: That did as far as failure to exhaust. I am talking about the substantial evidence review. That exhaustion of remedies didn't put me on notice. That's a whole different ball game. I suppose you can have on a plain old contract between two private individuals that had some remedies they had to go through as far as meetings, go to a board, or go to your insurance committee and have them make a ruling before you can file a lawsuit. I mean that's not unusual to have contracts that require you to take steps to exhaust your remedies before filing a lawsuit. So I don't think that necessarily put me on notice that he was going to claim any kind of substantial evidence appeal rather than a contract case.

BAKER: Did it put the TC on notice, the type of review the City thought was appropriate for this lawsuit?

STRODER: Not by pleading. Just on the day of trial when we showed up and said...

BAKER: Is that the only time they took that position?

STRODER: Yes, and the cases that are cited by Mr. O'Leary on the substantial evidence somebody filed something. They filed a plea of jurisdiction. They filed a plea in abatement. They filed a motion for summary judgment. I have seen no case where they show up the morning of trial and say, "well I'm going to object to all your evidence on just cause because this is substantial evidence review type of case."

BAKER: Did they raise the same question when the charge conference was going on?

STRODER: Yes.

BAKER: You can't do that?

STRODER: Yes.

BAKER: They made it clear throughout the course of the trial itself what their position was on how the trial should _____?

STRODER: Yes, certainly.

BAKER: I guess the TC understood where they were coming from?

STRODER: Yes.

BAKER: Will you say that any of those attempts when they notified the TC _____ was untimely?

STRODER: Yes, it was untimely, because they didn't plead in the lawsuit in answer to our allegations on the face of our pleadings was a breach of a contract case. And that was what we had. And we showed up the day of trial and all of a sudden it's substantial evidence review. I know it's not cited specifically in rule 94, but surely that's a plea of avoidance. It's got to be. No matter what we should prove on our contract case.

BAKER: Purportedly Mr. Cody found just cause?

STRODER: Yes.

BAKER: So if you looked at the administrative record, the issues are the same and the evidence is the same. So what else is there to talk about on this trial? In other words, the same evidence that was put on in the pre-termination hearing by your client, and the same evidence that the city put on there resulted in Mr. Cody's order, is the same thing that was tried to the jury in your breach of contract case, is that correct?

STRODER: Oh, no. In a pre-termination hearing, you show up, and your supervisor says, "I've heard you did this, that and the other, and I don't like it." You don't bring witnesses in. And you're fired and you're going to have a post-termination hearing. There is no evidentiary hearing in a pre-termination hearing at all. That can be as little as one, which it was in this case, and he just said, "I've heard this and you're fired." There was no examination of witnesses or anything like that in the pre-termination hearing.

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REBUTTAL

O'LEARY: The issue of substantial evidence was preserved. You do not need a pleading. Let me tell you why against the background of a couple of principles. This court held in *Gerst v. Nixon*, the substantial evidence rule is not really a rule at all. It's a test. Secondly, this court has held since the substantial evidence rule was advised, that it is simply an issue of law. It has nothing to do with facts. Now, that's background.

If you looked in McDonald's civil practice, and it's cited in our brief, you don't have to plead Texas law from a constitution, from the statute and the courts, the courts and the parties are presumed to know Texas law. Texas law is a substantial evidence rule applies. As a matter of law it is a matter of law.

ABBOTT: Applying that rule, since there was no conclusion by the panel, since there were no findings issued by the panel, how could that rule be applied?

O'LEARY: Two or three different ways. One of the exceptions to exhaustion is if the hearing agency or hearing body doesn't do anything, then you have the right of appeal under the substantial evidence rule. Secondly, there was an order in effect with findings and conclusions.

ABBOTT: Let me just say that for purposes right now assume that when