# THE EMPLOYER'S TEETH IN CIVIL SERVICE CASES… IS THE PLAYING FIELD LEVEL?



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# TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. THE HISTORY OF THE CIVIL SERVICE STATUTE ..... 1

III. THE TEXAS CIVIL SERVICE ACT ..... 1
- A. Appeal of a Disciplinary Measure Under the Civil Service Act ..... 2
- B. Appeal Before an Independent Third Party Hearing Examiner ..... 2

IV. CREATING A DISTINCTION BETWEEN DISCIPLINARY AND NON-DISCIPLINARY SUSPENSIONS ..... 2
- A. Sweetwater v. Geron ..... 3
- B. Corbitt v. City of Temple ..... 3
- C. Grote v. City of Mesquite ..... 3
- D. Jackson v. City of Texas City ..... 3
- E. Support From The Texas Attorney General ..... 4

V. CURRENT LITIGATION OVER THE DISCIPLINARY AND NON-DISCIPLINARY DISTINCTION ..... 4
- A. Planeta v. Edge ..... 4
- B. Brown v. City of Georgetown ..... 5

VI. CONCLUSION ..... 5

# THE EMPLOYER'S TEETH IN CIVIL SERVICE CASES…IS THE PLAYING FIELD LEVEL?

## I. INTRODUCTION

The Texas Civil Service Act provides the important function of protecting Police Officer and Fire Fighters from the pressures of politics and political patronage. The Act ensures that the hiring, promotion, discipline, and termination of employees are based upon merit and provides credibility, stability, and consistency to the public.

These protections, however, are not all-encompassing. Legal precedent has established that non-disciplinary terminations are not subject to the requirements of the Texas Civil Service Act. As a consequence, public sector employers are not always bound by the Act. Police Officers and Fire Fighters must be able to perform their professional duties along with the coordinating agencies. If the employee cannot meet the requirements of his position, the public sector employer may terminate the employee. This termination may occur outside the disciplinary mandate and review of the Texas Civil Service Act.

## II. THE HISTORY OF THE CIVIL SERVICE STATUTE

The modern civil service system has its origins in the Pendleton Civil Service Reform Act, Act of Jan. 16, 1883, c. 27, § 2 (2) Fifth, Sixth, 22 Stat. 404 ("Pendleton Act"), passed by Congress in 1883. The purpose of the Pendleton Act was to discourage the corruption and inefficiency that abounded as a result of the practice of political patronage at the time. *See Elrod v. Burns*, 427 U.S. 347, 354 (1976). Thus, the effect of the Pendleton Act was to prohibit the removal of civil service employees for political reasons. *See* R. VAUGHN, PRINCIPLES OF CIVIL SERVICE LAW 1-23 (1976). Subsequent civil service reform acts, including that in Texas, evolved to restrict the public employer's ability to terminate or otherwise enforce discipline, including demotion and suspension, by limiting those reasons to just cause or specifying permissible reasons for termination.

## III. THE TEXAS CIVIL SERVICE ACT

The Texas civil service statute is governed by Chapter 143 of the Texas Local Government Code (the "CSA" or "Chapter 143"). The application of Chapter 143 is limited to municipalities (1) with a population of 10,000 or more; (2) that have a paid fire department or police department; and, (3) that have voted to adopt this chapter or the law codified by this chapter. In special circumstances, the law enacted by House Bill 822, Acts of the 73rd Legislature, Regular Session, 1993 may convey the protection to a qualifying municipality. TEX. LOC. GOV'T CODE § 143.002(1) and (2).

The purpose of Chapter 143 is to "secure efficient fire and police departments composed of capable personnel who are free from political influence and who have permanent tenure as public servants." *Id.*, § 143.001. In light of this objective, Chapter 143 regulates various aspects of civil service employment, including the hiring, promotion, demotion, and discipline of civil servants. *See id.*, §§ 143.021-.038, 051-.057. This includes guidelines for civil servants seeking review of *disciplinary* actions for violation of a civil service rule. *See id.*, §§ 143.053-.057.

The CSA sets out its list of grounds for which Police Officers or Fire Fighters can be terminated or suspended. *Id.*, § 143.051. These include:

(1) conviction of a felony or other crime involving moral turpitude;
(2) violations of a municipal charter provision;
(3) acts of incompetency;
(4) neglect of duty;
(5) discourtesy to the public or to a fellow employee while the Police Officers or Fire Fighters is in the line of duty;
(6) acts showing lack of good moral character;
(7) drinking intoxicants while on duty or intoxication while off duty;
(8) conduct prejudicial to good order;
(9) refusal or neglect to pay just debts;
(10) absence without leave;
(11) shirking duty or cowardice at fires, if applicable; or
(12) violation of an applicable Police or Fire Department Rule or Special Order.

*Id.* Thus, measures taken against offending Police Officers and Fire Fighters are considered disciplinary only if they fall within the parameters listed in section 143.051.

Moreover, in disciplining the employee, the head of the Police or Fire Department is limited to (1) suspending a Police Officer or Fire Fighter for violation of the above section either for up to 15 days or indefinitely, which is equivalent to a termination; (2) demoting the employee; or (3) for a promotional pass over. *See id.*, §§ 143.034, .053, .054.

The department head must immediately deliver a copy of a written statement with the reasons for the disciplinary measures to the suspended employee in person. *Id.*, § 143.052(c). The statement must also be filed with the Civil Service Commission within 120 hours of suspension. *Id.*

Of note, no statutory deadline exists in the CSA regarding the time in which an employer must commence disciplinary actions against a Police Officer

or Fire Fighter. *See* Tex. Att'y Gen. LO-JC-334 (2001). Rather, each municipality may determine whether it wishes to include a provision setting a statute of limitations at the time it votes to adopt Chapter 143. *See e.g.,* City of Carrollton Fire Fighters' and Police Officers' Civil Service Commission Local Rules and Regulations, Rule 8.03 ("The department head may not suspend an employee based upon an act that occurred more than 180 days preceding the date of suspension by the department head . . . .").

### A. Appeal of a Disciplinary Measure Under the Civil Service Act

Should a Police Officer or Fire Fighter be disciplined for one of the above reasons, the CSA sets out the procedure for an appeal to a Civil Service Commission. *See* TEX. LOC. GOV'T CODE § 143.053. In fact, § 143.053 is specifically captioned "Appeal of *Disciplinary* Suspension", which further sets up the distinction between a disciplinary and non-disciplinary action. *See id.*, § 143.053 (emphasis added).

Each Civil Service Commission consists of three members appointed by the municipality's chief executive and confirmed by the governing body of the municipality. *Id.*, § 143.006(b). A person appointed to the commission must (1) be of good moral character; (2) be a United States Citizen; (3) be a resident of the municipality for more than three years; (4) be over 25 years of age; and (5) not have held a public office within the preceding three years. *Id.*, § 143.006(c).

In order to appeal a disciplinary action, a Police Officer or Fire Fighter must file an appeal with the Civil Service Commission within 10 days after the date of the action. *Id.*, § 143.010(a). The appeal needs to include the basis for the appeal and a request for a hearing before the Civil Service Commission. *Id.*, § 143.010(b). The appeal must also contain (1) a statement denying the truth of the charge as made, (2) a statement taking exception to the legal sufficiency of the charge, (3) a statement alleging that the recommended action does not fit the offense or alleged offense, or (4) a combination of these statements. *Id.*

The affected Police Officer or Fire Fighter may be represented by counsel or any other person the Police Officer or Fire Fighter chooses. *Id.*, § 143.010(c). In furtherance of the appeal, a Civil Service Commission can administer oaths, issue subpoenas, and depose witnesses. *Id.*, § 143.009. The Police Officer or Fire Fighter may also request the Civil Service Commission subpoena any documents or witnesses that the Police Officer or Fire Fighter considers relevant to the case up to 10 days before the appeal hearing. *Id.*, § 143.010(e). The Department Head may produce evidence and witnesses as well. But the facts and charges are restricted to the original written statement and charges, which may not be amended. *Id.*, § 143.053(c)

Should the Civil Service Commission find that the employee's sentence should be modified, the Commission is limited to deciding whether the disciplined Police Officer or Fire Fighter is: (1) permanently dismissed from the Police or Fire Department; (2) temporarily suspended from the department; or, (3) restored to the person's former position or status. *Id.*, § 143.053(e). All concurring members must sign the subsequent written decision issued by the Civil Service Commission. *Id.*, § 143.011(a).

If the Police Officer or Fire Fighter is dissatisfied with the Civil Service Commission's decision, he or she may file suit in District Court to have the decision set aside within 10 days after he or she receives the decision. *Id.*, § 143.015(a).

### B. Appeal Before an Independent Third Party Hearing Examiner

Alternatively, the CSA provides that a disciplined employee can choose to appeal to an independent third party hearing examiner rather than the Civil Service Commission. *See id*., § 143.057. If the Police Officer or Fire Fighter chooses the third party hearing examiner, however, he waives his or her right to appeal to a District Court. *Id.*, § 143.057(c). The hearing examiner has the same duties and powers as the Civil Service Commission in such a case. *Id.*, § 143.057(f).[1]

## IV. CREATING A DISTINCTION BETWEEN DISCIPLINARY AND NON-DISCIPLINARY SUSPENSIONS

But what happens when a civil servant is terminated for non-disciplinary reasons?

In such a situation, case law and other authorities support the argument that the CSA no longer applies, and Police Officers and Fire Fighters revert back to at-will employees under general Texas law. As such, they are no longer guaranteed the rights under Chapter 143, including the right to appeal any termination or suspension.

As Courts have noted and as discussed above, Chapter 143 establishes a statutory framework for Police Officers and Fire Fighters to challenge *disciplinary* suspensions. *City of San Antonio v. Salvaggio*, 419 S.W.3d 605, 611 (Tex. App.—San Antonio 2013, pet. denied). In light of this distinction between disciplinary and non-disciplinary actions, Courts have ratified terminations outside of the CSA where civil servants were terminated for non-disciplinary reasons. *See, e.g., Sweetwater v. Geron*, 380 S.W.2d 550, 553 (Tex. 1964); *Corbitt v. City of*

[1] The appeal procedure before a Civil Service Commission or third party hearing examiner varies slightly for municipalities with populations of 1.5 million or more. *See* TEX. LOC. GOV'T CODE §§ 143.1015, .1016.

*Temple*, 941 S.W.2d 354, 355 (Tex. App.—Austin 1997, writ denied); *Grote v. City of Mesquite*, No. 05-98-01367-CV, 2001 Tex. App. LEXIS 1191, at *10 (Tex. App.—Dallas Feb. 26, 2001, pet. denied); *Jackson v. City of Texas City*, 265 S.W.3d 640, 649 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). The sections below discuss each case in further detail.

### A. Sweetwater v. Geron

In *Sweetwater v. Geron*, the Texas Supreme Court overturned the lower court's ruling that a city ordinance enforcing a retirement age of 65 was in conflict with the Texas CSA. 380 S.W.2d at 551. Geron, a Police Officer for the City of Sweetwater, was 70 years old at the time the retirement ordinance was put into effect and forced to retire as a result. He consequently filed suit, seeking reinstatement and back pay.

Geron argued that the ordinance was in violation of the CSA, which provides specific and exclusive grounds for which Police Officers and Fire Fighters could be terminated. *Id.* at 552-53. Geron further argued that, because retirement age did not fall under any of the categories listed in §143.051 of the CSA, the City did not have authorization to enforce such an ordinance against Police Officers and Fire Fighters. *Id.*

The Court, finding in favor of the City, held that municipalities do have a right to force retirement of Police Officers and Fire Fighters outside, and independent, of the CSA. *Id.* at 554. In reaching this conclusion, the Court reasoned that "legislative bodies of cities do have residual control over civil service employment other than those controls that are specifically defined in the CSA itself . . . ." *Id.* at 553; *see also City of San Antonio v. Wallace*, 338 S.W.2d 153, 156 (Tex. 1960). The Court cautioned, however, that "such residual control must be exercised in good faith and for the betterment of municipal service." *Id.*

### B. Corbitt v. City of Temple

In light of the Texas Supreme Court's clear statement that municipalities still have control over the employment of Police Officers and Fire Fighters outside of the CSA, Texas District Courts have ruled accordingly.

For instance, in *Corbitt v. City of Temple*, the Internal Affairs Division of the Temple Police Department discovered that the Plaintiff Police Officers were improperly working off-duty jobs while officially on duty. *Id.* at 355. The Plaintiffs were suspended for one day, which they did not appeal, and were barred from performing any future off-duty work, which the Plaintiffs attempted to appeal to the Civil Service Commission but were denied. *Id.*

The Plaintiffs filed suit, seeking relief under the CSA. The Austin Court of Appeals, affirming the Trial Court's ruling, held that the Plaintiffs did not have a right to appeal to the Civil Service Commission because a ban on performing off-duty work does not fall under the jurisdiction of the Civil Service Commission. *Id.* The Court reasoned that the CSA does not provide for administrative appeal of every possible disciplinary action, only those that are specifically enumerated. *Id.* In fact, "the Commission only has jurisdiction to hear appeals from promotional passovers, disciplinary suspensions, and demotions." *Id.*; *see also* TEX. LOC. GOV'T ACT §§ 143.034, .053, .054. Outside of this limited set of actions, Police Officers and Fire Fighters have no right to an appeal before a Civil Service Commission. *Corbitt*, 941 S.W.2d at 355.

Thus, *Corbitt* furthers the proposition that employers are not limited to the disciplinary measures laid out in the CSA. Not only that, such non-disciplinary prohibitions would not be appealable to the Civil Service Commission.

### C. Grote v. City of Mesquite

In *Grote v. City of Mesquite*, Grote, a Fire Fighter, filed suit, complaining that he was not permitted to appeal his termination resulting from his failure to maintain his EMT/Paramedic certification as required by his conditions of employment. 2001 Tex. App. LEXIS 1191, at *4-5. Grote argued that, because his termination was disciplinary in nature, it was subject to a civil service appeal under the CSA. *Id.* at *7-8.

The Dallas Court of Appeals found against Grote, reasoning that the exclusive grounds for disciplinary terminations laid out in §143.051 concern "acts of incompetency or violation of an applicable fire department rule or special order." *Id.* at *9. Grote's failure to maintain his certification did not reflect any specific act of misconduct or violation on the part of Grote. Rather, Grote was terminated for an explicitly non-disciplinary reason, and termination for a failure to qualify to perform the functions of one's position cannot be considered disciplinary. *Id.* at *9-10. Thus, Grote was not entitled to appeal his termination under the CSA.

### D. Jackson v. City of Texas City

The Houston Court of Appeals reached a similar holding in *Jackson v. City of Texas City*. In *Jackson*, two Fire Fighters were terminated for failing their EMT certification exams. *Jackson*, 265 S.W.3d 640, 643. The men attempted to appeal their termination to the Civil Service Commission but were informed by the Civil Service Director that they were not eligible to appeal because their discharges were non-disciplinary. *Id.* The parties subsequently filed suit, seeking a

declaratory judgment that Texas City had violated their rights and a writ of mandamus directing Texas City to permit them to appeal pursuant to the CSA. *Id.*

As in *Grote*, the Court held that the men's failure to obtain their EMT certification was a non-disciplinary ground for termination. *Id.* at 646-647. The Court further noted, citing to *Corbitt*, that the CSA provides the Civil Service Commission with the jurisdiction to hear appeals only from promotional examinations, *disciplinary* suspensions, and demotions. *Id.* at 648. In light of this, the Civil Service Commission had no obligation to review the Plaintiffs' terminations because failure to fulfill the conditions of employment did not fall under any of the provisions listed in the Act. *Id.* at 648-49.

### E. Support From The Texas Attorney General

In fact, not only have the Courts found that employers are not limited only to working within the parameters of the CSA when terminating Police Officers or Fire Fighters, the Texas Attorney General has also issued opinions supporting this position.

In answering the question whether a Police Officer who has resigned his commission may rescind his resignation and be reinstated, the Attorney General noted:

> The police chief's authority to dismiss the police officer, indeed, is broader than that provided in [C]hapter 143 and is not absent in this case merely because none of the grounds for suspension or removal specified in section 143.051 apply to the subject officer.

Tex. Att'y Gen. LO-DM-248 (1993). Thus, consistent with the rulings in the cases discussed above, employers are not limited to terminating or suspending Police Officers and Fire Fighters solely on the grounds enumerated in the CSA.

## V. CURRENT LITIGATION OVER THE DISCIPLINARY AND NON-DISCIPLINARY DISTINCTION

As the above examples demonstrate, employers are not limited to the CSA when terminating or suspending Police Officers or Fire Fighters for non-disciplinary reasons. Nor are Police Officers and Fire Fighters wholly shielded by the CSA in maintaining tenure within their positions. Yet, despite a generally unequivocal stance from the Courts distinguishing between disciplinary and non-disciplinary actions, litigation continues wherein civil servants terminated on non-disciplinary grounds seek the right to appeal under the CSA.

The cases discussed below, however, present a new twist. Even though the Police Officers in these lawsuits were terminated for non-disciplinary reasons on their faces, the underlying conduct at issue could be considered as a disciplinary matter. Consequently, although the arguably stronger claim rests with the employer defendants, the possibility exists nonetheless that the Courts could rule for the plaintiffs and find that an arguable, and underlying, disciplinary infraction establishes a civil servant's right to protection under the CSA.

### A. Planeta v. Edge

For instance, two similar cases have been filed in federal and state Courts. In *Planeta v. Edge*, No. 3:14-cv-00179 (N.D. Tex, filed Jan. 17, 2014), the Plaintiff, a police officer for the City of Waxahachie, was involved in an internal investigation regarding a damaged police vehicle. The Plaintiff claimed no involvement, but his lie detector results demonstrated that he had been untruthful. Although the Defendant Police Chief chose not to terminate the Plaintiff based solely on circumstantial evidence, the Chief felt it was, nevertheless, his duty to inform the Ellis County District Attorney of potential *Brady* material—mainly that the results of the investigation indicated that the Plaintiff had been untruthful.

In light of this information, the District Attorney decided that he would no longer be able to sponsor the Plaintiff as a witness in trials because the District Attorney would need to disclose this incident under *Brady* obligations, which could lead to excessive motions and unpredictable results. Consequently, the Ellis County District Attorney's office began rejecting cases involving the Plaintiff for that specific reason. As a result, the Plaintiff could no longer testify in Court —an essential job function for a Police Officer.

Because of the Plaintiff's inability to perform such an essential aspect of his job, the Waxahachie Police Department had no choice but to terminate the Plaintiff for this non-disciplinary reason. In fact, the Police Chief specifically stated in the Plaintiff's termination letter that he was being terminated for the non-disciplinary reason of being unable to fulfill an essential job function.

In a departure from the cases discussed, *supra*, however, the Plaintiff was permitted to appeal his termination before a grievance review board consisting of three objective directors from unrelated departments within the city. At this hearing, the Plaintiff, through his attorney, called witnesses and presented evidence in order to make his case before the Review Board. Thereafter, the Grievance Review Board made its recommendations to the Waxahachie City Manager, who ultimately accepted the Board's recommendation to uphold the Plaintiff's termination. The Plaintiff

subsequently filed suit in the Northern District of Texas, claiming that he did not receive his due process right to an appeal before a Civil Service Commission or third party examiner.

Although this case is currently pending before the Court on a Motion for Summary Judgment, the law seems reasonably clear based upon the precedent discussed above that the Plaintiff in *Planeta* has no right to an appeal pursuant to the CSA. The Plaintiff was not terminated due to the results of the investigation, either because of his involvement with the damage to the police car or because he was untruthful during the investigation itself. In fact, the Police Chief had already decided not to terminate the Plaintiff, explaining that he was unwilling to take such a drastic action as termination based solely upon circumstantial evidence, which left open a window of doubt, however small.

Rather, the Plaintiff was terminated after the investigation had concluded and only because he was unable to perform the essential job function of testifying in Court. The inability to perform a job function does not fall within any of the enumerated grounds listed in §143.051 and does not reflect any specific misconduct or violation. *See Grote*, 2001 Tex. App. LEXIS 1191, at *9-10. Consequently, the Plaintiff's termination was non-disciplinary and not subject to the provisions of the CSA.

### B. Brown v. City of Georgetown

A similar case is concurrently being adjudicated in the state court arena. The Plaintiff in *Brown v. City of Georgetown*, No. 13-1178-C277 (227th Dist. Ct., Williamson County, Tex. Nov. 26, 2013), has appealed the District Court 's granting of the Defendant City's Plea to the Jurisdiction, finding that Plaintiff was not entitled to an appeal of her non-disciplinary termination. The Plaintiff in *Brown* was terminated upon findings of misconduct—namely, taking illegal prescription drugs and ingesting mescaline—by the Georgetown Police Department. The Plaintiff did, in fact, appeal this decision to an independent hearing examiner pursuant to the CSA.

In the meantime, while the examiner's decision was still pending, the Georgetown Police Chief provided the Williamson District and County Attorneys with information regarding the Plaintiff's misconduct pursuant to his *Brady* obligations. Before the hearing examiner issued his decision, the attorneys informed the Police Chief via letter that they would no longer accept cases in which the Plaintiff was involved.

Subsequent to the Police Chief's receipt of this letter, the hearing examiner rendered his decision to reduce the Plaintiff's termination to a 15-day suspension, which the Police Department honored by reinstating the Plaintiff and paying accrued back-pay. The District and County Attorneys, however, were unwilling to withdraw their stance regarding their refusal to sponsor the Plaintiff as a witness in criminal cases. Consequently, the Police Chief decided to terminate the Plaintiff for the non-disciplinary reason of being unable to fulfill the essential job function of testifying in Court. The City denied the Plaintiff's request to appeal her termination because it was non-disciplinary.

The Plaintiff filed suit soon thereafter, claiming that she should have been afforded the right to appeal her allegedly non-disciplinary termination under the CSA. The Trial Court, in this instance, followed precedent and granted the Defendants' Plea to the Jurisdiction. The Court found that the termination was non-disciplinary, and, thus, the Plaintiff had no right to an appeal before the Civil Service Commission or third party examiner.

Brown is currently appealing the Trial Court's dismissal with prejudice before the Third Court of Appeals in Austin, Texas (No. 03-14-00231-CV).

## VI. CONCLUSION

The Texas Civil Service Act provides a safeguard for Police Officers and Fire Fighters who are terminated for disciplinary reasons. In such instances, governmental employers must and should work within these prescribed parameters.

It is equally important to note, however, that employers and department heads are not limited to operating solely within the bounds of Chapter 143. Where employees are terminated or suspended for non-disciplinary reasons, such as the failure to meet a condition of their jobs or the inability to perform an essential job function, the employees lose the protection of Chapter 143, including the right to appeal their termination before a Civil Service Commission or third party hearing examiner.

Not only that, arguably disciplinary measures, outside of those specified by the CSA, are not appealable under Chapter 143. As discussed above, clear precedent from case law and Attorney General Opinions supports this right, providing employers with management authority for issues outside the CSA protections.