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Supreme Court of Texas.
City of Waco, Texas, Petitioner,
v.
Larry Kelley, Respondent.
No. 07-0485.

April 2, 2008

Appearances:

David W. Holman, The Holman Law Firm, P.C., Houston, TX, for petitioner.

Lanelle L. McNamara, Lanelle L. McNamara, P.C., Waco, WX, and Richard W. Carter, C.L.E.A.T. Office, Fort Worth, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, Don R. Willett, Texas Supreme Court Justices, en banc.

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CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument now in 07- 0485, City of Waco versus Larry Kelley.

COURT MARSHALL: May it please the Court, Mr. Holman will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

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

MR. HOLMAN: May it please the Court. On April 2, 2001, exactly seven years ago today, the Police Chief of the City of Waco Police Department dismissed Assistant Police Chief Larry Kelley. An arbitrator modified that dismissal after finding that the charges against Mr. Kelley were true. The question before the Court is, what power does an arbitrator have to reverse a police chief's dismissal? And we have, we have a couple of different arguments before the Court and, and I know that the Court has reviewed it and there's some complexities with the statute. There are no cases that discuss what happens in the context of an assistant police chief. And so the Court is right in, kind of, on a blank slate in this. And the-- when you-- when the Court does that, the Court looks at the-- plain language of the statute and construes the statute. So let's do that. The first thing is that there is only one

statute that applies to an assistant police chief, and that is Texas Local Government Code 143.014. That's the only statute that applies to an assistant police chief and there's a reason for that. An assistant police chief is not a classified employee. He serves at the pleasure of the police chief. He can be demoted, he can't have-- he, he can't complain about a demotion. But in this, in this case, in 014, provides the exclusive remedy in the case of an indefinite suspension by the police chief. And it says, that if there's an indefinite suspension and the charges are found not to be true, unfounded, then the assistant police chief is to be restored to the position that he held prior to the appointment. They don't give him his old job back as the appointed assistant police chief. If he's indefinitely suspended, they reduce his, his rank back to the rank he held before. But that's if it's not true. The statute that deals with assistant police chiefs does not provide for any remedy if the charges are found to be true. And we believe what happened is that the hearing examiner, also known as an arbitrator, exceeded his jurisdiction because he went beyond the statute and awarded a number of different modifications and reversals of the dismissal that are not provided for in the statute. Now this Court knows from just pure statutory construction. The Court is not entitled to rewrite the statute. It may be more desirable to rewrite the statute as a matter of equity, but the Court does not rewrite statutes. That provision-- that, that rule was stated in the PUC versus Cawford case in 1988. The [inaudible] will not rewrite a statute even if it seems more desirable. Now, the, the respondent has argued that 143.053 should apply. And in fact, that's one our fallback positions, that even if 053 applies, and should he-- not allowed to, to go beyond the dismissal, but let's focus on whether 053 can apply. Number one, 053 by its very language, only applies to classified employees. We know that the assistant police chief is not a classified employee. Number one. Number two, 053 provides full civil service protection to a dismissed police officer. We know from the court of appeals' opinion and the legislative history, that an assistant police chief does not have full civil service protection. In fact, 143.021 says this specifically. An assistant police chief does not have full service-- civil service protection. Now, what the court of appeals did wrong was they held that the assistant police chief doesn't have full civil service protection, but then they provided him with full civil service protection by saying that 053 apply. And finally, just as a matter of statutory construction, 053 has nothing to do with 014; 053 provides different remedies than 014. Even the remedy of restoration is different if you look at the language because it says that he is restored, but he's restored to his position that he held prior to the appointment. 053 provides that he can be restored to the position from which he was suspended and it provides back pay, not just lost wages as in 014, but it provides other provisions: sick leave credit, vacation credit, service time credit and so forth. Those remedies are different. So how can 014 be harmonized, as the court of appeals says, with 053?

JUSTICE O'NEILL: So you're saying there should be a complete dismissal, and that's it?

MR. HOLMAN: Yes. Yes. And what, what happens is -

JUSTICE O'NEILL: Why would you deprive an assistant police chief of the protections that everybody else is entitled to?

MR. HOLMAN: Because the statute does say.

JUSTICE O'NEILL: Well, but I mean, there's a gap there. That-- you'd admit, there's a gap, but that didn't really talk about what happens if there's indefinite suspension.

MR. HOLMAN: Well, it does talk about what happens if there's indefinite suspension. It doesn't talk about what happens if the charges are true. If the charge-- if there's indefinite suspension and charges are untrue, then the statute 014 provides -

JUSTICE O'NEILL: - Oh I, I know. That's right. But I mean, but if it's true, why would you not give him the protections that everybody else in the department has by putting him in one position lower?

MR. HOLMAN: Because he serves at the pleasure of the, of police chief. He doesn't have full service, civil service protection. He doesn't have the rights that a-- an ordinary police officer does. That's part of the trade off in-- in taking that position. That's, you know, serving as a, as a representative of the City of Waco.

JUSTICE O'NEILL: Works for 20 years and you're deemed good enough to be assistant police chief, but if you're dismissed, you don't get any protections at all. That doesn't make much sense.

MR. HOLMAN: If you're dismissed and the charges are true, then there's no reason to go behind what the police officer did, or what the police chief did, I'm sorry. I mean, the police chief has the ultimate authority here. It's not the hearing examiner. The hearing examiner is only to determine if the police chief did something that was inappropriate in-- under the circumstances.

JUSTICE O'NEILL: Well, let me ask you this. If there's a bit of a gap in the statute, then how does that affect the scope of our review? I know that, and if you would address, I don't know, if the City of Pasadena versus Smith that's pending, but in that case, the court of appeals said, just because the hearing examiner got it wrong, didn't mean that the hearing examiner exceeded his jurisdiction. If there's a gap, how can the hearing examiner exceed his jurisdiction?

MR. HOLMAN: Well, in-- with all due respect, I, I don't think there, there is a gap and because I think that they only provide one, one option and one remedy. And so I don't think that the fact that they don't provide another remedy doesn't mean that the Court can rewrite the statute and create another remedy. Having said that, the, the whole concept and, and of, of providing an arbitrator is that you only have a limited right to appeal. And a limirbitrator awards remedies that aren't provided before in the statute. That's an excessive use of authority.

JUSTICE HECHT: And in that connection, do you think, one way or the other, that if you're not an assistant chief and the charges are found to be true, that the hearing examiner can nevertheless adjust the sanction during the discipline?

MR. HOLMAN: At a certain extent. If there's, if there's a-- indefinite suspension, however, as there is in this case. We don't believe that, that that can be reduced to a temporary suspension for a number of reasons. Number one, in this particular situation, a, a reduction to a temporary suspension is really a restoration. It's a restoration of him to his prior position, and we know that that can't be done because that would be combining two of the remedies together and that would be, would also be contrary to the idea of a temporary suspension. It would be, it would be, be a reversal of the indefinite suspension. But more importantly, the hearing examiner found that restoration was not appropriate. Restoration to his former position is not appropriate because he-- there, there had been enough facts presented that questioned his ability to lead in his judgment and so forth.

JUSTICE HECHT: And by that you mean the position held before he was assistant chief?

MR. HOLMAN: True. Because what, what the hearing examiner found is that he should be reduced all the way to sergeant. But of course, the court of appeals found, and probably rightly, that they didn't have the-- that the hearing examiner didn't have the authority to demote him to sergeant ' cause there's no authority to demote under the remedies of the statute. That was an excessive use of authority. But more importantly, the court of appeals' reduction to commander can't be possible under the statute. And the reason that we know it can't be possible is because that is the exact remedy that 014 provides if the charges are not true. So the irony is, that what the Court of Appeals did was they did-- gave him the type of remedy he would have if the charges were not true, when in fact the hearing examiner found the charges were true and found it would be inappropriate to reduce him to commander. So we know that that's not the proper statute.

JUSTICE O'NEILL: But isn't that the way it works if he had not been assistant chief?

MR. HOLMAN: True. If he, if he -

JUSTICE O'NEILL: - [inaudible] works that way for everybody else, why wouldn't it work for him?

MR. HOLMAN: Because he doesn't have the benefits of that statute.

JUSTICE: Assistant chief, might, might be a good idea to hold assistant chief to a little higher standard.

MR. HOLMAN: Well, that's, that's, that's what we believe and we, we also believe that there are very sensitive issues with regard to the conduct of a police department and the police chief authority. And I, we believe this is what the legislature intended. The police chief's authority to dismiss an assistant police chief should be respected. And we shouldn't have hearing examiners going willy-nilly, saying, well, [inaudible] shouldn't be demoted to sergeant and temporarily suspended for much time and, and given full back pay and, and so forth, when the charges are true.

JUSTICE BRISTER: What kind of policy decisions does an assistant chief make that a sergeant or line officer doesn't?

MR. HOLMAN: I can't answer that. And I don't-- it's not on the record, so I'd, I'd, I'd ...

CHIEF JUSTICE JEFFERSON: So is there no limit on the type of sanction that the chief can give and, and no review? In other words, if the charges are true?

MR. HOLMAN: Well, there's no review if the charges are true.

CHIEF JUSTICE JEFFERSON: None whatsoever?

MR. HOLMAN: Well, the-- you, you can go to the hearing examiner and you can have those charges tested. And if the, if their charges are unfounded or untrue, then there is a remedy. If the charges are found to be true, there is no remedy.

CHIEF JUSTICE JEFFERSON: So there's potential then for truly, I mean, think of the wildest scenario, excessive punishment. A discharge for the most minor violation and there's no remedy.

MR. HOLMAN: There may be some constitutional implications within a-- with them-- with excessive punishment. The Court has held on a number occasions that when the punishment doesn't fit the crime, then there's some constitutional implications, particularly when it's government action. Those arguments weren't raised here and are not part of this case.

JUSTICE: [inaudible]

MR. HOLMAN: - [inaudible] all, all our, I'm sorry.

JUSTICE WAINWRIGHT: I said, "There's no remedy to the hearing examiner or arbitrator for someone who believes the police chief's

discipline is inappropriate for the assistant police chief." Let me ask you a different question. Are there any limits, whether they can be enforced by the arbitrator or not and the police chief's ability to discipline the assistant chief?

MR. HOLMAN: Your, your Honor, there's plenty of limits in the statute. There's, there's limits in 054 with regard to the motion, there's limits on 052 with regard to suspension, how long he can be temporarily suspended.

JUSTICE WAINWRIGHT: All of these and when the charges are true?

MR. HOLMAN: All of these were [inaudible] the charges are true. It's what the police chief can do, and the police chief can only suspend for 15 days, temporarily suspend for 15 days, which is another reason why the hearing examiner just went off on his own because he's, he's giving a greater degree of temporary suspension than the police officer is allowed to do under 052. And even the police officer can't give 180-day-- the police chief can't give 180-day suspension. Yeah, so we believe that-- and, and there's another problem with the back pay award that the-- both the, both the court of appeals and the hearing examiner gave. And that is under 014, you're allowed to have back pay but just of lost wages, that's if the, if it's not true. Under 053, you're only entitled to back pay if you're restored to the position from which you were suspended. He wasn't restored to the position from which he is suspended under any scenario. And it can't be under the statute 014, it provides that if he's removed from office, then he has to be returned to office in the position that he held prior to the appointment, which is the classified position that he held which would have been the commander. But in this situation, I don't think that the Court, if a court properly construes the statute and looks at the plain language of the statute can hold that the hearing examiner had anything, any other option except to uphold the dismissal. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, Mr. Holman. The court is now ready to hear argument from the respondent.

COURT MARSHALL: May it-- may it please the Court. Ms. McNamara and Mr. Carter will present argument for the respondent. Ms. McNamara will open with the first 17 minutes.

ORAL ARGUMENT OF LANELLE L. MCNAMARA ON BEHALF OF THE RESPONDENT

MS. MCNAMARA: May it please the Court. I would like to address the, the issue that has just come before us [inaudible]. In the letter that was delivered by Chief Melis to indefinitely suspend the assistant police chief who was Larry Kelley. Then in that letter, he was supposed to have put the statutory references in the letter so that Larry Kelley would know what he was charged with. And in that-- in the letter that Chief Melis sends to the Civil Service connection, and to Larry Kelly did not at all address, 143.014. I'm sorry.

JUSTICE GREEN: Well, let me ask you a question. Going, going to 014, is it your position that because the charges are found to be true against the, the client, that he, he ends up in a better position and that it'd found untrue, is that what you believe? Is that your position?

MS. MCNAMARA: No, I am saying that Larry Kelley did not have notice that he was going to be operating under -

JUSTICE GREEN: - I understand that. But I have different question

for you.

MS. MCNAMARA: Okay.

JUSTICE GREEN: Under Section 014 -

MS. MCNAMARA: Uh-huh.

JUSTICE GREEN: - that's what we were talking about a moment ago. The City's position is that, if it's, if it's found to be true, then dismissal can't be-- there's no remedy for dismissal. But is it your position then that because Mr. Kelley was found-- that the charges against him were found to be true, he ends up in a better position than if it was found to be untrue?

MS. MCNAMARA: I think that the way it, that I interpret the statute is that there was a new statute written about an assistant police chief and that you could hire and fire, or I guess you could hire him and you could demote him back to a different position. That's what has happened in the police force in Waco. And so the assistant chief may-- still has the rights of an officer under the local government code. And those provisions that have been there from, forever, 143.051, 52, 53, 54, 56, 57, to protect against activities or to review activities of police officers for discipline. That, you know, Larry Kelley didn't ask to be an assistant police chief. I assume that because he had 28 years, he knew that if, if he was not going to be the police chief, then he could move down to a lower place. But once he -

JUSTICE HECHT: - What he-- do you agree that he can't be demoted?

MS. MCNAMARA: I'm sorry?

JUSTICE HECHT: Do you agree he cannot be demoted?

MS. MCNAMARA: No. Not -

JUSTICE HECHT: - you think he can be demoted?

MS. MCNAMARA: I believe he can be demoted from the assistant chief to a -

JUSTICE HECHT: Commander.

MS. MCNAMARA: - to a commander.

JUSTICE HECHT: But not sergeant?

MS. MCNAMARA: But not sergeant, because -

JUSTICE HECHT: Do you agree the court of appeals on that?

MS. MCNAMARA: That's right.

JUSTICE HECHT: And you agree with the [inaudible]?

MS. MCNAMARA: That's right. Kirkwood versus Corsicana.

JUSTICE HECHT: So, so the [inaudible] question is, if the charges are untrue, he gets to go back and be a commander. If the charges are true, he gets to go back and be a commander. That's your position?

MS. MCNAMARA: Yes, that is my position at this time.

JUSTICE HECHT: It seems a little odd that if the charges are false, you get the same penalty as if the charges are true, then it strike you as odd?

MS. MCNAMARA: Well, the police chief has the right to terminate the assistant police chief, at will.

JUSTICE JOHNSON: He did. And you may not terminate an employment.

MS. MCNAMARA: No.

JUSTICE JOHNSON: You just terminate and, and demote him.

MS. MCNAMARA: It's basically the equivalent, in my mind, to a demotion to a civil service protection, which he had before. He was-- became the police chief.

JUSTICE MEDINA: [inaudible] is a big distinction between termination and demotion? [inaudible] terminating and how long [inaudible] the job? To be demoted, you have a job in a lesser capacity.

MS. MCNAMARA: And is there any-- I have not, I do not know that--

is there any place that you know of where it says, if the police chief was terminated at will by the police, I mean, if the assistant police chief was terminated by the police chief.

JUSTICE MEDINA: Well, to coin a phrase by the Honorable Justice Poster we get to ask the questions here.

MS. MCNAMARA: Well, I'm sorry. But I, I just wanted to go on and say that he would, Larry Kelley would have gone back to a position of commander.

CHIEF JUSTICE JEFFERSON: And where does-- where is that in the statute exactly? That once-- if, if the assistant-- that the police chief terminates or suspends indefinitely, where in the statute does it say he revert-- he then reverts to a regular police officer.

MS. MCNAMARA: That's 143.057 or 56, I mean.

CHIEF JUSTICE JEFFERSON: And does that deal with classified or non-classified employees?

MS. MCNAMARA: Classified employees.

JUSTICE JOHNSON: Under 114(g) the, the chief has the option to remove the assistant and return him to the, to a lower position and department.

MS. MCNAMARA: Correct, which would be a classified-- part of the classified -

JUSTICE JOHNSON: That's one option the chief has. And in under (h), the chief has the option of indefinitely suspending, under 014(h).

MS. MCNAMARA: Okay.

JUSTICE JOHNSON: Is that correct? I mean, (g) gives the chief right to demote, (h) gives the chief the right to indefinitely suspend, which effectively is termination.

MS. MCNAMARA: That is termination.

JUSTICE JOHNSON: Okay.

MS. MCNAMARA: But -

JUSTICE JOHNSON: So the chief has both of those options, and in this case, the chief chose indefinite suspension.

MS. MCNAMARA: Well, if I can go back to the first of my argument, I would like to tell you that 143.014 was not a part of the chief's letter, and he, he could not cite that as what he was relying on. He cited 143.057 as, or 53 as supposed to the 141-- 143.014. There is not reference in that letter, that civil service letter to .014. Larry Kelley would have had no notice of what was happening under 143.014. It's the same thing as the Kirkwood versus Corsicana 143.054 where [inaudible] and, and in this letter, and therefore, Larry Kelley should not have been demoted back to sergeant. He was demoted from assistant chief and then left in a commander's position by the court of appeals. And I believe that the proper procedure.

JUSTICE MEDINA: What would the remedy be then? Would, would there be a do-over with proper notice or -

MS. MCNAMARA: Well, the letter has to be amended. I mean, once it is sent to the Civil Service Commission, which he did to the Waco Civil Service Commission, he did it on April 2, 2001 at 9:00 a.m., and he signed for it on April 2, 2001. Those provisions 143.014 and 143.054 were not at all cited in this letter. And it says that under the rules of the process, as sending it to the Civil Service Commission, that you have-- you cannot amend this, the statement that you send to the Civil Service Commission. That is, this is like the indictment and you can't change it.

JUSTICE O'NEILL: Let me make sure I understand the way the statute works. If he had been a commander with the same offense and the hearing examiner had found the allegations true, then he would be returned to

sergeant? Is that right?

MS. MCNAMARA: He could. There are three options under the statute. When he was a commander, there would be three options and one would be, to-- to restore him to his position. One would be -

JUSTICE O'NEILL: Even, even if it was found true?

MS. MCNAMARA: Even if it was found true, and you could impose an indefinite suspension or you could terminate his employment. Three options. And -

JUSTICE O'NEILL: I thought indefinite suspension and termination were the same.

MS. MCNAMARA: Under 143.014 or under 143.057 or 53, I'm sorry.

JUSTICE O'NEILL: They're different under-- depending on what section?

MS. MCNAMARA: Yes.

JUSTICE O'NEILL: Okay.

JUSTICE HECHT: Well, how the-- how is an indefinite suspension different from being terminated?

MS. MCNAMARA: I'm sorry?

JUSTICE HECHT: How is an indefinite suspension different from being terminate under any section or in the English language?

MS. MCNAMARA: Well, if you, if you're going through all the English language, I would have to say that, you know, that they're equals.

JUSTICE HECHT: They're equal.

MS. MCNAMARA: Yes. But -

JUSTICE HECHT: But they're different in the statute?

MS. MCNAMARA: They appear to be different in the statute. Yes. And [inaudible] says, "You can-- you could restore him to his former position. You can temporarily suspend him and you can terminate."

JUSTICE HECHT: The argument by the petitioner is that you can't mix and match those. You can't pick two among those. What's your view in this?

MS. MCNAMARA: That has been in the statute for some period of time. And the hearing examiner imposed a temporary suspension on Larry Kelley. He also demoted-- double demoted Larry Kelley. But because of Kirkwood versus Corsicana that, that provision was not in the letter and it was rightfully as , as I think the other counsel has said that it's right, the Kirkwood versus Corsicana is, is appropriate. There is one issue that has played a small factor or-- and maybe a larger factor since, for today, what the, the Court is going to consider with respect to 143.014. The hearing examiner in this case began Kelley's hearing on November 15, 2001 and the hearing was continued to March 5-- 4 and 5, 2002. And then the hearing examiner's opinion came out on June 3, 2002, which said that the charge was true and that Kelley's indefinite suspension should be reduced to 180 days and that retroactively demoting Kelley to the rank of sergeant. He also said that, "Kelley should be made whole subject to the normal principles of mitigation." In the course of the hearing, the first day, which was November 15, 2001, the City of Waco had-- and consequently, Larry Kelley had retained at court-- a transcript, a court reporter to keep a hearing of the record. And the city assumes the responsibility for obtaining that record. And as it turned out, on March 4 and March 5, we could not locate the hearing record from the original hearing on November 15, 2001. And in the course of that hearing, which is an all-day hearing, the hearing examiner talked about some guidelines for the hearing and had opening statements, took evidence from, and all of this was transcribed by a court reporter. And there were also, on March 4, when

the hearing examiner came again to-- open the hearing, there was a transcriptionist there, but it was a different transcriptionist.

JUSTICE BRISTER: Let me, let me ask you back on [inaudible] trying to figure out the statute. It seems the whole basis of the court of appeals' opinion is that if your police officer and civil service protected, you just, you retain that even if you move up to a position that's not civil service protected. You just, you can't possibly lose that. And that's why they interpret it so well. Yes, you can be fired from that position, but of course you wouldn't lose your civil service protection, but I'm thinking in lots of situations, again, I don't know enough about civil service but I mean, if you're in the state department and you're civil service protected for years and years, you do such a great job they're going to appoint you a Secretary of State. But you can be fired from Secretary of State whenever the president wants to. And you don't have a right to go back just 'cause you used to be civil service protected. What, is there some part of the statute, and I'm, I can't find--there's nothing in the statute that says, "If move to a non-civil service position, no protection, there's nothing in the statute says, well, but you retain your civil service [inaudible], in fact, those would be inconsistent, wouldn't they?"

MS. MCNAMARA: They appear to be inconsistent. Correct.

JUSTICE BRISTER: So why would you -

MS. MCNAMARA: - except that -

JUSTICE BRISTER: - I mean, do you-- are you forced to take? You said it wasn't his choice. Are you forced to take the non-Civil Service position?

MS. MCNAMARA: No, you are not forced to take the -

JUSTICE BRISTER: So the deal -

MS. MCNAMARA: - non-service -

JUSTICE BRISTER: - so you -

MS. MCNAMARA: - non-civil service.

JUSTICE BRISTER: - so you get, you get an appointment. You're going to be assistant police chief. You get a bigger office and a better salary, but the deal is you lose civil service protection. And if you don't want to do that, you shouldn't do it.

MS. MCNAMARA: Well, if he-- I guess he had an opportunity before the police chief terminated him to, to resign and withdraw to be a commander.

CHIEF JUSTICE JEFFERSON: Ms. McNamara you're sharing time with Mr. Carter, is that correct?

MS. MCNAMARA: Yes. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you.

MR. CARTER: May it please the Court. I have less than three minutes left and hopefully I won't need all of that unless you have some questions that you like for me to answer. The point that I would like to, to make is that there's a, a maxim and there is a chain of precedent that exist in this state and another states as well that-- is such that it has the understanding that arbitration awards will be binding at certain things. In this state, we have the rules that apply to vacature of arbitration awards. All of the law that I have found in this state appears to put a burden upon the party who's seeking to have arbitration award vacated. They put the burden upon that party to produce a complete record, not a partial record -

JUSTICE BRISTER: But if the arbitrator does something wrong, clearly exceeds his or her powers, the Courts don't say, well, they missed it, so we'll take over it. The, the remedy is always to say you're beyond your powers, go back and do it again, isn't it?

MR. CARTER: I, I think you're right -

JUSTICE BRISTER: So can the, the court of appeals, I mean, just basically took over the case right?

MR. CARTER: I think one of the problems that we have is created by the lack of record. We don't know everything that got the case through the arbitrator to, to the court here today. Mr. Holman, in his remarks, at one point in response to a question, stated that he couldn't answer that because that's not in the record. And that's the problem -

JUSTICE HECHT: But, but we do know that he-- we do know the hearing examiner could not double demote him. You say that. Petitioner says that. Everybody says that.

MR. CARTER: We, we accept the Clark decision. We, we, we felt that, you have to argue what's the law at that time and, and at that time, we thought that Clark was the appellate court decision, and if we didn't, we would be remiss as, as attorney is representing our client. Now that it's over and done, we respect Justice O'Neill's and the Court's opinion. In the Clark case, we understand that and we don't think that Larry Kelley should be left without any remedy just as in the Clark case. The, the court felt that it was ridiculous for the city to have no right to appeal. We, we likewise feel it's a extremely unfair for a person who is still in the same police department, still under the same chief of police, not able to have any right of appeal when, when the city chose to impose the indefinite suspension. They had selected the statutes. They basically-- MacNamara said they didn't use anything but 053. They, they chose their, their method -

CHIEF JUSTICE JEFFERSON: Can Justice Medina -

MR. CARTER: - and under that method, it gives him the right to the law -

CHIEF JUSTICE JEFFERSON : - Justice Medina has a question.

MR. CARTER: I'm sorry.

JUSTICE MEDINA: Thank you, Chief. Is there anything in the statutes that state or indicate that an individual like your client who accepts a promotion forfeits any other civil right-- civil order-- civil service protection?

MR. CARTER: I, I don't know of any, in, in fact we have had cases -

JUSTICE MEDINA: That's what cited in the majority opinion.

MR. CARTER: Okay. The, the, the theme, if you will, that I have seen running through the civil service decisions, for example, there was one where the service, that someone put in as an assistant chief and that discretionary position serving under the chief was allowed to go back and receive credit where there's a two-year requirement and promotion observed in that classification before you're appointed. The, the appellate court's decision says, "You count what you had before, but I think there's, there's an understanding other-- hopefully there's an understanding that this person is not giving up their career with the department." They're not taking an appointment that leads nowhere but out the door.

CHIEF JUSTICE JEFFERSON: Is there any other questions? Thank you.

MR. CARTER: Thank you very much.

JUSTICE MEDINA: Mr. Holman, can you address this issue about Mr. Kelley not having notice on this particular statute which the hearing examiner made his decision.

REBUTTAL ARGUMENT OF DAVID W. HOLMAN ON BEHALF OF PETITIONER

MR. HOLMAN: Yes, I can, your Honor. The notice requirements are in the statute. And the notice requirements under 143.057 require him to have notice of his election for appeal, the, the opportunity to go to a commission and the opportunity to go to an independent hearing examiner. It also requires the letter to state that if he go to the independent hearing examiner, he will waive all rights. Under 143.052, he's required in the letter to have notice of all the charges against him. Those are the only notice requirements in the statute. And if you look at the letter, the letter supplies all of those things. Now the records 053 is important. And I-- let me tell you why the reference 053 is important, because the statute 014 says that he will-- have the same rights and privileges of a hearing as, as a classified employee. And where you find out what the rights and privileges are of a hearing is under 053 so that's why it's referenced in the letter where he stated, here's your, here's your hearing and here's the charges against you and here's what your rights on appeals are. Now, 014 on the other hand, is a jurisdictional statute and that provides the remedy. You're not required to provide notice of the remedy in the, in the notice letter, and those remedies are provided by the statute and cannot be ignored by the hearing examiner.

JUSTICE GREEN: I wonder, under 014, all the examiner's responsibility is to determine whether the charges are true, and that ends it.

MR. HOLMAN: If he determines that the charges are true under 014, he has no other option. If he determines it untrue, then he has the option of restoring him and providing lost wages. But 014 doesn't provide any other remedies.

JUSTICE HECHT: You're saying -

MR. HOLMAN: - as 053 does.

JUSTICE HECHT: But to make it clear, restoring to the rank he had before, he was elevated to assistant chief.

MR. HOLMAN: And, and the, and, and under the, under 014, in two separate places, it provides that if he's returned back to his position, he has to be returned to the position he held before the appointment. So even if the charges are untrue, he will not become the assistant police chief. Now, the question was asked by Justice Medina, where, where does it say in the statute that he forfeits his civil service protection. And the court of appeals went into that in some depth. 143.021 is the statute you, you need to look to. And in that statute, it says that, "An assistant police chief does not have full civil service protection. And it goes into the reviser's notes, which says, this is intended." This is what the legislature intended, that he doesn't have full service-- civil service protection. The civil service protection that he has is stated in 014. That's the only provision in the statute that deals with assistant poJustice Gray made in his dissent, and that is because the statute says that he has the same rights and privileges of a hearing as a classified employee but then you look to 053. But it doesn't say he has the same rights and privileges as a classified employee. It just says he has the same rights and privileges of a hearing. And the only way you get 053 to apply is to write that, that little three-word-- phrase, all the hearing out of the statute because he doesn't have the same rights and privileges. The-- 021 says he doesn't have the same rights and privileges as a classified employee. And the hearing examiner exceeded his jurisdiction by looking at 053 and providing remedies that are not

provided for, for an assistant police chief.

JUSTICE WILLETT: You said, "The law requires complete dismissal." If a, if a new chief came on board in a year or two that he or she re-hire Mr. Kelley.

MR. HOLMAN: There's, there's no provision for that. You know, I imagined there would be some, some concern about, you know, his, his qualification for office. But there's no provisions in the statute to, to do that.

JUSTICE GREEN: What is the proper remedy assuming that, you know, the case in this posture with the hearing examiner's finding of truth to the charges, does the case go back and are viewed to the, to the hearing examiner or, or what?

MR. HOLMAN: There's a case called "Kirkwood" and, and in that case, they held, that the-- after, after the case was decided, you couldn't send it back to, to the commission because commissions [inaudible] jurisdiction. You could argue the hearing examiner would be without jurisdiction, but in this situation, if the hearing examiner exceeds his authority than this Court can render a decision and just say that the hearing examiner went beyond his authority, I don't think you, you send it back as Justice Gray would have, would have argued. The fact that the hearing examiner to read-- to do a do over.

CHIEF JUSTICE JEFFERSON: Are there any further questions? Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

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