ORAL ARGUMENT — 4/1/98
97-1039
PROCTOR V. ANDREWS

DEATS: This case involves the constitutionality of Texas Local Govt Code §143.057, which allows covered employees to appeal terminations to independent hearing examiners rather than the civil service commission whose members are appointed by the city. The Amarillo CA ruled the statute unconstitutional rejecting the Tyler CA reasoning in *Blair v.* Razos. A case decided only 1 year earlier. The Amarillo court found that statutes' use of a single word "qualify" to describe arbitrators set so vague a standard as to delegate to the Triple AAA or FNCS the legislative task of determining hearing examiner qualifications. The CA's decision itself raises two issues. First, whether the court correctly ruled that the statute's use of the word "qualified" renders the statute unconstitutionally vague. And second, whether the court correctly ruled that the city as a governmental entity had standing to raise its vagueness challenge to the statute. On this appeal the respondent has raised a third issue not addressed by the CA. That issue is whether the statute cedes the city's power to discipline police officers to hearing examiners in violation of the home rule provision of the Texas constitution.

In argument today, I will focus on the vagueness and home rule issues touching briefly on the standing issue as time permits.

PHILLIPS: Are you equating the so-called vagueness issue with an unconstitutional delegation issue? Are you treating this as the same?

DEATS: It is couched as a legislative delegation challenge. However, as I think this court noted in the *Texas Boll Weevil v. Llewellyn*, some legislative delegation challenges are in fact substantive due process claims. We contend that the city's vagueness challenge in this case is in fact a due process claim that the city lacked standing to present.

OWEN: Is it correct that there is no appeal from the hearing examiner's determination?

DEATS: Section 057 provides a limited appeal if the hearing examiner exceeds his jurisdiction, or if the arbitration award is procured by frauds or unlawful _____.

OWEN: But there is not a substantial evidence review?

DEATS: There is not a substantial evidence review as there is in the case of civil service commissions; however, I would point out with regards to civil service commission cases, the city lacks any authority to appeal whatsoever. Only a police officer or firefighter can appeal a civil service commission decision.

Looking at the respondent's vagueness challenge it's their position adopted

by the CA that the statute delegates the task of determining hearing examiner qualifications to the Triple AAA by using an inherently vague term "qualify." It's important to understand the way the statute operates to see the city's attack and perspective. The statute allows a disciplined employee to appeal to a hearing examiner instead of the civil service commission. When the employee and city cannot agree on a hearing examiner, the Triple AAA must provide a list of 7 qualified neutral arbitrators for consideration. The city and the employee then use that list to select a hearing examiner for the case.

HANKINSON: And how does the Triple AAA determine who is qualified to hear one of these matters?

DEATS: The Triple AAA is assigned the task of providing a hearing examiner. What they are required to provide are lists of qualified neutral arbitrators. Each of those terms is a term that is a general commonly understood term that's not vague in the context of the statute. What the Triple AAA is asked to provide are lists of capable, impartial hearing examiners. Now the city has pointed out, "well the statute doesn't prescribe any more qualifications for hearing examiners than that." They point to the civil service commission as an example where standards have been set.

HANKINSON: So how does the Triple AAA decide who is qualified to be on this list of 7 that's presented to the parties?

DEATS? The Triple AAA has standards that it utilizes to determine whether people can in fact be arbitrators. Each of the arbitrators on a Triple AAA list in fact has training and experience specifically in the area of hearing these types of appeals. Civil Service commissioners on the other hand are required only to be a certain age.

HANKINSON: I am just taking you back to just the focus of qualified with respect to the hearing examiner list that is provided by the Triple AAA. And it's the Triple AAA's qualification list for what it takes to be an arbitrator with the Triple AAA that is the standard?

DEATS: That's correct. Every person that's on a list that is provided by the Triple AAA is going to be a person who has met its qualification standards.

HANKINSON: Is that what "qualified" means in the statute then?

DEATS: I think what qualified means in the statute is simply that it's a capable person. To look at the term "qualified neutral arbitrator" in the context of the statute, you have to ask the question, "what's this person being assigned to do?" The statute assigns that person the task of hearing a disciplinary appeal. A person who is a qualified neutral arbitrator on a Triple AAA list is a person that is in fact qualified. And in fact, the City has never offered any evidence in this case or any other that I am aware of where persons actually offered as hearing examiners were in fact not qualified.

HANKINSON: Some of the amici say in their briefs that that in fact is the case that for example, we have people who are not lawyers making legal determinations, interpreting federal statutes, and that type of thing. And so they argue that in fact these people are not qualified even in the general sense given what a hearing examiner must do. What is your response to that argument?

DEATS: That's the exact same attack that can be made on civil service commissioners. To be a commissioner you are only required to be age 25, a nonpublic office holder of good moral character, and whatever that means, the city executive who picks the sides, so those persons aren't necessarily lawyers.

HANKINSON: I understand. But we're not worrying about that piece of the statute right now, and that's why I am trying to focus on what the argument is. As I understand it to be, is whether or not the use of the word "qualified" is vague.

DEATS: While the use of the word "qualified" would not require a person on a Triple AAA list for example to be an arbitrator, it would require that person to have some training and experience in this area, which in fact, is more that what is required of civil service commissioners. So I think that the point made by the amicus briefs is incorrect when they say that in fact untrained people are being assigned the task of hearing these cases. In each case, of course, a list of 7 names is provided. The city and the employee then alternately strike. And so certainly the city has some ability to control who ultimately is selected as a hearing examiner in that case.

BAKER: But that's not their argument. What is the source of the standards for the civil service commissioners that you just quoted?

DEATS: The statute.

BAKER: Their argument is, that in that case, the legislature is the one who sets the standards, and whoever gets the selection purpose follows that standard. And yet, the other part of their argument is, here qualified is not by legislative definition, but is decided by a profit organization vis-a-vis the Triple AAA, and therein lies the difference between who does what and under what basis.

DEATS: That's an attack on the use of the word "qualify" and you have to read the whole phrase, "qualified neutral arbitrators." It's an attack on the use of "qualified" as a standard of measurement of the delegation. This court routinely has upheld the use of such general words as standards of delegation. This court's decision in *Jordan v. State Board of Insurance*, a unanimous decision of this court in 1960, a statute required the board to rescind certificates for insurance carriers whose officers were not worthy of the public confidence. The carrier just like the city here claimed that the statute was vague because it set no standards for the insurance board to use to determine whether or not insurance company officers were not worthy of public confidence. The carrier argued just like the city here that the statute allowed the insurance board to arbitrarily set

officer qualifications that they would use to judge. This court unanimously rejected that idea. This court held that the idea embodied within that phrase "worthy of public confidence" was reasonably clear and hence acceptable as a standard of measurement. In so ruling, the court noted abundant case law upholding the statutory use of similarly general reasonably understood terms as standards of measurement.

BAKER: But is there a difference in that in the *Jordan* case it's the insurance board which is a state agency that applies the legislative standard whatever it is. And in the case of the civil service commissioner it's a city person part of the government that applies the standard that the legislature said. But in this case their argument is, qualified is not applied by any government agency. It's applied by a non government agency that is a profit organization; therefore, it suffers from the problem that we had in the *Boll Weevil* case?

DEATS: There is no doubt that the statute utilizes the experience of the American Arbitration Association in coming up with persons who are qualified, which is the statutory standard. And they are relying on the Triple AAA in that regard. That's no different than a host of statutes that similarly use the expertise of private organizations. The Worker's Compensation statute uses the AMA's expertise in coming up with guidelines for what constitutes an impairment.

HECHT: No. It uses a specific publication. They've changed that since, and that does not change the standards.

DEATS: To give another example. This court in deciding who will be bar applicants that can be appropriate allows them to attend accredited schools. Schools accredited by whom? By the American Bar Association. That's utilizing private standard to make a decision about whether or not a person that's had the required schooling to become a lawyer to practice before this and other courts in Texas.

HECHT: But the additional concern here is that there are more people who are qualified than the 7 on the list, whatever qualified means. So how did the 7 get on the list?

DEATS: The 7 are chosen at random from among the qualified arbitrators that are in the pools that the Triple AAA keeps.

HECHT: Well they are required to choose them at random or they do choose them at random?

DEATS: I believe that they do choose them at random.

HECHT: But they are not required to? If somebody who is in charge of it wants to put 5 people, 1 person, 3 people, 7 people on this list, they can do that?

DEATS: If there were manipulation of the list that would certainly raise the question of fraud, and of course, fraud is one basis for appeal of a hearing examiner's award. So certainly that kind of evidence or information would be relevant to an appeal of a hearing examiner's award.

HECHT: But the statute does not prescribe how you get on the list. It could be the people that have been most successful, or the people that have been the best comments about, or people who had the most business, or least business. It doesn't have to be random does it?

DEATS: No, there is no requirement that it be random. But I think that the situation that you are posing is a situation where there is actual manipulation of the list, and certainly that I think would be challengeable.

HECHT: But you _____ manipulation. This private group that decide how we're going to pick the...once you get over qualified, now there is 1000 people who are qualified. We are going to decide the mechanism by which these 7 get picked. They can do that, the statute doesn't prohibit that?

DEATS: The statute doesn't specifically prohibit that. And I would point out that the word "qualified" that the court is focusing on with regards to this statute appears in a host of other arbitration statutes that are utilized in Texas. This court has said previously that arbitration of disputes is highly favored in Texas.

OWEN: But those are statutes where the employees opt into the arbitration process are they not? It's an optional procedure.

DEATS: I don't think that provides a basis for distinction. The question is whether by allowing the court or a private entity to determine qualifications for arbitrators, whether that's an impermissible delegation of legislative authority. If it is in the non voluntary sense, it doesn't make any sense that it wouldn't be in the voluntary sense. So you have a situation where when the parties in an arbitration under the Texas General Arbitration Act cannot agree on who will be an arbitrator, the court is assigned the function of looking at the dispute and picking one or more qualified arbitrators.

ENOCH: The city is not arguing that the legislature could set up a mechanism where the aggrieved employee could seek an arbitrator from outside the city. They are not arguing that there is something unconstitutional about a statute that authorizes the American Arbitration Association to be the arbitrator, some member of that to be the arbitrator. Am I correct?

DEATS: In this case they are arguing simply that there aren't sufficient standards to guide the Triple AAA in providing a list of arbitrators. They are not arguing in this case that it would in all circumstances be impermissible to obtain an arbitrator to hear a disciplinary case in front of the Triple AAA.

ENOCH: Is there a complaint that the American Arbitration Association is the one that's being used, or is there a complaint that the legislature cannot authorize anybody outside of the civil service to be the arbitrator? Is the real problem here because they use the word "qualified," or is the real problem here that there are no standards for the qualification?

DEATS: The real problem cited by the city is that they use qualified and the city understands that to be establishing qualifications. Now in answer to your question though, I would point out that the city also contends that its power to discipline officers and presumably to hear disciplinary appeals is a home rule power that can't be ceded at all. And that's their third argument.

ENOCH: I'm going strictly to the first argument. If this statute had not used the word "qualified" would the city by complaining about this statute?

DEATS: Yes. As I understand their complaint, their complaint is that the word "qualified" is too vague a standard to guide the Triple AAA in providing people that are capable of hearing these disciplinary appeals. And that's the jest of their complaint.

ENOCH: They don't complain about the Triple AAA membership being the pool that's being that's being used?

DEATS: No, there hasn't been a complaint in this case. They are simply saying the use word "qualified" sets too vague a standard for guidance of the Triple AAA in providing lists of people that are capable of hearing firefighter and police officer disciplinary appeals.

PHILLIPS: Is the Federal Arbitration Mediation Service a federal entity?

DEATS: Yes, the Federal Mediation & Conciliation Service is an entity of the federal government. Lists can be requested from either the Triple AAA or the FMCS.

PHILLIPS: And that's at the city's option?

DEATS: Yes.

PHILLIPS: Do you see any distinction between a delegation of this type of state governmental authority to another governmental entity albeit federal, as opposed to a private group?

DEATS: I think this court has recognized in *Llewellyn* that there is a distinction between a delegation to a governmental agency on the one hand and to a private entity on the other, and this court has indicated that it would look more closely at private delegations and utilize the 8 factor test that was announced in *Llewellyn*. So there is a distinction based on the *Llewellyn* decision. However, in this case, there doesn't have to be a delegation to a private entity at all unless the city chooses to get the list from the Triple AAA as opposed to the FMCS.

PHILLIPS: Would you speak to their home rule argument?

DEATS: Their home rule argument is that the statute cedes what is in effect a police or governmental power to a third party in violation of their rights as a home rule city. I think that this court's decision in *City of Sweetwater v. Garrin* completely forecloses that argument. *The City of Sweewater v. Garrin* says that the home rule powers of a city may be modified or restricted by higher state law in the form of state statutes. The Civil Service Act of which §057 is a part is one such statute. And in *The City of Sweetwater v. Garrin* this court specifically held in 1964 that the legislature has preempted the field of firefighter and police officer discipline for firefighters and police officers covered by the civil service act. For that reason, there is no improper abrogation of their home rule authority, and I don't believe that that point can stand.

GONZALEZ: Let me give you a hypothetical case, not this case. Assuming the city had agreed to comply with the statute and you got 7 names does each side get limited strikes?

DEATS: No. The sides alternately strike, so each side would get 3 strikes until one name remains on the list. That name which survives the strike process would be the person who is chosen as hearing examiner.

GONZALEZ: So in essence, the bottom line is, three strikes apiece, and whoever remains is the arbitrator?

DEATS: That's correct. That's how the system works.

PHILLIPS: The parties do have the opportunity first to agree on their own arbitrator apart from ever going to one of these services?

DEATS: Correct. In fact, you don't go to either the FMCS or the Triple AAA unless the parties first have been unable to agree on a hearing examiner to resolve the dispute.

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RESPONDENT

WADE: First of all, I would like to put one of the issues to bed, the Federal Mediation and Conciliation Service is a government entity, but the arbitrators are not government employees. It is nothing more than a clearing house for arbitrators. And so it should not be given the same benefit under the law when you're talking about delegation to a private entity as opposed to a governmental agency.

PHILLIPS: That brings up a very interesting point. Throughout your brief it seemed to me the delegation you were talking about was more than the delegation to choose the arbitrator, it was the delegation to the arbitrator himself to make this decision in lieu of the civil service

commission. Whereas, almost all the petitioners' briefs seem to be talking about the delegation under the statute to make a choice of the arbitrator. Does that disconnect there as I saw it?

WADE: You've really got more than one delegation here. You've got a delegation to the Triple AAA or the federal mediation and conciliation service to come up with a list, then you have an additional delegation to the individual that is ultimately selected to hear this dispute.

PHILLIPS: You're complaining about both delegations and you complained about both in the TC?

WADE: Yes. In fact I think in the footnote of Justice Dodson's opinion, I think in the Amarillo court he talks about another delegation of the right to appeal. Despite what counsel for the petitioner has said, I think there is a real dispute about whether or not the city has any right of an appeal from an arbitrator's decision under the Triple AAA and the hearing examiner's scheme. And whereas I thought it real interesting in the East Texas case that they are saying is in conflict the East Texas case talks about qualifications and then dropped it from that point, and then in the last paragraph they say, "well we agree that these hearing examiners should apply the Texas case law and the civil service law, but they don't talk anything at all about the qualifications that that individual should possess." And so I take some heart from that part of the opinion that they are saying that there are some qualifications that this hearing examiner should have. Now the Act just doesn't speak to them, and we think it's an incomplete delegation of legislative authority to a private entity.

OWEN: You cite article 11, §5 of the Texas constitution. Is there any other source in the Texas constitution that prohibits delegation to a private person?

WADE: Article 2 and 3, the legislative function. We think they have delegated the legislative function in this case.

PHILLIPS: The delegation from the AAA to the hearing examiner is not a legislative delegation, it's some other type of delegation?

WADE: Well it's a delegation that the legislature said you're going to get your hearing examiner from a list from the Triple AAA and that individual ultimately has the delegation...well I guess he doesn't have the delegation as far as his qualification is concerned.

ENOCH: It seems to me your argument that the delegation issue was decided a long time ago when the legislature and the court decided that there could be administrative hearings with administrative officers deciding these cases. But it seemed to me the argument was the delegation of judicial authority not delegation of the legislative authority. The issue is not it seems to me whether or not it's an impermissible delegation of legislative authority to have a judge from the AAA deciding this case. It seems to me whether or not this is a judicial delegation. There's a difference between legislative delegation that is the authority to regulate and make rules, and the issue of a

hearing officer to resolve a dispute. The city's argument is not correct here. The issue about this hearing officer is not a legislative delegation, because this officer is not going to be setting up city ordinances or regulating the conduct of the city. This officer is simply going to be deciding a dispute between the officer and the city and it seems to me that issue was long ago resolved when you had administrative hearing officers and that sort of thing set up. Why isn't that the issue here?

WADE: This issue is so important to the cities because in effect what is involved is a police power of a home rule city. Now the issue was brought up, well is it preemptable by the legislature? Well no it isn't, because the legislature set this up originally requiring the cities to vote to whether or not they wanted a civil service system for their police and fire departments. So it's not preempted by the legislature. It's still a voluntary thing and in fact not all the cities have a civil service system, not all of them have adopted it. And when it was originally adopted it did not have this 143.057. It only had the civil service commission system in place. So I guess we could certainly argue that there might be a real problem right now whether or not after the legislature added this some 36 years later, whether or not any city in its right mind would adopt it. Because in effect what it does it transfers the discipline (as one justice referred to it as a very para military police force) to an outside body to where you are going to have different arbitrators each time you set up facts.

I disagree also with counsel when he says this only applies to terminations. None of the officers that are petitioners in this case were terminated. They were disciplined with suspensions for various things, such as: mistreating an officer who is handcuffed and being restrained by two other officers. We have another officer responding to a call and there is a dispute, somebody is in the house, and somebody is outside, and in violation of procedure he helps the guy outside get back inside. We have another officer who was under the influence of alcohol while he was supposed to be in an undercover support situation supporting another officer who was doing a narcotics check and these were all in violation of the policies of the police department.

SPECTOR: What are the qualifications of the civil service commissioners?

WADE: They are set out in 143.006 and they have to be over 25 years of age, not held a public office within the last 3 or so years. And there are some other qualifications set in there. Now we're not here to argue that we want to set the qualifications. That is obviously a function of the legislative process whatever the legislature comes up with.

GONZALEZ: To follow up on the facts on the three individuals involved here. The chief of police or some city official set a certain punishment for their acts and the officers were appealing or opted to appeal, they thought that perhaps it was too harsh?

WADE: Yes.

GONZALEZ: And they had an option to have the city and themselves agree on an arbitrator, and that did not work, so they opted to utilize the benefits under this statute, and have a neutral

qualified arbitrator to determine whether the chief's punishment was too severe or not. And that neural arbitrator had the power to reduce the sentence that the chief of police had given, is that correct?

WADE: That's correct.

GONZALEZ: Could the arbitrator increase the sentence?

WADE: No, I don't think he can. The officers are the only ones that have that option. You actually have 3 options: 1) you can go to civil service, which is as a practical matter not done; 2) you can agree on a hearing examiner; and 3) you can demand that the director of the civil service requests a list from either the Triple AAA or the FMCS, and then that individual hears it from which I contend is our position, we have no appeal from that.

PHILLIPS: I'm trying to understand 2 arguments here. One, you're talking about there's an improper delegation, the delegation of the civil service commission is fine, because they have to be 25 years old and a Texas resident. But it's too loose for whom the AAA chooses. If the statute were amended to have the AAA choosing whoever they want to, accept they had to be residents of Texas and 25 years old and not a public official, etc., would you then have a delegation complaint? And I hadn't thought you would until a minute ago when you started talking about discipline of a para military force.

WADE: We may or may not depending upon what comes out of the legislature and the give and take that goes into that process.

PHILLIPS: Don't give and take to it all. If the AAA and FMCS were limited to it had to be someone who also met the qualifications of the civil service commissioners, would you then have a delegation complaint?

WADE: We might have. I'm not going to say that we wouldn't. But the city's option then is to look at the new system and see if it works, and then they could vote to repeal it.

PHILLIPS: Which you could vote to repeal this, correct? The electorate already chose this system is that correct?

WADE: Yes. We are not wanting to throw away civil service.

PHILLIPS: Does your local city government have the authority to repeal this or does it have to come from the electorate?

WADE: No, the electorate has to repeal it. And that's set out in the statute. But we don't want to throw away civil service.

BAKER: When you say "has the power to repeal it," does it have the power to repeal this particular section, 143.057, or just opt out of the whole?

WADE: Just opt out.

GONZALEZ: If you opted out of civil service what would you be left with? What would be the rights of the firemen and police officers rights?

WADE: It's interesting that you brought that up, because there's another case coming up that that might be an issue in that case. Petition is pending before this court at that time. Our position in that case is, we went back and looked and found out that the City of Lubbock did not adopt an identical verbatim civil service system set out exactly like 1269M was. So it would be our position in that case that when 143.057 or its predecessor came in that the electorate of the City of Lubbock would have to pass on that. There are other cities in the state that have civil service systems that aren't like this. But that's not required. We have civil service.

OWEN: I'm not sure that answers your question. If you repeal the civil service system that you've got how would officers be disciplined and would there be an appeal process?

WADE: We might establish the same civil service system, a system that wasn't identical to. I can't answer that, because I don't know.

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PHILLIPS: Your opposing counsel says this is really a void for vagueness argument couched in terms of separation of powers and the municipality has no power to bring a due process claim under established Texas law. Would you comment on that?

LAWYER: There are several points on that. In the first place, it's clear that it is not a void for vagueness argument, which was our point one in the CA. We had 4 constitutional points. Point 1 was vagueness. And point 2 was unconstitutional delegation of the legislative authority. Under article 2, §1, Article 3, §1, our third point was that it creates an inherent bias the way that this thing is set up against the city. And fourthly, it violates the delegation of home rule city authority under article 11, §5.

The Amarillo court rejected our points 1 and 3 on the ground of standing that the city was not a person, and these were bill of rights complaints which the city couldn't raise. The CA rejected that and they specifically decided on our point 2, which was unconstitutional delegation of legislative authority. They do use the word "vague" in there, but clearly if you read the opinion clearly what they are talking about is the word "qualified" has a meaning. The word "qualified" is not vague. The word "qualified" means one that complies with the standards.

PHILLIPS: In this court you're not pressing your points 1 and 3 below? You're abandoning those?

LAWYER: No. Although the court has not sustained them, we have raised them as alternative grounds. And in the *Wilson* case, we have raised them in our motion for rehearing.

PHILLIPS: So it is your argument that you can make a void for vagueness argument separate from your delegation argument?

LAWYER: Correct. And also it's important to point out that the city is not the only party here. We think under *Newtsy* even the city itself has a right to bring these challenges. It's important to note, we are talking here about two different types of delegations. One of them is the complaint that we have that the Amarillo court ruled on its unconstitutional delegation of legislative authority under art. 2, §1. That can be cured by going back in and setting forth the standards. That can be cleared up by a legislative amendment. But article 11, §5 which the Amarillo court did not reach in the *Proctor* case, but they did reach in the *Wilson* case, which we've attached as an appendix to our brief, which came up subsequently involves the same constitutional issues and other issues as well. In the *Wilson* case they said it was also an unconstitutional delegation of home rule power, and that's a constitutional matter whether or not the legislature can permit the citizens to vote or direct an arbitration on a police power to some arbitrator that could live anywhere in the US. And that could not be cured we submit by a mere statutory amendment.

OWEN: If the legislature came back and made the arbitration boards they had the same requirement that your civil service commission has, but it's still a private arbitrator or private mediator, would you still have a unconstitutional delegation problem?

LAWYER: If the legislature allowed the AAA to give a list of arbitrators but set forth in the statute that you shall not put anybody on this list that does not have a law degree, etc., if that met the appropriate standards, then you would not have an unconstitutional delegation legislative authority under art. 2, §1 or art. 3, §1. But we feel that you would still have an unconstitutional delegation under art. 11, §5, because ultimately you're giving to some private individual who has no accountability to the city whatsoever aside from the _____ opinions that you are going to get. We submit that the discipline of the police force is a city function, which cannot be delegated to some private individual, however the legislature tries to do it.

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REBUTTAL

DEATS: I think it's important to refocus on what exactly is the nature of the two challenges by the city.

OWEN: Why isn't that a problem when you delegate the police power to discipline

policemen to a private entity under our constitution?

DEATS: Their argument is under the home rule provision. Under the home rule provision you can't cede governmental powers to anybody absent constitutional authorization. I think that this court foreclosed that argument in *Sweetwater v. Garen*. Home rule authority to the extent it exists derives from the constitution. But it can be limited by state statutes. The state has done so by state statute. They have assigned this adjudicatory function to hearing examiners. This court in *City of Sweetwater v. Geren* said, the state has preempted the field of firefighter and police officer discipline.

OWEN: How can the state delegate its police power to private entities?

DEATS: They don't cite any authority and the CA in *Wilson* did not cite any authority for the idea that this adjudicatory function simply hearing a disciplinary appeal is a police power. If the court were to accept that argument, then could the state regulate the city's control of its police force in any manner? Could they require that they have a civil service system? Could they require that the police officers be certified by the _____ organization?

OWEN: How is it that the state has the authority to delegate discipline of firefighters and police officers to the private sector? Where do they get that authority as opposed to the governmental sector where there is some sort of checks and balances and accountability to a government official?

DEATS: The answer is, they have not delegated the power to discipline police officers to a private entity. The police chief still makes that decision.

OWEN: Which can be totally overridden by a private individual?

DEATS: The private individual can say that that decision is either not supported by the facts or is inappropriate in the context of the case. That's true.

OWEN: And that private individual has the final say so?

DEATS: Except for the limited appeal that the statute provides.

OWEN: So how does the state have the authority to delegate that police power, that function of disciplining police officers to a private individual?

DEATS: What I would say is, is that the power to hear a disciplinary appeal is not in fact a police power, that the power to make decisions by discipline does in fact remains with the city and that hearing of adjudicatory appeals is a totally separate matter that clearly is within the province of the state. Otherwise, the state couldn't set up administrative agencies at all to look at things that

cities or other governmental entities do.

SPECTOR: The civil service commission members are private citizens are they not? They are not or are they employed by the city?

DEATS: They are private citizens. Under the statute, the fire chief's brother can be a civil service commissioner.

OWEN: But they are chosen by elected officials?

DEATS: They are chosen by the city manager and approved by the city council. In other words they are chosen by one party to the dispute.

OWEN: They are chosen by a governmental entity who have some accountability to the electorate if they don't properly pick the civil service commissioners?

DEATS: That's correct. They are chosen by that. But keep in mind that the persons they pick, there is almost a limitless area within which they can choose, and the question would be: If the state cannot in the civil service act assign the task of hearing disciplinary appeals to hearing examiners, why could they assign that task to for example a civil service commission or a state board that they might set up?

OWEN: Do you see a difference where the police chief picks his brother or someone on the city council picks the chief's brother, and put him on a civil service commission, and the public gets dissatisfied with the civil service commission's ruling? They have some means of making the city council account for that do they not through the electorate?

DEATS: They do. And also if they become dissatisfied with the civil service system in general they can hold them accountable thereto, because the citizenry can by petition and election rescind a civil service in its entirety. It's a local option statute that the city has chosen to adopt. If they choose to rescind it they can do that too.

GONZALEZ: If they did that, what protection does the firemen and policemen have without a civil service system if the city opted out?

DEATS: They would have none. They would have only whatever protection the city chose to afford. They would be employees at will just like any other employee.

GONZALEZ: So whatever the city manager or the police chief decided the discipline would be, there would be no recourse on that?

DEATS: There would be no recourse from that unless I suppose there was some sort

of constitutional question raised.