Reversed & Rendered and Opinion filed August 30, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-01040-CV

THE CITY OF HOUSTON, Appellant and Cross-Appellee

V.

RONALD MARTIN, Appellee and Cross-Appellant

On Appeal from the 127th District Court
Harris County, Texas
Trial Court Cause No. 99-10905

O P I N I O N

This appeal arises from a lawsuit brought by appellee Ronald Martin, an emergency medical technician employed by the City of Houston Fire Department ("HFD"). Martin's lawsuit claimed that appellant and cross-appellee, the City of Houston ("the City") were liable for statutory penalties because HFD's Fire Chief intentionally failed to implement an award rendered by an independent hearing examiner in connection with a grievance Martin filed concerning HFD's overtime policy for EMTs at special events. As a consequence, Martin claimed he was entitled to a $1,000.00-a-day penalty under the Local Government Code, and the trial court agreed, entering judgment for Martin in the amount

of $788,000.00. Both parties appealed—Martin claiming he is entitled to an additional 97 days' worth of penalties, or $97,000.00, plus pre-judgment interest,[1] and the City claiming, *inter alia*, that the hearing examiner's award was preempted as a matter of law. We agree with the City and reverse and render judgment in its favor.

I. Background Facts and Procedural History

During December 1996 and January 1997, the City of Houston hosted a Smithsonian Exhibition at the George R. Brown Convention Center. HFD supplied paramedics and EMTs for first-aid service on an overtime basis. Martin, an EMT, was not scheduled for any overtime during the exhibition and subsequently filed a grievance. The matter was eventually appealed to an independent hearing examiner.

The evidence before the hearing examiner revealed that overtime rosters were done on an ad hoc basis: shift captains would supply the Assistant Fire Chief with a list of EMTs who they believed should get the overtime. This practice, Martin alleged, perpetuated a system of favoritism. On November 21, 1997, at the conclusion of the hearing, the examiner entered an Award in favor of Martin. In it, the examiner established overtime guidelines for HFD to follow. Under the guidelines contained in the hearing examiner's award HFD was to create an EMT overtime roster of roughly 240 persons, with an equal number of EMTs selected from each shift.[2] EMTs would be ranked, by shift, according to their performance ratings. If more than one EMT had the same performance rating, a senior EMT would be placed ahead of a junior one. After the roster was in place, overtime

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[1] Martin asserts that the hearing examiner's Award was not implemented until May 7, 2000, or seven days after the court conducted a Rule 166 hearing. After this hearing, the trial court decided there were no issues of material fact to be decided and that Martin was entitled to judgment as a matter of law. Martin claims that the court erred by only awarding damages through the date of the 166 hearing. Martin argues he is entitled to the other 90 days worth of penalties because the trial court erred in not awarding the penalty during the days in which the hearing examiner retained jurisdiction. Because our disposition of this case, we do not address Martin's claim that he is entitled to an additional 97 days' worth of penalties.

[2] At oral argument, Martin's attorneys did not dispute the City's assertion that HFD employs more than 1,800 EMTs.

would be offered to the first person on the list, then the second, and so on. The overtime roster would be reconstituted annually. The hearing examiner retained jurisdiction for 90 days from the date of the hearing examiner's Award "for the purpose of handling any disputes that might arise in the implementation of the remedy specified herein." Neither side returned to the hearing examiner nor was his decision appealed.

Around the time the hearing examiner heard Martin's grievance, the City of Houston and the Houston Professional Fire Fighters Association a/k/a International Association of Fire Fighters, AFL-CIO, Local Union No. 341 ("the Union"), of which Martin is a member, were negotiating the terms of a new Meet and Confer Agreement, a document which covers wages, hours, and conditions of employment with HFD. Among its terms, the Meet and Confer Agreement addresses a new overtime policy for all HFD firefighters, specifically providing that "[t]he Fire Chief shall establish, in consultation with the [Union], an overtime policy for *all* divisions. The Fire Chief shall establish performance/attendance standards for eligibility for overtime in all divisions." (Emphasis our own.) By a popular vote of its members, the Union adopted the Meet and Confer Agreement, and the City and the Union's leadership memorialized their agreement on or about December 17, 1997, or less than one month from the date of Martin's award.

By July 4, 1998, the Fire Chief established an overtime policy pursuant to "Section 4 of the Meet and Confer Agreement . . . ." The policy does not include performance ratings as part of the calculus for overtime eligibility. Rather, under the policy, everyone is eligible for scheduled overtime assignments unless they fall within a designated exception. The exceptions include, among others, an assistant fire chief's written request for removal of a member in accordance with section 6.05 of the policy. That section calls for mandatory removal from the overtime list only if the member declines three consecutive opportunities for overtime on three different dates or the member is on temporary suspension after all appeals have been exhausted.[3] Additionally, an assistant

[3] A member must also be removed if he makes a written request to his superior.

fire chief may remove a member from the list if the current performance evaluation establishes that the member has not properly conducted himself according to the Rules and Regulations and Guidelines of HFD.

Martin sued the City in March, 1999, claiming that, under the Local Government Code, the City was liable for penalties at the rate of $1,000.00 a day due to the Fire Chief's intentional failure to implement the hearing examiner's award. *See* TEX. LOC. GOV'T. CODE ANN. § 143.001, *et. seq.* (Vernon 1999). After a little more than a year had passed, the trial court conducted a pretrial hearing pursuant to Texas Rule of Civil Procedure 166. At the conclusion of the hearing, the trial court determined that no genuine issue of material fact existed and that Martin was entitled to judgment as a matter of law. Accordingly, the trial court entered judgment in Martin's favor.

II. Discussion

In its second point of error, the City contends that the Meet and Confer Agreement supercedes and preempts the hearing examiner's award. We disagree. Under section 143.207(a), a Meet and Confer Agreement "supercedes a previous statute concerning wages, salaries, rates of pay, hours of work, and other terms and conditions of employment to the extent of any conflict with the previous statute." TEX. LOC. GOV'T. CODE ANN. § 143.207(a) (Vernon 1999). The plain language of section 143.207(a) applies only to previously enacted statutes. An independent hearing examiner's award is not a statute.

The City, however, also argues that, under section 143.207(b), the Meet and Confer Agreement preempts the hearing examiner's award. That section provides that, "[a] written agreement under this section preempts all contrary local ordinances, executive orders, legislation, or rules adopted by the state or a political subdivision or agent of the state, *such as* a personnel board, *a civil service commission*, or a home-rule municipality." TEX. LOC. GOV'T. CODE ANN. § 143.207(b) (Vernon 1999) (emphases added). We must decide, first, whether an independent hearing examiner is like a civil service commission and, second, if so, whether the hearing examiner's Award is contrary to the Meet and

Confer Agreement.

A. Is a Hearing Examiner Like a Civil Service Commission Within the Meaning of Section 143.207(b)?

A civil service commission is the functional equivalent of an independent hearing examiner. A firefighter, unhappy with the outcome of a Step II grievance,[4] may pursue his grievance by either proceeding before an independent hearing examiner under section 143.057, as Martin did here, or by filing a Step III grievance form. TEX. LOC. GOV'T. CODE ANN. § 143.129(d) (Vernon 1999). The two options are mutually exclusive. *Id.*; *see also City of Houston v. Jackson*, 42 S.W.3d 316 (Tex. App.—Houston [14th Dist.] 2001, pet. filed). Also, an independent hearing examiner has the same powers and duties as the firefighter's civil service commission. TEX. LOC. GOV'T. CODE ANN. § 143.057(f) (Vernon 1999). We therefore conclude that an independent hearing examiner is like a civil service commission within the meaning of section 143.207(b) of the Local Government Code.

B. Is the Meet and Confer Agreement Contrary to the Hearing Examiner's Award?

We next turn to whether the Meet and Confer Agreement preempts the award rendered by the independent hearing examiner. Under the hearing examiner's Award, the City is required to implement a "special event" overtime policy limited to 240 EMTs—80 being selected from each of three shifts. On the other hand, the Meet and Confer Agreement requires the City to implement a single overtime policy for all firefighters.[5] Both sides agree the City employs more than 1,800 EMTs and even more firefighters who

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[4] In a Step II grievance, the aggrieved firefighter, his or her immediate supervisor, and the department head or department head's representative meet, after which the department head issues a written response to the grievant. TEX. LOC. GOV'T. CODE ANN. § 143.129 (Vernon 1999). A Step I grievance, on the other hand, is a meeting consisting of the grievant, his or her immediate supervisor, and the person against whom the grievance is lodged. *Id.* at § 143.128 (Vernon 1999).

[5] The language of the Meet and Confer Agreement does not purport to limit the overtime policy to special events only. But even if it did, our result would be the same because of the singular fact that the Meet and Confer Agreement does establish a uniform policy for everyone, whereas the Award limits the overtime policy to 240 EMTs.

are not classified as EMTs. Even if we focus only on the overtime policy as it applies to EMTs in an effort to harmonize the hearing examiner's Award and the Meet and Confer Agreement, we must conclude that the Meet and Confer Agreement and the Award are in conflict for at least three basic reasons. First, the Meet and Confer Agreement requires a single overtime policy for all EMTs, not just the 13**a** percent of them required by the independent hearing examiner's Award. Thus, if the City were to establish an overtime policy for all EMTs, it would be in violation of the hearing examiner's award to the extent the new policy contemplated an additional 1,560 EMTs. Second, the hearing examiner's Award establishes a merit-based system of awarding overtime, whereas under the Meet and Confer Agreement, everyone is eligible for overtime unless they fall within a specified exception. Therefore, the Meet and Confer Agreement necessarily dilutes the 240 "preferred" overtime recipients' right to overtime by spreading overtime opportunities across all 1,800 EMTs. Finally, the City could not live up to the terms of the Meet and Confer Agreement if it were to establish an overtime policy for only 240 EMTs, as called for by the hearing examiner's Award. For the foregoing reasons, the two are contrary. Accordingly, the Meet and Confer Agreement preempts the Award of the independent hearing examiner. *See* TEX. LOC. GOV'T. CODE ANN. § 143.207(b) (Vernon 1999). Therefore, it was error for the trial court to order the City to pay damages to Martin. The judgment of the trial court is reversed and judgment is rendered in favor of the City.

Leslie Brock Yates
Justice

Judgment rendered and Opinion filed August 30, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

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