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Supreme Court of Texas.
THE COUNTY OF DALLAS, Petitioner,
v.
Linda L. WILAND, as Administrator for the Estate of Stanley Gaines, Jim
Gilliand, and Sonia Avina, Respondents.
Nos. 04-0247, 04-0631.

March 22, 2005

Appearances:
Deborah G. Hankinson, Law Offices of Deborah Hankinson PC, Dallas,
TX, for Petitioner.
Douglas Alexander, Alexander Dubose Jones & Townsend, LLP, Austin,
TX, for Respondent.

Before:

Chife Justice Wallace B. Jefferson, Priscilla R. Owen, Harriet
O'Neill, David M. Medina, Paul w. Green, Nathan L. Hecht, Dale
Wainwright, Scott A. Brister, Justices.

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JUSTICE: Be seated please.

The Court is ready to hear argument in the consolidated cases
040247 and 040631, which is consolidated for argument.

SPEAKER: May it please the Court. Ms. Deborah Hatkinson
[inaudible].

ORAL ARGUMENT OF DEBORAH G. HANKINSON ON BEHALF OF THE PETITIONER

MS. HANKINSON: May it please the Court. The court of appeals in
this case err when it improperly transformed grievance procedures that
Dallas County provided to its employees into a constitutionally
protected property interest in continued public employment.

To accomplish this transformation, the Court of Appeals
contradicted the large body of law by this Court that is well
established in its opinions dating back a hundred years in the area of
at-will employment. Those principles, since that time, had been
uniformly applied by all those Court of Appeals that have addressed
similar issues until these cases came along. The errors evident in the
words chosen by the Court of Appeals in its opinions, the property
interest is created not by the words used in Dallas County's policy
manual but rather in the words that had been omitted. And through that

omission, the Court implied a modification of the at-will relationship between Dallas County and its deputy constables.

Because these cases present only claims under 42 USC Section 1983, the dispositive question before the Court is whether the respondents, plaintiffs below have a constitutionally protected property in their continued public employment.

JUSTICE: What's the purpose of the grievance process?

MS. HANKINSON: The purpose of the grievance process, your Honor, is to give employees the opportunity to be heard by others than their supervisor, to possibly have termination decisions overturned, and to give them a voice in their employment matters.

JUSTICE: So, if the employment decision is overturned by higher authority, does it have to be based on cause or I mean, how does that work?

MS. HANKINSON: Just as -- the particular procedures that Dallas County chose to adopt as part of its Civil Service system provides for supervisors decisions to be reviewed by department heads. And after that, if the employee is not happy with the dismissal decisions, then they have the opportunity to use the grievance procedures that have been set up by Dallas County. The Civil Service Commission is made up of Dallas County commissioners, and they then can review the decision and decide if they choose to reverse it or not.

JUSTICE: What are the constraints? Is it substantial evidence? Is it [inaudible] can county commissioner decide well? There was really no reason to terminate the employee that --

MS. HANKINSON: There really are not standards in the grievance policy. It really is a very much opportunity to be heard. Now, the procedures then provide for review in district court and those are by substantial evidence.

JUSTICE: All right so, is it a mandatory process in term? Is it constitution exhaustion requirement? If the employee is terminated, do they have to go through the grievance procedure before they sue in district court?

MS. HANKINSON: I would presume so, your Honor. But, I think, then the question becomes, what are they suing for? If the question is, are they suing over the failure to be provided the grievance processes as a manner of local policy, as opposed to a matter of constitutional right, then I think you have different issues and different paths.

JUSTICE: Well, I guess, this one, lets just say, the constable gets some letters that says, "You're terminated." No reason, just says, "You're terminated. In two weeks you're out here." What the constable does the grievance procedure is I didn't do anything wrong and all the way up the line they just say, terminate, terminate, terminate. Gets this to district court and the district court says, "I don't see any basis in the record for you being terminated." Does the district court have to reinstate them? I mean, what is the substitute?

MS. HANKINSON: Well, Dallas County is an at-will -- has an at-will employment relationship with all of its employees, and that has not been altered by the policy law.

JUSTICE: So, what's the purpose of the grievance --

MS. HANKINSON: It's the opportunity to be heard by someone besides your immediate supervisor.

JUSTICE: And if -- once you should get to district court, does the district court look at substantial evidence? Do they say, "Well, it doesn't matter why you were terminated, the county has rights to terminate you."

MS. HANKINSON: Well, I think that that's right.

JUSTICE: So, what's the point of the --

MS. HANKINSON: It's the opportunity to go beyond your immediate supervisor.

JUSTICE: Doesn't that procedure in itself create a substantial interest for the employee?

MS. HANKINSON: No, it does not.

JUSTICE: Why not?

MS. HANKINSON: It does not create a property interest. The question is whether it creates a constitutionally protected property interest and the law is very clear on what it takes to require that.

JUSTICE: And what is it? To follow up with Justice Owen's question, what is the purpose of that procedure?

MS. HANKINSON: The procedure is to give them the opportunity to be heard.

JUSTICE: Well, its all for naught at the end of the day.

MS. HANKINSON: No, it's not, because the county commissioners may choose to reverse. They may decide that the employee has been treated unfair or that there is some basis for personal animosity between supervisor and employee. It gives them the opportunity to be able to have somebody else hear what their complaint is. And the grievance policy can be used for other reasons besides dismissal. It's available anytime a Dallas County employee has something to grieve about. And it --

JUSTICE: Isn't it standard procedure for these newly elected constables to hire their own staff and terminate the people that where they're supporting their predecessor?

MS. HANKINSON: They don't terminate, your Honor. What the statutes require, the local government code that governs deputy constables provides that a constable appoints his or her deputies in writing, that the appointment of those constables have to be approved as necessary by the county commissioners and that the constables are legally responsible.

As a result of that framework, both for deputy sheriffs and deputy constables, the Courts of Appeals have recognized in the state that the appointment of a constable is -- last for as long as the term of the appointing constable, the deputy's term does. So what happens is, when the constable who appointed his term expires, then that employment expires and there must be a reappointment under the new constable or under the new term.

JUSTICE: Is there any problem constitutionally with the decision not to reappoint for purely political reasons, "You were not in my administration, you supported my opponent and I just don't want you for that reason?"

MS. HANKINSON: I think that's a First Amendment claim, which is not an issue in this particular case. There is nothing about this particular policy or procedure that would stand in the way of an employee whose protected speech had been impaired by employment decision for moving forward under Section 1983. That would be a constitutionally protected interest that would give rise to 1983 claim. That is different than what we have here, that is not an issue here, and I don't think that anything Dallas County did or can do alters that fundamental right in the United States Constitution.

JUSTICE: I just want to follow up --

MS. HANKINSON: Yes.

JUSTICE: -- to be sure I understand. I follow your argument about how the process is designed to give employees hearing. But I'm not sure then what you complain of to the district court if you are an at-will

employed?

MS. HANKINSON: I agree, your Honor. I don't have a disagreement with that. And I think that the mere fact that that is the way the system is setup, does not in anyway make this Court's test for what it takes, not by the at-will employment relationship.

JUSTICE: Well, the existence of a constitutionally protected property interest is going to depend on whether we can stray the policy manual to require for cause termination.

MS. HANKINSON: Absolutely.

JUSTICE: And so if you look at 4.22 it says, "The notice shall specify the cause for termination."

MS. HANKINSON: Yes.

JUSTICE: That would seem to me to require for cause termination.

MS. HANKINSON: I don't believe that it does, your Honor. There still could be a reason. I mean, at that for cause, typically mean at-will employment is defined. For cause, no cause, good cause, whatever is the at-will arrangement.

MS. HANKINSON: So there are different kinds of causes. So it's giving a reason to the employee.

JUSTICE: Which is my point, I mean, when they say you shall specifies a cause that seems inconsistent with no cause termination.

MS. HANKINSON: I don't think so, your Honor. I don't think you could purge with all of the case law at this Court with the statute what it takes, because I think the policy has to specifically say not just cause, but the determination has to be only for just cause.

JUSTICE: Which brings in Dr. Mudley and Taylor, the county's director of personnel and civil servants who said the plaintiffs can only have been terminated for cause. The brief states that her opinion is irrelevant here. Isn't it some evidence of what the manual means when the high level employees and officials of the county give their opinion of what the policy manual means?

MS. HANKINSON: It is not, your Honor, it is not because whether there is a constitutionally protected property interest, it is a question of law, first of all. And second of all, as this Court has said, that a county exercising a government function is not subject to estoppel by statements made by its various employees, so she is unable to bind the county by that statement. In addition, your honor --

JUSTICE: It doesn't have to be an estoppel argument. I could be a matter of interpreting the policy manual such that 4.22, as Justice O'Neill just pointed out in trying to figure out what that language means. I don't disagree with it as a question of law but by saying it's a question of law, you're saying that we should not consider the high level policy statements of the county employees as to what the manual means.

MS. HANKINSON: You should not, your Honor. It is irrelevant. It's a question of law though this Court under the applicable tasks. One month before she gave her deposition in this case, you will find in the record, at page 49, the clerk's record, that the county in answering the request for revisions denied the existence of a property right.

JUSTICE: Let me ask you, in the Grounds v. Tolar, we said that by requiring preestablished reasons, the term contract nonrenewal act created a substitute right. Now, why is this not requiring preestablished reasons?

MS. HANKINSON: Because the provision under 4.21, which is the provision that [inaudible] is only specified when employees can be dismissed without prior notice. If you look down below at the other provisions, you will see that notices required predetermination

hearings or --

JUSTICE: But doesn't that lead to -- then you can terminate with notice for no reason.

MS. HANKINSON: It is not, your Honor, because this Court's test is that you have specifically and expressively indicate in this kind of policy manual that you can only be terminated for just cause. There is no language to that in effect in here. There is case law as well that we decided there are three reasons why that's wrong --

JUSTICE: I understand that -- Hold on.

MS. HANKINSON: Yeah.

JUSTICE: The logic, although, follow up to that, is that you would be able to send notice that we're terminating you for no reason --

MS. HANKINSON: Right.

JUSTICE: -- and that is the distinction that you're drawing -- that they intended to draw a distinction. You now notice that there's reason but you have to give the notice that there's no reason.

MS. HANKINSON: No, no, because the list under 4.21 is not exhaustive. It has, but not limited to, language in it. It also has a catch all at the end. There is plenty of Texas case law that indicates nonexhaustive lists do not translate into only for just cause.

In addition to that, we have a disclaimer in this manual. We have a specific disclaimer that this policy manual is not to be construed as a contractive employment or a provision guaranteeing specific term or tenure of employment. This Court has specifically said that a disclaimer negates modification of the at-willed offer. You have to look at the totality of the policy manual. You can't take the words out of isolation. So we don't have a specific and expressed limitation. We have a nonexhaustive list, a specific lineage in 4.201 talks about dismissal without prior notice.

In addition to that, we have a statement by the county in the manual that it reserved the right to unilaterally amend the policy. Texas law is clear that that is an indicator that at-will employment has not been modified. And finally at best, we have an interview. And it's been very clear under Texas law as well, as well as the Fifth Circuit, interpreting Texas law that ambiguities are resolved in favor of the employer. So the bottom line is that we have cited many Court of Appeals decisions and this Court's decisions in our in our break looking at all of these applicable principles, specifically in expressed language saying that the decisions of the county are specifically modified for only just cause termination.

JUSTICE: Is that distinguishable from the situation in *Grounds v. Tolar* because there we said that prerequisites include providing the teacher with notice of preestablished reasons for nonrenewal in a hearing and that could be decided at the local level which to track what's happening here. And my question is, do we need to overrule *Tolar* to rule your win?

MS. HANKINSON: No. Because under *Grounds v. Tolar*, under the term contract nonrenewal act, the Court ruled that there is an absolute limit on the discretion of the school district because there were certain procedures implies. And if a school under the term contract nonrenewal act is required to set specific reasons for not renewing, then they're required to give those reasons if they're going to nonrenewed for a specific time. If not, they're precluded, they cannot discharge the teacher, they cannot nonrenew the teacher. So there was an absolute limit. That's specific inexpressed limitation on the employer's discretion that exists in *Grounds v. Tolar* and exists in any task. This is not something that you root around in a language and

think, "Gosh, maybe I can find something here." Texas law is very clear that in order to create a constitutionally protect a property interest, you have to have a specific and expressed limitation that the termination can only be for just cause.

JUSTICE: So we get back to the district courts. There is nothing in the record -- what can the district court say they didn't -- since they didn't specify a cause for terminating you and there is no evidence supporting if there is any reason to terminate you, doesn't the district court have to reinstate under the grievance procedure?

MS. HANKINSON: No. Because the grievance procedure gives no substantive right, no constitutionally protective right to continue employment. That's the whole point.

JUSTICE: So what's the difference if the district to review in any error, if they always have the right no matter what you just charged them? What's the point?

MS. HANKINSON: I don't disagree with you, your Honor --

JUSTICE: It's kind of a feel good policy.

MS. HANKINSON: It is, it is a policy that allows --

JUSTICE: But why involve the district courts in a feel good policy? I mean the district court require, I thought, to reinstate if the record doesn't support what was done below.

MS. HANKINSON: Well, if you look at the grievance policy, your Honor, and if you look at 4.26, if the grievance is upheld. So the point is that it's not just a matter --

JUSTICE: We don't have that in our briefs, but what is 4.26?

MS. HANKINSON: 4.26 says this, "If a grievance is upheld, the category she employed in maybe reinstated and maybe granted that pay depending on the determination of the grievance." It is a grievance procedure which means that I have a complaint about how --

JUSTICE: [inaudible] that terminate and you didn't tell me why I was terminated, and no one will tell me why I'm terminated. I go to district court, and the court says, you weren't given a reason, there is no substantial evidence supporting your termination. Doesn't the court have to reinstate the employment?

MS. HANKINSON: No, because its at-will employment.

JUSTICE: What is Civil Service protection now?

MS. HANKINSON: Civil Service protection depends on what the county adopts as Civil Service protection. The statutes and local government code provision that gave Dallas County the authority to establish a Civil Service protection system, gave it total discretion to decide what that system would be, and whether it would be of any substantive rights, or whether it would only give procedural protections.

JUSTICE: What are category C employees?

MS. HANKINSON: Pardon me?

JUSTICE: Category C employees.

MS. HANKINSON: Correct.

JUSTICE: What are they?

MS. HANKINSON: The category C employees are really pretty much the catchall. I mean, the deputy constables are swept in under this. Most employees of Dallas County are under that as opposed to elected officials and other should fall under the other categories. There is category D that involves employees that are employed by virtue of grant money. C is kind of the catchall kind of provision. That in nature --

JUSTICE: If I can follow up on that question, what's the purpose of C protection? Why create these categories if everything's gonna be at-will? What's the purpose of categorizing?

MS. HANKINSON: Because there are two different issues and the law

is very clear that grievance procedures in the establishment of grievance procedures does not mean the granting of a constitutional protective property interest. Those are two entirely different issues. And what happened in this particular case was the two that meshed together. They have to be analyzed separately. And so what we have to look at is the entirety of this policy manual and look under the court's tests for whether there has been modification of at-will. And there is not -- the test has not been met. Dallas County chose, as under Local Government Code Chapter Section 86.001, to set up Civil Service and to do it however they wanted to do it, and they chose to adopt grievance procedures out of concern that employees didn't feel like they had the chance to be heard. If you don't like what your supervisor did, you go to your department head. If you don't like that, you can have three commissioners who at Civil Service commissioner -- Commission reviewed to make sure you do that with fairly.

JUSTICE: Counsel.

MS. HANKINSON: Yes.

JUSTICE: You said that the deputy constables' terms expire when the constables' term expires.

MS. HANKINSON: Yes.

JUSTICE: With regard to deputy sheriffs, the statute's pretty clear on that, it says county sheriffs [inaudible] pleasure of the share. That same language is not on Chapter 86 for constables. What statutory language do you cite to support the position that the deputy constables term expires?

MS. HANKINSON: I actually rely on case law interpreting that the deputy sheriff and the deputy constables' statute. The deputy constable statute does require appointment in writing and approval by the commissioner, and it also makes the particular constable responsible or liable for the acts of the deputy constable. And what we've got is the Dallas Court of Appeals decision, the Arrington case, and then we also look to the -- and it cites back to the El Paso case law deals with deputy sheriffs that talk about how terms -- because of the fact that the deputies are responsible to the appointing official, constable or sheriff, it is viewed as having being tied to the term, and that's why the Court of Appeals has interpreted both the constables' statute as well as the sheriffs' statute and it makes sense. If you hire me to work for you and then Justice Owen is elected to be the constable the next year, she, under the statute, has to appoint her own constables and her budgetary concern, so it is the practical extension of the statute in the real world.

JUSTICE: And your response to the respondent's argument that your position was in the old legislative world that represented Rollins and others past statutory change that makes Arrington simply of no effect in the new legislative environment? What's your response?

MS. HANKINSON: Well, Arrington dealt with the question of whether they were category C employees, and decided that they were not entitled to the protections under the policy manual. So what ended up happening after that was that Representative Rollins went to the legislature and that's when 86.011 was put into local government code which gave large counties the ability be able to do these Civil Service systems and include deputy constables, which Dallas County chose to do. If there was no dictate on what that system would look like, it is entirely -- if you look at the language of the statute, its entirely at Dallas County as to what it was going to do.

JUSTICE: So it was a legislative change but it didn't change how the process works in Dallas?

MS. HANKINSON: No. Because it was up to Dallas to change how things were going in Dallas. The legislature gave Dallas County the authority to do that and then it was up to Dallas whether it chose to do it. And once the question was -- once it chose to do it, then how it was going to do it and how far it would go?

JUSTICE: Thank you, Counsel.

The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Douglas Alexander will represent argument of the respondent.

ORAL ARGUMENT OF DOUGLAS ALEXANDER ON BEHALF OF THE RESPONDENT

MR. ALEXANDER: May it please the Court. I've got seven areas that I want to cover that were based upon the argument that was just made and I tried to bang through them as quickly as possible to leave some time but the answers [inaudible].

First, Justice Wainwright, you've asked about the question about the testimony that designated corporate representative. We are not claiming an estoppel. We are claiming, what you are talking about, an interpretation of their own rules. Let me give you a cite to a case, there's Public Utility Commission of Texas v. Both States 809 Southwest Second 201 at 207, Texas Supreme Court case in which --

JUSTICE: I wanna know if this disclaimer that they have under manual --

MR. ALEXANDER: Yes, we can talk about the disclaimer then right now. The disclaimer provision has to do with disclaiming this being a contract.

JUSTICE: Right.

MR. ALEXANDER: It's important to understand that in this case, we are predicating our argument upon the existence of Civil Service rules, not a contract, completely different. If we were making a breach of contract claim, for instance, if this was the private employer context, in which you had an employee handbook that had a for-cause limitation, then that type of disclaimer would work. But here, what we have is Civil Service rules and for that reason, the disclaimer does not work.

Now, getting back to this point. If you'll on your tab one, we don't just have the testimony of the corporate designated representative giving the opinion, the interpretation of Dallas County; I'm citing here three cases to you. Other than this case, in which courts around the state have held for 17 years, and each of this case have held that Civil Service employees in Dallas County had a protected property interest in their jobs. Now, what's significant is that in each of these cases, Dallas County never disputed that proposition. It took as a given of each of those cases that was protected so that we know that for 17 years, Dallas County has consistently interpreted its Civil Service rules as creating a protective property interest.

JUSTICE: That was also the county's position on the grievance process --

MR. ALEXANDER: Yes -- in what?

JUSTICE: At the grievance stage that was also Dallas County's position in this case, wasn't it?

MR. ALEXANDER: Correct. So they consistently taken that position. Now, moving on to --

JUSTICE: Well, let me get back to your first point. Why should we

treat the adoption of Civil Service rules differently from a private contract?

MR. ALEXANDER: Okay, lets [inaudible]. If you'll turn the tab two, I got this handout, what the courts have made clear and the Supreme Court, I'm not quoting this one now, Perry v. Sander indicates that you can have protected property interest arise from various different ways, either from rules or from mutually explicit understandings. If you look at the Borsan case out of the Seventh Circuit, what they are distinguishing here is you can have Civil Service regulations that give rise to [inaudible] interest. You can have a collective bargaining agreement that does it or alternatively you can have a contract. And what this Court recognized in the Bear County Sheriff Civil Service Commission case is, if you have a for-cause limitation in Civil Service rules, that is sufficient grief of property interest, okay, if Civil Service rules.

So a contract disclaimer -- let me explain what we have here. We have 169-page manual, okay? And what they're disclaiming on the front of that is this shall not be interpreted as a contract. We agree it's not a contract. And I'll give you an example as to why that has meaning. Dallas County doesn't want people coming in playing in some trivial point in here and raising this as a breach of contract. I'll give you an example. If you turn to page 93, that's in the record, page 93 of that Civil Service rules, has a provision regarding training. It says that Civil Service employees shall receive training to develop their potential. What Dallas County had by its disclaimer is that it's claiming the ability of a Civil Service employee coming in saying, "You know, you never trained me to my full potential and therefore I'm suing you for breach of contract." That kind of claim would fail --

JUSTICE: Do you think that Dallas County can hire employee for a term -- specified term?

MR. ALEXANDER: No, and I'll tell you why. Are you talking about like the four-year term of the constable?

JUSTICE: Well, it's just any term.

MR. ALEXANDER: No.

JUSTICE: That say, "I want you to this job and it's gonna run out in two years and I don't want to keep you after that."

MR. ALEXANDER: They can't do that for Civil Service employees. And the reason for that is, let me give you a cite, its Section 158, this is local government code, Section 158.010 A and D. This is the local government code rules we've related to Civil Service employees. And what it says in section A is, "A department head coming onboard has the authority to hire people." But then it says under section D that "authority shall not affect the status of those people who are already onboard." And so, it's dealing with the situation, and this is what Civil Service rules do. It's avoiding the situation of, you know, out with the old in with the new, every time somebody come onboard. The constable, under the constitution, has a four-year term. But once deputy constables were made Civil Service employees in 1990, they no longer were confined to a term, the case law that she cite to, the Arrington case, was decided before that change and in fact was exactly what prompted Dallas County to extend Civil Service protection to deputy constables.

JUSTICE: But it seems like that if you were facing a sudden onslaught of work and you just wanted somebody for six months to two years, your answer is [inaudible] contract [inaudible]

MR. ALEXANDER: Well, that's interesting. I think, and I could be wrong, and it's just that my knowledge of the rules is not that

exhausted. I think that there are provisions for temporary employees. It's just that they are not given Civil Service protection.

JUSTICE: Okay.

MR. ALEXANDER: I believe that is correct. But if you are a deputy constable, you have to go through a 12-month period of probation before you can get full Civil Service protection, which of course begs the question, if they are at-will, why do we do that?

JUSTICE: Let me -- I'm interested in the disclaimer argument that you're making. Are you saying that the county cannot disclaim Civil Service protection? Or is it this particular disclaimer doesn't get you? I mean, we interpreting --

MR. ALEXANDER: Well, yeah, you're right. Okay. Yes, they can disclaim it. Let me --

JUSTICE: So they can?

MR. ALEXANDER: Yes.

JUSTICE: So we're just quibbling over the interpretation of this particular disclaimer.

MR. ALEXANDER: Correct. And let me make sure that this point is clear, it's up to the county whether to adopt a Civil Service. County gets entirely voluntary in this state. If you have more than 200,000 employees in the county, then you are permitted, by the legislature, to adopt Civil Service rules and you can define [inaudible]. But once you've done it, then you would have to live with what you've adopted.

JUSTICE: I understand that, but let me ask you, you have to admit that there is some tension between the disclaimer and the Civil Service protection.

MR. ALEXANDER: In this case, I'd say, there's not because its apples and oranges. The disclaimer is a disclaimer of being able to sue for breach of contract. It's not a disclaimer for being able to complain of the fact that you have been deprived of this property interest given to you by Civil Service rules. That's what's so important to understand.

JUSTICE: You're saying you used to label Civil Service then you can't have at-will employee.

MR. ALEXANDER: No, I'm not saying that. I'm saying that -- and this gets to, I mean, let's talk about it, you can have Civil Service and still remain at-will. You can have a Civil Service that has, I think the term that Justice Medina used was well, "I'll pat you on the head policy." You can do that. Dallas County chose not to do that. It has got a very sophisticated Civil Service system which draws a distinction between category. In fact, here's a good example, it has category A, employees who are not Civil Service and therefore at-will, it's got category B who are not Civil Service and therefore at-will, and there are category C who are Civil Service and -- I mean let's flip through the provisions which are under tab four, are they entirely different? Civil Service employees, and this gets back to your point Justice O'Neill, if look at 4.22. They really tried to speak out both sides of the mouth with that one. 4.22 is the notice of determination that a Civil Service employee gets handed. It has to be done in every case in which you terminate somebody because that is what triggers the process for being able to grieve and ultimately, we'll talk about this in a minute. Go to the district court. It says, and it shall specify the cause for the termination, you can't say of one side of your mouth, "Well, we can dismiss them without cause because they're at-will," but then, on the other hand, recognize that you have to specify the cause. And let's talk about --

JUSTICE: Why involve the district courts in this building

[inaudible]?

MR. ALEXANDER: This is it. Okay, let's talk about that. I think that this is the -- why involve the district court? Let's talk about that. The section you need to look at here at the local government code is 158.0121 that is the provision that allows for an appeal to the district court under the substantial rule. Well, substantial evidence of what? Substantial evidence of the good cause that you were supposedly denied.

JUSTICE: Well, but you just said that the -- it's up to the government to provide whatever Civil Service system at once --

MR. ALEXANDER: Correct.

JUSTICE: It can provide a "feel good system".

MR. ALEXANDER: I beg your pardon.

JUSTICE: It can provide a "feel good system".

MR. ALEXANDER: It can.

JUSTICE: And so they would have no argument basically and then on the [inaudible]

MR. ALEXANDER: Well, let's go back the -- excellent point. So the question then, it really was down to this, is this a feel good system or is this a for cause system? And the answer is, it is a for cause system. 4.22, you can't explain it any other way. Why draw distinction from category A, category B, category C? Makes no sense.

JUSTICE: Okay. Let's take that as a given. Let's take it that 4.22 and all these provisions are for cause.

MR. ALEXANDER: Correct.

JUSTICE: But why didn't they, I mean could they not have just said, "We don't want to create any right of action to sue for damages so we're gonna put this disclaimer in here and you have to have good cause but you can't sue us for damages."

MR. ALEXANDER: That would be constitutionally impermissible.

JUSTICE: Why?

MR. ALEXANDER: Because, you can't, with the one hand, give a constitutionally protective right and then say you cannot sue other. What you could say is this --

JUSTICE: You're presuming the constitutionally protected right. In looking at whether there is one, we're supposed to look at these two provisions together. And so if we say the disclaimer they intended to give with the right hand but take away with the left, then you don't have a constitutionally protected [inaudible].

MR. ALEXANDER: Well, my point is, and I'm clearly not making it clear, the disclaimer doesn't take away with the right. The disclaimer of a contract action doesn't take away for a suit for breach of Civil Service rules. That's apples and oranges, two entirely different things. Now, if you have a different disclaimer, if you had a disclaimer that said on the front, "these had all employees in this county are at-will", that would at least create an ambiguity. Okay. In that case, with left hand, you're saying they're at-will, but with the right hand in the dismissive provisions saying they're for cause, and then you're in an ambiguous situation, what would you do? You'd look at the Fifth Circuit's decision in Batterton and county will probably win in that situation, that's an ambiguity. But please understand that in this contract disclaimer, in no way is the disclaimer of an action for Civil Service. This is contract versus Civil Service.

JUSTICE: Let me see if I understand your position. You agree that the deputy constables are at-will employees?

MR. ALEXANDER: That they are?

JUSTICE: They are.

MR. ALEXANDER: They are not at will. Okay.

JUSTICE: Okay. You agree, however, that they do not have a right to a term of employment.

MR. ALEXANDER: Well, I'm saying that they are not restricted to a term of employment. They are not restricted to four years, that's what 158.010 [inaudible].

JUSTICE: So you agree that the deputy constables do not have a right to a term of employment.

MR. ALEXANDER: Right. They don't have a guaranteed right to a term of employment if --

JUSTICE: Let me try to state it so that I'm clear on what your position is. If they are terminated, or the other side would say their terms expire, well you wouldn't agree that their terms can expire. You had to say that they must be terminated for cause and that's the only way they can be discharged.

MR. ALEXANDER: Correct.

JUSTICE: But you also agreed down to the 4.22 -- the 4.21 is not exclusive, it includes the language including but not limited to in the laundry list.

MR. ALEXANDER: Let's talk about that, because I think that's --

JUSTICE: Isn't that inconsistent with --

MR. ALEXANDER: No. And I'm glad you brought that up 'cause it's on my list. The doctrine that you need to look at to address this argument about the laundry list, is the doctrine to Latin phrase, Justice Jefferson used it in his Hilcam case, and I'll pronounce it wrong, *adjustum generis*, okay. And actually I'm quoting now from a second opinion by Justice Hankinson in the case of City of [inaudible] because of the excellent that's placeable here. When a statute says out the specific list followed by a general phrase, here we have that specific list, and with the catchall general phrase, the general phrase is interpreted by the *adjustum generis* Canon of Construction which states that the general phrase is limited to the same type of things that are listed more specifically. So if you look here, here's our list, there's the specific list and then we've got the general catchall. What that means is that the cause that you have to have under H, the catchall, has to be of the same dignity as these other things which have --

JUSTICE: Budget constraints don't come in there.

MR. ALEXANDER: They do. I'll tell you how budget constraints come in. You need to look at, and I wish I could cite you chapter and verse to this. I think its Section 7, layoffs. There is a whole provision on layoffs.

JUSTICE: In the manual?

MR. ALEXANDER: In the manual. Okay. In other words, if you have got a situation -- when you're a Civil Service employee you are not protected from a layoff. You are not, and in fact if you look at, here is a great case, the Ingram case is a great case that says just that. Seventeen years ago wasn't contested by them. The Civil Service protection afforded category C employees, includes protection for dismissal parenthetically except for layoffs.

JUSTICE: Where is it in the manual? You say -- you're talking about *adjustum generum* and I'm just asking where's the language in the manual that gives you flexibility on budget constraints.

MR. ALEXANDER: Court's record 388 to 389.

JUSTICE: What is that?

MR. ALEXANDER: That is the provision in the policy manual talking about the ability to lay off Civil Service employees. In other words,

if you are in a budget crunch, if you don't have enough money to maintain people, under the Civil Service rules, there is a whole set of rules that you can lay them off, so you're not stuck with them. So that's what deals with that.

JUSTICE: And what does the grievance procedure say? Is it mandatory?

MR. ALEXANDER: The grievance procedure is mandatorily available to those who were terminated. In other words, if you were terminated then you have the opportunity to grieve --

JUSTICE: Do you have to exhaust remedies before you can go to district court?

MR. ALEXANDER: Generally speaking, yes. I believe that is correct. Yes.

JUSTICE: Constables have to have official bonds, don't they? By statute --

MR. ALEXANDER: Are you -- I know the constable does. Yes.

JUSTICE: The constables may also be liable on their official bonds for acts of deputy constables. Correct?

MR. ALEXANDER: I believe that's correct.

JUSTICE: Does it make sense then that the constables who want to have working for the constable persons who hear or she thinks will not make them liable for their acts, people that they have confidence in?

MR. ALEXANDER: Well, this is the balance of -- good question -- it's one of the factors in the balancing test that a county decides in deciding whether to adopt Civil Service. And what these rules say, I mean if you got somebody who's incompetent, that's a good cause. You can get rid of him for incompetence. In other words, Dallas County has perceived that these provide adequate protection to the constable but also to the deputy constables and avoid the patronage hiring and firing problem that can arise.

JUSTICE: But there could be a difference between incompetence and not just having a great deal of confidence in somebody's judgment and ability, they may seem to be confident. The people you hire to your firm, you are not liable for a bond on that -- are people that you have confidence in. Right?

MR. ALEXANDER: Correct.

JUSTICE: And if there is statutory obligation that you may be liable on an official bond for the acts of people who were working for you and you're elected for a specific term, wouldn't you want to have the ability to make sure those persons are not gonna get you held liable for some other conduct? But then it seemed to make sense that new constables who are elected might want to -- might have the ability to hire and fire?

MR. ALEXANDER: They would die to have that. They would want to have that. I am glad that all of my employees are at-will. But please understand that when a county makes the decision, are we going to be at-will? There is a good policy reason to go at-will, there are also countervailing reasons not to at-will.

A good way to look at this is to hop on Google, type in Civil Service history, and you will see there laid out precisely what it is that we have Civil Service offered around this country. It's to deal with the equally divisive problem of, new administration comes in and a rank that follows at risk every four years. There are risks of being disturbed because someone comes in and goes into "I'd rather have my people than that." It's [inaudible] patronage.

JUSTICE: Let me just follow up one final thing on the disclaimer question. I want to make sure I understand your argument. Your argument

is that by this policy manual, there is an intent to create Civil Service protection, but to disclaim contracts [inaudible].

MR. ALEXANDER: Well, let me just read the -- make sure that we're not just talking about policy manual but this has a lot of cases out there [inaudible] involving employee handbooks and the policy --

JUSTICE: But, we don't know if they had the notice on the [inaudible].

MR. ALEXANDER: All right. But let me just make sure that we are talking about Civil Service rules. This is provision 1.00 of the manual. The Civil Service system is a systematic method of pointing employees, the following rules are designed -- these are Civil Service rules.

JUSTICE: I understand.

MR. ALEXANDER: Okay.

JUSTICE: I want to make sure I understand your argument.

MR. ALEXANDER: Okay.

JUSTICE: We're adopting Civil Service rules.

MR. ALEXANDER: We're adopting Civil Service rules. We're saying that you can't use this manual to sue us for breach of contract. But, we are not in any way disclaiming that by that, that somehow a contract provision disclaims the constitutional protective property interest which have recognized for 17 years by three different courts.

JUSTICE: We're guaranteeing the Civil Service protection. We are not guaranteeing you an employment.

MR. ALEXANDER: We are guaranteeing you Civil Service protection. We are not guaranteeing you of employment. It's not a contractive employment. You don't have a contract for per term. We are not guaranteeing you employment. You only have employment -- in fact, you're subject everyday to either a layoff or tripping up and being discharged for dead cause. So it's not a contract employment. Correct.

JUSTICE: If we look just at 4.21, isn't that consistent with an at-will state? In Texas you can dismiss an employee for incompetence, offensive conduct, etc. etc., but you can also do it for no reason just to dismiss.

MR. ALEXANDER: Well, if we view it in a vacuum --

JUSTICE: It was viewed in vacuum on under 4.21, an employee in Texas without any sort of good cause exception, an employee in Texas may be dismissed without prior notice for just cause including but not limited to all these things. Right?

MR. ALEXANDER: Right.

JUSTICE: So under 4.22, is that where you base your argument, that this is -- any termination here must be for caused because you have to provide a notice of the cause.

MR. ALEXANDER: It's bolstered with that but also 4.21, a good way to look at it is in context. And this is the way to understand the words. Category A is non-Civil Service, and therefore they may be dismissed without good cause. They may be dismissed for -- to say a good reason, bad reason, or no reason. Category B, same thing, they maybe dismissed for whatever reason that makes a question we know that category C is given special protection. So the question is what are the permissible grounds for which these people may be dismissed? And the answer lies in 4.21. They maybe dismissed for just cause. "Just cause" is a term of art. It's a term that has very real meaning, it has teeth, it gives a perfectly good set of examples under *adjustum generis*. It's not void for that reason. And so, yes, I mean, this is a "just cause" limitation as three different courts have held over the years and Dallas County never once disputed in cases where, if that was their

position, they would scream at you like mad.

Lets take Ingram and look at that. In Ingram, the predicate assumption going in was the category C employees have a [inaudible] interest in their job. What does county say about that? Not a pea. Their whole dispute was, they said, "Well, they're category A. We agree if they're category C that they are protected, but we are saying they are category A."

JUSTICE: I take it. Do you think Deputy Walton's primary statement was just ineffectual? His, in note, Deputy Walton's statement at the beginning of his report.

MR. ALEXANDER: Are we talking about the one that he signed?

JUSTICE: Yes.

MR. ALEXANDER: Yes.

JUSTICE: That was just ineffectual.

MR. ALEXANDER: Ineffectual. And the reason for that is that was something handed to him by the constable, it wasn't form the county. Only the county can take it away that which the county hath provided. And so for that reason that's just a [inaudible].

JUSTICE: When were the county given something to sign? Why wouldn't it be the constable?

MR. ALEXANDER: What? Why would the constable do that?

JUSTICE: No. When he expected the constable, as employer give him that document, as opposed to some high ranking official within the county whoever that may be.

MR. ALEXANDER: Well, no. Let's be clear about what this is. This is the deputy constable about to do something -- that the deputy constable can't do and hands him something which he signs, which if, you know any employee is going to sign something the employer gives it. The question is, was that an authorized act? I mean, was that -- I mean the only one that can take it away is the Dallas County Commissioners Court. Once the Dallas County Commissioners Court has given that protection, which is precisely to prevent elected officials from being able to alter the status, the elected official can't do it. It's a novelty. So only the Dallas County Commissioners Court would do it. I want to just see if I [inaudible] to set on my things.

JUSTICE: Any further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF DEBORAH G. HANKINSON ON BEHALF OF THE PETITIONER

JUSTICE: Is there any difference between procedural and substituting process protections in this context?

MS. HANKINSON: Yes, absolutely.

JUSTICE: And what would those be?

MS. HANKINSON: Procedural due process protects you to the opportunity to be heard, to be noticed, and the opportunity to be heard. And it attaches when there are property rights that can arrive form circumstances that are state law or under the federal constitution. The majority of federal courts did an substantative process --

JUSTICE: Let me rephrase my question.

MS. HANKINSON: Yes.

JUSTICE: In terms of damages, what is the difference?

MS. HANKINSON: The damages that flow from procedural due process are tied to the harm that is caused as a result of having been denied

the process. So for example, you get your hearing, and make it nominal damages, if the decision is to reverse, let's say that you had the hearing and the decisions signed --

JUSTICE: Well, that leads to the prime question about the proper disposition from your viewpoint. Do you agree that there was no reason for the termination or would you want it to be remanded for a grievance hearing in accordance with that?

MS. HANKINSON: I agree that there has been a termination. Because I agreed that the constables finished their term and were no longer employees --

JUSTICE: I understand, but if you were to lose by that -- if we were to find a procedural due process right that was violated here, the disposition would be?

MS. HANKINSON: That I would be getting a hearing.

JUSTICE: Get a hearing.

MS. HANKINSON: I think that that's what I get. What they got were damages for the loss of their employment which is not what you get --

JUSTICE: Because the briefing says that everyone seems to agree that if they got that hearing, there was no reason and therefore there would be no purpose.

MS. HANKINSON: You know they actually had a hearing. The record reflects that the Waylon plaintiffs, in fact, did have a hearing before the Civil Service Commission to take up the very issue that we are talking about here. And the three commissioners decided that their turn had ended. The question is they may have had all the process they were due in any event. I think --

JUSTICE: But the hearing did not involve the subsidy reasons for their terminations. They claim they were entitled to -- I know you disagree, but the hearing was about whether they had grievable claim not about the substance or the merits of their, they would say, termination.

MS. HANKINSON: Well, I think that actually they got in to the substance of it because their complaint was that they have not been resworn in. And they had to discuss during the course of that hearing [inaudible]. Supposedly, I agree, Justice Wainwright that they did have process --

JUSTICE: Ms Hankinson?

MS. HANKINSON: Yes.

JUSTICE: Mr. Alexander, I think, has indicated that Dallas County has adopted these Civil Service rules previously, is that correct?

MS. HANKINSON: I'm sorry. I can't hear you, your Honor.

JUSTICE: That Dallas County has adopted these Civil Service rules.

MS. HANKINSON: Yes, Dallas County adopted a Civil Service system but there are different kinds of Civil Service systems. Some of them provide substantive rights, some of them do not. This one does not. The appropriate inquiry is to look at the manual and see under Texas law whether the at-will relationship has been altered and meet the requirements of Texas law to do that to create a property interest. [inaudible] what they want to do is say, if you adopt a Civil Service system you automatically get a property right. That's not the inquiry. Here, they got grievance procedures. Justice Owen had asked me, we have been talking about a feel good system, the trick is that it's feel goods but it's very real too because employees do get these decisions reversed. They do come in and have the commission reinstate them and give them back [inaudible]. When you go to district court, there may not be a reason as a result of an at-will employment determination, but if the termination was the result of something illegal, termination for

race, age, whatever it might be, and then there would be something for a district court to review. So, these are not just on the books and meaningless the give their advantages --

JUSTICE: Well, they just simply say you're terminated, they don't cite the layoff provision that you said you're terminated.

MS. HANKINSON: Right.

JUSTICE: Where's the district court review in that case?

MS. HANKINSON: There may not be anything to review in that case. There may not be but it doesn't mean the employee going through the process is going through a meaningless process because they make it reinstated. They may end up happy. And the point is that there are two separate inquiries here. Two separate inquiries, the civil system is a different inquiry on what it does. We have to go back to basic Texas law on whether a constitutional protective property exists.

JUSTICE: 86.011 says that each deputy constable must qualify in a manner of provided for deputy sheriffs.

MS. HANKINSON: Right.

JUSTICE: How does a deputy constable qualify?

MS. HANKINSON: I think if you look -- I don't have the statute right in front of me, but if you look back under the deputy sheriff --

JUSTICE: The provision say that have to be 21 years of age, they have to have a high school diploma, and some other things.

MS. HANKINSON: Right.

JUSTICE: What about the requirement that they serve at the pleasure of the sheriff? That the sheriff must like them and want to be working for him? Is that a requirement?

MS. HANKINSON: I don't know that that is a requirement in terms of that. But clearly, the constable has to appoint them so that does involve the discretion of the constable. And in fact, that to me sounds a whole lot like the same kind of thing given that the appointment power lies with the constable who appoints their particular deputies.

JUSTICE: Further questions?

That concludes the argument and all arguments for the moment and the Marshall will now appear in the court.

JUSTICE: All rise. Oyez, oyez, oyez. The Honorable, the Supreme Court of Texas now is adjourned.

2005 WL 6161826 (Tex.)