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SUPREME COURT OF TEXAS
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No. 21-0518

IN THE SUPREME COURT OF TEXAS

CITY OF HOUSTON, TEXAS,

Petitioner,

v.

HOUSTON PROFESSIONAL FIRE FIGHTERS' ASSOCIATION, LOCAL 341,

Respondent.

On Review from the Fourteenth District Court of Appeals
Nos. 14-18-00990-CV and 14-18-00976-CV

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the Case	The Houston Professional Fire Fighters' Association, Local 342 (the "Association") sued the City of Houston under Texas Local Government Code section 174.252 seeking "a declaration of the compensation and other conditions of employment required by Section 174.021" for one year; attorney's fees; and other relief. 1CR4-9, 48-57. The City answered and asserted defenses including governmental and sovereign immunity. 1CR58-62. The City also filed a plea to the jurisdiction along with a motion for summary judgment challenging the constitutionality of sections 174.021 and 174.252. 1CR63-220. The Association filed a response to the City's plea to the jurisdiction along with a cross-motion for summary judgment. 2CR227-406.
Trial Court	234th District Court of Harris County, Hon. Wesley Ward.
Trial Court Disposition	The trial court signed a single order in which it (1) denied the City's plea to the jurisdiction and motion for summary judgment with respect to section 174.252's constitutionality; and (2) granted the Association's cross-motion for summary judgment. 2CR450-52. The City timely appealed from the denial of its plea to the jurisdiction; that appeal was docketed as Cause No. 14-18-00990-CV in the Fourteenth Court of Appeals. 2CR457-60. Separately, the parties jointly requested and obtained permission to appeal from the trial court's interlocutory order denying the City's motion for summary judgment as to the constitutionality of sections 174.021 and 174.252. *See* Tex. Civ. Prac. & Rem. Code § 51.014(d). The permissive interlocutory appeal

was docketed in the Fourteenth Court of Appeals as Cause No. 14-18-00976-CV.

Court of Appeals Disposition

The court of appeals panel consisting of Justices Wise, Spain, and Hassan affirmed the trial court's order denying the plea to the jurisdiction and denying the City's constitutional challenge to sections 174.021 and 174.252. *City of Houston v. Houston Pro. Fire Fighters' Ass'n, Loc. 341*, 626 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2021, pet. filed).

STATEMENT OF JURISDICTION

This Court has jurisdiction under Government Code section 22.001(a) because the court of appeals committed an error of law of such importance to the jurisprudence of the state that it requires correction. *See Hughes v. Tom Green Cnty.*, 573 S.W.3d 212, 216 (Tex. 2019) ("[I]n 2017, the 85th Texas Legislature greatly simplified the byzantine statutes that previously governed this Court's appellate jurisdiction. . . . Part of that simplification was to grant the Court general appellate jurisdiction over interlocutory appeals.") (citations omitted). At issue here is a clear split in appellate authority concerning the constitutionality of the statutory mechanism established in the Texas Local Government Code addressing judicial setting of standards for prevailing wages and working conditions for fire fighters and police officers.

ISSUES PRESENTED

1. Do sections 174.021 and 174.252 of the Texas Local Government Code violate the separation of powers provision in Article II, Section I of the Texas Constitution by delegating a legislative function to the judiciary and failing to prescribe sufficient standards to guide the discretion conferred?

2. Did the appellate court err in affirming the trial court's denial of the City's plea to the jurisdiction and determining that Chapter 174 of the Texas Local Government Code does not require good faith collective bargaining with respect to prevailing compensation and other conditions of employment in the private sector?

INTRODUCTION

The Court should resolve a clear split of authority regarding the constitutionality of The Fire and Police Employee Relations Act (the "Act").

The Act mandates compensation and other conditions of employment for fire fighters and police officers that are "substantially the same as compensation and conditions of employment prevailing in comparable private sector employment;" this statute also allows organizing for collective bargaining. Tex. Loc. Gov't Code §§ 174.002(a), (b); 174.021. But public safety considerations mean that fire fighters and police officers cannot strike if an impasse is reached during negotiations. *Id*. §§ 174.002(c), 174.202.

In lieu of strikes, lockouts, work stoppages, and slowdowns, the Act creates an alternative mechanism through which (1) a public employer and fire fighters can engage in non-compulsory arbitration; and, if the public employer does not agree to arbitrate, (2) judicial enforcement of section 174.021's standards for prevailing private sector wages and working conditions is authorized. *Id*. § 174.252. Among other things, section 174.252 allows a district court to "declare the compensation or other conditions of employment required by Section 174.021" for up to one year. *Id*. § 174.252(b)(2). The City's immunity from suit and liability is waived "only to the extent necessary to enforce this Chapter against that employer." *Id*. § 174.008.

The Act and its predecessor statute long have existed under a legal cloud with respect to the unconstitutional delegation of legislative power accomplished by this judicial enforcement mechanism. *Compare Int'l Ass'n of Firefighters, Loc. Union No. 2390 v. City of Kingsville*, 568 S.W.2d 391, 395 (Tex. App—Corpus Christi 1978, writ ref'd n.r.e.) ("[T]he issue here becomes whether or not the Legislature prescribed sufficient guidelines to guide the District Court's discretion. We find that the Legislature did not.") *with City of Port Arthur v. Int'l Ass'n of Fire Fighters, Loc. 397*, 807 S.W.2d 894, 898 (Tex. App.—Beaumont 1991, writ denied) ("We disagree with the decision in *Kingsville* that . . . the Act is unconstitutional.").

This legal cloud has lingered because section 174.252's one-year time limit removes the incentive to litigate this issue to resolution in this Court. For a variety of practical reasons, negotiating parties in this circumstance usually opt to resolve these disputes by settling them. Delays inherent in litigating to a final appellate conclusion also discourage parties from seeking such a conclusion; this case, for example, involves the City's 2017 pay and benefits fiscal cycle.

But now the Fourteenth Court of Appeals has weighed in and created a clear split of authority by upholding the Act's constitutionality. *See City of Houston v. Houston Pro. Fire Fighters' Ass'n, Loc. 341*, 626 S.W.3d 1, 22 (Tex. App.—Houston [14th Dist.] 2021, pet. filed). It has done so against a backdrop of

significant, prolonged, contentious, and ongoing disagreement between the City and the Association with respect to compensation and other employment conditions.

The constitutionality issue is ripe for decision, and this case provides a suitable vehicle for deciding it. Additional errors in the appellate court's analysis regarding waiver of immunity from suit confirm the need for this Court's intervention.

STATEMENT OF FACTS

According to the Association's first amended petition, the collective bargaining agreement between the City and the Association expired on June 30, 2017. 1CR51.

The Association alleged that the collective bargaining process began on March 14, 2017, and continued through May 14, 2017, without resolving the issues in dispute. *Id.* The Association further alleged that the parties reached an impasse under section 174.152 with respect to compensation, hours of work, overtime, paid leave, staffing, and grievance procedures. *Id.* at 51-52. The Association filed suit under section 174.252 on June 28, 2017, after the Association requested arbitration and the City did not agree to arbitrate. 1CR4-9, 48-57. Among other things, the Association requested "a declaration of the compensation and other conditions of employment required by Section 174.021 for one year." 1CR55.

The City answered and asserted defenses including governmental and sovereign immunity (1CR58-62); the City also filed a plea to the jurisdiction along with a motion for summary judgment challenging the constitutionality of sections 174.021 and 174.252. 1CR63-220. The Association filed a response to the City's plea to the jurisdiction along with a cross-motion for summary judgment on the jurisdictional challenge. 2CR227-406.

The trial court signed a single interlocutory order in which it (1) denied the City's plea to the jurisdiction; (2) denied the City's motion for summary judgment with respect to section 174.252's constitutionality; and (3) granted the Association's cross-motion for summary judgment on immunity. 2CR450-52. The City timely appealed from the denial of its plea to the jurisdiction; that appeal was docketed in the Fourteenth Court of Appeals as Cause No. 14-18-00990-CV. 2CR457-60. Separately, the parties jointly requested and obtained permission to appeal from the trial court's interlocutory order denying the City's motion for summary judgment as to the constitutionality of sections 174.021 and 174.252. *See* Tex. Civ. Prac. & Rem. Code § 51.014(d). The permissive interlocutory appeal was docketed in the Fourteenth Court of Appeals as Cause No. 14-18-00976-CV.

The court of appeals consolidated the two appeals; it then affirmed the trial court's order denying the plea to the jurisdiction and rejecting the City's constitutional challenge to sections 174.021 and 174.252. *City of Houston*, 626 S.W.3d at 5-8.

SUMMARY OF ARGUMENT

Public employers, fire fighters, and police officers across Texas need to know whether the Act's alternative mechanism passes constitutional muster as they navigate recurring negotiations involving important public safety considerations. The better-reasoned authority confirms that the Act violates separation of powers principles and lacks reasonable standards to guide the discretion conferred for judicial enforcement of the Act's requirements with respect to prevailing wages and working conditions.

The accompanying issue in this case pertaining to standards governing the "good faith" collective bargaining requisite for section 174.008's waiver of immunity from suit warrants this Court's attention as well. This issue is of comparable importance; confirming that elements of the statute are a jurisdictional requirement encompassed by the "good faith" negotiating obligation would ensure that parties address these elements in their negotiations before seeking judicial intervention.

The Court should grant the City's petition for review and hold that the Act violates separation of powers principles in keeping with the better reasoned authority. Review also is warranted to address the denial of the City's plea to the jurisdiction and fix the appellate court's erroneous construction of the Act's good faith bargaining requirement.

ARGUMENT

I. Sections 174.021 and 174.252 unconstitutionally delegate legislative power to the judiciary and fail to prescribe sufficient standards to guide the discretion conferred.

The Act's separation of powers violation arises from the interplay of sections 174.021 and 174.252.

Section 174.021 focuses on the "prevailing wage and working conditions" that the City must by statute provide to the Association's members. *See* Tex. Loc. Gov't Code § 174.021. The "compensation and other conditions of employment" so provided must be "substantially equal to compensation and other conditions of employment that prevail in comparable employment in the private sector . . . ." *Id.* § 174.021(1). They also must be "based on prevailing private sector compensation and conditions of employment in the labor market area in other jobs that require the same or similar skills, ability, and training and may be performed under the same or similar conditions." *Id.* § 174.021(2).

Section 174.252 authorizes a district court to enforce the Act; it specifically identifies section 174.021's "compensation and other conditions of employment" requirement as an element to be enforced if the City does not engage in arbitration—and, in so doing, establishes this requirement as an element of the Act's waiver of immunity from suit "to the extent necessary to enforce this chapter against that

employer." *Id.* §§ 174.008, 174.021, 174.252(a). The court of appeals disregarded this specifically identified element.

The constitutional question is whether this statutory scheme violates separation of powers principles. The better-reasoned authority confirms that it does.

A. A constitutional legislative delegation to the judiciary must appertain to the judiciary and provide reasonable standards.

The Texas Constitution prohibits one branch of state government from exercising power inherently belonging to another branch. Tex. Const. art. II, § 1; *see also Gen Servs. Comm'n v. Little-Tex. Insulation Co.*, 39 S.W.3d 591, 600 (Tex. 2001). This separation of powers principle means that "[t]he power to pass laws rests with the Legislature, and that power cannot be delegated to some commission or other tribunal." *Brown v. Humble Oil & Ref. Co.*, 83 S.W.2d 935, 941 (Tex. 1935). This principle implicates a court's subject matter jurisdiction. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex. 1993) ("Under this doctrine, governmental authority vested in one department of government cannot be exercised by another department unless expressly permitted by the constitution. Thus we have construed our separation of powers article to prohibit courts from issuing advisory opinions because such in the function of the executive rather than the judicial department.").

Legislative power is broadly defined; it includes not only the "power to set public policy," but also "many functions that have administrative aspects . . . ." *FM*

Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 873 (Tex. 2000). These aspects include "the power to provide the details of the law, to promulgate rules and regulations to apply the law, and to ascertain conditions upon which existing laws may operate." *Id.*

The court of appeals here recognized that the delegation at issue involves legislative power. *See City of Houston*, 626 S.W.3d at 13-23. "A government function is legislative, and not judicial, when it 'looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or part of those subject to its power.'" *City of Austin v. Quick*, 930 S.W.2d 678, 684 (Tex. App.—Austin 1996) (quoting *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908)), *aff'd in part and rev'd in part*, 7 S.W.3d 109 (Tex. 1998).

The Association cannot credibly contend that the delegation at issue here does not involve legislative power. Section 174.252(a) authorizes forward-looking judicial enforcement of "the requirements of Section 174.021 as to any unsettled issue relat[ed] to compensation or other conditions of employment of fire fighters, police officers, or both." Tex. Loc. Gov't. Code § 174.252(a). Subsection (a) does not require a finding that the City violated section 174.021. *Id.* The authorized judicial action looks to the future and changes existing conditions by making a new rule; it does so when the Act authorizes a court to "declare the compensation or other conditions of employment required by Section 174.021 for the period, not to exceed

one year, as to which the parties are bargaining ….” *Id.* § 174.252(b)(2). The power at issue here plainly is legislative. *See Brown v. Todd*, 53 S.W.3d 297, 303 (Tex. 2001) (“setting salaries for public officials and employees is a legislative power”) (citing *Taxpayers’ Ass’n of Harris Cnty. v. City of Houston*, 105 S.W.2d 655, 657 (Tex. 1937)); *see also Taxpayers’ Ass’n of Harris Cnty.*, 105 S.W.2d at 657 (“the prescribing of minimum salaries and wages for public officers and employees is but an expression of a public policy”).

The constitutional limits on legislative delegation do not translate into a bright-line rule. Rather, separation of powers principles underlying the nondelegation doctrine demand that permissible legislative delegations must provide reasonable standards to guide the discretion that has been conferred. *See, e.g., Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 467 (Tex. 1997) (collecting cases). “A delegation of power without such standards is an abdication of the authority to set government policy which the Constitution assigns to the legislative department.” *City of Pasadena v. Smith*, 292 S.W.3d 14, 18 (Tex. 2009); *see also Moody v. City of Univ. Park,* 278 S.W.2d 912, 921-22 (Tex. App.—Dallas 1955, writ ref’d n.r.e.) (“On the question of constitutionality or not of the delegated

power, the inquiry is . . . whether the legislature has prescribed sufficient standards to guide the discretion conferred.").[1]

Context is key for the nondelegation doctrine inquiry because legislative delegations are directed to a variety of recipients. In some circumstances, the delegation is directed to a state agency. *See, e.g., Edgewood Indep. School Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995). Sometimes it is directed to a municipality, or even to a federal agency. *See Proctor v. Andrews,* 972 S.W.2d 729, 734-35 (Tex. 1998). In other circumstances, it is directed to a private actor. *See, e.g., FM Props. Operating Co.*, 22 S.W.3d at 873-74; *Tex. Boll Weevil Eradication Found.*, *Inc.,* 952 S.W.2d at 471. And in still other circumstances, it is directed to a court. *See, e.g., Holloway v. Butler*, 828 S.W.2d 810, 811-12 (Tex. App.—Houston [1st Dist.] 1992, writ denied); *In re Johnson*, 554 S.W.2d 775, 779-82 (Tex. App.—Corpus Christi 1977), writ dism'd w.o.j.*,* 569 S.W.2d 882 (Tex. 1978) (per curiam).

These varied contexts explain why the analysis of constitutionally permissible delegations differs depending on the circumstances. *Compare Tex. Boll Weevil Eradication Found.*, *Inc.,* 952 S.W.2d at 472 (private delegation factors), *with Hous.*

[1] To be clear, constitutional analysis under the nondelegation doctrine is distinct from the separate inquiry into whether a statutory provision is void for vagueness because it violates due process by providing insufficient notice. *See Proctor v. Andrews*, 972 S.W.2d 729, 734 (Tex. 1998). The City does not assert (and indeed lacks standing to assert) a due process challenge contending that the statute is void for vagueness. *See id.* For this reason, the Association's invocation of cases addressing due process challenges based on vagueness standards are inapposite. *See* Reply in Support of Petition for Review at 6-7.

Auth. of City of Dallas v. Higginbotham, 143 S.W.2d 79, 87 (Tex. 1940) (public delegation factors). In short, one size does not fit all when it comes to assessing whether a constitutionally permissible delegation has been accomplished.

Of particular significance here is that the delegation at issue involves the ***judiciary***. In enforcing the restriction on unfettered delegation of legislative authority, the Texas Supreme Court "has been especially willing to strike down delegations of legislative authority to the judicial department." *Tex. Boll Weevil Eradication Found., Inc.*, 952 S.W.2d at 468 (citing *Chem. Bank & Tr. Co. v. Falkner*, 369 S.W.2d 427 (Tex. 1963); *Davis v. City of Lubbock*, 326 S.W.2d 699 (Tex. 1959); and *Daniel v. Tyrrell & Garth Inv. Co.*, 93 S.W.2d 372 (Tex. 1936)); *see also City of Kingsville*, 568 S.W.2d at 394 ("It is well-settled that the Legislature cannot impose a function upon the judiciary that is legislative in nature.").

As this Court's observation from *Texas Boll Weevil Eradication Foundation* indicates, the constitutional concerns animating the nondelegation doctrine are especially acute when delegations to the judiciary are at issue. *See Daniel*, 93 S.W.2d at 375 (rejecting legislative delegation to the courts with respect to insurance rate-making power that "does not appertain to the judicial department of our government"); *see also Tex. Bldg. Owners & Managers Ass'n, Inc. v. Pub. Util. Comm'n of Tex.*, 110 S.W.3d 524, 535 n.10 (Tex. App.—Austin 2003, pet. denied)

("[A] delegation of power to the judiciary may require an evaluation specific to that context.") (citing *In re Johnson*, 554 S.W.2d at 779-82).

Before the Fourteenth Court of Appeals' decision in this case, two opinions addressed whether the legislative delegation to the judiciary accomplished by the Act and its predecessor complied with the nondelegation doctrine. Those opinions came to opposite conclusions.

B. Because this legislative delegation involves rate-making and does not provide reasonable standards, it is unconstitutional.

The first-decided case held that the Act's predecessor statute failed to prescribe "sufficient guidelines to guide the District Court's discretion" in enforcing the statute's mandate. *City of Kingsville*, 568 S.W.2d at 395.

Like the current statute, the predecessor statute required cities to provide fire fighters and police officers with "compensation and other conditions of employment" that were (1) "substantially the same" as those "which prevail in comparable private sector employment;" and (2) "based on prevailing private sector wages and working conditions" for similar jobs requiring similar skills and performed under similar conditions. *Id.* at 394.[2]

[2] There is no material difference between the predecessor statute's language and the current standard now codified in Texas Local Government Code section 174.021. *See City of Houston*, 626 S.W.3d at 16-17 & n.11.

City of Kingsville concluded that a general legislative standard directing a district court to enforce compensation and working conditions that are "substantially the same" as those for private sector employment is insufficient because it is "too subjective to prevent arbitrary and unequal application of its provisions." *Id.* at 395.

As *City of Kingsville* noted, terms and conditions of employment encompass myriad factors including hourly rates, overtime, seniority, sick leave, severance, benefits, training, continuing education, insurance, profit sharing, and facilities. *Id.* "For a court to decide which of the above conditions of employment are appropriate for any particular group of firemen, subject only to guideline of 'substantially the same' would represent a policy determination which is legislative in nature." *Id*. "Moreover, in order to determine the wage rate and conditions of employment the district court would have to ascertain what constitutes the 'labor market area.'" *Id.* "Such determination would clearly be a policy decision, in that the court would have unbridled discretion to decide the size of the labor market area." *Id.; see also Jones v. Int'l Ass'n of Firefighters, Loc. Union No. 936*, 601 S.W.2d 454, 458 (Tex. App.—Corpus Christi 1980, writ ref'd n.r.e.) (following *City of Kingsville*).

This record illustrates that *City of Kingsville*'s concerns about the standards at issue are fully justified. When asked to identify "comparable employment" during his deposition, Houston Fire Chief Samuel Peña stated: "So you can compare the different functions that the Houston Fire Department does, and there are private

industries that provide those particular functions." 1CR199. "But when you take them as a collective and . . . try to compare or try to find a comparative organization or department, I can't think of one right now that . . . would do what the fire department here in Houston does in the private sector." *Id.* at 199-200. "[I]f we break apart all the functions that the Houston Fire Department is responsible for, you can find a comparable . . . private-sector industry that would do those different components." *Id.* at 200-01. "But when you take them as a collective, I cannot think of a . . . company or a private-sector agency that does what the Houston Fire Department does in the same fashion." *Id.* at 201. "As far as what we do . . . I can't think of . . . another industry that would do the same thing that we do." *Id.* at 204.

City of Kingsville is no outlier. To the contrary, the Texas Supreme Court subsequently cited *City of Kingsville* in discussing the limits of permissible legislative delegation in *Texas Boll Weevil Eradication Found., Inc.*, 952 S.W.2d at 469. This Court expressed no disagreement with *City of Kingsville*. *See id.*

The City's nondelegation challenge here likewise fits comfortably within the realm of cases in which this Court itself has rejected invalid legislative delegations to the judiciary.

In *Chemical Bank & Trust Company*, for example, this Court rejected a statutory provision mandating trial de novo on whether an applicant for a bank charter had established that a "public necessity" existed for the proposed bank.

Chem. Bank & Tr. Co., 369 S.W.2d at 431-32. It reasoned that "[t]he determination of 'public necessity' by the State Banking Board involves a determination of public policy which is a matter of legislative discretion which cannot constitutionally be given to the judiciary." *Id.* at 432.

In *Davis*, this Court rejected a statutory provision mandating trial de novo on whether a property designated for urban renewal satisfied the standards for establishing a "Slum Area" and a "Blighted Area." *Davis*, 326 S.W.2d 713-15. Among other factors, the "Slum Area" determination turned on whether the designated property "is detrimental to the public health, safety, morals or welfare of the city;" is "conducive to the ill-health of the inhabitants of the area or to the transmission of disease, and to the incidence of abnormally high rates of infant mortality;" or is "conducive to abnormally high rates of crime and juvenile delinquency." *Id.* at 713. The "Blighted Area" determination turned on whether the designated property is in a condition "which substantially retards or arrests the provisions of a sound and healthful housing environment" or "results in and constitutes an economic or social liability to the city." *Id.* at 713-14. This Court concluded that these determinations presented "a decision of a question of pure public policy." *Id.* "A decision or conclusion by the agency that a particular area is a 'Slum Area' or 'Blighted Area' is thus made to rest upon a finding involving

legislative discretion." *Id.* "A de novo judicial review of such a decision would clearly involve the exercise by the courts of nonjudicial powers." *Id*.

And in *Daniel*, this Court rejected a statutory provision for a trial de novo on setting compensation rates for title insurance. *Daniel*, 93 S.W.2d at 375. The Court concluded that "rate-making, as that term is applied in cases such as this, is a legislative power, which can be delegated to a board or commission, under proper safeguards; but it does not appertain to the judicial department of our government." *Id*. "A court may review the rates fixed by a proper legislative authority, an[d] may, in a proper case, adjudge such rates unjust or illegal; but there the power of the court ends." *Id*. at 375-76. "It cannot substitute its rates for those of the board." *Id.* at 376. "To permit a court to do that would be to confer on it a legislative prerogative." *Id.*

As these cases illustrate, the nondelegation doctrine forecloses efforts to conscript the judiciary for compensatory "rate-making"—and for obligations to make additional legislative policy choices focused on determinations such as "the incidence of abnormally high rates of infant mortality"—that do not "appertain to the judicial department." *See id.* at 375; *see also Davis*, 326 S.W.2d 713.[3] The

[3] In contrast to *Daniel*, examples of permitted delegations that appertain to the judicial department include determinations regarding required court deposits, court reporter fees, and similar inquiries directly related to court operations. *See Mid-Am. Indem. Inc. Co. v. King*, 22 S.W.3d 321, 323, 327-28 (Tex. 1995) (orig. proceeding) (court deposits by unauthorized insurers participating in litigation); *Holloway*, 828 S.W.2d at 811-13 (court reporter fees).

doctrine applies here because, in contrast to section 174.253 of the Act, section 174.252 does not merely provide for judicial review of an arbitration determination with respect to compensation and conditions of employment. Instead, section 174.252 requires the district court itself to make an independent judicial determination of (and policy choice regarding) the compensation rate to be paid to firefighters and officers police as a substitute for arbitration. *Cf. State v. Sw. Bell Tel. Co.*, 526 S.W.2d 526, 529 (Tex. 1975) ("Of course, the fixing or revision of rates is not a judicial function and under our system of separation of powers the courts do not and cannot regulate rates of public utilities; but the determination of whether rates fixed by the utility are unreasonably high is a judicial function.").

The limits on improperly delegated "rate-making" authority for a court to make a policy-based compensation determination regarding services provided by title insurers apply with equal force to improperly delegated "rate-making" authority for a court to make a policy-based compensation determination regarding services provided by fire fighters and police officers. *See In re Johnson*, 554 S.W.2d at 784 (setting "fees or charges for a professional service" is "'rate making'"); *see also* Op. Tex. Att'y Gen. No. H-965 (1977) ("[T]he fixing of compensation is analogous to rate-setting. It is well established that the doctrine of separation of powers precludes a court from setting rates; it may only review the rates set to determine their legality."). The lack of reasonable standards to be enforced pursuant to section

174.252 of the Act compounds the separation-of-powers problems arising from the impermissible nature of this attempted delegation to the judiciary. *See City of Kingsville*, 568 S.W.2d at 395.

C. This Court should reject contrary cases determining that the Act's delegation to the judiciary is constitutional.

A subsequent intermediate appellate decision rejected *City of Kingsville* and stated that the predecessor statute's legislative delegation to the judicial branch is constitutional. *See City of Port Arthur*, 807 S.W.2d at 897-900. Now, the Fourteenth Court of Appeals erroneously has embraced *City of Port Arthur*'s constitutional analysis and likewise rejected *City of Kingsville*. *See City of Houston*, 626 S.W.3d at 18-23.

A clear split of authority exists. This Court should resolve the split by confirming that the Act's impermissible delegation of a public policy determination concerning rate-setting to the judiciary violates separation of powers principles. A closer examination shows *City of Port Arthur* cannot bear the weight that the Fourteenth Court of Appeals and the Association would have it carry.

Unlike *City of Kingsville*, the *City of Port Arthur* decision did not arise from a constitutional challenge to the predecessor statute and was not an action for judicial enforcement of the statute. Instead, it arose from a declaratory judgment action brought by the City against the fire fighters' association challenging on preemption

grounds the validity of a city charter amendment requiring binding arbitration. *City of Port Arthur*, 807 S.W.2d at 894-96.

Although *City of Port Arthur* discussed at some length its disagreement with *City of Kingsville*'s constitutional analysis, *City of Port Arthur* ultimately concluded that the charter amendment's validity must be determined "regardless of the constitutionality or unconstitutionality" of the predecessor statute. *Id.* at 900. *City of Port Arthur* held that the predecessor statute did not expressly or implicitly preempt a city charter amendment providing for binding arbitration; therefore, the appellate court affirmed the trial court's judgment upholding the charter amendment. *Id.* For this reason, the precedential weight of *City of Port Arthur*'s constitutional discussion has been open to serious question.

In *City of Houston*, the Fourteenth Court of Appeals now has put to rest any doubt about the existence of a true split of authority on the Act's constitutionality. This latest decision rejects *City of Kingsville*; embraces *City of Port Arthur*; and squarely holds that sections 174.021 and 174.252 do not amount to an unconstitutional delegation of a legislative function to the judiciary in violation of the separation of powers provision in the Texas Constitution. *City of Houston*, 626 S.W.3d at 18-23.

The Fourteenth Court of Appeals concedes (as it must) that the Act's "stated requirements" for prevailing wages and working conditions "are not the most

detailed and precise." *Id.* at 21. That is an understatement, as a comparison to another relevant statute confirms. *See City of Houston v Houston Firefighters' Relief & Ret. Fund*, 502 S.W.3d 469 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *see also* Tex. Rev. Civ. Stat. Ann. Art. 6243e.2(1).

In contrast to sections 174.021 and 174.252, the fire fighters' pension statute provides detailed guidelines for the exercise of authority delegated to the board of the Houston Firefighters' Relief and Retirement Fund. The City's contribution rates are set at precise percentage amounts based upon an actuarial valuation for a three-year period according to specific criteria; additionally, benefit increases must be approved by an actuary, a majority of the fund members, and the State Pension Review Board. *City of Houston*, 502 S.W.3d at 478-79. This level of specificity defeats any contention that "broad" standards are necessary here because employment-related conditions for fire fighters "cannot be conveniently investigated by the legislature." *See Higginbotham*, 143 S.W.2d at 87.

The Fourteenth Court of Appeals acknowledged that "the statute in the pension fund case provided more detailed standards and guidance than the Act before us . . . ." *City of Houston*, 626 S.W.3d at 21. The appellate court nonetheless rejected the City's separation of powers challenge to section 174.021 and 174.252 despite the lack of specific standards governing the mandated "prevailing wage and

working conditions." The appellate court relied in significant part on *City of Port Arthur* to support its determination. *See id.* at 16 & n.11. This reliance is misplaced.

As noted above, *City of Port Arthur*'s actual holding focused on preemption—not on the constitutionality of the Act's predecessor statute. *See City of Port Arthur*, 807 S.W.2d at 900 ("We feel compelled to look at Proposition No. 3 as approved by the majority of the voters of the City of Port Arthur only from the standpoint of whether or not the Act itself expressly or impliedly preempts such determination by the voters.").

Insofar as dicta in *City of Port Arthur* criticized *City of Kingsville*'s constitutional analysis, it did so based on a disagreement about characterizing the judicial branch as "subordinate" to the legislative branch. *See City of Port Arthur*, 807 S.W.2d at 898 ("The *Kingsville* court was apparently structuring courts as subordinate bodies of the legislature which needless to say was improper."); *see also id.* ("Courts are not subordinate legislative bodies and the *Kingsville* court was in error in so stating.").

This discussion misses the point. Absent from *City of Port Arthur* is analysis of (1) the predecessor statute's actual standards for judicial setting of wages and working conditions; and (2) whether this mechanism satisfies separation of powers principles. *City of Port Arthur* sidestepped the reasonable specificity requirement by observing that parties must provide proof of whatever statutory guidelines the

statute contains. *Id*. This observation is accurate as far as it goes, but it does not go far enough to answer the constitutional question: Does this delegation involve determinations that appertain to the judiciary and provide sufficient guidance to satisfy separation of powers principles?

In short, *City of Port Arthur* cannot prop up the Fourteenth Court of Appeals' conclusion regarding the constitutionality of sections 174.021 and 174.252. The appellate court's remaining points do not fill the analytic gap.

Seeking to bolster its conclusion, the appellate court cites a number of cases involving statutes that use some (but by no means all) of the discrete words appearing in section 174.021. *See City of Houston*, 626 S.W.3d at 18 & n.12.[4] It goes on to assert that isolated words such as "comparable" plucked from different statutes "have been applied routinely by courts without difficulty in different areas of the law." *Id*. (citing *Hertz Equip. Rental Corp. v. Barousse*, 365 S.W.3d 46, 59 (Tex. App.—Houston [1st Dist.] 2011, pet. denied), and *Basic Cap. Mgmt., Inc. v. Phan*, No. 05-00-00147-CV, 2001 WL 893986, at *7 (Tex. App.—Dallas Aug. 9, 2001, pet. denied) (not designated for publication)). This approach, or course, runs afoul of the command to consider statutory language in context and as a whole. *See,*

[4] None of the cited cases refer to "compensation and other conditions of employment that prevail" in comparable employment or "prevailing private sector compensation and conditions of employment." *See id.* at 18 & n.9.

e.g., R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water, 336 S.W.3d 619, 628 (Tex. 2011) ("We generally avoid construing individual provisions of a statute in isolation from the statute as a whole."). More fundamentally, neither these cases nor *City of San Antonio v. International Ass'n of Fire Fighters, Local 624*, *San Antonio*, 539 S.W.2d 931, 933-35 (Tex. App.—El Paso 1976, no writ), purport to address the nondelegation doctrine. These cases, therefore, are not germane to the inquiry before this Court.[5]

Equally unavailing is the appellate court's reliance on a string cite to a series of cases addressing the nondelegation doctrine under statutory standards having no overlap whatsoever with language used in The Fire and Police Employee Relations Act. *See City of Houston*, 626 S.W.3d at 22 & n.15. With two exceptions, the cited cases do not address efforts to effect a legislative delegation to the judiciary. *See id.* And as discussed above, the two cited cases involving a delegation to the judiciary address determinations that appertain to the judiciary because they are directly

[5] The cited federal cases are inapposite for the same reason because they do not address the nondelegation doctrine; they merely recite statutory language. *See City of Houston*, 626 S.W.3d at 18 & n.12. And even if they did have something to say about the nondelegation doctrine, reliance on the cited federal employment cases still would be unwarranted here given the "extreme judicial deference to legislative delegation" that historically has been afforded in federal jurisprudence; Texas law takes a much more proactive approach to policing the boundaries between the legislative and the judicial branches via the nondelegation doctrine. *See Tex. Boll Weevil Eradication Found., Inc.*, 952 S.W.2d at 468; *see also id.* ("State courts may have less need to reinvigorate the doctrine, since they have historically been more comfortable with striking down state laws on this basis than their federal counterparts.… Texas courts are no exception.").

related to court operations. *See King*, 22 S.W.3d at 327-28; *Holloway*, 828 S.W.2d at 811-13. These delegated determinations involving matters specific to court operations bear little resemblance to the larger public policy choices inherent in rate-making and deciding compensation for services provided by fire fighters and police officers, which have nothing whatsoever to do with court operations.

The directly on-point decision addressing the same language that actually appears in this Act is *City of Kingsville*, but the Fourteenth Court of Appeals erroneously opted not to follow it. *See City of Houston*, 626 S.W.3d at 18-23. This is reason enough to grant the City's petition for review.

But this reason does not stand alone. The appellate court's accompanying statutory construction errors in analyzing Chapter 174's good faith bargaining requirement underscore the need for this Court's intervention.

II. The appellate court erred in determining that Chapter 174 does not require good faith collective bargaining with respect to prevailing compensation and other conditions of employment in the private sector.

In addition to its erroneous treatment of separation of powers, the Fourteenth Court of Appeals' analysis goes awry again in discussing the City's plea to the jurisdiction. *See City of Houston*, 626 S.W.3d at 9-13.

The Act expressly waives the City's immunity from suit and liability "only to the extent necessary to enforce this chapter against that employer." Tex. Loc. Gov't

Code § 174.008. The statutory immunity waiver standard raises this question: What is "necessary to enforce this chapter"?

The City filed a combined plea to the jurisdiction and motion for summary judgment establishing that the jurisdictional facts demonstrate the absence of a prerequisite for section 174.008's immunity waiver—namely, the absence of good faith collective bargaining based on comparable private sector standards. 1CR63-220; *see, e.g., State v. Lueck*, 290 S.W.3d 876, 880 (Tex. 2009) ("[W]hen the facts underlying the merits and subject-matter jurisdiction are intertwined, the State may assert sovereign immunity from suit by a plea to the jurisdiction, even when the trial court must consider evidence 'necessary to resolve the jurisdictional issues raised.'") (quoting *Bland Indep. Sch. Dist. v. Blue,* 34 S.W.3d 547, 555 (Tex. 2000)); *cf. San Antonio Water Sys. v. Nicholas*, 461 S.W.3d 131, 136 (Tex. 2015) (failure of proof on the elements of a TCHRA claim "deprives the trial court of jurisdiction" because "[t]he elements of a retaliation claim under the TCHRA are jurisdictional" based on the Legislature's waiver of immunity from suit for a TCHRA claim).

The jurisdictional facts here demonstrate that the Association did not communicate in any manner about comparable pay and benefits in the private sector before an impasse was declared. 1CR118-19. The Association later backtracked and asserted that it had received information on private sector labor standards from various sources 2CR311-12. The undisputed jurisdictional facts nonetheless

establish that the Association "did not provide to the City at any time during 2017 Collective Bargaining information concerning the compensation and other conditions of employment that are substantially equal to compensation and other conditions of employment that prevail in comparable employment in the private sector." 1CR142. Further, the Association "did not provide any proposal or information that they claimed to be based on prevailing private sector compensation and conditions of employment in the labor market area in other jobs that require the same or similar skills, ability, and training and may be performed under the same or similar conditions." *Id.*

These jurisdictional facts conclusively establish that a prerequisite to enforcing the Act against the City (and, thus, a prerequisite to section 174.008's waiver of immunity from suit) is not satisfied on this record.

The appellate court rejected this jurisdictional challenge on grounds that "nothing in sections 174.008 and 174.252 (or in any other statutory provision of the Act) . . . would support the City's contention that the Act's governmental immunity waiver requires good faith collective bargaining based on private sector labor standards . . . ." *City of Houston*, 626 S.W.3d at 11; *see also id.* at n.4 ("[T]he Act contains no provision that requires good faith collective bargaining based on prevailing private sector labor standards, and the Association was not required to plead and present evidence that the parties negotiated based on prevailing private

sector comparators for compensation and other employment conditions to establish a waiver of governmental immunity under the Act.").

The appellate court's statutory construction is erroneous because it impermissibly granulates the Act's provisions.

Viewed in isolation, no single provision by itself "requires good faith collective bargaining based on private sector labor standards" in precisely those words. *Id*. at 11. But the standards governing statutory interpretation direct that provisions must not be viewed in isolation and divorced from the context in which they appear. *See, e.g., Aleman v. Tex. Med. Bd.*, 573 S.W.3d 796, 802 (Tex. 2019) ("[W]e construe the words and phrases chosen by the Legislature in context rather than in isolation.").

The statutory context here forecloses the appellate court's truncated interpretation of the Act's requirements.

- The City must provide fire fighters "with compensation and other conditions of employment" that are "substantially equal" to those "that prevail in comparable employment in the private sector" and are "based on prevailing private sector compensation and conditions of employment in the labor market area . . . ." Tex. Loc. Gov't Code §§ 174.021(1), (2).

- In addressing section 174.021's requirements, the City and the Association ***both*** must "bargain collectively" by "confer[ring] in good faith regarding compensation, hours, and other conditions of employment or the negotiation of an agreement . . . ." *Id*. § 174.105(b)(2).

- The Association can request arbitration if the parties "reach an impasse in collective bargaining," but ***only*** if the parties already have "made every

reasonable effort . . . to settle the dispute through good-faith collective bargaining . . . ." *Id*. §§ 174.152, 174.153(a)(1)(A), (B).

- If the City does not agree to arbitration after the Association has requested it, ***only then*** can a district court "enforce the requirements of Section 174.021" against the City "as to any unsettled issue relating to compensation or other conditions of employment . . . ." *Id*. § 174.252.
- Immunity from suit and liability "is waived only to the extent necessary to enforce" these provisions against the City. *Id.* § 174.008.

This context confirms that (1) section 174.021's prevailing private sector wage and condition requirement can be enforced against the City under section 174.252 only after an effective section 174.153 arbitration request; and (2) an effective arbitration request can occur only if it is preceded by good-faith collective bargaining on the Association's part with respect to prevailing private sector wages and working conditions under sections 174.021, 174.105, and 174.153.

The appellate court tries to avoid this conclusion with the following statement: "[T]he Legislature specifically provided that a public employer is considered to be in compliance with the standards expressed in section 174.021 regardless of whether the collectively bargained-for agreement actually is in compliance therewith." *City of Houston*, 626 S.W.3d at 13 (citing Tex. Loc. Gov't Code § 174.022(a)). According to the appellate court, "This undermines the City's argument that the Act imposes a requirement to collectively bargain based on section 174.021 prevailing private sector labor standards." *Id.* This assertion is erroneous because section 174.022(a) addresses only circumstances in which the parties have "reached an

agreement" and applies only "for the duration of the agreement." *See* Tex. Loc. Gov't Code § 174.022(a). This provision has nothing to say about forward-looking negotiating obligations in connection with the expiration of an agreement.

Because the jurisdictional facts negate these prerequisites for enforcement of the Act against the City, section 174.008's waiver of immunity from suit does not apply and the plea to the jurisdiction should have been sustained.

PRAYER FOR RELIEF

The City asks this Court to grant its petition for review; reverse the court of appeals' judgment; and hold that the Act's delegation violates separation of powers principles. Further, dismissal is warranted based on the City's plea to the jurisdiction. The City requests all other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Based on a word count run in Microsoft Word 2016, this brief contains 6,442 words excluding the portions of the petition exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

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CERTIFICATE OF SERVICE

On January 19, 2022, I electronically filed this brief with the Clerk of Court using the eFile.TXCourts.gov electronic filing system which will send notification of such filing to the following:

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APPENDIX

Tab	Item
1.	Order Denying Defendant City of Houston, Texas' Plea to the Jurisdiction and Cross-Motion for Summary Judgment and Granting Plaintiff's Motion for Summary Judgment on Sovereign/Governmental Immunity
2.	Order Granting Tex. Civ. Prac. & Rem. Code Section 51.014(d) Joint Motion for Written Order Permitting Interlocutory Appeal of Order Denying Defendant City of Houston's Motion for Summary Judgment With Respect to Constitutionality of Tex. Loc. Gov't Code Sections 174.021 and 174.252
3.	Court of Appeals Opinion, *City of Houston v. Houston Pro. Fire Fighters' Ass'n, Loc. 341*, 626 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2021, pet. filed)
4.	Judgment of the Court of Appeals
5.	Tex. Loc. Gov't Code § 174.008
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8.	Tex. Loc. Gov't Code § 174.152
9.	Tex. Loc. Gov't Code § 174.153
10.	Tex. Loc. Gov't Code § 174.252

APPENDIX 1

P.3

PJURY MPSJY

CAUSE NO. 2017-42885

HOUSTON PROFESSIONAL FIRE FIGHTERS' ASSOCIATION, LOCAL 341, Plaintiff	§	IN THE DISTRICT COURT OF
vs.	§	HARRIS COUNTY, TEXAS
CITY OF HOUSTON, TEXAS, Defendant	§	234th JUDICIAL DISTRICT

FILED
Chris Daniel
District Clerk
OCT 22 2018
Time: 12:17
Harris County, Texas
By _____ Deputy

ORDER DENYING DEFENDANT CITY OF HOUSTON, TEXAS' PLEA TO THE JURISDICTION AND CROSS-MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON SOVEREIGN/GOVERNMENTAL IMMUNITY

Came on for consideration Defendant City of Houston, Texas' Plea to the Jurisdiction and Cross-Motion for Summary Judgment and Plaintiff Houston Professional Fire Fighters' Association, Local 341's Motion for Summary Judgment on Defendant City of Houston's Affirmative Defense of Governmental and Sovereign Immunity. The Court, having considered the plea to the jurisdiction, the summary judgment pleadings and summary judgment evidence and argument of counsel, has concluded that Defendant City of Houston, Texas' Plea to the Jurisdiction and Cross-Motion for Summary Judgment should be denied and that Plaintiff's motion for

summary judgment on sovereign/governmental immunity should be granted.

It is **ORDERED, ADJUDGED and DECREED** that Defendant City of Houston, Texas' Plea to the Jurisdiction and Cross-Motion for Summary Judgment is denied and that Plaintiff Houston Professional Fire Fighter Association, Local 341's Motion for Summary Judgment on Defendant City of Houston's Affirmative Defense of Governmental and Sovereign Immunity is granted.

Date: 22 OCT, 2018
OCT 22 2018

DISTRICT JUDGE PRESIDING

APPROVED AS TO FORM:

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I, Marilyn Burgess, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.
Witness my official hand and seal of office this May 10, 2021

Certified Document Number: 82256384 Total Pages: 3

Marilyn Burgess, DISTRICT CLERK
HARRIS COUNTY, TEXAS

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APPENDIX 2

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CAUSE NO. 2017-42885

P.4

TJNOK

HOUSTON PROFESSIONAL FIRE FIGHTERS' ASSOCIATION, LOCAL 341, Plaintiff	§	IN THE DISTRICT COURT OF
	§	HARRIS COUNTY, TEXAS
vs.	§	
CITY OF HOUSTON, TEXAS, Defendant	§	234th JUDICIAL DISTRICT

ORDER GRANTING TEX. CIV. PRAC. & REM. CODE § 51.014(d) JOINT MOTION FOR WRITTEN ORDER PERMITTING INTERLOCUTORY APPEAL OF ORDER DENYING DEFENDANT CITY OF HOUSTON'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO CONSTITUTIONALITY OF TEX. LOC. GOV'T CODE §§ 174.021 AND 174.252

Came on for consideration the Joint Motion for Written Order Permitting Interlocutory Appeal of Order Denying Defendant City of Houston's Motion for Summary Judgment with Respect to Constitutionality of Tex. Loc. Gov't Code §§ 174.021 and 174.252 and the Court, having considered the motion, has determined the motion should be granted.

It is **ORDERED, ADJUDGED and DECREED** that the Joint Motion for Written Order Permitting Interlocutory Appeal of Order Denying Defendant City of Houston's Motion for Summary Judgment with Respect to Constitutionality of Tex. Loc. Gov't Code §§ 174.021 and 174.252 is hereby granted.

This Court denies the motion for summary judgment filed by Defendant City of Houston asserting that Tex. Loc. Gov't Code §§ 174.021 and 174.252 are unconstitutional as constituting an unconstitutional delegation of legislative authority (the "Order"). This Court finds that the Order to be appealed involves the following controlling questions of law as to which there is a substantial ground for difference of opinion based on the decisions in International Association of Firefighters, Local No. 2390 v. City of Kingsville, 568 S.W.2d 391 (Tex. Civ. App. – Corpus Christi 1978, writ ref'd n.r.e. and City of Port Arthur v. International Ass'n of Fire Fighters, Local 397, 807 S.W.2d 894 (Tex. Civ. App. – Beaumont 1991, writ denied):

1. WHETHER OR NOT TEX. LOC. GOV'T CODE §§ 174.021 AND 174.252 ARE CONSTITUTIONAL

2. WHETHER OR NOT TEX. LOC. GOV'T CODE §§ 174.021 AND 174.252 CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY

Immediate appeal of the constitutional issue would terminate threshold uncertainty concerning the validity of the statutory provisions and the constitutionality of the claims asserted by Plaintiff and would streamline and narrow issues to be resolved at the trial on the merits and the relief, if any, that can or cannot be afforded by this Court. Immediate appeal of the Order with respect to constitutionality may also facilitate resolution by settlement

because the parties would be afforded some degree of certainty of the constitutionality issues. For these reasons, this Court finds that an immediate appeal for the Order with respect to constitutionality may materially advance the ultimate termination of the litigation.

SIGNED this 22 day of OCT, 2018.

OCT 22 2018

DISTRICT JUDGE PRESIDING

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APPENDIX 3

CITY OF HOUSTON, Texas, Appellant

v.

HOUSTON PROFESSIONAL FIRE FIGHTERS' ASSOCIATION, LOCAL 341, Appellee

NO. 14-18-00976-CV, NO. 14-18-00990-CV

Court of Appeals of Texas, Houston (14th Dist.).

Opinion filed May 6, 2021

Background: Fire fighters' union filed suit against city alleging city was failing to provide fire fighters with substantially equal compensation and conditions of employment that prevailed in comparable private sector employment. The 234th District Court, Harris County denied city's plea to the jurisdiction and motion for summary judgment, granted union's summary judgment motion concerning governmental immunity, and permitted city to file interlocutory appeal summary judgment denial. City appealed.

Holdings: The Court of Appeals, Hassan, J., held that:

(1) Fire and Police Employee Relations Act waived city's governmental immunity and did not impose as condition precedent good faith collective bargaining based on private sector labor standards;

(2) Legislature provided adequate guidelines for courts to enforce remedial provision of Act, and thus provision was not unconstitutional delegation of legislative authority; and

(3) two of city's arguments were not within scope of permissive interlocutory appeal.

Affirmed.

1. Municipal Corporations ⚿1016
States ⚿191.1

Governmental immunity and sovereign immunity are related common law doctrines protecting the government from suit.

2. Municipal Corporations ⚿1016
States ⚿191.1

Sovereign immunity protects the state and its various divisions, such as agencies and boards, from suit and liability, while governmental immunity provides similar protection to the political subdivisions of the state, such as counties, cities, and school districts.

3. Pleading ⚿104(1)

An assertion of governmental immunity implicates a court's subject matter jurisdiction and is therefore properly asserted in a plea to the jurisdiction.

4. Appeal and Error ⚿3211

A plea questioning the trial court's jurisdiction raises a question of law that is reviewed de novo.

5. Pleading ⚿111.36

A plea to the jurisdiction can challenge either the pleadings or the existence of jurisdictional facts.

6. Pleading ⚿111.38

When a plea to the jurisdiction challenges a plaintiff's pleadings, the determination pivots on whether the pleader has alleged sufficient facts to demonstrate the court's subject matter jurisdiction over the matter.

7. Pleading ⚿111.38

When a plea to the jurisdiction challenges a plaintiff's pleadings, the court construes the pleadings liberally in favor of the plaintiff and looks to the pleader's intent.

8. Pleading ⚿104(1)

A plaintiff generally will not be required to marshal evidence and prove a claim just to overcome a plea to the jurisdiction.

9. Pleading ⚿111.48

If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of sufficiency pleading and plaintiff should be afforded opportunity to amend.

10. Pleading ⚿111.48

If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend.

11. Appeal and Error ⚿3807

If plea to jurisdiction challenges existence of jurisdictional facts, Court of Appeals considers relevant evidence submitted by parties when necessary to resolve jurisdictional issues raised, even where those facts may implicate merits of cause of action.

12. Pleading ⚿111.43

If evidence submitted for determination of plea to the jurisdiction creates fact issue as to jurisdictional issue, then it is for fact finder to decide.

13. Pleading ⚿111.43

If relevant evidence is undisputed or fails to raise fact question on jurisdictional issue, trial court rules on plea to jurisdiction as matter of law.

14. Pleading ⚿111.39(.5)

In considering evidence on plea to the jurisdiction, court takes as true all evidence favorable to nonmovant and indulges every reasonable inference and resolves any doubts in nonmovant's favor.

15. Municipal Corporations ⚿1016

The Legislature must use clear and unambiguous language indicating its intent to waive governmental immunity.

16. Municipal Corporations ⚿1016

Whether the Legislature has imposed conditions precedent to a waiver of governmental immunity is a matter of statutory interpretation.

17. Labor and Employment ⚿1122

Municipal Corporations ⚿194

Fire and Police Employee Relations Act waived city's governmental immunity for fire fighters' union's claim that city was failing to provide fire fighters with substantially equal compensation and conditions of employment that prevailed in comparable private sector employment, and it did not impose, as condition precedent to waiver, good faith collective bargaining based on private sector labor standards; Act explicitly waived immunity with respect to claims brought under section requiring compensation substantially similar to private sector, and allowed for public employer and union to reach agreement that would be deemed to be in compliance with prevailing private sector standards mandated by prevailing wage provision of Act, even if agreement did not actually comply with requirements. Tex. Loc. Gov't Code Ann. § 174.001 et seq.

18. Public Employment ⚿792

States ⚿191.9(1)

Under the waiver of immunity provision in the Texas Whistleblower Act, sovereign immunity is waived when a public employee alleges a violation of Act. Tex. Gov't Code Ann. § 554.0035.

19. Public Employment ⚿286

Violation of Texas Whistleblower Act occurs when a governmental entity retal-

iates against a public employee for making a good faith report of a violation of law to an appropriate law enforcement authority. Tex. Gov't Code Ann. § 554.002(a).

20. Constitutional Law ⚿990

When the Court of Appeals evaluates the constitutionality of a statute, it starts with the presumption that statutes enacted by the Legislature comply with the Texas Constitution.

21. Constitutional Law ⚿990

If a statute is susceptible to two interpretations, one constitutional and the other unconstitutional, then the constitutional interpretation will prevail.

22. Constitutional Law ⚿1030

The party asserting that a statute is unconstitutional bears a high burden.

23. Constitutional Law ⚿2390

While legislative power includes the power to set public policy, it also includes many functions that have administrative aspects, including the power to provide the details of the law, to promulgate rules and regulations to apply the law, and to ascertain conditions upon which existing laws may operate.

24. Constitutional Law ⚿2400

Although power to pass laws rests with legislature and cannot be delegated to some commission or other tribunal, these blanket pronouncements should not be read too literally.

25. Constitutional Law ⚿2400

Delegation of power to enforce and apply law is not only proper but necessary.

26. Constitutional Law ⚿2400

Generally, Texas Legislature may delegate its powers so long as it establishes reasonable standards to guide entity or tribunal to which it delegates power.

27. Constitutional Law ⚿2400

To satisfy separation of powers provision, standards of delegating Legislature's powers must be reasonably clear and hence acceptable as standard of measurement.

28. Constitutional Law ⚿2400

Legislature is not required to include every detail or anticipate every circumstance in statutes when delegating power; such requirement would defeat purpose of delegating legislative authority.

29. Constitutional Law ⚿2400

Broad standards included in legislative delegation may pass constitutional scrutiny, especially when conditions must be considered which cannot be conveniently investigated by legislature.

30. Constitutional Law ⚿2403
Labor and Employment ⚿966

Legislature provided adequate guidelines for courts to enforce remedial provision of Fire and Police Employee Relations Act providing for judicial enforcement of requirement that political subdivision provide fire fighters with compensation and other conditions of employment substantially equal to compensation and conditions of employment that prevailed in private sector, and thus provision was not unconstitutional delegation of legislative authority; Legislature provided descriptive, easily understandable language and commonly used and routinely applied terms in employment law and other areas of law as well as several factors as guiding posts for courts to determine conditions substantially equal to comparable employment in private sector. Tex. Loc. Gov't Code Ann. §§ 174.021, 174.252.

31. Evidence ⚿470

An expert witness may testify regarding scientific, technical, or other special-

ized matters if the expert is qualified and if the expert's opinion is relevant and based on a reliable foundation. Tex. R. Evid. 702.

32. Evidence ⚿555.2

In determining whether expert testimony is reliable, courts must consider list of non-exclusive factors, as well as the expert's experience, knowledge, and training; factors include: extent to which theory has been or can be tested; extent to which technique relies upon subjective interpretation of expert; whether theory has been subjected to peer review and/or publication; technique's potential rate of error; whether underlying theory or technique has been generally accepted as valid by relevant scientific community; and nonjudicial uses which have been made of theory or technique. Tex. R. Evid. 702.

33. Labor and Employment ⚿965

Municipal Corporations ⚿176(3.1)

City's obligation to provide compensation for firefighters and/or policemen that is "substantially the same" as that in private sector is state policy mandate to make compensation and conditions of employment for firefighters and/or policemen substantially the same as private sector. Tex. Loc. Gov't Code Ann. § 174.021.

34. Labor and Employment ⚿1995

District court reviews evidence and makes determination as to whether city's obligation to provide compensation for firefighters and/or policemen that is "substantially the same" as that in private sector has been complied with. Tex. Loc. Gov't Code Ann. § 174.021.

35. Constitutional Law ⚿1140.2

Constitutional standard set forth in a statute may be broad and encompass multitude of factors if it is no more extensive than public interest demands.

36. Appeal and Error ⚿3159(3)

The scope of review in a permissive interlocutory appeal is limited to controlling legal questions on which there are substantial grounds for disagreement and the immediate resolution of which may materially advance the ultimate termination of the litigation. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d); Tex. R. App. P. 28.3(e); Tex. R. Civ. P. 168.

37. Appeal and Error ⚿3159(3)

Parties may not add to the trial court's description of the controlling legal question in permissive interlocutory appeal. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d); Tex. R. App. P. 28.3(e); Tex. R. Civ. P. 168.

38. Appeal and Error ⚿3159(3)

City's arguments that motion for summary judgment conclusively proved fire fighters' union never negotiated in good faith for compensation and benefits based on private sector compensation and that trial court erroneously denied motion for summary judgment, were not within scope of permissive interlocutory appeal; controlling questions of law concerned whether two provisions of Fire and Police Employee Relations Act were constitutional and whether provisions constituted unconstitutional delegation of legislative authority. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d).

39. Appeal and Error ⚿68

Rule providing for interlocutory appeal is an exception to the general rule that only final judgments are appealable, and is thus strictly construed. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d).

40. Appeal and Error ⚿68

Appellate court strictly construes statute providing for interlocutory appeal from county or district court. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d).

On Appeal from the 234th District Court, Harris County, Texas, Trial Court Cause No. 2017-42885

Lowell Frank Denton, San Antonio, Joseph Alan Callier, Houston, Richard J. Navarro, Harlingen, for Appellant.

E. Troy Blakeney, Richard Charles Mumey, Houston, Vincent L. Marable, III, Wharton, for Appellee.

Panel consists of Justices Wise, Spain, and Hassan.

OPINION

Meagan Hassan, Justice

The City of Houston (the "City") appeals the denial of its interlocutory plea to the jurisdiction based on governmental immunity in case number 14-18-00990-CV. The City also appeals the interlocutory denial of its motion for summary judgment based on the unconstitutionality of Texas Local Government Code section 174.252 in case number 14-18-00976-CV. We affirm the trial court's orders denying the City's plea to the jurisdiction and motion for summary judgment.

Background

This case arose after the City and the Houston Professional Firefighters' Association, Local 341 (the "Association") negotiated but failed to reach a collective bargaining agreement regarding Houston fire fighters' compensation, hours, and other working conditions pursuant to The Fire and Police Employee Relations Act (the "Act"). *See* Tex. Loc. Gov't Code Ann. §§ 174.001-.253.

The Act is codified in chapter 174 of the Texas Local Government Code and provides fire fighters and police officers of a political subdivision the right to organize and collectively bargain with their public employers regarding their compensation and employment conditions (which should be substantially the same as compensation and conditions of employment prevailing in comparable private sector employment). *See id.* §§ 174.002(a), (b); 174.021.

The City and the Association entered into a collective bargaining agreement in 2011, which was set to terminate on December 31, 2016. In August 2016, both parties agreed to extend the agreement until June 30, 2017, at which time the agreement would terminate. In the meantime, the Association sent the City a written notice (as required by the Act) in January 2017; this notice requested "collective bargaining to negotiate wages, rates of pay, benefits, and working conditions requiring the appropriation of monies that would have an impact on the next fiscal year's operating budget." *See id.* § 174.107. In February 2017, the City and the Association agreed to several "ground rules for the negotiations regarding a Collective Bargaining Agreement ("CBA") pursuant to the Fire and Police Employee Relations Act," including "the principle of good faith bargaining . . . to reach a mutual agreement that is consistent with the intent and purpose of Chapter 174."

After bargaining for 60 days, the parties failed to reach a collective bargaining agreement. The Association sent the City a letter in May 2017, stating that the parties reached an impasse (as defined in the Act) regarding a successor agreement to the 2011 collective bargaining agreement and requesting arbitration pursuant to the Act. Specifically, the letter stated:

> Pursuant to Texas Local Government Code § 174.152, the 60-day statutory impasse deadline has arrived. Having begun bargaining on March 14, 2017 and failing to reach agreement by May 14, 2017, under law, the City of Houston and the Houston Professional Fire

> Fighters Association are at impasse regarding a successor agreement to the 2011 CBA [Collective Bargaining Agreement].
>
> The Houston Professional Fire Fighters Association, Local 341 . . . on behalf of all Houston fire fighters requests arbitration to resolve the remaining issues in dispute. Pursuant to section 174.153, [the Association] specifies the following issues to be in dispute:
>
> - Compensation;
> - Hours of work;
> - Overtime;
> - Paid leaves, including sick leave and vacation leave;
> - Staffing; and
> - Dispute resolution (commonly referred to as the grievance procedure).

The City did not agree to arbitrate, and the Act does not require compulsory arbitration. Instead, the City suggested mediation, and the parties proceeded to mediate unsuccessfully.

On June 28, 2017, the Association sued the City for allegedly violating section 174.021. Specifically, the Association alleged the City was failing to provide fire fighters with substantially equal compensation and conditions of employment that prevailed in comparable private sector employment. *See id.* § 174.021. The Association sought judicial enforcement (in accordance with section 174.252) and asked the trial court to declare the compensation and other conditions to which the fire fighters were entitled under section 174.021. *See id.* § 174.252. In August 2017, the City filed an original answer, special exceptions, and amended special exceptions to the Association's original petition.

The trial court signed an order on October 12, 2017 that required the Association to amend its petition and to re-plead facts (1) supporting its claim that the City failed to bargain in good faith; (2) specifying which issues remained unresolved when the parties reached an impasse; and (3) identifying "the relief claimed to 'make whole' the employees, including any compensation or conditions of employment which were changed or eliminated." The Association then filed an amended petition, and the City filed an answer thereto.

The Association filed a motion for summary judgment on the City's governmental immunity defense in November 2017. In September 2018, the City filed a plea to the jurisdiction and cross-motion for summary judgment (1) asking the trial court to dismiss the case for lack of jurisdiction and (2) arguing (a) the Association failed to establish a waiver of immunity because it did not bargain or negotiate in good faith "for 'wages, benefits, or conditions of employment' under the private sector labor standards provisions of the statute" and (b) absent "proof that employment compensation and conditions [are] less than those enjoyed by similar private sector firefighters," the Association cannot establish "the statutory condition required for this Court's jurisdiction under Chapter 174." The City also asked the trial court to dismiss the case for want of jurisdiction with regard to "any subjects which are not mandatory subjects for bargaining under Texas law", contending the Association failed to plead facts establishing each of the bargaining subjects were mandatory subjects under the Act.

Additionally, the City moved for summary judgment on grounds that (1) the Association did not bargain in good faith when it failed to bargain for compensation or benefits based upon private sector labor standards or comparators and therefore there is immunity from suit; (2) there is no evidence that the items set out by the Association in their pleading "were manda-

tory subjects of bargaining" and therefore the trial court has "no jurisdiction to determine or enforce any . . . topics as listed by the Association as having reached" impasse; and (3) section 174.252 violates the separation of powers provision in the Texas Constitution "because it delegates the exclusively legislative power to declare the compensation of public officers to the judiciary without prescribing sufficient and adequate standards to guide the discretion conferred."

The Association filed its response to the City's plea to the jurisdiction and cross-motion for summary judgment on October 15, 2018. Four days later, the City filed a reply. The trial court held a hearing on the City's plea to the jurisdiction and cross-motion for summary judgment on October 22, 2018. After the hearing, the trial court signed an order denying both but granting the Association's summary judgment motion concerning governmental immunity. The trial court also signed an "Order Granting Tex. Civ. Prac. & Rem. Code § 51.014(d) Joint Motion for Written Order Permitting Interlocutory Appeal of Order Denying Defendant City of Houston's Motion for Summary Judgment with Respect to Constitutionality of Tex. Loc. Gov't Code §§ 174.021 and 174.252." The order states in relevant part:

> It is ORDERED, ADJUDGED and DECREED that the Joint Motion for Written Order Permitting Interlocutory Appeal of Order Denying Defendant City of Houston's Motion for Summary Judgment with Respect to Constitutionality of Tex. Loc. Gov't Code §§ 174.021 and 174.252 is hereby granted.
>
> This Court denies the motion for summary judgment filed by Defendant City of Houston asserting that Tex. Loc. Gov't Code §§ 174.021 and 174.252 are unconstitutional as constituting an unconstitutional delegation of legislative authority (the "Order"). This Court finds that the Order to be appealed involves the following controlling questions of law as to which there is a substantial ground for difference of opinion based on the decisions in *International Association of Firefighters, Local No. 2390 v. City of Kingsville*, 568 S.W.2d 391 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) and *City of Port Arthur v. International Ass'n of Fire Fighters, Local 397*, 807 S.W.2d 894 (Tex. Civ. App.—Beaumont 1991, writ denied):
>
> 1. WHETHER OR NOT TEX. LOC. GOV'T CODE §§ 174.021 AND 174.252 ARE CONSTITUTIONAL
> 2. WHETHER OR NOT TEX. LOC. GOV'T CODE §§ 174.021 AND 174.252 CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY
>
> Immediate appeal of the constitutional issue would terminate threshold uncertainty concerning the validity of the statutory provisions and the constitutionality of the claims asserted by Plaintiff and would streamline and narrow issues to be resolved at the trial on the merits and the relief, if any, that can or cannot be afforded by this Court. Immediate appeal of the Order with respect to constitutionality may also facilitate resolution by settlement because the parties would be afforded some degree of certainty of the constitutionality issues. For these reasons, this Court finds that an immediate appeal for the Order with respect to constitutionality may materially advance the ultimate termination of the litigation

On November 6, 2018, the City filed a petition for permission to appeal the trial court's October 22, 2018 order denying the City's motion for summary judgment pur-

suant to section 51.014(f) of the Civil Practices and Remedies Code. In its petition, the City asserted that Texas Local Government Code sections 174.021 and 174.252 are unconstitutional delegations of legislative authority and that the requirements for a permissive appeal are met in this case. That appeal was assigned to this court under case number 14-18-00976-CV. The Association filed a response indicating that it did not oppose the petition for permission to appeal.

On November 12, 2018, pursuant to section 51.014(a)(8) of the Civil Practices and Remedies Code, the City filed a notice of interlocutory appeal from the trial court's October 22, 2018 order denying its plea to the jurisdiction. That appeal was assigned to this court under case number 14-18-00990-CV. On November 27, 2018, this court (in a per curiam order) consolidated case number 14-18-00976-CV with case number 14-18-00990-CV, stating that both "involve the same suit and the same order signed by the trial court on October 22, 2018[.]"

On September 1, 2020, this court granted the City's petition for permission to appeal, provided notice to the Texas Attorney General (pursuant to Texas Government Code section 402.010) that the City filed a petition for permission to appeal challenging the constitutionality of sections 174.021 and 174.252, requested the Texas Attorney General to weigh in on the issues presented in the petition for permission to appeal by September 30, 2020, and abated the appeals. The court did not receive the requested briefing. The court then granted the Association's motion to reinstate the appeals and set a briefing schedule on October 27, 2020.

Analysis

We begin our analysis with the City's challenge to the trial court's denial of its plea to the jurisdiction based on governmental immunity in the interlocutory appeal in case number 14-18-00990-CV; we then address the City's arguments challenging the constitutionality of section 174.252 presented in the permissive appeal in case number 14-18-00976-CV.

I. Plea to the Jurisdiction

In two issues, the City contends that the trial court erroneously denied its plea to the jurisdiction because (1) the Act's governmental immunity waiver "requires good faith collective bargaining based on prevailing private sector comparators for compensation and other conditions of employment", and (2) the "City's evidence supporting its plea to the jurisdiction conclusively showed that Association bargaining with the City was not based on private sector comparator compensation."

A. Standard of Review and Governing Law

[1–4] Governmental immunity and sovereign immunity are related common law doctrines protecting the government from suit. *Harris Cty. v. Annab*, 547 S.W.3d 609, 612 (Tex. 2018); *Travis Cent. Appraisal Dist. v. Norman*, 342 S.W.3d 54, 57-58 (Tex. 2011). Sovereign immunity protects the state and its various divisions (such as agencies and boards) from suit and liability while governmental immunity provides similar protection to the political subdivisions of the state (such as counties, cities, and school districts). *Annab*, 547 S.W.3d at 612; *Norman*, 342 S.W.3d at 57-58; *see also Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). An assertion of governmental immunity implicates a court's subject matter jurisdiction and is therefore properly asserted in a plea to the jurisdiction. *Annab*, 547 S.W.3d at 613; *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004). A plea questioning the trial court's jurisdiction

raises a question of law that is reviewed *de novo*. *State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007).

[5–10] A plea to the jurisdiction can challenge either the pleadings or the existence of jurisdictional facts. *See Miranda*, 133 S.W.3d at 226-27; *City of Houston v. Ranjel*, 407 S.W.3d 880, 887 (Tex. App.—Houston [14th Dist.] 2013, no pet.). When a plea to the jurisdiction challenges a plaintiff's pleadings, the determination pivots on whether the pleader has alleged sufficient facts to demonstrate the court's subject matter jurisdiction over the matter. *Miranda*, 133 S.W.3d at 226-27. We construe the pleadings liberally in favor of the plaintiff and look to the pleader's intent. *Annab*, 547 S.W.3d at 612-13; *City of Waco v. Kirwan*, 298 S.W.3d 618, 621 (Tex. 2009). A plaintiff generally will not be required to marshal evidence and prove a claim just to overcome a plea to the jurisdiction. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 637 (Tex. 2012). If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend. *Miranda*, 133 S.W.3d at 226-27. If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Id.* at 227.

[11–14] If a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, even where those facts may implicate the merits of the cause of action. *Kirwan*, 298 S.W.3d at 622; *Miranda*, 133 S.W.3d at 227. If the evidence creates a fact issue as to the jurisdictional issue, then it is for the factfinder to decide. *Kirwan*, 298 S.W.3d at 622. If the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* In considering this evidence, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Id.*

B. Waiver of Governmental Immunity

The City claims that "without good faith collective bargaining based on prevailing private sector comparators for compensation, and other conditions of employment, there is no waiver." The City argues that the governmental immunity waiver provided in the Act is narrow in that it requires (as a condition precedent) that the Association engaged in good faith collective bargaining based on private sector labor standards "consistent with" sections 174.021 and 174.105. According to the City, the Legislature did not intend a court to have jurisdiction over a suit under the Act "to resolve unsettled § 174.021 compensation issues without prima facie proof by publicly employed firefighters (or police) of compensation bargaining based on private sector comparators."

[15, 16] The Legislature must use clear and unambiguous language indicating its intent to waive governmental immunity. *See Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 838 (Tex. 2010); *Harris Cty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009).[1] Whether the Legislature has

1. *See also* Tex. Gov't Code Ann. § 311.034. The Code of Construction Act provides:

§ 311.034. Waiver of Sovereign Immunity

imposed conditions precedent to a waiver of governmental immunity is a matter of statutory interpretation. *See Jefferson Cty. v. Jefferson Cty. Constables Ass'n*, 546 S.W.3d 661, 667 (Tex. 2018). "In construing the Act, as with any statute, our primary objective is to give effect to the Legislature's intent." *Id.* We begin with the "ordinary meaning of the statutory text." *In re Ford Motor Co.*, 442 S.W.3d 265, 271 (Tex. 2014) (orig. proceeding). "We analyze statutory language in context, considering the specific section at issue as well as the statute as a whole." *CHCA Woman's Hosp., L.P. v. Lidji*, 403 S.W.3d 228, 232 (Tex. 2013).

[17] "We presume the Legislature selected language in a statute with care and that every word or phrase was used with a purpose in mind." *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010). Here, the Legislature has further instructed that the Act "shall be liberally construed." Tex. Loc. Gov't Code Ann. § 174.004. Applying these principles, we conclude the Act (1) waives the City's governmental immunity for the Association's claim under section 174.252 and (2) does not impose as a condition precedent good faith collective bargaining based on private sector labor standards.

The Act implements several express policies. *See Jefferson Cty.*, 546 S.W.3d at 667. First, it mandates "that a political subdivision shall provide its fire fighters and police officers with compensation and other conditions of employment that are substantially the same as compensation and conditions of employment prevailing in comparable private sector employment." *See* Tex. Loc. Gov't Code Ann. § 174.002(a). Second, "it gives fire fighters and police officers 'the right to organize for collective bargaining' as 'a fair and practical method for determining compensation and other conditions of employment.' "[2] *See Jefferson Cty.*, 546 S.W.3d at 667 (quoting Tex. Loc. Gov't Code Ann. § 174.002(b)). Third, "despite granting this right, the Act stops short of allowing these employees to engage in strikes and other work stoppages"; instead, it provides " 'reasonable alternatives' like arbitration and judicial enforcement of the Act's requirements." *Id.* (quoting Tex. Loc. Gov't Code Ann. § 174.002(c), (d)). "The provision of alternatives to strikes is intended to protect the 'health, safety, and welfare of the public' in light of 'the essential and emergency nature of the public service

> In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language. In a statute, the use of ''person,'' as defined by Section 311.005 to include governmental entities, does not indicate legislative intent to waive sovereign immunity unless the context of the statute indicates no other reasonable construction. Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.
>
> *Id.*

2. A majority of fire fighters of the fire department of the political subdivision, or a majority of police officers of the police department of the political subdivision, may select an association to function as its exclusive bargaining agent. *Id.* §§ 174.101, 174.102. If the fire fighters or police officers of a political subdivision are represented by such an association, the public employer and the association ''shall bargain collectively'', and the association may enter into a collective bargaining agreement with the public employer on behalf of the fire fighters or police officers. *Id.* § 174.105. If a public employer and an association reach a collective bargaining agreement under the Act, the agreement ''is binding and enforceable against a public employer, an association, and a fire fighter or police officer covered by the agreement.'' *Id.* § 174.109.

performed by fire fighters and police officers.'" *Id.* at 667-68 (quoting Tex. Loc. Gov't Code Ann. § 174.002(c), (d)).

[18, 19] As applicable in this case, the Act waives the City's governmental immunity to ensure judicial enforcement of the Act's requirements in section 174.021. *See* Tex. Loc. Gov't Code Ann. §§ 174.008, 174.252. The clear statutory language regarding waiver of governmental immunity, viewed in context, lends no support to the City's assertion that without good faith collective bargaining based on prevailing private sector comparators, "subject matter jurisdiction does not exist under §§ 174.008 and 174.252 to waive immunity from suit."[3] Together, these two sections unambiguously waive the City's governmental immunity with respect to the Association's claim (1) brought under section 174.252; (2) to enforce the requirements of section 174.021 as to any unsettled issue relating to compensation or other employment conditions of fire fighters; and (3) after an impasse in the collective bargaining process occurred between the City and the Association and the City refused to engage in arbitration. *See* Tex. Loc. Gov't Code Ann. §§ 174.008, 174.252; *cf. Stines v. Jefferson Cty.*, 550 S.W.3d 178, 179-80 (Tex. 2018) (per curiam); *Jefferson Cty. v. Stines*, 523 S.W.3d 691, 713, 720-21 (Tex. App.—Beaumont 2017), *rev'd in part and vacated in part*, 550 S.W.3d 178 (Tex. 2018). There is nothing in sections 174.008 and 174.252 (or in any other statutory provision of the Act) that would support the City's contention that the Act's governmental immunity waiver requires good faith collective bargaining based on private sector labor standards, nor has the City cited to any applicable authorities.[4]

3. *See id.* §§ 174.008, 174.252. Section 174.008, titled "Waiver of Immunity", expressly provides: "This chapter is binding and enforceable against the employing public employer, and sovereign or governmental immunity from suit and liability is waived only to the extent necessary to enforce this chapter against that employer." *Id.* § 174.008. Further, section 174.252, titled "Judicial Enforcement When Public Employer Declines Arbitration", provides:

> (a) If an association requests arbitration as provided by Subchapter E and a public employer refuses to engage in arbitration, on the application of the association, a district court for the judicial district in which a majority of affected employees reside may enforce the requirements of Section 174.021 as to any unsettled issue relating to compensation or other conditions of employment of fire fighters, police officers, or both.
>
> (b) If the court finds that the public employer has violated Section 174.021, the court shall:
>
> (1) order the public employer to make the affected employees whole as to the employees' past losses;
>
> (2) declare the compensation or other conditions of employment required by Section 174.021 for the period, not to exceed one year, as to which the parties are bargaining; and
>
> (3) award the association reasonable attorney's fees.
>
> (c) The court costs of an action under this section, including costs for a master if one is appointed, shall be taxed to the public employer.

Id. § 174.252 (footnote omitted).

4. The City's reliance on *State v. Lueck*, 290 S.W.3d 876 (Tex. 2009) is misplaced because it is distinguishable. Under the waiver of immunity provision in the Texas Whistleblower Act, sovereign immunity is waived when a public employee alleges "a violation of this chapter", namely chapter 554 of the Texas Government Code. *Id.* at 878 (citing Tex. Gov't Code Ann. § 554.0035). A chapter 554 violation occurs when a governmental entity retaliates against a public employee for making a good faith report of a violation of law to an appropriate law enforcement authority. *Id.* (citing Tex. Gov't Code Ann. § 554.002(a)). The *Lueck* court held that there are two jurisdictional requirements in the waiver of immunity section, so that "[f]or the government's immunity to be waived, the plaintiff must (1) be a public employee, and (2) allege a violation *of this chapter.*" *Id.* at 881 (emphasis in original) (citing Tex. Gov't Code Ann.

Instead, the City cites sections 174.021 and 174.105 to support its contentions.[5] However, neither of these sections imposes a statutory requirement that parties collectively bargain based on private sector labor standards as described in section 174.021 and, thus, lend no support for the City's argument. Specifically, 174.105 lacks any requirement that the parties collectively bargain based on prevailing private sector comparators outlined in section 174.021, and does not even mention "private sector labor standards" or "comparators". *See* Tex. Loc. Gov't Code Ann. § 174.105. Additionally, section 174.021 (titled "Prevailing Wage and Working Conditions Required") lays out a more detailed outline of the required wage and work conditions the Act requires political subdivisions to provide fire fighters and police officers in order to satisfy the Act's policy stated in section 174.002. *See id.* § 174.021. However, it does not mention private sector labor standards in the context of collective bargaining.

If the Legislature intended to require parties to collectively bargain in good faith based on prevailing private sector compensation and work conditions, it could have easily done so.[6] Instead, the Legislature allowed for a public employer and an asso-

§ 554.0035). The court stated that ''it necessarily follows from this language that Lueck must actually allege a violation of the Act for there to be a waiver from suit. Therefore, the elements under section 554.002(a) must be considered in order to ascertain what constitutes a violation, and whether that violation has actually been alleged.'' *Id.* The court concluded that the elements of section 554.002(a) can be considered as jurisdictional facts when it is necessary to resolve whether a plaintiff has alleged a violation under the Act. *Id.*

Here, the Act contains no provision that requires good faith collective bargaining based on prevailing private sector labor standards, and the Association was not required to plead and present evidence that the parties negotiated based on prevailing private sector comparators for compensation and other employment conditions to establish a waiver of governmental immunity under the Act. *See also infra* pp. 11–13.

5. Section 174.105, titled ''Duty to Bargain Collectively in Good Faith'' states:

(a) If the fire fighters, police officers, or both of a political subdivision are represented by an association as provided by Sections 174.101-174.104, the public employer and the association shall bargain collectively.

(b) For purposes of this section, the duty to bargain collectively means a public employer and an association shall:

(1) meet at reasonable times;

(2) confer in good faith regarding compensation, hours, and other conditions of employment or the negotiation of an agreement or a question arising under an agreement; and

(3) execute a written contract incorporating any agreement reached, if either party requests a written contract.

(c) This section does not require a public employer or an association to:

(1) agree to a proposal; or

(2) make a concession.

Tex. Loc. Gov't Code Ann. § 174.105.

6. *See City of Rockwall v. Hughes*, 246 S.W.3d 621, 631 (Tex. 2008) (''If the Legislature desires to amend the statute to add words so that the statute will then say what is contended for by the Estate, we are confident it will do so. However, changing the meaning of the statute by adding words to it, we believe, is a legislative function, not a judicial function.'') (citing 67 Tex. Jur. 3d *Statutes* § 85 (2003) (noting that it is for the Legislature, not the courts, to remedy deficiencies, if any, in laws)); *see also RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985) (''Courts must take statutes as they find them. More than that, they should be willing to take them as they find them.... They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law. It must be an interpretation which expresses only the will of the makers of the law, not forced nor strained, but simply such as the words of the law in their plain sense fairly sanction and will clearly sustain.'') (quoting *Simmons v. Arnim*, 110 Tex. 309, 220 S.W. 66 (1920)).

ciation to reach an agreement that would be deemed to be in compliance with prevailing private sector standards mandated in section 174.021, even if the agreement did not actually comply with the requirements of section 174.021. *See id.* § 174.022(a).[7] Thus, the Legislature specifically provided that a public employer is considered to be in compliance with the standards expressed in section 174.021 regardless of whether the collectively bargained-for agreement actually is in compliance therewith. *See id.* This undermines the City's argument that the Act imposes a requirement to collectively bargain based on section 174.021 prevailing private sector labor standards.

We conclude that the government's waiver of immunity does not require as a condition precedent that the Association and the City engaged in good faith collective bargaining based on prevailing private sector comparators for compensation and other employment conditions. We therefore also conclude that the Association was not required to present evidence of collective bargaining based on private sector labor standards to establish a waiver of governmental immunity under the Act. Accordingly, we hold the trial court did not err in denying the City's plea to the jurisdiction because the Association properly pleaded a waiver of the City's governmental immunity and invoked the trial court's jurisdiction. We overrule the City's two issues.

II. Constitutionality of the Act

We next turn to the City's arguments in the permissive appeal challenging the constitutionality of the Act. The City contends the trial court erred in denying its motion for summary judgment because section 174.252 of the Texas Local Government Code constitutes an unconstitutional delegation of a legislative function to the judiciary in violation of the separation of powers provision in the Texas Constitution. We disagree.

A. Standard of Review and Governing Law

We review a trial court's denial of a traditional motion for summary judgment *de novo*. *Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 680 (Tex. 2017); *Laverie v. Wetherbe*, 517 S.W.3d 748, 752 (Tex. 2017). A party moving for traditional summary judgment must establish there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c); *Hansen*, 525 S.W.3d at 681; *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215-16 (Tex. 2003). We take all evidence favorable to the nonmovant as true, indulge every reasonable inference, and resolve any doubts in its favor. *See Hansen*, 525 S.W.3d at 681; *Knott*, 128 S.W.3d at 215.

[20–22] Additionally, when we evaluate the constitutionality of a statute, we start with the presumption that statutes enacted by the Legislature comply with the Texas Constitution. *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 754 (Tex. 2020); *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 725 (Tex. 1995).[8] "In line with this pre-

7. Section 174.022(a), titled "Certain Public Employers Considered to be in Compliance", states: "A public employer that has reached an agreement with an association on compensation or other conditions of employment as provided by this chapter is considered to be in compliance with the requirements of Section 174.021 as to the conditions of employment for the duration of the agreement." *Id.*

8. *See also* Tex. Gov't Code Ann. § 311.021(1) ("In enacting a statute, it is presumed that:

sumption, if a statute is susceptible to two interpretations—one constitutional and the other unconstitutional—then the constitutional interpretation will prevail." *Hegar*, 601 S.W.3d at 754 (*citing Key W. Life Ins. Co. v. State Bd. of Ins.*, 163 Tex. 11, 350 S.W.2d 839, 849 (1961)); *City of Pasadena v. Smith*, 292 S.W.3d 14, 19 (Tex. 2009). The party asserting that a statute is unconstitutional bears a high burden. *Hegar*, 601 S.W.3d at 754; *Patel*, 469 S.W.3d at 87.

[23] The Texas Constitution provides for the separation of powers between the executive, legislative, and judicial branches of state government and prohibits one branch of state government from exercising power inherently belonging to another branch. *See* Tex. Const. art. II, § 1; *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 600 (Tex. 2001); *City of Houston v. Houston Firefighters' Relief & Ret. Fund*, 502 S.W.3d 469, 474 (Tex. App.—Houston [14th Dist.] 2016, no pet.). The Texas Constitution expressly vests legislative power in the Legislature. *See* Tex. Const. art. III, § 1. "Defining what legislative power is or when it has been delegated is no easy task." *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000). Texas courts have defined legislative power broadly. *Id.* While it includes the power to set public policy, it also includes "many functions that have administrative aspects, including the power to provide the details of the law, to promulgate rules and regulations to apply the law, and to ascertain conditions upon which existing laws may operate." *Id.*; *see also Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 466-67 (Tex. 1997).

[24, 25] Although the power to pass laws in Texas rests with the Legislature and "cannot be delegated to some commission or other tribunal", "these blanket pronouncements should not be read too literally." *Boll Weevil*, 952 S.W.2d at 466. "Even in a simple society, a legislative body would be hard put to contend with every detail involved in carrying out its laws; in a complex society it is absolutely impossible to do so." *Id.* Therefore, delegation of power to enforce and apply law is not only proper but necessary. *Id.* "Such power must almost always be exercised with a certain amount of discretion, and at times the line between making laws and enforcing them may blur." *Id.* Because no statute can be entirely precise and some judgments, including judgments involving policy considerations, " 'must be left to the officers executing the law and to the judges applying it, the debate over constitutional delegation becomes a debate not over a point of principle but over a question of degree.' " *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 415, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (Scalia, J., dissenting)).

[26–29] Generally, the Texas Legislature may delegate its powers so long as it establishes "reasonable standards" to guide the entity or tribunal to which it delegates power. *See FM Props. Operating Co.*, 22 S.W.3d at 873; *Meno*, 917 S.W.2d at 740; *R.R. Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 689 (Tex. 1992). To satisfy the separation of powers provision, the standards of delegation must be " 'reasonably clear and hence acceptable as a standard of measurement.' " *Meno*, 917 S.W.2d at 741 (quoting *Jordan v. State Bd. of Ins.*, 160 Tex. 506, 334 S.W.2d 278, 280 (1960)). However, the Legislature is not required to include every detail or anticipate every circumstance in statutes when delegating power; such a requirement would defeat the purpose of

(1) compliance with the constitutions of this state and the United States is intended".)

delegating legislative authority. *See id.* at 740; *Lone Star Gas Co.*, 844 S.W.2d at 689. Broad standards included in legislative delegation may pass constitutional scrutiny, especially when "conditions must be considered which cannot be conveniently investigated by the legislature." *See Lone Star Gas Co.*, 844 S.W.2d at 689.

B. Constitutional Delegation of Legislative Power

The City argues that the remedial provision in section 174.252 of the Texas Local Government Code is unconstitutional because "it delegates a legislative function to the judiciary and does not 'prescribe[ ] sufficient guidelines to guide the District Court's discretion,' as held in *International Ass'n of Firefighters, Local No. 2390 v. City of Kingsville*, 568 S.W.2d 391 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.)." According to the City, section 174.252 violates the constitution's separation of powers provision because (1) it requires courts to declare fire fighter compensation and other work conditions as mandated by section 174.021 and (2) said section "establishes a private sector standard for compensation and benefits but does not do so with sufficient and adequate safeguards to guide the judicial discretion conferred."

The Legislature's enactment of section 174.252 includes a judicial enforcement provision to ensure that fire fighters have a reasonable alternative to enforce the Act's policy and requirements outlined in sections 174.002 and 174.021. *See* Tex. Loc. Gov't Code Ann. §§ 174.002, 174.021, 174.252. The Act's enforcement provision (1) authorizes courts to enforce the requirements of section 174.021 and (2) instructs courts to (a) order the public employer to make the affected employees whole as to the employees' past losses if it finds the public employer violated section 174.021; (b) declare the compensation or other employment conditions required by section 174.021 for a one-year period; and (c) award reasonable attorney's fees. *See id.* § 174.252; *see also id.* § 174.021.[9]

In support of their respective arguments, the parties point us to the only two cases that have analyzed whether section 174.252 "provides for an unconstitutional delegation of a legislative function to the judiciary." *See City of Port Arthur v. Int'l Ass'n of Fire Fighters, Local 397*, 807 S.W.2d 894, 897-99 (Tex. App.—Beaumont 1991, writ denied); *Kingsville*, 568 S.W.2d at 392-96. The City urges us to follow the *Kingsville* court and hold that section 174.252 provides an unconstitutional delegation of legislative authority to the judicial branch because the guidelines the Legislature furnished in section 174.021 are insufficient to guide a court's discretion.[10] Conversely, the Association asks us

9. Section 174.021, titled "Prevailing Wage and Working Conditions Required", provides:

> A political subdivision that employs fire fighters, police officers, or both, shall provide those employees with compensation and other conditions of employment that are:
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> (1) substantially equal to compensation and other conditions of employment that prevail in comparable employment in the private sector; and
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> (2) based on prevailing private sector compensation and conditions of employment in the labor market area in other jobs that require the same or similar skills, ability, and training and may be performed under the same or similar conditions.

Id. § 174.021.

10. In concluding that the Legislature did not prescribe adequate standards to guide the discretion it conferred on the courts to enforce section 174.021's requirements in section 174.252, the *Kingsville* court stated:

> The guideline for directing the District Court's discretion, that compensation and conditions of employment shall be "substantially the same" as those that prevail in private sector employment, is too subjective

to reject the *Kingsville* court's holding and follow the "better reasoned analysis" of the *Port Arthur* court (determining that section 174.252 is not unconstitutional because the Legislature provided sufficient guidelines in section 174.021 to enforce that section's requirements).[11]

> to prevent arbitrary and unequal application of its provisions notwithstanding the enumeration of factors the Legislature prescribed for the courts to consider.
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> In our complex society, the terms and conditions of employment are no longer a simple hourly wage or other easily determinable amount. In addition to a flat salary or hourly rate, conditions such as: overtime pay; seniority; sick leave; severance and layoff pay; fringe benefits including paid vacations, training and further education, insurance benefits, and profit sharing; and special working facilities such as lunchrooms, showers, athletic clubs, and staff medical personnel, all defy quantification or comparison in a uniform manner. For a court to decide which of the above conditions of employment are appropriate for any particular group of firemen, subject only to a guideline of ''substantially the same'' would represent a policy determination which is legislative in nature. The generality of the guideline would force District Courts to make certain rules for the future as to how conditions of employment would be determined.
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> As we stated, . . . a delegation of a legislative power is valid if it is so complete in all its terms and provisions when it leaves the legislative branch that nothing is left to the judgment of the recipient of a delegated power. We find that several matters are left to the judgment of the District Court, as we have pointed out, and accordingly find Section 16 of the Act to be unconstitutional.

See Kingsville, 568 S.W.2d at 395 (internal citations omitted). We note that the former The Fire and Police Employee Relations Act, 63d Leg., R.S., ch. 83, 1973 Tex. Gen. Laws 151 (unofficially designated Tex. Rev. Civ. Stat. Ann. art. 5154c-1, since amended) was repealed and codified in 1993 to its current designation as Texas Local Government Code Chapter 174. Former article 5154c-1, section 16 (discussed in *Kingsville* and *Port Arthur*) is now codified in Texas Local Government Code section 174.252. The wording of former article 5154c-1, section 16 did not materially change in that codification.

11. The *Port Arthur* court determined that section 174.252 is constitutional and criticized *Kingsville*'s decision:

> The *Kingsville* court held § 16 unconstitutional as it did not provide sufficient and adequate standards to guide district courts in resolving impasses brought about by recalcitrant employers. The *Kingsville* court cited the general rule that the legislature cannot impose a function upon the judiciary that is legislative in nature, but also recognized in the same breath an exception to the rule. The legislature may, however, delegate to a subordinate body the duty to administer and enforce its legislative function as long as the legislature prescribes sufficient and adequate standards to guide the discretion conferred. The Kingsville court was apparently structuring courts as subordinate bodies of the legislature which needless to say was improper.
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> The *Kingsville* court concluded that the Texas Legislature failed to provide such standards to guide district courts in their discretion. . . . We disagree with the decision in *Kingsville* that § 16 of the Act is unconstitutional. We take issue with the Corpus Christi court's finding that:
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> 'The guideline for directing the District Court's discretion, that compensation and conditions of employment shall be ''substantially the same'' as those that prevail in private sector employment, is too subjective to prevent arbitrary and unequal application of its provisions notwithstanding the enumeration of factors the Legislature prescribed for the courts to consider.'
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> In order for a court to find that a city is in violation of § 4, as is initially required under § 16, probative evidence must be presented by the employees. The employees certainly could not prevail should they fail to do so. The burden of proof is on the employees. If a trial court is satisfied, after considering all of the evidence presented, that a city is in violation of § 4, the Act permits the court to apply whatever facts and figures were supplied by the evidence in satisfaction of the Act's requirement under § 16. This is unquestionably a judicial function. Simply put, § 4 sets out a city's

The City relies heavily on *Kingsville* to support its contention that the standards set forth in section 174.021 are so broad, generic, and amorphous that "[e]very judge and every juror would have a differing view of what was the 'same or similar,' and what 'employment' was comparable." The City contends the statutory language contains no meaningful standards, criteria, or limits to "determine which private sector comparators should apply on how they should change existing HFD pay." The City complains the "statute essentially leaves the parties and the courts to guess at the methods for any comparisons and places no limits on the outcomes" because there are "no limits, either annually or formulaically", "no specified professional disciplines with recognized standards or certifications as to competence and reliability", and "no listed labor or wage rate comparisons from government or industry to be used as a reference or guide." The City insists that "[w]ith no more than the generalized comparison words in § 174.021, any expert will be making it up as they go forward, not following established law or professional discipline, as required under Rule 702 and Texas case law."

For a constitutionally acceptable standard, the City points to the statute establishing the pension system for the City's fire fighters this court analyzed in *City of Houston v. Houston Firefighters' Relief & Retirement Fund*, and maintains that the statute before us requires similar parameters to be a constitutional delegation of legislative authority. 502 S.W.3d at 471, 477-80. In the pension fund case, the City sought a declaration that the statute violates the constitution's separation of powers provision because it is an improper delegation to a non-legislative entity. *Id.* at 473. This court held that the statute was constitutional because the Legislature established reasonable standards to guide the board of trustees in exercising the powers bestowed under the statute to, among other things, receive, manage, and disburse retirement funds. *Id.* at 477-79. The statute (1) set the City's contributions based on member salaries and contributions and not based on an arbitrary deci-

> obligation to provide compensation for firefighters and/or policemen that is ''substantially the same'' as that in the private sector. Section 4 is a State policy mandate . . . to make compensation and conditions of employment for firefighters and/or policemen substantially the same as the private sector. Section 16 is the judicial enforcement provision of that duty. A district court reviews the evidence and makes a determination as to whether § 4 has been complied with. This is a legislative creation of a cause of action against employers whose offers violate § 4. Courts are not subordinate legislative bodies and the *Kingsville* court was in error in so stating.
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> The *Kingsville* court recognized that the language of § 16 was intrinsically intertwined with the language of § 4. Indeed, it was actually the language of § 4 that gave the *Kingsville* court the most concern; ultimately finding that the language of § 4 provided insufficient guidance for district courts. For this reason, the *Kingsville* court found that the stated exception to the general rule prohibiting the legislature from imposing a legislative function on the judiciary did not apply. Recall that the exception is that so long as the legislature provides sufficient guidelines to the subordinate body (district court), then the legislature may delegate to this subordinate body the duty to administer and enforce its legislation. Carrying the *Kingsville* rationale to its logical conclusion, any section in the Act that provides for administration and/or enforcement of § 4 by a ''subordinate body'' would also be unconstitutional. . . . To our Pandora's Box we are unwilling to apply the *Kingsville* key.

See Port Arthur, 807 S.W.2d at 898-99. We note that former article 5154c-1, section 4 (discussed in *Port Arthur*) is now codified in Texas Local Government Code section 174.021. The wording of former art. 5154c-1, section 4 did not materially change in the codification.

sion by the board; (2) set the member contributions as a percentage of their salary; (3) made the City's contribution rate also dependent on the results of an actuarial valuation according to certain criteria; (4) allowed the board to select the actuary but required the actuary to possess certain qualifications; and (5) allowed the board to adopt binding rules, policies, and procedures so long as they are consistent with the statute. *Id.* at 478-79.

The City claims that, just as in the pension fund case, for there to be a proper delegation of legislative authority in this case, the Legislature could have included the following "parameters and safeguards": (1) "set maximum or minimum amounts, or thresholds for annual increases in compensation based on judicial review of private sector pay data from many possible data resources"; (2) "require analysis by experts with certifications or credentials" to "remove the absolutely subjective guesswork that is now required"; and (3) "provide for some correlation to, or factor in consideration of, the prior compliant pay and benefits."

[30] For several reasons, we cannot agree with the City's contention that section 174.252 is an unconstitutional delegation of legislative authority to the judiciary because the Legislature provided inadequate guidelines in section 174.021 for courts to enforce that section's requirements.

To begin with, we take issue with the *Kingsville* court's pronouncements that "a delegation of a legislative power is valid if it is so complete in all its terms and provisions when it leaves the legislative branch that nothing is left to the judgment of the recipient of a delegated power." *Kingsville*, 568 S.W.2d at 395. This pronouncement runs afoul of binding precedent because the supreme court has stated that delegated power must almost always be exercised with a certain amount of discretion and that the Legislature need not include every detail or anticipate every circumstance when permissibly delegating power. *See Boll Weevil*, 952 S.W.2d at 466; *Meno*, 917 S.W.2d at 740; *Lone Star Gas Co.*, 844 S.W.2d at 689.

We also reject the contention that the standards outlined in section 174.021 are too subjective and discretionary with no meaningful criteria so that different courts "would have a different view of what was the 'same or similar,' and what 'employment' was comparable", and would have to make "the problematic choice of a labor market for comparison." The terms used in the Act to provide the standards to guide courts in determining if there was a violation of section 174.021 and declaring compensation and work conditions required by section 174.021 are not too subjective and amorphous and already have been applied routinely by courts without difficulty in different areas of the law. *See Hertz Equip. Rental Corp. v. Barousse*, 365 S.W.3d 46, 59 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (applying standard of "comparable" employment in retaliatory discharge case); *Basic Capital Mgmt., Inc. v. Phan*, No. 05-00-00147-CV, 2001 WL 893986, at *7 (Tex. App.—Dallas Aug. 9, 2001, pet. denied) (applying standards of "comparable" employment and "substantially equivalent" employment in employment discrimination and retaliation case).[12]

12. *See also Ford Motor Co. v. E. E. O. C.*, 458 U.S. 219, 231-32, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982) (applying standard of "substantially equivalent" employment in the context of mitigation damages in Title VII case); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308-13, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977) (discussing "relevant labor market area" considerations for an ultimate determination whether employer engaged in discrimination

Moreover, at least one Texas court has applied the Act's judicial enforcement provision in section 174.252 and the required standards set out in section 174.021. *See City of San Antonio v. Int'l Ass'n of Fire Fighters, Local 624, San Antonio*, 539 S.W.2d 931, 933-35 (Tex. Civ. App.—El Paso 1976, no writ). There, the fire fighters brought suit under the Act's judicial enforcement provision in section 174.252 because the City of San Antonio rejected arbitration after failing to agree to a requested pay increase. *Id.* at 933. The fire fighters presented evidence from one expert who determined the fire fighters' wages should be increased by 53% to satisfy section 174.021 requirements. *Id.* The trial court concluded the presented evidence was insufficient to establish that the city violated the requirements of section 174.021, and the court of appeals did not disturb the trial court's finding on appeal. *Id.* at 933-34.

We also reject the City's contention that the Legislature gave "virtually no parameters" and failed to "set true standards or criteria" to guide the courts. As we have quoted above, the Legislature in section 174.021 provided descriptive, easily understandable language and commonly used and routinely applied terms in employment law and other areas of the law as well as several factors as guiding posts for courts to determine fire fighters' compensation and work conditions that are *substantially equal* to compensation and other work conditions in *comparable employment* in the private sector based on prevailing private sector compensation and work conditions in the *labor market area* in other jobs that require the *same or similar skills, ability*, and *training* and may be *performed* under the *same or similar conditions*. The Legislature chose sufficiently detailed but not too confining language to account for the many different circumstances affecting compensation and other conditions of employment.

In that regard, we disagree with the City that the Act does not provide reasonable standards because it fails to "set maximum or minimum amounts, or thresholds for annual increases in compensation based on judicial review of private sector pay data from many possible data resources." Setting minimum, maximum, or threshold amounts for annual compensation increases could be unworkable and problematic. For one, a minimum or maximum amount would address employees' compensation only; it would not address substantially equal conditions of employment. Depending on the labor market area and other employment conditions, a maximum or minimum compensation amount that is substantially equal based on prevailing private sector compensation in one geographic area can be substantially different from another geographic area. Also, setting minimum and maximum amounts might be detrimental to employers or employees depending on whether the private sector employees' compensation remains stagnant or drastically increases or decreases. For example, setting thresholds for annual increases in compensation might not account for an unexpectedly higher increase in pre-

in a Title VII case); *Palasota v. Haggar Clothing Co.*, 499 F.3d 474, 486 (5th Cir. 2007) (applying standards of "comparable" employment and "substantially equivalent" employment in the context of mitigation damages in Title VII case); *Newark Branch, N.A.A.C.P. v. Town of Harrison*, 940 F.2d 792, 800-01 (3d Cir. 1991) (determining relevant "labor market" in Title VII case); *Sellers v. Delgado Coll.*, 902 F.2d 1189, 1193 (5th Cir. 1990) (applying standard of "substantially equivalent" employment in the context of mitigation damages in Title VII case); *Sellers v. Delgado Cmty. Coll.*, 839 F.2d 1132, 1138 (5th Cir. 1988) (applying standards of "comparable" employment and "substantially equivalent" employment in the context of mitigation damages in Title VII case).

vailing private sector compensation and thus not satisfy the Legislature's policy to provide fire fighters with substantially equal compensation. *See* Tex. Loc. Gov't Code Ann. §§ 174.002, 174.021. Therefore, the Legislature's standards in section 174.021 give sufficient guidance and parameters while being fluid enough for courts to consider various different circumstances that make not only pay but also other work conditions substantially equal to the private sector.

Additionally, we disagree with the City's contention that using "prior compliant pay and benefits" as a threshold or as a factor would provide more guidance and precise standards in determining substantially equal compensation and employment conditions. A previously "compliant" collective bargaining agreement may only have been compliant because the parties agreed to it and not because it actually complied with the requirements of section 174.021. *See id.* § 174.022. A previous agreement also may be many years old and, even if compliant at the time it was signed, may be significantly out of step with prevailing private sector compensation and other work conditions so as to provide not much guidance.

[31, 32] Further, we reject the City's assertion that reasonable standards to guide courts' discretion required the Legislature to proscribe "analysis by experts with certifications or credentials" so that experts "will [not] be making it up as they go forward, not following established law or professional discipline, as required under Rule 702 and Texas case law." It is not essential to specifically mandate analysis by experts with particular qualifications because courts only can consider expert testimony that complies with Texas Rule of Evidence 702, namely " '[a]n expert witness may testify regarding 'scientific, technical, or other specialized' matters if the expert is *qualified* and if the expert's opinion is *relevant* and *based on a reliable foundation.*' " *See Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 215 (Tex. 2010) (emphasis added) (quoting *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006)); Tex. R. Evid. 702 ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."). In determining whether expert testimony is reliable, courts must consider non-exclusive factors [13] first set out in *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995), as well as the expert's experience, knowledge, and training. *Crump*, 330 S.W.3d at 215-16.

[33, 34] The lack of a mandate that only experts with specific "certifications or credentials" can testify presented no obstacle for the San Antonio trial court to apply the Act's judicial enforcement provision in section 174.252 and the required standards set out in section 174.021. *See Int'l Ass'n of Fire Fighters, Local 624*, 539 S.W.2d at 933-34 (refusing to reverse the trial court's finding that the fire fighters' expert evidence was insufficient to establish the city violated the requirements of

13. Factors include, but are not limited to: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique. *E.I. du Pont de Nemours & Co., Inc. v. Robinson,* 923 S.W.2d 549, 557 (Tex. 1995).

section 174.021). As the *Port Arthur* court stated in its assessment that section 174.252 is a constitutional delegation of a legislative function to the judiciary to determine whether a public employer violated section 174.021:

> In order for a court to find that a city is in violation of § 4, as is initially required under § 16, probative evidence must be presented by the employees. The employees certainly could not prevail should they fail to do so. The burden of proof is on the employees. If a trial court is satisfied, after considering all of the evidence presented, that a city is in violation of § 4, the Act permits the court to apply whatever facts and figures were supplied by the evidence in satisfaction of the Act's requirement under § 16. This is unquestionably a judicial function. Simply put, § 4 sets out a city's obligation to provide compensation for firefighters and/or policemen that is "substantially the same" as that in the private sector. Section 4 is a State policy mandate . . . to make compensation and conditions of employment for firefighters and/or policemen substantially the same as the private sector. Section 16 is the judicial enforcement provision of that duty. A district court reviews the evidence and makes a determination as to whether § 4 has been complied with. This is a legislative creation of a cause of action against employers whose offers violate § 4.

Port Arthur, 807 S.W.2d at 898.

We acknowledge that the statute in the pension fund case [14] provided more detailed standards and guidance than the Act before us, but we disagree with the City that such standards are minimum required standards to pass constitutional scrutiny. The supreme court has made clear that the Legislature is not required to include every detail or anticipate every circumstance when delegating power because such a requirement would defeat the purpose of delegations. *Meno*, 917 S.W.2d at 740; *Lone Star Gas Co.*, 844 S.W.2d at 689. Nor are statutes invalid based on a legislative failure to include specific details. *Lone Star Gas Co.*, 844 S.W.2d at 689. The supreme court explained that delegated power "must almost always be exercised with a certain amount of discretion, and at times the line between making laws and enforcing them may blur." *Boll Weevil*, 952 S.W.2d at 466. The court recognized that because statutes cannot be entirely precise, some judgments (even involving policy considerations) must be left to the judges applying the statutes. *Id.* Thus, broad standards included in legislative delegation may pass constitutional muster, particularly when "conditions must be considered which cannot be conveniently investigated by the legislature." *See Lone Star Gas Co.*, 844 S.W.2d at 689.

[35] Here, the Legislature's passage of section 174.252 provided the judiciary with both the authority and the duty to enforce the Act's policy that public employers provide fire fighters with compensation and other employment conditions that are substantially equal to compensation and employment conditions prevailing in comparable private sector employment. *See* Tex. Loc. Gov't Code Ann. §§ 174.002, 174.021, 174.252. As stated above, the Legislature in section 174.021 used descriptive language, common and routinely applied terms, and multiple factors for courts to consider in exercising the enforcement authority. Although the stated requirements are not the most detailed and precise, a constitutional standard may be broad and encompass a multitude of factors if it is no more extensive than the public interest

14. *See Houston Firefighters' Relief & Retirement Fund,* 502 S.W.3d at 477-80.

demands. *See Jordan v. State Bd. of Ins.*, 160 Tex. 506, 334 S.W.2d 278, 280 (1960); *Tex. Bldg. Owners & Managers Ass'n, Inc. v. Pub. Util. Comm'n of Tex.*, 110 S.W.3d 524, 535 (Tex. App.—Austin 2003, pet. denied). If the idea embodied in a phrase is reasonably clear, and we find that it is, a court should find it to be acceptable as a standard of measurement. *See Jordan*, 334 S.W.2d at 280. Standards far less descriptive and precise (and even amorphous) have been upheld as adequate and reasonable standards to guide entities to which authority was delegated.[15]

Based on the foregoing analysis and authorities, we conclude (1) the City failed to establish that section 174.252 is an unconstitutional delegation of a legislative function to the judiciary in violation of the

15. *See Mid-Am. Indem. Ins. Co. v. King*, 22 S.W.3d 321, 323, 327-28 (Tex. 1995) (concluding Legislature may delegate authority to courts to dispense with the statutory requirement that before filing a pleading in defense of a suit, an unauthorized insurer must deposit funds "in an amount to be determined by the court sufficient to secure the payment of any final judgment that may be rendered", if the court determines the insurer establishes that it maintains funds or securities that are "sufficient and available to satisfy any final judgment" that may be rendered in the suit); *see also Lone Star Gas Co.*, 844 S.W.2d at 689-90 (upholding the "broad standards in the statutes which delegate authority to the Railroad Commission includ[ing] (1) the prevention of discriminatory production and taking of natural gas, (2) the prevention of waste and (3) the promotion of conservation"; "It is utterly impossible for the Legislature to meet the demands of every detail in the enactment of laws relating to the production of oil and gas."); *Key W. Life Ins. Co. v. State Bd. of Ins.*, 163 Tex. 11, 350 S.W.2d 839, 844-45 (1961) (concluding Legislature may delegate authority to the former State Board of Insurance under the statute's "encourages misrepresentation" provision; the "standards the Supreme Court (of the United States) has held adequate include 'just and reasonable,' 'public interest,' 'unreasonable obstruction to navigation,' 'reciprocally unequal and unreasonable,' 'public convenience, interest, or necessity,' 'tea of inferior quality,' 'unfair methods of competition,' 'reasonable variations,' 'unduly or unnecessarily complicate the structure' of a holding company system or 'unfairly or inequitably distribute voting power among security holders' "); *Jordan*, 334 S.W.2d at 280 (approving a statutory grant of power to the Insurance Commissioner to determine if an officer or director of an insurance company is "not worthy of public confidence"; "While the term 'not worthy of the public confidence' is broad and undoubtedly encompasses a multitude of factors, it is no more extensive than the public interest demands. Further the idea embodied within the phrase is reasonably clear and hence acceptable as a standard of measurement."); *Sw. Sav. & Loan Ass'n v. Falkner*, 160 Tex. 417, 331 S.W.2d 917, 920 (1960) (upholding Legislature's delegation of power to the Banking Commissioner to ascertain "whether the public convenience and advantage will be promoted by allowing such proposed building and loan association to be incorporated and engaged in business, and whether the population in the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed building and loan association" before granting a certificate to establish and operate a branch office; "The statutory standards of public convenience and advantage, and adequate population to assure reasonable support, are sufficient statutory basis for the rules and regulations."); *Holloway v. Butler*, 828 S.W.2d 810, 811-13 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (upholding the constitutionality of a statute permitting trial courts to set court reporters' fees; "If an objection is made to the amount of the transcript fee, the judge shall determine a reasonable fee, taking into consideration the difficulty and technicality of the material to be transcribed and any time constraints imposed by the person requesting the transcript."); *Tex. Bldg. Owners & Managers Ass'n, Inc.*, 110 S.W.3d at 535-36 (upholding a statutory delegation of authority to the Public Utility Commission to enforce the right of a property owner to require a utility to pay "reasonable" and "nondiscriminatory" compensation when a utility gains access to the property and rejecting an argument that the statutes do not contain sufficient standards to guide the Commission in making its determination).

separation of powers provision in the Texas Constitution, and (2) the trial court did not err in denying the City's motion for summary judgment. Accordingly, we overrule the City's first issue.

C. Good Faith and Mandatory Subjects

In addition to the controlling questions the trial court identified in its order permitting an interlocutory appeal, the City raises two additional issues which were also raised below. The City argues in its second issue that (1) its motion for summary judgment conclusively proved the Association never negotiated in good faith for compensation or benefits based on prevailing private sector compensation and conditions of employment as required by section 174.021, and (2) "[t]he lack of this essential factual element deprives the court of jurisdiction over this matter." In its third issue, the City contends the trial court erroneously denied its motion for summary judgment because (1) any "statutory right to enforcement" in section 174.252 "is limited to 'mandatory subjects' of bargaining and negotiation", and (2) there is no "evidence that key contract elements pleaded by the Association meet the test under Texas law for 'mandatory subjects.' "

[36–40] These two issues are not within the scope of this permissive interlocutory appeal. We construe section 51.014(d) of the Texas Civil Practice and Remedies Code strictly because it provides for an interlocutory appeal, which is an exception to the general rule that only final judgments are appealable. *Lakes of Rosehill Homeowners Ass'n, Inc. v. Jones*, 552 S.W.3d 414, 418 (Tex. App.—Houston [14th Dist.] 2018, no pet.); *Gulf Coast Asphalt Co. v. Lloyd*, 457 S.W.3d 539, 545 (Tex. App.—Houston [14th Dist.] 2015, no pet.). "Our scope of review in a permissive interlocutory appeal is limited to controlling legal questions on which there are substantial grounds for disagreement and the immediate resolution of which may materially advance the ultimate termination of the litigation." *Jones*, 552 S.W.3d at 418; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d); Tex. R. App. P. 28.3(e); Tex. R. Civ. P. 168. The parties may not add to the trial court's description of the controlling legal question. *Jones*, 552 S.W.3d at 418; *see also Lloyd*, 457 S.W.3d at 544; *White Point Minerals, Inc., v. Swantner*, 464 S.W.3d 884, 890-91 (Tex. App.—Corpus Christi 2015, no pet.).

The trial court permitted the City to file interlocutory appeals to address the controlling questions of law identified by the trial court. We granted the City's petition for permission to appeal to address these controlling questions of law, and we addressed them in our analysis of the City's first issue. We therefore do not address other matters argued in the City's or the Association's briefs. Accordingly, we overrule the City's second [16] and third issues.

Conclusion

We affirm the trial court's order denying the City's plea to the jurisdiction and cross-motion for summary judgment.

16. We note that because the City's second issue in the permissive appeal basically mirrors the second issue it raises in its plea to the jurisdiction appeal, we have already addressed said issue in our plea to the jurisdiction analysis.

APPENDIX 4

May 6, 2021

JUDGMENT

The Fourteenth Court of Appeals

CITY OF HOUSTON, TEXAS, Appellant

NO. 14-18-00976-CV

NO. 14-18-00990-CV V.

HOUSTON PROFESSIONAL FIRE FIGHTERS' ASSOCIATION, LOCAL 341, Appellee

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This cause, an appeal from an order denying the plea to the jurisdiction and the cross-motion for summary judgment of appellant, City of Houston, signed October 22, 2018, was heard on the appellate record. We have inspected the record and find no error in the judgment. We order the judgment of the court below **AFFIRMED**.

We order appellant, City of Houston, to pay all costs incurred in this appeal.

We further order this decision certified below for observance.

Judgment Rendered May 6, 2021.

Panel Consists of Justices Wise, Spain, and Hassan. Opinion delivered by Justice Hassan.

APPENDIX 5

Vernon's Texas Statutes and Codes Annotated
Local Government Code (Refs & Annos)
Title 5. Matters Affecting Public Officers and Employees
Subtitle C. Matters Affecting Public Officers and Employees of More than One Type of Local Government
Chapter 174. Fire and Police Employee Relations (Refs & Annos)
Subchapter A. General Provisions

V.T.C.A., Local Government Code § 174.008

§ 174.008. Waiver of Immunity

Effective: June 15, 2007
Currentness

This chapter is binding and enforceable against the employing public employer, and sovereign or governmental immunity from suit and liability is waived only to the extent necessary to enforce this chapter against that employer.

Credits
Added by Acts 2007, 80th Leg., ch. 1200, § 2, eff. June 15, 2007.

Notes of Decisions (4)

O'CONNOR'S ANNOTATIONS
Jefferson Cty. v. Stines, 523 S.W.3d 691, 712-13 (Tex.App.--Beaumont 2017), *rev'd in part on other grounds*, 550 S.W.3d 178 (Tex.2018). See annotation under Local Government Code §174.251.

V. T. C. A., Local Government Code § 174.008, TX LOCAL GOVT § 174.008
Current through legislation effective June 3, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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APPENDIX 6

Vernon's Texas Statutes and Codes Annotated
Local Government Code (Refs & Annos)
Title 5. Matters Affecting Public Officers and Employees
Subtitle C. Matters Affecting Public Officers and Employees of More than One Type of Local Government
Chapter 174. Fire and Police Employee Relations (Refs & Annos)
Subchapter B. Conditions of Employment and Right to Organize

V.T.C.A., Local Government Code § 174.021

§ 174.021. Prevailing Wage and Working Conditions Required

Currentness

A political subdivision that employs fire fighters, police officers, or both, shall provide those employees with compensation and other conditions of employment that are:

(1) substantially equal to compensation and other conditions of employment that prevail in comparable employment in the private sector; and

(2) based on prevailing private sector compensation and conditions of employment in the labor market area in other jobs that require the same or similar skills, ability, and training and may be performed under the same or similar conditions.

Credits
Added by Acts 1993, 73rd Leg., ch. 269, § 4, eff. Sept. 1, 1993.

Notes of Decisions (4)

V. T. C. A., Local Government Code § 174.021, TX LOCAL GOVT § 174.021
Current through legislation effective June 3, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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APPENDIX 7

Vernon's Texas Statutes and Codes Annotated
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Title 5. Matters Affecting Public Officers and Employees
Subtitle C. Matters Affecting Public Officers and Employees of More than One Type of Local Government
Chapter 174. Fire and Police Employee Relations (Refs & Annos)
Subchapter D. Collective Bargaining

V.T.C.A., Local Government Code § 174.105

§ 174.105. Duty to Bargain Collectively in Good Faith

Currentness

(a) If the fire fighters, police officers, or both of a political subdivision are represented by an association as provided by Sections 174.101-174.104, the public employer and the association shall bargain collectively.

(b) For purposes of this section, the duty to bargain collectively means a public employer and an association shall:

(1) meet at reasonable times;

(2) confer in good faith regarding compensation, hours, and other conditions of employment or the negotiation of an agreement or a question arising under an agreement; and

(3) execute a written contract incorporating any agreement reached, if either party requests a written contract.

(c) This section does not require a public employer or an association to:

(1) agree to a proposal; or

(2) make a concession.

Credits
Added by Acts 1993, 73rd Leg., ch. 269, § 4, eff. Sept. 1, 1993.

Notes of Decisions (5)

O'CONNOR'S ANNOTATIONS
Corpus Christi Fire Fighters Ass'n v. City of Corpus Christi, 10 S.W.3d 723, 727-28 (Tex.App.--Corpus Christi 1999, pet. denied). "No Texas case has discussed the analysis to be used in determining whether a subject must be collectively bargained

when that subject arguably relates to both conditions of employment and the City's right to administer departmental rules and policies. Because 'conditions of employment' is obviously a catchall phrase into which almost any proposal may fall, we hold that a balancing test should be applied and a proposed subject constitutes a condition of employment under the [Fire and Police Employee Relations Act] only if it has a greater effect on working conditions than on management prerogatives."

V. T. C. A., Local Government Code § 174.105, TX LOCAL GOVT § 174.105
Current through legislation effective June 3, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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APPENDIX 8

Vernon's Texas Statutes and Codes Annotated
Local Government Code (Refs & Annos)
Title 5. Matters Affecting Public Officers and Employees
Subtitle C. Matters Affecting Public Officers and Employees of More than One Type of Local Government
Chapter 174. Fire and Police Employee Relations (Refs & Annos)
Subchapter E. Mediation; Arbitration

V.T.C.A., Local Government Code § 174.152

§ 174.152. Impasse

Currentness

(a) For purposes of this subchapter, an impasse in the collective bargaining process is considered to have occurred if the parties do not settle in writing each issue in dispute before the 61st day after the date on which the collective bargaining process begins.

(b) The period specified in Subsection (a) may be extended by written agreement of the parties. An extension must be for a definite period not to exceed 15 days.

Credits
Added by Acts 1993, 73rd Leg., ch. 269, § 4, eff. Sept. 1, 1993.

V. T. C. A., Local Government Code § 174.152, TX LOCAL GOVT § 174.152
Current through legislation effective June 3, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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APPENDIX 9

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Subtitle C. Matters Affecting Public Officers and Employees of More than One Type of Local Government
Chapter 174. Fire and Police Employee Relations (Refs & Annos)
Subchapter E. Mediation; Arbitration

V.T.C.A., Local Government Code § 174.153

§ 174.153. Request for Arbitration; Agreement to Arbitrate

Currentness

(a) A public employer or an association that is a bargaining agent may request the appointment of an arbitration board if:

(1) the parties:

(A) reach an impasse in collective bargaining; or

(B) are unable to settle after the appropriate lawmaking body fails to approve a contract reached through collective bargaining;

(2) the parties made every reasonable effort, including mediation, to settle the dispute through good-faith collective bargaining; and

(3) the public employer or association gives written notice to the other party, specifying the issue in dispute.

(b) A request for arbitration must be made not later than the fifth day after:

(1) the date an impasse was reached under Section 174.152; or

(2) the expiration of an extension period under Section 174.152.

(c) An election by both parties to arbitrate must:

(1) be made not later than the fifth day after the date arbitration is requested; and

(2) be a written agreement to arbitrate.

(d) A party may not request arbitration more than once in a fiscal year.

Credits

Added by Acts 1993, 73rd Leg., ch. 269, § 4, eff. Sept. 1, 1993.

V. T. C. A., Local Government Code § 174.153, TX LOCAL GOVT § 174.153

Current through legislation effective June 3, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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APPENDIX 10

Vernon's Texas Statutes and Codes Annotated
Local Government Code (Refs & Annos)
Title 5. Matters Affecting Public Officers and Employees
Subtitle C. Matters Affecting Public Officers and Employees of More than One Type of Local Government
Chapter 174. Fire and Police Employee Relations (Refs & Annos)
Subchapter G. Judicial Enforcement and Review

V.T.C.A., Local Government Code § 174.252

§ 174.252. Judicial Enforcement When Public Employer Declines Arbitration

Currentness

(a) If an association requests arbitration as provided by Subchapter E [1] and a public employer refuses to engage in arbitration, on the application of the association, a district court for the judicial district in which a majority of affected employees reside may enforce the requirements of Section 174.021 as to any unsettled issue relating to compensation or other conditions of employment of fire fighters, police officers, or both.

(b) If the court finds that the public employer has violated Section 174.021, the court shall:

(1) order the public employer to make the affected employees whole as to the employees' past losses;

(2) declare the compensation or other conditions of employment required by Section 174.021 for the period, not to exceed one year, as to which the parties are bargaining; and

(3) award the association reasonable attorney's fees.

(c) The court costs of an action under this section, including costs for a master if one is appointed, shall be taxed to the public employer.

Credits
Added by Acts 1993, 73rd Leg., ch. 269, § 4, eff. Sept. 1, 1993.

Notes of Decisions (2)

O'CONNOR'S ANNOTATIONS
Jefferson Cty. v. Stines, 523 S.W.3d 691, 720 (Tex.App.--Beaumont 2017), *rev'd in part on other grounds*, 550 S.W.3d 178 (Tex.2018). Local Government Code subch. E's "arbitration provisions apply only to arbitration for collective bargaining impasses; they do not apply to arbitration of disputes pursuant to the contractual terms of a fully-negotiated collective bargaining agreement. [¶] [A] plain reading of [Tex. Loc. Gov't Code] §174.252 unambiguously indicates that it applies only to claims:

(1) brought by an association (2) against a public employer (3) to enforce the requirements of [Tex. Loc. Gov't Code] §174.021 as to any unsettled issue relating to compensation or other conditions of employment of firefighters, police officers, or both."

Footnotes

1 V.T.C.A., Local Government Code § 174.151 et seq.

V. T. C. A., Local Government Code § 174.252, TX LOCAL GOVT § 174.252

Current through legislation effective June 3, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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