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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 21-0518

IN THE SUPREME COURT OF TEXAS

CITY OF HOUSTON, TEXAS

Petitioner,

v.

HOUSTON PROFESSIONAL FIRE FIGHTERS' ASSOCIATION, LOCAL 341

Respondent.

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

HOUSTON PROFESSIONAL FIRE FIGHTERS' RESPONSE BRIEF ON THE MERITS

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Petitioner City of Houston is referred to in the Response Brief on the Merits as the "City of Houston" or the "City."

Respondent Houston Professional Fire Fighters' Association, Local 341 is referred to in the Response Brief on the Merits as the "Fire Fighters" or "Fire Fighters' Union."

There is a two-volume clerk's record. References to the clerk's record in the Response Brief on the Merits are to the volume and page of the particular document. ("__ CR __").

There is a one-volume reporter's record. References to the reporter's record in the Response Brief on the Merits are to the particular page of the record. ("RR __").

STATUTORY REFERENCES

This case involves Chapter 174 of the Texas Local Government Code, "The Fire and Police Employee Relations Act." (FPERA). References in this Response Brief on the Merits to various 174 Sections are to specific Chapter 174 provisions of the FPERA.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondent Houston Professional Fire Fighters' Association, Local 341 (the "Fire Fighters") file this Response Brief on the Merits:

INTRODUCTION AND OVERVIEW

The City of Houston argues the FPERA, Chapter 174 of the Texas Local Government Code, is unconstitutional because it is an impermissible delegation of legislative authority to the district court and that there is no waiver of sovereign immunity for the claims asserted by the Houston Fire Fighters in this case for the City of Houston's violations of the Private Sector Labor Standards prescribed by the FPERA.

The Fire Fighters seek compensation for the period of July 1, 2017, to June 30, 2018, for the City's violations of Private Sector Labor Standards prescribed by the Texas Legislature in Section 174.021 of the FPERA, entitled "Prevailing Wage and Working Conditions Required." The Fire Fighters seek to recover their "past losses" for the now almost four year past period as authorized by the "Judicial Enforcement" provision of the FPERA, Section 174.252(b)(1). See City of Houston Brief on the Merits, p. 15 ("[T]his case, for example, involves the City's 2017 pay and benefits fiscal cycle.")

The district court in this case is not performing a legislative function. It is performing a judicial function or "judicial inquiry" only between Houston Fire Fighters and the City of Houston which "investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist," rather than a legislative function that "looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power." Key Western Life Ins. Co. v. State Bd. of Ins., 350 S.W.2d 839, 847 (Tex. 1961), quoting, Prentis v. Atlantic Coast Line, 29 S. Ct. 67, 69 (1908).

The City of Houston cannot make a legitimate argument of unconstitutional delegation of legislative function where the Fire Fighters seek to recover past losses for the period July 1, 2017, to June 30, 2018, for the City of Houston's violations of statutory Private Sector Labor Standards that have been prescribed by the Legislature. The district court in this case is not making broad, general policy determinations and is not promulgating future rules or public policy. The district court is adjudicating the past relationship and past disputes between the Fire Fighters and City of Houston and is enforcing liabilities under specified statutory standards.

The City urges review by this Court because of the purported "legal cloud" created by the Kingsville and Port Arthur decisions and makes a factually unsupported claim that "this legal cloud has lingered" because the one-year time limit in Section 174.252 removes incentives to appeal, results in settlements and discourages parties from seeking final appellate conclusion. See 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. App. – Beaumont 1991, writ denied).

The Court of Appeals correctly rejected the Kingsville reasoning advocated by the City of Houston because it conflicts with multiple decisions of this Court, the Court of Appeals concluding "that the Legislature need not include every detail or anticipate every circumstance when permissibly delegating power," and because "the terms used in the [FPERA] 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." City of Houston v. Houston Professional Fire Fighters' Association,

Local 341, 626 S.W.3d 1, 18 (Tex. App. – Houston [14th Dist.] 2021, pet. filed.) The City has no legitimate argument that these conclusions are substantively erroneous. The thirty-year old purported unresolved conflict between Kingsville and Port Arthur and unsubstantiated "legal cloud" contention relied on by the City do not justify review.

Section 311.021 of the Code Construction Act, Tex. Gov't Code, provides, among other things, that the FPERA is presumed to be constitutional, a just and reasonable result is intended and a result feasible of execution is intended. Section 311.023 directs this Court to consider the object sought to be attained by the FPERA and the consequences of a particular statutory construction. Section 174.002(a) states that it is the policy of Texas that the City of Houston "shall provide its fire fighters … with compensation and other conditions of employment that are substantially the same as compensation and conditions of employment prevailing in comparable private sector employment." Section 174.002(c) recognizes that fire fighters may not strike. Section 174.002(d) provides alternatives of voluntary arbitration and judicial enforcement of the requirements of the FPERA. Section 174.002(e) expresses the policy that the "alternative procedures must be expeditious, effective, and binding." (emphasis

supplied). This judicial enforcement lawsuit was filed over four and one-half years ago, relates to the one-year period of July 1, 2017, to June 30, 2018, and has plainly failed to achieve the statute's alternative procedures mandate of being "expeditious, effective, and binding." (1 CR 4 – 9).

The Fire Fighters' summary judgment evidence reflects that they are paid fifty percent less than fire fighters employed by comparable, private sector fire departments. (2 CR 379). The Collective Bargaining Agreement between the Fire Fighters and the City of Houston has terminated and is no longer in effect, the City of Houston has refused to arbitrate and the City of Houston says the FPERA judicial enforcement provision is unconstitutional and unenforceable, leaving the Fire Fighters with no remedy for this gross underpayment by the City of Houston since the Fire Fighters cannot strike, they cannot arbitrate and cannot obtain relief from the Courts. Undisputedly, this factual scenario and statutory construction advocated by the City of Houston renders the FPERA ineffective, is an unjust and unreasonable result, violates the object sought to be attained by the FPERA and denies the Fire Fighters the precise relief that the FPERA was intended to provide to them.

The City of Houston criticizes the Court of Appeals' decision finding the FPERA constitutional because "it has done so against a backdrop of significant, prolonged, contentious, and ongoing disagreement between the City and the [Fire Fighters] with respect to compensation and other employment conditions". See City of Houston Brief on the Merits, pp. 15 – 16. The City of Houston's arguments urging this Court's review underscore the City's strategy to leave the Fire Fighters remediless for the violations of the Private Sector Labor Standards in the FPERA. According to the City of Houston, the Fire Fighters have no judicial remedy, they cannot compel arbitration with the City and there is no realistic or reasonable expectation of a negotiated collective bargaining resolution in light of the "significant, prolonged, contentious, and ongoing disagreement." That leaves the Fire Fighters seeking to petition the Legislature for any recourse for the City's underpayment, which is clearly not the result the Legislature sought to achieve in passing the FPERA.

The City of Houston's construction and interpretation of the FPERA in this case – that it is invalid, unconstitutional and legally ineffective to afford the Fire Fighters with any remedy – is in stark contrast with the City of Houston's assertion in the November 2018 Proposition B Pay-Parity Charter

Amendment litigation, which is that the FPERA is valid, constitutional and preempts the voter approved pay-parity wage referendum for the Fire Fighters. See No. 21-0755; Houston Police Officers' Union, et al. v. Houston Professional Fire Fighters Association, IAFF, Local 341; In the Supreme Court of Texas; Houston Professional Fire Fighters Association, IAFF, Local 341 v. Houston Police Officers' Union, No. 14-19-00427-CV, __ S.W.3d __, 2021 WL 3206056 (Tex. App. – Houston [14th Dist.] July 29, 2021, pet. filed).

In the Proposition B Pay-Parity Charter Amendment litigation, the City requested and obtained a declaratory judgment that "the pay-parity amendment is preempted by the FPERA." Houston Police Officers' Union, et al., 2021 WL 3206056 at * 2, 3. While that declaratory judgment was subsequently reversed by the Court of Appeals, this Court should not countenance the City of Houston's arguments in this case that the FPERA is unconstitutional in order to defeat relief sought by the Fire Fighters for the period July 1, 2017, to June 30, 2018, and is valid, constitutional and preemptive in the later litigation in order to defeat relief sought by the Fire Fighters based on the November 2018 Proposition B Pay-Parity Charter Amendment.

While the City of Houston claims in this case there has been "significant, prolonged, contentious, and ongoing disagreement … with respect to compensation and other employment conditions," it asserts that good faith collective bargaining based on the Section 174.021 Private Sector Labor Standards is mandatory and a jurisdictional prerequisite to the waiver of immunity expressed in Section 174.008 of the FPERA because it "would ensure the parties address these elements in their negotiations before seeking judicial intervention." City Brief on the Merits, pp. 16, 19. There is no language in the FPERA which conditions the waiver of immunity on good faith collective bargaining or negotiation of the Section 174.021 Private Sector Labor Standards.

The Fire Fighters and the City of Houston were permitted to collectively bargain on compensation and other conditions of employment based on whatever standards they chose, irrespective of whether they were the Section 174.021 Private Sector Labor Standards. Once a CBA was entered between the City of Houston and the Fire Fighters, Section 174.022(a) deems the City to be in compliance with the Private Sector Labor Standards even if any negotiated CBA contains no compensation or working conditions based on such standards. Section 174.022(a) "undermines the City's

argument that the Act imposes a requirement to collectively bargain based on section 174.021 prevailing private sector labor standards." City of Houston, 626 S.W.3d at 13.

Section 174.008 undisputedly waives the City's sovereign immunity for claims asserted by the Fire Fighters under the FPERA. The City of Houston admitted "the Association's pleadings allege prima facie requisites (firefighters and a public employer not reaching agreement on future compensation and benefits) to invoke an immunity waiver, and concomitant Court jurisdiction under Section 174.008 …" (1 CR 67). "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. … 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." City of Houston, 626 S.W.3d at 11 & n. 4.

FACTUAL BACKGROUND

The Fire Fighters and City of Houston were parties to a collective bargaining agreement (CBA). The most recent CBA was signed on June 29, 2011. (2 CR 299 – 301). Article 2, Section 4 of the CBA states:

> This Agreement shall remain in full force and effect until June 30, 2014, and shall continue in effect from year to year until replaced by a successor agreement or until terminated by mutual agreement. In no event shall this Agreement continue in effect after December 11, 2016.

(2 CR 300). On August 24, 2016, the Fire Fighters and the City of Houston amended the term of the CBA to provide that "the Agreement shall continue in effect until June 30, 2017, but in no event shall the Agreement continue in effect after June 30, 2017." (2 CR 302). The CBA has terminated by its own terms – over four and one-half years ago – and is no longer in effect.

Chapter 174 of the Texas Local Government Code is "The Fire and Police Employee Relations Act." (FPERA) See Tex. Loc. Gov't Code § 174.001. Section 174.002 of the FPERA is entitled "Policy". Paragraph (a) of Section 174.002 states that it is the policy of Texas that the City of Houston "shall provide its fire fighters … with compensation and other conditions of employment that are substantially the same as compensation and conditions of employment prevailing in comparable private sector employment."

Paragraph (c) of Section 174.002 recognizes that fire fighters may not strike. Paragraph (d) contains the following provision:

> Because of the essential and emergency nature of the public service performed by fire fighters and police officers, a reasonable alternative to strikes is a system of arbitration conducted under adequate legislative standards. Another reasonable alternative, if the parties fail to agree to arbitrate, is judicial enforcement of the requirements of this chapter regarding compensation and conditions of employment applicable to fire fighters and police officers.

(emphasis supplied). Paragraph (e) of Section 174.002 expresses the policy of Texas that "with the right to strike prohibited, to maintain the high morale of fire fighters … and the efficient operation of the departments in which they serve, alternative procedures must be expeditious, effective, and binding." (emphasis supplied). The CBA terminated and this lawsuit was filed over four and one-half years ago by the Fire Fighters seeking the judicial enforcement the Legislature authorized through the FPERA. (1 CR 4 – 9).

Section 174.021 is entitled "Prevailing Wage and Working Conditions Required". This provision ties Fire Fighter compensation to Private Sector Labor Standards and reads as follows:

> 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.

Section 174.022 states that if a collective bargaining agreement is reached on compensation or other conditions of employment, the municipality is considered to be in compliance with the requirements of Section 174.021. Accordingly, once the Fire Fighters and the City of Houston entered into the CBA in 2011 – even if not based on Section 174.021 Private Sector Labor Standards – the City of Houston was deemed to be in compliance with Section 174.021 as to compensation and the conditions of employment for the duration of the CBA.

On January 3, 2017, counsel for the Fire Fighters served the City of Houston with notice pursuant to Tex. Loc. Gov't Code Section 174.107 requesting collective bargaining on wages, rates of pay, benefits and working conditions. (2 CR 303).

On February 22, 2017, the Fire Fighters and the City of Houston entered into an agreement described as "Ground Rules for Collective

Bargaining Negotiations." (2 CR 304 – 307). The parties agreed to "Good Faith Negotiations" as follows:

> 21. The parties agree to the principle of good faith bargaining and shall each strive to reach a mutual agreement that is consistent with the intent and purpose of Chapter 174 of the Local Government Code, as adopted by the citizens of the City of Houston, Texas.

(2 CR 306). During collective bargaining, the Fire Fighters agreed to many conditions of employment with the City of Houston, but the City of Houston unilaterally terminated the collective bargaining process. (2 CR 311 – 337).

Section 174.152 states that 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. The collective bargaining process began on March 14, 2017, and the 61st day occurred on May 15, 2017, without resolving each issue in dispute. (2 CR 308 – 309). The Fire Fighters and the City of Houston reached "IMPASSE" as that term is described in Section 174.152 with respect to the following issues:

- Compensation;
- Hours of work;
- Overtime;
- Paid leaves, including sick leave and vacation leave;
- Staffing; and

- Dispute resolution (commonly referred to as the grievance procedure).

Id.

The Fire Fighters requested that the City of Houston agree to arbitration on May 15, 2017, which was within the 5-day window as set out in Section 174.153. The City of Houston declined arbitration. (2 CR 310). Section 174.163 confirms that Chapter 174 does not require compulsory arbitration.

The City of Houston passed laws amending Chapters 14 and 34 of the Code of Ordinances, Houston, Texas, on June 28, 2017, two days before the CBA expired. (1 CR 145 – 186; City of Houston – City Council Meeting Date 06/28/2017 Minutes; LGL Amending Chapters 14 and 34; Agenda Item # 20). These ordinances addressed Houston Fire Fighter compensation and other conditions of employment in the absence of the CBA which terminated. (1 CR 184 – 185). The Fire Fighters assert that these ordinances do not satisfy Chapter 174 and violate the Private Sector Labor Standards. (1 CR 48 – 57). The Fire Fighters are underpaid by fifty percent in comparison to private sector fire departments in violation of Tex. Loc. Gov't Code Section 174.021. (2 CR 379).

Section 174.252 is entitled "Judicial Enforcement When Public Employer Declines Arbitration." Section 174.252 authorizes the district court to enforce the requirements of Section 174.021 for the period not to exceed one year. The one year period involved in this case is July 1, 2017, to June 30, 2018.

The Fire Fighters sued under Section 174.252, (1 CR 48 – 57), which reads as follows:

§ 174.252. Judicial Enforcement When Public Employer Declines Arbitration

(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.

The Fire Fighters' First Amended Petition (1 CR 48 – 57) asserts that the "City of Houston is not in compliance with Section 174.021 and is therefore violating Section 174.021 … Defendant refused to go to arbitration … [T]he Fire Fighters have no choice but to seek judicial enforcement in accordance with Section 174.252." (1 CR 51, 52 – 53).

SUMMARY OF RESPONSIVE ARGUMENTS

The Fire Fighters' labor economics expert testified that the Fire Fighters are grossly underpaid by the City of Houston in violation of the Private Sector Labor Standards in Tex. Loc. Gov't Code Section 174.021. (2 CR 379). ("In my opinion, Houston Firefighters are paid, approximately, fifty percent less than comparable, private sector fire departments.") The City of Houston moved for summary judgment that Tex. Loc. Gov't Code Section 174.021, which establishes the private sector labor standards, and Tex. Loc. Gov't Code Section 174.252, which provides for a judicial remedy for non-compliance, are unconstitutional. (1 CR 66, 76 – 84). The trial court and Court of Appeals correctly rejected this argument. (2 CR 450 – 452).

> When we evaluate the constitutionality of a statute, we start with the presumption that statutes enacted by the Legislature comply with both the United States and Texas Constitutions. See Tex. Gov't Code § 311.021(1); Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 87 (Tex. 2015). In line with this presumption, if a statute is susceptible to two interpretations – one constitutional and the other unconstitutional – then the constitutional interpretation will prevail. See Key W. Life Ins. Co. v. State Bd. of Ins., 163 Tex. 11, 350 S.W.2d 839, 849 (1961) ("[I]t is the duty of the courts to construe a statute in such a way as to avoid repugnancy to the Constitution.") The party asserting that the statute is unconstitutional bears a "high burden to show unconstitutionality." Patel, 469 S.W.3d at 87 (citing Trapp v. Shell Oil Co., 145 Tex. 323, 198 S.W.2d 424, 428 (1946)).

EBS Solutions, Inc. v. Hegar, 601 S.W.3d 744, 754 (Tex. 2020).

Chapter 174 is presumed to be constitutional. The Private Sector Labor Standards in Section 174.021 are not unconstitutionally vague. Sections 174.021 and 174.252 are not an unconstitutional delegation of legislative authority to the trial court. Section 174.252 provides for "Judicial Enforcement" of Chapter 174. The Legislature has prescribed the standards of compensation and conditions of employment that the Fire Fighters are entitled to receive from the City of Houston in Section 174.021. The trial court's judicial enforcement under Section 174.252 must be in accordance with and circumscribed by the standards expressed in Section 174.021.

The Fire Fighters collectively bargained in good faith. The statutory waiver of sovereign immunity in Section 174.008 does not require as a condition precedent good faith collective bargaining based on the Section 174.021 Private Sector Labor Standards.

RESPONSIVE ARGUMENTS

A. Section 174.021 Is Not Unconstitutional

Section 174.021 Is entitled "Prevailing Wage and Working Conditions Required" and provides for Private Sector Labor Standards.

> 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.

The City of Houston claims in footnote 1 on page 24 of its Brief on the Merits that "the City does not assert (and indeed lacks standing to assert) a due process challenge contending that the statute is void for vagueness."

But, this is precisely the argument made by the City of Houston in the trial court in its:

> 1. Special Exceptions (1 CR 14) – "Given that at least one court has held that § 174.021, TLGC standards to be unconstitutionally vague …";
>
> 2. Amended Special Exceptions (1 CR 19) – "Given that at least one court has held that § 174.021, TLGC standards to be unconstitutionally vague …"' and
>
> 3. Original Answer to First Amended Petition (1 CR 59) – "Section 174.021 TLGC Unconstitutionally Vague. More, specifically, DEFENDANT COH hereby contends that the statutory provision codified at § 174.021, Texas Local Gov't Code, which purports to establish a minimum standard for compensation and 'other conditions of employment' is unreasonably vague and does not legitimately convey to the parties' objective criteria that is either 1) ascertainable; and 2) rationally related to the fiscal realities of the public sector compensation and benefits for civil service employees in the relevant labor market area." See also 2 CR 222.

The Private Sector Labor Standards described in Section 174.021 are not materially different from the criteria for enforceability of covenants not to compete described in Tex. Bus. & Com. Code Section 15.50(a) – "…to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest

of the promisee." The above-quoted language has never been challenged as unconstitutionally vague.

Key Western Life Ins. Co. v. State Bd. of Ins., 350 S.W.2d 839, 844 – 845 (Tex. 1961), involved a vagueness challenge to Article 3.42 of the Texas Insurance Code that allows the Commissioner of Insurance to withdraw approval of insurance policy forms because they contain provisions which "encourage misrepresentation." In rejecting the vagueness challenge, this Court applied a standard requiring that the statutory language be reasonably clear, noting that in Jordan v. State Board of Insurance, 334 S.W.2d 278, 279 (Tex. 1960), this Court found that the standard "not worthy of public confidence" was not unconstitutionally vague. Id. at 845.

Statutory language need only provide a reasonable degree of certainty as to its application to provide fair notice. A statute is not rendered unconstitutionally vague merely because the words or terms are not specifically defined. Words defined in dictionaries and with meanings so well-known as to be understood by a person of ordinary intelligence are not vague and indefinite. See Canales v. Paxton, No. 03-19-00259-CV, 2020 WL 5884123 at * 4 (Tex. App. – Austin Sep. 30, 2020, pet. denied) (mem. op.),

(rejecting a vagueness challenge to Section 154.302 of the Texas Family Code.)

Adame v. 3M Company, 585 S.W.3d 127, 139 (Tex. App. – Houston [1st Dist.] 2019, no pet.), stated that civil statutes are "subject to a less strict vagueness test" and that "a civil statute violates due process only if it requires compliance in terms so vague and indefinite as really to be no rule or standard at all." See also Howeth Investments, Inc. v. City of Houston, 259 S.W.3d 877, 904 (Tex. App. – Houston [1st Dist.] 2008, pet denied.); Bailey v. Dallas County, No. 05-16-00789-CV, 2017 WL 6523392 at * 5 (Tex. App. – Dallas Dec. 21, 2017, pet. denied) (mem. op.).

The Private Sector Labor Standards expressed in Section 174.021 are reasonably clear, provide fair notice, are civil remedies, not criminal penalties, and cannot be reasonably or legitimately construed to be "no rule or standard at all." "[T]he 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." City of Houston, 626 S.W.3d at 20.

B. Section 174.021 and Section 174.252 Are Not An Unconstitutional Delegation of Legislative Authority (Responsive to City of Houston Brief on the Merits, pp. 20 – 38)

Section 174.021, the Private Sector Labor Standards, was quoted on page 29 of this Response. Section 174.252 provides for "Judicial Enforcement" of Section 174.021.

§ 174.252. Judicial Enforcement When Public Employer Declines Arbitration

(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.

This Court presumes that Sections 174.021 and 174.252 are constitutional. See Tex. Gov't Code § 311.021(1); EBS Solutions, Inc. v. Hegar, 601 S.W.3d at 754. The City "bears a 'high burden to show unconstitutionality'." Id.

The City relied upon testimony of the Fire Chief, Samuel Pena, in arguing that Sections 174.021 and 174.252 provide the district court with unconstitutional unbridled discretion: "Chief Pena clearly states that he doesn't know what a private sector comparable would be … Chief Pena further states that with the many components of the Houston Fire Department he cannot think of a private sector comparable." (1 CR 83). See also City Brief on the Merits, pp. 27 – 28.

Chief Pena claimed there is no private sector agency that "collectively" does what the Fire Department does and "in the same fashion." (1 CR 199 – 201; 1 CR 84). Chief Pena admitted that "you can compare the different functions that the Houston Fire Department does, and there are private industries that provide those particular functions … You can find a comparable industry – private sector industry that would do those different components." See (1 CR 199 – 201; 1 CR 84).

Chief Pena is not an expert witness. He is a lay witness. His purported inability to make "collective" private sector comparisons is not probative on the constitutional challenge to Section 174.021 and Section 174.252. The Fire Fighters retained Dr. Elizabeth A. Paulin, a tenured labor economics professor. (2 CR 347). Dr. Paulin testified in detail on her ability to make the required comparisons to the Private Sector Labor Standards described in Section 174.021 and the City of Houston's violations of same which authorize the judicial enforcement under Section 174.252. (2 CR 346 – 401).

Dr. Paulin is familiar with fire departments and fire department operations. (2 CR 352). She identified fifteen "career" private sector fire departments similar to the City of Houston Fire Department, including private fire departments in Amarillo, Fort Worth and Magnolia. (2 CR 353, 358, 359). Dr. Pauline concluded that "Houston Firefighters are paid, approximately, fifty percent less than comparable, private sector fire departments." (2 CR 379).

The arguments based on Chief Pena's beliefs about the private sector and comparison to municipal fire fighters are evidentiary issues, not a basis for declaring the FPERA unconstitutional. See City of Houston, 626 S.W.3d at 19, citing to City of San Antonio v. Int'l Ass'n of Fire Fighters, Local 624,

San Antonio, 539 S.W.2d 931, 933 – 935 (Tex. Civ. App. – El Paso 1976, no writ). The City of San Antonio decision aptly demonstrates that the trial court's enforcement powers under Section 174.252 represent typical constitutional judicial enforcement or judicial inquiry exercised by Texas district courts, not legislative functioning.

> Only one witness, George A. Benz, Associate Professor of Economics at Saint Mary's University, testified as to prevailing private sector wages and working conditions in the labor market area in other jobs, or portions of other jobs, which require the same or similar skills, ability and training, and which may be performed under the same or similar conditions. He reviewed at length the task of other employees which he said are similar to a firefighter; he compared physical and mental requirements of firemen and other employees, and concluded that firefighters should be making $6.00 per hour, or $1,450.00 per month to be comparable to private sector employment. This would mean a fifty-three percent increase in current wages.
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> The trial Court found:
>
> '5. The evidence, considered independently of the Ordinance (referred to in Finding of Fact No. 6), is insufficient to establish that City of San Antonio is in violation of the requirements of Section 4 of Article 5154c – 1.
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> As previously noted, the trial Court found that the evidence, independent of the ordinance, was insufficient to establish a violation of Section 4 of the Act. Thus, the trial Court determined

> that the evidence from the expert witness did not make out a prima facie case.
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> The opinion evidence of the Economics Professor was only evidentiary and was not binding upon the trier of facts.
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> His opinion testimony does not establish facts as a matter of law.
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> The trial Court having concluded that his testimony did not establish a violation of Section 4 of the Act, we cannot hold to the contrary, and certainly we cannot conclude that it was established as a matter of law.

Id. at 933 – 935.

Kingsville held that Section 174.252 was "an unconstitutional delegation of a legislative function to the judiciary". 568 S.W.2d at 392. Kingsville defined the issue as "whether or not the Legislature prescribed sufficient guidelines to guide the District Court's discretion," and concluded the Legislature prescribed insufficient guidelines because the Private Sector Labor Standards in Section 174.021 were "too subjective to prevent arbitrary and unequal application of its provisions notwithstanding the enumeration of

factors the Legislature prescribed for the courts to consider." 568 S.W.2d at 395.

Port Arthur, 807 S.W.2d at 897 – 900, concluded that Sections 174.021 and 174.252 were constitutional, rejecting all aspects of the reasoning in Kingsville. The Ninth Court of Appeals stated: "[The district court's enforcement action under Section 174.252] is unquestionably a judicial function. Simply put, § [174.021] 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 [174.252] is the judicial enforcement provision of that duty. … This is a legislative creation of a cause of action against employers whose offers violate § [174.021]." 807 S.W.2d at 898.

Port Arthur is the better reasoned analysis and correctly recognizes that Section 174.252 does not constitute a delegation of legislative authority, but instead is a judicial enforcement provision, which provides sufficient and adequate standards for determining whether the municipality is in statutory compliance with the Private Sector Labor Standards set by the Legislature. See City of Houston, 626 S.W.3d at 15 (describing Section 174.252 as "a judicial enforcement provision"). See also Section 174.002(d) (providing for

"judicial enforcement of the requirements of this chapter regarding compensation and conditions of employment applicable to fire fighters …"). (emphasis supplied).

Section 174.252 is constitutional. It does not delegate legislative authority. Rather, it creates a cause of action or remedy – "Judicial Enforcement" – for the City's violation of a prescribed statutory standard. The Legislature has set the standard for fire fighter compensation and conditions of employment in Section 174.021. The Legislature created a cause of action for violation of those standards in Section 174.252. Section 174.252 does not grant policymaking authority or unfettered discretion to trial courts. Section 174.252 calls for the performance of a traditional judicial function. The trial court can award damages for "past losses," attorneys' fees and prospective declaratory and injunctive relief for a one-year period. This kind of relief is a run-of-the-mill judicial function. See, e.g., City of El Paso v. Heinrich, 284 S.W.3d 366, 369 (Tex. 2009). The one-year period in this case is July 1, 2017, to June 30, 2018. The only relief the trial court can provide specific to this case is to compensate the Fire Fighters for past losses for this period since it is now almost four years past the end of the statutory period stated in Section 174.252.

The analysis in Port Arthur, quoted previously, is consistent with this Court's pronouncements on the differences between legislative and judicial functions. A delegation of legislative authority "occurs only when an entity is given a public duty and the discretion to set public policy, promulgate rules to achieve that policy, or ascertain conditions upon which existing laws will apply." FM Properties Operating Co. v. City of Austin, 22 S.W.3d 868, 880 (Tex. 2000) (citing Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen, 952 S.W.2d 454, 466 – 67 (Tex. 1997)). See Sansom v. Texas Railroad Commission, No. 03-19-00469-CV, 2021 WL 2006312 at * 6 (Tex. App. – Austin May 20, 2021, no pet.) (mem. op.) (stating that the predicate inquiry in an unconstitutional delegation challenge is whether the function in question is legislative in the first place and concluding plaintiffs asserting the unconstitutional delegation argument in that case presented no support for the argument.) Sections 174.021 and 174.252 do not give the district court the power to provide the details of the law, to promulgate rules and regulations to apply the law, or to ascertain conditions upon which existing laws may operate.

The City of Houston falsely argues that Sections 174.021 and 174.252 are an unconstitutional delegation of legislative authority to the district court

because they purportedly delegate to the district court the legislative power and authority to set salaries and wages for Houston Fire Fighters. The Houston Fire Fighters in this case seek to enforce their right to statutory compensation – past losses – from the City of Houston for the City's violations of Chapter 174 for the period of July 1, 2017, to June 30, 2018. This is a damage remedy afforded the Fire Fighters through Section 174.252 – a judicial enforcement provision – for violation of Section 174.021 of the statute, "Prevailing Wage and Working Conditions Required," the "Private Sector Labor Standards." This is not legislative setting of salaries and wages.

On page 22 of the City of Houston' Brief on the Merits, it claims "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.'" The district court in this case is not making new rules and its action can only apply to the City of Houston Fire Fighters who have sued in this case, not to any other municipality's fire fighters. And, clearly, as this case involves the period July 1, 2017, to June 30, 2018, the district court is not "looking to the future" or changing existing conditions.

On page 22 of the City of Houston's Brief on the Merits, the City claims that "Subsection (a) [of Section 174.252] does not require a finding that the City violated Section 174.021." Section 174.021 is a mandatory directive that the City of Houston "shall provide" the Fire Fighters with compensation and conditions of employment that satisfy the Private Sector Labor Standards. The City of Houston and the Fire Fighters either have an existing collective bargaining agreement which under Section 174.022 means the City of Houston is not in violation of Section 174.021, or alternatively, there is no collective bargaining agreement and the City of Houston is either complying with or is violating Section 174.021. If the City of Houston violates Section 174.021, which the Fire Fighters assert, the Fire Fighters can seek remedies under Section 174.252. Section 174.252(a) refers to "enforcement" of the "requirements" of Section 174.021. There is nothing for the district court to enforce under Section 174.252(a) unless there is a violation of Section 174.021 by the City of Houston.

If the trial court determines that the City has violated Section 174.021 – the Private Sector Labor Standards prescribed by the Legislature – it shall order the City to compensate the Fire Fighters for their "past losses" and shall declare the compensation or other conditions of employment required

by Section 174.021 (the Legislature's prescribed Private Sector Labor Standards) for the period, not to exceed one year, as to which the parties are bargaining. The one year period in this case, July 1, 2017, to June 30, 2018, ended almost four years ago. The only remedy the trial court can now order in this case based on this passage of time is damages for past losses of the Fire Fighters for the one year period.

To the extent that a trial court reached the merits of remedying violations of the Private Sector Labor Standards during a one year period, it can award past losses and declare the Section 174.021 compensation and other conditions of employment for the remainder of the year period. But, in this case, the one year period long ago concluded.

The City of Houston focuses acutely on Section 174.252(b)(2) and the district court's power 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" in making the unconstitutional delegation argument. See Brief on the Merits, pp. 22 – 23. But, as this Court stated in Key Western, there is not a delegation of legislative authority when the court "investigates, declares and enforces liabilities as they stand on

present or past facts and under laws supposed already to exist." 350 S.W.2d at 847 (emphasis supplied).

The judicial enforcement remedies available to the Fire Fighters in Section 174.252 for violations of Section 174.021 are not a legislative delegation to the trial court and therefore not an unconstitutional delegation of legislative authority.

In Key Western Life Insurance Co. v. State Bd. of Insurance, 350 S.W.2d 839 (Tex. 1961), this Court analyzed a statute which authorized review by trial de novo based on preponderance of the evidence by a district court of decisions by the Commissioner of Insurance and State Board of Insurance that insurance policy forms encouraged misrepresentation, were unjust, unfair, inequitable, misleading, deceptive and contrary to public policy of the State. Id. at 841 – 842. The district court invalidated the statute concluding that allowing district court de novo preponderance of the evidence review was an unconstitutional delegation of legislative authority. This Court, on direct appeal, reversed. Id.

This Court analyzed whether the administrative decisions of the Commissioner of Insurance and the Board of Insurance with respect to Key

Western's policies were legislative in nature or judicial in nature, first noting as follows:

> Under this Section of Article 2 (or similar provisions contained in the constitutions of other states) provisions in Acts of legislatures calling for the review of legislative determinations or executive rulings by a trial de novo in a judicial tribunal have been declared invalid as violative of the constitutional doctrine of separation of powers. A power or authority which cannot be lawfully delegated directly to the judiciary by the Legislature because of the constitutional provision cannot be conferred upon the courts by means of a de novo trial after an administrative hearing.

Id. at 847.

This Court then quoted from two authorities which it states were of aid in determining whether the Commissioner and Board determinations were a judicial function or a legislative function.

> Many definitions of legislative functions and judicial functions have been set forth by various courts. The Supreme Court of the United States stated:
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> > 'A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.' Prentis v. Atlantic Coast Line, 211 U.S. 210, 29 S.Ct. 67, 69, 53 L.Ed. 150.

> In 73 C.J.S. Public Administrative Bodies and Procedure s 8, p. 306, it is said:
>
> > 'It has been stated that the nature of the final act and the character of the process and operation, rather than the general character of the authority exercised, is determinative. The action of an administrative body or officer is adjudicatory in character if it is particular and immediate, rather than, as in the case of legislative or rulemaking action, general and future in effect.'

Id. at 847.

This Court, applying these authorities, concluded the determinations of the Commission and Board under the statute were clearly a quasi-judicial function, not a legislative function.

> Appellee urges that the determination made by the Board in the instant case is a legislative function in which the Board utilizes 'legislative discretion'. With this contention we do not agree.
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> Appellee fails to appreciate that there is a distinction between the types of decisions rendered by different administrative agencies. Some agencies perform judicial or quasi-judicial functions; others exercise powers which are essentially legislative.
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> Under Article 3.42(f) of the Insurance Code the Board of Insurance Commissioners may disapprove or withdraw previous approval of the policy form:

> '* * * if, and only if,
>
> > '(1) it is in any respect in violation of or does not comply with this code.
> >
> > '(2) It contains provisions which encourage misrepresentation or are unjust, unfair, inequitable, misleading, deceptive or contrary to law or to the public policy of this state.
> >
> > '(3) It has any title, heading, or other indication of its provisions which is misleading.' (Emphasis added.)
>
> 'The board can exercise only such authority as is conferred upon it by law in clear and unmistakable terms and the same will not be construed as being conferred by implication.' … Therefore, the Board in the instant case could exercise no more discretion than the terms of the statute clearly provide, and it appears from a literal reading of the statute that the Board was not to have broad legislative discretion. The Board of Insurance Commissioners is empowered to disapprove a form for certain specific reasons only and may not dictate to the insurance companies the particular form to be used. Its only duty is to determine whether the form of the policy submitted for its approval meets the standards prescribed by the statute. The action of the Board of Insurance Commissioners 'is particular and immediate, rather than, as in the case of legislative or rulemaking action, general and future in effect.'

Id. at 847 – 848.

This Court further emphasized that the Board was not empowered to make legislative "pure public policy" determinations.

> The Board of Insurance Commissioners under Article 3.42(f) does not make a determination 'of a question of pure public

> policy,' as in the Davis case, supra (326 S.W.2d 714). The Board may disapprove a form 'if, and only if' it violates the provisions of the statute. Under the provisions of the statute, the State Board of Insurance is also empowered to disapprove or withdraw approval of a policy form if the form is contrary to the public policy of the state….[T]he 'public policy' of which the statute speaks is defined in the statute itself. It is the right of the public to be free of insurance contracts which contain 'provisions which encourage misrepresentation or are unjust, unfair, inequitable, misleading, deceptive * * *'. Thus, the determination made by the Board of Insurance Commissioners under Article 3.42(f) is clearly a quasi-judicial function.

Id. at 848 – 849.

Finally, this Court emphasized a statutory construction principle it continues to apply – "[O]ur standard for construing statutes is not to measure them for logic." City of Rockwall v. Hughes, 248 S.W.3d 621, 629 (Tex. 2008), citing, Lee v. City of Houston, 807 S.W.2d 290, 293 (Tex. 1991).

> However, the fact that a statute may have mischievous or even disastrous results is no basis for declaring the same to be unconstitutional. 'It should perhaps be reiterated that Courts have no concern with the wisdom of legislative acts, but it is our plain duty to give effect to the stated purpose or plan of the Legislature, although to us it may seem ill advised or impracticable.'
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> We therefore hold that in so far as the trial court held the judicial review statutes unconstitutional as applied to the instant case, it was in error. The function of the Board of Insurance Commissioners under Article 3.42(f) is quasi-judicial, and

> therefore the courts could properly make the same determination on trial de novo.

Key Western, 360 S.W.2d at 850.

In the present case, the district court can only award relief to the Fire Fighters if the City has violated the Private Sector Labor Standards prescribed by the Legislature, which requires that the Fire Fighters carry a traditional evidentiary burden. See City of Houston, 626 S.W.3d at 19; City of San Antonio, 539 S.W.2d at 933 – 935. The district court cannot exercise more discretion than the standards and terms set forth in Sections 174.021 and 174.252. Sections 174.021 and 174.252 do not provide the district court with legislative discretion, much less "broad legislative discretion." The district court's award to the Fire Fighters, if they prove their case, will be particular and immediate based on past losses for the period July 1, 2017, to June 30, 2018, will apply only to Houston Fire Fighters and the City of Houston and will have no general or future effect. The district court in this case will not be making a determination of pure public policy.

The City of Houston's argument on page 31 of its Brief on the Merits that "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 [police officers] as a substitute for arbitration" is demonstrably false. Under Section 174.252, the Fire Fighters must sue for and prove violations of Section 174.021. The district court makes no "independent judicial determination". Rather the trier of fact, the court or jury, decides the issues based on the evidence presented by the parties, like other damage cases.

This Court later explained that the basis of the decision in Key Western, which concluded there was a quasi-judicial function, "was that the statute did not give the Insurance Board legislative discretion in approving insurance policies," a holding fully applicable to this case and the district court's judicial enforcement under Section 174.252 for the violations of standards stated in Section 174.021. See Chemical Bank & Trust Company v. Faulkner, 369 S.W.2d 427, 432 (Tex. 1963).

In Scott v. Texas State Bd. of Medical Examiners, 384 S.W.2d 686, 690 – 691 (Tex. 1964), this Court concluded that the action of the State Medical Board in revoking a physician's license was a judicial function, and not an unconstitutional delegation of legislative authority.

> This points to what should be the controlling criteria of constitutionality. The validity of a full de novo appeal requirement turns on the nature of the act of the administrative agency

> contemplated by the statute to which the appeal requirement refers. An important consideration is whether the administrative action called for by the empowering legislative act involves public policy or is policy-making in effect, or whether the action concerns only the parties who are immediately affected. Here, the question of whether a particular medical practitioner has performed acts and engaged in conduct requiring revocation of his license under the standards prescribed by the Legislature involves the professional activities of only one person. In resolving this matter the Board was not engaged in promulgating rules of general application or in deciding questions of broad public policy. The fact questions inherent in the decision of the Board are typical of those which can on appeal be decided by a judge or a jury on evidence introduced in court.

In the present case, the district court's judicial enforcement of violations of the Private Sector Labor Standards involves only the City of Houston and Houston Fire Fighters, the district court will not engage in promulgating rules of general application or in deciding questions of broad public policy and the factual questions inherent in whether the City of Houston violated the Section 174.021 Private Sector Labor Standards and the past losses owed to the Fire Fighters are typical of the questions that fact finders decide based on the evidence.

The criteria set out in Key Western continues to be applied in deciding issues of legislative versus judicial delegation. Commercial Life Insurance Company v. Texas State Bd. of Ins., 808 S.W.2d 552, 555 – 556 (Tex. App.

– Austin 1991, writ denied), involved a challenge to the Board's denial of a name reservation, which the Court of Appeals held was a judicial function.

> In Key Western, the Board made exactly the same argument that it does in the present case. The Board argued that the determination of whether the policy form contained provisions which violated article 3.42(f) was a legislative function, and thus could only be reviewed on appeal under the substantial evidence rule. The Board argued that a review of its decision by trial de novo would violate the separation of powers clause of the Texas Constitution. The supreme court unequivocally rejected this argument and held that the determination made by the Board was a quasi-judicial function which was reviewable on appeal by a trial de novo under the preponderance of the evidence rule. Id. at 849.
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> The supreme court noted in Key Western that it was obliged, if possible, to construe the de novo review mandate in § 1.04(f) "in such a way as to avoid repugnancy to the Constitution." 350 S.W.2d at 849. In determining the constitutionality of the review statute the courts must consider whether the reviewing court is required to exercise a function that is deemed non-judicial. An inquiry by a court is non-judicial and unconstitutional if it looks to the future and changes existing conditions by making a new rule which is to be applied thereafter. However, a court engages in a judicial inquiry if it investigates, declares and enforces liabilities as they stand on present or past facts and under laws already in existence. Thus, the court's action is adjudicatory in nature if its action is particular and immediate rather than general and future. Id. at 847.
>
> This analysis leads us to conclude that the Board's action in denying Commercial its name reservation was quasi-judicial and not legislative in nature. Just as the only function of the Board in

> Key Western was to determine whether the form of the policy submitted for its approval met the standards prescribed by article 3.42(f), likewise the Board's only function in this case was to determine whether Commercial's name reservation met the standards prescribed by article 3.02, § 1(2) of the Insurance Code.

The Court of Appeals rejected the argument that Key Western was "aberrational."

> Finally, the Board suggests that we should abandon the holding in Key Western as an aberrational precedent which should no longer be followed. It is our opinion that Key Western is sound precedent which continues to be cited and applied not only by this Court but also by the supreme court of this state. We hold, therefore, that article 1.04(f) of the Insurance Code is constitutional as applied in the present case, and that the trial court erred in determining this cause based upon a substantial evidence scope of review, thus denying Commercial a trial de novo.

Id. at 556.

Similar reasoning was applied in Macias v. Rylander, 995 S.W.2d 829, 833 (Tex. App. – Austin 1999, no pet.), in concluding that the Comptroller of Public Accounts was acting in a judicial function in suspending a customs broker license.

> Generally, an administrative agency acts in a legislative capacity when it addresses broad questions of public policy and promulgates rules for future application "to all or some part of those subject to its power." Key W. Life, 350 S.W.2d at 847; see Scott v. Texas State Bd. of Med. Exam'rs, 384 S.W.2d 686, 691

(Tex. 1964); American Diversified, 631 S.W.2d at 809 (trial de novo "not allowed where agency engaged in setting down general rules as part of its quasi-legislative power."). A judicial inquiry, on the other hand, typically involves an investigation of present or past facts and a determination of liability based on laws already in existence. See Key W. Life, 350 S.W.2d at 847; Scott, 384 S.W.2d at 691. In determining whether an administrative agency was acting in a legislative or judicial capacity, we ask whether the administrative action implements broad public policy or concerns only the parties immediately affected. See Scott, 384 S.W.2d at 690 – 91; see also Key W. Life, 350 S.W.2d at 847 (approval of individual insurance policy form by State Board of Insurance is quasi-judicial function, properly subject to trial de novo); Petty, 482 S.W.2d at 952 (Department of Public Safety, in determining whether person suffering from physical handicap was incapacitated from safely operating motor vehicle, was not making general policy affecting all future cases; rather, it was determining fact related to one individual and thus trial de novo was proper).

Here, the Comptroller was clearly acting in a judicial or quasi-judicial capacity when she suspended Macias's license. The Comptroller was not in the process of promulgating rules that would broadly affect customs brokers as a whole. Instead, she engaged in a factual inquiry into the conduct of a particular individual. See Scott, 384 S.W.2d at 691 (fact questions inherent in Board of Medical Examiners' decision to revoke medical license typical of those decided by a judge or jury on evidence introduced in court). Specifically, the Comptroller investigated Macias's activities, applied the existing rules regarding suspension of brokers' licenses, and concluded that Macias's conduct constituted good cause for suspension. We hold that conducting a trial de novo of the Comptroller's charges against Macias would not violate the separation of powers provision of the constitution.

In the present case, the district court will not be promulgating rules that will broadly affect all Texas fire fighters or all Texas municipalities or promulgating general policy affecting all future cases. It will be engaged in the factual inquiry into the specific past conduct of the City of Houston with respect to the Private Sector Labor Standards and the Fire Fighters in this case and these issues are typical of those decided by a jury or court based on the evidence presented.

The City of Houston relies heavily on "ratemaking" cases claiming that ratemaking is a legislative activity and that the trial court in this case will be ratemaking by setting Fire Fighter salaries. See Brief on the Merits, pp. 30 – 32. The damage remedy for past losses available to the Fire Fighters for the period July 1, 2017, to June 30, 2018, is not ratemaking for the identical reasons explained in City of Dallas v. Sabine River Authority, No. 03-15-00371-CV, 2017 WL 2536882 at * 4 – 5 (Tex. App. – Austin June 7, 2017, no pet.) (mem. op.). First, the Court of Appeals discussed the judicial versus legislative distinction, reaffirming the standards discussed by the Fire Fighters above.

> The City does not contend that it challenges a statute or ordinance but argues that the UDJA's limited waiver covers challenges to "a statute, ordinance, or other legislative

pronouncement" and that SRA's action was "ratemaking," which is legislative in nature. (Emphasis added.) We do not find this argument persuasive.

■ ■ ■

Further, even if we were to conclude that the UDJA's waiver of immunity extends to a broader range of challenges to "other legislative pronouncements," SRA's act of setting a new rate was not "ratemaking" or legislative in nature based upon the record before us. "Ratemaking has been likened to a legislative activity, even though it is carried out by an administrative agency." Central Power & Light Co. v. Public Util. Comm'n of Tex., 36 S.W.3d 547, 554 (Tex. App. – Austin 2000, pet. denied); see Railroad Comm'n v. Houston Nat. Gas Corp., 289 S.W.2d 559, 562 (Tex. 1956) (stating that it is fundamental that fixing of utility rates is legislative function of State delegated to subordinate body). However, "[g]enerally, an administrative agency acts in a legislative capacity when it addresses broad questions of public policy and promulgates rules for future application 'to all or some part of those subject to its power.'" Macias v. Rylander, 995 S.W.2d 829, 833 (Tex. App. – Austin 1999, no pet.); accord City of Corinth v. NuRock Dev., Inc., 293 S.W.3d 360, 368 (Tex. App. – Fort Worth 2009, no pet.) (stating that legislation is "designed to address broad questions of public policy and to promulgate laws that those subject to government's power must follow in future conduct"). In contrast, an administrative body acts in a judicial capacity when it determines action "concerns only the parties immediately affected." Macias, 995 S.W.2d at 833. "In determining whether an administrative agency was acting in a legislative or judicial capacity, we ask whether the administrative action implements broad public policy or concerns only the parties immediately affected." Id.; see also Scott v. Texas State Bd. of Med. Exam'rs, 384 S.W.2d 686, 690 – 91 (Tex. 1964) (distinguishing between agency action that "involves public policy or is policy-making in effect" and action that "concerns only the parties who are immediately affected"). An act or instrument

> that "memorializes a specific act to resolve a specific, isolated dispute between specific parties ... establishe[s] no rule or law that all members of the public must adhere to in future conduct." NuRock, 293 S.W.3d at 368 – 69.

Id. at * 4 – 5.

The Court of Appeals then explained that the River Authority's approval of a contractual compensation rate with the City of Dallas was not prohibited legislative activity or ratemaking.

> Here, SRA unilaterally approved a compensation rate in the context of a contract renewal between it and the City, and the rate affected only the sale of water from SRA to the City. Although the City could be expected to pass the rate increase on to its customers, the increased rate would have no broader application to other purchasers of wholesale water from SRA or to other members of the general public in the future. See Id.; Macias, 995 S.W.2d at 833. Put another way, it was not a water rate broadly applicable to all of SRA's water sales. Nor does the fact that the renewal rate SRA decided to charge the City is subject to PUC review convert a rate that is applicable only to the City into an act with broad public application. Scott, 384 S.W.2d at 690 – 91; Macias, 995 S.W.2d at 833. Thus, even if we were to conclude that the UDJA's waiver of immunity encompasses challenges to "other legislative pronouncements" such as ratemaking, we cannot agree that SRA's act of increasing the price the City is to pay for water under the Contract constituted "ratemaking." See Scott, 384 S.W.2d at 691 (concluding that in revoking medical license, agency "was not engaged in promulgating rules of general application or deciding question of broad policy"); NuRock, 293 S.W.3d at 368 – 69 (holding that, where settlement agreement lacked characteristics of statutes and ordinances designed to address broad questions of public policy and affect members of public, UDJA did not waive city's

> immunity for suit seeking declaratory relief that NuRock did not breach settlement agreement or otherwise fail to meet obligations to city); Macias, 995 S.W.2d at 833 (holding that comptroller acted in judicial or quasi-judicial, not legislative, capacity in suspending individual's customs broker's license).

Id. at * 5.

In this case, for the same reasons explained above, the Fire Fighters' request for statutory damages – "past losses" – for the period July 1, 2017, to June 30, 2018, does not constitute ratemaking by the district court. The Fire Fighters only seek compensation from the City of Houston for past losses. The relief sought by the Fire Fighters has no "broad public application" and "concerns only the parties immediately affected."

The City of Houston repeatedly cites to In re Johnson, 554 S.W.2d 775, 782 – 783 (Tex. Civ. App. – Corpus Christi 1977), writ ref'd n.r.e., 569 S.W.2d 882 (Tex. 1978), in arguing that Section 174.252 constitutes unconstitutional "rate-making" delegated to the judiciary. See City of Houston Brief on the Merits, pp. 24, 26, 31. As explained in Pogue v. Duncan, 770 S.W.2d 867, 874 (Tex. App. – Tyler 1989, writ denied), this Court rejected Johnson's unconstitutional delegation holding in refusing the writ of error in Johnson on procedural grounds.

> We now consider appellants' argument which asserts that the delegation in question violates the separation of powers doctrine found in Tex. Const. art. II, § 1. Ironically, appellants claim that this constitutional provision is breached by the partial removal from a judicial body, and the transfer to a judicial officer, of the power to fix a salary.
>
> The court in In re Johnson, 554 S.W.2d 775, 782 – 783 (Tex. Civ. App. – Corpus Christi 1977), writ ref'd n.r.e. per curiam, 569 S.W.2d 882 (Tex. 1978), struck down former Tex. Rev. Civ. Stat. art. 2324 as violative of Tex. Const. art. II, § 1. For reasons based solely upon procedure, the Supreme Court refused Johnson's application for writ of error n.r.e. The Court carefully noted, however, that the orders refusing the application "are not to be understood as approving the holding by [the Corpus Christi Court of Appeals] that the third paragraph of article 2324 is unconstitutional." 569 S.W.2d at 883 (citations omitted). The clear implication of the opinion in In re Johnson, 569 S.W.2d at 882 – 883, is that the declaration made in Wichita County v. Griffin, 284 S.W.2d at 256, viz., "We do not think that the [statute] which empowers District Judges, within certain limits, to fix the salaries of Court Reporters is an unconstitutional delegation of power." Section 52.051 limits the district judges' authority to increase the court reporter's salary without the approval of the commissioners court to an amount not exceeding ten percent of the reporter's prior annual salary. By analogy, the statute provides a limitation on the district judges' delegated powers sufficient to preserve the act from condemnation as violative of art. II, § 1. We therefore overrule appellants' third and fourth points of error.

The Court of Appeals in Holloway v. Butler, 828 S.W.2d 810, 812 (Tex. App. – Houston [1st Dist.] 1992, writ denied), similarly rejected the holding of the Corpus Christi Court of Appeals in In re Johnson because of this Court's

statement in refusing the application for writ of error that it did not approve the holding that the statute was unconstitutional.

There has been no delegation of legislative authority because the Legislature has set the policy for fire fighter pay in Section 174.021. The judiciary's only role is to remedy violations of that legislative policy in the manner prescribed by the Legislature, which is judicial enforcement via Section 174.252. If a trial court has to exercise some judgment in declaring compensation and other conditions of employment for the one year period, this Court has recognized "that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it." Boll Weevil, 952 S.W.2d at 466.

Even if the Court accepts the City's erroneous position that Section 174.252 delegates legislative authority to the judiciary, the statute still passes constitutional muster. Delegations of legislative authority are constitutional as long as the Legislature "establishes 'reasonable standards to guide the entity to which the powers are delegated.'" Edgewood ISD v. Meno, 917 S.W.2d 717, 740 (Tex. 1995). Article II, Section 1 of the Texas

Constitution "requires that the standards of delegation be 'reasonably clear.'" Id. at 741.

This lenient standard for delegation to governmental entities is in contrast to the analysis applied to legislative delegation to private individuals or entities, which requires "more searching scrutiny than their public counterparts," and must be analyzed under the 8-factor Boll Weevil test. 952 S.W.2d at 469, 472. The fact that a court may have to make a policy judgment in exercising delegated legislative authority does not render the delegation unconstitutional. Boll Weevil, 952 S.W.2d at 466.

Section 174.021(1) refers to "comparable employment," which is a familiar standard guiding the judiciary in employment law. See, e.g., Hertz Equipment Rental Corp. v. Barousse, 365 S.W.3d 46, 58 – 59 (Tex. App. – Houston [1st Dist.] 2011, pet. denied); Palasota v. Haggar Clothing Co., 499 F.3d 474, 486 (5th Cir. 2007); see also City of Houston, 626 S.W.3d at 18 & n. 12 (collecting cases).

Section 174.021(1)'s standard of "substantially equal" to compensation and other conditions of employment that prevail in comparable employment in the private sector, is frequently used in statutes and guides judicial decision making on various issues in many areas of the law. See, e.g.,

Neeley v. West Orange-Cove Consol. ISD, 176 S.W.3d 746, 752 (Tex. 2005); Edgewood ISD v. Meno, 917 S.W.2d at 729. "Substantially equal" is a standard that guides the judiciary in deciding issues under the United States Constitution. The Equal Protection Clause of the Fourteenth Amendment requires "substantially equal" legislative representation for all citizens of a state. See, e.g., Reynolds v. Sims, 377 U.S. 533, 567 (1964). The Sixth Amendment requires appointed appellate counsel to render assistance of counsel substantially equal to that which retained counsel would provide. See, e.g., McCoy v. Court of Appeals, 486 U.S. 429, 435, 438 (1988); Douglas v. California, 372 U.S. 353, 357 (1963).

Section 174.021(2) refers to the "labor market area." Courts routinely make such a determination in racial discrimination cases. In a Title VII case involving comparative work-force statistics, the racial composition of the employer's work force is compared to the population possessing the necessary qualifications for the job in the relevant "labor market area." Hazelwood School District v. United States, 433 U.S. 299, 308 – 313 (1977); Meditz v. City of Newark, 658 F.3d 364, 371 (3d Cir. 2011); EEOC v. E. I. duPont de Nemours & Co., 445 F. Supp. 223, 236 (D. Del. 1978). These determinations are guided by the evidence presented by the parties, usually

in the form of expert testimony that can be rejected if inadequate. See, e.g., Williams v. City of New Orleans, 729 F.2d 1554, 1562 (5th Cir. 1984).

The standards in Section 174.021 are reasonably clear. The City cannot overcome the presumption of constitutionality by claiming that these standards are somehow different under Chapter 174 than they are in the other contexts where they are used.

Legislative delegations with standards much less detailed than what Chapter 174 includes have been upheld as constitutional, including delegations allowing district courts to declare the compensation of public officers. The Legislature authorized a district judge to set the salary of official court reporters for Wichita County between $2,750 per year and $6,600 per year. The Court of Appeals rejected the argument that the statute was an unconstitutional legislative delegation. Wichita County v. Griffin, 284 S.W.2d 253, 256 (Tex. Civ. App. – Fort Worth 1955, writ ref'd n.r.e.).

Holloway v. Butler, 828 S.W.2d 810, 812 (Tex. App. – Houston [1st Dist.] 1992, writ denied), upheld, against a separation-of-powers attack, a statute allowing a district judge to determine a court reporter's fee, guided by the standard that the fee must be "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." Chapter 174 provides considerably more guidance than did the statute that Holloway upheld.

Martinez v. State, 323 S.W.3d 493 (Tex. Crim. App. 2010), rejected a challenge to Section 125.065(a) of the Texas Civil Practice and Remedies Code as an unconstitutional legislative delegation. This statute allows a court that finds that "a combination or criminal street gang constitutes a public nuisance" to enter an order imposing any "reasonable requirements to prevent the combination or gang from engaging in future gang activities." Some discretionary authority is required to allow a trial court to tailor the remedy authorized by Section 174.252 based on the Section 174.021 standards in order to effectuate Chapter 174's purpose. There is much more specific guidance in the standards of Section 174.021 than in Tex. Civ. Prac. & Rem. Code § 125.065(a). If "reasonable requirements to prevent ... future gang activities" is a clear enough standard to pass constitutional muster, then Chapter 174's standards are necessarily sufficiently clear as well.

In footnote 4 on page 36 of its Brief on the Merits, the City of Houston says none of the cases cited by the Court of Appeals refer to "'compensation and other conditions of employment that prevail' in comparable employment

or ‘prevailing private sector compensation and conditions of employment’.” The City’s argument about “compensation and other conditions of employment that prevail in comparable employment” ignores the fact that this type of evidence is routinely presented in cases by economists and damage experts in proving lost wages and lost earning capacity and by defense experts arguing failure to mitigate due failure to obtain employment or being underemployed.

There are a multitude of cases and statutes which address prevailing private sector compensation and conditions of employment, specifically in the context of public or governmental employees. See Davis v. District of Columbia Child and Family Services Agency, 304 F.R.D. 51, 63 (D.D.C. 2014) (discussing application of private market rates to government attorneys when awarding sanctions); Bradley v. U.S., 26 Cl. Ct. 699, 700 (1992) (analyzing 5 U.S.C. § 5649(a) which “is part of the statutory mechanism for setting the wages of skilled craftsmen employed in federal agencies by comparison with prevailing private sector wages for similar crafts in various ‘local wage areas’.”); Bradley v. U.S., 870 F.2d 1578 (Fed. Cir. 1989) (same); Building and Construction Trades Department, AFL-CIO v. Turnage, 705 F.Supp. 5, 5 (D.D.C. 1988) (discussing Davis-Bacon Act

which "requires that workers performing construction work on public buildings or public works under contracts in excess of $2000, to which the United States is a party, be paid the prevailing private sector wage rate.")

The unconstitutional delegation of legislative authority argument made by the City of Houston fails.

C. The City's Immunity Was Waived (Responsive to City of Houston Brief on the Merits, pp. 38 – 43)

The City of Houston admitted "the Association's pleadings allege prima facie requisites (firefighters and a public employer not reaching agreement on future compensation and benefits) to invoke an immunity waiver, and concomitant Court jurisdiction under Section 174.008 …" (1 CR 67). Section 174.008 is a broad, express waiver of immunity for claims seeking to enforce the provisions of Chapter 174.

The Fire Fighters' lawsuit was (1) brought under Section 174.251, (2) to enforce the FPERA and (3) was against the employing public employer. (1 CR 48 – 57). "Construing sections 174.008 and 174.251 together, we conclude that the FPERA clearly and unambiguously waives immunity from suit for claims (1) brought under section 174.251 (2) to enforce the FPERA (3) against the employing public employer. See Id. §§ 174.008, 174.251."

Jefferson County v. Stines, 523 S.W.3d 691, 713 (Tex. App. – Beaumont June 2017), rev'd in part, vacated in part, 550 S.W.3d 178 (Tex. 2018). On review in this Court, citing to Jefferson County v. Jefferson County Constables Ass'n, 546 S.W.3d 661, 667 – 668 (Tex. 2018), this Court held the Court of Appeals erred in reversing the trial court's denial of the plea to the jurisdiction because Section 174.008 waived the County's sovereign immunity. See Stines v. Jefferson County, 550 S.W.3d 178, 179 – 180 (Tex. 2018).

The argument made by the City of Houston that the parties did not negotiate based on Private Sector Labor Standards is factually false. As detailed in the affidavit of Marty Lancton, the Union President, the Fire Fighters' Union did receive information on Private Sector Labor Standards as part of the collective bargaining process, did consider such information and did utilize such Private Sector Labor Standards in collectively bargaining with the City of Houston. (2 CR 311 – 312).

There is no statutory provision in Chapter 174 or Section 174.105 ("Duty to Bargain Collectively in Good Faith") requiring that the Fire Fighters collectively bargain with the City of Houston based on "private sector labor standards." The Private Sector Labor Standards are referred to in Section

174.021. The immediately following section, 174.022, provides unambiguously that "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." The structure of Chapter 174 and the above provisions mean that if the Fire Fighters and the City of Houston entered into a collective bargaining agreement, as they did in 2011 – on any terms – the City of Houston was considered to be in compliance with the Private Sector Labor Standards expressed in Section 174.021 – irrespective of whether the provisions of the CBA were in fact in compliance with Section 174.021 and irrespective of whether the parties negotiated based on Private Sector Labor Standards. See Tex. Loc. Gov't Code § 174.022.

In a similar fashion, had the Fire Fighters and the City of Houston entered into an enforceable amendment to the CBA or a new CBA – on any terms – the City of Houston would have been deemed to be in compliance with Section 174.021 irrespective of whether, in fact, the terms of the CBA satisfied Section 174.021 and irrespective of whether the parties negotiated based on Private Sector Labor Standards. See Tex. Loc. Gov't Code §

174.022. For this reason, the Fire Fighters had no obligation to collectively bargain or negotiate based on the Section 174.021 Private Sector Labor factors as claimed by the City of Houston and could not have acted in bad faith.

The Court of Appeals in this case stated:

> [Section 174.022(a)] undermines the City's argument tha 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.

City of Houston, 626 S.W.3d at 13.

The City of Houston discounts this analysis arguing that "Section 174.022(a) addresses only circumstances in which parties have 'reached an agreement' and applies only 'for the duration of the agreement' [and] has nothing to say about forward-looking negotiating obligations in connection with the expiration of an agreement." City of Houston Brief on the Merits, pp. 42 – 43. The FPERA makes no provision or distinction for forward-looking

negotiating obligations in connection with the expiration of an agreement. Irrespective of whether the CBA is in effect, is about to expire or has expired, any agreement reached under FPERA satisfies the municipality's obligations under Section 174.021 to comply with the Private Labor Sector Standards. The Legislature was clearly aware that the fire fighters and police and the municipality would have to negotiate the terms of a collective bargaining agreement, either at inception, during the term of the agreement or after expiration of the agreement. The Legislature could have easily mandated negotiation of Private Labor Sector Standards by the parties and could have easily required such negotiation of Private Labor Sector Standards as an element to be satisfied for waiver of sovereign immunity. It did not do so. This Court "may not add requirements to a statute that are not contained in the plain language." Republican Governors Ass'n v. Bell, 421 S.W.3d 42, 50 (Tex. 2013).

The only pertinent issues for waiver of immunity and enforcement under Section 174.252 are: (1) whether there was a CBA between the Fire Fighters and the City of Houston (there was), (2) whether the CBA has terminated and the parties have reached an impasse with respect to the CBA (that occurred), (3) whether the City of Houston declined arbitration (it did)

and (4) whether the City of Houston is in compliance with Section 174.021 (The Fire Fighters assert it is not). The Fire Fighters' pleadings plead all of these elements and the summary judgment evidence proves all four points. (1 CR 48 – 57; 2 CR 227 – 403).

The City of Houston cites no authority in support of its immunity argument based on "Private Sector Labor Standards". Section 174.105 of the Texas Local Government Code addresses the duty to bargain collectively in good faith. Section 174.152 addresses impasse. Section 174.153 addresses a request for arbitration. None of these provisions obligate or require the Fire Fighters to negotiate or collectively bargain based on the Private Sector Labor Standards as argued by the City of Houston. Similarly, the "Ground Rules for Collective Bargaining Negotiations" agreed to by the Fire Fighters and the City of Houston did not obligate or require the Fire Fighters to negotiate or collectively bargain based on the Private Sector Labor Standards as argued by the City of Houston. (2 CR 304 – 307). But, even if any of the statutory provisions did require such negotiation or collective bargaining based on such factors, the evidence presented in the trial court reflects that the Fire Fighters did consider such private sector labor

standards, and did utilize such standards in their negotiations and collective bargaining with the City of Houston. (2 CR 311 – 312).

The Fire Fighters declared impasse and requested arbitration on May 15, 2017. (2 CR 308 – 309). The City of Houston declined the request to arbitrate on May 19, 2017. (2 CR 310). The City did not assert that the Fire Fighters had failed to negotiate in good faith and suggested mediation. Id. The Fire Fighters mediated with the City of Houston before this lawsuit was filed. The City of Houston never claimed that the Fire Fighters did not negotiate in good faith until its litigation counsel made the argument in this case. (1 CR 10 – 13, 58 – 62). The trial court in this case had the authority to enforce the duty to bargain in good faith under Chapter 174. Section 174.251 authorizes the district court to issue an injunction or other order to enforce the provisions of Chapter 174, including any duty to bargain in good faith. See Liberty County Officers Association v. Liberty County, Texas, No. 09-97-452CV, 1999 WL 817527 at * 1 (Tex. App. – Beaumont Oct. 14, 1999, no pet.) (not designated for publication) ("The County was required to bargain in good faith with the Association. See TEX. LOC. GOV'T CODE ANN. § 174.105 (Vernon 1999). In addition, a liberal construction of the Act

leads us to conclude the trial court can enforce that duty, see TEX. LOC. GOV'T CODE ANN. 174.004 (Vernon 1999).")

The City of Houston has never sought relief from the trial court requiring the Fire Fighters to bargain in good faith because they purportedly violated Section 174.105. The Fire Fighters dispute and deny the contention they did not bargain in good faith. Regardless of the merits of such argument, it is not a jurisdictional defense that would allow for dismissal of the Fire Fighters' claims. See Pike v. Texas EMC Management, LLC, 610 S.W.3d 763, 775 (Tex. 2020), citing Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 76 – 77 (Tex. 2000). ("Yet we have been clear in this century that the question whether a plaintiff has established his right "to go forward with [his] suit" or "satisfied the requisites of a particular statute" pertains "in reality to the right of the plaintiff to relief rather than to the [subject-matter] jurisdiction of the court to afford it.").

Chapter 174 does not define what constitutes "good faith" collective bargaining. Section 174.105 is entitled "Duty to Bargain Collectively in Good Faith" and reads in its entirety as follows:

> (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.

There is an extensive body of case law discussing "good faith" in the context of collective bargaining under the National Labor Relations Act (NLRA) and before the National Labor Relations Board (NLRB). Good faith requires a serious intent to adjust differences and to reach an acceptable common ground. NLRB v. Ins. Agents' Int'l Union, AFL-CIO, 361 U.S. 447, 485 (1960); Carey Salt Co. v. N.L.R.B., 736 F.3d 405, 412 (5th Cir. 2013). Good faith means more than mere talk with the purpose of avoiding

agreement, National Labor Relations Bd. v. Darlington Veneer Co., 236 F.2d 85, 88 (4th Cir. 1956), and more than sterile or formalistic discussions. United Packinghouse, Food and Allied Workers Intern. Union, AFL-CIO v. N. L. R. B., 416 F.2d 1126, 1131 (D.C. Cir. 1969); N. L. R. B. v. W. R. Hall Distributor, 341 F.2d 359, 362 (10th Cir. 1965). Although the NLRA does not compel either a union or an employer to agree to a proposal or make a concession, a union or an employer that enters into negotiations without any intention of reaching an agreement acts in bad faith. 29 U.S.C.A. § 158(d); American Newspaper Publishers Ass'n v. N.L.R.B., 193 F.2d 782, 804 (7th Cir. 1951); Excelsior Pet Products, 276 N.L.R.B. 795, 120 L.R.R.M. (BNA) 1117, 1985 – 86 NLRB Dec. (CCH) ¶ 17883, 1985 WL 46333 (1985).

Whether or not an employer or a union has acted in good faith is a matter within the NLRB's special expertise, United Packinghouse, Food and Allied Workers Intern. Union, AFL-CIO v. N. L. R. B., 416 F.2d 1126, 1131 (D.C. Cir. 1969), and that determination depends on the totality of the facts and circumstances of the individual case. Carey Salt, 736 F.3d at 412; United Steelworkers of America, AFL-CIO v. N. L. R. B., 390 F.2d 846, 852 (D.C. Cir. 1967). The participant's intentions may be ascertained from circumstantial evidence, Continental Ins. Co. v. N.L.R.B., 495 F.2d 44, 48

(2d Cir. 1974), and the credibility of the parties' involved is often a crucial factor. Wausau Steel Corp. v. N. L. R. B., 377 F.2d 369, 372 (7th Cir. 1967).

In Carey Salt Co. v. N.L.R.B., 736 F.3d at 412 – 413, the Fifth Circuit considered five factors in addressing the good faith issues, stating as follows:

> In that case, the Board enumerated five factors that aid in determining whether an impasse existed, and both parties here urge us to apply them. These factors are (1) the parties' bargaining history; (2) the parties' good faith; (3) the duration of negotiations; (4) the importance of issues generating disagreement; and (5) the parties' contemporaneous understanding of the state of negotiations. Taft Broad. Co., 163 NLRB 475, 478 (1967), enforced sub. nom., Am. Fed'n Television & Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968). All five factors are probative of impasse, but in the very same section of its decision, the Board explained that impasse is reached "after good-faith negotiations have exhausted the prospects of concluding an agreement." Id. (emphasis added). In applying the factors, the Board emphasized that "no evidence" suggested bad faith had tainted the parties' ultimately unfruitful efforts during twenty-three bargaining sessions. Id. Indeed, the D.C. Circuit, in enforcing the Taft decision, determined that this understanding of impasse "governed" the case and cited the Board's formulation verbatim, including the requirement of good faith. Am. Fed'n Television & Radio Artists, 395 F.2d at 624.

A labor organization's overall bargaining conduct can evidence bad faith. Cheney Cal. Lumber Co. v. N. L. R. B., 319 F.2d 375, 380 (9th Cir. 1963). A union displayed bad faith when it repeatedly refused to alter its original proposals, cancelled meetings, suggested that negotiations be

conducted by telephone, and announced its representatives' lack of authority to engage in meaningful bargaining. Graphic Arts Intern. Union, Local 280, 235 N.L.R.B. 1084, 98 L.R.R.M. (BNA) 1188, 1978 NLRB Dec. (CCH) ¶ 19229, 1978 WL 7484 (1978). A finding by the NLRB that an employer adhered to unreasonable positions on key issues during negotiations and thus interfered with its employees' collective bargaining rights and failed to bargain in good faith was supported by substantial evidence. The employer had insisted on retaining the exclusive right to unilaterally and arbitrarily change all conditions of employment. Frankl ex rel. N.L.R.B. v. HTH Corp., 693 F.3d 1051, 1059 (9th Cir. 2012).

The record fully supported the NLRB's finding that an employer committed the unfair labor practice of failing to bargain in good faith when it refused to put forward proposals until the union, which had recently been certified to represent employees, presented its proposals on every issue over which the parties were bargaining. After reaching tentative agreements on a handful of issues, the employer refused to offer further proposals until the union set forth its proposal in full. Hospital of Barstow, Inc. v. National Labor Relations Board, 897 F.3d 280, 289 – 290 (D.C. Cir. 2018).

Misrepresentations may constitute evidence of a lack of good faith (e.g., where the employer tries to bluff the union into believing it wants to move operations out of the area when it has already bought a nearby facility). N.L.R.B. v. Waymouth Farms, Inc., 172 F.3d 598, 600 (8th Cir. 1999).

The City of Houston presented absolutely no evidence that was probative on its contention that the Fire Fighters did not collectively bargain in good faith. (1 CR 63 – 220). The City of Houston presented no evidence of misrepresentations or that the Fire Fighters lacked serious intent to adjust differences and to reach an acceptable common ground. Id. There was no evidence the City of Houston negotiators accused the Fire Fighters of lack of good faith. Id. The lack of good faith argument made by the City of Houston is purely legal – that the purported failure to collectively bargain based on the Section 174.021 Private Sector Labor Factors conclusively establishes, as a matter of law, that the Fire Fighters did not collectively bargain in good faith and therefore there was no waiver of sovereign immunity.

That argument fails as a matter of law for the reasons correctly explained by the Court of Appeals.

CONCLUSION AND PRAYER

The City of Houston's petition for review must be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The Response Brief on the Merits complies with the length limitations of Tex. R. App. P. 9.4(i)(2)(c) because this Response Brief on the Merits consists of 14,859 words, excluding the parts of the Response Brief on the Merits exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Vincent L. Marable III
VINCENT L. MARABLE III

CERTIFICATE OF SERVICE

I certify that on February 8, 2022, a true and correct copy of the above and foregoing Response Brief on the Merits was forwarded to all counsel of record by e-file.

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