

IN THE SUPREME COURT OF TEXAS

No. 98-0216

ERIC WILSON AND JOHN CORNYN,
ATTORNEY GENERAL OF TEXAS, PETITIONERS

v.

MARY ANDREWS, IN HER OFFICIAL CAPACITY AS
CIVIL SERVICE DIRECTOR OF THE CITY OF LUBBOCK, TEXAS,
AND AS MANAGING DIRECTOR OF HUMAN RESOURCES
FOR THE CITY OF LUBBOCK, TEXAS; ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS

Argued on October 12, 1999

JUSTICE HECHT, concurring.

I concur in the Court's opinion except for its conclusion that respondents do not argue that article XI, section 5 of the Texas Constitution precludes the Legislature from delegating the authority to hear civil service appeals to a private entity as it has done in section 143.057(d) of the Texas Local Government Code. This argument is different from another argument respondents make, and which we addressed in *Proctor v. Andrews*, that article III, section 1 of the Texas Constitution precludes the Legislature from delegating the authority to a private entity to determine who can be a neutral arbitrator in hearing such appeals.¹ In *Proctor* we rejected the latter argument² and did not address

¹ 972 S.W.2d 729, 734-738 (Tex. 1998).

² *Id.*

the former argument.³

The Court concludes that respondents did not raise their nondelegation argument regarding the authority to decide appeals in the court of appeals, but that is simply incorrect. Respondents argue that to delegate the authority to decide appeals is to delegate an important element of a city's authority to discipline, suspend, or discharge police officers. Respondents stated in their brief:

It has long been settled by numerous cases that the city's governmental functions, such as the exercise of its police power, must remain under the control of the city and such functions cannot be transferred or ceded to another entity (either voluntarily or involuntarily) absent specific constitutional provision.

* * *

The City submits that § 143.057 . . . is an invalid and unconstitutional interference with the City's constitutional rights, powers and duties under the home-rule provisions of the Texas Constitution which prohibit the delegation to a third power of the City's governmental powers, which include its duty and authority to discipline, suspend or discharge its police officers.

The court of appeals discussed this argument at length and concluded that the statutory delegation was improper.⁴

The court of appeals assumed the premise of respondents' argument, that requiring a city to arbitrate civil service appeals at a police officer's election was a delegation of the city's supervisory authority over the police and then applied the factors set out in *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*⁵ for reviewing, under article III, section 1 of the Texas Constitution, a delegation of governmental authority to a private entity. Apart from the issue whether the analysis would be the same under article XI, section 5, as under article III, section 1, I do not agree that the

³ *Id.* at 735.

⁴ 959 S.W.2d 686, 690-692.

⁵ 952 S.W.2d 454, 473 (Tex. 1997)

arbitration requirement is a delegation of power constitutionally committed to a city. The city's argument would be the same if the officer appealed to a court under section 143.057(j): that is, that the city's authority to supervise its police officer cannot be delegated to the district court. The validity of the argument rests on the incorrect notion that requiring a city to arbitrate or litigate its disputes with officers before an arbitration panel or a court is an unconstitutional delegation of the city's police powers to the panel or court. Article XI, section 5 does not make a city the judge of its own cause.

The Court should address respondents' argument, as several amici curiae here urge. The argument was before the court of appeals and has been urged in this Court. I agree with the Court, however, that we should not address the argument that could be made, that section 143.057's delegation of authority to decide appeals violates article III, section 1 of the Texas Constitution, on the briefs we have before us.

With this caveat, I concur in the rest of the Court's opinion.

Nathan L. Hecht
Justice

Opinion delivered: December 23, 1999