



# Civil Service Case Update

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# CONSEQUENCE OF PARTICIPATING IN JANUARY 6 ACTIVITIES IN WASHINGTON



Bexar

# Mathai v. Bexar County Sheriff's Office



- Lieutenant in Sheriff's Office participated in January 6 events in Washington
  - Sheriff learned of this not long after event
  - Lieutenant posted pictures and videos of rioters
- Sheriff investigated Lieutenant's participation
  - Fired Mathai
  - Appeal filed under CBA between Sheriff and Deputies' Association
- Arbitrator noted Lieutenant
  - Did nothing to stop others from illegal actions
  - Did not call her supervisor to relate what she had seen

(cont.)

# Mathai v. Bexar County Sheriff's Office (cont.)



- Arbitrator doubted her credibility as she claimed she
  - Was “Documenting history”
  - Was “Showing her patriotism”
  - “Saw nothing illegal”
- Termination was upheld due to
  - Conduct unbecoming
  - Failing to report a crime
  - Improper social media use

# RACIALLY DEROGATORY COMMENT AND IMAGE WARRANT INDEFINITE SUSPENSION





# Bienek v. City of San Antonio

- Firefighter indefinitely suspended after she posted racially derogatory comment and image on Facebook
  - Picture of monkey next to post of former President Obama
  - Employee added her own racially derogatory comment and identified as firefighter
  - Employee claimed comment was humorous and had no racial motive
- Hearing Examiner upheld firing
  - Poor reactions from other co-workers
  - Employee claimed she didn't know what material Chief ordered her to remove and did so only after fired
  - "Straw that broke camel's back" was second post regarding George Floyd incident/death

(cont.)



## Bienek v. City of San Antonio (cont.)

- Hearing Examiner says good record and tenure not material

*“There are some acts committed by employees that are so egregious that a first offense satisfies the just cause standard for reasons of discipline.”*

- This was one of them!



# RELATIONSHIP WITH “VICTIM” COSTS POLICE OFFICER HIS JOB





# Wagstaff v. City of Austin



- Police Officer responded to stalking call at local gym and then began sexual relationship with owner
- Officer also
  - Accessed confidential databases
  - Gave information to gym owner
  - Patrolled at gym while on duty
- Later the Officer
  - Gave owner his back-up weapon
  - Went out socially with her
  - Watched gym when off duty

(cont.)

# Wagstaff v. City of Austin (cont.)



- Officer denied knowing relationship was prohibited
  - Continued relationship despite earlier warning
  - Later compromised criminal case involving stalker
- Hearing Examiner upheld indefinite suspension despite no prior discipline
  - Officer destroyed his credibility and community trust
  - Officer “grooming” victim to depend on him
  - Difficult to take case to trial where officer was witness
  - Stalking cases are hard to prove
  - Officer continued his action even after being informed his actions were unethical and policy violation

# DETECTIVE D.P.'S SOAP OPERA



# Detective D.P. v. City of San Antonio



- Detective assaults woman in her front yard and Sheriff was alerted
- Followed earlier altercation when Detective kicked in woman's door to take an iPhone
- Deputy orders him to approach
  - He refuses and goes into house
  - Deputy kicks door in and "subdues" Detective
- Hearing Examiner upheld termination due to
  - Video
  - Physical evidence
  - untruthfulness

(cont.)

# Detective D.P. v. City of San Antonio (cont.)



- Defenses were weak:
  - “Didn’t happen on work time.”
  - “Not performing police duties.”
- Important words from Hearing Examiner:

*Burden of proof is preponderance of evidence,  
Not “beyond reasonable doubt.”*



# EMS EMPLOYEE STRIKES OUT IN ATTEMPTED ROMANCE WITH PATIENT



# Lotfalian v. City of Austin (EMS)



- Austin Medic attempted “come on” to ambulance patient who had exhibited suicidal ideations
  - Numerous complaints from witnesses
  - Touching patient’s knee
- Later sent Facebook messages to patient whose reaction was very negative
- Medic’s defenses include
  - Tried to help woman
  - Denied rubbing patient’s leg
  - Claimed no policy restricting patient contact via social media

(cont.)



# Lotfalian v. City of Austin (EMS) (cont.)



- Hearing Examiner upheld penalty
- EMS employees to avoid engaging in contact with former patients to avoid complaints like this
- Maintaining public trust is critical to EMS service
- Employee's conduct eroded trust and cannot be tolerated

# FIREFIGHTER INTOXICATION LEADS TO FIRING





# Samano v. City of San Antonio

- Off-duty firefighter pulled over for driving erratically by trooper
- Firefighter couldn't complete field sobriety test
  - Glassy eyes
  - Strong smell of alcohol
- Belligerent and threatened never to help trooper if he needed help
- Became violent
- Charged with DWI and failure of field sobriety test
- Later firefighter complained of chest pains

(cont.)



# Samano v. City of San Antonio (cont.)

- Hearing Examiner upheld indefinite suspension
  - No disparate treatment
  - Cursing and name calling was a negative (“faggot” and “fake ass cop”)
- Hearing Examiner sustained
  - All rules violations
  - Criminal mischief
  - Intoxication
- Important Hearing Examiner statement:  
*“Firefighter knew he’d lose his job”* due to intoxication
- Hearing Examiner emphasizes  
*“Not knowing policy is not a defense.”*

# ANOTHER FIREFIGHTER DRINKING CASE





# Cerda v. City of San Antonio

- Engineer in San Antonio Fire Department had stopped in traffic in another town and was slumped over wheel sleeping
- Officer taps on window and employee drives away without talking to officer
- Pursuit occurs
  - Open beer and loaded gun found in truck
  - Engineer goes to hospital claiming chest pains
  - Blood test reveals .131 alcohol level
- Arrested and goes to jail after charges of
  - Driving While Intoxicated (DWI)
  - Unlawful carrying of firearm
  - Evading arrest (driving away)

(cont.)





# Cerda v. City of San Antonio

- The Fire Chief indefinitely suspended employee
- Cerda appealed
- Hearing Examiner agreed with City
  - Criminal conviction not required to establish rule violation
  - Okay for Chief to charge him with DWI
- Hearing Examiner overturned indefinite suspension due to
  - Disparate treatment from previous DWI firefighter discipline (no just cause)
  - Length of service weighed in employee's favor
  - Penalty reduced to 60 days



# INDEFINITE SUSPENSION OVERTURNED FOR “APPARENT” INTOXICATION





# Fire Captain S.G. v. City of Denton

- SG denied reporting to work intoxicated, claimed
  - Spilled alcohol on shirt night before and wore clothes to work
  - Had PTSD and was on Benadryl
- Hearing Examiner found he was impaired which was serious because he was in charge of responses to EMS calls
- Chief offered 16-day suspension, but Captain rejected
- Hearing Examiner reduced penalty to 15 days
  - Only a “belief” that Captain was drunk
  - No testing was done

(cont.)



## Fire Captain S.G. v. City of Denton (cont.)

- Hearing Examiner found Captain was impaired due to PTSD and not alcohol
- Hearing Examiner concluded conduct prejudicial to good order
- Hearing Examiner rejected City's reliance on observations of witnesses

# FAILING RANDOM DRUG TEST





# City of Houston v. Cortez

- Fire engineer failed random drug test
  - First test said “positive” and “diluted”
  - Second test with hair was positive for cocaine
  - Medical Review Officer (MRO) forgot to tell Cortez he could get second test
- Internal investigation concluded engineer
  - Had violated Department’s policy
  - Had not been exposed through environment as he claimed
- Civil Service Commission upheld termination
- District Court reversed termination and Court of Appeals affirmed reversal
- Court said City’s failure to inform Cortez of his right to re-test was “arbitrary” and termination was tainted by illegality



# PHONE MANNERS ARE IMPORTANT



# Biegert v. City of San Antonio



- Citizen's complaint of Police Officer's rudeness in phone call to funeral director regarding a relative's funeral
- Officer admitted vulgarity at end of phone call thinking other party had disconnected
- Chief indefinitely suspended Officer upon Review Board's recommendation
  - Officer tried to use his position in PD to get what he wanted
- Employee claimed he was "stressed" due to family death and heart problems
- Hearing Examiner reinstated Officer
  - Citing four (4) character witnesses and no prior discipline



# FIREFIGHTER CAN'T ESCAPE DISCIPLINE FOR CARELESSNESS





# Hagan v. City of Houston

- Houston Firefighter on drone training out of town (in Dallas)
- Ran Fire Department Drone Response Vehicle (DRV) into fire hydrant
- Resulted in \$3600 in damages to DRV
- Investigation revealed the accident was preventable
- Chief gave one-day suspension
- Firefighter filed appeal claiming he hadn't had enough training on operating DRV
- Notably, Hearing Examiner concluded not to disturb penalty
  - Chief wasn't arbitrary, capricious, or unreasonable
  - Hearing Examiner found no disparate treatment
  - Rejected Firefighter's claim of not enough training on operating DRV
- Hearing Examiner concluded one-day suspension justified

# CHALLENGE TO PROMOTIONAL EXAMINATION FAILS





# City of Garland v. Jordan

- Garland firefighter miscalculated time he allotted for reading questions and then marking answer sheet
  - Ran out of time before completing marking
- Filed challenge that proctor failed in her duties
- Court of Appeals rejected firefighter's claims and concluded
  - City had immunity from suit because he claimed City employees violated law
  - Nothing the City did resulted in waiver of immunity
- **Word to Wise:** Make sure all persons working with Director are trained to perform assigned duties when proctoring promotional exams



# “SUBSTANTIAL EVIDENCE” SUPPORTED HEARING EXAMINER’S UPHOLDING PROMOTIONAL PASS OVER



# Maloy v. City of Greenville



- Sergeant bypassed for Lieutenant promotion as Chief concluded second highest test taker would be “better Lieutenant”
- Issues arose due to assessment center process and grading
- Hearing Examiner concluded Chief had valid reason for bypassing Maloy
  - Number two (2) on list had no disciplinary record
  - Maloy, Number one (1), had several disciplinary events
- Evidence also of Maloy’s attempt to evade detection by disabling vehicle locator on two (2) occasions
- Hearing Examiner adopted “test” of substantial evidence to uphold Chief’s decision

# VAN HOUTEN - SECOND VERSE





# Van Houten v. City of Fort Worth



- Police Chief recommended Van Houten be demoted from Sergeant in Police Department
- Van Houten requested Hearing Examiner
- Hearing Examiner ruled
  - Only Hearing Examiner had authority to consider whether evidence introduced in previous case was admissible in demotion hearing
  - Commission was limited to a “probable cause” finding
  - Commission’s redaction of prior written reprimand could be used by the City during demotion hearing

(cont.)

# Van Houten v. City of Fort Worth (cont.)



- Employee criticized investigation, but Hearing Examiner found
  - *“While the City need not conduct a perfect investigation; it must conduct an adequate one.”*
- Good point by Hearing Examiner “[Un]related good performance does not negate poor judgment listed in charging letter.”
- Hearing Examiner upheld demotion after reviewing all evidence

# ESPINOZA FINALLY FADES INTO THE PAST



# Espinoza v. City of Kyle



- In 2016, Espinoza was indefinitely suspended for his participation in scheme by an outsider to have Police Chief fired
- City learned of scheme and thoroughly investigated allegation
- Espinoza was fired and requested hearing before Hearing Examiner
  - Many days of testimony (~10)
  - Briefs submitted by attorneys
  - 30 days to write a decision
- Unfortunately, Hearing Examiner unexpectedly passed away due to cancer
  - Parties agree to “do-over” of hearing with new Hearing Examiner
  - New Hearing Examiner chosen

(cont.)

# Espinoza v. City of Kyle (cont.)



- One year later, parties started all over again
- Hearing Examiner found in favor of City
- Later in 2018, Espinoza filed lawsuit seeking to require City to engage in arbitration of his indefinite suspension
- Not until 2022 did Espinoza’s attorney seek to move case off dead center
- Parties in District Court with City urging
  - Hearing Examiner has no jurisdiction
  - Hearing Examiner decision is not “arbitration”
- After many months of wrangling back and forth, City’s written material to judge “saved the day” as court concluded no arbitration for Civil Service challenge



# UPDATE ON LONGEST RUNNING CIVIL SERVICE CASE ON RECORD







# City of Beaumont v. Mathews

- City of Beaumont case finally (hopefully) reaches end in courts after more than eleven (11) years winding its way up and down and back up in courts
- Employee's termination is upheld by new Hearing Examiner in 2022 and Court of Appeals denied Mathew's appeal
- Court says no violation for Hearing Examiner to view evidence in a pre-hearing hearing on City's motion to dismiss

(cont.)



## City of Beaumont v. Mathews (cont.)

- Hearing Examiner upheld indefinite suspension, but trial court overturned that ruling
- City went to Court of Appeals that overturned District Court finding
  - Hearing Examiner did not exceed his jurisdiction
  - Trial court wrongly substituted its judgment for Hearing Examiner

# BUTLER SAGA CONTINUES



Big Spring



# Butler v. Big Spring

- In 2016, Butler was indefinitely suspended
  - Misconduct at hospital
  - Numerous other infractions regarding treatment of public and other employees
- Hearing Examiner overturned indefinite suspension
  - One week suspension
- City filed appeal to District Court
  - Court overturned Hearing Examiner decision
  - Remanded for more evidence
- Butler was reinstated after next hearing
- In 2022, Butler challenged for back pay
- City Supreme Court issues

# O'NEILL CASE KEEPS GOING ON AND ON . . .





# O'Neill v. City of Fort Worth

- One of longest cases in Civil Service history
- O'Neill fired after disciplinary incident at TCU football game in 2015 with charges of
  - Untruthfulness
  - Assaultive behavior
  - Other criminal charges
- In 2017, Hearing Examiner reinstated because of “no due process”
- City appealed to District Court – dismissed case for lack of jurisdiction
- City appealed again – Appellate Court found that fact question existed and remanded the case to District Court

(cont.)





## O'Neill v. City of Fort Worth (cont.)

- Case was then remanded to Hearing Examiner
- City sued trying to get new Hearing Examiner due to bias exhibited earlier
- District Court agreed
- O'Neill appealed
- When Hearing Examiner was found, Court of Appeals held
  - Hearing Examiner exhibited bias against purposes of Civil Service
  - Hearing Examiner was no longer "independent"
- Court affirmed lower court order to select new Hearing Examiner

*We will keep you posted on this one.  
It is eight (8) years in the making.*

# ROLE OF OFFICE POLICE OVERSIGHT (OPO) IN AUSTIN POLICE DEPARTMENT



# Austin Police Ass'n v. City of Austin



- Over 20 years ago, APA and City had an agreement in Meet and Confer Agreement for civilian oversight board to investigate citizen complaints against sworn police officers
- APA filed contract grievance in 2018 prohibiting OPO from
  - Investigating complaints
  - Collecting evidence
  - Interviewing witnesses
- Arbitrator concluded
  - OPO violated the agreement
  - APA had not agreed to expand OPO's role prior to new CBA
  - City Manager could not “get around” agreement by himself permitting Director of OPO to take certain actions prohibited by agreement
- Arbitrator concluded Meet and Confer agreement was binding contract between City and Association

# “BONUS DAYS” TANGLE WITH “USE IT OR LOSE IT” RULE





# Deason v. San Antonio

- Arbitration over San Antonio's two (2) bonus days for firefighters with perfect attendance who failed to take days off
- City unilaterally instituted "Use It or Lose It" policy
  - Union failed to object to rule from 2009 until 2020 when it filed grievance
  - Arbitrator rejected City's claim grievance was untimely
- Arbitrator ruled all employees who had previously forfeited bonus days should get them back
- Rationale for decision:
  - CBA ambiguous
  - Hearing Examiner had to look to intent of parties to determine outcome





# City of Houston v. Houston Professional Firefighters Association





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