Office of the Attorney General
State of Texas

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June 26, 1992

Honorable Alvin Roy Granoff
Chairman
Committee on State, Federal and
International Relations
Texas House of Representatives
P. O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 92-17

Re: Whether a hearing examiner may be named a party defendant or subpoenaed to testify in an appeal of a civil service award under Local Government Code section 143.057(j) (RQ-296)

Dear Representative Granoff:

In municipalities that have adopted the terms of chapter 143 of the Local Government Code, police officers and fire fighters may appeal certain enumerated personnel actions to a three-member civil service commission.[1] Local Gov't Code § 143.010. Members of the civil service commission are appointed by the chief executive officer of the municipality and confirmed by the governing body. *Id.* § 143.006(b); 143.010. In the case of an indefinite suspension, suspension, promotional passover, or a recommended demotion of an employee, the employee may elect to have the appeal heard by an independent third party hearing examiner rather than the civil service commission. *Id.* § 143.057(a). The employee, in electing this option, waives all right to judicial appeal except as provided in subsection (j) of section 143.057. *Id.* The sole grounds for judicially appealing a hearing examiner's award are as follows:

> (j) A district court may hear an appeal of a hearing examiner's award only on the grounds that the arbitration panel[2] was without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion, or other unlawful means.

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[1]Only cities that have a population of 10,000 or more and that have a paid fire department and police department may vote to adopt the provisions of chapter 143. Local Gov't Code § 143.002.

[2]Section 143.057 does not provide for the appointment of an "arbitration panel," but for the appointment of an independent hearing examiner. *See also* Local Gov't Code § 143.1016 (hearing examiners in a cities with a population of 1.5 million or more).

> An appeal must be brought in the district court having jurisdiction in the municipality in which the fire or police department is located. [Footnote added.]

Id. § 143.057(j).[3]

You ask whether, in an appeal to a district court brought pursuant to subsection (j) of section 143.057, it is proper or necessary to name the third party hearing examiner as a party defendant. In the event the answer to the first question is "no," you ask whether a party to an appeal may subpoena the hearing examiner to testify or provide other evidence concerning the award.[4] In the absence of explicit statutory guidance, we believe a court would conclude that while an independent third party hearing examiner is not a "necessary" defendant[5] in a subsection (j) appeal, a hearing examiner may be joined in a proper case as a defendant. We also believe a court would, by analogy to the common-law rule governing testimony by arbitrators, conclude that a hearing examiner may, under appropriate circumstances, be required to testify in such appeals.

An appeal of an employment action under section 143.057 exhibits characteristics of both administrative hearings and arbitration proceedings. A hearing before a civil service commission is an administrative proceeding of a quasi-judicial character. *See generally Connor v. Klevenhagen*, 726 S.W.2d 205 (Tex. App.--Houston [14th Dist] 1987, writ ref'd n.r.e.); *Vick v. City of Waco*, 614 S.W.2d 861 (Tex. App.--Waco 1981, writ ref'd n.r.e.). But unlike ordinary administrative or civil service hearings, the decisionmaker in a section 143.057 proceeding is not

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[3]A special provision authorizes appeals to hearing examiners in cities with a population of 1.5 million or more. Local Gov't Code § 143.1016. The special provision imposes slightly different procedural requirements and filing deadlines than section 143.057. You ask only about hearing examiner proceedings in cities with less than 1.5 million inhabitants.

[4]We understand that your questions are prompted by the recent practices of some cities to appeal hearing examiner awards by naming the hearing examiner as the defendant in the appeal and to subpoena hearing examiners to testify in such appeals. We are advised that these practices have led arbitrators in some communities to decline appointment as a hearing examiner, thus limiting to some degree the availability of this option to fire fighters and police officers in the affected communities.

[5]A "necessary" defendant is one whose presence is necessary in order to afford the plaintiff complete relief to which it is entitled against other defendants. *Sabine Prod. Co. v. Frost Nat'l Bank of San Antonio*, 596 S.W.2d 271 (Tex. Civ. App.--Corpus Christi 1980, writ dism'd).

necessarily an appointee or employee of the government.[6] Furthermore, the repeated references to "arbitrators" in section 143.057 suggest characteristics of labor arbitration.

Examining the language of section 143.057, it is clear that the legislature intended proceedings under the section to carry some of the attributes of private arbitration. First, it should be noted that the process of selecting a hearing examiner by agreement of the parties, followed in the event of disagreement by selection from a list of arbitrators supplied by an outside agency, is a typical feature of standard arbitration. *See* F. Elkouri & E. Elkouri, *How Arbitration Works* 135-137 (1985). Section 143.057 sets forth a comparable process. It provides for the selection of a "neutral arbitrator" if the employee and the city cannot agree on the selection of a hearing examiner within ten days of the filing of the appeal. Local Gov't Code § 143.057(d). The arbitrator is selected from a list supplied by the American Arbitration Association or the Federal Mediation and Conciliation Service or their successors in function. *Id.*; *see also* Elkouri & Elkouri. Subsection (j), moreover, refers to the "arbitration panel" and supplies grounds for appeal comparable to those typically associated with appeals of arbitration awards. *Compare* V.T.C.S. art. 237 (provision of Texas General Arbitration Act authorizing award to be vacated for reasons that, *inter alia*, award was procured by fraud, corruption, or "other undue means" or where arbitrators "exceeded their powers").

Despite these similarities, section 143.057 does not provide for pure arbitration. For instance, the proceeding is not compelled by contract or a collective bargaining agreement, but by statute. The hearing examiner enjoys the same powers and duties as the civil service commission, including the right to issue subpoenas. Local Gov't Code § 143.057(f). The hearing examiner, in essence, serves in the commission's stead in appeals of the enumerated personnel actions.

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[6]It should be noted that section 143.057 does not, at least initially, prohibit the selection of an employee or appointee of the city government from serving as hearing examiner. Subsection (d) of the section provides that upon the invocation of section 143.057 the employee and the department head "shall first attempt to agree on the selection of an impartial hearing examiner." If the parties cannot agree, or if ten days pass after the filing of the appeal, the director of the civil service department must immediately request a list of seven qualified neutral arbitrators from the American Arbitration Association or the Federal Mediation and Conciliation Service or their successors in function. Local Gov't Code § 143.057(d). The hearing examiner is ultimately selected from this list. *Id.* There is no provision barring an employee or appointee of the city government from serving as a hearing examiner selected by agreement of the parties prior to the solicitation of the list of arbitrators.

See City of Carrolton v. Popescu, 806 S.W.2d 268, 273-274 (Tex. App.--Dallas 1991, no writ) (trial court, in subsection (j) appeals, enjoys same statutory authority as hearing examiner, which is the same as that of civil service commission). Thus, while civil service proceedings under section 143.057 exhibit traits common to private arbitration, they also partake of the administrative character of civil service hearings under section 143.010. *See Downs v. City of Fort Worth*, 692 S.W.2d 209 (Tex. App.--Fort Worth 1985, writ ref'd n.r.e.) (equating appeals to independent third party hearing examiner with appeals to civil service commission).

Again, your first question is whether an independent third party hearing examiner appointed pursuant to section 143.057 is a proper or necessary defendant in an appeal brought pursuant to subsection (j) of that provision. The general rule regarding appeals of administrative orders is that the party pursuing the appeal must name the defendant mandated by statute as a party within the time limit set forth in order to invoke the trial court's jurisdiction. *Texas Catastrophe Property Ins. Ass'n v. Council of Co-owners of Saida II Towers Condominium Ass'n*, 706 S.W.2d 644, 646 (Tex. 1986). However, we find no provision in section 143.057 or elsewhere specifying the defendant to be named in a judicial appeal of a commission's or hearing examiner's award.

In *Connor v. Klevenhagen*, a deputy sheriff who had been discharged from the sheriff's department sought judicial review of the decision of the sheriff's department civil service commission which upheld his termination. In his initial pleadings the deputy named only the sheriff as defendant. Later he added the civil service commission as a party defendant, but after the statutory time period in which to file an appeal had expired. The sheriff and commission both sought and were each granted a dismissal. On appeal, the court found that the relevant statute did not require naming the commission as a defendant within the time period allotted for filing an appeal. The court declared that

> [i]f it is the intention of the legislature to require that the Commission be named as a defendant, then it is the obligation of the legislature to so include said requirement in article 2372h-8, section 7, as it has clearly done in the past in other statutes. [Citations omitted.]

726 S.W.2d at 207.

In response to the argument that the applicable statute jurisdictionally required joinder of the commission "because it must defend its ruling," the court stated:

> We note that the decision to terminate appellant commenced in the Harris County Sheriff's Department. The Commission's review of appellant's termination . . . was an action of quasi-judicial character. Generally, appellate review of a trial court's decision or of an intermediate court's decision does not require joinder of either of these courts as a defendant. Consequently, we will not inject such a jurisdictional requirement when one is seeking review of a decision by a commission acting in a quasi-judicial capacity in the absence of clear legislative language mandating such a requirement.

Id.

The Connor case suggests that the proper defendant in an appeal of a civil service order is the employing governmental body when the relevant statute does not name the party defendant. It does not appear that the presence of the arbiter is necessary either as a jurisdictional prerequisite or in order to accord the parties complete relief. *See, e.g., Connor v. Klevenhagen*; *City of Carrollton v. Popescu*, (trial court, in appeal of hearing examiner's decision, had same powers to grant employee relief as civil service commission). Thus, it would appear that a third party hearing examiner is not a necessary or indispensable party to a subsection (j) appeal. *See also* Tex. R. Civ. P. 39 (compulsory joinder).

This conclusion, however, does not mean that the hearing examiner can *never* be named as a defendant in an appeal of an award under section 143.057. The *Connor* case does not address the issue of whether the trier of fact in a civil service hearing may be joined as a party defendant under the rules of permissive joinder, and we are aware of no authority which does so. It is apparent that in enumerating the grounds for judicial review of an award under section 143.057, the legislature was concerned, at least in some measure, with the conduct of hearing examiners. Furthermore, we are unaware of any case or statute which extends third party hearing examiners immunity from suit either as arbitrators or as quasi-judicial officers. Thus, it cannot be said that a party appealing an award under section 143.057 is as a matter of law forbidden from naming a third party hearing examiner

as a defendant to the appeal. Whether a third party independent hearing examiner may be named as a defendant in an appeal of an award under section 143.057 is ultimately a question of fact that must be determined in reference to the criteria prescribed by the Texas Rules of Civil Procedure, which govern the procedures in civil actions filed in the district courts. Tex. R. Civ. P. 2.

The Texas Rules of Civil Procedure allow for the joinder of parties to lawsuits on a permissive or compulsory basis. Under the rule of permissive joinder, parties may be joined as defendants if (1) there is asserted against them any right to relief that is joint, several, or in the alternative; (2) the right must be in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (3) a question of law or fact common to all of the parties joined must arise in the action. Tex. R. Civ. P. 40(a).

The rules of civil procedure also allow for the liberal dismissal of parties improperly joined in an action. Misjoinder of parties is not a ground for dismissal of an action. Tex. R. Civ. P. 41. But a court, either on motion of any party or on its own initiative, may drop from an action any party improperly joined on such terms as are just at any time before the cause is submitted to the jury or the court if trial is without a jury.[7] *Id.*

You next ask whether a party to an appeal of a section 143.057 award may subpoena the hearing examiner to testify or provide other evidence concerning the award. Although we have concluded that an appeal to an independent third party hearing examiner is in many essential respects an administrative proceeding, the fact

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[7]Although we cannot predict the courts' resolution of the issue of permissive joinder in particular cases, there are at least two arguments which weigh against finding that a hearing examiner may be properly regarded as a party to a subsection (j) appeal. First, section 143.057 does not mandate that the third party hearing examiner be named as defendant in a subsection (j) appeal. In accordance with the rule in *Connor v. Klevenhagen*, it might be argued that a hearing examiner is thereby not a proper defendant to such an action. Second, the general rule in this state regarding appeals of arbitration awards is that the parties to the arbitration agreement are properly regarded as parties to the appeal. *Schultz & Bros. v. Lempert*, 55 Tex. 273 (Tex. 1881). In the only reported case involving an appeal of a hearing examiner's award, the parties are the employee and the employing municipality. *See City of Carrolton v. Popescu*. However, it should also be noted that reported decisions under Local Government Code section 143.015, which authorizes appeals of civil service commission rulings to district court, show cities, fire and police departments, *and* civil service commissions as parties. Section 143.015, like section 143.057, does not designate the party defendant in these appeals.

that the examiner has no official connection to the municipal government makes it necessary, in our opinion, to consult rules regarding the admissibility of testimony by arbitrators for the purpose of impeaching an arbitration award.[8]

The rule observed in Texas has been that an arbitrator is competent to testify as to the subject of the controversy, the matters that entered into the decision, the award or decision that was made, and the fairness or impartiality of the arbitrators.[9] *Holcomb v. Blankenship*, 180 S.W. 918 (Tex. Civ. App.--Texarkana 1915, no writ); *see, e.g., National Auto. & Cas. Ins. Co. v. Holland*, 483 S.W.2d 28 (Tex.Civ. App.--Dallas 1972, no writ) (testimony of arbitrator regarding duty to determine accident claim); *Albert v. Albert*, 391 S.W.2d 186, 188 (Tex. Civ. App.--San Antonio 1965, no writ) (testimony of arbitrator to show matters considered by arbitration panel).

A noted authority has likened these principles to the rules governing the testimony of trial jurors for purposes of impeaching the jury's verdict. *See* 1 RAY, TEXAS LAW OF EVIDENCE § 401 (3d ed. 1980). The rules regarding testimony of jurors in this regard have changed significantly since this comparison was made, however. Prior to 1983, jurors were permitted to testify as to any act or statement that occurred during deliberations with the exception of the actual mental processes of the jurors themselves. *See Flores v. Dosher*, 622 S.W.2d 573 (Tex. 1981); *Strange v. Treasure City*, 608 S.W.2d 604 (Tex. 1980). These principles were derived from rule 327 of the Texas Rules of Civil Procedure.[10] In 1983, the Texas Rules of Evidence

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[8]In this regard, the third party hearing examiner might be compared to a special commissioner appointed to serve in an eminent domain proceeding or an architect or engineer on a public construction project who by contract is designated to resolve disputes between the contractor and governmental entity. *See generally* Prop. Code § 21.014; *City of San Antonio v. McKenzie Const. Co.*, 150 S.W.2d 989 (Tex. 1940).

[9]This rule runs counter to the majority of jurisdictions in this country, which generally hold that arbitrators may not impeach their award by affidavit or direct testimony. Annotation, *Admissibility of Affidavit or Testimony of Arbitrator to Impeach or Explain Award*, 80 A.L.R. 3d 155 (1977); *see, e.g., Fukaya Trading Co., S.A. v. Eastern Marine Corp.*, 322 F.Supp. 278 (D.D.C. 1971).

[10]Rule 327 governs motions for new trial based on misconduct of the jury. A motion for new trial, supported by affidavit, under this rule may be based on the following:

(1) misconduct of the jury or the officer in charge of them;

(2) any communication made to the jury; or

were codified, and in 1984 the Texas Supreme Court amended rule 327. Rule 606 of the rules of evidence in civil cases and amended rule 327 now generally prohibit testimony by jurors about matters or statements occurring during the course of jury deliberations.[11] *Robinson Electric Supply Co. v. Cadillac Cable Corp.*, 706 S.W.2d 130 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.). These rules align Texas "with the majority of jurisdictions in subordinating the desire to rectify verdicts arrived at through irregular means to the desire to protect jurors and the finality of their judgments." GOODE, WELLBORN, AND SHARLOT, *TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL* § 606.2 at 389 (Texas Practice 1988) (footnotes omitted).

That said, it must be conceded that no statute or rule of court specifically addresses the subject matter of your second question. Further, our research indicates that no Texas court has reconsidered in a reported decision the rule announced in 1915 by the court of civil appeals in *Holcomb v. Blankenship*. That decision constitutes the only guiding Texas case law on the question. Nevertheless, we believe that it in light of the change in the rules governing testimony by jurors it might be argued that an arbitrator or third party hearing examiner may not be compelled to testify as to any matter relating to an arbitration or a proceeding under section 143.057.

With regard to appeals of awards under section 143.057, we note that the section itself lends guidance as to the proper subject matter of a hearing examiner's testimony. Since an appeal can be brought only on the grounds that (1) the

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(footnote continued)

> (3) an erroneous or incorrect answer given by a juror on voir dire examination.

[11]Specifically, both rules provide that a

> juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or to dissent from the verdict concerning his mental processes in connection therewith . . . .

Tex. R. Civ. P. 327(b); Tex. R. Civ. Evid. 606(b). A juror's testimony or affidavit may be considered, however, if it is shown that "outside influence was improperly brought to bear upon any juror." *Id.*; *Robinson Electric Supply Co. v. Cadillac Cable Corp.*, 706 S.W.2d 130 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.).

examiner was without jurisdiction or exceeded his jurisdiction or (2) that the order was procured by fraud, collusion, or other unlawful means, it follows that a hearing examiner's testimony should likewise be limited. But it does not follow that the testimony of the hearing examiner will always be required to carry out the right of appeal granted by subsection (j). For instance, an allegation that a hearing examiner was without jurisdiction would not involve an inquiry into the award itself. Also, whether the hearing examiner exceeded jurisdiction should, it would seem, be evident from the face of the award since the jurisdiction of the examiner is defined by chapter 143 and, if applicable, local civil service rules. Neither does the second ground for appeal automatically require the testimony of the hearing examiner because subsection (j) does not require that the fraud, collusion, or other illegality complained of involve the conduct of the hearing examiner.

Furthermore, the clear public policy, as reflected in evidence rule 606 and civil procedure rule 327, is to insulate most of the deliberation process from scrutiny, to encourage full and frank discussion during deliberations, and to reduce juror harassment. *See Robinson Elec. Supply Co.*, 706 S.W.2d at 132. It may be argued that similar policy considerations should govern the testimony of arbitrators and third party hearing examiners. Indeed, such a determination would draw Texas closer to the majority of jurisdictions in this country. *See supra* note 8. More importantly, it would help preserve for employees the right to appeal personnel matters to an independent arbiter, an option the legislature, by the enactment of section 143.057, has clearly endorsed.

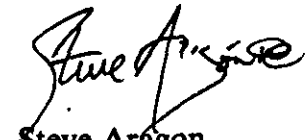
In the end, however, this office cannot predict with certainty the courts' resolution of this issue. Since the limits to which a hearing examiner can be called to testify can only be determined by the courts, we are unable to further advise you in this regard.

SUMMARY

A third party hearing examiner appointed pursuant to section 143.057 of the Local Government Code is not a necessary or indispensable defendant to an appeal of the hearing examiner's award, but may be joined in a proper case as a defendant. Texas case law to date indicates that a third party hearing examiner may be called to testify in such an appeal.

The scope of any such testimony cannot be determined in an opinion of the attorney general.

Yours very truly,



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