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Statute Providing That the Standard by Which Firemen's Wages Are to Be Determined Is by Reference to Private Sector Employment Excludes Wages Paid in Public Sector Employment.

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MUNICIPAL CORPORATIONS—Public Employee Bargaining—Statute Providing That the Standard by Which Firemen's Wages Are To Be Determined Is by Reference to Private Sector Employment Excludes Wages Paid in Public Sector Employment

City of San Antonio v. Fire Fighters Local 624,
539 S.W.2d 931 (Tex. Civ. App.—El Paso 1976, no writ).

The City of San Antonio elected to be covered by the Fire and Police Employee Relations Act,[1] which provides for collective bargaining between a political jurisdiction and the firefighters and policemen it employs.[2] Section 4 of the Act provides that the compensation of the firefighters is to be comparable to that of similar private sector employment.[3] Fire Fighters Local 624 requested, *inter alia,* a wage increase. Since the parties were unable to reach an agreement, the dispute was submitted to the district court. Evidence of prevailing private sector wages in similar employment was introduced which indicated a need for a substantial wage increase. Pending the decision of the case, the City of San Antonio granted, by ordinance, an across-the-board five percent wage increase to all of its employees, including firefighters. The trial court found that the evidence, considered independently of the ordinance, was insufficient to establish a violation by the city of section 4 of the Act. Nevertheless, supported by the ordinance, the evidence established a violation of the Act and showed the firefighters to be entitled to a wage increase. In addition, the court ordered the City to include firefighters in future across-the-board pay increases. Both sides appealed to the El Paso Court of Civil Appeals. Held - *Affirmed in part, reversed in part.* The statute specifically provides that the standard by which firemen's wages are to be determined is by reference to private sector employment. It excludes wages paid in public sector employment, including other city employees.[4]

In response to a strike by Houston city employees, the Texas Legislature, in 1947, passed the Manford Act.[5] That Act provided that strikes by public employees were illegal and that anyone participating in such strikes would lose reemployment, civil service, and other specified rights.[6] In addition, sections 1 and 2 expressly prohibited public employee union recognition

1. TEX. REV. CIV. STAT. ANN. art. 5154c-1 (Supp. 1976-1977).

2. *Id.* § 5(a).

3. *Id.* § 4.

4. City of San Antonio v. Fire Fighters Local 624, 539 S.W.2d 931, 935 (Tex. Civ. App.—El Paso 1976, no writ).

5. TEX. REV. CIV. STAT. ANN. art. 5154c (1971); I. HELBURN, PUBLIC EMPLOYER-EMPLOYEE RELATIONS IN TEXAS 10 (1971); *see* Morris, *Everything You Always Wanted to Know About Public Employee Bargaining in Texas—But Were Afraid to Ask,* 13 HOUS. L. REV. 291, 293 (1976).

6. TEX. REV. CIV. STAT. ANN. art. 5154c, § 3 (1971).

and collective bargaining.[7] Protection was afforded, however, to the right of membership in the employee organization,[8] and under section 6 employee organizations not claiming a right to strike were allowed to present grievances.[9] This law has been described as unique in its prohibition of collective bargaining and adoption of the "most inclusive and severe strike ban of any state."[10] Until recently there was little deviation from this legislative hostility toward public employee unionization.[11]

The passage of the Fire and Police Employee Relations Act[12] in 1973 was the most significant departure from this policy, since it legitimated collective bargaining for fire and police employees.[13] It applies, however, only to political subdivisions that elect to adopt its provisions.[14] The City of San Antonio adopted the Act in July 1974.

Section 5(a) of the Act grants fire and police employees the right to organize and bargain collectively with their public employer.[15] Because such services are essential to the functioning of a city, section 17 prohibits

7. *Id.* §§ 1, 2.

8. *Id.* § 4. The right of nonmembership was also protected. *Id.* § 4.

9. *Id.* § 6. The scope of article 5154c was defined by several cases. In Beverly v. City of Dallas, 292 S.W.2d 172 (Tex. Civ. App.—El Paso 1956, writ ref'd n.r.e.), the court invalidated a city ordinance which made it illegal to be a member of a union, holding that public employees had the right to join a labor organization of their choice. *Id.* at 176. In Dallas Independent School Dist. v. State, County & Mun. Employees Local 1442, 330 S.W.2d 702, 707 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.), the right of a union to present grievances on behalf of public employees was affirmed. The Supreme Court of Texas in Lunsford v. City of Bryan, 156 Tex. 520, 297 S.W.2d 115, 117 (1957) expanded the meaning of membership in a union under § 4 to include acts leading to a membership.

10. I. HELBURN, PUBLIC EMPLOYER-EMPLOYEE RELATIONS IN TEXAS 10 (1971), *quoting* Newland, *Public Employee Strikes: Administrative Change and Political Protest,* 14 PUB. AFFAIRS COM. 2 (1968); *see* Comment, *Public Employee Bargaining Rights—A Proposal for Texas,* 48 TEXAS L. REV. 625, 627 (1970).

11. In 1967, however, the legislature allowed check-off of union dues for consenting employees in municipalities with populations of 10,000 or more. TEX. REV. CIV. STAT. ANN. art. 6252-3a (1970). A similar bill for counties with a population of 20,000 or more was passed in 1969. *Id.* art. 2372h-4.

12. *Id.* art. 5154c-1 (Supp. 1976-1977). For a discussion of the development of public employee rights *see* H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES 69-82 (1971); Shaw, *The Development of State and Federal Laws,* in PUBLIC WORKERS AND PUBLIC UNIONS 20-36 (1972).

13. TEX. REV. CIV. STAT. ANN. art. 5154c-1, § 5(a) (Supp. 1976-1977).

14. *Id.* § 5. A political subdivision must file a petition signed by five % or 20,000 of the qualified voters, whichever is less. Elections are then held within 60 days after the petition has been filed. When the majority votes for adoption, the Act goes into effect within 30 days after the beginning of the first fiscal year. A procedure is also established for the repeal of the Act. *Id.* § 5. This section is unique since no other state makes public employee bargaining contingent on local elections. Morris, *Everything You Always Wanted to Know About Public Employee Bargaining in Texas—But Were Afraid to Ask,* 13 HOUS. L. REV. 291, 295 n.22 (1976).

15. TEX. REV. CIV. STAT. ANN. art. 5154c-1, § 5(a) (Supp. 1976-1977).

strikes or work slowdowns.[16] As an alternative to strikes or slowdowns, the Act provides that compensation should be comparable to the private sector employment.[17] Such comparability is to be based on similarity of skill, ability, training, and conditions under which the jobs are performed, but similarity of the entire job is not required.[18] When an impasse is reached in the collective bargaining process, either side may request arbitration.[19] Although the policy of the Act favors arbitration,[20] the public employer has the right to refuse arbitration.[21] In such a case the matter is submitted to the district court, which has the power to enforce the prevailing wages and working conditions as required by section 4.[22] Section 13(a) provides further guidelines for the arbitration board to consider in reaching its decision.[23]

City of San Antonio v. Fire Fighters Local 624[24] involved the interpretation of the Fire and Police Employee Relations Act. The initial negotiations between the parties produced an agreement on twenty-four of twenty-six issues. Once arbitration was requested and refused, the union submitted the issue of wages to the district court pursuant to section 16 of the Act.

The primary disagreement between the parties was the applicability of section 13 of the Act.[25] Section 13(a) requires the arbitrators to consider and base their decision on such factors as hazards of employment, physical and educational qualifications, job training, and skills.[26] While it is clear that the requirements of section 4 are applicable to all disputes brought before the arbitration board or the district court, it is uncertain whether the standards as set out in section 13(a) are the ones to be considered by

16. *Id.* § 17.

17. *Id.* § 4.

18. *Id.* § 4.

19. *Id.* § 9.

20. *Id.* § 10(b).

21. *Id.* § 16.

22. *Id.* § 16. The prevailing-wage-and-conditions guideline was necessary because an open-ended determination of wages and working conditions would impose a legislative function upon the court. Brief for Appellee at 6, City of San Antonio v. Fire Fighters Local 624, 539 S.W.2d 931 (Tex. Civ. App.—El Paso 1976); Morris, *Everything You Always Wanted to Know About Public Employee Bargaining in Texas—But Were Afraid to Ask*, 13 HOUS. L. REV. 291, 295 (1976). Statutory provisions for arbitration of labor disputes in other jurisdictions have been challenged as an invalid delegation of legislative authority. *See, e.g.*, City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973); Harney v. Russo, 255 A.2d 560 (Pa. 1969); City of Warwick v. Warwick Regular Firemen's Ass'n, 256 A.2d 206 (R.I. 1969). *See generally* Annot., 68 A.L.R.3d 885 (1976).

23. TEX. REV. CIV. STAT. ANN. art. 5154c-1, § 13(a) (Supp. 1976-1977).

24. 539 S.W.2d 931 (Tex. Civ. App.—El Paso 1976, no writ).

25. Brief for Appellee at 6-9, City of San Antonio v. Fire Fighters Local 624, 539 S.W.2d 931 (Tex. Civ. App.—El Paso 1976, no writ); Brief for Appellant at 5-6, City of San Antonio v. Fire Fighters Local 624, 539 S.W.2d 931 (Tex. Civ. App.—El Paso 1976, no writ).

26. TEX. REV. CIV. STAT. ANN. art. 5154c-1, § 13(a) (Supp. 1976-1977).

the district court. The court in *Fire Fighters Local 624* did not confront this issue. It merely held that the firefighters presented insufficient evidence to warrant recovery.[27]

The firefighters' interpretation of the statute seems justifiable. It is provided in section 16 that the district court shall have the power to enforce the requirements of section 4.[28] Section 13(a) sets out the same requirements for the arbitrators while specifying additional factors to be considered.[29] It appears, therefore, that the section 13(a) requirements prescribe a standard to be employed by both the arbitrators and the district court when determining comparable wage rates. It would be unreasonable to require the arbitrators and the court to arrive at the same result but to do so on the basis of different criteria.[30] In addition, section 10(b) states that the policy of the Act is to favor and encourage arbitration.[31] As argued by appellant, "the imposition of a standard which makes it more difficult for the Firefighters to proceed before the Court would discourage rather than encourage the city to seek arbitration. Such a construction would, therefore, be contrary to stated legislative policy."[32]

Moreover, even if such proposed construction of the Act were utilized by the court in determining wages, the basic problem would remain. There is a certain attractive simplicity to the idea that wage rates in a given public bargaining unit should be adjusted to the level of wage rates in comparable private sector employment. In economic equilibrium the same wages are paid in a market for a given labor service.[33] The slogan "equal pay for equal work" is universally accepted.[34] Nevertheless, as demonstrated by *Fire Fighters Local 624,* the illusion of simplicity vanishes when one is confronted with the meaning and requirement of proof of a "comparable wage." Clearly, there is no private sector employment comparable to that

27. City of San Antonio v. Fire Fighters Local 624, 539 S.W.2d 931, 934 (Tex. Civ. App.—El Paso 1976, no writ).

28. TEX. REV. CIV. STAT. ANN. art. 5154c-1, § 16 (Supp. 1976-1977).

29. *Id.* § 13(a).

30. Brief for Appellee at 6-14, City of San Antonio v. Fire Fighters Local 624, 539 S.W.2d 931 (Tex. Civ. App.—El Paso 1976, no writ).

31. TEX. REV. CIV. STAT. ANN. art. 5154c-1, § 10(b) (Supp. 1976-1977).

32. Brief for Appellee at 12, City of San Antonio v. Fire Fighters Local 624, 539 S.W.2d 931 (Tex. Civ. App.—El Paso 1976, no writ).

33. J. DUNLOP & J. HEALY, COLLECTIVE BARGAINING 86 (rev. ed. 1969).

34. *Id.* Congress declared that "[f]ederal pay rates be comparable with private enterprise pay rates for the same levels of work." Federal Pay Comparability Act of 1970, 5 U.S.C. § 5301(a)(3) (1970); *see* J. BACKMAN, WAGE DETERMINATION 18-66 (1959); L. REYNOLDS, LABOR ECONOMICS AND LABOR RELATIONS 443 (6th ed. 1974); M. WORTMAN & C. RANDLE, COLLECTIVE BARGAINING 315 (2d ed. 1966). For studies indicating that wages in public sector employment exceed those paid in comparable private sector employment, see Fogel & Lewin, *Wage Determination in the Public Sector,* 27 INDUS. & LAB. REL. REV. 410, 413 (1973); Smith, *Pay Differentials Between Federal Government and Private Sector Workers,* 29 INDUS. & LAB. REL. REV. 179, 196 (1975).

of a San Antonio firefighter.[35] It was up to the firefighters to build a composite firefighter from portions of private sector jobs that require the "same or similar skills, ability and training and which may be performed under same or similar conditions."[36] Even if the additional guidelines provided by section 13(a) are considered, it is virtually impossible to isolate the specified factors, compare them to similar portions of private sector employment, and attach a monetary value to them. The issue of comparability is complicated by the fact that job classification varies among different employers.[37] It is further impaired by differences in nonwage benefits, variations in the method of wage payments, regularity of employment, conditions of employment, and geographical differences.[38] It is very unlikely that absolute answers to these problems, in principle or in measurement, can be found.[39]

City of Beaumont v. Fire Fighters Local 399[40] is the only other recorded dispute in Texas that has dealt with the Act. In that case the dispute over wages and other issues between the city and the firefighters was submitted to the tripartite arbitration board. The board was unable to make findings on most issues in the absence of precise evidence of private sector wages and practices[41] and experienced "extreme difficulty because of the limited criteria [it was] requested to follow."[42] Both sides acknowledged that there is no job sector truly comparable to a municipal firefighter.[43] The

35. City of Beaumont v. Fire Fighters Local 399, 65 Lab. Arb. 1049, 1051 (1975) (few private sector jobs are comparable to a municipal firefighter's); Brief for Appellee at 5, City of San Antonio v. Fire Fighters Local 624, 539 S.W.2d 931 (Tex. Civ. App.—El Paso 1976, no writ); *see* J. BACKMAN, WAGE DETERMINATION 29-32 (1959).

36. TEX. REV. CIV. STAT. ANN. art. 5154c-1, § 4 (Supp. 1976-1977).

37. J. BACKMAN, WAGE DETERMINATION 29-32 (1959); J. DUNLOP & J. HEALY, COLLECTIVE BARGAINING 86-87 (rev. ed. 1955). For a discussion of distinctions between private and public sector employment that must be considered in determining wages, see M. MOSKOW, J. LOEWENBERG, & E. KOZIARA, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 14-18 (1970); Kleinsorge & Harter, *Criteria for Impasse Resolution in Public Employee Labor Disputes: An Economic Analysis*, 51 ORE. L. REV. 202, 203-06 (1971).

38. J. BACKMAN, WAGE DETERMINATION 32-41 (1959); J. DUNLOP & J. HEALY, COLLECTIVE BARGAINING 87-90 (rev. ed. 1955); M. WORTMAN & C. RANDLE, COLLECTIVE BARGAINING 315-16 (2d ed. 1966); *see* Bloch & Karson, *Comparison Data in Public Sector Bargaining*, 50 J. URB. L. 717, 721 (1973); Fogel & Lewin, *Wage Determination in the Public Sector*, 27 INDUS. & LAB. REL. REV. 410 (1973).

39. J. BACKMAN, WAGE DETERMINATION 29-30 n.27 (1959); J. DUNLOP & J. HEALY, COLLECTIVE BARGAINING 90 (rev. ed. 1955); *see* Ross, *The Arbitration of Public Employee Wage Disputes*, 23 INDUS. & LAB. REL. REV. 3, 4 (1969).

40. 65 Lab. Arb. 1049 (1975).

41. *Id.* at 1051. For a discussion of the case and a view that the arbitrators failed to follow statutory standards in rendering an award even when no evidence was presented, see Morris, *Everything You Always Wanted to Know About Public Employee Bargaining in Texas—But Were Afraid to Ask*, 13 HOUS. L. REV. 291, 308 (1976).

42. City of Beaumont v. Fire Fighters Local 399, 65 Lab. Arb. 1049, 1051 (1975).

43. *Id.* at 1051.

board went so far as to recommend that the statute be amended to allow consideration of other factors.[44]

Public employees should benefit from general economic growth as much as employees in private sector jobs. Unless definite standards for decision making are developed, however, arbitration will fail as a method of resolving public employee wage disputes.[45] Other states have tried to implement statutory standards by which an arbitrator might reach an equitable decision.[46] The specificity of such standards varies.[47] In Michigan, for example, the arbitration panel is required to consider and base its decision on several factors, including the government's ability to pay, the consumer price index, comparison of wages and conditions in similar public and private employment, and fringe benefits.[48] In Oklahoma similar standards are established, specifically requiring comparison of wage rates of fire and police employees with that of their counterparts in towns of comparable size in and outside the state of Oklahoma.[49] In Texas, however, third parties are guided only by the requirement of section 4—compensation based on comparable private sector employment, as defined by section 13(a).[50] It is clear that statutes such as those in Michigan and Oklahoma provide for more specific and more measurable standards.

The Fire and Police Employees Relations Act has not been in force long enough for its practical effects to be thoroughly evaluated. In *Fire Fighters Local 624* and *Fire Fighters Local 339,* the only cases that have dealt with the Act; the firefighters failed in their search for a "comparable private sector employment." The experience so far indicates that the "comparable

44. *Id.* at 1051. Proposed factors included: (1) comparable public employment; (2) conditions in comparable cities not in the same area; and (3) different kinds of jobs involving a comparable degree of difficulty, training, and skills. *Id.* at 1051.

45. Ross, *The Arbitration of Public Employee Wage Disputes,* 23 INDUS. & LAB. REL. REV. 3, 4 (1969); *see* Hines, *Mandatory Contract Arbitration—Is it a Viable Process?,* 25 INDUS. & LAB. REL. REV. 533, 541 (1972) (a study of arbitration methods in several Canadian hospitals).

46. The states that have established standards include Michigan, Nebraska, Nevada, Oklahoma, Rhode Island, and Wisconsin. *See* Howlett, *Contract Negotiation Arbitration in the Public Sector,* 42 U. CIN. L. REV. 47, 68 n.87 (1973).

47. *Compare* NEB. REV. STAT. § 48-818 (Supp. 1969), *with* R.I. GEN. LAWS § 28, ch. 9.2 (1969), *and* WIS. STAT. ANN. § 111.70(4) (West 1974). *See generally* Bloch, *Wage Controls and Interest Arbitration in the Public Sector,* 52 J. URB. L. 203 (1974); Howcett, *Contract Negotiation: Arbitration in the Public Sector,* 42 U. CIN. L. REV. 47 (1973).

48. MICH. COMP. LAWS § 423.239 (MICH. STAT. ANN. § 17.455(39) (Callaghan 1975)).

49. OKLA. STAT. tit. 11, § 548.10 (Supp. 1976-1977).

50. TEX. REV. CIV. STAT. ANN. art. 5154c-1, §§ 4, 13 (Supp. 1976-1977). A similar standard is used in Los Angeles. The provisions require city employees' wages to be determined according to comparable private sector employment wages. However, "[i]t is doubtful that many communities would agree to the kind of open-ended commitment found in the Los Angeles charter. It is more likely that comparisons will be made between various government units within a state." Kleinsorge & Harter, *Criteria for Impasse Resolution in Public Employee Labor Disputes: An Economic Analysis,* 51 ORE. L. REV. 203, 210 (1971).

wage" concept as required in section 4 and defined in section 13(a) is not working. The requirements are too confining, and the formula is not precise enough in its measurements to satisfy the courts and the arbitrators.[51]

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51. Morris, *Everything You Always Wanted to Know About Public Employee Bargaining In Texas—But Were Afraid to Ask*, 13 HOUS. L. REV. 291, 309 (1976).