Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-17-00450-CV

CITY OF SAN ANTONIO, Texas, Fire Chief Charles Hood, In his Official Capacity, and City Manager Sheryl Sculley, In her Official Capacity,
Appellants

v.

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, Local 624,
Appellee

From the 45th Judicial District Court, Bexar County, Texas
Trial Court No. 2014-CI-13252
Honorable Angelica Jimenez, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: August 29, 2018

AFFIRMED IN PART AND REVERSED AND RENDERED IN PART

The City of San Antonio, its Fire Chief Charles Hood, and its City Manager Sheryl Sculley, appeal the trial court's judgment declaring they violated Chapter 143 of the Texas Government Code by creating a new non-classified position in the Fire Department and filling it with a non-civil-service employee, enjoining them from maintaining the non-classified position, and awarding the plaintiff International Association of Fire Fighters, Local 624 attorney's fees against the Fire Chief and City Manager. We hold the City has sovereign immunity from the claims made in this suit, and we therefore reverse the judgment against the City and render a judgment of dismissal.

We further hold the new position of Assistant to the Director of the Fire Department is a "fire fighter" position that must be classified, and we therefore affirm the judgment for declaratory and injunctive relief against the Fire Chief and City Manager in their official capacities. Lastly, we hold the officials are not immune from the award of attorney's fees in an *ultra vires* action under the Uniform Declaratory Judgment Act, and therefore affirm the award.

BACKGROUND

The City of San Antonio has adopted the Fire and Police Civil Service Act, Chapter 143 of the Texas Local Government Code. The purpose of the Act is to "secure efficient fire and police departments composed of capable personnel who are free from political influence and who have permanent employment tenure as public servants." TEX. LOCAL GOV'T CODE ANN. § 143.001(a) (West 2008). To that end, Chapter 143 requires that "fire fighter" positions in the Fire Department must be classified and filled by certified, sworn fire fighters selected by competitive examination. *See id.* §§ 143.003(4); 143.021; TEX. GOV'T CODE ANN. §§ 419.021(3)(C), 419.032, 419.0322(a)(1) (West 2012).[1]

In late 2013, San Antonio Fire Chief, Charles Hood, asked the City to create a new civilian (non-civil-service), non-classified, position of Assistant to the Director of the Fire Department. The City Manager's office and the City Human Resources Department approved the request and posted the position. The position was funded in part by eliminating a civilian, non-classified position in the Fire Department. No classified positions were eliminated.

[1] The collective bargaining agreement with Local 624 International Association of Fire Fighters authorizes an exception to this rule by authorizing the Fire Chief to fill three Deputy Chief positions and six Assistant Chief positions by appointment. However, the people appointed to those senior staff positions must be classified, sworn members of the San Antonio Fire Department and must occupy the rank of Assistant Chief, District Chief, or Captain. The agreement provides that no additional appointed positions shall be created.

The job was posted for one week over the Christmas holidays, from December 20 – 27, 2013. The posting made clear the position is "unclassified" and would not be filled under Chapter 143, the Civil Service Act. The applicants were screened and then some were interviewed by a panel of persons selected by the Fire Chief and the City's Human Resources Department. Chief Hood participated in the interviews and recommended Noel Horan to fill the position. Mr. Horan was hired. He had worked for the San Antonio Fire Department for thirty-four years and was a Deputy Chief when he retired in December 2013. Mr. Horan began work in the civilian position of Assistant to the Director in January 2014.

The International Association of Fire Fighters, Local 624 (the "Union") is the recognized and exclusive bargaining agent for the full-time permanent civil service employees of the San Antonio Fire Department. In August 2014, the Union sued the City and Chief Hood and City Manager Sculley in their official capacities, alleging they acted without lawful authority by creating a classified position and staffing it with a civilian, in violation of Chapter 143. The petition alleges the Assistant to the Director position requires substantial knowledge of fire fighting and work in the Department and that the Assistant to the Director performs fire administration duties that were previously performed by classified personnel. The petition alleges that Horan, as Assistant to Chief Hood, "works alongside the classified deputy chiefs in the Fire Chief's office, and essentially functions as a fourth deputy chief, albeit in a civilian capacity." The petition asserts that the position is required to be classified and filled in compliance with Chapter 143. The Union sought a declaratory judgment that (1) the position of Assistant to the Director is a fire fighter position within the scope of Chapter 143 that must be classified and (2) Chief Hood and City Manager Sculley, in their official capacities, acted *ultra vires* by creating and filling the Assistant to the Director position in violation of sections 143.003 and 143.021 and violated the

corresponding rights of Union members. The Union further sought prospective injunctive relief and recovery of its attorney's fees under the Declaratory Judgments Act.

The parties filed competing motions for summary judgment on the issue of whether the Assistant to the Director position must be classified pursuant to Chapter 143. The trial court granted the Union's motion for summary judgment and denied the City's motion. The court declared the Assistant to the Director position is a "fire fighter" position required to be classified by Chapter 143 and that by creating and filling the position with a civilian, the defendants violated their legal duties and obligations under the Act and the Union members' corresponding rights. The court entered a permanent injunction prohibiting defendants from continuing to maintain the non-classified position and prohibiting them from "continuing to employ any employee who was not hired in substantial compliance with the Civil Service Act to perform the duties of any 'fire fighter' position that is required to be classified under the Civil Service Act." The court subsequently granted the Union's application for an award of attorney's fees against Chief Hood and City Manager Sculley in their official capacities and denied their claims of immunity from the award.

This appeal followed, in which the following issues are raised: (1) whether the City should be dismissed from the suit on the ground of governmental immunity; (2) whether the Fire Chief and City Manager committed *ultra vires* acts in violation of Chapter 143 by creating the non-classified Assistant to the Director position and staffing it with a non-civil-service, civilian employee; (3) whether granting judgment to the Union was error because the Union failed to establish that the collective bargaining agreement did not authorize the defendants' actions; and (4) whether the Fire Chief and City Manager in their official capacities are immune from the award of attorney's fees under the Uniform Declaratory Judgments Act (UDJA).

GOVERNMENTAL IMMUNITY OF THE CITY OF SAN ANTONIO

The trial court's judgment granting declaratory and injunctive relief was rendered against the City as well as against the public officers in their official capacities. The City asserts the judgment against it must be reversed because it has governmental immunity from this suit.

Chapter 143 does not provide a waiver of immunity from the claims made in this suit. The UDJA waives the immunity of a city if the plaintiff challenges the validity of an ordinance. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009). But it does not waive the city's immunity from a claim that it violated the law. *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011) (per curiam). A suit to require government officials to comply with the law "cannot be brought against the state, which retains immunity, but must be brought against the state actors in their official capacity." *Heinrich*, 284 S.W.3d at 373. We agree the City is immune from this suit, and we therefore reverse the judgment against the City of San Antonio and render judgment dismissing the Union's claims against the City for lack of jurisdiction. *See id.* at 379-80. We now turn to the Union's *ultra vires* claims against the Fire Chief and City Manager.

CHAPTER 143 – MUST THE POSITION BE CLASSIFIED?

The central issue in this appeal is whether the Assistant to the Director is a "fire fighter" within the meaning of Chapter 143 such that the position must be classified. The parties filed competing traditional motions for summary judgment on this question. We review summary judgments de novo. *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 583 (Tex. 2015). "On cross-motions for summary judgment, each party bears the burden of establishing that it is entitled to judgment as a matter of law." *City of Richardson v. Oncor Elec. Delivery Co. LLC*, 539 S.W.3d 252, 259 (Tex. 2018). When the trial court grants one motion and denies the other, we consider the summary judgment evidence presented by both sides, determine all questions presented, and render the judgment the trial court should have rendered. *Sw. Bell Tel.*, 459 S.W.3d at 583.

Pursuant to Chapter 143, all of the City's "fire fighters" must be classified. *See* TEX. LOC. GOV'T CODE ANN. § 143.021(a). The Fire Department must fill existing and newly created positions and classifications only from an eligibility list that results from competitive examination. *Id.* § 143.021(c). In San Antonio, only the Chief and the nine Deputy and Assistant Chief positions (which must be filled from the classified ranks) are excepted from this requirement. *See id.* § 143.021(b); *see also supra* n.1. Otherwise, each "fire fighter" should be a classified employee, entitled to civil service protection. *Id.* If the City creates an unclassified position that should have been classified, the courts will deem the position to have been properly created, treat the position as classified, and require it to be properly filled. *Houston Prof'l Fire Fighters' Ass'n v. City of Houston*, 177 S.W.3d 95, 101 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *see Lee v. Downey*, 842 S.W.2d 646, 649 (Tex. 1992) (orig. proceeding).

"Fire fighter" is defined in Chapter 143 as follows:

> (4) "Fire fighter" means a member of a fire department who was appointed in substantial compliance with this chapter or who is entitled to civil service status under Section 143.005 or 143.084. The term:
>
> > (A) applies only to an employee of a fire department whose position requires substantial knowledge of fire fighting and who has met the requirements for certification by the Texas Commission on Fire Protection under Chapter 419, Government Code, including an employee who performs:
> >
> > > (i) fire suppression;
> > > (ii) fire prevention;
> > > (iii) fire training;
> > > (iv) fire safety education;
> > > (v) fire maintenance;
> > > (vi) fire communications;
> > > (vii) fire medical emergency technology;
> > > (viii) fire photography;
> > > (ix) fire administration; or
> > > (x) fire arson investigation; and
> >
> > (B) does not apply to a secretary, clerk, budget analyst, custodial engineer, or other administrative employee.

TEX. LOC. GOV'T CODE ANN. § 143.003(4). This section has been construed to mean that a member of a fire department is a "fire fighter" if their position requires substantial knowledge of fire fighting and of work in the fire department. *See Houston Prof'l Fire Fighters Ass'n*, 177 S.W.3d at 101; *Int'l Ass'n of Firefighters Local 624 v. City of San Antonio*, 822 S.W.2d 122, 129 (Tex. App.—San Antonio 1991, writ denied) (op. on reh'g); TEX. ATT'Y GEN. OP. GA-0041, 2003 WL 1384468, at *4 (2003); *see also Lee v. City of Houston*, 807 S.W.2d 290, 294 (Tex. 1991) (construing Chapter 143 definition of "police officer"). The functions listed in section 143.003(4)(A) (i) – (x) are considered to require substantial knowledge of fire fighting and of work in the fire department as a matter of law. TEX. ATT'Y GEN. OP. GA-0041, 2003 WL 1384468, at *4. Thus, if a member of the Fire Department performs any of the functions listed in 143.003(4)(A) (i) – (x) or holds a position that requires substantial knowledge of fire fighting and of work in the Fire Department, then the member falls within the statutory definition of a "fire fighter," the position must be classified, and the fire fighter is entitled to civil service protection. *Id*. On the other hand, a member of the department whose position does not require substantial knowledge of fire fighting and of work in the department and whose job is purely administrative, such as a clerk, secretary, budget analyst, or custodian, is not a "fire fighter" and the City is not required to classify the position. *See id.*; TEX. Loc. GOV'T CODE ANN. § 143.003(4)(B).

The defendants argue the Union failed to meet its summary judgment burden to establish the Assistant to the Director performs any of the functions listed in section 143.003(4)(A). They argue the evidence instead establishes that the Assistant to the Director oversees only civilian employees of the department, performs purely administrative duties, does not perform any of the duties listed in section 143.003(4)(A), and that the job could be performed by a person who did not have any knowledge of fire fighting and work in the San Antonio Fire Department. They contend the position therefore comes within section 143.003(4)(B), is administrative, and does not

have to be classified. The Union asserts the undisputed evidence establishes the Assistant to the Director is a "fire fighter" under both tests—the position requires substantial knowledge of fire fighting and work in the fire department, and the job functions include critical "fire administration" duties that are not merely "administrative," such as those performed by a clerk or a secretary. The summary judgment evidence consisted of the depositions of Chief Hood and Neal Horan, Horan's affidavit, the collective bargaining agreement, and some documents relating to the posting and filling of the Assistant to the Director position. Neither party contends the job duties are disputed. When the job duties are undisputed, whether the position must be classified is a question of law. *Lee*, 807 S.W.2d at 294.

Substantial knowledge of fire fighting and of work in the fire department

The defendants contend the summary judgment evidence establishes the Assistant to the Director position does not require substantial knowledge of fire fighting work or of work in the San Antonio Fire Department. They rely primarily on the job posting, which summarizes the job as being "responsible for supervising, coordinating, and overseeing administrative support operations for the Fire Chief's Office." The mandatory qualifications listed in the posting include only a bachelor's degree and supervisory experience in a governmental agency. Knowledge of fire fighting is not listed as a qualification and "[k]nowledge of the Fire Department" is listed only as a preferred qualification. Defendants also rely on Chief Hood's deposition testimony that someone who had never worked in the San Antonio Fire Department and who had never been a fire fighter could be effective in the job.

The Union argues that notwithstanding the contents of job posting prepared by City staff, Chief Hood acknowledged that knowledge of both fire fighting and work in the Fire Department are necessary to effectively perform the Assistant to the Director job. In his memorandum to the City's Human Resource Director, requesting the job be created and posted, Chief Hood, stated:

> The position will require someone with in-depth knowledge of the department in order to effectively coordinate with staff to resolve complex issues in a thorough and timely manner. Indeed, the Assistant to the Director position is critical to me and the department.

The Chief was asked in his deposition whether someone who had never been a fire fighter could perform the job. He testified that such a person could be effective, but only after the person acquired knowledge of the fire service and of work in the department. He testified that in his review of the applicants, he thought "in-depth knowledge of the fire service was critical." He further testified that "having a fire service background" was "very important" and that the position requires "a lot of knowledge of work in the San Antonio Fire Department." A person without knowledge of work in the San Antonio Fire Department or who had not been a fire fighter would "have to acquire" the knowledge and "get … up to speed" in order to be effective. Horan confirmed in his deposition that his duties require that he have substantial knowledge of work in the fire department. This evidence conclusively establishes that the Assistant to the Director position requires substantial knowledge of fire fighting and of work in the fire department. Pursuant to the caselaw construing section 143.003(4), the Assistant to the Director position is therefore a "fire fighter" position that must be classified. *See Hous. Prof'l Fire Fighters Ass'n*, 177 S.W.3d at 101; *Int'l Ass'n of Firefighters Local 624*, 822 S.W.2d at 129; TEX. ATT'Y GEN. OP. GA-0041, 2003 WL 1384468, at *4 (2003); *see also Lee*, 807 S.W.2d at 294.

Fire administration or administrative employee

The defendants also argue the Union did not establish that the Assistant to the Director performs any of the "fire fighter" functions listed in section 143.003(4)(A), and that the evidence instead conclusively established Horan is an "administrative employee" who, pursuant to section 143.003(4)(B), is not a "fire fighter." The Union disagrees, contending the summary judgment evidence conclusively establishes that Horan performs "fire administration" duties and that he is

not simply an "administrative employee" akin to a "secretary, clerk, budget analyst, [or] custodial engineer." *See* TEX. LOC. GOV'T CODE ANN. § 143.003(4)(A)-(B).

The phrase "fire administration" in section 143.003(4)(A) is not defined anywhere in Chapter 143. Nor has it been defined or interpreted in the case law. The Union urges the court to interpret the phrase according to its ordinary meaning and refers to a dictionary definition of "administration" as being "the process or activity of running a business, organization, etc." *Administration*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010). It argues that people in management positions who assist the Chief in running the Department are performing "fire administration" functions. The defendants do not offer an alternative definition, and their arguments suggest an agreement in principle with the Union's proposed definition. However, they disagree with the Union's assertion that Horan is "a member of the Fire Department's administration," contending instead that Horan is only "a member of the Fire Chief's administrative staff" who "oversees administrative operations for the Fire Chief's office." They argue that being part of the Chief's administrative staff is not the same as being part of the Fire Department's administration and is therefore not properly considered "fire administration."

To determine whether Horan performs fire administration, we review all the summary judgment evidence. Initially, we address the defendants' contention that we must take as true the statement in Horan's affidavit that he does "not perform . . . fire administration" or any of the other functions listed in section 143.003(4)(A). The statement is conclusory and insufficient on its own to either establish a fact or raise a fact issue. *See Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *see also Nichols v. Lightle*, 153 S.W.3d 563, 570-71 (Tex. App.—Amarillo 2004, pet. denied) (affidavit that merely paraphrases statutory language with no supporting facts is conclusory). Instead, we review the factual assertions in the affidavit and in Horan's and Chief Hood's depositions about the functions Horan performs.

Chief Hood testified he requested the position be created as part of a reorganization of the Department. He testified that his intent and purpose was to take various purely administrative duties away from his Assistant and Deputy Chiefs and assign those duties to a new Assistant to the Director, who would also oversee the civilian administrative staff and help the Chief with the flow of paperwork and information in the Department and between the Department and other City departments. The evidence establishes that Horan handles a variety of administrative tasks, such as helping manage communications for the Chief by sending and responding to e-mails, drafting memos and letters, and responding to inquiries from state and local officials. He also schedules, sets the agenda for, and facilitates periodic meetings for the Chief. However, most of his functions are not clerical.

Horan has primary responsibility for and manages the benefits, payroll, and the risk management/workers compensation functions of the department, as they relate to both civilian and classified personnel. This includes administering the tuition reimbursement plan established in the collective bargaining agreement. Horan also is in charge of the fiscal department. He manages the accountants and budget staff and is responsible, on a department-wide basis, for developing and managing the Fire Department budget.

Horan has direct supervisory authority over seventy to eighty civilian employees in the personnel support, payroll, and fiscal areas of the Department. Originally, he directly supervised the administrative staff in the Chief's office, but by the time the depositions were taken, that function had been moved to one of the Deputy Chiefs. Horan does not directly supervise any classified employees, and does not impose discipline on the classified employees because he is not in their chain of command; however, he provides the administrative support needed to carry out the investigation and discipline of classified employees, and he is asked for and makes recommendations to the division heads on the appropriate discipline. When either a classified or

civilian member has legal trouble, Horan coordinates with the City's legal department, human resources department, or the Office of Municipal Integrity to make sure everything is handled timely and appropriately.

Horan is responsible for tracking and monitoring grievances filed by both civilian and classified employees and he is involved in developing substantive responses to grievances. And Horan is the person responsible for coordinating with the City attorney's office regarding litigation involving the Department.

Horan is the Department's liaison with other governmental units. He prepares weekly communications to the City Manager on critical issues in the Department and regularly deals with the City Manager's office to respond to requests for information and handle any issues that may arise. Horan is the liaison with the City Intergovernmental Relations Department regarding legislation that may affect the Fire Department. Until shortly before the deposition was given, Horan reviewed all proposed legislation and made recommendations on whether to support them. That function was recently transferred to a Deputy Chief.

Horan assists in formulating and implementing policies and procedures in the areas for which he is responsible. He also coordinates with staff "to establish schedules and methods for providing effective services." And, as part of the Department's Senior Staff[2], he is involved in strategic planning and makes recommendations to assist the Chief in strategic decision-making for the Department. Chief Hood testified Horan is "absolutely" involved in strategic planning and he provides "another perspective that has eyes on the organization as a whole."

Although Horan performs some purely administrative or clerical tasks and does not directly supervise classified employees, the summary judgment evidence establishes Horan does not

[2] The Senior Staff consists of the Chief, the Assistant to the Director, the three Deputy Chiefs, and one of the Assistant Chiefs.

simply "oversee administrative operations for the Fire Chief's Office." He is a high-level member of the Senior Staff, who participates in strategic planning for the Department and is tasked with responsibilities essential to running the Fire Department as a whole. Horan has Department-wide responsibility for payroll, benefits, workers' compensation, risk management, and the development and management of the Fire Department budget. Almost all of the functions he performs were previously performed by the Chief, an Assistant Chief, or a Deputy Chief, and not by a secretary, clerk, budget analyst, or other similar administrative employee. Horan has a significant role in the administration of the Fire Department that is not limited to functions involving only the Chief's office or only the administrative civilian staff. We conclude the evidence conclusively establishes that as Assistant to the Director, Horan "performs . . . fire administration," a function that requires substantial knowledge of fire fighting and work in the fire department as a matter of law. *See* TEX. LOC. GOV'T CODE ANN. § 143.003(4)(B)(ix); TEX. ATT'Y GEN. OP. GA-0041, 2003 WL 1384468, at *4.

The Union's summary judgment evidence conclusively established Horan is a "fire fighter" both because (1) it established that the Assistant to the Director position requires substantial knowledge of fire fighting and work in the Fire Department and (2) it established that Horan, as Assistant to the Director, performs fire administration and is not a secretary, clerk, budget analyst, or other administrative employee. *See Houston Prof'l Fire Fighters Ass'n*, 177 S.W.3d at 101; *Int'l Ass'n of Firefighters Local 624*, 822 S.W.2d at 129; Tex. Att'y Gen. Op. GA-0041, 2003 WL 1384468, at *4; *see also Lee*, 807 S.W.2d at 294. Defendants therefore were required to classify the position and fill it from an eligibility list that resulted from competitive examination. We hold the trial court did not err by declaring that "the San Antonio Fire Department's Assistant to the Director position is a 'fire fighter' position that is required to be classified under the Civil Service Act, Texas Local Government Code Chapter 143" and "Defendants' actions of creating and filling

a non-classified position of Assistant to the Director of the San Antonio Fire Department violated their legal duties and obligations under the Civil Service Act and the corresponding rights of [the Union's] members."

VIOLATION OF THE COLLECTIVE BARGAINING AGREEMENT

The parties' collective bargaining agreement states that if any of its provisions "conflicts or is inconsistent with any provision of Chapter 143 Local Government Code, th[e] Agreement shall prevail." The defendants argue the Union could not show itself entitled to judgment as a matter of law by merely showing a violation of Chapter 143; it had to also either show the collective bargaining agreement was violated or negate that the collective bargaining agreement authorized creation of the position. The defendants point specifically to article 1, section 3 of the agreement, the management rights section, which states:

> nothing in this Agreement is intended to circumscribe or modify the existing rights of the City. These rights include: . . . (G) Use civilians in the Fire Department to perform duties which do not require a sworn certified Fire Fighter.

Defendants contend the Union had the burden to separately establish this section does not authorize the creation and filling of the Assistant to the Director position with a civilian, and because the Union did not move for summary judgment on that ground, it was not entitled to judgment.

This court has previously held that article 3, section 1 of the collective bargaining agreement is not inconsistent with and does not supersede the classification requirements of Chapter 143. *City of San Antonio v. San Antonio Firefighters' Ass'n, Local 624*, 533 S.W.3d 527, 540-41 (Tex. App.—San Antonio 2017, pet. denied); *City of San Antonio v. Bullock*, 34 S.W.3d 650, 655 (Tex. App.—San Antonio 2000, pet. denied). Moreover, the parties in this case agree

that the collective bargaining agreement does not give the City more or different rights than does Chapter 143 with respect to creating and filling non-classified civilian positions.[3]

The Union sought declaratory judgment that "the position of Assistant to the Fire Chief is a position within the scope of Tex. Local Government Code Section 143.003(4)(A)" and "the defendants' actions … violate their legal duties and obligations under [Chapter 143]," and their motion for summary judgment sought to establish those propositions as a matter of law. The Union did not file a breach of contract action and therefore had no obligation to plead and prove violation of the collective bargaining agreement. If the defendants had contended the collective bargaining agreement authorized or excused conduct that violates Chapter 143, it could have so pled or raised it in response to the motion for summary judgment. But because they do not so contend, and in fact all parties agree the defendants' rights and duties under Chapter 143 regarding the creation and filling of this new position are not varied by the collective bargaining agreement, the Union was not required to move for summary judgment to establish a conflict.

ATTORNEY'S FEES

The trial court awarded the Union a judgment for attorney's fees pursuant to the UDJA. The award was rendered solely against the officials in their official capacities. The officials argue they have governmental immunity from the attorney's fee claim.

Suits against governmental officials alleging that they "acted without legal authority or failed to perform a purely ministerial act" and seeking to compel the officials "to comply with statutory or constitutional provisions are not prohibited by sovereign immunity, even if a

[3] Defendants' motion for summary judgment asserted that the "language [of the management rights section of the collective bargaining agreement] is consistent with the language of 143.003(4)" regarding the positions that can be assigned to civilians. And their brief on appeal states that "Defendants do not believe their management rights under the collective bargaining agreement are inconsistent with the language in Tex. Local Gov't Code Sec. 143.003(4)." The Union's agrees, stating there is "no conflict" between the collective bargaining agreement and Chapter 143 "concerning the use of civilian employees in the Fire Department."

declaration to that effect compels the payment of money." *Heinrich*, 284 S.W.3d at 372. The rationale for this "*ultra vires* exception" to immunity is that "*ultra vires* suits do not attempt to exert control over the state—they attempt to reassert the control of the state. Stated another way, these suits do not seek to alter government policy but rather to enforce existing policy." *Id.* (footnote omitted). "Further, while a lack of immunity may hamper governmental functions by requiring tax resources to be used for defending lawsuits ... rather than using those resources for their intended purposes, this reasoning has not been extended to *ultra vires* suits. …[E]xtending immunity to officials using state resources in violation of the law would not be an efficient way of ensuring those resources are spent as intended." *Id.* (internal quotation marks and citations omitted).

However, even in proper *ultra vires* suits, the remedy may implicate immunity. *Id.* at 373. Although "the basis for the *ultra vires* rule is that a governmental official is not following the law, so that immunity is not implicated . . . because the suit is, for all practical purpose, against the state, its remedies must be limited." *Id.* at 374. The Texas Supreme Court in *Heinrich* rejected "[d]rawing the line at monetary relief," and instead adopted the approach of the United States Supreme Court in Eleventh Amendment cases, holding that prospective remedies are allowed and retrospective relief is barred. *Id.* at 374, 375. Thus, claims for past monetary damages are barred, but declaratory and injunctive relief that may require the payment of money by the state is permissible, so long as the order is prospective. *Id.* at 374-76. The court noted that this "compromise between prospective and retroactive relief, while imperfect, best balances the government's immunity with the public's right to redress in cases involving *ultra vires* actions." *Id.* at 375.

Unanswered by *Heinrich* or any subsequent Texas Supreme Court case is whether an award of attorney's fees for successfully pursuing an *ultra vires* claim under the UDJA is allowed or is

considered retrospective monetary relief and barred by immunity. This court in *City of San Antonio v. Rogers Shavano Ranch, Ltd.*, No. 04-13-00623-CV, 2014 WL 631484, at *7 (Tex. App.—San Antonio Feb. 9, 2014, pet. denied) (mem. op), declined to express an opinion as to whether attorney's fees could be recovered in an *ultra vires* action against public officials under the UDJA.

Defendants assert the officials are immune because attorney's fees are "retroactive monetary relief," but they do not provide any argument or authority to support the assertion that a UDJA fee award is retrospective relief. The Union argues an award of attorney's fees incurred to compel the public officials to comply with their duties under the law does not award retrospective relief, but is instead ancillary to the award of prospective injunctive relief. We agree with the Union.

Attorney's fee awards do not compensate the plaintiff for the officials' pre-litigation conduct. An award of attorney's fees as part of costs is unlike retroactive monetary relief because it "does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief." *Hutto v. Finney*, 437 U.S. 678, 691, 695 n.24 (1978). A federal court award of trial and appellate attorney's fees against state officials in a suit for injunctive relief therefore is not retroactive relief barred by the Eleventh Amendment. *Id.* at 695; *see Missouri v. Jenkins*, 491 U.S. 274, 279 (1989) (holding award of attorney's fees ancillary to prospective relief is not barred by Eleventh Amendment immunity).

"The line between retroactive and prospective relief cannot be so rigid that it defeats the effective enforcement of prospective relief." *Hutto*, 437 U.S. at 690. We hold that a public official does not have governmental immunity from a claim for attorney's fees ancillary to an award of prospective relief in an *ultra vires* action brought under the UDJA.

CONCLUSION

For the reasons stated above, we reverse the judgment for declaratory and injunctive relief against the City of San Antonio and render judgment dismissing the claims against the City for lack of jurisdiction. We affirm the judgment against Fire Chief Charles Hood, in his official capacity, and city manager Sheryl Sculley, in her official capacity.

Luz Elena D. Chapa, Justice