

No. 22-1149

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**IN THE SUPREME COURT OF TEXAS**

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ROGER BORGELT; MARK PULLIAM; JAY WILEY,  
*Petitioners,*

TEXAS,  
*Intervenor-Petitioner,*

v.

CITY OF AUSTIN; SPENCER CRONK,  
IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF AUSTIN; AND  
AUSTIN FIREFIGHTERS ASSOCIATION LOCAL 975  
*Respondents.*

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On Petition for Review  
From the Third Court of Appeals, Austin

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**PETITION FOR REVIEW**

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## STATEMENT OF THE CASE

***Nature of the Case:*** This case involves a challenge under the Texas Constitution’s Gift Clause, Tex. Const. art. III, § 52(a); *see also id.* art. III, §§ 50, 51; 52(a); art. XVI, § 6(a), to a City of Austin (“City”) program that allocates one-full time employee, and the equivalent of two other full-time employees, to work for Appellee Austin Firefighters’ Association (“AFA”) to advance the AFA’s mission, while receiving City-funded salaries. Taxpayer Petitioners are City taxpayers and the State of Texas, seeking declaratory and injunctive relief against Appellees City and the AFA.

***Trial Court:*** 201st District Court of Travis County (Hon. Amy Clark Meachum)  
419th District Court of Travis County (Hon. Jessica Mangrum)  
419th District Court of Travis County (Hon. Orlinda Naranjo)

***Disposition in the Trial Court:*** The trial court granted a Texas Citizens’ Participation Act (“TCPA”) motion filed by the AFA against taxpayer Taxpayer Petitioners on February 7, 2017. CR.1392. The trial court later granted in part and denied in part the City’s and the AFA’s Joint Cross-Motion for Summary Judgment, leaving a fact issue for trial. CR.3813-3815. On March 8–9, 2021, this case was heard as a bench trial on the remaining issues, and the trial court entered judgment in favor of Appellees City and the AFA. CR.4163–64

***Parties in the Court of Appeals:*** Taxpayers Roger Borgelt, Mark Pulliam, and Jay Wiley, and the State of Texas as Taxpayer Petitioners. City of Austin, Spencer Cronk (formerly Marc Ott) in his official capacity as the City Manager of the City of Austin, and the Austin Firefighters’ Association, IAFF Local 975 as Appellees.

***Disposition in the Court of Appeals:*** The Third Court of Appeals affirmed the trial court’s final judgment. *Borgelt v. Austin Firefighters Ass’n, IAFF Loc. 975*, No. 03-21-00227-CV, 2022 WL 17096786, at \*1 (Tex. App.—Austin, Nov. 22, 2022) (Triana, J., joined by Baker, J. and Kelly, J.). No motions for rehearing *en banc* were filed.



## STATEMENT OF JURISDICTION

This Court has jurisdiction under Texas Government Code § 22.001(a) because this case involves “question[s] of law that [are] important to the jurisprudence of the state.” Specifically, the lower court issued an erroneous decision on a crucial question regarding the scope and application of the Texas Constitution’s Gift Clause.<sup>1</sup> That decision is contrary to this Court’s longstanding Gift Clause jurisprudence because it misapplies each of the elements of the test this Court has set out to ensure that public resources are not allocated to private, special interests that are not controlled by the government, and without sufficient consideration to the public. *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers’ Comp. Comm’n*, 74 S.W.3d 377, 383–84 (Tex. 2002).

This Court has not examined in depth the contours of the Gift Clause for over 20 years, and lower courts need guidance as to the application of the Gift Clause to cases involving government aid to private entities generally, and the subsidization of union activities with taxpayer resources specifically.

## ISSUES PRESENTED

1. Does the Gift Clause prohibit the City of Austin (“City”) from paying the salary and benefits of City employees to work, not for the general public, but for the Austin Firefighters’ Association (“AFA”)—a politically active private

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<sup>1</sup> Tex. Const. art. III, § 52(a); see also *id.* art. III, §§ 50, 51; art. XVI, § 6(a).

organization—when the City does not control those employees’ activities, and when they work to advance the interests of the AFA, not the City?

2. Did the lower court err in granting the AFA’s Texas Citizens’ Participation Act (“TCPA”) motion, thus allowing government officials in the scope of their official duties to weaponize the TCPA against citizens challenging the constitutionality of government action in good faith—and concluding that Taxpayers failed to establish a prima facie Gift Clause violation when the trial court simultaneously found sufficient evidence for the case to go to trial?

## STATEMENT OF FACTS

This case challenges the legality of “Association Business Leave” (“ABL”) or “release time,” whereby the City of Austin (“City”) employs one full-time City employee, and pays the equivalent of two other full-time employees, *not* to perform the government jobs they were hired to do, but instead to work under the exclusive direction and control of the Austin Firefighters Association, Local 975 (“AFA” or “Union”), a private labor organization.

While on release time, these “released” employees engage in union activities solely determined by the Union that “directly support the [AFA’s] mission,” including political, recruiting, and other activities that advance the AFA’s institutional interests, as opposed to discharging public responsibilities. Although the City pays for this with taxpayer money, it exercises virtually no control or oversight over the use of release time, but instead allows the AFA to direct and control the use of these *public* funds as the *private* Union sees fit.

The AFA is a private labor union that represents *some* Austin firefighters; it is also a political organization that, among other things, supports and opposes candidates for election and engages in lobbying activities. 2.SCR.471 at 127:12–128:6. Yet the City pays “released” employees through a Collective Bargaining Agreement (“CBA”) signed with the AFA, which allows City employees to receive

their public salaries while “conduct[ing] [AFA] business” instead of working for the City. 7.RR.24–25 (Joint Ex. 1, CBA, art. X).

The CBA establishes two categories of ABL: (1) leave for the AFA President, and (2) leave for other union members. *Id.* §§ 1.A–B. The President (currently, Bob Nicks) “may use ABL for any lawful Association business activities consistent with *the Association’s* purposes.” *Id.* § 1.B.1. (emphasis added); *See* 7.RR.451 ¶ 19. The President is allotted up to 2,080 hours per year, which means he has a full-time, no-show job that allows him to receive a salary from the City while devoting his entire work week to Union, not City, business. 7.RR.25 (Joint Ex. 1, art. X, § 2.C); *See also* 7.RR.451 ¶¶ 18, 20.

Mr. Nicks takes full advantage of this provision. He devotes “all of his time” to working on behalf of the Union, not the City. 4.RR.57:17–20. No one at the City directs his activities, nor does the City place any prohibitions on his activities. 7.RR.451 ¶¶ 24–25. He is not required to report to Fire Department Headquarters, or any other City office, on a regular basis. *Id.* ¶ 25; 2.SCR.506 at 20:23–25; 2.SCR.449 at 40:3–7; 4.RR.59. Instead, he reports to AFA’s offices. *Id.* While there, or anywhere else, he is not required to provide an accounting of any kind to the City about his daily activities, or how he uses ABL. *Id.*; 2.SCR.507 at 21:20–22, 2.SCR.513–14 at 48:21–49:2; 4.RR.59; *see also* 4.RR.74; 2.SCR.540, RFA 12. No one in the City directly supervises Mr. Nicks, 7.RR.451 ¶ 29–30. The City also

has no say in who becomes the AFA President (or any other Authorized Association Representative) and cannot remove Nicks from his job. 2:SCR.451 at 48:10–14.

While using ABL, Nicks engages in political and lobbying activities, 4.RR.67:23–68:6, and recruiting for the Union, 7.RR.453 ¶¶ 48–50, 4.RR.75:12–77:18; he also attends private Union conferences and meetings. 4.RR.79:23–81:16. The City also pays him for the time he spends opposing the City in contract negotiations and grievance proceedings. 4.RR.76:2–79:22. He even used ABL to represent *himself* when he was subject to a disciplinary investigation by the Fire Department. 7.RR.451 ¶ 31; 4:RR:102:7–16. In other words, Nicks uses all his time in all his working days to advance the Union’s interests and the Union’s work with effectively no City oversight.

Other Union members also use thousands of hours of ABL as “other authorized representative[s].” CR.4212 ¶ 41. These Union members “can use ABL for activities that directly support the mission of the AFA” rather than the Department’s mission. 4.RR.69:11–70:1. The President, not the City, “direct[s] the activities” of these “released” employees. 4.RR.84:18–24; *see* 7.RR.453 ¶ 51. These activities include attending private charitable events (e.g., “a gala,” a boxing match called “Battle of the Badges,” “fishing fundraisers”) and meetings of the union’s “political action committee.” 4.RR.90:6–96:18.

Even after the fact, the City does not know how a large portion of ABL time is spent. In the City’s reporting system, most ABL hours used by “other Authorized Association representatives” are simply categorized as “other Association business” without further detail. 7.RR.453 ¶¶ 48–50. Nearly 96.4% of *all* ABL time was used for Union recruitment, to attend Union meetings, and engage in the undefined and unaccounted-for category of “other Association business.” 7.RR.113–15, 448.

While using ABL for these private Union activities, “released” employees “receive their ordinary City salaries, benefits, and pensions.” 7.RR.451 ¶ 21. ABL costs the city roughly \$200,000 to \$250,000 per year, roughly \$1.25 million over the course of the CBA. *See* 4.RR.158:1–10. Those costs are ultimately borne by taxpayers, like Plaintiff Borgelt. *See* 7.RR.449–50 ¶¶ 5–7.

## **SUMMARY OF ARGUMENT**

The Texas Constitution’s Gift Clause prohibits the government from giving public funds to private parties that are not controlled by the state, or subsidizing private undertakings that primarily advance private, rather than public, interests. In other words, sections 50, 51, and 52(a) of Article III, and section 6(a) of Article XVI of the Texas Constitution “prohibits the expenditure of public funds for private gain.” *Graves v. Morales*, 923 S.W.2d 754, 757 (Tex. App.—Austin 1996, writ denied), or “the application of public funds to private purposes.” *Edgewood Indep.*

*Sch. Dist. v. Meno*, 917 S.W.2d 717, 739–40 (Tex. 1995), *as modified* (Feb. 16, 1995) (citation omitted).

An expenditure violates the Constitution if it is granted “gratuitously” to a private entity, meaning that the government does not receive sufficient consideration in exchange for the payment, or the payment does not “serve a legitimate public purpose and[] afford[] a clear public benefit<sup>2</sup>...in return.” *See Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers’ Comp. Comm’n*, 74 S.W.3d 377, 383–84 (Tex. 2002). A three-part test determines if an expenditure accomplishes a public purpose. Specifically, the government must: “(1) ensure that [the expenditure’s] *predominant* purpose is to accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public’s investment; and (3) ensure that the political subdivision receives a return benefit.” *Id.* at 384 (emphasis added).

These are *conjunctive* requirements. *Id.* A government expenditure is unconstitutional if it fails *any* of these tests.

The Third Court misapplied each one of the three factors in its decision. First, it erred in finding that release time was not gratuitous—when it is, because it is not individual employee compensation, and the City does not receive sufficient

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<sup>2</sup> The “clear public benefit” factor overlaps somewhat with the “predominately public purpose” test because if the public expenditure does not advance a predominantly public purpose, then it also does not afford a clear public benefit.

consideration in return for ABL expenditures. Second, the Third Court was wrong to say release time serves a public purpose—it does not, because it *predominantly* benefits the AFA, a private party, including the AFA’s political and lobbying activities. Finally, the Third Court erred in concluding that the City retains *adequate control* over “released” employees—when they are not directed or controlled by, or accountable to, the City in any meaningful way. The decision below upholds exactly the type of subsidy that the Clause was written to prohibit and eviscerates vital taxpayer protections in the Texas Constitution.

If allowed to stand, the lower court’s decision will provide carte blanche for the City, and cities throughout Texas, to subsidize private activities with taxpayer resources. The framers of the Texas Constitution enacted the Gift Clause to avoid precisely such a misallocation of public money for private, special interests. This Court should grant review because the decision is contrary to longstanding Gift Clause jurisprudence, which requires a predominantly *public purpose* for all public expenditures, as well as *public control* over those expenditures to ensure that the public receives adequate consideration for its money.

This Court should also grant review because the decision below violates both the letter and purpose of the TCPA, which is intended to guarantee citizens’ exercise of their constitutional rights, including their right to challenge the legality of



government action, such as Taxpayer Petitioners did here. The decision below transforms this shield protecting the citizen into a sword in the government's hands.

## **ARGUMENT**

### **I. The Third Court erred in applying each of the Gift Clause's factors to uphold a government subsidy to a private entity pursuing private goals.**

#### **A. ABL is a gift to the Union, not compensation to employees.**

In finding that the ABL payments are not gratuitous, the Third Court made two fundamental legal errors. First, it concluded that under the CBA, “no funds are ... paid directly to the Association.” Op. at 10. Second, it said that ABL is “part of the agreed compensation provided for [all firefighters] in the Agreement.” *Id.* at 11. In other words, it found that ABL is a benefit provided to all firefighters, whether they belong to the AFA or not, and regardless of whether they use ABL. Proceeding from this faulty premise, the court concluded that consideration must be measured based on the entirety of the CBA, *id.* at 13–14, rather than on what the City gets from the Union in exchange for the ABL expenditures. This is legal error.

First, it makes no difference that ABL is provided as a leave benefit to the Union, as opposed to a direct cash payment. ABL “funds” the Union just the same. It is axiomatic that what cannot be done directly cannot be done by indirection. *Harbin Indep. Sch. Dist. v. Denman*, 222 S.W. 538, 540 (Tex. Comm’n App. 1920); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 288 (1866) (“what cannot be done directly cannot be done indirectly.”). While a direct *cash* payment of \$1.25 million

to the Union to pay the President’s salary and the salaries of other “released” members might be more obviously unconstitutional, the Gift Clause violation is the same when the City pays the salaries of employees who engage in AFA activities. That’s just an *indirect* gift of public funds—which violates the Constitution the same as a direct one. If left undisturbed the lower court’s holding that “no funds are ... paid directly to the Association,” Op. at 10, would encourage government entities to subsidize private parties by coming up with circuitous schemes to indirectly fund private undertakings.

Second, *by its own terms*, ABL is not a benefit that runs to *individual* firefighters for services rendered. Under the CBA, this leave time is specifically earmarked and set aside for use by the AFA, *not* by individual firefighters. The Agreement itself makes this obvious because it mandates that AFA’s President use ABL for “any lawful Association business activities consistent with *the Association’s* purposes.” 7.RR.24 (emphasis added), and it allows other members to use ABL for activities that “directly support the mission of the ... Association.” *Id.* In other words, the CBA *expressly* states that ABL is *not* compensation to individual firefighters for “the performance of employment duties,” as the court below claimed, Op. at 13 (citation omitted), but is instead directed to *the AFA* for *the AFA* to use in whatever ways it believes advance the Association’s “purposes” and “mission.” 7.RR.24.

This is also made plain under the CBA because 2,080 hours of ABL are directed to the sole and exclusive use of the AFA President, and *no* other AFA member, or anyone else, can use that releasee time. 7.RR.24. ABL cannot therefore be consideration for the “performance of employment duties,” Op. at 13, since no other employee apart from Nicks can use *his* ABL.

Indeed, the lower court seems to concede the point that ABL is not compensation to individual firefighters, when it says that ABL was bargained “for firefighters *authorized by the Association* to receive such leave ...” Op. at 11. If the Association must authorize the use of ABL for individual firefighters, it is not compensation to those firefighters; it is, instead, a gift to the Union for the Union to dole out to its members and for its purposes.

By evaluating consideration under the CBA as employee compensation that is just part of a larger contract, the lower court also created a legal loophole through which other government entities can now jump. Under the lower court’s reasoning, any gift or subsidy is permissible as long as it is embedded within a larger contract. If the City gave a \$1.25 million home to the AFA’s President, but did so as one provision of a much larger contract, that would *not* be a gift under the lower court’s decision. That is obviously wrong—and would contravene the goal of the Gift Clause, which is “to prevent the application of public funds to private purposes.”

*Edgewood Indep. Sch. Dist.*, 917 S.W.2d at 740 (citation omitted). An illegal gift hidden within a large contract is still an illegal gift.

**B. The Third Court erred in not applying the Gift Clause’s “predominant purpose” test, but instead finding that speculative, incidental benefits of ABL purportedly serve a public purpose.**

The Third Court also erred by failing to apply the governing “predominant purpose” test. According to the court below, ABL serves a public purpose because state law “declare[s] that collective bargaining ... is in the public interest,” Op. at 18, and ABL “facilitates the Association’s ability to carry out its business of supporting the Fire Department’s mission and maintaining good labor relations ...” *Id.* at 20. But this conflates the purpose of collective bargaining generally with the use of ABL by the Union specifically. The constitutionality of the City’s decision to give taxpayer money to the AFA to use for its own private purposes has nothing to do with the merits of collective bargaining generally, or the maintenance of labor relations.

Under Texas law, an expenditure achieves a public purpose only when its “*predominant* purpose is to accomplish a public purpose, not to benefit private parties.” *Tex. Mun. League*, 74 S.W.3d at 384 (emphasis added); *see also Brazoria Cnty. v. Perry*, 537 S.W.2d 89, 90 (Tex. Civ. App.—Houston 1976, no writ) (“The clear purpose of this constitutional provision is to prevent the gratuitous application of funds to private use.”) But instead of identifying the specific public purposes

served by ABL, the lower court gestured in the direction of general policy propositions, none of which are at issue here, such as the legal right to engage in collective bargaining. Op. at 18. But if that is enough to satisfy the Gift Clause, then *every* expenditure will *always* pass muster. If the City simply gave the AFA a \$1.25 million donation, that would arguably “improve labor relations.” But the test is not whether the expenditure is somehow related to some public benefit. As Justices Owen and Hecht observed, this Court’s Gift Clause jurisprudence “does not stand for the proposition that public funds can be funneled to an individual or a private corporation so long as the public interest is somehow furthered.” *Tex. Mun. League*, 74 S.W.3d at 392 (dissenting opinion). Rather, the question is whether the “*predominant* purpose” of the challenged expenditure is a public or a private one, and whether the public receives proportionate consideration in exchange for that money. *Id.* at 384 (emphasis added). Here, the expenditure *predominantly* serves a private purpose, not a public one.

The CBA itself tells us what the predominant purpose of ABL is: doing private union business, *not* the City’s business. The CBA says that the predominant purposes of release time are “the Association’s purposes.” 7.RR.24; 7.RR.451 ¶ 17. This is also clear from the record, which shows that ABL is used for the Union’s political and lobbying activities, 4.RR.67:23–68:6, recruitment activities, and to attend Union conferences and meetings. Indeed, 96.4% of *all* ABL use reported by

Union members was for Union recruitment, to attend Union meetings, and engage in the undefined and unaccounted-for category of “other Association business.” 7.RR.113–15, 448. None of these can be said to advance a predominantly public purpose—unless, of course, absolutely any expenditure is constitutional. Even if the public may sometimes receive some incidental benefits from ABL, the *predominant* purpose of ABL is just what the CBA says: to benefit the union itself.<sup>3</sup>

**C. The Third Court neutered the control element of the Gift Clause by finding that the City exercises sufficient control over government employees who are directed by and accountable to a private organization, rather than their public employer.**

Apart from the “predominant purpose” test, this Court has also set forth the “public control” requirement: a public entity must maintain “public control over the [expenditure of public] funds to ensure that the public purpose is accomplished and to protect the public’s investment.” *Tex. Mun. League*, 74 S.W.3d at 384. Such control is necessary to prevent what *appear* to be proper, public expenditures from actually being forbidden subsidies to private, special interests.

The court below erred in concluding that the CBA “sets forth the parameters of what constitutes Association business activities for which Association Leave may

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<sup>3</sup> The lower court said that the missions of the AFA and the City “overlap[,]” Op. at 18–19, but the record contradicts this point. It shows that the AFA often uses ABL in ways that are contrary to the City’s interests—for example, filing and pursuing grievances against the City—situations in which the City and the AFA are “diametrically opposed.” 2.SCR:511 at 37:8.

be used.” Op. at 21. No, it does not. In fact, its plain language not only allows, but *mandates*, that the AFA President devote *all* his time to “Association business activities consistent with *the Association’s* purposes.” 7.RR.24. The President said that “association business leave” means “leave that can be used to do *Association* business,” 2.SCR.446 at 26:6–7, and the City said that ABL means activities “that support [the AFA’s] role as an employee organization.” 2.SCR.615, Resp No. 18. This is undisputed. Also undisputed: the CBA imposes no meaningful City control, restraint, or even oversight over those activities. And the City does not “retain some degree of control over the *performance of* [the CBA],” *Key v. Comm’rs Ct. of Marion Cnty.*, 727 S.W.2d 667, 669 (Tex. App.—Texarkana 1987) (emphasis added), as the law requires to ensure that a public purpose is accomplished.

This is most obviously true with respect to the President, who is released *full-time* from any regular firefighting duties to work for the Union—while his salary is paid by taxpayers. Nobody at the City directs his activities or places any prohibitions on his activities; he is not required to provide an accounting of *any* kind to the City about how he spends his day. 2.SCR.507 at 21:20–22, 2.SCR.513 at 48:21–49:2; 4.RR.59; *see also* 4.RR.74; 2.SCR.540, RFA 12. The City does not select him as the AFA’s President, and cannot remove him from that position. 2:SCR.451 at 48:10–14. And the same lack of public control exists with respect to other “released”

employees, whose activities are directed and controlled by the Union, not the City. 4.RR.84; *see* 7.RR.453 ¶ 51.

This makes City employees utilizing ABL unlike any other employer-employee relationship in Texas (or anywhere else). In every other employer-employee relationship, the employer “ha[s] the right to hire and fire the employee, the right to supervise the employee, and the right to set the employee’s work schedule.” *Johnson v. Scott Fetzer Co.*, 124 S.W.3d 257, 263 (Tex. App.—Fort Worth 2003, pet. denied). Here that’s not the case: although the City pays for the “released” employees’ time, the work they actually perform is for a private entity, the AFA, which alone has the right to set their schedule, to supervise them, etc. The point is simple: **they actually work for the AFA, but are paid by the City**. And that’s an unconstitutional gift to the AFA.

If the decision below is left undisturbed, nothing would prevent municipalities from providing public funds or public employee time to perform private functions for private entities, free of government supervision and control. This would not only lead to substantial special interest abuse, but would effectively neuter the “control” requirement of the Gift Clause.



**II. The Third Court erred in sustaining the trial court’s TCPA order because parties should not be permitted to file a TCPA motion against citizen plaintiffs challenging government action, and in any event, the TCPA was misapplied here.**

This Court should also grant review because the lower court’s decision is inherently contradictory and violates both the letter and purpose of the TCPA. If allowed to stand, the decision would invert the purpose of a statute that was intended to protect citizens in the exercise of their constitutional rights, and make it instead a device whereby to chill public interest litigation brought by citizens seeking in good faith to vindicate their constitutional rights.

The purpose of the TCPA is to “*protect[] citizens* who [associate,] petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them.” *Youngkin v. Hines*, 546 S.W.3d 675, 679 (Tex. 2018) (emphasis added). It was not to penalize citizens for petitioning the government for a redress of grievances, as these taxpayer Plaintiffs are doing. That much is clear from the text of the TCPA, which says it was written to “safeguard the *constitutional* rights of *persons*,” not governments, and which allows motions only for parties whose rights to free speech, association, or petition have been violated. Tex. Civ. Prac. & Rem. Code §§ 27.002 (emphasis added), 27.003. But government actions are not speech by a person. *See San Ramon Valley Fire Prot. Dist. v. Contra Costa Cnty. Emps.’ Ret. Ass’n*, 22 Cal. Rptr.3d 724, 732 (App. 2004) (“Acts of governance mandated by law, without more, are not exercises of free speech or petition.”)

In *State ex rel. Best v. Harper*, 562 S.W.3d 1, 19 (Tex. 2018), this Court found that “the state should not be suing to prevent its own citizens from participating in government” and allowed an individual to bring a TCPA counter-claim against a government entity. The rationale was that government entities and officials should not weaponize the TCPA to punish citizens from participating in government. That same rationale applies to this taxpayer action brought against the City<sup>4</sup> by citizens who participated in government by challenging the legality of government action. This Court should therefore grant review to clarify that the pre-2019 TCPA cannot be invoked against private citizens challenging the legality of government action in good faith.

The lower court also erred in sustaining the TCPA motion by finding that Taxpayers failed to present a *prima facie* Gift Clause claim against the City at the TCPA stage. In no way does the TCPA establish a threshold burden for plaintiffs higher than plaintiffs’ burden for summary judgment or trial on the merits. Here, the evidence Taxpayer Petitioners presented at the TCPA hearing, along with Taxpayer Petitioners’ pleadings, was substantively the same as the arguments and

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<sup>4</sup> Here, the AFA intervened back into a lawsuit from which it had previously been dismissed as a party under the TCPA. CR.2236–2242. The AFA should be estopped from seeking relief under the TCPA because it took inconsistent positions by seeking to be dismissed as a party, and then later voluntarily intervening as a party in this public interest case challenging government action. See *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 6 (Tex. 2008).

evidence presented when the district court denied the City's Plea to the Jurisdiction, and the City's Motion to Abate, and (partially) the City's and the AFA's Joint Motion for Summary Judgment. It said a justiciable issue remained for trial on the merits.<sup>5</sup> The lower courts thus erred by finding that Taxpayer Petitioners failed to present a *prima facie* case in response to AFA's TCPA dismissal motion while simultaneously finding that Taxpayer Petitioners pleaded and produced evidence sufficient to prevail at summary judgment and defeat the City's multiple jurisdictional motions. If a party has produced sufficient evidence to go to trial, as the district court held, that party has by definition presented a *prima facie* case. See *Coward v. Gateway Nat'l Bank of Beaumont*, 525 S.W.2d 857, 859 (Tex. 1975) (the term *prima facie* evidence "mean[s] that the proponent has produced sufficient evidence to go to the trier of fact on the issue.').

Finally, the court below erred in awarding sanctions against these public interest Taxpayer Petitioners when there was no evidence in the record to support a finding that such a punitive sanction amount was necessary for deterrence. The sanction award, like the attorney fee award, transformed the TCPA into a tool to bar litigants from petitioning the government for a redress of grievances.

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<sup>5</sup> Which was correct; after all, the CBA itself says ABL is to be used for "any lawful Association business activities consistent with the Association's purposes," 7.RR.24, which is itself a *prima facie* gift of public resources to private purposes.

This Court should grant review and hold that the pre-2019 TCPA<sup>6</sup> does not entitle government employees acting in their official capacities to sanction citizens who, in good faith, petition the government to redress their grievances that such employees are acting illegally.

### **PRAYER**

Based on the foregoing, Taxpayer Petitioners respectfully request that the Court grant this petition, reverse the court of appeals' judgment, and enter judgment in favor of Taxpayer Petitioners.

/s/ Robert Henneke

Robert Henneke

Texas Bar No. 24046058

Chance Weldon

Texas Bar No. 24076767

rhenneke@texaspolicy.com

cweldon@texaspolicy.com

/s/ Jonathan Riches

Jonathan Riches

*Pro Hac Vice Application Pending*

litigation@goldwaterinstitute.org

*Attorneys for Plaintiffs/Taxpayer Petitioners*

---

<sup>6</sup> In 2019, the Legislature specifically amended the TCPA to prohibit “a government entity, agency, or an official or employee acting in an official capacity” from filing a TCPA motion. Tex. Civ. Prac. & Rem. Code § 27.003(a).

## **CERTIFICATE OF COMPLIANCE**

I certify that this document complies with the word-count limitations in Tex. R. App. P. 9.4(i)(2)(D) because it contains 4,309 words, excluding the parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Robert Henneke  
ROBERT HENNEKE

## **CERTIFICATE OF SERVICE**

I hereby certify that the above and foregoing document has been served via electronic service to all counsel of record listed below on this 6th day of February, 2023.

ANNE L. MORGAN, CITY ATTORNEY  
MEGHAN L. RILEY, LITIGATION DIVISION CHIEF  
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City of Austin - Law Department  
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State of Texas*

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*Attorneys for Defendant*  
*Austin Firefighters Assoc., Local 975*

/s/ Robert Henneke  
ROBERT HENNEKE

**IN THE SUPREME COURT OF TEXAS**

---

ROGER BORGELT; MARK PULLIAM; JAY WILEY,  
*Petitioners,*

TEXAS,  
*Intervenor-Petitioner,*

v.

CITY OF AUSTIN; SPENCER CRONK,  
IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF AUSTIN; AND  
AUSTIN FIREFIGHTERS ASSOCIATION LOCAL 975  
*Respondents.*

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On Petition for Review  
From the Third Court of Appeals, Austin

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**APPENDIX**

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Robert Henneke  
Texas Bar No. 24046058  
Chance Weldon  
Texas Bar No. 24076767  
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Jonathan Riches  
*Pro Hac Vice Application Pending*  
**Scharf-Norton Center for  
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GOLDWATER INSTITUTE**  
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litigation@goldwaterinstitute.org

*Attorneys for Plaintiffs/Taxpayer  
Petitioners*

1. February 7, 2017 Order Granting Defendant Austin Firefighters Association, Local 975's Texas Citizens Participation Act Motion to Dismiss, Cause No. D-1-GN-16-004307, in the 419th Judicial District of Travis County, Texas
2. September 19, 2017 Order and Certification Clarifying Order Granting Defendant Austin Firefighters Association, Local 975's Texas Citizens Participation Act Motion to Dismiss, Cause No. D-1-GN-16-004307, in the 419th Judicial District of Travis County, Texas
3. July 18, 2019 Order on Plaintiff Taxpayers' and Intervenor Texas' Joint Motion for Summary Judgment, Cause No. D-1-GN-16-004307, in the 419th Judicial District of Travis County, Texas
4. July 18, 2019 Order Granting in Part Defendants' and Intervenor-Defendant's Joint Cross Motion for Summary Judgment, Cause No. D-1-GN-16-004307, in the 419th Judicial District of Travis County, Texas
5. July 18, 2019 Order Granting Austin Firefighters Association, IAFF Local 975's Motion for an Award of Costs, Attorneys' Fees, Other Expenses, and Sanctions, Cause No. D-1-GN-16-004307, in the 419th Judicial District of Travis County, Texas
6. March 24, 2021 Final Judgment, Cause No. D-1-GN-16-004307, in the 419th Judicial District of Travis County, Texas
7. May 11, 2021 Amended Findings of Fact and Conclusions of Law, Cause No. D-1-GN-16-004307, in the 419th Judicial District of Travis County, Texas
8. November 22, 2022 Memorandum Opinion, Cause No. 03-21-00227-CV, in the Third District Texas Court of Appeals
9. Tex. Const. art. 3 § 50
10. Tex. Const. art. 3 § 51
11. Tex. Const. art. 3 § 52(a)
12. Tex. Const. art. 16 § 6(a)
13. Texas Citizens' Participation Act, Tex. Civ. Prac. & Rem. Code §§ 27.001–011



14. Pre-2019 Texas Citizens' Participation Act, Tex. Civ. Prac. & Rem. Code §§ 27.001–011
15. Tex. Gov't Code § 22.01
16. October 1, 2017 Collective Bargaining Agreement between City of Austin and Austin Firefighters Association Local 975

**1**

**NO. D-1-GN-16-004307**

**MARK PULLIAM AND JAY WILEY,  
Plaintiffs**

**and**

**TEXAS,  
Intervenor,**

V.

**CITY OF AUSTIN, TEXAS; MARC A. OTT, IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF THE CITY OF AUSTIN, AND AUSTIN FIREFIGHTERS ASSOCIATION, LOCAL 975**

\*\*\*\*\*

**IN THE DISTRICT COURT**

**Filed in The District Court  
of Travis County, Texas**

FEB - 7 2017 NNR

At 4:09 p M.  
Velva L. Price, District Clerk

## 419<sup>th</sup> JUDICIAL DISTRICT

**TRAVIS COUNTY, TEXAS**

**ORDER GRANTING DEFENDANT AUSTIN FIREFIGHTERS ASSOCIATION, LOCAL**  
**975'S TEXAS CITIZENS PARTICIPATION ACT MOTION TO DISMISS**

On January 17, 2017 came before the court Defendant Austin Firefighters Association, Local 975's (hereafter "Defendant") Texas Citizens Participation Act Motion to Dismiss.

The parties appeared through their attorneys of record. After careful consideration of the Motion and evidence, considering the pleadings, supporting and opposing affidavits, and the arguments of counsel, the Court finds that the Motion is well taken and should be, and hereby is, in all respects GRANTED.


IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendant's Texas Citizens Participation Act Motion to Dismiss is GRANTED in all respects.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all claims of Plaintiffs against Defendant are hereby DISMISSED with prejudice in their entirety. Plaintiffs shall take nothing from these claims.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, in accordance with Texas Civil Practice & Remedies Code Section 27.009(1), Defendant is entitled to recover its attorneys' fees and costs in bringing its Motion to Dismiss and defending against these claims. The parties are therefore ORDERED to set this matter for a hearing before the Hon. Orlinda L. Naranjo to submit evidence of their fees and costs, and to do so within thirty (30) days of the date of this Order, unless otherwise agreed to by the parties.

SIGNED on this the 17 day of February, 2017.

ry, 2017.



Judge Orlinda L. Naranjo

**2**

NO. D-1-GN-16-004307MARK PULLIAM AND JAY WILEY,  
Plaintiffs

and

TEXAS,  
Intervenor,

v.

CITY OF AUSTIN, TEXAS; MARC A.  
OTT, IN HIS OFFICIAL CAPACITY AS  
CITY MANAGER OF THE CITY OF  
AUSTIN, AND AUSTIN FIREFIGHTERS  
ASSOCIATION, LOCAL 975

IN THE DISTRICT COURT

Filed in The District Court  
of Travis County, Texas

SEP 19 2017 NNR

At 1:19 P.M.  
Velva L. Price, District Clerk419<sup>th</sup> JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

**ORDER AND CERTIFICATION CLARIFYING ORDER GRANTING DEFENDANT****AUSTIN FIREFIGHTERS ASSOCIATION LOCAL 975'S TEXAS CITIZENS****PARTICIPATION ACT MOTION TO DISMISS**

On February 7, 2017, the Court signed an Order Granting Defendant Austin Firefighters Association Local 975's Texas Citizens Participation Act Motion to Dismiss. On September 12, 2017, the Court received an Order and Memorandum Opinion from the Third Court of Appeals ordering the Court to clarify its intent as it relates to the February 7, 2017 Order's effect on Intervenor State of Texas' Plea to the Jurisdiction.

The Court hereby certifies that the February 7, 2017 Order applies only to Defendant Austin Firefighters Association Local 975's Texas Citizens Participation Act Motion to Dismiss. The Court did not rule on the State's Plea to the Jurisdiction, and did not intend its February 7, 2017 Order to function either as an explicit or implicit denial of that motion.

**IT IS THEREFORE ORDERED** that, by September 26, 2017, at 5:00 p.m., the Travis County District Clerk will prepare a supplemental clerk's record consisting of the clerk's record from February 7, 2017, to the date that the record is transmitted, including this order, and file the record with the Clerk of the Third Court of Appeals.

SIGNED on this the 19 day of September, 2017.
  
Judge Orlinda L. Naranjo

**ORLINDA NARANJO**  
Judge  
(512) 854-4023

**TAMMY ST. GEORGE**  
Court Operations Officer  
(512) 854-4023



**419TH DISTRICT COURT**

HEMAN MARION SWEATT TRAVIS COUNTY COURTHOUSE  
P. O. BOX 1748  
AUSTIN, TEXAS 78767  
FAX: (512) 854-2224

**TRENT HIGHTOWER**  
Staff Attorney  
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**LEAH HAYES**  
Official Court Reporter  
(512) 854-9329

**VICTORIA CHAMBERS**  
Court Clerk  
(512) 854-5956

September 19, 2017

**Via Facsimile (512) 472-2728**

Robert Earl Henneke  
Texas Public Policy Foundation  
901 Congress Avenue  
Austin, Texas 78701  
**Attorney for Plaintiff**

**Via Facsimile (512) 974-2888**

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City of Austin Law Department  
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**Attorney for City of Austin**

**Via Facsimile (512) 474-6200**

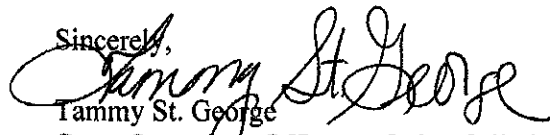
Matthew Bradley Bachop  
Deats, Durst & Owen, PLLC  
1204 San Antonio St. Ste# 203  
Austin, Texas 78701  
**Attorney for Austin Firefighters Association**

**Re: Cause No. D-1-GN-16-004307; Mark Pulliam and Jay Wiley and Texas v. City of Austin, Texas; Marc A. Ott, In his Official Capacity as City Manager of The City of Austin, and Austin Firefighters Association, Local 975; In the 419<sup>th</sup>. Judicial District Court, Travis County, Texas**

Dear Counsel:

Enclosed is the signed Order and Certification Clarifying Order Granting Defendant Austin Firefighters Association, Local 975's Texas Citizens Participation Act Motion to Dismiss, in the above referenced case. The Order has been stamped and filed with the District Clerk's Office.

If you have any questions regarding this matter, please contact me directly at (512) 854-4023.

Sincerely,  
  
Tammy St. George  
Court Operations Officer to Judge Orlanda L. Naranjo  
419<sup>th</sup> District Court, Travis County

Enclosures (1): Ms. Velve Price, District Clerk

**3**

JUL 18 2019

At 2:46 P.M.  
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-16-004307

MARK PULLIAM; JAY WILEY,

*Plaintiffs,*

And

TEXAS,

*Intervenor-Plaintiff,*

v.

CITY OF AUSTIN, TEXAS; MARC A.  
OTT, in his official capacity as City  
Manager of the City of Austin,

*Defendants,*

AUSTIN FIREFIGHTERS  
ASSOCIATION, LOCAL 975,

*Intervenor-Defendant.*

IN THE DISTRICT COURT OF


TRAVIS COUNTY, TEXAS

419TH JUDICIAL DISTRICT

**ORDER ON PLAINTIFF TAXPAYERS' AND INTERVENOR TEXAS' JOINT MOTION  
FOR SUMMARY JUDGMENT**

BE IT REMEMBERED that on this day, the Court considered Plaintiff Taxpayers' and Intervenor Texas' Joint Motion for Summary Judgment. Plaintiff Taxpayers' and Texas' Joint Motion for Summary Judgment is DENIED.

SO ORDERED on this 18<sup>th</sup> day of July, 2019

  
Amy Clark Meachum  
Judge, 201st District Court  
Travis County, Texas



AGREED AS TO FORM:

/s/ Sameer Birring  
Sameer Birring  
Hannah Vahl  
Attorneys for Defendant City of Austin and Marc A. Otto

/s/ Jonathan Riches  
Jonathan Riches  
Robert Henneke  
Attorneys for Plaintiffs

/s/David J. Hacker  
David J. Hacker  
Attorney for Intervenor-Plaintiff State of Texas

/s/ Diana J. Nobile  
Diana J. Nobile  
John W. Stewart  
Attorneys for Intervenor-Defendant Austin Firefighters Assoc., Local 975

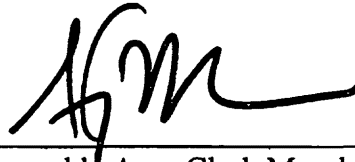
**4**

At 2:46 p.m.  
JUL 18 2019  
Velva L. Price, District Clerk

IT IS, THEREFORE, ORDERED AND ADJUDGED AND DECREED that the Court hereby GRANTS Defendant's and Intervenor-Defendant's Joint Cross-Motion for Summary

Judgment as to any claims related to the collective bargaining agreement itself and the terms therein, that are challenged in the Amended Original Petition and Application for Injunctive Relief and the First Amended Plea in Intervention of Texas. Defendants and Intervenor-Defendant's Joint Cross-Motion for Summary Judgment is DENIED with regard to the implementation of such contract by the City of Austin.

SIGNED on July 18, 2019.



Honorable Amy Clark Meachum  
Judge, 201st District Court  
Travis County, Texas

AGREED AS TO FORM:

/s/ Sameer Birring

Sameer Birring

Hannah Vahl

Attorneys for Defendant City of Austin and Marc A. Ott

/s/ Jonathan Riches

Jonathan Riches

Robert Henneke

Attorneys for Plaintiffs

/s/ David J. Hacker

David J. Hacker

Attorney for Intervenor-Plaintiff State of Texas

/s/ Diana J. Nobile

Diana J. Nobile


John W. Stewart

Attorneys for Intervenor-Defendant Austin Firefighters Assoc., Local 975

**5**

JUL 18 2019 *an*  
At 2:44 *P* M.  
Velva L. Price, District Clerk

SIGNED on July 18 2019.



---

Honorable Amy Clark Meachum  
Judge, 201st District Court  
Travis County, Texas



**6**

**CAUSE NO. D-1-GN-16-004307**

<b>ROGER BORGELT,</b>	§	<b>IN THE DISTRICT COURT</b>
<i>Plaintiff,</i>	§	
	§	
<b>AND</b>	§	
	§	
<b>THE STATE OF TEXAS,</b>	§	<b>TRAVIS COUNTY, TEXAS</b>
	§	
<i>INTERVENOR-PLAINTIFF,</i>	§	
<b>v.</b>	§	
	§	
<b>CITY OF AUSTIN, TEXAS; et al.</b>	§	
<i>Defendants.</i>	§	<b>419<sup>TH</sup> JUDICIAL DISTRICT</b>

**FINAL JUDGMENT**

On July 18, 2019, the Court granted Defendants' Cross-Motion for Summary Judgment. Because the order left certain matters undecided, it was interlocutory. On March 8 and 9, 2021 came to be heard by the court the remaining claims in this matter. Over two days the Court heard evidence, and having considered the evidence and the arguments of counsel, the Court finds that the Plaintiff Roger Borgelt and Intervenor-Plaintiff the State of Texas have not shown themselves to be entitled to any relief on their claims against the Defendants.

On May 1, 2019, came to be heard Defendant Austin Fire Fighters Association, Local 975's (AFA)'s Motion for an Award for Costs, Attorneys' Fees, Other Expenses, and Sanctions against non-suited Plaintiffs Mark Pulliam and Jay Wiley. On July 18, 2019, the Court GRANTED Defendant AFA's Application for Attorneys' Fees related to the Order Granting Defendant Austin Firefighters' Association, Local 975's Texas Citizen Participation Act Motion to Dismiss in the amount of \$115,250.00 and sanctions of \$75,000.00.

It is therefore ORDERED that Plaintiff Roger Borgelt and Intervening Plaintiff the State of Texas take nothing, that their claims against the Defendants be dismissed with prejudice and

that final judgment is hereby ENTERED in favor of the Defendants the City of Austin and Marc Ott, in his official capacity. It is also ORDERED that Mark Pulliam and Jay Wiley shall pay the Austin Firefighters Association, Local 975 the amount of \$190,250. All other relief requested by these parties and not granted herein is DENIED. This order, together with the summary judgment order and the fee order, disposes of all claims and all parties. This order is intended to be an appealable final judgment.

SO ORDERED.

SIGNED on the 24th day of March, 2021.

  
\_\_\_\_\_  
THE HONORABLE JESSICA MANGRUM  
JUDGE PRESIDING

**7**

ROGER BORGELT,

*Plaintiff,*

And

TEXAS,

*Intervenor-Plaintiff,*

v.

CITY OF AUSTIN, TEXAS; MARC A. OTT,  
in his official capacity as City Manager of the  
City of Austin,

*Defendants.*

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

419<sup>th</sup> JUDICIAL DISTRICT

**AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Court makes the following amended findings of fact and conclusions of law:

**I. AMENDED FINDINGS OF FACT**

1. The purpose of the Collective Bargaining Agreement (CBA) between the Austin Fire Department (AFD) and the Austin Firefighters Association, Local # 975 (AFA), as stated in the agreement, is to achieve and maintain harmonious labor relations between the parties, to establish benefits, rates of pay, hours of work, and other terms and conditions of employment for all members of the bargaining unit and to provide for the equitable and orderly adjustment of grievances that may arise during the term of the agreement.
2. The Austin City Council ratified the CBA in a public vote.
3. As stated in the CBA, the parties agreed that the City maintains all inherent rights to manage AFD and its work force which it enjoys under applicable law, subject to applicable federal and statute statutes, local ordinances, resolutions, and rules, except as provided in the CBA.

4. The CBA allows the City and the AFA to agree on terms of hiring and promotion beyond those that are specified in Chapter 143 of the Local Government Code, which allows the AFD to hire and promote candidates based on more than just the candidate's test score.
5. Employing a staff of individuals who are trained to effectively suppress fires and protect public safety is a public purpose.
6. Good labor relations between the City and the AFA, including a duly negotiated and ratified labor agreement, are integral in AFD achieving its purpose, mission, vision, goals and core values.
7. The AFA pledged in the CBA to support the service and mission of the AFD, to constructively support the goals and objectives of the AFD, and to abide by the statutorily imposed no strike or work slowdown obligations placed on it.
8. The mission of the AFA includes furthering professional standards for firefighters, promoting fire fighter and public safety, and working towards more harmonious labor relations.
9. The missions of the AFD and AFA overlap and are not mutually exclusive.
10. The CBA benefits the public in general.
11. The City does not give any public funds to the AFA.
12. The CBA constitutes a bargained-for exchange of valid consideration on all sides.
13. The policy of the State of Texas as stated in Chapter 174 of the Texas Local Government Code is that firefighters, like employees in the private sector, should have the right to organize for collective bargaining.
14. Collective bargaining between the City and AFA is a fair and practical method for determining compensation and other conditions of employment for AFD firefighters.

15. Collective bargaining and the establishment of “expeditious, effective, and binding” contractual arbitration and enforcement procedures promotes the health, safety, and welfare of the public by ensuring “high morale of fire fighters . . . . and the efficient operation of the departments.” TEX. LOCAL GOV’T CODE § 174.002(b), (e).
16. Achieving and maintaining harmonious relations between public safety employees and local government is a public purpose.
17. Agreeing to a method of equitable and orderly adjustment of firefighter grievances, as described in the CBA, is a public purpose.
18. The use of association business leave (ABL) by City of Austin firefighters is governed by Art. 10 of the CBA.
19. ABL is a type of paid leave available to City of Austin firefighters.
20. The individual who was designated by the AFD Fire Chief to review ABL requests for most of the period at issue in this case was Assistant Chief Aaron Woolverton.
21. Art. 10, Sec. 1(C) of the CBA requires that requests for ABL made by other authorized representatives of the AFA be made in writing and submitted to AFD HQ support staff at least three days in advance, and may be made in person, by fax, or by e-mail by noon of the day the request is due.
22. AFD, through Woolverton, has denied ABL requests that are untimely and do not comply with Art. 10 of the CBA.
23. Individual AFD firefighters must submit their own requests to use ABL and may not make a request on behalf of another member.
24. AFD management including Woolverton can and do review the written requests for ABL made by other authorized representatives of the AFA and has denied those requests when they do not comply with Art. 10 of the CBA or when the requests would interfere with the operational needs of the department.

25. The City is not aware of any instance where ABL was utilized by an authorized representative of the AFA for legislative and/or political activities at the State or National level, except for activities that relate to wages, rates of pay, hours of employment, or conditions of work affecting the members of the bargaining unit, as described in Art. 10, Sec. 1(B)(2) of the CBA.

26. The City is not aware of any instance where ABL was utilized by an authorized representative of the AFA for legislative and/or political activities at the local, state, or national levels that were contrary to the City's adopted legislative program, as described in Art. 10, Sec. 1(B)(2) of the CBA.

27. The City is not aware of any instance where ABL was utilized by the AFA President or an authorized representative of the AFA for activities prohibited by Section 143.086 of the Texas Local Government Code or the Texas Ethics Commission, as described in Art. 10, Sec. 1(B)(2) of the CBA.

28. AFD has authorized firefighters' use of ABL to compete in the Fire Fighter Combat Challenge event, which promotes firefighter fitness and furthers the Department's mission of maintaining a healthy and highly performing workforce.

29. Ensuring that first responders like AFD firefighters are physically fit serves a public purpose.

30. All AFD members are expected to comply with applicable personnel policies and AFD's Code of Conduct while they are out on leave, including ABL.

31. The City has and continues to monitor ABL usage by compiling quarterly ABL usage reports, which show the amount of ABL used and the general nature of the business that was conducted while the AFD firefighters used that leave.

32. AFA president Bob Nicks is required to follow the personnel policies of the City and the AFD.



33. Bob Nicks is required to follow AFD's Code of Conduct at all times when using ABL.
34. Bob Nicks is required to comply with continuing education requirements, EMT requirements, and any applicable credentials by the Austin/Travis County Office of the Medical Director, just as any other member of the AFD.
35. As an AFD member, Bob Nicks may be disciplined by the City for failing to follow applicable personnel policies, AFD's Code of Conduct, or applicable continuing education and medical credentialing requirements.
36. Bob Nicks regularly attends meetings with AFD management and meets with the Fire Chief when requested to do so.
37. If there were ever a conflict between Bob Nicks' duties as AFA president under the Association's bylaws and the personnel policies and Code of Conduct of the AFD, Nicks would have to comply with AFD's personnel policies and Code of Conduct.
38. AFA President Bob Nicks is currently using ABL on a full-time basis, meaning that he spends 40 hours on ABL per week. In addition to his time on ABL, he estimates that he spends many hours more per week performing work as AFA President, while not on ABL.
39. The AFA uses ABL for "other association business" including station visits.
40. The AFA uses ABL for "other association business" including organizing and working third-party charity events.
41. Any member of the bargaining unit may request to use ABL as an "other authorized representative."

## **II. AMENDED CONCLUSIONS OF LAW**

1. Plaintiff argues that the City's implementation of ABL under the CBA violates what it refers to as the "gift clause" or the "gift clauses" of the Texas Constitution, referring to sections 50, 51, and 52-a of Art. III, and section 6-a of Art. XVI of the Texas Constitution.

2. The primary purpose of the gift clause is to prohibit the *gratuitous* grant of public funds. *See Tex. Mun. League v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 389 (Tex. 2002) (stating that the purpose of Art. III, Sec. 52 is to prevent the “*gratuitous* appropriation of public money or property” (emphasis added)); *State v. Austin*, 331 S.W.2d 737, 742 (Tex. 1960) (same, addressing a challenge based on Art. III, Sec. 50-51, and Art. XVI, Sec. 6); *Byrd v. Dallas*, 6 S.W.2d 738, 740 (Tex. 1928) (same, concerning Art. III, Sec. 51-52, Art. XVI, Sec. 6, and others).

3. The Texas Constitution’s prohibition on “authorizing a political subdivision ‘to grant public money’ means that the Legislature cannot require *gratuitous* payments to individuals, associations, or corporations. A political subdivision's paying public money is not ‘gratuitous’ if the political subdivision receives return consideration.” *Tex. Mun. League*, 74 S.W.3d at 383 (emphasis in original) (citations omitted). If there is valid consideration, there is no gift clause violation: “consideration renders the provisions constitutional.” *Id.* at 384.

4. When analyzing contractual consideration, “individual paragraphs of a contract are not separate and divisible contracts.” *Howell v. Murray Mortg. Co.*, 890 S.W.2d 78, 86-87 (Tex. App.—Amarillo 1994, writ denied) (citing *Pace Corp. v. Jackson*, 284 S.W.2d 340, 344 (Tex. 1955)). Rather, the contract must be analyzed as a whole, even when only one article or clause has been challenged. *See, e.g., In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 676 (Tex. 2006) (“[W]hen an arbitration clause is part of a larger, underlying contract, the remainder of the contract may suffice as consideration for the arbitration clause.”); *see also Howell*, 890 S.W.2d at 86-87 (“[A]n individual paragraph is merely a part of an entire, integrated contract between the contracting parties. Mutuality of obligation in each individual clause of a contract is unnecessary where there is consideration given for the contract as a whole.”); *Farmers’ State Bank v. Mincher*, 290 S.W. 1090, 1091 (Tex. 1927) (“[T]he provision relating to interest is subsidiary to the principal contract and is supported by the same consideration. When a promise is thus supported by a valuable consideration, the fact that the promise is not also supported by a corresponding

obligation on the part of the promisee becomes of no importance.”); *Fortner v. Fannin Bank in Windom*, 634 S.W.2d 74, 77 (Tex. App.—Austin 1982, no pet.) (“A basic principle of contract law is that one consideration will support multiple promises by the other contracting party.” (citing Restatement (Second) of Contracts, § 80(1) (1981))).

5. “Moreover, [the Texas Supreme Court] has determined that section 52(a) does not prohibit payments to individuals, corporations, or associations so long as the statute requiring such payments: (1) serves a legitimate public purpose; and (2) affords a clear public benefit in return.” *Tex. Mun. League*, 74 S.W.3d at 383-84 (citations omitted). In turn, a payment “serves a legitimate public purpose” if (1) “the statute [rendering the payment]’s predominant purpose is to accomplish a public purpose, not to benefit private parties;” (2) the municipality “retain[s] public control over the funds to ensure that the public purpose is accomplished and to protect the public’s investment;” and (3) “the political subdivision receives a return benefit.” *Id.* (citations omitted).

6. The City’s implementation of ABL under the CBA does not violate the requirements of Art. III, §50 of the Texas Constitution.

7. The City’s implementation of ABL under the CBA does not violate the requirements of Art. III, §51 of the Texas Constitution.

8. The City’s implementation of ABL under the CBA does not violate the requirements of Art. III, §52(a) of the Texas Constitution.

9. The City’s implementation of ABL under the CBA does not violate the requirements of Art. XVI, §6(a) of the Texas Constitution.

10. The CBA, containing the ABL article, is supported by an exchange of valid, bargained-for consideration on both sides.

11. The CBA, including the ABL article and the City’s implementation of ABL under the CBA, accomplishes a predominantly public purpose and is not predominantly a benefit to private parties.

12. The CBA, including the ABL article and the City's implementation of ABL under the CBA, permits the City to maintain sufficient public control over City funds to ensure they accomplish a public purpose and the public's investment is protected.
13. The CBA, including the ABL article and the City's implementation of ABL under the CBA, ensures that the City receives a return benefit, and the City receives a clear public benefit in return.
14. The City's implementation of ABL under the CBA is not a "gift" to any individual or entity. *See Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. 1928) ("There is no reason why a city may not engage its servants and employees upon any terms of payment acceptable to both parties.").
15. ABL is a bargained-for provision of a CBA that sets, among other things, the conditions of employment for the City of Austin's firefighters. The CBA, City policies, and in particular the rules and practices AFD follows in approving and accounting for the use of ABL by AFA president Bob Nicks and other Austin firefighters provides sufficient control to ensure that the public purposes of the CBA and the ABL provision are accomplished and to protect the public's investment.
16. Plaintiff and the State of Texas have not established that they will be irreparably harmed by the alleged actions of the City if they are not restrained by a permanent injunction.
17. Plaintiff and the State of Texas are not entitled to a permanent injunction against the City, as prayed for in their pleading, as a matter of law or equity.
18. Plaintiff and the State of Texas are not entitled to recover any attorneys' fees from the City under Texas Civil Practices and Remedies Code §37.009.

19. Plaintiff and the State of Texas are not entitled to recover any court costs from the City under Texas Civil Practices and Remedies Code §37.009.

SIGNED AND ENTERED this 11<sup>th</sup> day of May, 2021.

  
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JESSICA MANGRUM, JUDGE PRESIDING

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**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-21-00227-CV**

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**Roger Borgelt, Mark Pulliam, Jay Wiley, and The State of Texas, Appellants**

**v.**

**Austin Firefighters Association, IAFF Local 975; City of Austin; and Spencer Cronk, in his  
Official Capacity as the City Manager of the City of Austin, Appellees<sup>1</sup>**

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**FROM THE 419TH DISTRICT COURT OF TRAVIS COUNTY  
NO. D-1-GN-16-004307, THE HONORABLE JESSICA MANGRUM, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

This appeal arises from a constitutional challenge to a provision of the 2017-2022 Collective Bargaining Agreement (Agreement) between the City of Austin and the Austin Firefighters Association, Local 975 (Association). The challenged provision provides a shared bank of paid leave (“Association Leave”) for City firefighters to use for Association activities, subject to contractual requirements and restrictions on its use. Taxpayers Mark Pulliam and Jay Wiley initiated the challenge to this contractual provision on the ground that it violates Article III, Sections 50, 51, and 52(a), and Article XVI, Section 6(a) of the Texas Constitution (collectively, the “Gift Clauses”), asserting that it is an unlawful transfer of public funds to a private entity. The State of Texas intervened in the lawsuit in support of the taxpayers’ challenge.

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<sup>1</sup> The Court has substituted the City of Austin’s current City Manager, Spencer Cronk, for his predecessor, Marc A. Ott. *See* Tex. R. App. P. 7.2(a).

The Association moved to dismiss Pulliam and Wiley’s claims against it pursuant to the Texas Citizens Participation Act (TCPA), and the trial court granted the motion. *See generally* Tex. Civ. Prac. & Rem. Code §§ 27.001-.011; *see also In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) (orig. proceeding) (“The TCPA’s purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits.”). Taxpayer Roger Borgelt later joined the lawsuit, and Pulliam and Wiley nonsuited their remaining claims against the City and its city manager, acting in his official capacity (collectively, the “City”). After a partial summary judgment and a subsequent bench trial, the trial court entered a final judgment denying Borgelt’s and the State’s claims against the City. Pulliam and Wiley appeal from the trial court’s order granting the Association’s TCPA motion to dismiss their claims against it, including the trial court’s award of sanctions, while Borgelt and the State appeal from the final judgment.

For the reasons that follow, we will affirm the trial court’s final judgment.

## **BACKGROUND**

The procedural background of this case is complex. We briefly summarize the trial-court proceedings that are relevant to this appeal. In September 2016, Pulliam and Wiley filed suit against the Association and the City, seeking injunctive relief and a declaratory judgment that Article 10 of the collective-bargaining agreement in place at that time between the Association and the City is unconstitutional. Pulliam and Wiley asserted that Article 10, which establishes a bank of shared leave that may be used for Association activities, violates the Texas Constitution’s “Gift Clauses.” *See* Tex. Const. art. III, §§ 50, 51, 52(a); *id.* art. XVI, § 6(a). In October 2016, the State of Texas filed a plea in intervention, asserting the same claims as Pulliam and Wiley. In



November 2016, the Association filed a TCPA motion to dismiss. After a hearing in January 2017, the trial court dismissed Pulliam and Wiley’s claims against the Association.

In November 2017, after some intervening appellate proceedings that are not relevant to the claims at issue in this appeal, Pulliam and Wiley repleaded their claims against the City, based on the 2017-2022 Agreement.<sup>2</sup> The amended petition and application for injunctive relief continued to name the Association as a defendant. Pulliam and Wiley acknowledged in the amended petition that the Association had been dismissed on its TCPA motion but stated that the Association remained listed in the amended petition “for the sole purpose of preserving Plaintiffs’ appeal under the TCPA once a final, appealable Order is entered by the Court.” The State filed an amended plea in intervention based on the new 2017-2022 Agreement against only the City and nonsuited all its claims against the Association. In July 2018, the Association filed a plea in intervention, asserting that it should be allowed to defend itself as a named defendant from the same claims based on the same facts and seeking the same relief in the same proceeding that the trial court had previously dismissed. In August 2018, it filed its motion for an award of costs, attorneys’ fees, other expenses, and sanctions, as allowed by the TCPA. On the same day, the City and the Association filed a joint motion for summary judgment. A few months later in December

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<sup>2</sup> The other appeals that have been filed and resolved related to the underlying trial-court proceeding include the following: *Pulliam v. City of Austin*, No. 03-17-00131-CV, 2017 WL 1404745 (Tex. App.—Austin Apr. 14, 2017, order) (per curiam) (dismissing Pulliam and Wiley’s interlocutory appeal from trial court’s order granting TCPA motion to dismiss for want of jurisdiction); *State v. City of Austin*, No. 03-17-00131-CV, 2017 WL 4582603 (Tex. App.—Austin Oct. 11, 2017, no pet.) (mem. op.) (concluding that trial court did not rule on Association’s TCPA motion to dismiss with respect to State’s claims and that trial court’s February 7, 2017 order granting Association’s TCPA motion to dismiss did not operate as implicit denial of State’s plea to jurisdiction); *City of Austin v. Pulliam*, No. 03-18-00306-CV, 2018 WL 3321197, at \*1 (Tex. App.—Austin July 6, 2018, no pet.) (mem. op.) (granting City’s unopposed motion to dismiss its interlocutory appeal from trial court’s order denying its amended plea to jurisdiction).

2018, Pulliam and Wiley and the State filed a joint motion for summary judgment, and the City and the Association filed a joint cross-motion for summary judgment and opposition to Pulliam and Wiley and the State's motion.<sup>3</sup> In July 2019, after the joint motions for summary judgment had been fully briefed and heard, the trial court granted in part the City and the Association's joint cross-motion for summary judgment "as to any claims related to the collective bargaining agreement itself and the terms therein, that are challenged in the Amended Original Petition and Application for Injunctive Relief and the First Amended Plea in Intervention of Texas." The trial court denied in part the City and the Association's joint cross-motion for summary judgment "with regard to the implementation of such contract by the City of Austin." The trial court denied Pulliam and Wiley and the State's joint motion for summary judgment. On the same day it signed the summary-judgment orders, the trial court also signed orders granting Pulliam and Wiley's motion to strike the Association's amended plea in intervention, while granting the Association's request against Pulliam and Wiley for TCPA attorneys' fees in the amount of \$115,250 and sanctions in the amount of \$75,000.

In November 2019, Pulliam nonsuited his claims against the City. In October 2020, Wiley and newly added plaintiff Borgelt filed a second amended petition and application for injunctive relief against the City. In November 2020, Wiley nonsuited his claims against the City.

On March 8-9, 2021, the trial court conducted a bench trial on the remaining claim by Borgelt and the State concerning the City's implementation of the Agreement. On March 24, 2021, the trial court issued a final judgment in favor of the City and Association on all of Borgelt's

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<sup>3</sup> The City and the Association's joint cross-motion for summary judgment raised similar legal arguments as their initial summary-judgment motion but contained additional facts and also incorporated additional evidence, as well as their opposition to Pulliam and Wiley and the State's joint motion.

and the State's claims. The trial court made findings of fact and conclusions of law, which it subsequently amended. This appeal followed.

## **THE CITY AND THE ASSOCIATION'S COLLECTIVE-BARGAINING AGREEMENT**

The Texas Legislature has established:

The policy of this state is that fire fighters and police officers, like employees in the private sector, should have the right to organize for collective bargaining, as collective bargaining is a fair and practical method for determining compensation and other conditions of employment. *Denying fire fighters and police officers the right to organize and bargain collectively would lead to strife and unrest, consequently injuring the health, safety, and welfare of the public.*

Tex. Loc. Gov't Code § 174.002 (b) (emphasis added). The Agreement notes in its Section 2, Purpose of Agreement, that "the citizens of the City of Austin have by referendum election chosen the Collective Bargaining Process as a fair and orderly way of conducting its relations with Austin Fire Fighters . . . ." The parties stipulated, and the Agreement provides, that the Association is the sole and exclusive bargaining representative for all Fire Fighters (as that term is defined in the Agreement) in the Austin Fire Department (AFD). The Agreement further provides:

the Association has pledged to support the service and mission of the Austin Fire Department, to constructively support the goals and objectives of the Austin Fire Department, and to abide by the statutorily imposed no strike or work slowdown obligations placed upon it;

. . . it is the intent and purpose of this Agreement to achieve and maintain harmonious relations between the parties, and to establish benefits, rates of pay, hours of work, and other terms and conditions of employment for all members of the bargaining unit and to provide for the equitable and orderly adjustment of grievances that may arise during the term of this Agreement . . . .

The provision challenged by the appellants is Article 10, Association Business Leave (“Association Leave Provision”). As will be discussed in more detail below, the Association Leave Provision establishes a pool of 5,600 hours of paid leave for the Association’s President and other Authorized Association Representatives to use to conduct Association business under the conditions specified in Article 10.

## **ANALYSIS**

Appellants present two issues on appeal. First, Borgelt and the State assert that the trial court erred by determining that they were not entitled to relief on their claims against the City because the Gift Clauses prohibit the Association Leave Provision. Second, appellees Pulliam and Wiley (who nonsuited their remaining claims against the City) assert that the trial court erred by granting the Association’s TCPA motion to dismiss against them and by awarding sanctions under the TCPA. We address each of these issues in turn.

### **I. The Association Leave Provision Does Not Violate the Gift Clauses**

In their first issue, Borgelt and the State assert that the trial court erred by granting judgment in the City’s favor, based on their contention that the Gift Clauses prohibit the City from paying City employees to work for the Association “when the City does not control the activities of those employees, when those employees are not obligated to provide services to the City, and when those employees work primarily to advance the private interests of the [Association], not the public interests of the City.” In response, the City frames the issues in terms of the trial court’s rulings. First, the City asserts that Borgelt and the State have not established a genuine issue of material fact as to whether the bargained-for contract term that provides for a shared leave bank to the City’s firefighters and that is subject to numerous rules, restrictions, and approval

requirements, constitutes an unconstitutional “gift” of public funds. Second, the City asserts that Borgelt and the State have not established that the trial court erred in reaching its bench-trial judgment determining that the challenged, bargained-for contract term, as implemented by the City, was not an unconstitutional “gift” of public funds.

**A. Standard of Review and the Law Governing the Gift Clauses**

Borgelt and the State do not challenge any of the trial court’s findings of fact or the sufficiency of the evidence supporting those findings. Instead, they challenge the trial court’s legal conclusions supporting its summary judgment and the final judgment issued after the bench trial. We defer to unchallenged findings of fact that are supported by some evidence. *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 523 (Tex. 2014).

We review the trial court’s summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). When both parties move for summary judgment and the trial court grants one motion and denies the other, we review all the summary-judgment evidence, determine all issues presented, and render the judgment the trial court should have rendered. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). When a trial court’s summary-judgment order does not specify the grounds relied on for its ruling, as is the case here, we must affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *Provident Life*, 128 S.W.3d at 216.

We review the trial court’s conclusions of law de novo, and we may review the trial court’s legal conclusions drawn from the facts found to determine the correctness of the conclusions. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). If we determine that a conclusion of law is erroneous, but the trial court rendered the proper judgment,

the erroneous conclusion of law does not require reversal. *Id.* To the extent our analysis requires us to construe the Agreement, interpretation of an unambiguous contract is a question of law that “we review de novo using well-settled contract-construction principles.” *URI, Inc. v. Kleberg County*, 543 S.W.3d 755, 763 (Tex. 2018).

The constitutional provisions that make up what the parties refer to as the “Gift Clauses” are Article III, Sections 50, 51, and 52(a), and Article XVI, Section 6(a). They provide as follows:

The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatsoever, for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever.

Tex. Const. art. III, § 50.

The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever; provided that the provisions of this Section shall not be construed so as to prevent the grant of aid in cases of public calamity.

*Id.* art. III, Section 51.

[T]he Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever . . . .

*Id.* art. III, § 52(a).

No appropriation for private or individual purposes shall be made, unless authorized by this Constitution. A regular statement, under oath, and an account of

the receipts and expenditures of all public money shall be published annually, in such manner as shall be prescribed by law.

*Id.* art. XVI, § 6(a). These sections are “intended to prevent the application of public funds to private purposes; in other words, to prevent the gratuitous grant of such funds to any individual, corporation, or purpose whatsoever.” *Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. [Comm’n Op.] 1928) (addressing, among other constitutional provisions, Article III, Sections 51 and 52, and Article XVI, Section 6).

The Texas Supreme Court, in a case interpreting Article III, Section 52(a), reiterated this prior holding that Section 52(a)’s prohibition on a grant of public money “means that the Legislature cannot require *gratuitous* payments to individuals, associations, or corporations.” *Texas Mun. League Intergov’tl Risk Pool v. Texas Workers’ Comp. Comm’n*, 74 S.W.3d 377, 383 (Tex. 2002) (analyzing whether Section 52(a) was violated by Labor Code provisions that required multi-city workers’ compensation risk pool to pay unclaimed death benefits into Texas Workers’ Compensation Subsequent Injury Fund). It further explained that “[a] political subdivision’s paying public money is not ‘gratuitous’ if the political subdivision receives return consideration.” *Id.*

In addition, the Texas Supreme Court explained, it has long been held that Section 52(a) “does not prohibit payments to individuals, corporations, or associations so long as the statute requiring such payments: (1) serves a legitimate public purpose; and (2) affords a clear public benefit received in return.” *Id.* at 383-84. The Texas Supreme Court established a three-part test for determining whether a statute accomplishes a public purpose:

Specifically, the Legislature must: (1) ensure that the statute’s predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) retain public

control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and (3) ensure that the political subdivision receives a return benefit.

*Id.* at 384.

The parties dispute whether the test as set forth in *Texas Municipal League* requires us to analyze both whether the public payment is gratuitous and whether it serves a legitimate public purpose (using the three-part test), or whether it is enough to determine that the payment is not gratuitous. Although the Texas Supreme Court did not explicitly state the test as requiring a consideration of both factors, we note that it determined both that the payments at issue were not gratuitous and then considered whether the payments accomplished a legitimate public purpose with a clear public benefit received in return. *Id.* at 385. Accordingly, we will do the same in this case.

#### **B. The Contractual Provision Is Not a Gratuitous Grant of Public Funds**

Our first inquiry is whether the trial court rightly concluded that the Association Leave Provision is not a gratuitous grant of public funds. As an initial matter, we note that although Borgelt and the State characterize Association Leave as a gratuitous grant of funds to the Association, no funds are ever paid directly to the Association. Instead, the Association Leave Provision establishes a mechanism by which firefighters are permitted to have paid time off to conduct Association business under the conditions specified in the Agreement.

When considering the constitutionality of a statute allowing pensions for firefighters and police officers, the Commission on Appeals in an opinion adopted by the Texas Supreme Court stated that if the pension provided for in the act “is a part of the compensation of such employee for services rendered to the city, or if it be for a public purpose,” then it did not



violate the Gift Clauses. *Byrd*, 6 S.W.2d at 740. The court in *Byrd* did not analyze whether the pension scheme served a public purpose; instead, it considered whether the pension plan was part of the employees' compensation. *Id.* It noted that "[t]here is no reason why a city may not engage its servants and employees upon any terms of payment acceptable to both parties." *Id.* It determined that the statutorily authorized pension plan contemplated that the employees' compensation would consist of their agreed-upon salaries and their entitlement to participate in the pension fund. *Id.* The court held:

When an officer or employee coming within the statute is employed and evidences his assent to the pension scheme, he thereupon has a binding contract with his employer for the stipulated salary and likewise to be "entitled to participate" in the fund upon the terms prescribed. The right to participate in such fund is therefore not a gratuity or donation in any sense. *It is as much a part of the agreed compensation as is the monthly stipend.*

*Id.* at 741 (emphasis added). Similarly, in this case, the Association Leave Provision was a bargained-for term of the 2017 Collective Bargaining Agreement, and the right for firefighters authorized by the Association to receive such leave was part of the agreed compensation provided for in the Agreement.

Borgelt and the State, however, assert in their reply that because Association Leave is set up as a bank of time that individual City firefighters can request and because Association President Nicks is allowed to use 2,080 hours of the Association Leave bank, Association Leave "is not compensation to all employees for services rendered, for them to use as they see fit." They contend that instead it is given to the Association for the Association to use as it sees fit. Moreover, they contend that because Association Leave may be used by the Association as it chooses, Association Leave is not "'sufficient consideration' for the 'performance of employment duties.'"

They further argue that Association Leave differs from the pension-plan participation that the court in *Byrd* concluded was “part of the compensation of such employee for services rendered to the city,” 6 S.W.2d at 740, based on their assertion that it is given to the Association for Association business activities consistent with the Association’s purposes, not to employees as payment for the performance of employment duties. In support of this line of argument, they also challenge the trial court’s conclusion of law number four in which the court concluded that for the purpose of “analyzing contractual consideration, ‘individual paragraphs of a contract are not separate and divisible contracts,’” quoting *Howell v. Murray Mortgage Co.*, 890 S.W.2d 78, 86-87 (Tex. App.—Amarillo 1994, writ denied) (citing *Pace Corp. v. Jackson*, 284 S.W.2d 340, 344 (Tex. 1955)).<sup>4</sup> Borgelt and the State argue that because they assert that only the Association Leave Provision is unlawful, that provision may be severed and the remainder of the contract may be enforced. However, the principle that an illegal contract provision may be severed does not answer the question of whether we should examine the contract as a whole to determine whether sufficient consideration exists for this Court to determine that the Association Leave Provision is not gratuitous.

As this Court has previously stated, “[a] basic principle of contract law is that one consideration will support multiple promises by the other contracting party.” *Fortner v. Fannin Bank in Windom*, 634 S.W.2d 74, 77 (Tex. App.—Austin 1982, no writ) (citing, e.g., Restatement (Second) of Contracts § 80(1) (1981)), and holding that summary-judgment proof established that bank’s customer purchased bank’s services of loan and of filing title papers in exchange for his promise to repay principal and interest). The Agreement between the City and the Association

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<sup>4</sup> They do not challenge the trial court’s finding of fact (FOF) number twelve, “The [Agreement] constitutes a bargained-for exchange of valid consideration on all sides.”

governs the City's relationship with the Association, which the City recognizes in the Agreement "as the sole and exclusive bargaining agent for all Fire Fighters pursuant to Local Government Code Section 174.101." As the court noted in *Byrd*, "[t]here is no reason why a city may not engage its servants and employees upon any terms of payment acceptable to both parties." 6 S.W.2d at 740; *see also Morales v. Hidalgo Cnty. Irrigation Dist. No. 6*, No. 13-14-00205-CV, 2015 WL 5655802, at \*4 (Tex. App.—Corpus Christi—Edinburg Sept. 24, 2015, pet. denied) (mem. op.) (holding that employment contract with term entitling employee to cash severance equal to employee's remaining compensation due for term of employment if terminated by public employer for any reason other than death or disability did not constitute gratuitous payment of public funds to employee). "Texas courts have long held that the performance of employment duties is consideration for the payment of benefits to employees under the terms of a contract, and therefore such payments are not unconstitutional gratuities." *Morales*, 2015 WL 5655802, at \*3 (citing cases).

Here, in addition to the fire-protection services that the City receives in return for the compensation terms of the Agreement, including the compensation provided by the Association Leave Provision, the trial court had before it evidence both at summary judgment and at trial that the City receives additional consideration in the form of concessions by the Association. These concessions result in changes favorable to the City on matters otherwise governed by the civil-service provisions found in Texas Local Government Code Chapter 143.<sup>5</sup> These matters

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<sup>5</sup> Unchallenged FOF number four states, "The [Agreement] allows the City and the [Association] to agree on terms of hiring and promotion beyond those that are specified in Chapter 143 of the Local Government Code, which allows the AFD to hire and promote candidates based on more than just the candidate's test score." Assistant Fire Chief Aaron Woolverton testified that the City and the Fire Department benefit from several articles in the Agreement, including the hiring article, the promotions article, and the drug-testing article, among others, and that "there's

include hiring, promotions, disciplinary investigations, disciplinary appeals, allowing for differences in base wages based upon seniority, longevity pay, required certifications, required education, specialized assignments, the designation of personnel in certain positions with certain leave and pay levels, drug testing, and the ability to merge the Austin Fire Department with Travis County Emergency Services Districts. These terms favorable to the City are incorporated into the Agreement. In addition, as the trial court states in unchallenged finding of fact (FOF) number seven, “The [Association] pledged in the [Agreement] to support the service and mission of the AFD, to constructively support the goals and objectives of the AFD, and to abide by the statutorily imposed no strike or work slowdown obligations placed on it.”

Borgelt and the State also argue that the Association “has not obligated itself to perform any duties, or give anything in return, for the [Association Leave] hours it receives.” As explained above, “an individual paragraph is merely a part of an entire, integrated contract between the contracting parties. Mutuality of obligation in each individual clause of a contract is unnecessary where there is consideration given for the contract as a whole.” *Howell*, 890 S.W.2d at 86-87 (citations omitted); *see also United Appliance Corp. v. Boyd*, 108 S.W.2d 760, 764 (Tex. App.—Fort Worth 1937, no writ) (“Generally there is mutuality in the case of mutual promises by both parties to the contract which furnish a consideration each for the other, or where both parties undertake to do something—even though every obligation of one party is not met by an equivalent counter obligation of the other.”). Despite Borgelt and the State’s assertion, and while an equivalent counter-obligation for Association Leave is not necessary, we note that the unambiguous terms of the Agreement in fact bind the Association to several specific obligations

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others, where the City has—has gained rights that we wouldn’t have had under a strict 143 standard, or our—our rule, and so we’ve gained in those . . . areas.”

related to a number of administrative requirements, including administering the Association Leave bank, recordkeeping regarding membership and dues withholding, and communications with members of the Civil Service Commission and with its own membership. A key duty of the Association is its role in the grievance-resolution procedure established in the Agreement “to establish an effective method for the fair, expeditious and orderly adjustment of grievances.” The Association Grievance Committee makes the initial determination of whether a valid grievance exists, and if it does, the Association moves the grievance forward through the process, which can include arbitration, on behalf of the firefighter. The Association also agreed to attempt to resolve grievances informally both before their filing and before arbitration “in an attempt to avoid costly arbitration.”

In addition, Borgelt and the State’s consideration argument presumes that because Association Leave may be used for Association activities that support the Association’s business, the City does not benefit from these activities. As we will discuss in more detail below as it relates to public purpose, this argument ignores the benefits received by the City from the concessions noted above and the role that the Association plays in the Agreement’s stated purpose of maintaining “harmonious relations between the parties,” including providing “for the equitable and orderly adjustment of grievances that may arise during the term of this Agreement.” The trial court made multiple unchallenged findings of fact that the public—on whose behalf the City negotiated the Agreement—benefits from “achieving and maintaining harmonious relations between public safety employees and local government” and from “[a]greeing to a method of equitable and orderly adjustment of firefighter grievances, as described in the Agreement.” As the trial court’s unchallenged FOF number six states, “Good labor relations between the City and the

[Association], including a duly negotiated and ratified labor agreement, are integral in AFD achieving its purpose, mission, vision, goals and core values.”

Finally, there was uncontroverted evidence before the trial court that as part of the collective-bargaining process in 2009, the City agreed to the current method of allowing up to 5,600 hours per year of Association Leave in exchange for a change in the treatment of sick leave from “productive leave” that counted toward employees’ hours worked for purposes of calculating overtime to “nonproductive leave” that did not count towards employees’ hours worked. Nicks estimated that this change saved the City between \$500,000 to \$600,000 per year, while the cost of Association Leave is approximately \$200,000 per year.

Both the Agreement’s express terms and the record evidence support a conclusion that the Association Leave Provision is supported by sufficient consideration. This consideration renders the Provision constitutional on its face because the Agreement’s grant to employees of the ability to take paid time off for Association Leave is not gratuitous. *See Texas Mun. League*, 74 S.W.3d at 384 (explaining that “only sufficient—not equal—return consideration” is required “to render a political subdivision’s paying public funds constitutional”). Consequently, we hold that the trial court did not err by concluding in conclusion of law number ten that “[t]he [Agreement], containing the [Association Leave] article, is supported by an exchange of valid, bargained-for consideration on both sides.” *See Byrd*, 6 S.W.2d at 741 (concluding that employees’ right to participate in pension fund was part of agreed compensation for services); *see also Walker v. City of Georgetown*, 86 S.W.3d 249, 260 (Tex. App.—Austin 2002, pet. denied) (concluding, without conducting analysis of public purpose, that City’s lease of portion of public park for batting-cage facility for \$400 per month was not gratuitous donation of public funds because lease was supported by valuable consideration).

**C. The Agreement, Including the Association-Leave Provision, Serves a Legitimate Public Purpose and Affords a Clear Public Benefit in Return**

We turn now to the two-prong test for constitutionality to determine whether the trial court correctly concluded that the Association Leave Provision does not violate the Gift Clauses because it (1) serves a legitimate public purpose and (2) affords a clear public benefit in return. *See Texas Mun. League*, 74 S.W.3d at 383. We will consider the three-part test established in *Texas Municipal League* for whether the challenged payment serves a legitimate public purpose: (1) whether the Association Leave Provision’s predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) whether the City retains public control over the City’s funds to ensure that the public purpose is accomplished and to protect the public’s investment; and (3) whether the City ensures that it receives a return benefit. *See id.* at 384. We then will consider the somewhat overlapping second prong of the constitutionality question—whether the Provision affords a “clear public benefit received in return.” *Id.* at 383.

**(1) The predominant purpose is to provide public employees with leave time that is used for purposes related to their public employment**

Borgelt and the State challenge the trial court’s conclusion of law number eleven, which states that “[t]he [Agreement], including the [Association Leave] article and the City’s implementation of [Association Leave] under the [Agreement], accomplishes a predominantly public purpose and is not predominantly a benefit to private parties.” Borgelt and the State argue that the Association Leave Provision does not serve a public purpose because they contend that the Association, not the City or its taxpayers, is the predominant beneficiary of Association Leave. They contend that because the Association is a private labor organization, its “mission is to advance the private interests of its members,” citing in support the City’s discovery response in

which it states that “[t]he Association is an organization that represents firefighters to deal with the City as an employer concerning grievances, labor disputes and conditions of employment affecting those firefighters” and that “[a]ctivities by the [Association] in connection with Article 10 are those that support their role as an employee organization.” In further support of this argument, Borgelt and the City contend that the predominant purpose of the Association Leave Provision is to allow firefighters to do “private union business, not the City’s business,” and that if all the activities done using Association Leave promoted public purposes, there would be no need for Association Leave because the City could just assign employees to further those purposes directly as part of their official duties.

This argument ignores the policy set forth by the Texas Legislature, as stated above, declaring that collective bargaining between a political subdivision and the designated bargaining agent for the political subdivision’s firefighters is in the public interest—“Denying fire fighters and police officers the right to organize and bargain collectively would lead to strife and unrest, consequently injuring the health, safety, and welfare of the public.” Tex. Loc. Gov’t Code § 174.002(b). Borgelt and the State dispute the City’s argument that the predominant purpose of the Agreement “is to secure safe and efficient fire safety and emergency services for the citizens of Austin, an unquestionable public purpose,” contending that the City cannot argue that Association Leave Provision “is necessary or (even helpful to) achieving this purpose.” At bottom, Borgelt and the State’s argument is that because the AFD could exist without the Association Leave Provision, the Provision does not serve a public purpose.

Borgelt and the State’s argument fails because Borgelt and the State ignore the fact that, as the trial court found, the Association’s mission—facilitating good labor relations between the AFD and its public-servant employees, furthering professional standards for firefighters, and



promoting firefighter and public safety—overlaps with the mission of the AFD, and the two organizations’ missions are not mutually exclusive. Thus, work done on behalf of the Association by firefighters who are using Association Leave not only furthers the mission of the Association but also furthers AFD’s mission and public purpose of providing safe and efficient fire safety and emergency services. As the trial court summarized in its FOF number fifteen, the Legislature has determined that “[c]ollective bargaining and the establishment of ‘expeditious, effective, and binding’ contractual arbitration and enforcement procedures promotes the health, safety, and welfare of the public by ensuring ‘high morale of fire fighters . . . and the efficient operation of the departments.’”<sup>6</sup> In addition, as the trial court found in other findings of fact, the Association’s business carried out on behalf of its public-servant employees serves a public purpose:

5. Employing a staff of individuals who are trained to effectively suppress fires and protect public safety is a public purpose.

6. Good labor relations between the City and the [Association], including a duly negotiated and ratified labor agreement, are integral in AFD achieving its purpose, mission, vision, goals and core values.

7. The [Association] pledged in the [Agreement] to support the service and mission of the AFD, to constructively support the goals and objectives of the AFD, and to abide by the statutorily imposed no strike or work slowdown obligations placed on it.

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<sup>6</sup> See Tex. Loc. Gov’t Code §§ 174.002(c) (establishing that “[t]he health, safety and welfare of the public demands that strikes, lockouts, and work stoppages and slowdowns of fire fighters and police officers be prohibited” and thus it is State’s “duty to make available reasonable alternatives to strikes by fire fighters and police officers”), (d) (“Because of the essential and emergency nature of the public service performed by firefighters and police officers, a reasonable alternative to strikes is a system of arbitration conducted under adequate legislative standards [or judicial enforcement of this Chapter’s requirements].”), (e) (“With the right to strike prohibited, to maintain the high morale of fire fighters and police officers and the efficient operation of the departments in which they serve, alternative procedures must be expeditious, effective, and binding.”), .101 (establishing that “public employer shall recognize an association selected by a majority of the fire fighters of the fire department of a political subdivision as the exclusive bargaining agent for the fire fighters of that department”).

. . . .

16. Achieving and maintaining harmonious relations between public safety employees and local government is a public purpose.

17. Agreeing to a method of equitable and orderly adjustment of firefighter grievances, as described in the [Agreement], is a public purpose.

We conclude that the Association Leave Provision’s “predominant purpose is to accomplish a public purpose” because it facilitates the Association’s ability to carry out its business of supporting the Fire Department’s mission and maintaining good labor relations between the City and its public-servant firefighters.

**(2) The trial court correctly determined that the City retains sufficient control over the Association Leave Provision to ensure that the public purpose is accomplished and to protect the public’s investment**

Borgelt and the State contend that the Association Leave Provision violates the Gift Clauses because the City failed to establish that it maintains any control—either in the language of the Agreement or in its implementation—over the public funds used to provide Association Leave. They primarily focus on the use of the Association Leave granted by the Agreement to the Association’s President and, to a lesser extent, on the use of Association Leave by other “Authorized Association Representatives,” as that term is defined in the Agreement. Borgelt and the State do not challenge any of the trial court’s findings of fact related to the issue of control. Instead, they assert that the terms of the contract and the evidence before the trial court support their contention that the City does not control its employees’ use of Association Leave in an adequate manner to avoid violating the Gift Clauses.

We first consider how the Agreement and its implementation apply to the Association's President. Bob Nicks, the Association's President since 2010, gave testimony both by deposition and at the two-day bench trial. Borgelt and the State contend that the City does not maintain adequate control over the Association President's use of Association Leave because he is allowed to work full-time on Association business but is not required to report to AFD headquarters or any other Department office on a daily basis or to report to the City his daily activities or what Association work he is doing. They also argue that because he is outside of the regular chain of command and reports to the Chief of Staff or the Fire Chief and because the City cannot remove the Association President from his Association position, the City lacks sufficient control over the Association President's use of Association Leave.

We disagree that the City lacks sufficient control over the Association President and his use of Association Leave. The Agreement itself sets forth the parameters of what constitutes Association business activities for which Association Leave may be used. For the Association President, the Agreement provides that he may use up to 2,080 hours of Association Leave per year from the 5,600 hours in the Association Leave pool "for any lawful Association business activities consistent with the Association's purposes." The Agreement further states that the Association President "shall be assigned to a 40 hour work week. The Association President shall account for all leave time taken under such status through the Fire Chiefs office and such time shall be subtracted from the Association leave pool." Furthermore, "[a]t the end of his/her term, the Association President will be allowed to return to the assignment s/he occupied before commencing [Association Leave] to perform duties as Association President." Thus, the Association President remains a City employee who returns to his previous City position whenever

his term as Association President ends.<sup>7</sup> In addition, the Agreement contemplates that the Association President may be required to return to duty at any time if an emergency situation exists and further provides that the Association President may also be assigned to special projects at the Fire Chief's discretion. Assistant Fire Chief Aaron Woolverton, a member of AFD management, testified that the Association President is supervised by someone in the executive staff rather than a shift commander partly because the Association President works a more traditional schedule (40 hours from Monday through Thursday) than a shift commander who comes in only every third day and partly because of the difference in his job duties.

While Borgelt and the State contend that the City does not adequately control the Association President as an employee because "[t]he City cannot 'hire' him as [Association] President or remove him as [Association] President; it does not supervise him or his activities," this description misrepresents the City's level of control over the Association President. While the City cannot choose who the Association's President is, the City controls his employment as an AFD employee, including retaining its ability to terminate his City employment, which would terminate his access to paid leave of any kind. As Nicks testified and the trial court found, he remains subject to the Department's Code of Conduct and the City's and Department's personnel policies, and he may be disciplined by the City for failing to follow any of the City's policies or requirements. Nicks testified that in fact he has been subjected to discipline from the Department for conduct during his Association Leave time. The trial court also found that "Nicks is required to comply with continuing education requirements, EMT requirements, and any applicable

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<sup>7</sup> The parties filed Amended Joint Stipulated Facts before the bench trial. Borgelt and the State stipulated that "[t]he [Association's] President is Bob Nicks, who is employed as a full-time City of Austin firefighter."

credentials by the Austin/Travis County Office of the Medical Director, just as any other member of the AFD.” The trial court found that the City is not aware of any instance where the Association President used leave for any activities prohibited by Texas Local Government Code Section 143.086, governing political activities, or by the Texas Ethics Commission. The trial court made a finding based on Nicks’s uncontradicted testimony that Nicks spends many more hours per week than his forty hours of Association Leave on his work as Association President.

And contrary to Borgelt and the State’s implication, while no one directs the Association President’s day-to-day activities, the evidence showed that the City does not lack oversight over his work. He testified, and the trial court found, that he meets with various members of AFD’s management on a regular basis, including the Chief of Staff, whom he reports to “[w]henever he asks me to,” and similarly attends any meeting that the Fire Chief asks him to attend. As Nicks explained it, “[w]hat we do is we work on a lot of common things together that are—that are mutually beneficial to the Department.” As an example, he described a project that he and the Fire Chief “worked many, many hours together on,” along with civilian budget analysts to come up with the most desirable ways from the Association’s membership’s point of view to solve an overtime crisis due to a personnel shortage. He testified that because he went through the process of engaging the membership and stakeholders, the City was able to save three to four million dollars and minimize morale issues.

We next turn to Borgelt and the State’s argument that the terms of the Agreement and the use of Association Leave by other Authorized Association Representatives violates the Gift Clauses because the City lacks sufficient control over the use of the Representatives’ time. The Agreement defines an “Authorized Association Representative” as “a representative of the Association authorized by the Association’s Executive Board to conduct business on behalf of the

Association” and sets forth specific parameters for their use of Association Leave time. The trial court found that any member of the Association may request to use Association Leave as an Authorized Association Representative. As provided in Article 10, they may use the time “for Association business activities that directly support the mission of the Department or the Association, but do not otherwise violate the specific terms of this Article.” The Agreement defines “Association business” as “time spent in Collective Bargaining negotiations[,] adjusting grievances, addressing cadet classes during cadet training (with prior approval of the time and content by the Fire Chief, or his/her designee), and attending union conferences and meetings.”

The Agreement limits the use of Association Leave for “legislative and/or political activities at the State or National level” to activities that “relate to the wages, rates of pay, hours of employment, or conditions of work affecting the members of the bargaining unit” and at the local level “to raising concerns regarding firefighter safety.” The Agreement prohibits the use of Association Leave for “legislative and/or political activities that are sponsored or supported by the Association(s) Political Action Committee(s)”; “for legislative and/or political activities at the local, state, or national levels that are contrary to the City’s adopted legislative program”; and for activities prohibited by Texas Local Government Code Section 143.086 (governing political activities) or by the Texas Ethics Commission.

The Agreement gives the City the right to specify in Departmental policy the “[a]dministrative procedures and details regarding the implementation of” Association Leave. The Agreement requires that the Authorized Association Representatives request Association Leave in writing and submit their requests to AFD headquarters support staff at least three days in advance. The trial court found that Assistant Chief Woolverton was the individual designated to review Association Leave requests for most of the period at issue in this case. Woolverton testified at

length about the approval process for Association Leave. The trial court made a number of findings supported by testimony from him and Nicks about the use of Association Leave by Authorized Association Representatives. The trial court found that AFD, through Woolverton and other members of AFD management, has denied Association Leave requests that are untimely or that do not comply with the Agreement's Leave Provision or that would interfere with the Department's operational needs. The trial court found that the City is not aware of any instance where Association Leave was used by an Authorized Association Representative for any of the expressly prohibited political or legislative activities. The trial court found that "[t]he City has and continues to monitor [Association Leave] usage by compiling quarterly [Association Leave] usage reports, which show the amount of [Association Leave] used and the general nature of the business that was conducted while the AFD firefighters used that leave."

The Agreement's Article 4 establishes that the City retains all its inherent rights to manage the Fire Department and its work force, including the right to discipline or discharge employees in accordance with Chapter 143 and the Agreement's terms. The trial court found that all AFD members are expected to comply with applicable personnel policies and AFD's Code of Conduct while they are out on leave, including Association Leave. The trial court made findings that the Association uses Association Leave for "other association business" that includes station visits; organizing and working third-party charity events; and the Fire Fighter Combat Challenge event, which promotes firefighter fitness and furthers the Department's mission of maintaining a healthy and highly performing workforce. The trial court also found that ensuring the first responders like AFD firefighters are physically fit serves a public purpose.

Borgelt and the State focus on what they describe as the "undefined, unaccounted-for category of time" of "other association business," which they assert represents the majority of

Association Leave used by Authorized Association Representatives. The record evidence does not support this characterization of “other association business” as “undefined” or “unaccounted-for.” While the quarterly summaries of Association Leave provided by the City do not explicitly show the specific activity for each entry logged as “other association business,” each Association Leave request requires that the requesting firefighter complete a “Purpose of Request” field, and this field is what the Association (who screens the request first) and then the City reviews when determining whether to approve the request as Association Leave.

The trial court concluded that “[t]he [Agreement], including the [Association Leave] article and the City’s implementation of [Association Leave] under the [Agreement], permits the City to maintain sufficient public control over City funds to ensure they accomplish a public purpose and the public’s investment is protected.” It further concluded:

[Association Leave] is a bargained-for provision of [an Agreement] that sets, among other things, the conditions of employment for the City of Austin’s firefighters. The [Agreement], City policies, and in particular the rules and practices AFD follows in approving and accounting for the use of ABL by [Association] president Bob Nicks and other Austin firefighters provides sufficient control to ensure that the public purposes of the [Agreement] and the [Association Leave] provision are accomplished and to protect the public’s investment.

Having examined the record and arguments de novo, we conclude that the trial court did not err in reaching these conclusions.

### **(3) The City receives a return benefit**

As we previously concluded in our discussions of consideration and public purpose, the City receives a return benefit from the Association Leave Provision, but we will summarize those benefits and some others here. The City presented evidence that the Provision was originally



negotiated in exchange for the way that certain sick-leave time was calculated, resulting in a cost savings for the City. There is also record evidence explaining some benefits to the Department from the work that Authorized Association Representatives may use Association Leave to do, including participation in a cadet-hiring oversight committee and a labor-management initiative that works to resolve issues in a proactive way. Assistant Chief Woolverton testified that the City benefited from having Association representatives attend dispute resolutions and grievance proceedings because the City prefers to work things out through a grievance process or dispute-resolution process instead of a lawsuit. In addition, Nicks testified that one of the benefits provided to the public from his full-time work as Association President is that through his regular contact with both AFD management and the Association's members, he is able to provide the Fire Chief with "the perspective of the rank and file" about what "helps or hurts morale" and that allows the Chief to make a more informed decision on important issues, including firefighter safety and operational issues. Woolverton testified that he viewed it as a benefit to the City to have the Association President spend his full-time work week on Association business rather than being a part-time president and also having a Battalion Chief position. He stated:

[H]aving had it both ways during the history of my tenure with the Fire Department, I was much more at ease with him actually being full-time dedicated to the functions of the presidency, and the reason being is the firefighter safety issue. I don't want the Union Presidents focused on something other than the men and women that are serving for him. And if his mind is elsewhere while he's on duty, that's not a good thing. So I like, personally, the split function.

Woolverton further testified that at one point Nicks had requested to be able to continue to work in operations and also maintain his Association President job, but the Fire Chief had denied that request for the same reason—to avoid a conflict in his two roles. Finally, the City benefits from

the Provision because the Provision enables the Association to conduct its business, and the Association's business serves the public purpose of facilitating harmonious labor relations between the firefighters and the City. The record evidence, including the Agreement's terms, supports the trial court's conclusion that "[t]he [Agreement], including the [Association Leave] article and the City's implementation of [Association Leave] under the [Agreement] ensures that the City receives a return benefit, and the City receives a clear public benefit in return."

Accordingly, having reviewed de novo the Agreement's terms and the City's implementation of the Association Leave Provision, we conclude that the Provision satisfies the three prongs of the public-purpose test. *See Texas Mun. League*, 74 S.W.3d at 385.

**(4) The Provision affords a clear public benefit in return**

As for the second prong of the constitutionality question (which somewhat overlaps with the third factor of the public-purpose test), the trial court also correctly concluded that the City has established that Association Leave Provision "benefits the public as a whole, and not merely a particular private interest." *See id.* As previously explained, the record evidence shows that the Association's business serves a public purpose, so the Provision serves a public purpose of facilitating harmonious labor relations between the firefighters and the City. And as the trial court found, "[g]ood labor relations between the City and the [Association], including a duly negotiated and ratified labor agreement, are integral in AFD achieving its purpose, mission, vision, goals and core values."

We conclude that the Association Leave Provision (1) serves a legitimate public purpose and (2) affords a clear public benefit received in return. *Id.* The trial court correctly concluded that neither the terms of the Provision nor the City's implementation of the Provision

violate the Gift Clauses. Therefore, we affirm the portion of the trial court's final judgment ordering that Borgelt and the State take nothing, dismissing their claims against the City with prejudice, and entering final judgment in favor of the City. We overrule Borgelt and the State's issue.

## **II. The Trial Court Did Not Err by Granting the Association's TCPA Motion and Awarding Sanctions**

In a multi-part issue, appellants Pulliam and Wiley challenge the trial court's rulings against them in connection with the Association's motion to dismiss brought under the TCPA. *See generally* Tex. Civ. Prac. & Rem. Code §§ 27.001-011. They assert that the trial court erred when it granted the motion to dismiss (1) by finding that the Association established that the action relates to the Association's constitutional rights, (2) by finding that Pulliam and Wiley failed to establish a prima facie violation of the Gift Clauses even though it later found that a fact issue existed requiring a bench trial, (3) by awarding sanctions against Pulliam and Wiley, and (4) by granting the TCPA order and sanctions in violation of their constitutional rights. The Association responds that Pulliam and Wiley's asserted arguments against the TCPA order are "imaginative, but fundamentally flawed."<sup>8</sup>

The Association filed its TCPA motion to dismiss on November 21, 2016. Although the Texas Legislature amended the TCPA in 2019, the prior version of the statute continues to control cases filed before September 1, 2019. *See* Texas Citizens Participation Act, 86th Leg., R.S., ch. 378, §§ 11-12, 2019 Tex. Gen. Laws 684, 687 (providing that amendments

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<sup>8</sup> The City did not move for dismissal of Pulliam and Wiley's claims under the TCPA, so the City takes no position on appeal on this issue. Similarly, the State takes no position on the appellate issues raised by Pulliam and Wiley related to the trial court's orders on the TCPA motion.

apply to actions filed on or after September 1, 2019). Thus, all references to the TCPA in this opinion are to the version that applies to this dispute. *See generally* Texas Citizens Participation Act, 82nd Leg., R.S., ch. 341, 2011 Tex. Gen. Laws 961, 961-64 (codified at Tex. Civ. Prac. & Rem. Code §§ 27.001-011).

### **A. Applicable TCPA Legal Standard**

The TCPA “protects citizens who petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them.” *In re Lipsky*, 460 S.W.3d at 584; *see also* Tex. Civ. Prac. & Rem. Code §§ 27.001-.011. The TCPA provides this protection by means of an expedited motion to dismiss a suit that appears to stifle the defendant’s exercise of certain protected rights, including the right of association. *In re Lipsky*, 460 S.W.3d at 584 (citing Tex. Civ. Prac. & Rem. Code § 27.003). Reviewing a TCPA motion to dismiss requires a three-step analysis. *Youngkin v. Hines*, 546 S.W.3d 675, 679 (Tex. 2018). Under the first step, the party moving for dismissal must show by a preponderance of the evidence that the TCPA applies to the legal action that is the subject of the motion to dismiss. *See* Tex. Civ. Prac. & Rem. Code §§ 27.003(a), .005(b). If the movant satisfies that burden, under the second step, the burden shifts to the nonmovant to establish “by clear and specific evidence a prima facie case for each essential element of the claim in question.” *Id.* § 27.005(c). Finally, under the third step, if the TCPA applies and the nonmovant satisfies its burden of presenting a prima facie case, the burden shifts back to the movant to establish by a preponderance of the evidence each essential element of a valid defense to the nonmovant’s claim. *Id.* § 27.005(d).

When determining whether a legal action should be dismissed under the TCPA, courts must consider “the pleadings and supporting and opposing affidavits stating the facts on

which the liability or defense is based.” *Id.* § 27.006(a). We view the pleadings, affidavits, and evidence in the light most favorable to the nonmovant. *Warner Bros. Ent., Inc. v. Jones*, 538 S.W.3d 781, 801 (Tex. App.—Austin 2017), *aff’d*, 611 S.W.3d 1 (Tex. 2020). We review de novo issues of statutory interpretation when determining whether the TCPA applies. *See Youngkin*, 546 S.W.3d at 680. We also review de novo the trial court’s ruling on a motion to dismiss, including whether the parties have carried their respective burdens. *Grant v. Pivot Tech. Sols., Ltd.*, 556 S.W.3d 865, 873 (Tex. App.—Austin 2018, pet. denied).

**B. The Association Carried Its Burden to Establish That the TCPA Applies to Pulliam and Wiley’s Claims**

Under the first step of the TCPA analysis, we consider whether the Association has demonstrated that the TCPA applies to this legal action. TCPA Section 27.005 provides that “a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party’s exercise of . . . the right of association.” Tex. Civ. Prac. & Rem. Code § 27.005(b)(3). The TCPA provides its own definition of the “[e]xercise of the right of association”: “a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.” *Id.* § 27.001(2). Both in their TCPA motion and on appeal, the Association urges that the TCPA applies to the suit because Pulliam and Wiley’s claims “relate to” the Association’s members’ exercise of the right of association as defined by the Act. Pulliam and Wiley argue that the trial court erred by determining the TCPA applies to this legal action because the lawsuit has not infringed, and cannot infringe, on any of the Association’s constitutional or statutory rights.

As the Association argued in its motion, the heart of Pulliam and Wiley’s claim is that Association Leave is used to further the interests of the Association rather than the City’s

interests. In support of this claim, they alleged in their petition that the Agreement allows Authorized Association Representatives to use Association Leave for “time spent in Collective Bargaining negotiations[,] adjusting grievances, attending dispute resolution proceedings, addressing cadet classes during cadet training (with prior approval of the time and content by the Fire Chief, or his/her designee), and attending union conferences and meetings.” All these acts are “communication[s] between individuals who join together to collectively express, promote, pursue, or defend common interests.” *Id.* Thus, on its face, Pulliam and Wiley’s pleading demonstrates, as the Association argues, that the case “relates to” the statutorily defined exercise of the right of association by the Association’s membership. *See Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017) (“When it is clear from the plaintiff’s pleadings that the action is covered by the Act, the defendant need show no more.”).

Pulliam and Wiley, on the other hand, contend that “this case does not impair [the Association’s] communications *at all*” and that even if they received the relief that they requested in this case (an injunction against Association Leave), the Association’s ability and right to communicate and to associate will be entirely unaffected. They argue that because they seek to stop only public funding of the Association’s activities, not the activities themselves, the case does not implicate the Association’s constitutional rights or statutory rights under the TCPA. Contrary to Pulliam and Wiley’s argument that the TCPA does not apply because their requested relief would not impair the Association’s communications at all, the Texas Supreme Court has made clear that we must “adhere to a plain-meaning, dictionary-definition analysis of the text within the TCPA’s definitions of protected expression, not the broader resort to constitutional context” that Pulliam and Wiley advocate. *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 204 (Tex. App.—Austin 2017, pet. dism’d) (citing *ExxonMobil Pipeline Co. v. Coleman*,

512 S.W.3d 895, 898-902 (Tex. 2017)). To support their allegation that Association Leave serves a predominantly private purpose and therefore violates the Gift Clauses, Pulliam and Wiley's suit relies upon the "communications" made by Association members using Association Leave. Applying the plain meaning of the terms defined by the Act, we conclude that the Association met its initial burden to show by a preponderance of the evidence that Pulliam and Wiley's "legal action" "is based on, relates to, or is in response to" the Association's "exercise of the right of association." *See id.* at 205.

### **C. Pulliam and Wiley Failed to Establish a Prima Facie Case for the Alleged Gift Clauses Violation**

On appeal, Pulliam and Wiley assert that the trial court erred by granting the TCPA motion because it is logically inconsistent for the court to find "(a) that plaintiffs failed to present a prima facie case while simultaneously finding (b) that plaintiffs pleaded and produced evidence sufficient to deny defendants' motion for summary judgment and (c) ordering trial on the merits of plaintiffs' constitutional claims." Pulliam and Wiley do not refer to any "clear and specific" evidence that they offered in response to the TCPA motion to establish a prima facie case. In response, the Association asserts that Pulliam and Wiley did not carry their burden under this second step of the TCPA analysis and that the trial court's subsequent rulings based on different standards of review, different record evidence, and even different collective-bargaining agreements do not demonstrate that the trial court erred by finding that they failed to establish a prima facie case in response to the TCPA motion.

Pulliam and Wiley's burden to present a "prima facie case" "refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted." *In re Lipsky*, 460 S.W.3d at 590. It is the "minimum quantum of evidence necessary to support a rational

inference that the allegation of fact is true.” *Id.* (quoting *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004) (orig. proceeding) (per curiam)). By legislative design, a TCPA motion must be filed very early in the life of a lawsuit, no later than the 60th day after the lawsuit is served. Tex. Civ. Prac. & Rem. Code § 27.003(b). And upon the motion’s filing, “all discovery in the legal action is suspended until the court has ruled on the motion to dismiss,” *id.* § 27.003(c), except that “the court may allow specified and limited discovery relevant to the motion,” upon a party’s or the court’s own motion and on a showing of good cause, *id.* § 27.006(b).

In this case, the trial court granted Pulliam and Wiley limited discovery relevant to the TCPA motion. It ordered the Association to respond to requests for admissions and to produce documents identifying the number of hours of Association Leave used by persons under the Agreement. It ordered the City to produce a report showing how Association Leave was used by Association members, including the Association President, during the prior three years and to produce policies and procedures concerning the use of Association Leave. The trial court also ordered Association President Nicks to appear and testify in support of the Association’s motion to dismiss at the hearing on the TCPA motion.

To successfully defend against the TCPA motion, Pulliam and Wiley needed to produce evidence sufficient *as a matter of law* to establish, if that evidence is not rebutted or contradicted, that the Association Leave Provision is gratuitous (i.e., the City does not receive return consideration) or that the Association Leave Provision (1) does not serve a legitimate public purpose and (2) does not afford a clear public benefit received in return. *See Texas Mun. League*, 74 S.W.3d at 383-84; *see also In re Lipsky*, 460 S.W.3d at 590 (explaining what evidence is required to establish prima facie case). Although Pulliam and Wiley’s amended petition sets forth in reasonable detail the nature of their constitutional challenge, they did not provide clear and



specific evidence of a prima facie case of each element of that challenge as the TCPA requires. *See* Tex. Civ. Prac. & Rem. Code Section 27.005(c); *In re Lipsky*, 460 S.W.3d at 591 (“Because the Act requires [clear and specific evidence of each essential element], mere notice pleading—that is, general allegations that merely recite the elements of a cause of action—will not suffice. Instead, a plaintiff must provide enough detail to show the factual basis for its claim.”). “[W]hile the trial court can and should consider the facts alleged in the pleadings in determining whether the nonmovant provided clear and specific evidence of a prima facie case of each essential element of its causes of action, the production of evidence in support of those allegations is also required.” *Yu v. Koo*, 633 S.W.3d 712, 728–29 (Tex. App.—El Paso 2021, no pet.). Pulliam and Wiley provided no such evidence here.

Instead, the undisputed evidence presented at the hearing contradicted their allegations and established that both the Agreement and the Association Leave Provision were supported by valid consideration, served a public purpose, and afforded a clear benefit in return. Nicks testified about the specific “give and take” that occurred during the collective-bargaining process by which the City agreed to the pool of 5,600 hours of Association Leave (a cost of approximately \$200,000 per year to the City) in exchange for the way sick time was calculated for purposes of overtime, a change that Nicks estimated saves the City \$500,000 to \$600,000 per year. In addition, the evidence established that (1) the activities performed by firefighters on Association Leave serves predominantly public purposes, (2) the City retains sufficient control over the Association Leave, and (3) the City receives a return benefit. Nicks testified about the work done by himself and by others on Association Leave to promote firefighter and public safety, to maintain harmonious relations between labor and management, and to support certain charities along with management—all predominantly public purposes. The evidence established that the City had

authority to review and reject Association Leave requests by Authorized Association Representatives and that any firefighter, including Nicks, using Association Leave remains subject to City policies and orders. Nicks testified that the Department could call him back to active duty at any time. The trial court also heard evidence of the return benefits received by the City of the change to the sick-leave calculation that saves the City money on overtime and of the overall benefit of harmonious labor relations, including the facilitation of collective bargaining (which the Legislature has recognized as serving the public interest). We hold that the trial court correctly concluded that Pulliam and Wiley failed to carry their burden to marshal clear and specific evidence to establish a prima facie case on each element of their claim. *See* Tex. Civ. Prac. & Rem. Code §27.005(c).

We are not persuaded by Pulliam and Wiley's argument that the trial court's ruling on the TCPA motion is inconsistent with the trial court's later rulings. Those later rulings on the City's pleas to the jurisdiction and the cross-motions for summary judgment were made years later. Subsequent rulings on different motions do not render incorrect the trial court's decision on the merits of the TCPA motion, which it decided based on the record before it at the time. *See* Tex. Civ. Prac. & Rem. Code § 27.006(a) ("In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based."). Pulliam and Wiley cite no authority, and we have found none, to support the proposition that the scope of our review after final judgment of the trial court's grant of a TCPA motion that dismisses part of a case should include not only the evidence before the trial court when it ruled on the motion, but also all evidence later adduced in the case. *Cf., e.g., LMP Austin English Aire, LLC through Lafayette English Partner, LLC v. Lafayette English Apartments, LP*, No. 03-21-00219-CV, \_\_\_ S.W.3d \_\_\_, 2022 WL

4594495, at \*13 (Tex. App.—Austin Sept. 30, 2022, no pet. h.) (reviewing pleadings and affidavit when analyzing partial grant of TCPA motion that had occurred before final summary judgment); *Beving v. Beadles*, 563 S.W.3d 399, 404 (Tex. App.—Fort Worth 2018, pet. denied) (“In our review, we consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.”). They do not point to any specific later-filed evidence to suggest that they established their prima facie case at the TCPA stage; they argue only that the later rulings are inconsistent with the earlier dismissal of their claim against the Association. But a denial of the City’s pleas to the jurisdiction does not establish that the trial court found that Pulliam and Wiley provided clear and specific evidence of a prima facie case of each essential element of their claim against the City, much less their claim against the Association. Moreover, there is nothing logically inconsistent about the trial court’s determining that Pulliam and Wiley failed to establish a prima facie case on each element of their claim at the TCPA stage but later in the case, after additional discovery, deciding that although the terms of the Agreement were not unconstitutional as a matter of law, Borgelt and the State had raised a fact issue on the implementation of the City’s control.<sup>9</sup>

Because Pulliam and Wiley failed to carry their burden under the TCPA, we affirm the trial court’s grant of the Association’s TCPA motion to dismiss.

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<sup>9</sup> Pulliam and Wiley also argue that the Association’s July 2018 attempt to intervene in the lawsuit after they amended their petition to challenge the 2017-2022 Collective Bargaining Agreement (and left the Association as a named party, ostensibly to preserve their appeal) means that the trial court should not have granted the TCPA motion in 2017. We are not persuaded that the Association’s attempt to ensure that Pulliam and Wiley were not allowed to seek the same relief from them as to a new agreement renders the trial court’s 2017 decision wrong.

**D. Pulliam and Wiley Have Not Established that the TCPA Sanctions Award Constituted an Abuse of Discretion**

After the trial court granted the Association's TCPA motion to dismiss in February 2017, and following the various appellate proceedings and other proceedings in the trial court and an agreement by the parties to postpone the issue until after pending dispositive issues could be heard, the Association filed its motion for attorneys' fees and sanctions in August 2018. The Association sought attorneys' fees in the amount of \$115,250 and sanctions in the amount of \$230,500 (two times the amount of attorneys' fees sought). On April 19, 2019, the Association filed a notice of supplemental evidence in support of its motion for fees and sanctions, requesting that the trial court take into account in its award of fees that the Association had incurred over 19 additional hours of attorneys' fees responding to Pulliam and Wiley's December 2018 motion to reconsider the 2017 TCPA order and October 2018 threat to file a TCPA motion against the Association's motion for fees. With the notice, the Association submitted deposition testimony from Pulliam and Wiley that it asserted further supported its contention that Pulliam and Wiley undertook the lawsuit for political reasons and would not be deterred from similar conduct in the future without substantial monetary sanctions.

On May 1, 2019, the trial court heard the Association's application for attorneys' fees and sanctions under the TCPA.<sup>10</sup> On July 18, 2019, the trial court granted the motion and awarded fees in the amount of \$115,250 and sanctions in the amount of \$75,000. On appeal, Pulliam and Wiley challenge the trial court's award of sanctions as excessive and punitive. They further argue that no sanctions should be awarded but advocate that if this Court upholds some

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<sup>10</sup> There is not a hearing transcript in the appellate record.

sanctions award, a nominal amount of sanctions would be a sufficient deterrent.<sup>11</sup>

The TCPA requires an award of costs, attorneys' fees, and sanctions when a motion to dismiss is granted:

If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

- (1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and
- (2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

Tex. Civ. Prac. & Rem. Code § 27.009(a). We review sanctions awards in TCPA cases for abuse of discretion. *Landry's, Inc. v. Animal Legal Def. Fund*, 631 S.W.3d 40, 46 (Tex. 2021). A trial court abuses its discretion if it acts "without reference to guiding rules and principles to such an extent that its ruling was arbitrary or unreasonable." *Id.* (quoting *Nath v. Texas Child.'s Hosp.*, 446 S.W.3d 355, 361 (Tex. 2014)). A trial court does not abuse its discretion when its sanctions award is based on conflicting evidence and some evidence of substantive and probative character supports its decision. *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009); *see also Rich v. Range Res. Corp.*, 535 S.W.3d 610, 614 (Tex. App.—Fort Worth 2017, pet. denied).

Moreover, "the statute does not specify a particular formula, amount, or guideline for determining the sanctions amount other than to say that the amount is to be sufficient to deter the party who brought the legal action from bringing similar actions." *Tatum v. Hersh*, 559 S.W.3d

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<sup>11</sup> Pulliam and Wiley do not contend that the attorneys' fees awarded by the trial court fail to satisfy the statutory requirement that the attorneys' fees are "reasonable." Tex. Civ. Prac. & Rem. Code § 27.009(a)(1).

581, 587 (Tex. App.—Dallas 2018, no pet.) (op. on remand). Thus, the TCPA “gives the trial court broad discretion to determine what amount is sufficient to deter the party from bringing similar actions *in the future*.” *Kinney v. BCG Att’y Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012 at \*11 (Tex. App.—Austin Apr. 11, 2014, pet. denied) (mem. op. on reh’g) (emphasis added).

Pulliam and Wiley argue that the trial court abused its discretion because the record contains no evidence that they have ever filed a frivolous lawsuit or that they have indicated any intention to file a meritless legal action in the future. However, the trial court had before it evidence that neither Pulliam nor Wiley had read the collective-bargaining agreement that they were challenging before they filed suit against the Association. At his deposition, Wiley admitted that he still had never read either the 2015 or the 2017 Agreement and that he had no knowledge of the negotiations between the City and the Association. He further admitted that even more than two years into the litigation, he had never sought to research the substance of the negotiations. The Association argues that Pulliam and Wiley’s failure to do this basic research provided evidence that they were willing to file politically expedient suits, regardless of whether those suits are meritorious.

The trial court also had before it evidence that both Pulliam and Wiley had motives for filing suit against the Association that go beyond their alleged concern as taxpayers. Pulliam testified that he “practiced labor and employment laws for many years and ha[s] written about public employee bargaining. I’m not a big fan of public employee bargaining.” He further admitted that “as a matter of public policy I do not believe that public employee bargaining is beneficial to taxpayers or to, to democracy for that matter.” In addition, Pulliam admitted to writing on his blog about “lawfare,” the practice of “pursuing a political goal through the legal

system, either criminally or civilly, by, you know, indirectly accomplishing a particular end,” although he does not consider this lawsuit to be lawfare. He also admitted to writing about the cost of a similar provision in a contract between the City of San Antonio and its public-employee union and admitted that “it’s possible” he would file a similar lawsuit in San Antonio if he became a taxpayer there.<sup>12</sup>

Wiley admitted to using the lawsuit as publicity to support his political platform as a “fiscal conservative” seeking “union reform” and “right-to-work laws” in Texas. In 2016, when this suit was initially filed, and again in 2018, Wiley ran in the Republican primaries for seats in the Texas House of Representatives. Soon after the suit was filed in September 2016, Wiley sent an email blast about the suit to his political listserv of about 9,000 to 10,000 individuals, including members of the press, who had expressed interest in his campaign or “who politically may have been interested in supporting my campaign.” The email contained a graphic of a “little thief running away with a bag of money,” which Wiley selected himself, and stated that “[i]f we are victorious, not only will our tax dollars no longer be used for private union activities, it will send a strong message to the City of Austin that they are not above the law.” Wiley also admitted to including information about his stance on “public spending” and the lawsuit on his campaign website when he first announced his candidacy. He admitted that he publicized the lawsuit because he “thought it would help [him] in [his] campaign.” At the time of his deposition his campaign’s Facebook page, which he created “to promote [his] political campaign,” stated that “[i]n 2016, Jay

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<sup>12</sup> The Court notes that, according to Borgelt’s testimony at trial, he joined the lawsuit because Pulliam was moving out of Austin and asked if he would be interested in helping Pulliam pursue the case.

sued the City of Austin over its unconstitutional use of tax dollars to pay union members for political work.”

While Pulliam and Wiley argue that the record contains no evidence that they have ever filed a frivolous lawsuit or that they intend to file a meritless lawsuit or another lawsuit against the Association in the future, “[i]t was the trial judge’s prerogative to weigh this evidence along with all the other evidence in determining, as a matter of discretion, how large the sanction needed to be to accomplish its statutory purpose” of deterrence. *American Heritage Cap., LP v. Gonzalez*, 436 S.W.3d 865, 881 (Tex. App.—Dallas 2014, no pet.), *disapproved of on other grounds by Hersh v. Tatum*, 526 S.W.3d 462 (Tex. 2017). In addition to the evidence referenced above, both Pulliam and Wiley admitted that they had never been billed by or paid any money to the attorneys at the organizations representing Pulliam and Wiley in the lawsuit. Thus, absent any monetary sanctions awarded against them here, they have no personal monetary incentive that would preclude them from filing similar suits in the future. Moreover, the trial court could have considered the history of the litigation, including Pulliam and Wiley’s unsuccessful delayed request for reconsideration of the TCPA order and their threat to file a TCPA motion in response to the Association’s motion for TCPA attorneys’ fees and sanctions. *See LMP Austin English*, \_\_\_ S.W.3d \_\_\_, 2022 WL 4594495, at \*18 (explaining that trial court may consider litigation’s history and parties’ conduct when awarding sanctions). Finally, the \$75,000 award of sanctions is substantially less than the \$230,000 requested by the Association and is also substantially less than the award of \$115,250 in attorneys’ fees. *See id.* (considering ratio of sanctions to attorneys’ fees when determining whether sanctions award was abuse of discretion and holding award that was nearly equal to attorneys’ fee award was not abuse of discretion).



Given the broad discretion provided by Section 27.009 and the conflicting evidence about potential deterrence, we conclude that the trial court did not abuse its discretion by determining that a \$75,000 sanction was required to deter further similar actions by Pulliam or Wiley. *See* Tex. Civ. Prac. & Rem. Code § 27.009(a)(2); *ADB Int., LLC v. Wallace*, 606 S.W.3d 413, 446 (Tex. App.—Houston [1st Dist.] 2020, pet. denied) (upholding \$125,487.50 TCPA sanction and citing *American Heritage Capital*, 436 S.W.3d at 881).

**E. Pulliam and Wiley Have Not Established That the TCPA Order Violates Their Constitutional Right to Bring This Lawsuit**

Pulliam and Wiley argue that the TCPA order and the order granting attorneys' fees and sanctions against them violates their and their attorneys' First and Fourteenth Amendment rights and "upends the purpose of the TCPA." They contend that the sanctions order "punish[es] citizens for exercising their right to prosecute constitutional claims in court." They contend that we must examine the trial court's grant of attorneys' fees and sanctions after resolution of the TCPA motion to determine whether it is narrowly tailored to advance a compelling government interest, citing the United States Supreme Court's determination that the state of Virginia's interest in regulating traditionally illegal practices of barratry, maintenance, and champerty did not justify Virginia's prohibition of the activities of the National Association for the Advancement of Colored People. *See National Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 428-29, 439 (1963). We disagree with Pulliam and Wiley that the TCPA's provision establishing that the prevailing party on a motion to dismiss is entitled to attorneys' fees and sanctions impinges on their or their attorneys' First and Fourteenth Amendment rights.

The TCPA's stated purpose is to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to

the maximum extent permitted by law and, at the same time, protect the rights of a person to file *meritorious lawsuits* for demonstrable injury.” Tex. Civ. Prac. & Rem. Code § 27.002 (emphasis added). The provision establishing a mandatory award of fees and sanctions is not imposed on parties before they may institute litigation, nor is it imposed on them if they meet their TCPA burden of establishing by “clear and specific evidence” the elements of their prima facie case so that they may avoid dismissal. *Id.* §§ 27.005(c), .009(1). Instead, after resolution of the motion to dismiss, the TCPA “shifts litigation costs from the prevailing party (who met its burden to show by a preponderance of the evidence that the legal action is based on, related to, or is in response to that party’s exercise of protected rights) to the party that failed to meet its burden.” *Memorial Hermann Health Sys. v. Khalil*, No. 01-16-00512-CV, 2017 WL 3389645, at \*16 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, pet. denied) (mem. op.). “Moreover, the TCPA includes a countermeasure that permits fee-shifting in the event a trial court finds that a motion to dismiss was frivolous or filed solely to delay.” *Id.* (citing Tex. Civ. Prac. & Rem. Code § 27.009(b) and concluding that TCPA’s fee-award provision is not unreasonable or arbitrary when balanced with statute’s purpose and does not violate open-courts doctrine). We conclude that Section 27.009 does not preclude or even chill the exercise of a litigant’s First or Fourteenth Amendment rights; instead, it shifts litigation costs after the litigant’s claim is determined not to be meritorious.

We overrule Pulliam and Wiley’s issue and affirm the trial court’s TCPA order and its order awarding fees and sanctions against Pulliam and Wiley.

## **CONCLUSION**

Having overruled the appellants' issues, we affirm the trial court's final judgment.

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Gisela D. Triana, Justice

Before Justices Baker, Triana, and Kelly

Affirmed

Filed: November 22, 2022

**9**

## **TEXAS CONSTITUTION**

### **ARTICLE 3. LEGISLATIVE DEPARTMENT**

**Sec. 50.** LOAN OR PLEDGE OF CREDIT OF THE STATE. The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatsoever, for THE TEXAS CONSTITUTION Statute text rendered on: 1/14/2023 - 82 - the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever. (Feb. 15, 1876.)

**10**

## **TEXAS CONSTITUTION**

### **ARTICLE 3. LEGISLATIVE DEPARTMENT**

**Sec. 51. GRANTS OF PUBLIC MONEY PROHIBITED.** The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever; provided that the provisions of this Section shall not be construed so as to prevent the grant of aid in cases of public calamity. (Feb. 15, 1876. Amended Nov. 6, 1894, Nov. 1, 1898, Nov. 8, 1904, Nov. 8, 1910, Nov. 5, 1912, Nov. 4, 1924, Nov. 6, 1928, Nov. 5, 1968, and Nov. 2, 1999.)

**11**



## **TEXAS CONSTITUTION**

### **ARTICLE 3. LEGISLATIVE DEPARTMENT**

**Sec. 52-a.** PROGRAMS AND LOANS OR GRANTS OF PUBLIC MONEY FOR ECONOMIC DEVELOPMENT. Notwithstanding any other provision of this constitution, the legislature may provide for the creation of programs and the making of loans and grants of public money, other than money otherwise dedicated by this constitution to use for a different purpose, for the public purposes of development and diversification of the economy of the state, the elimination of unemployment or underemployment in the state, the stimulation of agricultural innovation, the fostering of the growth of enterprises based on agriculture, or the development or expansion of transportation or commerce in the state. Any bonds or other obligations of a county, municipality, or other political subdivision of the state that are issued for the purpose of making loans or grants in connection with a program authorized by the legislature under this section and that are payable from ad valorem taxes must be approved by a vote of the majority of the registered voters of the county, municipality, or political subdivision voting on the issue. A program created or a loan or grant made as provided by this section that is not secured by a pledge of ad valorem taxes or financed by the issuance of any bonds or other obligations payable from ad valorem taxes of the political subdivision does not constitute or create a debt for the purpose of any provision of this constitution. An enabling law enacted by the legislature in anticipation of the adoption of this amendment is not void because of its anticipatory character. (Added Nov. 3, 1987; amended Nov. 8, 2005.)

**12**

## **TEXAS CONSTITUTION**

### **ARTICLE 16. GENERAL PROVISIONS**

**Sec. 6.** APPROPRIATIONS FOR PRIVATE PURPOSES; ANNUAL ACCOUNTING OF PUBLIC MONEY; ACCEPTANCE AND EXPENDITURE OF CERTAIN MONEY FOR PERSONS WITH DISABILITIES. **(a)** No appropriation for private or individual purposes shall be made, unless authorized by this Constitution. A regular statement, under oath, and an account of the receipts and expenditures of all public money shall be published THE TEXAS CONSTITUTION Statute text rendered on: 1/14/2023 - 240 - annually, in such manner as shall be prescribed by law.

**13**

Vernon's Texas Statutes and Codes Annotated  
Civil Practice and Remedies Code (Refs & Annos)  
Title 2. Trial, Judgment, and Appeal  
Subtitle B. Trial Matters  
Chapter 27. Actions Involving the Exercise of Certain Constitutional Rights (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 27.001

§ 27.001. Definitions

Effective: September 1, 2019

[Currentness](#)

In this chapter:

- (1) “Communication” includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.
- (2) “Exercise of the right of association” means to join together to collectively express, promote, pursue, or defend common interests relating to a governmental proceeding or a matter of public concern.
- (3) “Exercise of the right of free speech” means a communication made in connection with a matter of public concern.
- (4) “Exercise of the right to petition” means any of the following:
  - (A) a communication in or pertaining to:
    - (i) a judicial proceeding;
    - (ii) an official proceeding, other than a judicial proceeding, to administer the law;
    - (iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;
    - (iv) a legislative proceeding, including a proceeding of a legislative committee;
    - (v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) “Governmental proceeding” means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) “Legal action” means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief. The term does not include:

(A) a procedural action taken or motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief;

(B) alternative dispute resolution proceedings; or

(C) post-judgment enforcement actions.

(7) “Matter of public concern” means a statement or activity regarding:

(A) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity;

(B) a matter of political, social, or other interest to the community; or

(C) a subject of concern to the public.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

#### **Credits**

Added by Acts 2011, 82nd Leg., ch. 341 (H.B. 2973), § 2, eff. June 17, 2011. Amended by Acts 2019, 86th Leg., ch. 378 (H.B. 2730), § 1, eff. Sept. 1, 2019.

V. T. C. A., Civil Practice & Remedies Code § 27.001, TX CIV PRAC & REM § 27.001  
Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

Vernon's Texas Statutes and Codes Annotated  
Civil Practice and Remedies Code (Refs & Annos)  
Title 2. Trial, Judgment, and Appeal  
Subtitle B. Trial Matters  
Chapter 27. Actions Involving the Exercise of Certain Constitutional Rights (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 27.002

§ 27.002. Purpose

Effective: June 17, 2011

[Currentness](#)

The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

**Credits**

Added by Acts 2011, 82nd Leg., ch. 341 (H.B. 2973), § 2, eff. June 17, 2011.

V. T. C. A., Civil Practice & Remedies Code § 27.002, TX CIV PRAC & REM § 27.002  
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V.T.C.A., Civil Practice & Remedies Code § 27.003

§ 27.003. Motion to Dismiss

Effective: September 1, 2019

[Currentness](#)

(a) If a legal action is based on or is in response to a party's exercise of the right of free speech, right to petition, or right of association or arises from any act of that party in furtherance of the party's communication or conduct described by [Section 27.010\(b\)](#), that party may file a motion to dismiss the legal action. A party under this section does not include a government entity, agency, or an official or employee acting in an official capacity.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The parties, upon mutual agreement, may extend the time to file a motion under this section or the court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by [Section 27.006\(b\)](#), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

(d) The moving party shall provide written notice of the date and time of the hearing under [Section 27.004](#) not later than 21 days before the date of the hearing unless otherwise provided by agreement of the parties or an order of the court.

(e) A party responding to the motion to dismiss shall file the response, if any, not later than seven days before the date of the hearing on the motion to dismiss unless otherwise provided by an agreement of the parties or an order of the court.

**Credits**

Added by [Acts 2011, 82nd Leg., ch. 341 \(H.B. 2973\), § 2, eff. June 17, 2011](#). Amended by [Acts 2019, 86th Leg., ch. 378 \(H.B. 2730\), § 2, eff. Sept. 1, 2019](#).

V. T. C. A., Civil Practice & Remedies Code § 27.003, TX CIV PRAC & REM § 27.003

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V.T.C.A., Civil Practice & Remedies Code § 27.004

§ 27.004. Hearing

Effective: June 14, 2013

[Currentness](#)

(a) A hearing on a motion under [Section 27.003](#) must be set not later than the 60th day after the date of service of the motion unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties, but in no event shall the hearing occur more than 90 days after service of the motion under [Section 27.003](#), except as provided by Subsection (c).

(b) In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court's docket conditions required a hearing at a later date, but in no event shall the hearing occur more than 90 days after service of the motion under [Section 27.003](#), except as provided by Subsection (c).

(c) If the court allows discovery under [Section 27.006\(b\)](#), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under [Section 27.003](#).

**Credits**

Added by [Acts 2011, 82nd Leg., ch. 341 \(H.B. 2973\), § 2, eff. June 17, 2011](#). Amended by [Acts 2013, 83rd Leg., ch. 1042 \(H.B. 2935\), § 1, eff. June 14, 2013](#).

V. T. C. A., Civil Practice & Remedies Code § 27.004, TX CIV PRAC & REM § 27.004  
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V.T.C.A., Civil Practice & Remedies Code § 27.005

§ 27.005. Ruling

Effective: September 1, 2019

[Currentness](#)

(a) The court must rule on a motion under [Section 27.003](#) not later than the 30th day following the date the hearing on the motion concludes.

(b) Except as provided by Subsection (c), on the motion of a party under [Section 27.003](#), a court shall dismiss a legal action against the moving party if the moving party demonstrates that the legal action is based on or is in response to:

(1) the party's exercise of:

(A) the right of free speech;

(B) the right to petition; or

(C) the right of association; or

(2) the act of a party described by [Section 27.010\(b\)](#).

(c) The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law.

**Credits**

Added by Acts 2011, 82nd Leg., ch. 341 (H.B. 2973), § 2, eff. June 17, 2011. Amended by Acts 2013, 83rd Leg., ch. 1042 (H.B. 2935), § 2, eff. June 14, 2013; Acts 2019, 86th Leg., ch. 378 (H.B. 2730), § 3, eff. Sept. 1, 2019.

V. T. C. A., Civil Practice & Remedies Code § 27.005, TX CIV PRAC & REM § 27.005

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V.T.C.A., Civil Practice & Remedies Code § 27.006

§ 27.006. Proof

Effective: September 1, 2019

[Currentness](#)

(a) In determining whether a legal action is subject to or should be dismissed under this chapter, the court shall consider the pleadings, evidence a court could consider under [Rule 166a, Texas Rules of Civil Procedure](#), and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.

**Credits**

Added by [Acts 2011, 82nd Leg., ch. 341 \(H.B. 2973\)](#), § 2, eff. June 17, 2011. Amended by [Acts 2019, 86th Leg., ch. 378 \(H.B. 2730\)](#), §§ 4, 5, eff. Sept. 1, 2019.

V. T. C. A., Civil Practice & Remedies Code § 27.006, TX CIV PRAC & REM § 27.006

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V.T.C.A., Civil Practice & Remedies Code § 27.007

§ 27.007. Additional Findings

Effective: September 1, 2019

[Currentness](#)

(a) If the court awards sanctions under [Section 27.009\(b\)](#), the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) The court must issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

**Credits**

Added by [Acts 2011, 82nd Leg., ch. 341 \(H.B. 2973\)](#), § 2, eff. [June 17, 2011](#). Amended by [Acts 2019, 86th Leg., ch. 378 \(H.B. 2730\)](#), § 6, eff. [Sept. 1, 2019](#).

V. T. C. A., Civil Practice & Remedies Code § 27.007, TX CIV PRAC & REM § 27.007

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V.T.C.A., Civil Practice & Remedies Code § 27.008

§ 27.008. Appeal

Effective: June 14, 2013

[Currentness](#)

(a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by [Section 27.005](#), the motion is considered to have been denied by operation of law and the moving party may appeal.

(b) An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under [Section 27.003](#) or from a trial court's failure to rule on that motion in the time prescribed by [Section 27.005](#).

(c) Repealed by [Acts 2013, 83rd Leg., ch. 1042 \(H.B. 2935\)](#), § 5.

**Credits**

Added by [Acts 2011, 82nd Leg., ch. 341 \(H.B. 2973\)](#), § 2, eff. June 17, 2011. Amended by [Acts 2013, 83rd Leg., ch. 1042 \(H.B. 2935\)](#), § 5, eff. June 14, 2013.

V. T. C. A., Civil Practice & Remedies Code § 27.008, TX CIV PRAC & REM § 27.008

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V.T.C.A., Civil Practice & Remedies Code § 27.009

§ 27.009. Damages and Costs

Effective: September 1, 2019

[Currentness](#)

(a) Except as provided by Subsection (c), if the court orders dismissal of a legal action under this chapter, the court:

(1) shall award to the moving party court costs and reasonable attorney's fees incurred in defending against the legal action;  
and

(2) may award to the moving party sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

(c) If the court orders dismissal of a compulsory counterclaim under this chapter, the court may award to the moving party reasonable attorney's fees incurred in defending against the counterclaim if the court finds that the counterclaim is frivolous or solely intended for delay.

**Credits**

Added by Acts 2011, 82nd Leg., ch. 341 (H.B. 2973), § 2, eff. June 17, 2011. Amended by Acts 2019, 86th Leg., ch. 378 (H.B. 2730), § 8, eff. Sept. 1, 2019.

V. T. C. A., Civil Practice & Remedies Code § 27.009, TX CIV PRAC & REM § 27.009

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V.T.C.A., Civil Practice & Remedies Code § 27.010

§ 27.010. Exemptions

Effective: September 1, 2021

[Currentness](#)

(a) This chapter does not apply to:

(1) an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney;

(2) a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer;

(3) a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action;

(4) a legal action brought under the Insurance Code or arising out of an insurance contract;

(5) a legal action arising from an officer-director, employee-employer, or independent contractor relationship that:

(A) seeks recovery for misappropriation of trade secrets or corporate opportunities; or

(B) seeks to enforce a non-disparagement agreement or a covenant not to compete;

(6) a legal action filed under Title 1, 2, 4, or 5, Family Code,<sup>1</sup> or an application for a protective order under Subchapter A, Chapter 7B, Code of Criminal Procedure;

(7) a legal action brought under Chapter 17, Business & Commerce Code, other than an action governed by Section 17.49(a) of that chapter;

- (8) a legal action in which a moving party raises a defense pursuant to [Section 160.010, Occupations Code](#), [Section 161.033, Health and Safety Code](#), or the Health Care Quality Improvement Act of 1986 (42 U.S.C. 11101 et seq.);
  - (9) an eviction suit brought under Chapter 24, Property Code;
  - (10) a disciplinary action or disciplinary proceeding brought under Chapter 81, Government Code, or the Texas Rules of Disciplinary Procedure;
  - (11) a legal action brought under Chapter 554, Government Code; or
  - (12) a legal action based on a common law fraud claim.
- (b) Notwithstanding Subsections (a)(2), (7), and (12), this chapter applies to:
- (1) a legal action against a person arising from any act of that person, whether public or private, related to the gathering, receiving, posting, or processing of information for communication to the public, whether or not the information is actually communicated to the public, for the creation, dissemination, exhibition, or advertisement or other similar promotion of a dramatic, literary, musical, political, journalistic, or otherwise artistic work, including audio-visual work regardless of the means of distribution, a motion picture, a television or radio program, or an article published in a newspaper, website, magazine, or other platform, no matter the method or extent of distribution; and
  - (2) a legal action against a person related to the communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer complaints, or reviews or ratings of businesses.
- (c) This chapter applies to a legal action against a victim or alleged victim of family violence or dating violence as defined in Chapter 71, Family Code, or an offense under Chapter 20, 20A, 21, or 22, Penal Code, based on or in response to a public or private communication.

#### Credits

Added by [Acts 2011, 82nd Leg., ch. 341 \(H.B. 2973\), § 2, eff. June 17, 2011](#). Amended by [Acts 2013, 83rd Leg., ch. 1042 \(H.B. 2935\), § 3, eff. June 14, 2013](#); [Acts 2019, 86th Leg., ch. 378 \(H.B. 2730\), § 9, eff. Sept. 1, 2019](#); [Acts 2021, 87th Leg., ch. 915 \(H.B. 3607\), § 3.001, eff. Sept. 1, 2021](#).

#### Footnotes

<sup>1</sup> [V.T.C.A., Family Code § 1.001 et seq.](#); [§ 16.001 et seq.](#); [§ 71.001 et seq.](#); [§ 101.001 et seq.](#)

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V.T.C.A., Civil Practice & Remedies Code § 27.011

§ 27.011. Construction

Effective: June 17, 2011

[Currentness](#)

(a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) This chapter shall be construed liberally to effectuate its purpose and intent fully.

**Credits**

Added by Acts 2011, 82nd Leg., ch. 341 (H.B. 2973), § 2, eff. June 17, 2011.

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CIVIL PRACTICE AND REMEDIES CODE

TITLE 2. TRIAL, JUDGMENT, AND APPEAL

SUBTITLE B. TRIAL MATTERS

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. In this chapter:

(1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

(2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of

public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.

(7) "Matter of public concern" includes an issue related to:

(A) health or safety;

(B) environmental, economic, or community well-being;

(C) the government;

(D) a public official or public figure; or

(E) a good, product, or service in the marketplace.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.002. PURPOSE. The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.004. HEARING. (a) A hearing on a motion under Section 27.003 must be set not later than the 60th day after the date of service of the motion unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(b) In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court's docket conditions required a hearing at a later date, but in no



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event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(c) If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 1, eff. June 14, 2013.

Sec. 27.005. RULING. (a) The court must rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.

(b) Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of:

- (1) the right of free speech;
- (2) the right to petition; or
- (3) the right of association.

(c) The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 2, eff. June 14, 2013.

Sec. 27.006. EVIDENCE. (a) In determining whether a legal action should be dismissed under this chapter, the court shall consider the

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pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.007. ADDITIONAL FINDINGS. (a) At the request of a party making a motion under Section 27.003, the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) The court must issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.008. APPEAL. (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.

(b) An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 or from a trial court's failure to rule on that motion in the time prescribed by Section 27.005.

(c) Repealed by Acts 2013, 83rd Leg., R.S., Ch. 1042, Sec. 5, eff. June 14, 2013.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 5, eff. June 14, 2013.

Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) This chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

(d) This chapter does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 3, eff. June 14, 2013.

Sec. 27.011. CONSTRUCTION. (a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) This chapter shall be construed liberally to effectuate its purpose and intent fully.

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Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. [2973](#)), Sec. 2, eff. June 17, 2011.

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Title 2. Judicial Branch (Refs & Annos)  
Subtitle A. Courts  
Chapter 22. Appellate Courts  
Subchapter A. Supreme Court

V.T.C.A., Government Code § 22.001

§ 22.001. Jurisdiction

Effective: September 1, 2017

[Currentness](#)

- (a) The supreme court has appellate jurisdiction, except in criminal law matters, of an appealable order or judgment of the trial courts if the court determines that the appeal presents a question of law that is important to the jurisprudence of the state. The supreme court's jurisdiction does not include cases in which the jurisdiction of the court of appeals is made final by statute.
- (b) A case over which the court has jurisdiction under Subsection (a) may be carried to the supreme court by petition for review.
- (c) Except as provided by this subsection or other law, an appeal may be taken to the supreme court only if the appeal was first brought to the court of appeals. An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state.
- (d) The supreme court has the power, on affidavit or otherwise, as the court may determine, to ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction.
- (e) Repealed by [Acts 2017, 85th Leg., ch. 150](#) (H.B. 1761), § 4(1).

#### Credits

Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985. Amended by [Acts 1987, 70th Leg., ch. 1106, § 1, eff. June 20, 1987](#); [Acts 2003, 78th Leg., ch. 204, § 1.04, eff. Sept. 1, 2003](#); [Acts 2017, 85th Leg., ch. 150 \(H.B. 1761\), §§ 1, 4\(1\), eff. Sept. 1, 2017](#).

V. T. C. A., Government Code § 22.001, TX GOVT § 22.001

Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

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End of Document

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**16**

**COLLECTIVE BARGAINING AGREEMENT**

**BETWEEN**

**CITY OF AUSTIN**

**AND**

**AUSTIN FIREFIGHTERS ASSOCIATION**

**LOCAL 975**

**EFFECTIVE OCTOBER 1, 2017**

COA0557



( Page left for Resolution / council Signature )

COA0558

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COA0560

# **ARTICLE 1**

## **PREAMBLE**

### **Section 1. Intent of Agreement**

This Agreement is made between the City of Austin, Texas, hereinafter referred to as the "City," and the Austin Firefighters' Association, Local 975 of the International Association of Fire Fighters, AFL-CIO-CLC, hereinafter referred to as the "Association."

### **Section 2. Purpose of Agreement**

WHEREAS, the citizens of the City of Austin have by referendum election chosen the Collective Bargaining Process as a fair and orderly way of conducting its relations with Austin Fire Fighters; and

WHEREAS, the Association has pledged to support the service and mission of the Austin Fire Department, to constructively support the goals and objectives of the Austin Fire Department, and to abide by the statutorily imposed no strike or work slowdown obligations placed upon it;

WHEREAS, it is the intent and purpose of this Agreement to achieve and maintain harmonious relations between the parties, and to establish benefits, rates of pay, hours of work, and other terms and conditions of employment for all members of the bargaining unit and to provide for the equitable and orderly adjustment of grievances that may arise during the term of this Agreement; and

WHEREAS, it is the intent and purpose of the parties to set forth herein their entire Agreement;

**NOW, THEREFORE**, in consideration of the mutual covenants and agreements herein contained, the parties mutually agree as follows.

## **ARTICLE 2 DEFINITIONS**

The following definitions apply to terms used in this Agreement, unless a different definition is required by the context in which the term is used.

1. "Agreement" refers to this Collective Bargaining Agreement.
2. "Alternate Cadet Training Class" means an expedited training class of no less than 14 full weeks duration that is available to candidates on the ranked entry level eligibility list who possess TCFP and NREMT certification.
3. "Association" means the Austin Firefighters' Association, Local No. 975 of the International Association of Fire Fighters, AFL-CIO-CLC, and its officers and agents authorized to act on its behalf.
4. "Authorized Association Representative" means a representative of the Association authorized by the Association's Executive Board to conduct business on behalf of the Association.
5. "City" means the City of Austin, Texas, the Austin Fire Department and its officers, agents, managers, and others authorized to act on its behalf.
6. "City of Austin Personnel Policies" means, unless otherwise provided herein, those provisions of the City of Austin Personnel Policies, as adopted by the City Council, that apply to Chapter 143 Public Safety Civil Service employees.
7. "Civilian employee(s)," "civilian(s)," or non-civil service employee(s)" means any employee of the Austin Fire Department who is not a fire fighter as defined in Local Government Code §143.003(4).
8. For purposes of Article 22 - Health Related Benefits, "employee" or "City employee" does not include members of the city council and their direct staff; persons who are appointed or elected by the city council pursuant to the City Charter; the city manager and assistant city managers; department directors; and assistant department directors.
9. "Consensus" means a form of group decision-making in which everyone discusses the issues to be decided so that the group may benefit from the knowledge and experience of all its members. In order for consensus to occur, every member of the group must be able to support the decision.
10. "Department" means the Austin Fire Department, acting through its management staff.
11. "Expiration date of this Agreement" means September 30, 2022, unless otherwise specified.

12. "Fire Chief" means the Fire Chief of the Austin Fire Department and is synonymous with the term "department head" as used in Local Government Code Chapter 143.
13. "Fire Fighter" means any employee who is a "fire fighter" as defined in Local Government Code §§143.003(4) and 174.003(2), employed by the Austin Fire Department. It excludes the Fire Chief, non-Civil Service employees, retirees, and any other employees specifically exempted by the terms of this Agreement.
14. "Hiring cycle" means the time period between the announcements for accepting applications through the final approval of an eligibility list, including any subsequent corrections.
15. "Hiring process" or "hiring selection process" means the components used to screen and test applicants to become eligible for selection as a fire cadet under the terms of the Consent Decree.
16. "Immediate family" means the following members of a Fire Fighter's family:
- a. Parents (biological parents, adoptive parents, or persons *in loco parentis* to the Fire Fighter when the Fire Fighter was a child);
  - b. Spouse (husband, wife, or domestic partner);
  - c. Child (biological, adopted, foster, stepchild, legal ward, or a child for whom the Fire Fighter is a person standing *in loco parentis*);
  - d. Sisters or brothers;
  - e. Grandparents;
  - f. Grandchildren;
  - g. Parents and grandparents of a Fire Fighter's spouse; and
  - h. Any relative living in the same household with a Fire Fighter.
17. "Local Government Code Chapter 143" and/or "Chapter 143" refers to those portions of the Fire Fighter and Police Officer Civil Service Act, Texas Local Government Code Chapter 143 which are applicable to the City.
18. "Local Government Code Chapter 174" and/or "Chapter 174" refers to the Fire and Police Employee Relations Act, Texas Local Government Code Chapter 174.
19. "Lawsuit" means the lawsuit known as *United States v. City of Austin*, Case No. 1:14-cv-00533, filed in the United States District Court for the Western District of Texas.
20. "Consent Decree" means the Consent Decree (Document No. 64) approved by the U.S. District Court and entered in the *United States v. City of Austin*, Case No. 1:14-cv-00533, in the United States District Court for the Western District of Texas concerning hiring at the Austin Fire Department, together with all changes or modifications resulting from a subsequent Court order or an agreement between the parties pursuant to the dispute resolution procedures in the Consent Decree.

21. "United States" means the United States of America, through the Department of Justice ("DOJ").

**ARTICLE 3**  
**RECOGNITION OF ASSOCIATION**

The City recognizes the Association as the sole and exclusive bargaining agent for all Fire Fighters pursuant to Local Government Code Section 174.101. Recognition of the Association as the exclusive bargaining agent is not understood to make it a necessary party to disciplinary agreements between a Fire Fighter and the Fire Chief.



## **ARTICLE 4**

### **MANAGEMENT RIGHTS**

The City retains all inherent rights to manage the Fire Department and its work force which it enjoys under applicable law, subject to applicable federal and state statutes and local ordinances, resolutions, and rules, except as specifically provided in this Agreement. These rights include, but are not limited to: direction of the work force, including but not limited to, the right to hire; the right to discipline or discharge in accordance with Chapter 143 and this Agreement; the right to decide job qualifications for hiring; the right to lay-off or abolish positions; the right to make rules and regulations governing conduct and safety; the right to determine schedules of work together with the right to determine the methods, processes and manner of performing work; the right to evaluate, supervise, and manage performance of the employees; the right to determine the size of the work force, and the assignment of work to Fire Fighters within the Department, including the right to transfer Fire Fighters; the right to determine policy affecting the selection of new Fire Fighters; the right to establish the services and programs provided by the Department, including the nature and level of such services and programs, as well as the type and quantity of resources allocated; the right to establish work performance measurements and standards; and the right to implement programs to increase the cost effectiveness of departmental operations.

## **ARTICLE 5**

### **NON-DISCRIMINATION**

#### **Section 1. Association Membership or Activity**

Neither the City nor the Association shall interfere with the right of Fire Fighters covered by this Agreement to become or not become members of the Association, and there shall be no discrimination against such Fire Fighters because of lawful Association membership or non-membership activity or status. Nothing in this Agreement will be construed to prevent the Association from requiring Fire Fighters desiring to obtain or retain Association membership to meet its lawful membership requirements. Nothing in this Agreement will be construed to impose on the Association any obligations to non-members of the Association greater than those imposed by the law.

**ARTICLE 6**  
**WORK FURLOUGHS**

It is expressly agreed and understood that during the term of this Agreement, Fire Fighters covered by this Agreement shall be exempt from any mandatory employee work furlough or other unpaid leave plan implemented by the City for the purpose of reducing base wages paid to employees by reducing an employee's normal work hours. This Article does not apply to disciplinary actions.

## **ARTICLE 7**

### **ASSOCIATION DUES & PAYROLL DEDUCTIONS**

#### **Section 1. Dues Check Off**

Upon receipt of a proper and signed authorization from an Association member and written approval by the Association, the City will deduct from the Association member's pay, regular Association dues in the amount set by the Association. The authorization shall be made on a form supplied by the City. The Association shall notify the City of any change in the amount of the regular dues.

#### **Section 2. Other Payroll Deductions**

A. The City will continue to deduct from the Association member's pay, upon receipt of an authorization from an Association member and written approval by the Association, deductions in the amount specified by the Association member, for up to ten (10) specific organizations or benefits. The initial organizations or benefits are the following:

Austin Fire Fighters Political Action Committee (PAC)  
AFD Historical Museum  
Austin Firefighters Relief and Outreach Fund  
Austin Firefighters Benevolent Fund  
Emergency Services Pipes and Drums Association (ESPADA)

For the Benevolent Fund and Membership Assessment, the Association may change the amount of deduction for those employees who have authorized payroll deductions by providing notification to the City, at least three pay periods in advance of the change.

B. The Association may add or change the specific organizations or benefits up to the ten (10) permitted, subject to approval by the City. In approving the request, the City may consider the type of use and whether the City's involvement in the funding of such organizations or benefits is appropriate. Upon request, the Association will provide appropriate documentation and/or information from which the City may determine and verify that adequate accounting safeguards and controls exist to protect employee funds. The City will not unreasonably delay or withhold approval for the use of deductions. Requests will be submitted to the persons designated in accordance with Article 29, *Notices*.

#### **Section 3. Prior Authorizations**

Prior to the effective date of this Agreement, the Association will furnish to the City a list of all Association members. Listed members who authorized dues or payroll deductions prior to the effective date of this Agreement will not be required to submit a new payroll deduction form. Members who are not included in the list must submit proper authorization requesting dues or payroll deductions.

#### **Section 4. Remittance of Deductions**

The amounts withheld by the City for dues and payroll deductions will be promptly remitted to the Association's Treasurer.

**Section 5. Association Payment of Deduction Costs**

The Association agrees to reimburse the City for the cost of making such deductions in an amount not to exceed ten cents (\$.10) per deduction. The City will not charge this fee for the following organizations: Austin Firefighters Relief and Outreach Fund, AFD Historical Fund, and Emergency Services Pipes and Drums Association (ESPADA).

**Section 6. Correction of Errors**

The Association will refund to the City any amount paid to the Association in error under this Article. The City will reimburse an Association member for any amount erroneously deducted from the Association member's pay under this Article.

**Section 7. Effect of Contract Expiration**

The provisions of this Article shall remain in full force and effect after expiration of this Agreement until the earlier of a successor Agreement has been reached, or twelve (12) months after expiration of this Agreement.

## **ARTICLE 8 CIVIL SERVICE COMMISSION**

### **Section 1. *Ex Parte* Communications with Commission**

The parties agree that neither the City nor the Association shall have *ex parte* communications with any member of the Civil Service Commission concerning any Commission proceedings such as disciplinary appeals, promotional bypasses, or examination appeals. This section does not prohibit the Civil Service Director, the Director's staff, the City Attorney, or the City Attorney's staff from communicating with Commissioners to the extent necessary to perform their duties in connection with the Commission, provided that such communications are in accordance with applicable law and ethics requirements.

### **Section 2. Agreed Scheduling of Disciplinary Hearings**

In any appeal of a suspension, including an indefinite suspension, the suspended Fire Fighter (or the Fire Fighter's designated representative) and the Fire Chief by written agreement may schedule or re-schedule the hearing on a date more than 30 days after the date the Commission receives the Fire Fighter's notice of appeal. Upon receipt of such written agreement, the Civil Service Director shall schedule the hearing on the agreed date unless a quorum of the Commissioners is unavailable. If a quorum of Commissioners is not available on the agreed date, the Director shall confer with the Fire Fighter (or the Fire Fighter's designated representative) and the Fire Chief to select a new date for the appeal hearing when the parties and a quorum of the Commissioners are available.

## **ARTICLE 9 WAGES & BENEFITS**

### **Section 1. BASE WAGES.**

#### **A. Policy.**

The parties' shared goal in this Agreement is to strive to increase Fire Fighters' base wages sufficiently to approximate increases in the local cost of living during that same time period for which the base wage increases are provided.

#### **B. Base Wage Increases.**

##### **1. For Fiscal Year 2017-2018**

Effective with the first full pay period after ratification of this Agreement, the pay scale attached hereto as Appendix A-1 shall apply to all Fire Fighters covered by this Agreement. Appendix A-1 reflects a 0.25% increase to current base wages.

##### **2. For Fiscal Year 2018-2019**

Effective with the first full pay period of Fiscal Year 2018-2019, the pay scale attached hereto as Appendix A-2 shall apply to all Fire Fighters covered by this Agreement. Appendix A-2 reflects a 0.5% increase to base wages over the pay scale attached as Appendix A-1.

##### **3. For Fiscal Year 2019-2020.**

Effective with the first full pay period of Fiscal Year 2019-2020, the pay scale attached hereto as Appendix A-3 shall apply to all Fire Fighters covered by this Agreement. Appendix A-3 reflects a 1.0% increase to base wages over the pay scale attached as Appendix A-2.

##### **4. For Fiscal Year 2020-2021.**

Effective with the first full pay period of Fiscal Year 2020-2021, the pay scale attached hereto as Appendix A-4 shall apply to all Fire Fighters covered by this Agreement. Appendix A-4 reflects a 2.0% increase to base wages over the pay scale attached as Appendix A-3.

##### **5. For Fiscal Year 2021-2022.**

Effective with the first full pay period of Fiscal Year 2021-2022, the pay scale attached hereto as Appendix A-5 shall apply to all Fire Fighters covered by this Agreement. Appendix A-5 reflects a 2.5% increase to base wages over the pay scale attached as Appendix A-4.

### **Section 2. ADDITIONAL PAY ITEMS**

#### **A. Assignment and Specialized Functions Pay**

Commencing on the effective date of this Agreement, the following Assignment and Specialized Functions Pay items shall continue to be available in accordance with criteria and procedures adopted by the Fire Chief:

Airport Fire and Rescue Pay	\$150 per month
Bilingual Translation Pay*	\$175 per month
Staff Schedule Pay For each consecutive month in a Staff Position, for up to 24 months	\$450 per month
For each consecutive month in a Staff Position, immediately following 24 months with no break in the Staff assignment	\$600 per month
Special Operations Teams Pay	\$150 per month

\*Bilingual Translation Pay applies, at a minimum, to the following languages: Spanish, American Sign Language, and Asian (Vietnamese, Cantonese, Mandarin, Thai, Korean, Japanese, and Malaysian). A Fire Fighter may receive Bilingual Translation Pay for only one (1) language.

## **B. Longevity Pay**

1. On the effective date of this Agreement, the City will continue to pay Fire Fighters longevity pay in the amount of One Hundred Dollars (\$100.00) per year for each year of service up to a maximum of twenty-five (25) years of service.

2. Beginning with the effective date of this Agreement, longevity pay shall be paid on an annual basis in a lump sum in the first regularly scheduled pay period after the Fire Fighter's anniversary date. This change in payment of longevity does not affect the treatment of longevity for retirement and overtime purposes, and the City and the Fire Fighters shall continue making retirement contributions for longevity payments.

## **C. Education Incentive Pay and Firefighter Certification Pay**

During the term of this Agreement, the City shall pay eligible Fire Fighters either Educational Incentive Pay or Firefighter Certification Pay at the rates specified in City of Austin Ordinance No. 20140306-010. To be eligible for such additional pay, the Fire Fighter must meet the criteria and comply with the requirements established by Part 2 of such Ordinance. A Fire Fighter shall not be entitled to receive both Education Incentive Pay and Firefighter Certification Pay.

## **D. Reimbursements**

During the term of this Agreement, the following reimbursements will be paid in accordance with City policy:

1. Mileage paid for travel between stations;



2. Reimbursement of auto insurance deductible.

#### **E. Preemption**

Fire Fighters shall be entitled to the Wage and Benefit provisions in this Article, in current state statutes except as amended by this Article, and Department policy as of the effective date of this Agreement. No change to or adoption of any state statute, Executive Order, local ordinance, resolution, rule or policy after the effective date of this Agreement shall alter or add to the terms of this Agreement in respect to Wages and Benefits.

### **Section 3. Assistant Chiefs**

A. The Fire Chief has the right to set wages and benefits for the Assistant Chiefs, subject to the approval of the City Council as a part of the budget. The base salary of each Assistant Chief shall be at least 12.8% higher than the base salary for the rank of Division Chief. The Fire Chief may designate one Assistant Chief as the Executive Assistant Chief or Chief of Staff, whose pay and benefits may be different than the other Assistant Chiefs.

B. Assistant Chiefs shall be compensated on a salary basis and are exempt employees for purposes of overtime compensation under applicable federal law.

C. Assistant Chiefs shall be entitled to wages and benefits as provided in this Article, and as to Assistant Chiefs, this Article shall totally preempt any provision for wages and benefits under state statute, including but not limited to Chapter 141, 142 and 143 of the Local Government Code, Executive Order, local ordinance, resolution or rule.

### **Section 4. EMT Certification**

During the term of this Agreement, the Department shall have a policy requiring all Fire Fighters through the rank of Battalion Chief to maintain EMT certification at the EMT-B skill level. If a state of emergency exists in the City of Austin, the Chief may require any Fire Fighter to perform duties requiring EMT-I or EMT-P skill levels without additional compensation. If, however, the Chief requires Fire Fighters to perform duties requiring EMT-I or EMT-P skill levels when such a state of emergency does not exist, those Fire Fighters will be compensated on the basis of a market-based study.

### **Section 5. Monthly Paid Compensation**

It is expressly understood and agreed that the City reserves the right to pro-rate and pay all monthly payments in bi-weekly equivalents.

### **Section 6. Pay Averaging**

During the term of this Agreement, the City may discontinue the current practice commonly known as "pay averaging" if the City determines in good faith that such practice

violates the requirements of the Fair Labor Standards Act, 29 U.S.C. §§201 *et seq.*, and its implementing regulations. The City will provide ninety (90) calendar days advance notice of the date the practice will be discontinued. Such notice will be provided to the Association President and will be posted on Fire Net.

#### **Section 7. Retirement Contributions**

During the term of this Agreement, the City's contribution rate to the Austin Fire Fighters Relief and Retirement Fund will continue to be no less than 22.05%.

**ARTICLE 10**  
**ASSOCIATION BUSINESS LEAVE**

**Section 1. Association Business Leave**

**A. Creation of Association Business Leave**

Authorized Association Representatives shall be permitted to have paid time off, designated as Association Business Leave (ABL), to conduct Association business under the conditions specified in this Article.

**B. Permitted Uses of ABL**

1. The Association President may use ABL for any lawful Association business activities consistent with the Association's purposes.

2. For other Authorized Association Representatives, ABL may be used for Association business activities that directly support the mission of the Department or the Association, but do not otherwise violate the specific terms of this Article. Association business is defined as time spent in Collective Bargaining negotiations; adjusting grievances, attending dispute resolution proceedings, addressing cadet classes during cadet training (with prior approval of the time and content by the Fire Chief, or his/her designee), and attending union conferences and meetings. It is specifically understood and agreed that ABL shall not be utilized for legislative and/or political activities at the State or National level, unless those activities relate to the wages, rates of pay, hours of employment, or conditions of work affecting the members of the bargaining unit. At the local level, the use of ABL for legislative and/or political activities shall be limited to raising concerns regarding firefighter safety. Association Business Leave shall not be utilized for legislative and/or political activities related to any election of public officials or City Charter amendments. Association Business Leave shall not be utilized for legislative and/or political activities that are sponsored or supported by the Association's Political Action Committee(s). Association Business Leave shall not be utilized for legislative and/or political activities at the local, state, or national levels that are contrary to the City's adopted legislative program. No Association Business Leave shall be utilized for activities prohibited by Section 143.086 of Chapter 143 or by the Texas Ethics Commission. Nothing contained in this Subsection is intended to limit the use of the individual firefighter's vacation time for legislative and/or political activities.

**C. Written Request Required**

All requests for ABL must be in writing and submitted at least 3 business days in advance to HQ support staff. To be considered timely, the request must be received in person, by fax, or by e-mail by noon of the day notice is due.

**D. Approval of ABL Requests**

The Fire Chief or the Fire Chiefs designee shall approve timely ABL requests, subject only to the operational needs of the Department.

**Section 2. Funding and Administration of the Association Business Leave Pool**

**A. Manner of Funding**

For the timeframe between the effective date of this Agreement and through December 31, 2017, the City will fund a pro rata number of hours of Association Business Leave

to a pool of leave time to be used in accordance with this Article. Beginning January 1, 2018, and each subsequent year during the term of this Agreement, during the first ten (10) days of the calendar year, the City will contribute 5,600 hours of Association Business Leave to a pool of leave time which may be used in accordance with this Article. The City will track deductions from the pool as Association Business Leave is used.

**B. Administration of Pool**

Up to one thousand (1,000) hours remaining at the end of a calendar year will remain in the pool for use in the following year. However, at no time may the pool exceed sixty six hundred (6,600) hours. Up to one thousand (1000) hours in the pool at the end of the Agreement will be available for use in the following year for Association Business Leave activities. The City and the Association shall track utilization of ABL.

**C. Use of Association Business Leave by Association President**

Beginning January 1, 2018, the Association President shall be permitted up to 2080 hours of Association Business Leave from the pool balance per year, less accrued leave time, which must be used under AFD policies, and shall be assigned to a 40 hour work week. The Association President shall account for all leave time taken under such status through the Fire Chiefs office and such time shall be subtracted from the Association leave pool. The Association President will not be entitled to overtime pay from the City for any hours using ABL leave. The Association President may at any time be required to return to duty if an emergency situation exists. The Association President may also be assigned to any special projects at the discretion of the Fire Chief. The pool balance will not be reduced by any hours that the President actually works at the direction of the Fire Chief. At the end of his/her term, the Association President will be allowed to return to the assignment s/he occupied before commencing ABL to perform duties as Association President.

**D. Administrative Procedures**

Administrative procedures and details regarding the implementation of this Article shall be specified in Departmental policy.

## **ARTICLE 11**

### **SHARED COMMUNICATIONS BETWEEN CITY & ASSOCIATION**

#### **Section 1. Need for Shared Communications**

The parties have agreed that there may be times when shared communications will be necessary and desirable. When those occasions occur, the parties have agreed to certain principles, as detailed in this Article.

#### **Section 2. Principles and Goals of Shared Communications**

##### **A. Avoidance of Personal Attacks**

Whenever Fire Department management or the Association finds it desirable to communicate with members of the Department or the public, it is specifically agreed that each will avoid personal attacks or inflammatory statements.

##### **B. Co-sponsored events**

It is also a goal of shared communications that Fire Department management and the Association will identify and participate in co-sponsored events.

##### **C. Association Representation on Department Committees**

Finally, it is a goal that the Association locates and assigns Association representatives to Fire Department committees established by the Fire Chief to advise on policies or working conditions.

#### **Section 3. Shared Communications Systems**

##### **A. Association Bulletin Boards**

The Association shall be permitted to use Association bulletin boards located at Fire Department work sites, after approval of placement and number by the Fire Chief. The Association's bulletin boards will be monitored by both Association battalion stewards and by station officers for content. The following Guidelines shall apply to materials posted on the bulletin boards:

- (1) There shall be no personal attacks or inflammatory statements;
- (2) All materials shall be directed toward dissemination of general Association information and advising members of events, meeting, and functions;
- (3) Department property (bulletin boards on AFD premises, the Pony, and email) is for public business only, and is not dedicated or made available for expressing or debating views or issues, or for any type of political campaign or election information or endorsements (this limitation does not apply to elections for Association officers, provided that only brief notices naming the individual rank, years of service and Association office sought shall be permitted);
- (4) Any concerns about the content of posted material shall be brought to the attention of the Association President or designee for review and adjustment as soon as the concerns are noticed. The objectionable material shall be removed from the bulletin board until final determination. An Association notice may include a simple reference to another source for further information such "See AFA Web Page or the Smoke Signal"; and

(5) The Fire Chief retains the final decision as to whether Association materials may be posted on bulletin boards except as to the items noted in (B) 1-5 below, which may be posted without prior approval.

**B. Association Use of the Pony and Station Computers and Printers**

The Association may also request approval to distribute specific Association materials to the stations through the Department's inter-office mail system (the "Pony"). The Fire Chief, or her/his designee, shall not unreasonably deny such permission. With approval of the Fire Chief, or designee, the Association may be granted approval to use station printers and computers for rapid dissemination of information. After initial approval of a particular type of routine communication, subsequent approval of these types of communications is not required. Use of the Pony or the Department's computers to disseminate information without prior approval shall be limited to members of the Executive Board and the Association President, on the following categories:

- (1) Items approved by the Executive Board of Local 975 and certified by the Board as in compliance with the provisions of this Article;
- (2) Dissemination of Local 975 meeting agendas;
- (3) Special notices of Association events, activities, member opportunities, public service announcements such as "Fill the Boot" or reminders to vote;
- (4) Notices of committee meetings; and
- (5) Notices of family member deaths.

Materials distributed in the Pony or on computer shall meet the same Guidelines as contained in Section 3.A. above regarding bulletin boards. Other communications between Fire Department Management and Association Representatives may be included by advance approval.

**C. Other Association Distributions**

Except for the categories specifically permitted without advance approval, the Fire Chief retains the final decision as to whether Association materials may be distributed on or using Department property. A copy of any material sent without prior approval shall be provided by email or photocopy for the Executive Staff.

**Section 4. Joint Communications**

In order to reduce the amount of rumors in the Department, the parties have agreed to certain methods of joint communications. These include, but are not limited to including a column in any Fire Department publication (should one again be published in the future) in which the Association will be permitted to address rumors. The Association also will permit the Fire Chief space for a column in the "Smoke Signal" (or other successor publication) in which to address rumors. If both parties agree, members of Fire Department management and the Association may make joint appearances at Departmental meetings in order to address critical communications.

## **ARTICLE 12 LEAVE PROVISIONS**

### **SICK LEAVE**

#### **Section 1. Sick Leave Accrual Rates**

Sick leave shall be accrued at the following rates.

53-hour week employees	7.50 hours per pay period
40-hour week employees	5.00 hours per pay period

#### **Section 2. Sick Leave Use**

A. The use of sick leave will be allowed in case of health care appointments, personal illness, or physical incapacity of an employee. It will also be allowed when a Fire Fighter is required to care for a member of his/her immediate family who is ill or incapacitated due to a medical condition.

B. Sick leave may be taken in intervals of one-quarter hour for all time that the employee is absent during a regular work day.

#### **Section 3. Payment of Sick Leave upon Separation**

Upon separation, maximum payout of sick leave shall be as follows:

53-hour week employees	1080 hours
40-hour week employees	720 hours

### **VACATION LEAVE**

#### **Section 4. Vacation Accrual Rates**

Vacation leave shall be accrued at the rates in effect for Fire Fighters as of October 1, 2014.

#### **Section 5. Leave Accruals for Certain Fire Fighters on Forty Hour Workweek**

Those Fire Fighters who work a forty hour workweek and those who volunteer to work four 10-hour days per work week, shall have their leave accruals calculated as follows: Leave shall be accrued on the basis of an eight (8) hour day rate. Leave must be used on an hour-per-hour basis.

#### **Section 6. Vacation Use**

All vacation leave shall be scheduled and used in accordance with Department procedures approved by the Fire Chief, which shall include a vacation selection process based on seniority. The procedures may permit approval of vacation for up to two Fire Fighters per unit assigned to the same station regardless of the unit to which they are assigned.

#### **Section 7. Vacation Slots**

The number of vacation slots that each Battalion will receive per shift will depend on the

number of Fire Fighter positions (excluding Battalion Chiefs) assigned to that Battalion based on the ratio of one vacation slot for every seven (7) Fire Fighter positions (excluding Battalion Chiefs) or fraction thereof.

#### **Section 8. Extra Vacation Slots on Certain Holidays**

The parties recognize that having one extra vacation slot available per Battalion per shift on Thanksgiving and Christmas is desirable. Therefore, the City agrees to permit one additional Fire Fighter per Battalion and per shift to schedule vacation time for the shift of, the shift before and the shift after Thanksgiving and Christmas. These slots will be in addition to those permitted under Section 7 above.

#### **Section 9. Vacation: Maximum Leave Accruals**

Maximum accrual of vacation shall be as follows:

53-hour week employees	600 hours
40-hour week employees	400 hours

The Fire Fighter will not receive financial compensation for any hours in excess of the cap.

#### **Section 10. Vacation/sick Leave Buyback**

During the first year of this Agreement, the City will budget up to \$500,000.00 for vacation/sick leave buyback, available on a first come, first served basis. If the employee elections as allowed under this Section exceed this dollar amount, the sick and/or vacation leave bought back by the City shall be reduced pro-rata for all persons who elected to participate. No employee shall lose any leave balance which is not purchased.

Vacation/sick leave buyback is available at the end of each six-month period covered by this Agreement (commencing April 1, 2018) for each year in which the program continues to:

- (1) Operations Fire Fighters who have used 24 hours or less of sick leave during the immediately preceding six-month period, and
- (2) Non-Operations Fire Fighters who have used 16 hours or less of sick leave during the immediately preceding six-month period.

The City Manager, at his/her sole option, may continue the vacation/sick leave buyback program in subsequent years of the Agreement. The Manager's decision to continue the option in any subsequent year will not bind the Manager to continue it in other years.

Employees will be permitted to sell back accrued leave, to the extent and under the limitations set forth in this Section.

- (a) Members must have a minimum sick leave balance of 240 hours in order to be eligible for the Buy Back program; and



- (b) The Buy Back program will be capped at a maximum 24 hrs per individual per each six month period, 48 hours total for the fiscal year; and
- (c) For 40 hour week staff members the Buy Back program will be capped at a maximum 8 hrs per individual each six month period, 16 hrs total for the fiscal year

Employees must elect to sell back in writing, on or before October 1, and April 1, respectively for each immediately preceding six (6) months of each sell back year, using a form provided by the Chief or his designee. Payments shall be made in the months of November and May, respectively, of the applicable year should the program be continued in any year after the first year of the Agreement.

Catastrophic Sick Leave donations shall not be counted as Sick Leave Used.

#### **Section 11. Payment of Vacation Leave Upon Separation**

Upon separation, maximum payout of vacation leave shall be as follows:

53-hour week employees	360 hours
40-hour week employees	240 hours

#### **Section 12. Accruals**

Sick leave and vacation leave shall accrue only in pay periods for which benefits accrue.

#### **Section 13. Family and Medical Leave**

The provisions of the City of Austin Personnel Policies shall apply to the use of leave pursuant to the Family and Medical Leave Act (FMLA).

### **EMERGENCY LEAVE**

#### **Section 14. Availability and Amount of Emergency Leave**

Emergency Leave is available to be used only for a death in the Fire Fighter's immediate family. A Fire Fighter on a 53-hour week is allowed four (4) days [forty-eight (48) hours] of Emergency Leave. A Fire Fighter on a 40-hour week is allowed five (5) days [forty (40) hours] of Emergency Leave. Emergency leave may be used on no more than four (4) occasions per calendar year, unless the Fire Chief grants a hardship exception to this limit.

#### **Section 15. Emergency Leave Not Subtracted from Other Leave**

A Fire Fighter's leave balances will not be reduced by usage of Emergency Leave.

### **CATASTROPHIC LEAVE**

#### **Section 16. Catastrophic Leave**

The Department shall establish a procedure whereby sick leave may be donated and used. The Department will establish criteria for the donation and use of hours for the identified need, and the

appropriate amount of donated hours. Included in the criteria will be a one-hour minimum donation and a specified beginning and ending date for the donation period. This procedure shall be subject to final approval by the Fire Chief before it is implemented. All requests for use of donated sick leave will be subject to approval of the Fire Chief.

## **MILITARY LEAVE OF ABSENCE**

### **Section 17. Military Leaves of Absence**

Military leave for annual duty in the military reserves or national guard will be granted in accordance with Local Government Code Section 143.072, plus an additional 48 hours for a Fire Fighter assigned to a 53 hour work week. A leave of absence for initial military training or a recall to active military duty will be granted in accordance with Local Government Code Section 143.072. Notwithstanding any provision of Section 143.072 of the Local Government Code, neither military leave nor military leave of absence requires approval of the Civil Service Commission.

## **HOLIDAYS**

### **Section 18. Holidays**

The following official holidays for City employees will be observed for Fire Fighters during the term of this Agreement. If a holiday falls on Saturday, it will be observed on the preceding Friday; if a holiday falls on Sunday, it will be observed on the following Monday.

New Year's Day	January 1
Martin Luther King, Jr.'s Birthday	Third Monday in January
Washington's Birthday	Third Monday in February
Memorial Day	Last Monday in May
Independence Day	July 4
Labor Day	First Monday in September
Veteran's Day	November 11
Thanksgiving Day	Fourth Thursday in November
Day After Thanksgiving	Friday after Thanksgiving
Christmas Eve*	December 24
Christmas Day*	December 25
Two Personal Holidays**	Open

\*Department policy and procedure will specify how these adjacent holidays are observed when either or both of them fall on a Saturday or Sunday.

\*\*Personal holidays will be used in accordance with Department policy and procedure. One of the two personal holidays will count as the Fire Fighter's September 11 holiday. Both parties agree this section is in compliance with the state statute regarding the September 11 holiday for Fire Fighters.

## **EXCEPTION VACATION**

### **Section 19. Exception Vacation**

Exception vacation hours are hours banked in a separate leave account as each holiday occurs. Use of exception vacation hours is subject to the same Department policies and procedures that apply to use of regular vacation hours.

### **Section 20. Maximum Accruals.**

Maximum accrual of exception vacation shall be as follows:

53-hour week employees	264 hours
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40-hour week employees	176 hours
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The Fire Fighter will not receive financial compensation for any hours in excess of the cap.

### **Section 21. Payment of Exception Vacation Upon Separation**

Upon separation, maximum payout of exception vacation shall be as follows:

53-hour week employees	264 hours
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40-hour week employees	176 hours
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## **ADMINISTRATIVE LEAVE**

### **Section 22. Administrative Leave**

Fire Fighters may be granted Administrative Leave based on participation in a City or departmental program that awards Administrative Leave to program participants or for any purpose authorized by the Fire Chief.

### **Section 23. Preemption**

Fire Fighters shall be entitled to the Leave provisions in this Article and Department policy as of the effective date of this Agreement. Such entitlements shall not be changed during the term of this Agreement, and shall preempt any inconsistent Leave provisions under Chapters 141, 142, and 143 of the Texas Local Government Code. No change to or adoption of any state statute after the effective date of this Agreement shall alter or add to the terms of this Agreement in respect to Leave. Additionally, such entitlements shall totally preempt Council Resolution No. 20130822-018 in its entirety, and that portion of Council Resolution No. 20130620-015 amending City of Austin Personnel Policies Chapter A, Section III.B.1.c.(2) Parental Leave Benefit. The remainder of Council Resolution No. 20130620-015 is not preempted by this Article.

## **ARTICLE 13 PERSONNEL DEPLOYMENT**

### **Section 1. Trading Assignments**

Two Fire Fighters of the same rank may trade or "swap" assignments in accordance with this procedure. An agreed swap must have the approval of the appropriate Battalion Chief and the next level supervisor. The swap must be made voluntarily by each Fire Fighter. No Fire Fighter may enter into a swap if he/she is high enough on a promotional eligibility list to make his/her promotion from that list likely. There shall be no swaps involving more than two Fire Fighters. If the swap is between Combat Operations and a Staff Section, it must be with the most senior member of that Staff Section who desires to return to Combat Operations. A member who swaps into a Staff assignment is required to remain in that assignment as described in Section 2.D. Any manipulation of the swap procedure by any Fire Fighter or supervisor shall be grounds to disallow the proposed swap.

### **Section 2. Policy on Transfers to Open Assignments**

#### **A. "Open Assignment" Defined**

For purposes of this Agreement only, an "open assignment" is a Civil Service position of any rank from Fire Fighter through Battalion Chief which has been vacated for any reason, including but not limited to retirement, resignation, termination, promotion, or transfer. New positions authorized by the City Council are also "open assignments."

#### **B. Policy**

The Fire Chief will issue a General Order that will include provisions establishing posting parameters including: posting of open assignments within ten (10) days after they occur; a minimum of ten (10) days posting period; providing for an application and selection process; and providing written feedback to all applicants who request same. Once an assignment has been posted, it will remain posted on the Fire Department intranet until filled.

#### **C. No selection for open assignment**

If no selection is made for an open assignment advertised by a Battalion Chief, the Fire Chief may, at his/her discretion:

1. Leave the assignment open;
2. Fill the assignment with a staff person, if possible;
3. Fill the assignment by promotion;
4. Fill the assignment with a recent academy graduate (if the opening is an assignment in the Fire Fighter rank); or

5. Fill the assignment by transfer.

#### **D. Two-Year Stay In Staff**

1. Fire Fighters who promote or transfer to a staff assignment (40 hours per week) or any other assignment for which assignment pay is received (except bilingual pay) shall ordinarily stay in the assignment for a minimum of two years.

2. A Fire Fighter who is nearing completion of a staff assignment may apply for an open assignment in Operations. If accepted for such assignment, the Fire Fighter will be placed in that open assignment as soon as operational needs of the Department allow, but no sooner than the pay period in which the Fire Fighter's two year staff assignment anniversary date occurs. The assignment will be reserved for the accepted Fire Fighter until such time that he or she is released from the staff assignment. If the Fire Fighter is not selected for the requested position, the Fire Fighter will, as soon as he/she has served 24 months in the staff assignment and as soon as operational needs allow, be placed in another vacant Operations position.

#### **E. Transfer Procedures**

The procedures to be followed in transferring Fire Fighters to "open assignments" are contained in the General Orders. If a Fire Fighter can document that they have applied for at least three open positions and has failed to be awarded any of them, the Fire Fighter may request that his/her transfer request be elevated to the Division Chief level. The Division Chief will investigate the situation and will assist the Fire Fighter in placement to an open position as soon as operational needs of the Department allow.

#### **F. Awarded Positions**

Once a position has been awarded to a Fire Fighter, the Fire Fighter may not be removed from that position without a documented business need. A position occupied for six months will become an awarded position.

### **Section 3. Shift Trading Privileges**

- A. During the term of this Agreement, the Department shall have a policy providing for the trading of shifts/time, and Kelly shifts, among Fire Fighters. The policy shall provide flexibility for Fire Fighters to make such trades, provided that the trades do not compromise the integrity of the firefighting company or the business needs of the Department.

- B. The City has agreed to facilitate the Fire Fighters' shift exchanges where the Fire Fighters do so at their sole option and for their convenience. The City offers Fire Fighters no incentive, encouragement, benefit, or promise of reward or advantage to Fire Fighters in connection with providing this option. The City retains the right to make any changes in policies or practices which the City Attorney deems necessary to comply with State and Federal overtime laws and regulations, including but not limited to 29 C.F.R. §§ 553.31 and 553.227, governing the

City's involvement, regulation, or approval of firefighter participation in this voluntary option.

**Section 4. Maternity Alternative Duty Status**

For safety purposes, Fire Fighters who learn that they are pregnant may report their condition as soon as practical to their immediate supervisor and report for Alternative Duty. Alternative Duty may be worked during the term of the pregnancy. The Fire Chief, on a case-by-case basis, may authorize post-delivery Alternative Duty status.

**Section 5. Discretion of Fire Chief**

Nothing in this Article shall be construed as limiting the Fire Chief's authority to determine personnel assignments.

## **ARTICLE 14 HOURS OF WORK**

### **Section 1. Employees Working 53-Hour Weeks**

Employees who work a 53-hour week shall work one twenty-four (24) hour work shift and forty-eight (48) hours off duty. This shift schedule results in an average of fifty-three (53) hours per week. This shall be accomplished by scheduling eighteen (18) twenty-four (24) hour regular shifts and one (1) twenty-four (24) hour Kelly shift.

### **Section 2. Employees Working 40-Hour Weeks**

The basic work week shall be forty (40) hours per week for all Fire Fighters who are not assigned to work a 53-hour week.

### **Section 3. Changes by Mutual Agreement**

By mutual agreement, the Fire Chief and the Association's Executive Board may agree to change the hours of work set out in this Article.

## **ARTICLE 15 OVERTIME**

### **Section 1. Overtime Rates**

A. Except as may otherwise be specified in this Agreement, all Fire Fighters shall be compensated at the overtime rate of one and one-half (1.5) times the Fire Fighter's regular rate for all hours worked over the applicable overtime threshold prescribed by the FLSA. For purposes of computing overtime, all approved paid leave time, except sick leave and regular vacation leave, shall be calculated as hours worked.

B. "Regular rate" or "regular rate of pay" for the calculation of overtime shall have the meaning prescribed by the FLSA (in accordance with 29 CFR Sections 778.107 through 778.109 and 778.113).

C. Overtime worked at the beginning or end of a Fire Fighter's shift shall be to the nearest quarter hour for the actual time worked. Overtime that occurs as the result of being called back for duty, and is not a continuation of the Fire Fighter's shift, will be paid to the nearest quarter hour for the actual time worked with a minimum of two (2) hours provided.

### **Section 2. Overtime Rules**

A. During the term of this Agreement, the Department shall have a policy regarding overtime work in the Operations Division. The policy shall provide for constant staffing of the Operations Division. The City agrees to a consistent and predictable application of its policy regarding overtime, provided that the application of the policy does not compromise the integrity of the firefighting company or the business needs of the Department. Overtime will be paid, when necessary, to maintain staffing levels established by the Fire Department's staffing policies.

B. Overtime shall be paid consistent with Section 1 of this Article to an individual for hours worked during his/her regularly assigned Kelly Shift. Fire Fighters will not be considered for overtime while working a Kelly trade.

C. Fire Fighters on their Kelly shift who have placed their name on the overtime Signup list will be offered overtime first and generally be released last. Within this group, Fire Fighters with the lowest total "personnel shortage" overtime hours year to date, regardless of rank, will be offered overtime first. If, after utilizing this process, overtime is still necessary, additional members will be selected by a process that does not compromise the integrity of the firefighting company.

### **Section 3. On Call Status**

The Fire Chief shall continue a program of providing additional pay for Fire Fighters who are required to be on call while off duty, which will be consistent with the Department's On Call Policy as it currently exists, or as amended in the future.

### **Section 4. FLSA Exemption**

It is understood and agreed that the City is entitled to the partial exemption under 7(k) of the FLSA (29 U.S.C. §207(k)) and that the Fire Fighters assigned to the Operations Division meet



the test for the 7(k) (also referred to as the 207k) partial exemption.

**ARTICLE 16**  
**PROMOTIONS, DEMOTIONS, & REINSTATEMENTS**

**PROMOTIONS**

**Section 1. Purpose and Objective**

The Association hereby agrees to the deviations from Chapter 143 promotion procedures specifically authorized by this Article. Except as allowed by this Article, the City will comply with the promotion procedures specified in Chapter 143, and retains all prerogatives granted to it by the statutory procedures.

**Section 2. Challenges to the Promotional Process**

In the event of a lawsuit or administrative claim asserted against the Association based on an allegation that a deviation by the City from Chapter 143 promotion procedures authorized by this Article violates a state or federal law, the City will reimburse the Association for sums paid as damages in such lawsuit or settlement, and for sums paid as attorney's fees and court costs in defending such lawsuit or claim, subject to each of the following required conditions:

1. The Association will fully and vigorously defend the claim on the merits.
2. The City has the right to approve the amount of any settlement of any such claim against the Association.
3. The Association will not assert a claim against the City based on an action by the City that was required by the terms of this Article.
4. Reimbursement for amounts paid as damages or settlement will be made after resolution of the lawsuit by either final judgment in court (including appeals), or settlement approved by the City.
5. Reimbursement for attorney's fees and costs will be ongoing as such fees and costs are paid by the Association. The City will reimburse the Association for attorney's fees at the actual hourly rate normally paid by the Association to the attorney, and in any event no greater than the average hourly rate paid by the City for outside counsel during the preceding fiscal year.
6. The City's total liability for damages and/or fees and costs under this Section will not exceed one hundred fifty thousand (\$150,000.00) dollars for the term of this Agreement, regardless of the number or size of claims asserted against the Association.

**Section 3. Promotional Examinations – General Provisions**

**A. Scheduled Examination Dates & Rescheduling Exams**

Prior to the effective date of this Agreement, the Chief will establish an examination schedule for all tested ranks, and publish the schedule as Appendix B to this Agreement. No promotional list shall extend longer than six (6) months after the expiration of the Agreement. Scheduled promotional examinations shall be held as provided in Appendix B of this Agreement unless the prior eligibility list is earlier exhausted, in which case the provisions of subsection F

apply. The Department may require members to sign up to take the examination according to the terms specified in the notice of the exam. The actual date of the exam may be rescheduled for up to sixty (60) days in the event of circumstances beyond the City's control, including but not limited to extraordinary weather events or other emergencies. In the event of a rescheduling, no further notice of the examination is required other than the new time, place, and date of the rescheduled examination, notwithstanding section 143.029. Only members eligible as of the original posted date of the examination shall be eligible to sign up for and take the examination.

**B. Effective Date of Promotions, Back Pay Liability**

With the exception of the initial scheduled examination dates for each rank, meeting the scheduled examination dates provided for in Appendix B or the re-scheduled date of an exam as allowed in Subsection A, precludes any liability for back pay for that position, provided that the promotion occurs within sixty (60) days after the scheduled examination date or within sixty (60) days after the date of an un-scheduled examination under Subsection F. A promotional delay beyond the sixty (60) days, caused by an Assessment Center appeal filed by any promotional candidate pursuant to Section 14.A.2, precludes any liability for back pay for that position. The right to back pay shall not be affected as to the initial examinations given under the schedule in Appendix B. The right to a retroactive promotion date and seniority shall not be affected as to any examination given during the life of this Agreement.

**C. Eligibility**

Subject to Subsection A. above and Section 4 below, all candidates for promotion must meet the requirements of Local Government Code §§143.028 and 143.030.

**D. Pass Not Promote Points**

If a Fire Fighter takes a promotional exam for the rank of fire specialist after December 20, 2009, and passes but does not promote from the resulting eligibility list, the Fire Fighter will receive one (1) point on his/her written exam raw score (after the application of the criteria for breaking ties) in future promotional examinations for the same rank. A maximum of two (2) PNP points may be awarded.

**E. Seniority Points**

Except as modified by this subsection, nothing in this Agreement preempts Local Government Code Chapter 143.033. If the candidate receives a passing written examination score, seniority points shall be added to the candidate's composite score on the testing battery.

**F. Unscheduled Tests Necessitated by Exhausted Eligibility Lists**

If a promotional eligibility list for a rank is exhausted more than 90 days prior to the next scheduled promotional exam for that rank, the City may conduct an un-scheduled promotional exam for that rank as follows:

1. The date of the unscheduled written examination and the list of source materials for the examination shall be posted in accordance with the provisions of Local Government Code Chapter 143.
2. The unscheduled exam, including any Assessment Center, will be conducted in accordance with the requirements of this Article.

3. The resulting Eligibility List will be created in accordance with the requirements of this Article, and will last for twelve (12) to twenty-four (24) months from the date of the written examination. The duration of the list shall be specified in the posting for the written promotional examination.

4. The date of the next scheduled exam will be during the month which is 12-24 months after the date of the unscheduled exam, if the new exam date would occur before the expiration of this Agreement.

5. If the new date for the scheduled exam is less than one year prior to the expiration of this Agreement, the Eligibility List created as a result of the exam will expire six (6) months after the Agreement's termination date.

#### **Section 4. Promotional Process for Captains & Battalion Chiefs**

##### **A. Structure of Process**

1. Vacant positions in the ranks of Captain and Battalion Chief shall be filled from an eligibility list created by a promotional process consisting of a Written Examination and an Assessment Center conducted in accordance with this Article.

2. The Fire Chief, with the assistance of the Promotional Process Consultant (third party vendor), will develop and implement the promotional process which will include a written test and an Assessment Center, covering subject matters as determined by the Chief.

3. The written examination score will be at least fifty percent (50%) of the composite score, unless the City's Promotional Process Consultant identifies a psychometric reason for weighting the written examination score at less than fifty percent (50%) of the composite score. If the Consultant identifies such a psychometric reason, the change to the weighting of the written examination score shall not be subject to challenge by the Association, either through a contract grievance or in court, unless there is evidence that the reason was obtained by intentional misconduct or clerical error.

4. The City's Promotional Process Consultant will certify that the promotional process is valid in accordance with accepted professional standards, such as the Society for Industrial and Organizational Psychology's *Principles for the Validation and Use of Personnel Selection Procedures* (SIOPS). This certification, a copy of which will be provided to the Association, shall serve as conclusive evidence of promotional process validity, and such validity shall not be subject to challenge by the Association, either through a contract grievance or in court, unless there is evidence that the certification was obtained by intentional misconduct or clerical error.

5. The Association retains the ability to file a grievance contesting whether the City has complied with the provisions of this Article, but will not otherwise bring or support any legal action challenging the City's implementation of this Article. This does not preclude the Association from bringing suit or seeking to intervene in litigation for the sole purpose of defending a promotional process implemented in accordance with this Article, neither does it

preclude the City from contesting such suit or intervention.

**B. Written Examinations**

1. The date of the Written Examination and the list of source materials for the examination shall be posted in accordance with the provisions of Local Government Code Chapter 143.

2. The Promotional Process Consultant will determine whether or not to have a passing cut off score as a condition of proceeding to the Assessment Center portion of the examination.

**C. Assessment Centers**

1. Parties Devising & Conducting Assessment Centers

(a) The Assessment Center process shall be administered by a Promotional Process Consultant (third party vendor) designated in accordance with this Article. The third party vendor shall be a professional vendor who is not a current or former employee of the City of Austin.

(b) The assessments themselves, which will be video recorded, shall be performed by an Assessment Center Panel consisting of three (3) members designated in accordance with this Article. An individual candidate's assessment will not be conducted in the presence of other promotional candidates, and may be given at different times from other candidates.

2. Oversight Committee

(a) An Oversight Committee ("OC") shall be appointed in accordance with this Article and shall have the responsibilities set forth below. The purpose of the OC is to identify the criteria (scope of work) to be used to select the third party vendor, and to assist the purchasing department in the development of the Request for Proposal (RFP). The OC will endeavor to reach consensus on a recommendation on the scope of work, the development of the RFP, and the selection of the vendor. The failure to reach consensus shall not be a grievable matter and shall not delay the selection process. The OC shall evaluate proposals (which may include interviewing applicants and checking references), and score proposals pursuant to purchasing department procedures which include a recommendation for its choice of vendors to the Fire Chief. The Association may appoint two voting members to the OC. The remaining three voting members of the OC will be appointed by the Fire Chief and the Director of Civil Service. The Director of Civil Service may also add two additional non-voting members from persons in departments that regularly are a part of the RFP process. The Director of Civil Service, in consultation with the Fire Chief, will draft the Request for Proposal and participate with the

OC in all phases of the process. No employee who is then a candidate for promotion to Lieutenant, Captain or Battalion Chief shall serve on the Oversight Committee.

- (b) The third party vendor (once awarded), upon request of two or more members of the OC, will meet with them and discuss the methods used in developing the testing processes.

3. Assessment Process Panel

The Assessment Process Panel (the "Panel") shall consist of three (3) members. The Promotional Process Consultant shall be responsible for the recruiting, training, and selection of the Panel members. None of the Panel members may be current, former, or retired employees of the City of Austin. None of the Panel members may have any relationship with any candidate participating in the Assessment Center. All members of the Panel shall have at least one (1) year of experience, within the last five (5) years immediately preceding the Assessment Center, as a fire service professional in the same or higher rank being assessed in a fire department having a minimum staffed strength of four hundred (400) fully paid career fire fighters. The same Panel of three (3) members will assess the entire candidate pool for any given scenario or discrete portion of the assessment center. This provision shall not apply to any candidate taking a promotional examination by virtue of rights granted under USERRA.

4. Posting and Orientation

The date(s) of the Assessment Center shall be posted at least ninety (90) days prior to the date(s) specified for the Assessment Center. If the date(s) of the Assessment Center are postponed, the new date(s) shall be posted at least ten (10) days prior to the new date(s). A brief description of the criteria and subject areas for the Assessment Center will be posted at least ninety (90) days prior to the date of the Assessment Center. All candidates will be invited to attend a classroom orientation concerning the Assessment Center process. The invitation will be posted on FireNet at least ten (10) days prior to the date of the orientation.

5. Debriefing Opportunity for Candidates

After the Assessment Center process has been completed, for each candidate who files a request there will be a process for a voluntary, individual debriefing, at which time the candidate will receive information concerning his or her scores and the weight of the components of the testing process. Notwithstanding Section 4.C.6 below, upon request a Fire Fighter may review the video of his/her own assessment center as a part of the debriefing process.

6. Confidentiality of Assessment Centers

The City and the Association agree that promotional Assessment Centers conducted in accordance with this Article, including any video recording of the assessments, are a scored component part of a Promotional Examination, used in like manner as the scored written examination, and are therefore confidential pursuant to LGC Section 143.032(h).

**D. Composite Scores from Written Examination and Assessment Center**

A candidate's total score resulting from the promotional procedure shall be based on a composite of scores combining the final Written Examination and the Assessment Center

scores, as determined by the Promotional Process Consultant. The total credit for all combined exam components will be 100% of the candidate's total score, and will be allocated as part of the test design, subject to the requirements of Section 4.A.3. The maximum number of points available for any single examination component will be determined through the test design, with the promotional consultant, which may include the job analysis process with Subject Matter Expert (SME) input. The allocation between the two procedures will be published as soon as practicable prior to the date of the written examination.

**E. Creation of Eligibility List**

1. Candidates who successfully complete all of the Assessment Center testing processes will be placed on an eligibility list in rank composite score order. A final composite score list will be issued by the Promotional Process Consultant for each Assessment Center completed. The Director of Civil Service shall produce the eligibility list from which vacant positions shall be filled in rank order. The eligibility list shall rank all candidates based on the candidate's composite scores from the Written Examination and the Assessment Center, together with any seniority points.

2. If, after the expiration of the deadline to file an appeal, no appeals have been filed, the Civil Service Office shall post the eligibility list and the list shall become effective on the date of the written exam. If, during the time to file an appeal, an appeal has been filed, the Civil Service Office shall then submit the list for certification to the Civil Service Commission.

3. If, for any reason, an effective eligibility list needs to be corrected, the Civil Service Office shall correct the list and submit the corrected list for certification to the Civil Service Commission. If the Commission chooses to certify a corrected list, the effective date of the list shall remain the same as the original effective date. In the event of a clerical or electronic error in computing the test score, the expiration date of any promotional examination eligibility list may be amended by written agreement between the President of the Association and the City Manager.

**Section 5. Life of Eligibility Lists Created Under This Agreement**

Notwithstanding the provisions of Local Government Code §143.036, the life of each promotional eligibility list created during the life of this Agreement will be determined by the Chief, but in no event shall be less than twelve (12) months or more than twenty-four (24) months from the date of the written examination, notwithstanding any pending disputes, appeals or litigation concerning an applicant's score or right to promotion. The duration of the list shall be specified in the posting for the written promotional examination.

**Section 6. Existing Promotional Eligibility Lists**

Promotional eligibility lists that exist on the effective date of this Agreement will be used to fill promotional vacancies in the ranks for which they were created until they expire. Division Chiefs promoted from Civil Service promotional lists may not be demoted involuntarily except in accordance with Local Government Code §143.054 or §143.085.

**Section 7. Eligibility to Promote to Fire Specialist**

Fire Fighters wishing to take the civil service promotional examination for the rank of Fire Specialist must be approved Relief Drivers. All Fire Fighters will be provided an opportunity to

take the Relief Driver course at some point prior to the date they become eligible to take the Fire Specialist promotional examination.

## **Section 8. Unlawful Impact**

The City agrees that it will not change the promotional process for any rank, once adopted for a promotional cycle, unless a court determines that the promotional process is unlawful. If the Department of Justice or the EEOC/TWC determines that reasonable cause exists to believe that the process is unlawful, the City and the Association will engage in informal discussions with the DOJ or the EEOC/TWC to determine whether to implement any changes or adjustments acceptable to the DOJ or the EEOC/TWC which otherwise comply with applicable law. Prior to any changes to the process being implemented, the Association must agree to such changes, unless the changes are ordered by a court.

## **Section 9. Promotions to Division Chief and Assistant Chief**

### **A. Promotions by Appointment Allowed; Appointment Procedure**

1. Except as herein specified, promotions to the rank of Division Chief and Assistant Chief will be made by use of the appointment procedure specified in Local Government Code §§143.014(b) & (e)-(h), except that appointees must hold the rank of Captain or above. Fire Fighters appointed to such positions must have all the qualifications specified, and will have all rights and remedies afforded them under §143.014, including but not limited to the appeal rights provided in §§143.014(h).

2. During the term of this Agreement, the total number of Division Chiefs and Assistant Chiefs may not exceed fifteen (15). The total number of appointed Division Chiefs and Assistant Chiefs may not exceed ten (10).

3. The Fire Chief may not make an appointment to the rank of Division Chief pursuant to this Section, until the Civil Service Promotional Eligibility List for the rank of Division Chief in existence on the effective date of this Agreement either expires or is exhausted prior to the date of its expiration.

### **B. Promotions by Appointment; When Allowed**

1. If a vacancy occurs at the rank of Division Chief or Assistant Chief, the Fire Chief shall have a window of forty-five (45) days, from the date of the vacancy, to fill the vacancy by appointment pursuant to Section 9.A(1) of this Article. No Fire Fighter shall acquire an equitable property right in that vacant position or a primary right to a promotion unless the vacancy remains after the expiration of the forty-five (45) day window. For purposes of this Subsection, a vacancy occurs when an existing Division Chief or Assistant Chief position is vacated pursuant to LGC Chapter 143.036(a), or when a newly created Division Chief or Assistant Chief position is established by ordinance. This subsection shall not affect the status of individuals on existing promotional eligibility lists, other than the ranks of Assistant Chief and Division Chief, on the date a vacancy occurs as provided in Chapter 143.

2. The Fire Chief may not fill the vacancy by appointment unless:
- (a) The Chief makes the appointment effective within the forty-five (45) day window, and



- (b) On the date of the appointment, the total number of appointed Fire Fighters (excluding the Fire Fighter to be newly appointed) in the combined ranks of Division Chief and Assistant Chief is fewer than ten (10).
- (c) If the Chief does not fill the vacancy by appointment within the 45 days, Sections 143.036(a) and 143.036(e) shall apply for purposes of determining when the vacancy occurred and the timelines for filling that vacancy.

3. If a vacancy is not filled by appointment, the vacancy shall be filled in accordance with the promotional process for Captains & Battalion Chiefs set forth in this Article.

4. The forty-five (45) day window provided for by this Subsection shall be excluded in determining whether a promotional candidate is entitled to back pay based on the date of his/her promotion.

### **C. Qualifying Criteria**

1. The Fire Chief shall establish, in writing, required qualifying criteria for appointed positions, which are in addition to the qualifications listed in Local Government Code §143.014, and may include management experience, education, training, and special experience.

2. The Fire Chief may not make an appointment until the required qualifying criteria are established as prescribed by this Subsection.

3. The Fire Chief may remove without cause a person appointed under this Section, subject to the person's rights under Local Government Code §143.014(g).

### **Section 10. Shift Commander Assignment**

The Fire Department will maintain a minimum of three (3) Shift Commander assignments which will be filled by a Division Chief with a minimum of two (2) years of experience in Operations in the rank of Battalion Chief, or who attained the rank of Division Chief through competitive examination. The requirement to fill the Shift Commander assignment in this manner will extend beyond the expiration date of this Agreement for six (6) months, or until every promotional list created under this Agreement has expired, whichever is later. This provision may also be extended as a result of any extension of this Agreement under Article 30.

## **WRITTEN PROMOTIONAL EXAMINATION APPEAL PROCESS**

### **Section 11. Application of this Process**

The appeal process specified in this Article applies to appeals by individual candidates regarding the grading of their written promotional examinations. Any challenges to the administration of a written promotional examination shall be made in accordance with the provisions of Chapter 143 of the Texas Local Government Code.

## **Section 12. Appeals Criteria**

A. In appeals from written promotion examinations, criteria will be applied to judge the merits of an appeal. The criteria are established in this Section, but may be modified by the Appeals Criteria Committee ("ACC") as provided in this Article. In judging the merits of an appeal the Employee Review Committee ("ERC") described in this Article shall apply only the criteria listed in this section. If, however, the ACC has modified the criteria, the modified criteria will be used by the ERC. The Civil Service Commission must apply the criteria as well, but may add any other criteria it deems relevant to judge the merits of an appeal. All appeals must be on the form prescribed by the Director of Civil Service and must meet the following criteria for the appeal to be submitted to the Civil Service Commission:

1. The form must be completed in the Fire Fighter's own handwriting, must be legible and must contain the following:

- (a) Fire Fighter's name and TXFIR number;
- (b) Name of the exam;
- (c) Question # being appealed;
- (d) The reason(s) why the question or exam is being appealed; and
- (e) The date.

2. The form must be completed so that it challenges a specific question.

3. The form must state or list clearly the specific reason(s) for the appeal and must refer only to the approved source material list used to formulate the questions.

4. All support materials cited in or attached to the appeal form must come only from the approved source material list.

5. Unless the criteria for appeals are altered or modified by the Appeals Criteria Committee, appeals must be based on at least one of the following reasons:

- (a) There is more than one correct answer.
- (b) There are no correct answers.
- (c) The question is not clearly stated or there is an error so that the correct answer could not be determined.
- (d) The question is not from the listed source material.
- (e) The correct answer scored is not the correct answer.
- (f) The context of the source material was not used properly in the question or answer.

6. The following contains examples of appeals that will not be submitted to the Civil Service Commission for its review:

- (a) Punctuation marks are missing or incorrect.
- (b) The exact wording in the source materials was not used.
- (c) The question is not job relevant. (All materials included on the approved source materials list are deemed job relevant.)

### **Section 13. Appeals Criteria Committee**

#### **A. Role of Appeals Criteria Committee**

An Appeals Criteria Committee (ACC) shall be appointed to review and modify, as necessary, the criteria for what may be appealed to the Civil Service Commission following all written promotional examinations. The ACC shall review the appeal criteria contained in this Agreement following the first written examination appeal conducted under this Agreement to determine whether the criteria should be modified. Thereafter, the ACC shall meet to review the criteria prior to each examination appeal process.

#### **B. Appointment of Members**

The ACC, composed of seven (7) individuals, shall be appointed as follows:

1. Three (3) members appointed by the Association, each having taken at least one (1) promotional exam;
2. Two (2) members appointed by the Fire Chief, each having taken at least one (1) promotional exam;
3. One (1) member appointed by the Director of Civil Service; and
4. One (1) member appointed by the Chair of the Civil Service Commission.

#### **C. Approval of Criteria**

A simple majority of the ACC shall approve the criteria. The criteria approved by the ACC shall not be appealable to either the Civil Service Commission or to the district court.

### **Section 14. Appeal Process after Examination**

#### **A. Appeal**

1. **Written Exam.** Any Fire Fighter who has taken a written promotional examination may, within five (5) City of Austin business days of posting of the written promotional examination results, review his/her examination results. In a process established by the Director of Civil Service, each candidate who has taken a written promotional examination may have a time period to review his/her examination, write, and submit an appeal. A candidate may submit his/her written appeal at any time before the close of business on the fifth (5th) City of Austin business day after the posting of the written promotional examination results. Any appeal must be based on the appeal criteria as provided in this Agreement or as altered or modified by the Appeals Criteria Committee. Each candidate will receive a copy of the Civil Service Director's process at the conclusion of his/her examination.

2. **Assessment Center.** A Fire Fighter who claims that a scoring error occurred in his/her Assessment may appeal to the vendor only, using a second review process as established and overseen by the vendor. The decision of the vendor regarding appeals using the second review process shall be final and binding. This Agreement does not a) require the vendor to accept assessment center appeals; or b) require the City to obligate the vendor to accept assessment center appeals. However, whether the vendor accepts such appeals will be one factor, not in itself determinative, considered in selecting the vendor. If a vendor agrees to accept Assessment Center appeals, the Director of Civil Service shall establish by policy the time lines for such appeals.

There shall be no other appeal from the results of an Assessment Center process unless an individual Fire Fighter alleges that the results of the process were tainted by fraud, substantive integral compromise or material manipulation on the part of the City, the Promotional Process Consultant or the Assessment Center Evaluation Board. If such allegation is made, the Fire Fighter may appeal only to the Civil Service Commission. The Commission's decision on such appeal may be overturned only if it was procured by fraud, collusion or other unlawful means, or it is not supported by substantial evidence as judged from the administrative record made before the Commission.

**B. Review of Examination**

The Director of Civil Service will be responsible for providing dates, times, and locations for members to sign up to review their examinations. Each Fire Fighter will be responsible for signing up for a specific time period to review his/her examination. The Fire Fighter will be permitted to stay beyond his/her scheduled time period, if needed, to complete his/her review and to write and submit an appeal. Copies of source materials will be provided for a Fire Fighter's use during this review period *only* if the Fire Fighter specifically requested the materials on the Sign Up form. During the period designated for the Fire Fighter to review his/her examination, the Fire Fighter may bring self-prepared materials such as notes, flash cards, or outlines. The only published materials a Fire Fighter may bring are the source materials upon which the examination was based.

**Section 15. Review by Employee Review Committee**

**A. Role of ERC**

An Employee Review Committee (ERC) will be appointed to screen written examination appeals for the ranks of Fire Fighter through Battalion Chief to the Civil Service Commission, applying the criteria described in this Article to determine if any appeals should not be advanced to the Civil Service Commission because they do not meet the criteria.

**B. Appointment of ERC Members**

The ERC shall be comprised of five (5) members, as follows:

1. For promotional examinations for Specialist rank:
  - (a) Four (4) Specialists or higher rank, two (2) each appointed by the Association and the Fire Chief; and
  - (b) One (1) non-voting member appointed by the Human Resources Department.
2. For promotional examinations for Lieutenant rank:
  - (a) Four (4) Lieutenants or higher rank, two (2) each appointed by the Association and the Fire Chief; and
  - (b) One (1) non-voting member appointed by the Human Resources Department.
3. For promotional examinations for Captain rank:
  - (a) Four (4) Captains or higher rank, two (2) each appointed by the Association and the Fire Chief; and
  - (b) One (1) non-voting member appointed by the Human Resources

Department.

4. For promotional examinations for Battalion Chief rank:
  - (a) Four (4) Battalion Chiefs or higher rank two (2) each appointed by the Association and the Fire Chief; and
  - (b) One (1) non-voting member appointed by the Human Resources Department.

**C. Conflicts of Interest**

To prevent conflicts of interest, a member of the ERC must not have a personal relationship or conflict of interest with any candidate whose appeal will come before them. The Fire Chief and the Association President shall appoint alternates to the ERC for each rank, who shall substitute for a member of the ERC who cannot review the appeal of a candidate because of a personal relationship or conflict of interest. The Fire Chief shall determine whether such a personal relationship or conflict exists. In a process established by the Director of Civil Service, each candidate who has taken a written promotional examination may appear before the ERC and present information on each question appealed. Only source material may be used to support the candidate's appeal.

**D. Decision on Appeals**

Appeals may be denied advancement from the ERC to the Civil Service Commission by a vote of a simple majority of the voting members on the ERC. The ERC will make one of the following decisions:

1. The appeal meets the applicable criteria and should be passed on to the Civil Service Commission. Any such decision will be written and include the ERC's view regarding the merits of the appeal.
2. The appeal does not meet the applicable criteria and should not be passed on to the Civil Service Commission.

**E. Appeal of Commission Decisions**

There will be no State District Court appeal of the ERC's examination appeal determinations or from the Civil Service Commission's written examination appeal decisions, except an appeal alleging the City's failure to validate the written examination, fraud, collusion, or unlawful means.

**F.** Nothing in this Article is to be construed as limiting a Fire Fighter's right to speak and present argument in support of or against an appeal that has been advanced to the Civil Service Commission.

**DEMOTION AND REINSTATEMENT**

**Section 16. Demotions due to Return from Military Leave of Absence**

In accordance with the provisions of Local Government Code §143.072, when a Fire Fighter returns from a military leave of absence, is reinstated to active duty in the department and

is restored to his/her former position, thus creating a surplus in his/her rank, the last person promoted to that rank will be demoted and placed on the reinstatement list for that rank.

## **Section 17. Reinstatement List**

### **A. Placement on List**

Any person placed on the reinstatement list (and there shall be only one list for each rank) by virtue of demotion shall remain on the list indefinitely. This section shall apply to all demotions other than voluntary demotions and those made for discipline on civil service charges, which circumstances do not give rise to any right to be placed on a reinstatement list. Persons on the list shall be entitled to reinstatement in the reverse order of demotion. This results in last demoted first reinstated. Reinstatements must occur off of the reinstatement list before any promotions from a promotional eligibility list. Until such reinstatements occur and the reinstatement list is exhausted, there shall be no “vacancy” created for the purpose of any promotional eligibility list.

### **B. Promotional Eligibility after Reinstatement**

Once reinstated, a Fire Fighter’s eligibility for promotion shall be determined from cumulative time in rank, rather than continuous time in rank.

### **C. Total Preemption**

This Section alone shall control any right to reinstatement from a reinstatement list, and shall totally preempt all provisions of Chapter 143, whether or not expressly inconsistent with this provision.

## **OTHER PROVISIONS**

## **Section 18. Vacancy Created by Extended Absence**

A. Notwithstanding any provision in this Article or any provision in Local Government Code Chapter 143, a continuous absence from duty for more than six (6) months because of illness, injury or other authorized leave shall create a vacancy in the affected Fire Fighter’s rank, but shall not expand the size of the classified service.

B. Authorized leave that it is anticipated to last for more than six (6) continuous months at the time the leave is approved by the Chief, creates a vacancy in the affected Fire Fighter’s rank as of the effective date of the authorized leave.

C. When the Fire Fighter whose absence created the vacancy pursuant to Subsection A or B returns to active duty, thus creating a surplus in his/her rank, the last person promoted to that rank will be demoted to the next lower rank and placed on a reinstatement list, with such rights as are prescribed in this Article. The same result applies to all other promotions in lower ranks that resulted from the first promotion and subsequent demotion. Any prior continuous absence as defined herein shall resume as of the effective date of this Agreement.

## **ARTICLE 17**

### **HIRING & CADET TRAINING**

#### **PART A.     HIRING**

##### **Section 1.     Initial Hiring Process**

###### **A.     Submission of Proper Application**

1.     In order to be considered for the position of cadet, each applicant must first submit a proper application as reasonably defined by the Department. A proper application shall include, but not be limited to, information on personal history, criminal history, driving record, and age. The information submitted shall be used by the Department to determine whether the applicant meets the minimum qualifications to proceed to the testing phases of the process.

2.     The Fire Chief shall establish the eligibility and posting requirements for applicants for the position of fire cadet which: (a) shall not be less than the requirements listed in Local Government Code Sections 143.022 through 143.024; and (b) will include a criminal background check conducted by or coordinated through the AFD Professional Standards Office.

3.     Any testing procedure ultimately used to create an eligibility list for beginning positions must be open to each person who makes a proper application and meets the requirements prescribed in this Section, unless otherwise specified in this Article.

###### **B.     Hiring Process Oversight Committee**

1.     The Department shall implement a Hiring Process Oversight Committee (HPOC) to assist in the selection of a third party hiring process vendor, and in the development of the hiring selection process to be submitted to the United States in compliance with the Consent Decree. The Association may appoint two voting members and one non-voting member to the HPOC. The remaining three voting members of the HPOC will be appointed by the Fire Chief. The Director of Civil Service may also add two non-voting members.

2.     Vendor Selection. The HPOC will identify the criteria (scope of work) to be used to select the third party vendor, and to assist the purchasing department in the development of the RFP. The HPOC will endeavor to reach consensus on a recommendation on the scope of work, the development of the RFP, and the selection of its recommended vendor. The failure to reach consensus shall not be a grievable matter and shall not delay the selection process. The HPOC shall evaluate proposals (which may include interviewing applicants and checking references), and score proposals pursuant to purchasing department procedures which includes a recommendation for its choice of vendors to the Fire Chief. The third party vendor shall be a professional vendor who is not a current or former employee of the City of Austin. The final recommendation of a test vendor to the City Council shall not be a grievable matter and shall not delay the hiring selection process.

3.     In identifying the rating criteria to be used in the selection of the third party vendor, and in making its recommendation of a vendor(s) to the Fire Chief, the HPOC should consider, among others, the following factors:

(a) Can the vendor demonstrate that its proposed hiring process has produced diverse pools of successful firefighters in other major or comparable metropolitan cities?

(b) Can the vendor provide criterion-related validity evidence to support or justify the use of the specified assessments? Claims of criterion-related validity should be supported by the provision of a validity coefficient and the requisite information and data (e.g., sample size, sample type [applicant vs. incumbent], criteria and source, corrections if any, and of what type, etc.) that went into the generation of the specified coefficients.

(c) Can the vendor provide empirically based evidence to support statements pertaining to subgroup differences and adverse impact reduction or elimination? Thus, for subgroup differences, it is expected that information pertaining to the standardized mean differences (d) will be provided. It is expected that similar information will be provided for adverse impact as well. This would include the appropriate prototypical adverse impact statistics such as the 80% rule (adverse impact ratio), z-test, chi-square test, Fisher Exact test, and Zir, and the cut-points on which these analyses are based. The magnitude of these differences should also be interpreted in the context of what is commonly reported in the extant literature for the focal and/or similar constructs.

(d) Has the vendor designed and implemented hiring processes for fire departments of 300 firefighters or more? The vendor will be required to list the larger metro fire departments and the dates for which the work was performed.

(e) Has the vendor designed and conducted assessments with a candidate pool approaching 1500?

(f) Can the vendor provide suggested recruiting techniques that can assist the Department in identifying individuals from under-represented groups that possess the skill sets needed to be a successful candidate within the hiring process?

4. The third party vendor (once awarded), upon request of two or more members of the HPOC, will meet with the HPOC as a group and discuss the methods used in developing the testing processes.

### **C. Development and Implementation of Hiring Selection Process**

1. The City, acting through the Fire Chief as its duly appointed representative, with the assistance of the third party vendor and the HPOC, shall design a hiring selection process, for submission to the United States pursuant to the Consent Decree, to determine whether an applicant will be offered a position as a Fire Cadet in an AFD Fire Academy class. The proposed hiring selection process submitted to the United States for approval under Part III(C)(6) of the Consent Decree shall include the items outlined in subsections (a) through (d) below. If the proposed hiring selection process submitted to the United States complies with the items outlined in subsections (a) through (d) below, the proposed selection process shall not be a grievable matter and shall not delay the hiring selection process. The proposed hiring selection process, including each Selection Device, described in this Article is subject to the requirements of the Consent Decree. As such, the City and the Association understand that the ultimate hiring selection process



actually used to hire applicants may deviate from subsections (a) through (d) under the terms of the Consent Decree.

(a) The hiring selection process will include, at a minimum, a cognitive test, an oral assessment process, a physical ability test, a medical test, a psychological test and a background investigation; and will include points for military service as determined by the Fire Chief in consultation with the vendor. The hiring selection process may include non-written Selection Devices.

(b) The cognitive test shall be constructed by the vendor, with the assistance of the HPOC and the Fire Chief, and shall test for multiple cognitive components as determined by the vendor. The cognitive test will be at least 20% of the total composite grade. The cognitive test will have a demonstrable criterion-related validity, using a Pearson correlation coefficient, of at least .28 (corrected using only predictor range restriction and criterion unreliability) with overall job performance as the criterion used to validate the test. One accepted validation approach is a local criterion-related validation study. The vendor will decide which and how many cognitive components to include. In doing so, the vendor must:

(i) Use cognitive components that have been deemed to be important for successful performance as an Austin fire fighter (non-exclusive examples: Verbal Comprehension, Verbal Expression, Problem Sensitivity, Deductive Reasoning, Inductive Reasoning, Information Ordering, Numeric Facility, Mathematical Reasoning, Mechanical Aptitude, and Spatial Orientation); and

(ii) Make reasonable efforts to explore the availability of, and if available, use cognitive components which have been shown to reduce or eliminate disparate impact upon African-Americans, Hispanics and Women without diminution of job-relatedness as set out in this subsection.

(c) The oral assessment process shall be videotaped. Evaluators will be provided at least 8 hours of training. This evaluator training will include frame-of-reference training designed to reduce evaluator panel variance.

(d) Applicants who successfully complete all of the screening and testing procedures will be placed on an eligibility list in the rank order determined from their composite scores on all scored selection devices used in that hiring cycle. The scored selection devices will include at a minimum the cognitive exam and oral assessment process. Scored selection devices may also include non-cognitive exams as determined by the test vendor. Pass/fail type exams may be used to establish candidate pools that are at least minimally qualified to continue in the hiring process. Applicants on the eligibility list may be offered a position as fire cadets in any upcoming AFD Cadet Training Academy class in rank order during the life of the eligibility list.

(e) The Chief may, at his/her discretion, place candidates from the ranked eligibility list who possess TCFP and NREMT certification in an Alternate Cadet Training Class. In no case may the Chief select candidates for the Alternate Cadet Training Class who are

not otherwise within reach on the eligibility list. The Alternate Cadet Training Class can be expedited, but must provide a minimum of 14 full weeks training designed to ensure that candidates attending the Alternate Academy can successfully meet or exceed all the requirements established for the regular Academy.

#### **D. ASSOCIATION PARTICIPATION AND CONFIDENTIALITY**

1. Subject to the terms of the Consent Decree, the HPOC may consult with the third party vendor in the development of the hiring selection process, and provide input to the Fire Chief regarding the vendor's recommendations. The HPOC will endeavor to reach consensus in performing its role. The City, acting through the Fire Chief as its duly appointed representative, retains the final authority as to the design and implementation of a hiring selection process. The third party vendor shall certify that the hiring process submitted to the United States in compliance with the Consent Decree is consistent with the "Principles for the Validation and Use of Employees Selection Procedures" (SIOP). This certification shall serve as conclusive evidence of validity and compliance with these principles, in the absence of fraud, substantive integral compromise, or material manipulation.

2. During the development of the hiring selection process and prior to its initial submission to the United States for review in compliance with the Consent Decree, the Association President and an expert chosen by the Association may review the raw data used to determine the validity coefficient of the cognitive test. This review will include all job analysis information that is used to or contributes to demonstrating the validity of all scored selection devices in the test battery (including the oral assessment process); pertinent descriptive statistics, including the item-construct map (breakdown of the number of questions that measure each component to be tested, as well as the pass/fail rate for each cognitive component tested); and requisite item (i.e., item-level construct)/KSA/task linkages, item analysis and statistics, along with all predictor and criterion data.

3. Once the Fire Chief has approved a hiring process for submission to the United States, the process will be made available to the HPOC and the Association President 14 days prior to its initial submission to the United States for review in compliance with the Consent Decree.

4. The hiring process information made available to the HPOC and the Association President shall not include the actual tests. The members of the HPOC and the Association agree that this information is confidential, and shall not be divulged in any manner, except the Association President may provide such information to an expert for review, provided that the expert likewise agrees to maintain such information in confidence. The members of the HPOC and the Association further agree that all copies of the provided information will be returned to the City upon completion of the review, and that no portion of the data shall be retained in any form by the HPOC, the Association, its President, or its expert.

## **Section 2. Benefit of the Bargain**

The City is now under a Consent Decree with the United States of America to ensure that all provisions of Title VII of the Civil Rights Act of 1964 are fully enforced and to ensure that no unlawful discrimination exists within any hiring process of the Austin Fire Department. It is the express intent of the City to comply with the terms of the Consent Decree. To insure that the City and the Association fully enjoy the benefit of this bargain, the City and the Association expressly agree that nothing in this Agreement shall prevent the City from implementing changes in a Selection Devices(s) or the overall hiring selection process in order to comply with:

- (a) The Consent Decree;
- (b) Any agreement reached by the City, United States and the Association; or
- (c) A Court order made under the Consent Decree concerning the City's use of a Selection Device or the overall hiring selection process.

## **Section 3. Expedited Contract Grievance Procedure**

A. For the provisions of Part A, Sections 1 and 2 of this Article that may be submitted for resolution as a Contract Grievance, the parties have agreed to the following expedited Contract Grievance procedure.

B. Within ten (10) days of the date upon which the Association President knew of or should have known of the facts or events giving rise to the grievance, the Association President shall file the grievance with the Fire Chief and the City's Labor Relations Office. After receipt of the grievance, the Fire Chief shall, within seven (7) days of receipt of the grievance, submit his/her response in writing to the Association President.

C. If the grievance is not resolved, the Association shall have seven (7) days from receipt of the Fire Chiefs decision to submit the matter to arbitration. Such arbitrations shall be conducted pursuant to the Expedited Labor Arbitration Procedures established by the American Arbitration Association ("AAA"), and in effect at the time of the dispute. To be appointed, the arbitrator must be available to hear the arbitration within thirty (30) calendar days of selection and a decision shall be made within one (1) week of the hearing. The parties agree to create a list of pre-approved arbitrators. Failing same, or in the absence of an available arbitrator from such pre-approved list, the arbitrator designated by the AAA shall be required to be licensed as an attorney in the State of Texas. The parties both agree that the arbitrator has the discretion to receive and hear issues and testimony by written submission or phone conference, but may also require live testimony where appropriate.

D. Article 20 of this Agreement shall not apply to any grievance as to the provisions of Part A, Sections 1 and 2 of this Article.

#### **Section 4. Life of Eligibility List**

Notwithstanding the provisions of Section 143.025, each eligibility list created during the life of this Agreement will be designated with a life of no less than twelve (12) months nor more than twenty-four (24) months from the date that the list is effective as a final eligibility list. The duration of the list shall be specified in the notice to submit applications. A final eligibility list in existence on the expiration date of this Agreement may continue to be used until the latter of the following dates: (a) six months beyond the expiration date of the Consent Decree, or (b) the last day the parties remain in good faith negotiation of a successor Agreement without declaration of an impasse. Any applicant hired under a list in effect on the expiration date of this Agreement shall continue to be trained utilizing the training standards in Part B of this Article.

#### **Section 5. Life of Certain Provisions of Hiring Article**

Notwithstanding any other part of this Agreement, Sections 1, 2, 3, and 4 of Part A of this Article shall survive the expiration of the Agreement, and shall remain in full force and effect so long as the Consent Decree in this Lawsuit is in effect, and for the term of any future collective bargaining agreement between the parties that may be in effect on the date the Consent Decree terminates.

#### **Section 6. Travis County ESD Merger**

If the City proposes to merge a Travis County ESD into the Austin Fire Department during the life of this Agreement, the parties agree that the City may use either of the options set forth below as the merger entry process:

##### ***Option 1***

##### **A. Applicability**

The Travis County ESD merger entry process applies only to the hiring of certified fire fighters who work for a Travis County ESD and meet the requirements established in Appendix C.

##### **B. Eligibility Requirements**

1. Eligibility requirements established in Appendix C. The requirements need not be the same as those established by Chapter 143 or those applicable to applicants for the position of Cadet in the Department's regular Training Academy.

2. Upon hire, each ESD merger entry candidate must complete a modified training academy established in Appendix C. The probation period for ESD merger entry candidates ends twelve months from the date of hire.

3. Each ESD merger entry candidate must successfully complete all Training

Standards established in this Agreement and Appendix C.

**C. Civil Service Status**

Upon successful completion of the Modified Training Academy and probationary period, each fire fighter hired through this process shall immediately become a full-fledged Civil Service employee.

**D. Pay and Seniority**

1. Within the guidelines established in Appendix C, The Fire Chief may determine the pay rate for each ESD merger entry class during the Modified Training Academy within the guidelines established in Appendix C. Upon completion of the Academy, the Fire Chief may determine the pay rate for each class hired through this ESD merger entry process within the guidelines established in Appendix C. Any pay rate established by the Chief shall not exceed that of a fire fighter with two years of experience in the Austin Fire Department. Each ESD merger entry hire shall be placed in the rank of fire fighter.

2. Regardless of the pay rate established for each ESD merger entry hire, seniority for purposes of longevity pay shall begin from the date of hire.

**E. Promotional Eligibility**

Fire fighters hired through the ESD merger entry process must meet the same promotional eligibility requirements as Austin Fire Department fire fighters hired through the Department's regular initial hiring process.

**F. Implementation**

The ESD merger entry process described by this Article may be used at any time, for any number of Travis County ESD's, as authorized by the Fire Chief.

***Option 2***

The Association will be provided advance notice and an opportunity to negotiate the terms and conditions of an ESD merger. The bargaining process shall be limited to 60 days unless extended by agreement. In the event the parties are unable after 60 days of bargaining to reach an agreement, a party may request, but neither party shall be required, to use mediation or arbitration to resolve disputed issues under Texas Local Government Code Chapter 174.

**Section 7. Internship Program**

The Association will be provided advance notice and an opportunity to negotiate the terms and conditions of an internship program. The bargaining process shall be limited to 60 days unless extended by agreement. In the event the parties are unable after 60 days of bargaining to reach an agreement, a party may request, but neither party shall be required, to use mediation or arbitration to resolve disputed issues under Texas Local Government Code Chapter 174.

## **Section 8. Lateral Entry**

### **A. Applicability**

1. The lateral entry process applies only to the hiring of certified fire fighters.

2. Eligibility Requirements

(a) The Fire Chief shall establish the eligibility requirements for applicants for the lateral entry process. The requirements need not be the same as those established by Chapter 143 or those applicable to applicants for the position of Cadet in the Department's regular Training Academy. The requirements may be modified by the Fire Chief, but shall include at least the following:

(b) At the time of application, each applicant must have been actively employed as a structural fire fighter for one or more municipalities, ESDs, military or county fire departments within the two years prior to the date of application, and must have a total of at least three years of active service as a fire fighter for one or more municipalities, ESDs, military or county fire departments. Austin-Travis County EMS employees, who have structural firefighting certification and three or more year's prior experience with a fire department, also qualify for the lateral entry program.

(c) Each applicant will be subject to a background investigation.

3. Selection and Placement

(a) The Fire Chief shall use the selection criteria and procedures set out in this Article to establish an eligibility list, except that the age limits of §143.023 shall not apply.

(b) Applicants who successfully complete all of the screening and testing procedures will be placed on an eligibility list. Applicants on the eligibility list may be offered a position as fire cadet in any upcoming Fire Academy class or placed in any Alternate Cadet Training class, if so determined by the Chief.

(c) Notwithstanding the provisions of 143.025, the life of each eligibility list created during the life of this Agreement will be designated a life of no less than twelve (12) months and not more than twenty-four (24) months from the date that the list is effective as a final eligibility list. The duration of the list shall be specified in the notice to submit applications for lateral entry. A list in existence on September 30, 2022 (the expiration date of this Agreement) may continue to be used until the latter of the following dates: (a) six months beyond the expiration date of this Agreement, (b) the last day the parties remain in good faith negotiation of a successor Agreement without declaration of an impasse. Any applicant hired under a list in effect on the expiration date of this Agreement shall continue to be trained utilizing the training standards in this Article.

(d) Upon hire, each lateral entry candidate must complete a modified training academy of not less than fourteen (14) weeks, as determined by the Chief.

(e) The probation period for lateral entry candidates is twelve months from the date of hire.

(f) Each lateral entry candidate must successfully complete all Training Standards established in this Agreement.

4. Civil Service Status

Upon successful completion of the Modified Training Academy and probationary period, each fire fighter hired through this process shall immediately become a full-fledged Civil Service employee.

5. Pay and Seniority

(a) The Fire Chief may determine the pay rate for each lateral entry hire during the Modified Training Academy. Upon completion of the Academy, the Fire Chief may determine the pay rate for each fire fighter hired through this lateral entry process. Any pay rate established by the Chief shall not exceed that of a fire fighter with two years' experience in the Austin Fire Department. Each lateral entry hire shall be placed in the rank of fire fighter.

(b) Regardless of the pay rate established for each lateral entry hire, seniority for purposes of longevity pay shall begin from the date of hire.

6. Promotional Eligibility

Fire fighters hired through the lateral entry process must meet the same promotional eligibility requirements as Austin Fire Department fire fighters hired through the Department's regular initial hiring process.

7. Implementation

The lateral entry process described by this Article may be used at any time, for any number of candidates, as authorized by the Fire Chief.

## **PART B. CADET TRAINING**

### **Section 1. Cadets**

Every Fire Cadet applicant hired by the Department must attend an Austin Fire Department Cadet Training Academy. Every applicant selected for a Training Academy must successfully complete the training program by meeting or exceeding all of the requirements established for that Academy.

### **Section 2. Training Manual**

A. The Fire Chief shall issue a Cadet Manual prior to the beginning of each Academy class. Subject to the Fire Chief's authority described below, the provisions of the Cadet Manual shall be published and enforced as written.

B. The Cadet Manual must include the following:

1. Requirement for Cadets to achieve all academic and skill performance criteria as mandated by governing agencies such as Texas Commission on Fire Protection, Texas Department of State Health Services, Office of the Medical Director and the National Registry of Emergency Medical Technicians.

2. Requirement for Cadets to achieve all Job Performance Requirements (JPR) and objectives as listed in the Cadet Training Academy curriculum.

3. Requirement for Cadets to achieve satisfactory performance for all Austin Fire Department Cadet Performance Standards. These performance standards must be comprised of essential job functions for an Austin Fire Department fire fighter and have been validated using an accepted process.

4. The composition and role of the Cadet Oversight Committee for the Training Academy to which the Manual applies. The Association will be entitled to have one committee member attend all Cadet Oversight Committee meetings, unless prohibited by law or in the event of confidential privacy issues, as determined by the Chief. In the event that the Cadet Oversight Committee meeting occurs on short notice due to unforeseen circumstances, the Association's observer will be briefed as soon as possible. The observer will use ABL if scheduled to work and will not otherwise be compensated.

5. A description of the process for referring Cadets to the Cadet Oversight Committee when their academic performance or skill performance does not meet the requirements or their behavior is deemed to be unsatisfactory. This process must require written documentation to be presented to the Cadet Oversight Committee and includes:

- (a) Lead Instructor documentation of any Cadet Training Academy curriculum JPR or objective not successfully achieved.
- (b) Training Academy staff documentation of any Cadet Manual academic and/or performance criteria not successfully met.
- (c) Training Academy staff or Team Leader documentation of any Cadet Manual violation.
- (d) Team Leader documentation of any unacceptable performance and/or behavior.

6. A description of the process that will be used for developing a Performance Improvement Plan (PIP) when the Cadet Oversight Committee determines that a Cadet's academic performance, skill performance or behavior is unsatisfactory. A Cadet PIP must:

- (a) Explain the performance and/or behavior that is unsatisfactory.



- (b) List the specific objective(s) that must be achieved including criteria for measuring successful achievement of the objective(s).
- (c) Indicate the date by which the objective(s) must be achieved. No Cadet PIP will extend beyond the end date of the Training Academy.
- (d) State any assistance that may be available to help the Cadet achieve the objective(s).
- (e) Identify the consequences for failing to achieve the objective(s) and for not improving to a satisfactory level of performance and/or behavior.

### **Section 3. Termination Recommendation for Unsatisfactory Performance and/or Behavior**

A. The Cadet Oversight Committee or the Training Academy staff shall make a written detailed recommendation that the Fire Chief terminate the employment of a Cadet based on the Cadet's failure to meet the objective(s) of a PIP and achieve a satisfactory level of performance and/or behavior.

B. The Fire Chief may review whether the conditions of the PIP were appropriate and whether an additional PIP is indicated. If the Fire Chief believes that an additional PIP may be indicated, the Chief shall convene a Chief's Review Committee to assist him/her in reviewing the information regarding the issue. The Association will be entitled to have a non-participating observer attend all Chief's Review Committee meetings, unless prohibited by law or in the event of confidential privacy issues, as determined by the Chief.

C. If the Fire Chief determines that the Cadet will be provided with an additional PIP, he/she shall provide written reasons to the Association President for his/her decision. The Association agrees to indemnify the City for any amounts awarded against the City due to a breach of confidentiality or release of this information that is demonstrated to be due to the Association's actions.

### **Section 4. Extenuating Life Circumstances**

During a Training Academy, the Fire Chief shall have authority to consider extenuating life circumstances that may be related to a Cadet's failure to improve performance to a satisfactory level. "Extenuating Life Circumstances" are events which are beyond the control of both the Cadet and the Training staff. If the Fire Chief finds that extenuating life circumstances justify an exception to the Cadet Training Manual, the Fire Chief may direct that the Cadet be retested. The Fire Chief shall notify the Association President, in writing, of his/her (the Chief's) decision and the extenuating life circumstances that justify his/her decision. The Association may challenge the Fire Chief's decision to retain the Cadet by filing a grievance in accordance with Article 20. In any arbitration resulting from the grievance, an arbitrator shall determine whether the extenuating life circumstances justified the Fire Chief's decision. If the arbitrator determines that the Fire Chief's decision was not justified, the arbitrator shall order that the Cadet's employment be

terminated, even if the Cadet has graduated from the Academy and/or completed probation at the time of the order. The arbitrator's decision shall be final.

## **Section 5. Actions by the Fire Chief**

A. Once a hiring cycle has begun, the Fire Chief may update the Cadet Training Manual, at any time, to implement any criteria required by law, regulation, or industry standard such as the Texas Commission on Fire Protection, Texas Department of State Health Services, American Heart Association, and the Office of the Medical Director or the National Registry of Emergency Medical Technicians.

B. This Article shall not affect the Chief's existing authority to make determinations about cadets on issues of attendance, discipline, personality, suitability or other such matters not covered by the performance and academic standards established for each cadet class.

C. This Article shall not affect the Chiefs authority to make any determination concerning the continued employment of probationary fire fighters.

D. No grievance or other remedy shall apply in the event of termination of a cadet by the Fire Chief.

E. This Agreement does not create any rights in continued employment for cadets, as third party beneficiaries or otherwise.

## **Section 6. Miscellaneous Provisions**

### **A. Training of Academy Instructors.**

AFD Management along with the Association will provide a class before the academy begins to the academy staff and team leaders on contract compliance as it relates to the training standards.

### **B. Association Representative on Curriculum Committee**

The Curriculum Committee is the group charged with creating the recommendation to the Fire Chief regarding amending the AFD operational and cadet training manual objectives. The Curriculum Committee may appoint sub-committees to accomplish a defined scope of work. The sub-committees will report back to the Curriculum Committee with their recommendations. The Association will be able to appoint (1) one member to the AFD Curriculum Committee.

## **PART C. OTHER PROVISIONS**

### **Section 1. Challenges to the Hiring/Training Process**

In the event of a lawsuit or administrative claim asserted against the Association based on an allegation that a deviation by the City from Chapter 143 hiring or training procedures authorized by this Article violates a state or federal law, the City will reimburse the Association for sums paid as damages in such lawsuit or settlement, and for sums paid as attorney's fees and court costs in defending such lawsuit or claim, subject to each of the following required conditions:

1. The Association will fully and vigorously defend the claim on the merits.
2. The City has the right to approve the amount of any settlement of any such claim against the Association.
3. The Association will not assert a claim against the City based on an action by the City that was required by the terms of this Article.
4. Reimbursement for amounts paid as damages or settlement will be made after resolution of the lawsuit by either final judgment in court (including appeals), or settlement approved by the City.
5. Reimbursement for attorney's fees and costs will be ongoing as such fees and costs are paid by the Association. The City will reimburse the Association for attorney's fees at the actual hourly rate normally paid by the Association to the attorney, and in any event no greater than the average hourly rate paid by the City for outside counsel during the preceding fiscal year.
6. The City's total liability for damages and/or attorney's fees and costs under this Section will not exceed one hundred fifty thousand (\$150,000.00) dollars for the term of this Agreement, regardless of the number or size of claims asserted against the Association

## **Section 2. Effective Dates of Article**

The provisions of this Article shall not apply to any Training Academies commenced before the effective date of this Agreement.

**ARTICLE 18**  
**INVESTIGATION & DISCIPLINARY ACTIONS**

**PART A. INVESTIGATIONS**

**Section 1. Definitions**

In Part A of this Article, the following terms and phrases have these meanings:

- A. "Complainant" means a person claiming to be the victim of misconduct by a Fire Fighter, or the Fire Chiefs designee acting on information of alleged misconduct by a Fire Fighter that could result in disciplinary action.
- B. "Investigation" means an administrative investigation, conducted by the Department, of alleged misconduct by a Fire Fighter that could result in disciplinary action against the Fire Fighter.
- C. "Investigator" means any agent or employee of the Department who is assigned to conduct an administrative investigation.
- D. "Normally assigned working hours" includes those hours during which a Fire Fighter is actually at work or at the Fire Fighter's assigned place of work, but does not include any time when the Fire Fighter is off duty on authorized leave, including sick leave.
- E. "Disciplinary action" means temporary disciplinary suspension, indefinite suspension, demotion in rank, alternative discipline under this Agreement, or any combination of those actions.
- F. "Complaint" means an allegation that a Fire Fighter engaged in misconduct.

**Section 2. Interview of Subject Fire Fighter**

- A. An investigator may interview a Fire Fighter who is the subject of an investigation only during the Fire Fighter's normally assigned working hours, unless:
  - 1. The seriousness of the investigation, as determined by the Fire Chief, or designee, requires interview at another time; and
  - 2. The Fire Fighter is compensated for the interview time on an overtime time basis.
- B. The Fire Chief may not consider work time missed from regular duties by a Fire Fighter due to participation in the conduct of an investigation in determining whether to impose disciplinary action or in determining the severity of disciplinary action.
- C. An investigator may not interview a Fire Fighter who is the subject of an investigation or conduct any part of the investigation at the Fire Fighter's home without the Fire Fighter's

permission.

D. Not less than forty-eight (48) hours before an investigator begins the initial interview of a Fire Fighter who is the subject of an investigation, the investigator must inform the Fire Fighter in writing of the allegations in the complaint. The Department may omit the name and/or identity of the person making the complaint(s). In the event the original notice does not contain all allegations of misconduct under investigation, not less than forty-eight (48) hours before the investigator conducts a subsequent interview of the subject Fire Fighter into the additional allegations, the investigator must inform the Fire Fighter in writing of the additional allegations being investigated. The notice of allegations need not reference any law, Department policy, or civil service rule that may have been violated.

E. An investigator may not interview a Fire Fighter based on a complaint by a complainant who is not a Fire Fighter unless the complainant verifies the complaint in writing before a public officer who is authorized by law to take statements under oath. An investigator may interview a Fire Fighter about events or conduct reported by a witness who is not a complainant without disclosing the name of the witness. An interview may be based on a complaint from an anonymous complainant if the departmental employee receiving the anonymous complaint certifies in writing, under oath, that the complaint was anonymous. The provisions of this Subsection do not apply to an on-the-scene investigation that occurs immediately after an incident being investigated, except that the Fire Fighter under investigation must be furnished, as soon as practicable, a written statement of the allegations in the complaint.

F. An interview session of a Fire Fighter who is the subject of an investigation may not be unreasonably long. In determining reasonableness, the gravity and complexity of the investigation must be considered. The investigator shall allow reasonable interruptions to permit the firefighter to attend to personal physical necessities.

G. An investigator may not threaten a Fire Fighter who is the subject of an investigation with disciplinary action during an interview. An investigator may inform a Fire Fighter that failure to answer truthfully reasonable questions directly related to the investigation or to cooperate fully in the conduct of the investigation may result in disciplinary action.

H. If prior notification of intent to record an interview is given to the other party, either the investigator or the Fire Fighter who is the subject of an interview may record the interview.

I. A Fire Fighter who is the subject of an investigation shall have the right to be represented by an attorney or Authorized Association Representative, both referred to as "representative" in this Article, of the Fire Fighter's choice during an interview and in any subsequent disciplinary and/or appeal proceedings. The attorney or representative cannot be a Fire Fighter who has any involvement with the matter under investigation, other than the Fire Fighter's role as representative of the Fire Fighter who is the subject of the investigation. At the conclusion of the interview, the Fire Fighter and/or the representative can offer mitigating circumstances to be considered, and to offer investigatory leads for the investigator's consideration. The right to representation does not apply to matters that are addressed through

the member's chain of command and that do not rise to the level of an investigation as defined in this Article.

J. To ensure a fair and unbiased review of the facts surrounding the alleged conduct, the Professional Standards Office (PSO) will adhere to the following principles.

1. The purpose of the PSO investigation is to gather information related to the alleged event and then provide a summary of that information to the Fire Fighter's chain of command.
2. The PSO will plan the interviews in an effort to limit the time period between the interviews of the first witnesses and the subject of the investigation.
3. The PSO will assign to each allegation against the Fire Fighter one of the following:
  - Not sustained – The evidence fails to prove the allegation.
  - Exonerated – The alleged conduct in fact did occur but the Fire Fighter's actions were acceptable under the circumstances.
  - Unfounded – The alleged conduct in fact did not occur.
  - Sustained – The department established by a preponderance of evidence that the alleged conduct occurred and constituted misconduct.

### **Section 3. Access to Records by Fire Fighters**

A. Before the Fire Fighter who is the subject of an investigation provides a statement to an investigator, the Fire Fighter and his/her representative shall be provided an opportunity to review any videotape, photograph, or other recording of the operative conduct or alleged injuries, which is the subject of the allegations if such recording is within the possession or control of the Department.

B. Before the Fire Fighter who is the subject of an investigation provides a statement to an investigator, the Fire Fighter and his/her representative shall be allowed to review the portions of any document(s) in which it is alleged that the Fire Fighter provided false, incomplete, inconsistent, or conflicting information, or in which it is alleged that the Fire Fighter omitted information in violation of any law or Department policy.

C. Before the Fire Fighter who is the subject of an investigation provides a statement to an investigator, the Fire Fighter and his/her representative shall be allowed to review any report, supplement, or other statement recorded or written by the Fire Fighter, setting forth particulars or facts regarding the operative conduct which is the subject of the allegation(s).

### **Section 4. Statements**

A. All recorded interviews of a Fire Fighter who is the subject of an investigation will be transcribed by the Professional Standards Office and signed by the Fire Fighter.

B. A Fire Fighter is entitled to a copy of his/her statement to the Professional Standards Office at the time the statement is finalized and signed by the Fire Fighter, but the statement

remains confidential in the hands of the Fire Fighter and his/her attorney or representative, pursuant to 143.089(g), and any orders of non-communication about internal investigations, except for consultations with the Fire Fighter's attorney or representative.

## **Section 5. Investigators**

A. A person may not be assigned to conduct an investigation if the person is the complainant, the ultimate decision-maker regarding disciplinary action, or a person who has any personal involvement regarding the alleged misconduct.

B. A Fire Fighter who is the subject of an investigation has the right to inquire and, on inquiry, to be informed of the identity of each investigator participating in an interview of the Fire Fighter.

## **Section 6. Polygraph Examinations**

A. A Fire Fighter will not be required to submit to a polygraph examination as part of an investigation unless:

1. The complainant submits to and passes a polygraph examination; or
2. The Fire Fighter is ordered to take an examination under Subsection E below.

B. Subsection A does not apply if the complainant is physically or mentally incapable of being polygraphed.

C. For the purposes of this Section, a Fire Fighter passes a polygraph examination if, in the opinion of the polygraph examiner, no deception is indicated in the examination regarding matters critical to the subject matter under investigation.

D. The results of a polygraph examination that relate to the complaint under investigation are not admissible in a proceeding before the Civil Service Commission or a Hearing Examiner.

E. The Fire Chief, or designee, may order a Fire Fighter to submit to a polygraph examination if the Chief, or designee, considers the circumstances to be extraordinary or believes that the integrity of a Fire Fighter or the Fire Department is in question.

## **Section 7. Chain of Command & Disciplinary Meetings**

A. When a Chain of Command Meeting is scheduled to consider the information presented to the PSO and to recommend, if any, the level of discipline against a Fire Fighter, the following procedures shall apply:

1. The Chain of Command Meeting will include the Fire Fighter's immediate and/or second level supervisors, unless the Fire Chief deems there is an investigatory conflict.

2. Prior to the Chain of Command Meeting, the Fire Fighter and his/her representative shall be allowed up to one (1) consecutive eight (8) hour period of time to review any and all evidence gathered or obtained during the investigation, including the PSO Summary, if any. The information available for review shall not include protected evidence from a pending criminal investigation or judicial proceeding, or information that is otherwise made confidential by law. (However, such information will be provided as soon as possible, and prior to the administrative appeal hearing, if any.) Neither the Fire Fighter nor the representative will be permitted to make copies of any of the evidence reviewed. At the conclusion of his/her evidence review, the Fire Fighter and his/her representative will be provided 48 hours to prepare a written rebuttal to be included with the PSO Summary at the same time it is presented to the Chain of Command panel.
3. The PSO shall present the information gathered during the investigation to the chain of command, including the PSO Summary (and Fire Fighter's written rebuttal, if any). The Fire Fighter will be offered the opportunity to be present during this meeting, although the Fire Fighter's presence is not mandatory, and a decision not to attend the Chain of Command Meeting shall not be held against the Fire Fighter.
4. After the Summary has been presented, the Fire Fighter may address the chain of command prior to its deliberation. During this time the Fire Fighter will be allowed to present his/her written rebuttal and/or any other exculpatory evidence or extenuating circumstances which he/she would like considered. If deemed appropriate or prudent by the representative, the chain of command may allow the Fire Fighter's representative to make a statement, and may impose reasonable limits on tone and duration.
5. The Fire Fighter and his/her representative shall be excused during the chain of command's deliberation.
6. At the conclusion of this process, the chain of command will consider each allegation against the Fire Fighter and provide a recommendation as to the appropriate level of discipline, if any, to be imposed.

B. When a Disciplinary Meeting is scheduled between the Fire Fighter and the Fire Chief for the purpose of determining whether the Fire Chief shall take disciplinary action against a Fire Fighter for alleged misconduct, the following procedures shall apply:

Not less than forty eight (48) hours before the scheduled Disciplinary Meeting:

- (a) The Fire Fighter will be notified of the Disciplinary Meeting.



- (b) The Department shall provide the Fire Fighter written notice of the policy violations and the range of discipline being recommended by the chain of command. The recommendation from the Fire Fighter's chain of command regarding the appropriate discipline is not binding on the Fire Chief. The Fire Chief will make the final determination on what charges are sustained, if any, and the appropriate disciplinary action, if any, up to and including indefinite suspension.

C. The time-lines set forth in this Section may be waived by the Fire Chief and shall not be considered a violation of the Fire Fighter's rights on appeal, if compliance with any such time-line would interfere or conflict with the 180 day statutory deadline for imposing discipline.

## **Section 8. Confidentiality of Records and Misuse of Information**

The access to records provided in this Article has been granted in exchange for the following agreements intended to insure confidentiality and to prevent retaliation or the threat of retaliation against any witness in an investigation:

A. Information provided or made available for review remains confidential in the hands of the Fire Fighter and his/her representative pursuant to 143.089(g), Department policy, and orders of non-communication about internal investigations, except for consultations with counsel and/or Association representatives who are not involved in the investigation.

B. Retaliation or the threat of retaliation by a Fire Fighter, or by an individual at the direction of the Fire Fighter, against a complainant or a witness is strictly prohibited. A sustained violation of this subsection shall result in either a temporary or indefinite suspension.

C. If a Fire Fighter is suspended for an alleged violation of Subsection B, the Fire Fighter shall have the right to appeal the suspension to the Civil Service Commission or to an Independent Third Party Hearing Examiner pursuant to the provisions of this Agreement and Chapter 143 of the Texas Local Government Code. The Commission or the Hearing Examiner shall decide whether the specific charge related to Subsection B is true. If the charge is found to be true, the Commission or Hearing Examiner must affirm the disciplinary action and cannot amend, modify, or reduce the period of disciplinary suspension. Sections 143.053(e) & (f) of the Texas Local Government Code are hereby superseded to the extent of any conflict with this Section.

## **Section 9. Violation of Fire Fighter Rights**

A violation of Part A of this Article may be considered by the Civil Service Commission or a Hearing Examiner during a disciplinary appeal hearing if the violation substantially impaired the Fire Fighter's ability to defend against the allegations of misconduct.

## **PART B. DISCIPLINARY ACTIONS**

### **Section 1. Alternative Discipline**

The Fire Chief shall have the authority to impose alternative disciplinary actions or enter into alternative discipline agreements under this Article when the Fire Chief determines that the use of alternative discipline is in the best interest of the Fire Department. Nothing in this Article shall diminish or otherwise affect the Fire Chiefs authority to take other disciplinary actions under Chapter 143.

### **Section 2. Alternative Discipline by Fire Chief**

In considering appropriate disciplinary action, the Fire Chief may require that a Fire Fighter be evaluated by a qualified professional approved by the Fire Chief. If that professional recommends a program of counseling and/or rehabilitation for the Fire Fighter, the Fire Chief may, as an alternative to temporary or indefinite suspension, or in combination with a temporary suspension, require that the Fire Fighter successfully complete the recommended program. The program of counseling and/or rehabilitation will be completed on the Fire Fighter's own time, unless the Fire Chief approves the use of vacation time. The Fire Fighter shall be responsible for paying all costs of the program of counseling and/or rehabilitation which are not covered by the Fire Fighter's health insurance plan. If the Fire Fighter's misconduct involves alcohol and/or drug related behavior, the Fire Chief may require that the Fire Fighter submit to mandatory alcohol and/or drug testing, upon order by the Fire Chief, for a specified period of time. If, after entering the program of counseling and/or rehabilitation, the Fire Fighter fails or refuses to complete the program, the Fire Fighter may be indefinitely suspended. The Fire Fighter has the right to appeal to the Civil Service Commission or to a third-party hearing examiner any discipline imposed under this Section by filing an appeal notice in accordance with the provisions of Chapter 143. On appeal, the Civil Service Commission's or hearing examiner's authority shall be limited to determining the facts, whether the facts reflect a policy violation, and the appropriate length of suspension, if any. Neither the Commission nor a hearing examiner may substitute a program of counseling and/or rehabilitation different than the program imposed by the Fire Chief or to substitute any period of suspension for the required program of counseling and/or rehabilitation.

### **Section 3. Alternative Discipline by Agreement**

In considering appropriate disciplinary action, the Fire Chief may require that a Fire Fighter be evaluated by a qualified professional approved by the Fire Chief. If that professional recommends a program of counseling and/or rehabilitation for the Fire Fighter, the Fire Chief may, as an alternative to temporary or indefinite suspension, or in combination with a temporary suspension, offer the Fire Fighter the opportunity to enter into an alternative disciplinary agreement under which the Fire Fighter would accept a temporary suspension of up to ninety (90) days and agree to successfully complete the program of counseling and/or rehabilitation recommended by the qualified professional approved by the Fire Chief. The program of counseling and/or rehabilitation will be completed on the Fire Fighter's own time, unless the Fire Chief approves the use of vacation time. The Fire Fighter shall be responsible for paying all costs of the program of counseling and/or rehabilitation which are not covered by the Fire Fighter's

health insurance plan. If the Fire Fighter's misconduct involves alcohol and/or drug-related behavior, the Fire Chief may require that the Fire Fighter submit to mandatory alcohol and/or drug testing, upon order by the Fire Chief, for a specified period of time. If the Fire Fighter accepts the opportunity for agreed alternative discipline, the Fire Fighter may not appeal any terms of the agreement. If the Fire Fighter fails to successfully complete the program of counseling and/or rehabilitation, the Fire Fighter may be indefinitely suspended without right of appeal.

#### **Section 4. Last Chance Probation Agreement**

In considering appropriate disciplinary action, the Fire Chief may require that a Fire Fighter be evaluated by a qualified professional approved by the Fire Chief. If that professional recommends a program of counseling and/or rehabilitation for the Fire Fighter, the Fire Chief may offer the Fire Fighter, as an alternative to indefinite suspension, the opportunity to enter into a "Last Chance Probation" agreement. The agreement may include the following provisions in addition to any other provisions agreed upon by the Fire Fighter and the Fire Chief.

1. The Fire Fighter will successfully complete the program of counseling and/or rehabilitation recommended by the qualified professional approved by the Fire Chief.
2. The program of counseling and/or rehabilitation will be completed on the Fire Fighter's own time, unless the Fire Chief approves the use of vacation time. The Fire Fighter shall be responsible for paying all costs of the program of counseling and/or rehabilitation which are not covered by the Fire Fighter's health insurance plan.
3. The Fire Fighter will agree to a probationary period not to exceed one year, with the additional requirement that if, during the probationary period, the Fire Fighter commits the same or a similar act of misconduct, the Fire Fighter will be indefinitely suspended without right of appeal.

B. If the Fire Fighter's misconduct involves alcohol and/or drug-related behavior, the Fire Chief may require that the Fire Fighter submit to mandatory alcohol and/or drug testing, upon order by the Fire Chief, for a specified period of time. If the Fire Fighter accepts the opportunity for a "Last Chance Probation" agreement, the Fire Fighter may not appeal any terms of the agreement. If the Fire Fighter fails to successfully complete the agreed program, the Fire Fighter may be indefinitely suspended without right of appeal.

#### **Section 5. Publishing Notice of Discipline**

The Fire Chief must publish and circulate within the Department a communication which informs Fire Fighters of disciplinary suspensions imposed by the Fire Chief or disciplinary suspensions agreed to by the Fire Chief and a Fire Fighter. The communication may include the Fire Fighter's rank; each policy or rule which was violated; any extenuating or mitigating circumstances; a brief factual description if the policy or rule violation is not self-explanatory; and the discipline imposed or agreed to by the Fire Fighter. The communication shall not identify the

Fire Fighter by name.

## **Section 6. Extending Disciplinary Deadline by Agreement**

A. A Fire Fighter and the Chief, or his/her designee, may agree to extend the 180-day statutory deadline for disciplinary action for a period not to exceed thirty (30) days. Either the Fire Fighter or the Fire Chief may offer or request the extension. The agreement to extend the statutory deadline shall be in writing and shall be signed by both the Fire Fighter and the Chief, or his/her designee.

B. Any disciplinary action taken by the Fire Chief before the extended deadline shall be considered timely. An agreement to extend the deadline does not affect a Fire Fighter's right of appeal from the disciplinary action.

## **Section 7. Written Response to Disciplinary Action**

If a Fire Fighter is temporarily or indefinitely suspended, the document imposing the suspension may not be placed in the Fire Fighter's Civil Service Commission file unless the Fire Fighter is first given an opportunity to read and sign the document. If the Fire Fighter refuses to sign the document, it may be placed in the personnel file with a notation that the person refused to sign it. A Fire Fighter who receives a temporary or indefinite suspension and who elects not to appeal the action may file a written response by submitting a written response to the Director of Civil Service not later than the 10<sup>th</sup> day after the date the Fire Fighter is given written notice of the disciplinary action.

## **Section 8. Transfers Related to Discipline**

The Fire Chief retains all right and authority to direct the assignment or placement of Fire Fighters. If any Fire Fighter is transferred in relation to a disciplinary action, the Fire Chief shall make every attempt to place the transferred Fire Fighter in a vacant assignment. If a Fire Fighter, other than the Fire Fighter being disciplined, is displaced because of a transfer related to discipline, the Fire Chief will make every attempt to help the displaced individual move to a more desirable location, which may not necessarily be the location from which the disciplined Fire Fighter was moved.

## **Section 9. Use of Accrued Leave**

Any Fire Fighter who is suspended from duty for up to fifteen (15) days may request approval of the Fire Chief to use accrued vacation leave to cover all or part of the suspension. The Fire Chief may, in his/her sole discretion, determine whether to approve the Fire Fighter's request and the number of days' vacation leave that may be used. The Fire Fighter must request the use of vacation leave within ten (10) days after receipt of notice of the disciplinary suspension. By requesting the use of vacation leave to cover all or part of the suspension, the Fire Fighter waives all right to appeal the disciplinary suspension to the Civil Service Commission or a Hearing Examiner.

## **Section 10. Non-disciplinary Corrective Action**

A. Verbal counseling, written counseling, and written reprimands are not discipline, and are not subject to grievances or appeals as to the substance of the decisions made. A contract grievance may be pursued for violations of the process set forth in this section. Written reprimands shall be initiated on a form which provides space for the Fire Fighter to respond and include his or her version of the event in dispute, which shall be completed and filed within 72 hours following delivery of the proposed written reprimand. That form shall be submitted by the initiating supervisor through the chain of command for review and action. There shall be no other requirement for advance notice of any proposed action. The form shall recite any instances of prior counseling or action, or if there are none, shall state the specific reasons justifying the present action without prior progressive corrective action. Written reprimands shall be initiated by the Fire Fighter's immediate supervisor. The "immediate supervisor" is the one who had immediate supervisory responsibility over the Fire Fighter at the time of the incident. If a higher ranking department officer witnesses the violation, that officer may direct the supervisor to initiate a written reprimand after discussing the incident with the supervisor.

B. If a written counseling or written reprimand is issued to a Fire Fighter, the written counseling or written reprimand may not be placed in the Fire Fighter's departmental personnel file unless the Fire Fighter is first given an opportunity to read and sign the document. If the Fire Fighter refuses to sign the document, it may be placed in the personnel file with a notation that the person refused to sign it. A Fire Fighter may respond in writing to a written counseling or written reprimand by submitting a written response to the Professional Standards Office not later than the 10<sup>th</sup> day after the date the Fire Fighter is asked to sign the document.

C. A written reprimand shall not be used or relied upon in connection with any future corrective action or discipline after 12 months from the date of its approval. If a written reprimand is offered as proof of progressive discipline in a disciplinary appeal hearing, any written response that was timely filed by the Fire Fighter shall be offered in evidence with the written reprimand.

## **PART C. EFFECT OF CONTRACT EXPIRATION**

The provisions of this Agreement shall remain in full force and effect after the expiration date of this Agreement as to:

- A. Any investigation assigned a "PSO Number" by the Professional Standards Office prior to the expiration of this Agreement;
- B. Any disciplinary decision by the Fire Chief prior to the expiration of this Agreement; and
- C. Any appeals of such disciplinary action.

## **ARTICLE 19 USE OF CIVILIAN EMPLOYEES**

### **Section 1. Goals and Objectives**

The parties acknowledge that they share the interest of utilizing civilian employees in a manner which best accomplishes the goals and objectives of the Department while preserving job security for Chapter 143 Civil Service employees. To fulfill this interest, the parties agree that this Article shall apply to the duties set out herein.

### **Section 2. Fire Prevention**

Fire prevention duties shall be performed by Fire Fighters, except that degreed engineers who are civilian employees may be assigned fire prevention duties.

### **Section 3. Fire Communications**

Fire communications duties will be performed by Fire Fighters, except that the one (1) dispatch position currently filled by a civilian employee will be converted to a Fire Fighter position through attrition. No additional dispatch positions will be filled by civilian employees.

### **Section 4. Fire Administration**

Fire Administration duties, within the meaning of Local Gov't Code 143.003(4)(A)(ix), may be performed by civilian employees. The Department agrees that civilian employees working in Fire Administration will not be used to perform the duties listed in Section 143.003(4)(A)(i-viii and x), or to perform Fire Administration duties currently performed by Fire Fighters.

### **Section 5. Recruiting**

Subject to the requirements of the Consent Decree, the Association agrees that the City may use civilian contractors and/or one-full time civilian employee, in the Recruiting Section, to recruit applicants for the Fire Department. The Association recognizes that recruiting activities are cyclical and during the months immediately preceding the hiring process, the city may employ additional temporary or part time civilian employees to assist in the recruiting efforts.

### **Section 6. Public Information Officer**

The position of Public Information Officer may continue to be a civilian position. The Fire Chief will continue to use Fire Fighters as public information officers for on-camera interviews and/or comments at fire or emergency scenes. The parties specifically agree, however, that no grievances or other claims may be filed by any Fire Fighter if any reporter or camera operator inadvertently speaks with and/or photographs a civilian at a fire or emergency scene.

### **Section 7. Photography and Videography**

Photography and videography for public information purposes, marketing and training video production may be performed by civilian employees. However, such civilian employees will not be allowed to perform fire photography duties within the meaning of Local Gov't Code §143.003.

### **Section 8. Air Shop**

The Air Shop supervisor will be under the direct supervision of an on-site Fire Fighter.

**Section 9. Wildfire Management Division**

Civilians working in the Wildfire Management Division will not be used for fire suppression duties. Civilians working in the Wildfire Management Division may perform community outreach and education, administer programs, provide training, and conduct wildfire prevention, including prescribed burns, under the direct supervision of a firefighter. These civilians will serve as technical advisors in the Wildfire Management, Wildfire Mitigation and Operations divisions.

**Section 10. Intent**

The parties agree that current job duties or functions now being performed by civilian employees may continue during this Agreement except as specifically modified in this Article. However, the Department agrees that it will not use civilians to perform duties that would not be permitted under Chapter 143, except as provided in this Article. Furthermore, civilian employees will not supervise the work of Fire Fighters. The City agrees that the use of civilian employees shall not cause a reduction in authorized force.

## **ARTICLE 20**

### **CONTRACT GRIEVANCE PROCEDURE**

#### **Section 1. Contract Grievances**

The purpose of this grievance procedure is to establish an effective method for the fair, expeditious and orderly adjustment of grievances and, except as provided in Section 5, is exclusively for contract grievances. A contract grievance is defined as any dispute, claim, or complaint involving the interpretation, application, or alleged violation of any provisions of this Agreement.

The Association or any bargaining unit member may file a contract grievance under the terms of this Agreement. Each contract grievance shall be submitted on a form agreed to by the parties and must include:

1. A brief statement of the grievance and the facts or events upon which it is based;
2. The section(s) of the Agreement alleged to have been violated;
3. The remedy or adjustment sought;
4. The steps taken by the grievant to resolve the issue; and
5. For a maintenance of standards or past practice grievance, the specific right or practice that is the basis of the complaint must be reasonably identified.

#### **Section 2. Procedure**

##### **A. Step 1**

The Association President or an employee who is aggrieved must file a grievance with the Association Grievance Committee within twenty (20) days of the date upon which the Fire Fighter knew of or should have known of the facts or events giving rise to the grievance. A copy of the grievance shall be forwarded to the Fire Chief or his/her designee and the City's Labor Relations Office by the Association Grievance Committee within three (3) days of receipt of the grievance.

The Association Grievance Committee shall within fifteen (15) days of receipt of the grievance, determine in its sole discretion, if a valid grievance exists. If the Association Grievance Committee determines that no valid grievance exists, it shall notify the Fire Chief or his/her designee and the City's Labor Relations Office that no further proceedings will be necessary. If the Association Grievance Committee determines that the grievance is valid, it shall process the grievance on behalf of the Fire Fighter(s) by forwarding the written grievance to Step 2 of this procedure.

##### **B. Step 2**

Any grievance found to be valid by the Association Grievance Committee, shall be submitted to the Fire Chief and the City's Labor Relations Office within ten (10) days of the Step 1 ruling. After receipt of the grievance, the Fire Chief shall, within ten (10) days of receipt of the



grievance, submit his/her response in writing to the Association Grievance Committee.

**C. Step 3**

If the grievance is not resolved at Step 2, the Association shall have ten (10) days from receipt of the Fire Chiefs decision to submit the matter to arbitration. The arbitration procedure will be implemented by the Association notifying the Fire Chief and the City's Labor Relations Office in writing of its intent to submit the grievance to arbitration.

**D. Step 4**

If a grievance is submitted to arbitration, the City and the Association may, within five (5) days of such request, mutually agree to a neutral arbitrator. If the parties are unable to agree on the selection of an arbitrator, the City and Association shall, within five (5) days, jointly request a list of seven (7) arbitrators from the American Arbitration Association or the Federal Mediation and Conciliation Service. Within ten (10) days following receipt of the list of arbitrators, the parties shall select an arbitrator by each party in turn striking one (1) name from the list until only one (1) name remains. The remaining individual on the list shall serve as the arbitrator. The arbitrator so selected shall, through the agency selected, be promptly notified of his/her selection and the parties, in agreement with the arbitrator, shall select a time, place and date for the hearing of the grievance.

1. Within thirty (30) days after conclusion of the hearing, the arbitrator shall issue a written opinion and ruling with respect to the issues presented, a copy of which shall be mailed or delivered to the Association and the City.
2. With respect to the application, interpretation and enforcement of the provisions of this Agreement the decision of the arbitrator shall be final and binding on the parties to this Agreement.
3. The arbitrator's authority shall be limited to the interpretation and application of the terms of this Agreement and/or any supplement thereto. The arbitrator shall have no jurisdiction or authority to establish provisions of a new agreement or modify the present Agreement or to arbitrate away, in whole or in part, any provisions of the Agreement or amendments thereto.
4. The cost of the impartial arbitrator shall be borne by the losing party. In the event of a composite decision, the arbitrator shall determine the portion of such cost to be borne by each party. If a transcript of the proceedings is requested, then the party so requesting shall pay for such transcript, unless otherwise agreed to by the parties.
5. Each party shall be responsible for the cost of the attendance of its witnesses at a contract grievance hearing.

**Section 3. Timelines and Calculation of Days**

For the purposes of this Article, a day is defined as a business day on which the City conducts normal business. In calculating deadlines, the day of the act, event or default after which a period of time begins to run is not included. The last day of the period is included unless it is a

weekend or City observed holiday. All time limits set forth in this Article may be extended by written mutual consent, but if not so extended must be strictly observed. Failure of the Association or the grievant to comply with the time limits set forth will serve to declare the grievance settled, and no further action shall be taken. Failure of the Fire Chief or the City to respond within the time limits shall constitute a denial of the grievance and the grievant (Association) may proceed to the next step.

#### **Section 4. Election of Remedies**

It is specifically and expressly understood that filing a grievance under this Article, which has as its last step final and binding arbitration, constitutes an election of remedies. Any appeal of an arbitrator's decision in this procedure shall be strictly and solely limited to the grounds that the arbitrator exceeded his/her authority and jurisdiction as provided under this Agreement, that the decision of the arbitrator was procured by fraud or collusion, or that the arbitrator's decision is based upon a clear and manifest error of law.

#### **Section 5. Statutory Appeals and Hearings**

Except as specifically provided in this Agreement, all statutory rights of appeal to the Civil Service Commission or Hearing Examiner, including disciplinary matters, promotional bypasses, and demotions will be governed by Chapter 143 and this Agreement, and are not subject to this contract grievance procedure.

#### **Section 6. Informal Grievance Resolution**

In an attempt to avoid costly arbitration, the parties will try to informally resolve grievances both prior to their filing and prior to arbitration. The attempt to informally resolve grievances does not extend any deadlines unless specifically agreed upon by the parties. Failure to comply with this section shall not serve as the basis of a grievance, nor shall it be admissible by either party at arbitration.

**ARTICLE 21**  
**PERSONNEL DEVELOPMENT EVALUATIONS**

The parties have agreed that Personnel Development Evaluations/PDE's shall be conducted at least annually, notwithstanding Local Government Code Section 143.082 or Commission rules. The Fire Chief shall determine the frequency of administration of the Evaluations. No information on discipline or reprimands shall be included on the efficiency report/PDE.

**ARTICLE 22**  
**HEALTH RELATED BENEFITS**

**Section 1. Health Insurance**

During the term of this Agreement, eligible Fire Fighters and their eligible dependents shall be offered the same health insurance coverage at the same subsidized cost as approved by Council for other City employees on an annual basis.

**Section 2. Retiree Medical Coverage**

During the term of this Agreement, the City will comply with Chapter 175 of the Local Government Code regarding continued health insurance coverage for eligible retired fire fighters and their eligible dependents. During the term of this Agreement, eligible retired fire fighters and their eligible dependents shall be offered the same health insurance coverage at the same subsidized cost as approved by Council for other retired City employees on an annual basis.

In addition, the City agrees to include Fire Fighters in any Post Employment Health Plan (PEHP) established for any of the City's employees, either public safety or non-public safety, during the term of this Agreement.

## **ARTICLE 23 FIRE CADETS**

### **Section 1. Status of Fire Cadets**

By including this Article, the City does not concede that the Association is the exclusive bargaining agent for fire cadets as provided in Local Government Code Section 174.101, and the Association does not concede that it is not the exclusive bargaining agent for fire cadets as provided in Local Government Code Section 174.101.

### **Section 2. Vacation and Sick Leave Accruals**

#### **A. Accrual Rates**

Fire Cadets will earn vacation and sick leave at the rate of entry level Fire Fighters during the time they are in Cadet Class.

#### **B. Leave Conversion for Fire Cadets**

Leave time accrued by Fire Cadets during their Cadet Class will be converted, upon graduation, by applying the standard rate already in use by the Department for converting leave accruals from 40 to the Operations Division work week schedules.

### **Section 3. Bilingual Proficiency Examination for Fire Cadets**

Fire Cadets will be given the opportunity to take a language proficiency examination before graduation from the Fire Academy for any language for which Bilingual Translation Pay is available under Article 9 of this Agreement. The examination may be scheduled by the Department during the Fire Cadets off-duty time. Any Fire Cadet who elects to take the examination during off-duty hours shall not be entitled to compensation for the time spent taking the examination. Each Fire Cadet who passes the examination shall be entitled to begin receiving Bilingual Translation Pay at the first pay period after graduation from the Academy.

### **Section 4. Service Credit**

Upon graduation from the Fire Academy, Fire Cadets will receive seniority and longevity credit for time spent in the Fire Academy, but such credit will not be counted as time in grade for determining eligibility for promotion.

### **Section 5. Association Access to Cadet Classes**

The Association, with the approval of the content by the Chief, shall be allowed up to four hours to address each Cadet class to inform them about the Association and its activities. Such time spent addressing Cadet classes shall be deducted from the Association Business Leave pool.

## **ARTICLE 24 DRUG TESTING**

### **Section 1. Commitment to an Effective Drug Interdiction Program**

The City and the Association agree that Fire Fighters work in hazardous situations and that their readiness to perform emergency functions cannot be compromised by the use of illegal drugs or controlled substances. In order to further this joint interest in protecting Fire Fighters and the public, the City and Association agree to mandatory drug testing as described in this Article. The City and the Association are committed to the principle that the mandatory drug testing policy for Fire Fighters is designed, and shall be administered, to result in disciplinary action only against those Fire Fighters who have violated the Department's rules, regulations, policies, and procedures.

### **Section 2. Drug Testing**

#### **A. Definitions**

1. As used in this Article in connection with post-motor vehicle collision testing pursuant to Section 3 and random testing pursuant to Section 4, "drug testing" means the compulsory production and submission of a urine sample by a Fire Fighter for chemical analysis to detect the presence of prohibited substance usage. Direct observation will not be included in the testing process.

2. As used in this Article in connection with testing on reasonable suspicion pursuant to Section 8, "drug testing" means the compulsory production and submission of a blood sample by a Fire Fighter for analysis to detect the presence and level of alcohol and prohibited substances.

B. Specimen testing shall be conducted using techniques, equipment, and laboratory facilities in compliance with regulations and guidelines of the U.S. Department of Health and Human Services (DHHS) by a laboratory certified by DHHS. Testing shall be consistent with procedures provided in 49 CFR §§40.71 and 40.73 as amended, except where provided otherwise in this Agreement.

C. The prohibited substances that will be tested for shall be the substances listed in 49 CFR §§40.85 and 40.87 at the time of the testing. A positive test is defined as one where there is a quantifiable presence of one of the above prohibited substances in an amount that meets or exceeds the thresholds under CFR §40.87.

D. A Fire Fighter will not be disciplined for the use of a controlled substance for which the Fire Fighter has a valid prescription, provided the employee is using the controlled substance in compliance with the prescription and Department policy, and is not impaired on duty.

### **Section 3. Post-Motor Vehicle Collision Drug Testing**

If a Fire Fighter is involved in a motor vehicle collision while driving a City-owned vehicle at any time, or a personally-owned vehicle while on City business, the driver will be subject to post-accident drug testing if:

1. The collision results in a human fatality; or

2. An individual is transported for medical treatment away from the scene; or
3. Any vehicle involved in the collision is towed from the scene; or
4. If the Fire Fighter requests to be tested.

#### **Section 4. Random Drug Testing**

All Fire Fighters at all ranks and the Fire Chief shall be subject to selection for mandatory testing for prohibited drugs and controlled substances during each calendar year on a fair and impartial statistical basis at the City's expense. Each year, up to twenty-five percent (25%) of the number of Fire Fighters in the Department will be randomly tested. The random selection process will be conducted using a scientifically valid method administered by a Third Party Administrator. Selections for random testing will be made for a defined period, no less frequently than monthly.

#### **Section 5. Providing a Urine Sample for Testing**

A. Upon being directed to submit a urine specimen for any drug test under this Agreement, a Fire Fighter shall provide a urine sample in accordance with protocols set out in 49 CFR Part 40, as amended, except where provided otherwise in this Agreement. The Fire Chief retains discretion to determine whether specimen collection will occur at a central location or on site at an AFD facility.

B. If the Fire Fighter is unable to provide at least 45ml of specimen on the first attempt, the provision under 49 CFR §40.193 shall be followed under the direction of the Medical Review Officer (MRO).

C. Failure to provide a urine sample other than for a medically verified inability may be considered insubordination, and may be the basis for suspension or indefinite suspension. The laboratory's Medical Review Officer (MRO) shall be contacted for instructions in the event of a claimed inability to provide a sample.

D. The parties recognize that individual testing facilities may have their own unique waiver forms they require the Fire Fighter to sign. Regardless of what the waiver form language states, the only testing and results the City will obtain shall be limited to the provisions of this Article.

#### **Section 6. Assurance of Accurate Results**

A. Fire Fighters shall have the right to request that their urine sample be stored in case of legal disputes. The urine sample will be submitted to the designated testing facility where a sample will be maintained for the period of one year. Drug testing shall consist of a two-step procedure:

1. Initial screening test.
2. Confirmation test.

B. Should a confirmation test be required, the test procedure will be technologically different and more sensitive than the initial screening test. All positive test results will be reviewed by a Medical Review Officer who shall be selected by the testing laboratory. Fire Fighters shall

be provided with a notice of the result and may obtain a copy of the actual laboratory result upon request to the Department's Drug Testing Coordinator.

C. A Fire Fighter who disputes the results of a drug test required under this Agreement may request that an additional test be conducted. This test must be conducted at a different DHHS-certified laboratory. The test must be conducted on a split specimen that was provided by the Fire Fighter at the same time as the original specimen. The Fire Fighter may witness the splitting of the specimen at the time of collection. The method of collecting, storing, and testing the split specimen will be consistent with the procedures set out in 49 CFR Part 40, as amended. The Fire Fighter's request for a split specimen test must be made to the Medical Review Officer within seventy-two (72) hours after the Fire Fighter received notice of the original specimen's verified positive result. Requests received after expiration of the seventy-two (72) hour period can be accepted only if the delay is determined, in the sole discretion of the Fire Chief, to be the result of documentable facts that were beyond the control of the Fire Fighter. The cost of the split specimen test will be paid by the City. If the result of the employee's split specimen test is positive, the Fire Fighter will reimburse the City for the cost of the test.

D. Each year the Drug Testing Program will be evaluated by a third party in accordance with the vendor agreement and CFR §40.121.

#### **Section 7. Confidentiality of Records**

The Austin Fire Department is committed to protect the individual dignity, privacy, and confidentiality (consistent with the purposes of the testing program). All records pertaining to required drug tests shall remain confidential except when disclosure is mandated by law or judicial order, or when used in a disciplinary or fitness for duty proceeding. Drug test results and records shall be stored in a locked file under the control of the Department's Drug Testing Coordinator, under the supervision of the Fire Chief, who will maintain original copies submitted by the laboratory. No access to these files shall be allowed without written approval of the Fire Chief.

#### **Section 8. Testing on Reasonable Suspicion**

Nothing in this Article shall be construed to prohibit the Fire Chief from conducting an alcohol or drug test on a Fire Fighter, or a search of any areas in which the Fire Fighter does not have a personal privacy expectation, based upon reasonable suspicion that the Fire Fighter has violated the Department's rules, regulations, policies, or procedures. Indicators that form the basis for reasonable suspicion shall be documented in writing.

#### **Section 9. Education**

Mandatory educational programs regarding alcohol and drug use will be implemented for all Fire Fighters and printed educational materials will be available to Fire Fighters, including Department policies and relevant federal regulations referred to in this Agreement.

#### **Section 10. Self-Disclosure Prior to Testing Requirement**

A. If a Fire Fighter self-discloses to the Fire Chief that the Fire Fighter has used illegal drugs or controlled substances and seeks treatment for drug use, the Fire Chief may use one of the alternative discipline processes in Article 18. Any such self-disclosure must occur:

1. Before the Fire Fighter is notified of selection for random drug testing under



Section 4 above;

2. Before the Fire Fighter is involved in any motor vehicle collision that would subject the Fire Fighter to drug testing under Section 3 above; or

3. Before the occurrence of any event which forms the basis of the Fire Chiefs decision to require a drug test based on reasonable suspicion that the Fire Fighter has violated the Department's rules, regulations, policies, or procedures.

**Section 11. Conflicts**

A. The terms of this Agreement shall prevail in a conflict with Departmental policy regarding alcohol or drug testing.

B. Nothing in this Article restricts the authority of the Fire Chief to impose appropriate disciplinary action for the violation of Department rules, regulations, policies, or procedures regarding:

1. The use or possession of prohibited substances; and/or
2. The misuse of controlled substances or the consumption of alcohol.

**ARTICLE 25**  
**PRE-EMPTION OF CIVIL SERVICE AND OTHER PROVISIONS**

In this Agreement the parties agree to the following;

**"Conflict preemption"** applies unless otherwise specified. Texas Local Gov't Code §174.006 authorizes the parties to alter a "state or local civil service provision" through collective bargaining. To the full extent authorized by §174.006, the parties agree that the provisions of this Agreement shall preempt those portions of any state statute, executive order, local ordinance, or rule with which they specifically conflict only to the extent of such conflict; remaining portions of such provisions will continue to govern the parties' actions.

**"Total preemption"** applies only where specified. However, to the extent allowed by §174.006, the parties may totally preempt a state statute, executive order, local ordinance, or rule, by placing a provision in this Agreement that: (1) specifically states it is intended to "totally preempt" the law in question, and (2) specifically identifies the law(s) being totally preempted.

**ARTICLE 26**  
**ENTIRE AGREEMENT**

**Section 1. Subjects Bargained**

The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to raise issues and make proposals with respect to any subject or matter which is a mandatory subject of the collective bargaining process, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the City and the Association, for the duration of this Agreement, each voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated, to bargain with respect to any subject or matter, whether or not referred to, or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

**Section 2. Amendment to the Agreement**

Except as otherwise explicitly stated, this Agreement may be amended during its term by the parties only by written mutual agreement ratified in accordance with the provisions of Chapter 174.

**ARTICLE 27**  
**MAINTENANCE OF STANDARDS**

**Section 1. Scope of Article**

Subject to Section 2 below, all economic benefits, privileges, and working conditions which are properly and lawfully in effect in the Austin Fire Department as to matters subject to mandatory bargaining under Local Government Code Chapter 174, and enjoyed by the Fire Fighters of the bargaining unit as of the effective date of this Agreement, but which are not included in this Agreement, shall remain unchanged for the duration of this Agreement.

**Section 2. Operational Needs of the Department**

Department management may change those benefits, privileges, and working conditions which it determines, in accordance with this subsection, to interfere with the operation of the Department. Any such changes must be made in good faith, must be consistent with the spirit and intent of the relevant provision or practice, must be reasonable and not discriminatory, must be reasonably related to the safe and orderly operation of the Fire Department, and must not conflict with any state or federal law, governmental regulation, or provision of this Agreement.

## **ARTICLE 28**

### **SAVINGS CLAUSE**

If any provision of this Agreement is subsequently declared by legislative or judicial authority to be unlawful, unenforceable, or contrary to applicable statutes, all other provisions of this Agreement shall remain in full force and effect for the duration of this Agreement, and the parties shall meet as soon as possible to agree on a substitute provision. However, if the parties are unable to agree within thirty (30) days following commencement of the initial meeting, then the matter shall be postponed until collective bargaining negotiations are resumed.

## **ARTICLE 29 NOTICES**

### **Section 1. Association Notices**

Notices the Association is required to provide to the City under this Agreement or Chapter 174, unless specifically noted otherwise, will be provided in writing (by e-mail or U.S. mail) to the Fire Chief's office, the designated attorney in the City Attorney's Office and the City's Labor Relations Office.

### **Section 2. City Notices**

Notices the City is required to provide to the Association under this Agreement or Chapter 174, unless specifically noted otherwise, will be provided in writing (by e-mail or U.S. mail) to the Association President, Secretary/Treasurer and Office Administrator.

### **Section 3. Designation of Notice Recipients**

Within 7 days after the effective date of this Agreement, both parties will provide the other written notice of the correct mailing and e-mail addresses of its designated recipients.

### **Section 4. Timeliness of Notice**

A notice will be deemed timely if postmarked or time stamped no later than the date such notice is due.

### **Section 5. Adequacy of E-mail Notice**

Use of e-mail communications under this Article shall be preceded by confirmed exchanges at the outset of the Agreement, from the sending to receiving servers, prior to using the e-mail option for notices under this Article. Any system change by either party which would modify IT protocols, filters, or other technical configurations shall require a confirmed exchange again. A notice sent by e-mail will be deemed timely if addressed to the correct e-mail addresses for the City or the Association and sent by 11:59 p.m. on the due date.

### **Section 6. Notice of Address Changes**

Notice of any changes of address or e-mail address must be provided in writing to the other party within 7 days of the change.

## **ARTICLE 30 TERMINATION OF AGREEMENT**

### **Section 1. Term of Agreement**

A. This Agreement shall be effective as of the date it is ratified by the City Council, except as to any provisions herein specifically made retroactive. It shall remain in full force and effect until the 30<sup>th</sup> day of September, 2022.

B. The provisions of this Agreement do not apply to any Fire Fighter who separates from City employment before the effective date of this Agreement or before the effective date of any specific provisions hereof.

### **Section 2. Continuation during Negotiations**

If the parties are engaged in negotiations for a successor Agreement at the time this Agreement expires, the Association's and the City's negotiating teams shall have the authority to extend this Agreement in thirty (30) calendar day increments by mutual written agreement, during any period of good faith negotiations after such termination date, not to exceed a total of six (6) months.

### **Section 3. Funding Obligations**

The City presently intends to continue this Agreement each fiscal year through its term, to pay all payments due, and to fully and promptly perform all of the obligations of the City under this Agreement. All obligations of the City shall be paid only out of current revenues or any other funds lawfully available therefore and appropriated for such purpose by the City Council, if necessary to comply with the Texas Constitution, Article XI.

**ARTICLE 31**  
**MERGER WITH ATCEMS**

If the City proposes to merge the Austin Fire Department with the Austin-Travis County Emergency Medical Services Department during the life of this Agreement, the parties agree that the Association will be provided advance notice and an opportunity to negotiate the mandatory subjects of bargaining applicable to and directly resulting from the addition of such employees to the bargaining unit before the merger occurs. The bargaining process shall be limited to 120 days unless extended by agreement. In the event the parties are unable after 120 days of bargaining to reach an agreement, a party may request, but neither party shall be required, to use mediation or arbitration to resolve disputed issues under Texas Local Government Code Chapter 174.



**ARTICLE 32**  
**LINE OF DUTY DEATHS**

In the event of a Line of Duty Death (LODD) in the Austin Fire Department, the Fire Chief may authorize TCFP Certified Fire Fighters employed by other municipalities to ride on AFD apparatus as temporary volunteer replacements during the time of the funeral services or other ceremonial involvement of regular Austin Fire Fighters.

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# APPENDIX A-1 PAY SCALES FY 2017-18

40 Hour Week														
	GRADE PAYSTEP YEAR	A 10 BASE	B 20 1	C 30 2	D 40 3	E 50 4	F 60 5	G 70 6	H 80 7	I 90 8	J 100 9	K 110 10	L 120 11	M 130 12
FIREFIGHTER	HR	25,034	27,206	29,520	32,222	32,222	32,222	33,831	33,831	33,831	35,524	35,524	35,524	37,297
14050	MO	4,339	4,716	5,117	5,585	5,585	5,585	5,864	5,864	5,864	6,157	6,157	6,157	6,465
F02	YR	52,070	56,588	61,402	67,021	67,021	67,021	70,369	70,369	70,369	73,889	73,889	73,889	77,578
FIRE SPECIALIST	HR			31,882	34,799	34,799	34,799	36,538	36,538	36,538	38,365	38,365	38,365	40,281
14025	MO			5,526	6,032	6,032	6,032	6,333	6,333	6,333	6,650	6,650	6,650	6,982
F06	YR			66,314	72,383	72,383	72,383	75,999	75,999	75,999	79,800	79,800	79,800	83,785
FIRE LIEUTENANT	HR					37,583	37,583	39,461	39,461	39,461	41,435	41,435	41,435	43,504
14020	MO					6,514	6,514	6,840	6,840	6,840	7,182	7,182	7,182	7,541
F08	YR					78,173	78,173	82,079	82,079	82,079	86,184	86,184	86,184	90,487
FIRE CAPTAIN	HR							42,618	42,618	42,618	44,749	44,749	44,749	46,984
13995	MO							7,387	7,387	7,387	7,757	7,757	7,757	8,144
F09	YR							88,645	88,645	88,645	93,079	93,079	93,079	97,726
FIRE BATTALION CHIEF	HR									46,453	48,777	48,777	48,777	51,212
13985	MO									8,052	8,455	8,455	8,455	8,877
F10	YR									96,623	101,456	101,456	101,456	106,522
FIRE DIVISION CHIEF	HR									50,170	52,679	52,679	52,679	55,309
14015	MO									8,696	9,131	9,131	9,131	9,587
F11	YR									104,353	109,572	109,572	109,572	115,044
	GRADE PAYSTEP YEAR	N 140 13	O 150 14	P 160 15	Q 170 16	R 180 17	S 190 18	T 200 19	U 210 20	V 220 21	W 230 22	X 240 23	Y 250 24	Z 260 25
FIREFIGHTER	HR	37,297	37,297	39,165	39,165	39,165	41,121	41,121	41,121	43,177	43,177	43,177	43,177	43,177
14050	MO	6,465	6,465	6,789	6,789	6,789	7,128	7,128	7,128	7,484	7,484	7,484	7,484	7,484
F02	YR	77,578	77,578	81,463	81,463	81,463	85,531	85,531	85,531	89,808	89,808	89,808	89,808	89,808
FIRE SPECIALIST	HR	40,281	40,281	42,298	42,298	42,298	44,410	44,410	44,410	46,631	46,631	46,631	46,631	46,631
14025	MO	6,982	6,982	7,332	7,332	7,332	7,698	7,698	7,698	8,083	8,083	8,083	8,083	8,083
F06	YR	83,785	83,785	87,980	87,980	87,980	92,374	92,374	92,374	96,993	96,993	96,993	96,993	96,993
FIRE LIEUTENANT	HR	43,504	43,504	45,682	45,682	45,682	47,963	47,963	47,963	50,362	50,362	50,362	50,362	50,362
14020	MO	7,541	7,541	7,918	7,918	7,918	8,314	8,314	8,314	8,729	8,729	8,729	8,729	8,729
F08	YR	90,487	90,487	95,018	95,018	95,018	99,764	99,764	99,764	104,752	104,752	104,752	104,752	104,752
FIRE CAPTAIN	HR	46,984	46,984	49,336	49,336	49,336	51,800	51,800	51,800	54,390	54,390	54,390	54,390	54,390
13995	MO	8,144	8,144	8,552	8,552	8,552	8,979	8,979	8,979	9,428	9,428	9,428	9,428	9,428
F09	YR	97,726	97,726	102,620	102,620	102,620	107,745	107,745	107,745	113,132	113,132	113,132	113,132	113,132
FIRE BATTALION CHIEF	HR	51,212	51,212	53,777	53,777	53,777	56,462	56,462	56,462	59,286	59,286	59,286	59,286	59,286
13985	MO	8,877	8,877	9,321	9,321	9,321	9,787	9,787	9,787	10,276	10,276	10,276	10,276	10,276
F10	YR	106,522	106,522	111,856	111,856	111,856	117,442	117,442	117,442	123,314	123,314	123,314	123,314	123,314
FIRE DIVISION CHIEF	HR	55,309	55,309	58,079	58,079	58,079	60,979	60,979	60,979	64,028	64,028	64,028	64,028	64,028
14015	MO	9,587	9,587	10,067	10,067	10,067	10,570	10,570	10,570	11,098	11,098	11,098	11,098	11,098
F11	YR	115,044	115,044	120,804	120,804	120,804	126,837	126,837	126,837	133,179	133,179	133,179	133,179	133,179
Rank Differentials: All rank differentials are 8% except Captain to Battalion Chief is 9% and Division Chief to Assistant chief is at least 12.8%														
Step Structure: 5% step increase at years 6, 9, 12, 15, 18, & 21 years and 9.15% increase at 3 years														
Notes: Month & Annual Pay Rates are approximations due to statistical rounding.														
Year 1: 0.25% effective the first pay period FY 2017-18														

COA0648



# APPENDIX A-1 PAY SCALES FY 2017-18

53 Hour Week														
	GRADE PAYSTEP YEAR	A 10 BASE	B 20 1	C 30 2	D 40 3	E 50 4	F 60 5	G 70 6	H 80 7	I 90 8	J 100 9	K 110 10	L 120 11	M 130 12
FIREFIGHTER	HR	18,893	20,533	22,279	24,318	24,318	24,318	25,533	25,533	25,533	26,810	26,810	26,810	28,149
14050	MO	4,339	4,716	5,117	5,585	5,585	5,585	5,864	5,864	5,864	6,157	6,157	6,157	6,465
F02	YR	52,070	56,588	61,402	67,021	67,021	67,021	70,369	70,369	70,369	73,889	73,889	73,889	77,578
FIRE SPECIALIST	HR			24,062	26,264	26,264	26,264	27,576	27,576	27,576	28,955	28,955	28,955	30,401
14025	MO			5,526	6,032	6,032	6,032	6,333	6,333	6,333	6,650	6,650	6,650	6,982
F06	YR			66,314	72,383	72,383	72,383	75,999	75,999	75,999	79,800	79,800	79,800	83,785
FIRE LIEUTENANT	HR					28,365	28,365	29,782	29,782	29,782	31,271	31,271	31,271	32,833
14020	MO					6,514	6,514	6,840	6,840	6,840	7,182	7,182	7,182	7,541
F08	YR					78,173	78,173	82,079	82,079	82,079	86,184	86,184	86,184	90,487
FIRE CAPTAIN	HR							32,164	32,164	32,164	33,773	33,773	33,773	35,460
13995	MO							7,387	7,387	7,387	7,757	7,757	7,757	8,144
F09	YR							88,645	88,645	88,645	93,079	93,079	93,079	97,726
FIRE BATTALION CHIEF	HR									35,059	36,813	36,813	36,813	38,651
13985	MO									8,052	8,455	8,455	8,455	8,877
F10	YR									96,623	101,456	101,456	101,456	106,522
FIRE DIVISION CHIEF	HR									37,864	39,758	39,758	39,758	41,743
14015	MO									8,696	9,131	9,131	9,131	9,587
F11	YR									104,353	109,572	109,572	109,572	115,044
	GRADE PAYSTEP YEAR	N 140 13	O 150 14	P 160 15	Q 170 16	R 180 17	S 190 18	T 200 19	U 210 20	V 220 21	W 230 22	X 240 23	Y 250 24	Z 260 25
FIREFIGHTER	HR	28,149	28,149	29,558	29,558	29,558	31,035	31,035	31,035	32,586	32,586	32,586	32,586	32,586
14050	MO	6,465	6,465	6,789	6,789	6,789	7,128	7,128	7,128	7,484	7,484	7,484	7,484	7,484
F02	YR	77,578	77,578	81,463	81,463	81,463	85,531	85,531	85,531	89,808	89,808	89,808	89,808	89,808
FIRE SPECIALIST	HR	30,401	30,401	31,923	31,923	31,923	33,517	33,517	33,517	35,193	35,193	35,193	35,193	35,193
14025	MO	6,982	6,982	7,332	7,332	7,332	7,698	7,698	7,698	8,083	8,083	8,083	8,083	8,083
F06	YR	83,785	83,785	87,980	87,980	87,980	92,374	92,374	92,374	96,993	96,993	96,993	96,993	96,993
FIRE LIEUTENANT	HR	32,833	32,833	34,477	34,477	34,477	36,199	36,199	36,199	38,009	38,009	38,009	38,009	38,009
14020	MO	7,541	7,541	7,918	7,918	7,918	8,314	8,314	8,314	8,729	8,729	8,729	8,729	8,729
F08	YR	90,487	90,487	95,018	95,018	95,018	99,764	99,764	99,764	104,752	104,752	104,752	104,752	104,752
FIRE CAPTAIN	HR	35,460	35,460	37,235	37,235	37,235	39,095	39,095	39,095	41,049	41,049	41,049	41,049	41,049
13995	MO	8,144	8,144	8,552	8,552	8,552	8,979	8,979	8,979	9,428	9,428	9,428	9,428	9,428
F09	YR	97,726	97,726	102,620	102,620	102,620	107,745	107,745	107,745	113,132	113,132	113,132	113,132	113,132
FIRE BATTALION CHIEF	HR	38,651	38,651	40,586	40,586	40,586	42,613	42,613	42,613	44,744	44,744	44,744	44,744	44,744
13985	MO	8,877	8,877	9,321	9,321	9,321	9,787	9,787	9,787	10,276	10,276	10,276	10,276	10,276
F10	YR	106,522	106,522	111,856	111,856	111,856	117,442	117,442	117,442	123,314	123,314	123,314	123,314	123,314
FIRE DIVISION CHIEF	HR	41,743	41,743	43,833	43,833	43,833	46,022	46,022	46,022	48,323	48,323	48,323	48,323	48,323
14015	MO	9,587	9,587	10,067	10,067	10,067	10,570	10,570	10,570	11,098	11,098	11,098	11,098	11,098
F11	YR	115,044	115,044	120,804	120,804	120,804	126,837	126,837	126,837	133,179	133,179	133,179	133,179	133,179
Rank Differentials: All rank differentials are 8% except Captain to Battalion Chief is 9% and Division Chief to Assistant chief is at least 12.8%														
Step Structure: 5% step increase at years 6, 9, 12, 15, 18, & 21 years and 9.15% increase at 3 years														
Notes: Month & Annual Pay Rates are approximations due to statistical rounding.														
Year 1: 0.25% effective the first pay period FY 2017-18														

COA0649

# **APPENDIX A-2** **PAY SCALES FY 2018-19**

40 Hour Week														
GRADE	A	B	C	D	E	F	G	H	I	J	K	L	M	
PAYSTEP	10	20	30	40	50	60	70	80	90	100	110	120	130	
YEAR	BASE	1	2	3	4	5	6	7	8	9	10	11	12	
FIREFIGHTER	HR	25,159	27,342	29,668	32,383	32,383	32,383	34,001	34,001	34,001	35,701	35,701	35,701	37,484
14050	MO	4,361	4,739	5,142	5,613	5,613	5,613	5,893	5,893	5,893	6,188	6,188	6,188	6,497
F02	YR	52,331	56,871	61,709	67,356	67,356	67,356	70,721	70,721	70,721	74,258	74,258	74,258	77,966
FIRE SPECIALIST	HR			32,041	34,973	34,973	34,973	36,721	36,721	36,721	38,557	38,557	38,557	40,483
14025	MO			5,554	6,062	6,062	6,062	6,365	6,365	6,365	6,683	6,683	6,683	7,017
F06	YR			66,645	72,744	72,744	72,744	76,379	76,379	76,379	80,199	80,199	80,199	84,204
FIRE LIEUTENANT	HR					37,771	37,771	39,658	39,658	39,658	41,642	41,642	41,642	43,721
14020	MO					6,547	6,547	6,874	6,874	6,874	7,218	7,218	7,218	7,578
F08	YR					78,564	78,564	82,489	82,489	82,489	86,615	86,615	86,615	90,940
FIRE CAPTAIN	HR							42,831	42,831	42,831	44,973	44,973	44,973	47,219
13995	MO							7,424	7,424	7,424	7,795	7,795	7,795	8,185
F09	YR							89,088	89,088	89,088	93,544	93,544	93,544	98,215
FIRE BATTALION CHIEF	HR									46,686	49,021	49,021	49,021	51,468
13985	MO									8,092	8,497	8,497	8,497	8,921
F10	YR									97,106	101,963	101,963	101,963	107,054
FIRE DIVISION CHIEF	HR									50,421	52,942	52,942	52,942	55,586
14015	MO									8,740	9,177	9,177	9,177	9,635
F11	YR									104,875	110,120	110,120	110,120	115,619
GRADE	N	O	P	Q	R	S	T	U	V	W	X	Y	Z	
PAYSTEP	140	150	160	170	180	190	200	210	220	230	240	250	260	
YEAR	13	14	15	16	17	18	19	20	21	22	23	24	25	
FIREFIGHTER	HR	37,484	37,484	39,361	39,361	39,361	41,326	41,326	41,326	43,393	43,393	43,393	43,393	43,393
14050	MO	6,497	6,497	6,823	6,823	6,823	7,163	7,163	7,163	7,521	7,521	7,521	7,521	7,521
F02	YR	77,966	77,966	81,870	81,870	81,870	85,959	85,959	85,959	90,257	90,257	90,257	90,257	90,257
FIRE SPECIALIST	HR	40,483	40,483	42,510	42,510	42,510	44,633	44,633	44,633	46,864	46,864	46,864	46,864	46,864
14025	MO	7,017	7,017	7,368	7,368	7,368	7,736	7,736	7,736	8,123	8,123	8,123	8,123	8,123
F06	YR	84,204	84,204	88,420	88,420	88,420	92,836	92,836	92,836	97,477	97,477	97,477	97,477	97,477
FIRE LIEUTENANT	HR	43,721	43,721	45,910	45,910	45,910	48,203	48,203	48,203	50,613	50,613	50,613	50,613	50,613
14020	MO	7,578	7,578	7,958	7,958	7,958	8,355	8,355	8,355	8,773	8,773	8,773	8,773	8,773
F08	YR	90,940	90,940	95,493	95,493	95,493	100,263	100,263	100,263	105,276	105,276	105,276	105,276	105,276
FIRE CAPTAIN	HR	47,219	47,219	49,583	49,583	49,583	52,059	52,059	52,059	54,662	54,662	54,662	54,662	54,662
13995	MO	8,185	8,185	8,594	8,594	8,594	9,024	9,024	9,024	9,475	9,475	9,475	9,475	9,475
F09	YR	98,215	98,215	103,133	103,133	103,133	108,284	108,284	108,284	113,698	113,698	113,698	113,698	113,698
FIRE BATTALION CHIEF	HR	51,468	51,468	54,046	54,046	54,046	56,745	56,745	56,745	59,582	59,582	59,582	59,582	59,582
13985	MO	8,921	8,921	9,368	9,368	9,368	9,836	9,836	9,836	10,328	10,328	10,328	10,328	10,328
F10	YR	107,054	107,054	112,415	112,415	112,415	118,029	118,029	118,029	123,931	123,931	123,931	123,931	123,931
FIRE DIVISION CHIEF	HR	55,586	55,586	58,369	58,369	58,369	61,284	61,284	61,284	64,349	64,349	64,349	64,349	64,349
14015	MO	9,635	9,635	10,117	10,117	10,117	10,623	10,623	10,623	11,154	11,154	11,154	11,154	11,154
F11	YR	115,619	115,619	121,408	121,408	121,408	127,471	127,471	127,471	133,845	133,845	133,845	133,845	133,845
Rank Differentials: All rank differentials are 8% except Captain to Battalion Chief is 9% and Division Chief to Assistant chief is at least 12.8%														
Step Structure: 5% step increase at years 6, 9, 12, 15, 18, & 21 years and 9.15% increase at 3 years														
Notes: Month & Annual Pay Rates are approximations due to statistical rounding.														
Year 2: 0.50% effective the first pay period FY 2018-19														

COA0650



# APPENDIX A-2 PAY SCALES FY 2018-19

53 Hour Week														
	GRADE PAYSTEP YEAR	A 10 BASE	B 20 1	C 30 2	D 40 3	E 50 4	F 60 5	G 70 6	H 80 7	I 90 8	J 100 9	K 110 10	L 120 11	M 130 12
FIREFIGHTER	HR	18,988	20,635	22,391	24,440	24,440	24,440	25,661	25,661	25,661	26,944	26,944	26,944	28,290
14050	MO	4,361	4,739	5,142	5,613	5,613	5,613	5,893	5,893	5,893	6,188	6,188	6,188	6,497
F02	YR	52,331	56,871	61,709	67,356	67,356	67,356	70,721	70,721	70,721	74,258	74,258	74,258	77,966
FIRE SPECIALIST	HR			24,182	26,395	26,395	26,395	27,714	27,714	27,714	29,100	29,100	29,100	30,553
14025	MO			5,554	6,062	6,062	6,062	6,365	6,365	6,365	6,683	6,683	6,683	7,017
F06	YR			66,845	72,744	72,744	72,744	76,379	76,379	76,379	80,199	80,199	80,199	84,204
FIRE LIEUTENANT	HR					28,507	28,507	29,931	29,931	29,931	31,428	31,428	31,428	32,997
14020	MO					6,547	6,547	6,874	6,874	6,874	7,218	7,218	7,218	7,578
F08	YR					78,564	78,564	82,489	82,489	82,489	86,615	86,615	86,615	90,940
FIRE CAPTAIN	HR							32,325	32,325	32,325	33,942	33,942	33,942	35,637
13995	MO							7,424	7,424	7,424	7,795	7,795	7,795	8,185
F09	YR							89,088	89,088	89,088	93,544	93,544	93,544	98,215
FIRE BATTALION CHIEF	HR									35,234	36,997	36,997	36,997	38,844
13985	MO									8,092	8,497	8,497	8,497	8,921
F10	YR									97,106	101,963	101,963	101,963	107,054
FIRE DIVISION CHIEF	HR									38,053	39,957	39,957	39,957	41,952
14015	MO									8,740	9,177	9,177	9,177	9,635
F11	YR									104,875	110,120	110,120	110,120	115,619
	GRADE PAYSTEP YEAR	N 140 13	O 150 14	P 160 15	Q 170 16	R 180 17	S 190 18	T 200 19	U 210 20	V 220 21	W 230 22	X 240 23	Y 250 24	Z 260 25
FIREFIGHTER	HR	28,290	28,290	29,706	29,706	29,706	31,190	31,190	31,190	32,749	32,749	32,749	32,749	32,749
14050	MO	6,497	6,497	6,823	6,823	6,823	7,163	7,163	7,163	7,521	7,521	7,521	7,521	7,521
F02	YR	77,966	77,966	81,870	81,870	81,870	85,959	85,959	85,959	90,257	90,257	90,257	90,257	90,257
FIRE SPECIALIST	HR	30,553	30,553	32,083	32,083	32,083	33,685	33,685	33,685	35,369	35,369	35,369	35,369	35,369
14025	MO	7,017	7,017	7,368	7,368	7,368	7,736	7,736	7,736	8,123	8,123	8,123	8,123	8,123
F06	YR	84,204	84,204	88,420	88,420	88,420	92,836	92,836	92,836	97,477	97,477	97,477	97,477	97,477
FIRE LIEUTENANT	HR	32,997	32,997	34,649	34,649	34,649	36,380	36,380	36,380	38,199	38,199	38,199	38,199	38,199
14020	MO	7,578	7,578	7,958	7,958	7,958	8,355	8,355	8,355	8,773	8,773	8,773	8,773	8,773
F08	YR	90,940	90,940	95,493	95,493	95,493	100,263	100,263	100,263	105,276	105,276	105,276	105,276	105,276
FIRE CAPTAIN	HR	35,637	35,637	37,421	37,421	37,421	39,290	39,290	39,290	41,255	41,255	41,255	41,255	41,255
13995	MO	8,185	8,185	8,594	8,594	8,594	9,024	9,024	9,024	9,475	9,475	9,475	9,475	9,475
F09	YR	98,215	98,215	103,133	103,133	103,133	108,284	108,284	108,284	113,698	113,698	113,698	113,698	113,698
FIRE BATTALION CHIEF	HR	38,844	38,844	40,789	40,789	40,789	42,826	42,826	42,826	44,968	44,968	44,968	44,968	44,968
13985	MO	8,921	8,921	9,368	9,368	9,368	9,836	9,836	9,836	10,328	10,328	10,328	10,328	10,328
F10	YR	107,054	107,054	112,415	112,415	112,415	118,029	118,029	118,029	123,931	123,931	123,931	123,931	123,931
FIRE DIVISION CHIEF	HR	41,952	41,952	44,052	44,052	44,052	46,252	46,252	46,252	48,565	48,565	48,565	48,565	48,565
14015	MO	9,635	9,635	10,117	10,117	10,117	10,623	10,623	10,623	11,154	11,154	11,154	11,154	11,154
F11	YR	115,619	115,619	121,408	121,408	121,408	127,471	127,471	127,471	133,845	133,845	133,845	133,845	133,845
Rank Differentials: All rank differentials are 8% except Captain to Battalion Chief is 9% and Division Chief to Assistant chief is at least 12.8%														
Step Structure: 5% step increase at years 6, 9, 12, 15, 18, & 21 years and 9.15% increase at 3 years														
Notes: Month & Annual Pay Rates are approximations due to statistical rounding.														
Year 2: 0.50% effective the first pay period FY 2018-19														

# **APPENDIX A-3 PAY SCALES FY 2019-20**

40 Hour Week														
GRADE	A	B	C	D	E	F	G	H	I	J	K	L	M	
PAYSTEP	10	20	30	40	50	60	70	80	90	100	110	120	130	
YEAR	BASE	1	2	3	4	5	6	7	8	9	10	11	12	
FIREFIGHTER	HR	25,411	27,615	29,964	32,706	32,706	32,706	34,341	34,341	34,341	36,058	36,058	36,058	37,859
14050	MO	4,404	4,787	5,194	5,669	5,669	5,669	5,952	5,952	5,952	6,250	6,250	6,250	6,562
F02	YR	52,854	57,440	62,326	68,030	68,030	68,030	71,428	71,428	71,428	75,001	75,001	75,001	78,746
FIRE SPECIALIST	HR			32,361	35,323	35,323	35,323	37,088	37,088	37,088	38,943	38,943	38,943	40,887
14025	MO			5,609	6,123	6,123	6,123	6,429	6,429	6,429	6,750	6,750	6,750	7,087
F06	YR			67,312	73,472	73,472	73,472	77,143	77,143	77,143	81,001	81,001	81,001	85,046
FIRE LIEUTENANT	HR					38,149	38,149	40,055	40,055	40,055	42,058	42,058	42,058	44,158
14020	MO					6,612	6,612	6,943	6,943	6,943	7,290	7,290	7,290	7,654
F08	YR					79,350	79,350	83,314	83,314	83,314	87,481	87,481	87,481	91,849
FIRE CAPTAIN	HR							43,259	43,259	43,259	45,423	45,423	45,423	47,691
13995	MO							7,498	7,498	7,498	7,873	7,873	7,873	8,266
F09	YR							89,979	89,979	89,979	94,480	94,480	94,480	99,197
FIRE BATTALION CHIEF	HR									47,153	49,511	49,511	49,511	51,983
13985	MO									8,173	8,582	8,582	8,582	9,010
F10	YR									98,077	102,983	102,983	102,983	108,125
FIRE DIVISION CHIEF	HR									50,925	53,472	53,472	53,472	56,142
14015	MO									8,827	9,268	9,268	9,268	9,731
F11	YR									105,923	111,221	111,221	111,221	116,775
GRADE	N	O	P	Q	R	S	T	U	V	W	X	Y	Z	
PAYSTEP	140	150	160	170	180	190	200	210	220	230	240	250	260	
YEAR	13	14	15	16	17	18	19	20	21	22	23	24	25	
FIREFIGHTER	HR	37,859	37,859	39,754	39,754	39,754	41,740	41,740	41,740	43,827	43,827	43,827	43,827	43,827
14050	MO	6,562	6,562	6,891	6,891	6,891	7,235	7,235	7,235	7,597	7,597	7,597	7,597	7,597
F02	YR	78,746	78,746	82,689	82,689	82,689	86,819	86,819	86,819	91,160	91,160	91,160	91,160	91,160
FIRE SPECIALIST	HR	40,887	40,887	42,935	42,935	42,935	45,079	45,079	45,079	47,333	47,333	47,333	47,333	47,333
14025	MO	7,087	7,087	7,442	7,442	7,442	7,814	7,814	7,814	8,204	8,204	8,204	8,204	8,204
F06	YR	85,046	85,046	89,304	89,304	89,304	93,764	93,764	93,764	98,452	98,452	98,452	98,452	98,452
FIRE LIEUTENANT	HR	44,158	44,158	46,369	46,369	46,369	48,685	48,685	48,685	51,119	51,119	51,119	51,119	51,119
14020	MO	7,654	7,654	8,037	8,037	8,037	8,439	8,439	8,439	8,861	8,861	8,861	8,861	8,861
F08	YR	91,849	91,849	96,448	96,448	96,448	101,265	101,265	101,265	106,328	106,328	106,328	106,328	106,328
FIRE CAPTAIN	HR	47,691	47,691	50,079	50,079	50,079	52,580	52,580	52,580	55,209	55,209	55,209	55,209	55,209
13995	MO	8,266	8,266	8,680	8,680	8,680	9,114	9,114	9,114	9,570	9,570	9,570	9,570	9,570
F09	YR	99,197	99,197	104,164	104,164	104,164	109,366	109,366	109,366	114,835	114,835	114,835	114,835	114,835
FIRE BATTALION CHIEF	HR	51,983	51,983	54,586	54,586	54,586	57,312	57,312	57,312	60,178	60,178	60,178	60,178	60,178
13985	MO	9,010	9,010	9,462	9,462	9,462	9,934	9,934	9,934	10,431	10,431	10,431	10,431	10,431
F10	YR	108,125	108,125	113,539	113,539	113,539	119,209	119,209	119,209	125,170	125,170	125,170	125,170	125,170
FIRE DIVISION CHIEF	HR	56,142	56,142	58,953	58,953	58,953	61,897	61,897	61,897	64,992	64,992	64,992	64,992	64,992
14015	MO	9,731	9,731	10,219	10,219	10,219	10,729	10,729	10,729	11,265	11,265	11,265	11,265	11,265
F11	YR	116,775	116,775	122,622	122,622	122,622	128,746	128,746	128,746	135,183	135,183	135,183	135,183	135,183
Rank Differentials: All rank differentials are 8% except Captain to Battalion Chief is 9% and Division Chief to Assistant chief is at least 12.8%														
Step Structure: 5% step increase at years 6, 9, 12, 15, 18, & 21 years and 9.15% increase at 3 years														
Notes: Month & Annual Pay Rates are approximations due to statistical rounding.														
Year 3: 1.00% effective the first pay period FY 2019-20														

COA0652



# **APPENDIX A-3 PAY SCALES FY 2019-20**

53 Hour Week														
	GRADE PAYSTEP YEAR	A 10 BASE	B 20 1	C 30 2	D 40 3	E 50 4	F 60 5	G 70 6	H 80 7	I 90 8	J 100 9	K 110 10	L 120 11	M 130 12
FIREFIGHTER	HR	19,178	20,842	22,615	24,684	24,684	24,684	25,917	25,917	25,917	27,214	27,214	27,214	28,573
14050	MO	4,404	4,787	5,194	5,669	5,669	5,669	5,952	5,952	5,952	6,250	6,250	6,250	6,562
F02	YR	52,854	57,440	62,326	68,030	68,030	68,030	71,428	71,428	71,428	75,001	75,001	75,001	78,746
FIRE SPECIALIST	HR			24,424	26,659	26,659	26,659	27,991	27,991	27,991	29,391	29,391	29,391	30,858
14025	MO			5,609	6,123	6,123	6,123	6,429	6,429	6,429	6,750	6,750	6,750	7,087
F06	YR			67,312	73,472	73,472	73,472	77,143	77,143	77,143	81,001	81,001	81,001	85,046
FIRE LIEUTENANT	HR					28,792	28,792	30,230	30,230	30,230	31,742	31,742	31,742	33,327
14020	MO					6,612	6,612	6,943	6,943	6,943	7,290	7,290	7,290	7,654
F08	YR					79,350	79,350	83,314	83,314	83,314	87,481	87,481	87,481	91,849
FIRE CAPTAIN	HR							32,648	32,648	32,648	34,281	34,281	34,281	35,993
13995	MO							7,498	7,498	7,498	7,873	7,873	7,873	8,266
F09	YR							89,979	89,979	89,979	94,480	94,480	94,480	99,197
FIRE BATTALION CHIEF	HR									35,587	37,367	37,367	37,367	39,233
13985	MO									8,173	8,582	8,582	8,582	9,010
F10	YR									98,077	102,983	102,983	102,983	108,125
FIRE DIVISION CHIEF	HR									38,434	40,356	40,356	40,356	42,371
14015	MO									8,827	9,268	9,268	9,268	9,731
F11	YR									105,923	111,221	111,221	111,221	116,775
	GRADE PAYSTEP YEAR	N 140 13	O 150 14	P 160 15	Q 170 16	R 180 17	S 190 18	T 200 19	U 210 20	V 220 21	W 230 22	X 240 23	Y 250 24	Z 260 25
FIREFIGHTER	HR	28,573	28,573	30,003	30,003	30,003	31,502	31,502	31,502	33,077	33,077	33,077	33,077	33,077
14050	MO	6,562	6,562	6,891	6,891	6,891	7,235	7,235	7,235	7,597	7,597	7,597	7,597	7,597
F02	YR	78,746	78,746	82,689	82,689	82,689	86,819	86,819	86,819	91,160	91,160	91,160	91,160	91,160
FIRE SPECIALIST	HR	30,858	30,858	32,404	32,404	32,404	34,022	34,022	34,022	35,723	35,723	35,723	35,723	35,723
14025	MO	7,087	7,087	7,442	7,442	7,442	7,814	7,814	7,814	8,204	8,204	8,204	8,204	8,204
F06	YR	85,046	85,046	89,304	89,304	89,304	93,764	93,764	93,764	98,452	98,452	98,452	98,452	98,452
FIRE LIEUTENANT	HR	33,327	33,327	34,996	34,996	34,996	36,744	36,744	36,744	38,581	38,581	38,581	38,581	38,581
14020	MO	7,654	7,654	8,037	8,037	8,037	8,439	8,439	8,439	8,861	8,861	8,861	8,861	8,861
F08	YR	91,849	91,849	96,448	96,448	96,448	101,265	101,265	101,265	106,328	106,328	106,328	106,328	106,328
FIRE CAPTAIN	HR	35,993	35,993	37,795	37,795	37,795	39,683	39,683	39,683	41,667	41,667	41,667	41,667	41,667
13995	MO	8,266	8,266	8,680	8,680	8,680	9,114	9,114	9,114	9,570	9,570	9,570	9,570	9,570
F09	YR	99,197	99,197	104,164	104,164	104,164	109,366	109,366	109,366	114,835	114,835	114,835	114,835	114,835
FIRE BATTALION CHIEF	HR	39,233	39,233	41,197	41,197	41,197	43,254	43,254	43,254	45,417	45,417	45,417	45,417	45,417
13985	MO	9,010	9,010	9,462	9,462	9,462	9,934	9,934	9,934	10,431	10,431	10,431	10,431	10,431
F10	YR	108,125	108,125	113,539	113,539	113,539	119,209	119,209	119,209	125,170	125,170	125,170	125,170	125,170
FIRE DIVISION CHIEF	HR	42,371	42,371	44,493	44,493	44,493	46,715	46,715	46,715	49,051	49,051	49,051	49,051	49,051
14015	MO	9,731	9,731	10,219	10,219	10,219	10,729	10,729	10,729	11,265	11,265	11,265	11,265	11,265
F11	YR	116,775	116,775	122,622	122,622	122,622	128,746	128,746	128,746	135,183	135,183	135,183	135,183	135,183
Rank Differentials: All rank differentials are 8% except Captain to Battalion Chief is 9% and Division Chief to Assistant chief is at least 12.8%														
Step Structure: 5% step increase at years 6, 9, 12, 15, 18, & 21 years and 9.15% increase at 3 years														
Notes: Month & Annual Pay Rates are approximations due to statistical rounding.														
Year 3: 1.00% effective the first pay period FY 2019-20														

COA0653



# **APPENDIX A-4** **PAY SCALES FY 2020-21**

40 Hour Week														
GRADE	A	B	C	D	E	F	G	H	I	J	K	L	M	
PAYSTEP	10	20	30	40	50	60	70	80	90	100	110	120	130	
YEAR	BASE	1	2	3	4	5	6	7	8	9	10	11	12	
FIREFIGHTER	HR	25,919	28,168	30,564	33,361	33,361	33,361	35,027	35,027	35,027	36,779	36,779	36,779	38,616
14050	MO	4,493	4,882	5,298	5,783	5,783	5,783	6,071	6,071	6,071	6,375	6,375	6,375	6,693
F02	YR	53,911	58,589	63,572	69,390	69,390	69,390	72,857	72,857	72,857	76,501	76,501	76,501	80,321
FIRE SPECIALIST	HR			33,009	36,029	36,029	36,029	37,830	37,830	37,830	39,722	39,722	39,722	41,705
14025	MO			5,722	6,245	6,245	6,245	6,557	6,557	6,557	6,885	6,885	6,885	7,229
F06	YR			68,658	74,941	74,941	74,941	78,685	78,685	78,685	82,621	82,621	82,621	86,747
FIRE LIEUTENANT	HR				38,912	38,912	40,856	40,856	40,856	42,899	42,899	42,899	42,899	45,041
14020	MO				6,745	6,745	7,082	7,082	7,082	7,436	7,436	7,436	7,436	7,807
F08	YR				80,937	80,937	84,980	84,980	84,980	89,231	89,231	89,231	89,231	93,686
FIRE CAPTAIN	HR						44,124	44,124	44,124	46,331	46,331	46,331	46,331	48,645
13995	MO						7,648	7,648	7,648	8,031	8,031	8,031	8,031	8,432
F09	YR						91,779	91,779	91,779	96,369	96,369	96,369	96,369	101,181
FIRE BATTALION CHIEF	HR								48,096	50,501	50,501	50,501	50,501	53,023
13985	MO								8,337	8,754	8,754	8,754	8,754	9,191
F10	YR								100,039	105,042	105,042	105,042	105,042	110,287
FIRE DIVISION CHIEF	HR								51,943	54,541	54,541	54,541	54,541	57,265
14015	MO								9,003	9,454	9,454	9,454	9,454	9,926
F11	YR								108,042	113,446	113,446	113,446	113,446	119,111
GRADE	N	O	P	Q	R	S	T	U	V	W	X	Y	Z	
PAYSTEP	140	150	160	170	180	190	200	210	220	230	240	250	260	
YEAR	13	14	15	16	17	18	19	20	21	22	23	24	25	
FIREFIGHTER	HR	38,616	38,616	40,549	40,549	40,549	42,574	42,574	42,574	44,703	44,703	44,703	44,703	44,703
14050	MO	6,693	6,693	7,029	7,029	7,029	7,380	7,380	7,380	7,749	7,749	7,749	7,749	7,749
F02	YR	80,321	80,321	84,343	84,343	84,343	88,555	88,555	88,555	92,983	92,983	92,983	92,983	92,983
FIRE SPECIALIST	HR	41,705	41,705	43,793	43,793	43,793	45,980	45,980	45,980	48,279	48,279	48,279	48,279	48,279
14025	MO	7,229	7,229	7,591	7,591	7,591	7,970	7,970	7,970	8,368	8,368	8,368	8,368	8,368
F06	YR	86,747	86,747	91,090	91,090	91,090	95,639	95,639	95,639	100,421	100,421	100,421	100,421	100,421
FIRE LIEUTENANT	HR	45,041	45,041	47,297	47,297	47,297	49,659	49,659	49,659	52,142	52,142	52,142	52,142	52,142
14020	MO	7,807	7,807	8,198	8,198	8,198	8,608	8,608	8,608	9,038	9,038	9,038	9,038	9,038
F08	YR	93,686	93,686	98,377	98,377	98,377	103,290	103,290	103,290	108,455	108,455	108,455	108,455	108,455
FIRE CAPTAIN	HR	48,645	48,645	51,081	51,081	51,081	53,632	53,632	53,632	56,313	56,313	56,313	56,313	56,313
13995	MO	8,432	8,432	8,854	8,854	8,854	9,296	9,296	9,296	9,761	9,761	9,761	9,761	9,761
F09	YR	101,181	101,181	106,248	106,248	106,248	111,554	111,554	111,554	117,131	117,131	117,131	117,131	117,131
FIRE BATTALION CHIEF	HR	53,023	53,023	55,678	55,678	55,678	58,458	58,458	58,458	61,381	61,381	61,381	61,381	61,381
13985	MO	9,191	9,191	9,651	9,651	9,651	10,133	10,133	10,133	10,639	10,639	10,639	10,639	10,639
F10	YR	110,287	110,287	115,810	115,810	115,810	121,594	121,594	121,594	127,673	127,673	127,673	127,673	127,673
FIRE DIVISION CHIEF	HR	57,265	57,265	60,132	60,132	60,132	63,135	63,135	63,135	66,292	66,292	66,292	66,292	66,292
14015	MO	9,926	9,926	10,423	10,423	10,423	10,943	10,943	10,943	11,491	11,491	11,491	11,491	11,491
F11	YR	119,111	119,111	125,075	125,075	125,075	131,321	131,321	131,321	137,887	137,887	137,887	137,887	137,887
Rank Differentials: All rank differentials are 8% except Captain to Battalion Chief is 9% and Division Chief to Assistant chief is at least 12.8%														
Step Structure: 5% step increase at years 6, 9, 12, 15, 18, & 21 years and 9.15% increase at 3 years														
Notes: Month & Annual Pay Rates are approximations due to statistical rounding.														
Year 4: 2.00% effective the first pay period FY 2020-21														

COA0654

# **APPENDIX A-4 PAY SCALES FY 2020-21**

53 Hour Week														
	GRADE PAYSTEP YEAR	A 10 BASE	B 20 1	C 30 2	D 40 3	E 50 4	F 60 5	G 70 6	H 80 7	I 90 8	J 100 9	K 110 10	L 120 11	M 130 12
FIREFIGHTER	HR	19,561	21,259	23,067	25,178	25,178	25,178	26,436	26,436	26,436	27,758	27,758	27,758	29,144
14050	MO	4,493	4,882	5,298	5,783	5,783	5,783	6,071	6,071	6,071	6,375	6,375	6,375	6,693
F02	YR	53,911	58,589	63,572	69,390	69,390	69,390	72,857	72,857	72,857	76,501	76,501	76,501	80,321
FIRE SPECIALIST	HR			24,912	27,192	27,192	27,192	28,551	28,551	28,551	29,979	29,979	29,979	31,476
14025	MO			5,722	6,245	6,245	6,245	6,557	6,557	6,557	6,885	6,885	6,885	7,229
F06	YR			68,658	74,941	74,941	74,941	78,685	78,685	78,685	82,621	82,621	82,621	86,747
FIRE LIEUTENANT	HR					29,367	29,367	30,835	30,835	30,835	32,377	32,377	32,377	33,994
14020	MO					6,745	6,745	7,082	7,082	7,082	7,436	7,436	7,436	7,807
F08	YR					80,937	80,937	84,980	84,980	84,980	89,231	89,231	89,231	93,686
FIRE CAPTAIN	HR							33,301	33,301	33,301	34,967	34,967	34,967	36,713
13995	MO							7,648	7,648	7,648	8,031	8,031	8,031	8,432
F09	YR							91,779	91,779	91,779	96,369	96,369	96,369	101,181
FIRE BATTALION CHIEF	HR									36,299	38,114	38,114	38,114	40,017
13985	MO									8,337	8,754	8,754	8,754	9,191
F10	YR									100,039	105,042	105,042	105,042	110,287
FIRE DIVISION CHIEF	HR									39,202	41,163	41,163	41,163	43,219
14015	MO									9,003	9,454	9,454	9,454	9,926
F11	YR									108,042	113,446	113,446	113,446	119,111
	GRADE PAYSTEP YEAR	N 140 13	O 150 14	P 160 15	Q 170 16	R 180 17	S 190 18	T 200 19	U 210 20	V 220 21	W 230 22	X 240 23	Y 250 24	Z 260 25
FIREFIGHTER	HR	29,144	29,144	30,603	30,603	30,603	32,132	32,132	32,132	33,738	33,738	33,738	33,738	33,738
14050	MO	6,693	6,693	7,029	7,029	7,029	7,380	7,380	7,380	7,749	7,749	7,749	7,749	7,749
F02	YR	80,321	80,321	84,343	84,343	84,343	88,555	88,555	88,555	92,983	92,983	92,983	92,983	92,983
FIRE SPECIALIST	HR	31,476	31,476	33,052	33,052	33,052	34,702	34,702	34,702	36,437	36,437	36,437	36,437	36,437
14025	MO	7,229	7,229	7,591	7,591	7,591	7,970	7,970	7,970	8,368	8,368	8,368	8,368	8,368
F06	YR	86,747	86,747	91,090	91,090	91,090	95,639	95,639	95,639	100,421	100,421	100,421	100,421	100,421
FIRE LIEUTENANT	HR	33,994	33,994	35,696	35,696	35,696	37,478	37,478	37,478	39,352	39,352	39,352	39,352	39,352
14020	MO	7,807	7,807	8,198	8,198	8,198	8,608	8,608	8,608	9,038	9,038	9,038	9,038	9,038
F08	YR	93,686	93,686	98,377	98,377	98,377	103,290	103,290	103,290	108,455	108,455	108,455	108,455	108,455
FIRE CAPTAIN	HR	36,713	36,713	38,551	38,551	38,551	40,477	40,477	40,477	42,501	42,501	42,501	42,501	42,501
13995	MO	8,432	8,432	8,854	8,854	8,854	9,296	9,296	9,296	9,761	9,761	9,761	9,761	9,761
F09	YR	101,181	101,181	106,248	106,248	106,248	111,554	111,554	111,554	117,131	117,131	117,131	117,131	117,131
FIRE BATTALION CHIEF	HR	40,017	40,017	42,021	42,021	42,021	44,120	44,120	44,120	46,326	46,326	46,326	46,326	46,326
13985	MO	9,191	9,191	9,651	9,651	9,651	10,133	10,133	10,133	10,639	10,639	10,639	10,639	10,639
F10	YR	110,287	110,287	115,810	115,810	115,810	121,594	121,594	121,594	127,673	127,673	127,673	127,673	127,673
FIRE DIVISION CHIEF	HR	43,219	43,219	45,383	45,383	45,383	47,649	47,649	47,649	50,032	50,032	50,032	50,032	50,032
14015	MO	9,926	9,926	10,423	10,423	10,423	10,943	10,943	10,943	11,491	11,491	11,491	11,491	11,491
F11	YR	119,111	119,111	125,075	125,075	125,075	131,321	131,321	131,321	137,887	137,887	137,887	137,887	137,887
Rank Differentials: All rank differentials are 8% except Captain to Battalion Chief is 9% and Division Chief to Assistant chief is at least 12.8%														
Step Structure: 5% step increase at years 6, 9, 12, 15, 18, & 21 years and 9.15% increase at 3 years														
Notes: Month & Annual Pay Rates are approximations due to statistical rounding.														
Year 4: 2.00% effective the first pay period FY 2020-21														

COA0655



# **APPENDIX A-5 PAY SCALES FY 2021-22**

40 Hour Week														
GRADE PAYSTEP YEAR	A 10 BASE	B 20 1	C 30 2	D 40 3	E 50 4	F 60 5	G 70 6	H 80 7	I 90 8	J 100 9	K 110 10	L 120 11	M 130 12	
FIREFIGHTER	HR	26,567	28,872	31,328	34,195	34,195	34,195	35,903	35,903	35,903	37,699	37,699	39,581	
14050	MO	4,605	5,004	5,430	5,927	5,927	5,927	6,223	6,223	6,223	6,534	6,534	6,861	
F02	YR	55,259	60,053	65,162	71,125	71,125	71,125	74,678	74,678	74,678	78,414	78,414	82,329	
FIRE SPECIALIST	HR			33,834	36,930	36,930	36,930	38,775	38,775	38,775	40,715	40,715	42,748	
14025	MO			5,865	6,401	6,401	6,401	6,721	6,721	6,721	7,057	7,057	7,410	
F06	YR			70,375	76,815	76,815	76,815	80,653	80,653	80,653	84,687	84,687	88,915	
FIRE LIEUTENANT	HR					39,885	39,885	41,877	41,877	41,877	43,972	43,972	46,168	
14020	MO					6,913	6,913	7,259	7,259	7,259	7,622	7,622	8,002	
F08	YR					82,960	82,960	87,105	87,105	87,105	91,462	91,462	96,028	
FIRE CAPTAIN	HR							45,228	45,228	45,228	47,490	47,490	49,861	
13995	MO							7,839	7,839	7,839	8,232	8,232	8,643	
F09	YR							94,073	94,073	94,073	98,778	98,778	103,711	
FIRE BATTALION CHIEF	HR									49,298	51,764	51,764	54,348	
13985	MO									8,545	8,972	8,972	9,420	
F10	YR									102,540	107,669	107,669	113,045	
FIRE DIVISION CHIEF	HR									53,242	55,905	55,905	58,696	
14015	MO									9,229	9,690	9,690	10,174	
F11	YR									110,743	116,282	116,282	122,088	
GRADE PAYSTEP YEAR	N 140 13	O 150 14	P 160 15	Q 170 16	R 180 17	S 190 18	T 200 19	U 210 20	V 220 21	W 230 22	X 240 23	Y 250 24	Z 260 25	
FIREFIGHTER	HR	39,581	39,581	41,563	41,563	41,563	43,639	43,639	43,639	45,821	45,821	45,821	45,821	
14050	MO	6,861	6,861	7,204	7,204	7,204	7,564	7,564	7,564	7,942	7,942	7,942	7,942	
F02	YR	82,329	82,329	86,451	86,451	86,451	90,769	90,769	90,769	95,307	95,307	95,307	95,307	
FIRE SPECIALIST	HR	42,748	42,748	44,888	44,888	44,888	47,130	47,130	47,130	49,486	49,486	49,486	49,486	
14025	MO	7,410	7,410	7,781	7,781	7,781	8,169	8,169	8,169	8,578	8,578	8,578	8,578	
F06	YR	88,915	88,915	93,367	93,367	93,367	98,030	98,030	98,030	102,932	102,932	102,932	102,932	
FIRE LIEUTENANT	HR	46,168	46,168	48,479	48,479	48,479	50,900	50,900	50,900	53,445	53,445	53,445	53,445	
14020	MO	8,002	8,002	8,403	8,403	8,403	8,823	8,823	8,823	9,264	9,264	9,264	9,264	
F08	YR	96,028	96,028	100,837	100,837	100,837	105,873	105,873	105,873	111,166	111,166	111,166	111,166	
FIRE CAPTAIN	HR	49,861	49,861	52,358	52,358	52,358	54,972	54,972	54,972	57,721	57,721	57,721	57,721	
13995	MO	8,643	8,643	9,075	9,075	9,075	9,529	9,529	9,529	10,005	10,005	10,005	10,005	
F09	YR	103,711	103,711	108,904	108,904	108,904	114,343	114,343	114,343	120,060	120,060	120,060	120,060	
FIRE BATTALION CHIEF	HR	54,348	54,348	57,070	57,070	57,070	59,920	59,920	59,920	62,916	62,916	62,916	62,916	
13985	MO	9,420	9,420	9,892	9,892	9,892	10,386	10,386	10,386	10,905	10,905	10,905	10,905	
F10	YR	113,045	113,045	118,705	118,705	118,705	124,633	124,633	124,633	130,865	130,865	130,865	130,865	
FIRE DIVISION CHIEF	HR	58,696	58,696	61,635	61,635	61,635	64,713	64,713	64,713	67,949	67,949	67,949	67,949	
14015	MO	10,174	10,174	10,683	10,683	10,683	11,217	11,217	11,217	11,778	11,778	11,778	11,778	
F11	YR	122,088	122,088	128,202	128,202	128,202	134,604	134,604	134,604	141,334	141,334	141,334	141,334	
Rank Differentials: All rank differentials are 8% except Captain to Battalion Chief is 9% and Division Chief to Assistant chief is at least 12.8%														
Step Structure: 5% step increase at years 6, 9, 12, 15, 18, & 21 years and 9.15% increase at 3 years														
Notes: Month & Annual Pay Rates are approximations due to statistical rounding.														
Year 5: 2.50% effective the first pay period FY 2021-22														

# **APPENDIX A-5 PAY SCALES FY 2021-22**

53 Hour Week														
	GRADE PAYSTEP YEAR	A 10 BASE	B 20 1	C 30 2	D 40 3	E 50 4	F 60 5	G 70 6	H 80 7	I 90 8	J 100 9	K 110 10	L 120 11	M 130 12
FIREFIGHTER	HR	20,050	21,790	23,644	25,807	25,807	25,807	27,097	27,097	27,097	28,452	28,452	28,452	29,873
14050	MO	4,605	5,004	5,430	5,927	5,927	5,927	6,223	6,223	6,223	6,534	6,534	6,534	6,861
F02	YR	55,259	60,053	65,162	71,125	71,125	71,125	74,678	74,678	74,678	78,414	78,414	78,414	82,329
FIRE SPECIALIST	HR			25,535	27,872	27,872	27,872	29,264	29,264	29,264	30,728	30,728	30,728	32,262
14025	MO			5,865	6,401	6,401	6,401	6,721	6,721	6,721	7,057	7,057	7,057	7,410
F06	YR			70,375	76,815	76,815	76,815	80,653	80,653	80,653	84,687	84,687	84,687	88,915
FIRE LIEUTENANT	HR					30,102	30,102	31,606	31,606	31,606	33,186	33,186	33,186	34,843
14020	MO					6,913	6,913	7,259	7,259	7,259	7,622	7,622	7,622	8,002
F08	YR					82,960	82,960	87,105	87,105	87,105	91,462	91,462	91,462	96,028
FIRE CAPTAIN	HR							34,134	34,134	34,134	35,841	35,841	35,841	37,631
13995	MO							7,839	7,839	7,839	8,232	8,232	8,232	8,643
F09	YR							94,073	94,073	94,073	98,778	98,778	98,778	103,711
FIRE BATTALION CHIEF	HR									37,206	39,067	39,067	39,067	41,018
13985	MO									8,545	8,972	8,972	8,972	9,420
F10	YR									102,540	107,669	107,669	107,669	113,045
FIRE DIVISION CHIEF	HR									40,183	42,192	42,192	42,192	44,299
14015	MO									9,229	9,690	9,690	9,690	10,174
F11	YR									110,743	116,282	116,282	116,282	122,088
	GRADE PAYSTEP YEAR	N 140 13	O 150 14	P 160 15	Q 170 16	R 180 17	S 190 18	T 200 19	U 210 20	V 220 21	W 230 22	X 240 23	Y 250 24	Z 260 25
FIREFIGHTER	HR	29,873	29,873	31,368	31,368	31,368	32,935	32,935	32,935	34,582	34,582	34,582	34,582	34,582
14050	MO	6,861	6,861	7,204	7,204	7,204	7,564	7,564	7,564	7,942	7,942	7,942	7,942	7,942
F02	YR	82,329	82,329	86,451	86,451	86,451	90,769	90,769	90,769	95,307	95,307	95,307	95,307	95,307
FIRE SPECIALIST	HR	32,262	32,262	33,878	33,878	33,878	35,570	35,570	35,570	37,348	37,348	37,348	37,348	37,348
14025	MO	7,410	7,410	7,781	7,781	7,781	8,169	8,169	8,169	8,578	8,578	8,578	8,578	8,578
F06	YR	88,915	88,915	93,367	93,367	93,367	98,030	98,030	98,030	102,932	102,932	102,932	102,932	102,932
FIRE LIEUTENANT	HR	34,843	34,843	36,588	36,588	36,588	38,415	38,415	38,415	40,336	40,336	40,336	40,336	40,336
14020	MO	8,002	8,002	8,403	8,403	8,403	8,823	8,823	8,823	9,264	9,264	9,264	9,264	9,264
F08	YR	96,028	96,028	100,837	100,837	100,837	105,873	105,873	105,873	111,166	111,166	111,166	111,166	111,166
FIRE CAPTAIN	HR	37,631	37,631	39,515	39,515	39,515	41,489	41,489	41,489	43,563	43,563	43,563	43,563	43,563
13995	MO	8,643	8,643	9,075	9,075	9,075	9,529	9,529	9,529	10,005	10,005	10,005	10,005	10,005
F09	YR	103,711	103,711	108,904	108,904	108,904	114,343	114,343	114,343	120,060	120,060	120,060	120,060	120,060
FIRE BATTALION CHIEF	HR	41,018	41,018	43,072	43,072	43,072	45,223	45,223	45,223	47,484	47,484	47,484	47,484	47,484
13985	MO	9,420	9,420	9,892	9,892	9,892	10,386	10,386	10,386	10,905	10,905	10,905	10,905	10,905
F10	YR	113,045	113,045	118,705	118,705	118,705	124,633	124,633	124,633	130,865	130,865	130,865	130,865	130,865
FIRE DIVISION CHIEF	HR	44,299	44,299	46,517	46,517	46,517	48,840	48,840	48,840	51,282	51,282	51,282	51,282	51,282
14015	MO	10,174	10,174	10,683	10,683	10,683	11,217	11,217	11,217	11,778	11,778	11,778	11,778	11,778
F11	YR	122,088	122,088	128,202	128,202	128,202	134,604	134,604	134,604	141,334	141,334	141,334	141,334	141,334
Rank Differentials: All rank differentials are 8% except Captain to Battalion Chief is 9% and Division Chief to Assistant chief is at least 12.8%														
Step Structure: 5% step increase at years 6, 9, 12, 15, 18, & 21 years and 9.15% increase at 3 years														
Notes: Month & Annual Pay Rates are approximations due to statistical rounding.														
Year 5: 2.50% effective the first pay period FY 2021-22														

COA0657



**APPENDIX B**  
**PROMOTIONAL EXAMINATION SCHEDULE**

- (a) The Specialist examination shall be given during June of 2019, and each successive June in odd numbered years. Initial source materials shall be identified and timely posted, as per Chapter 143, in March 2019, and in March of each successive odd numbered year, together with all other test information required under Chapter 143 to be in the posted notice for promotional examinations.
- (b) The Lieutenant examination shall be given during June of 2019, and each successive June in odd numbered years. Initial source materials shall be identified and timely posted, as per Chapter 143, in March 2019, and in March of each successive odd numbered year, together with all other test information required under Chapter 143 to be in the posted notice for promotional examinations.
- (c) The Captain examination shall be given during September of 2019, and each successive September in odd numbered years. Initial source materials shall be identified and timely posted, as per Chapter 143, in June 2019, and in June of each successive odd numbered year, together with all other test information required under Chapter 143 to be in the posted notice for promotional examinations.
- (d) The Battalion Chief examinations shall be given during November of 2019, and each successive November in odd numbered years. Initial source materials shall be identified and timely posted, as per Chapter 143, in August 2019, and in August of each successive odd numbered year, together with all other test information required under Chapter 143 to be in the posted notice for promotional examinations.

## **APPENDIX C**

### **Entry Standards Requirements**

Entry standards shall be completed before merger commitment, unless management and labor from both Austin Fire and the merging ESD mutually agree to a deviation. The merging ESD must pay AFD for all costs associated with the evaluation of entry standards. Entry standards will include:

- Minimum experience of 2 years firefighting experience in a Travis County ESD as defined by:
  - A Travis County ESD carried their TCFP certification for at least 24 of the past 48 months.
  - Over the last two years, the firefighter must have worked at least 1,500 hours per year for an ESD classified as a full-time firefighter by TCFP
- Certifications including;
  - TCFP Structure Firefighting
  - EMT
  - Credentialed by the Travis County Office of the Medical Director
- AFD Physical Ability:
  - CPAT (AFD)
  - Aerobic capacity assessment measuring 12 METS
- Medical
- Drug Screening
- Psychological evaluation
- Criminal background check
- Salary will be set at a level to be determined but will not exceed the pay of a two year AFD firefighter.
- Similar to traditional cadets, the Executive Team will review all candidates disqualified because of Entry Standards. For ESD mergers, the Executive Team will include two AFA representatives.

### **Training Standards Requirements**

A. The ESD firefighters will be tested on all initial cadet and Probationary Fire Fighter (PFF) skills while in the Academy.

B. There will be a preparation packet delivered to the ESD firefighters while still employed at their ESD:

- a. Time Frame (3.5 – 4 months)
- b. Overview: ESD firefighters will be given a prep pack to start preparing for the merger academy. The packet will consist of: AFD Policies as are usually provided to an AFD Probationary Firefighter; Cadet and Probationary Skills (skill sheets and videos); COG's, 130/190 coursework. An AFD Liaison will be assigned to assist them.

C. The ESD firefighters will successfully complete an ESD merger academy before being hired by the City of Austin.

The merger academy will be a minimum of 14 weeks in length.

All Initial Cadet and PFF skills current within AFD at the time of the beginning of the merger transfer period would be tested, with the rules for retest, etc. in place that are current for traditional AFD cadets at that time.

### **AFD ESD Merger Academy**

a. Overview: During this time the ESD firefighters will be tested on all cadet and probationary skills at Shaw Lane. ESD firefighters will prepare themselves to show up for the AFD Merger Academy prepared to pass the skill tests and AFD policy tests on day one of the Merger Academy. , There will be scenario based training allowing for evaluation of understanding of AFD Policies. Scenarios will include, but will not be limited to,: Wildland, High rise, fire attack, RIC and EMT. The ESD firefighter will graduate AFD Merger Academy upon successful completion of cadet and probationary skills and an AFD Policy test written to the same difficulty as a traditional AFD Probationary Policy Test.

ESD firefighters' Probation evaluations should not test on Policies, as this has been completed during the Merger Academy (and learned during the Prep Packet period). Each module, they should practice and be tested by their Captain on one Fire and one EMT module, chosen by the Captain. The practices and test results would be placed in RMS. They will not test on skills at the end of Probation.

The ESD Fire Fighters' probation period ends one year from their date of hire.

### **Station Assignment Requirements**

- Merging ESD employees shall receive a station assignment upon completion of the AFD Training Academy through the normal AFD station assignment process. The exceptions below shall remain in place until successful completion of their probationary period. During the probationary period:
  - Merging ESD employees shall not receive an assignment to any fire station located within the former ESD's response area.
  - Merging ESD employees shall not be grouped in one geographical area but shall be dispersed throughout the entire department.
  - Merging ESD employees shall not be assigned to the same unit on the same shift.

### **Seniority Requirements**

With regard to civil service seniority:

- Seniority: Maintain system as it exists currently with seniority accrual beginning with Austin Fire Department hire date.
- Promotion Eligibility: Maintain the requirement of two years in classified rank with the Austin Fire Department prior to promotional exam eligibility.
- Tie Breakers: In the event of a tie on a promotional exam
  - The current first tie breaker of “time in rank,” will serve adequately between any two members regardless of merger unless they have the same hire date.
  - All new merged members should have the same AFD hire date and therefore in the instance they are tied with each other a new civil service rule will be required. The following is proposed:
    - After “time in rank” with AFD, the next tie breaker – Highest rank held in original/merged department. (eg. Lt in former dept would win tie breaker over firefighter)
    - The next tie breaker, if needed, would be time in that rank. (eg. Driver with the most time in that rank at former dept would win tie breaker over driver from former dept with less time at that rank.
    - The next tie breaker, if needed, would be date of hire with original/merged department.
    - The next tie breaker, if needed, would be by randomized lottery, which, the subcommittee believes the civil service commission already utilizes.
- Vacation Selection: Maintain system of selecting vacation dates as it currently exists.
- Force Reduction: Maintain current civil service order of release and rehire for any future force reductions.
  - The current CBA gives further protection to members demoted/laid off and placed on reinstatement lists. Those protections should be maintained and should apply equally to merged members.
  - Assuming the following doesn’t disagree with the CBA and assuming all merged members would have the same hire date, then a system would be needed to determine order of release and rehire as between those members. The following is proposed:
    - Hire date with original/merged department would act as seniority to order those members for last in / first out decisions.
      - The lowest seniority date with the original/merged department would be the first to be laid off.
    - The highest seniority date with the original/merged department would be the first to be rehired
    - This date/order would need to be determined at the time of hiring and maintained by the civil service commission



### Automated Certificate of eService

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Status as of 2/6/2023 12:49 PM CST

Associated Case Party: State of Texas

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