

# TCAA NEWS

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## News and Updates

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As another benefit to TCAA members, the 2012 Riley Fletcher Basic Municipal Law Seminar will be live streamed. The seminar will take place on February 24, 2012, at the Texas Municipal Center in Austin, Texas. But you will also be able to view it online if you cannot make it to Austin. To register, go to [www.texascityattorneys.org](http://www.texascityattorneys.org).



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TCAA, in conjunction with the Texas Municipal League, files amicus briefs in support of cities on many different cases. To keep up to date with the status of those briefs, go to [http://www.tml.org/legal\\_pdf/AmicusBrief.pdf](http://www.tml.org/legal_pdf/AmicusBrief.pdf).

### Municipal Attorney Job Openings

For the most recent Texas Municipal League classifieds postings, please go to <http://tml.associationcareernetwork.com/JobSeeker/Jobs.aspx?abbr=TML>.

## Articles

### **Fort Worth Court of Appeals Rules that Owners May Sue to Recover the Sentimental (Intrinsic) Value of a Pet**

*Medlen v. Strickland*, No. 02-11-00105-CV  
Fort Worth Court of Appeals—November 3, 2011  
Christy Drake-Adams  
Legal Counsel, Texas Municipal League

In a November 2011 opinion, the Fort Worth Court of Appeals held that pet owners could be awarded damages based on the sentimental value of a pet. *Medlen v. Strickland*, No. 02-11-00105-CV, 2011 WL 5247375 (Tex. App.—Fort Worth Nov. 3, 2011) (not desig. for pub.). The decision reverses the ruling of the trial court and changes, what most thought was, a well-settled area of law.

In this case, a City of Fort Worth animal control employee (Strickland) mistakenly euthanized a dog. The owners of the dog sued Strickland, alleging that her negligence proximately caused the dog's death. Because the dog had little to no market value, the owners sued for the "sentimental or intrinsic value" of the dog. The trial judge dismissed the suit and the dog owners appealed.

The only issue on appeal was whether a party can recover sentimental or intrinsic damages for the loss of a dog. The Fort Worth Court of Appeals held that an owner may be awarded damages based on the sentimental value of lost personal property such as a dog, leaving the intermediate appellate courts split on the issue. Compare *id.*, e.g., with *Petco Animal Supplies Inc. v. Schuster*, 144 S.W.3d 554 (Tex. App.—Austin 2004, no pet.) (reversing the award of damages for the intrinsic value of a dog).

Strickland's legal counsel filed a motion for reconsideration en banc, which was denied on December 1, 2011. It is our understanding that Strickland will file a petition for review with the Texas Supreme Court in mid-January. If this issue is not taken up on appeal, it appears likely Strickland will seek to have the case dismissed by the trial court on grounds of governmental immunity. *Medlen v. Strickland*, No. 02-11-00105-CV, 2011 WL 5247375 at \*5 (Tex. App.—Fort Worth Nov. 3, 2011) (not desig. for pub.) (explaining that Strickland raised a cross-point asking that the case be remanded, if reversed, so that she could file a motion to dismiss on grounds of governmental immunity).

### **THE ECONOMIC LOSS RULE AFTER *SHARYLAND WATER SUPPLY CORPORATION v. CITY OF ALTON***

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In October 2011, the Texas Supreme Court issued its opinion in the *Sharyland Water Supply Corporation v. City of Alton* matter. *Sharyland Water Supply Corp. v. City of Alton, Carter & Burgess, Inc., Cris Equipment Company, Inc., and Turner, Collie & Braden, Inc.*, 2011 LEXIS 805 (Tex. 2011). The impact of that decision for cities with respect to governmental immunity was addressed in the November 2011 edition of the TCAA newsletter. While the Supreme Court affirmed the application of section 271.153 of the local government code as a limited waiver of immunity for contract actions, the opinion has far greater impact concerning the economic loss rule in Texas. This article will address that topic. TEX. LOC. GOV'T CODE § 271.153.

Alton had an existing, potable water supply system that it originally constructed in the 1980s and had conveyed that system to Sharyland under an agreement that Sharyland would maintain the system and provide water for Alton's residents. In 1994, Alton contracted with Carter & Burgess, Inc.; Turner, Collie & Braden, Inc.; and Cris Equipment Company, Inc. (collectively "contractors") to design and construct a sanitary sewer system. The sewer system was constructed in a manner that the sewer main ran parallel to the water main and sewer stub-out crossed the water main. The proximity and intersection of the systems posed a threat of contamination of the potable water supply. *Sharyland*, 2011 LEXIS 805 at \*3.

In the underlying litigation, Sharyland sued both the City of Alton and its contractors for damages associated with the need to protect or relocate Sharyland's potable water to prevent contamination from the sewer lines. After trial, the jury found that, between the contractors, Carter & Burgess was liable for 20 percent, Cris Equipment Co. was liable for 40 percent, and Turner, Collie, & Braden was liable for 40 percent of Sharyland's damages. The jury assessed damages at \$1,139,000 and attorney's fees of \$510,221.68. The trial court entered judgment in favor of Sharyland against Alton and the contractors. *City of Alton, Carter & Burgess, Inc., Cris Equipment Company, Inc., and Turner, Collie & Braden, Inc. v. Sharyland Water Supply Corp.*, 277 S.W.3d 132, 141-2 (Tex. App.—Austin 2009, overruled by *Sharyland Water Supply Corp. v. City of Alton, Carter & Burgess, Inc., Cris Equipment Company, Inc., and Turner, Collie & Braden, Inc.*, 2011 LEXIS 805 (Tex. 2011)).

In the court of appeals, the contractors successfully argued that the economic loss rule barred Sharyland's negligence claim because Sharyland claimed economic damages but failed to claim and prove property damages. *Id.* at 155. The court of appeals agreed and rendered a take-nothing judgment as to the contractors. *Id.* at 158.

Prior to the Supreme Court's decision, the economic loss rule had become a sizable shield against tort claims when parties had entered into a contract that was the subject upon which the tort claims were based. For example, in this case, because the contractors had contractual agreements with Alton for work on the sewage system, the economic loss rule prevented tort claims related to the contractors' work on the system. This rule held true for any entity, even those not in privity with the contractual actor who caused damages. Also, prior to the Supreme's Court decision, the only acknowledged exceptions to the application of the economic loss rule were when the damages sought were the result of property damage to property that was not the subject of the contract or personal injury. *Id.* at 152 (citing *Thomson v. Espey Huston & Assocs.*, 899 S.W.2d 415, 421 (Tex. App.—Austin 1995, no writ)).

At trial, Sharyland presented evidence that its damages were the costs associated with encasing its water supply lines or relocating them to prevent possible contamination. The evidence did not demonstrate that Sharyland had suffered property damage as a result of the contractors' actions. The court of appeals, applying then existing precedent, held that absent property damage, recovery in tort was barred by the economic loss rule. *Alton v. Sharyland*, 277 S.W.3d at 155.

The Supreme Court examined the history and development of the economic loss rule and determined that the economic loss rule had become misinterpreted and overused as a shield from liability when actors injured others in the market place. In making this determination, the Supreme Court stated:

Merely because the sewer was the subject of a contract does not mean that a contractual stranger is necessarily barred from suing a contracting party for breach of an independent duty. If that were the case, a party could avoid tort liability to the world simply by entering into a contract with one party. The economic loss does not swallow all claims between contractual and commercial strangers.

*Sharyland v. Alton*, 2011 Tex. LEXIS at \*30-\*31. In its examination, the court noted that there is not a single economic loss rule. *Id.* at \*16. The economic loss rule originally applied to products liability cases and prevented recovery in tort where the damages claimed were to the product itself. *Id.* at \*17. Notably, the court never stated that economic losses were not recoverable in those situations. *Id.* at \*19. Instead, the court required recovery of economic losses to the product itself through the UCC's implied warranty. *Id.* If the products failure caused damage to other property or personal injury, the manufacturer could be held liable in tort for those damages not covered by the UCC's implied warranty. *Id.* It was under this line of precedent that the property damage and personal injury exceptions to the economic loss rule developed.

From the products liability application, the Supreme Court had the opportunity to extend the economic loss rule to contractual actions. In a home construction case, the contractor had performed negligent construction, thereby causing damage to the homeowner. *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617 (Tex 1986). In examining the difference between contract and tort duties that arise under a contractual relationship, the court held that the homeowner's injuries and disappointed expectations, even though caused by negligent performance, could only be characterized as a breach of contract that could not support exemplary damages (or non-contractual economic losses). *Id.* at 618.

After explaining the two applications of the economic loss rule, the *Sharyland* court stated:

Thus, we have applied the economic loss rule only in cases involving defective products or failure to perform a contract. In both of those situations, we held that the parties' economic losses were more appropriately addressed through statutory warranty actions or common law breach of contract suits than tort claims. Although we applied this rule even to parties not in privity (*e.g.* a remote manufacturer and a consumer), we have never held that it precludes recovery completely between contractual strangers in a case not involving a defective product—as the court of appeals did here.

*Sharyland v. Alton*, 2011 Tex. LEXIS at \*25. Prior to that statement, Texas courts had applied the economic loss rule to prevent recovery in tort against all parties where a contract existed that covered the work complained of that resulted in a loss to the claimant. *Alton v. Sharyland*, 277 S.W.3d at 152-53. Essentially, before *Sharyland*, the rule had become that a party could never recover economic damages for a tort claim when a contract existed. The court rejected that rule and scaled back its application considerably with this decision.

The economic loss rule for tort claims involving contractual relationships now allows for the recovery of economic losses to parties not in privity of contract through negligence claims where the contracting party causes damages unrelated to its contractual performance. *Sharyland v. Alton*, 2011 Tex. LEXIS at \*31-\*33. The economic loss doctrine no longer serves as a complete barrier to recovery of economic damages.

## **Cities Need to Review Personnel Grievance Policies to Ensure Protection under Whistleblower Act**

*Leyva v. City of Crystal City*, 04-11-00113-CV  
San Antonio Court of Appeals, October 12, 2011

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Leyva was an employee of the City of Crystal City who was responsible for locking the city's vault every night. The morning after the city's May election, the vault, which contained the ballot boxes from the election, was found opened. Leyva was reprimanded and suspended for this, even though she claimed that she had locked it and someone else opened it. Leyva made a police report to the police chief that she felt that someone else had opened the vault in order to tamper with the ballot boxes. Leyva's attorney then sent a letter to the city arguing that the police report was a good faith allegation of law violation that protected her from retaliation under the Texas Whistleblower Act. Three weeks after returning from her suspension, Leyva was terminated for insubordination. Leyva did not file a written grievance with the city regarding her termination. Leyva did sue the city, arguing that the city violated the Texas Whistleblower Act by terminating her after she had filed a police report regarding alleged illegal activity at the city. The city responded to the lawsuit by arguing that Leyva had failed to exhaust her administrative remedies, namely to file a grievance as required by the city's personnel policies. Leyva argued that her letter from her attorney was her grievance, even though it was filed before she was terminated, and that the grievance policy only applied to current employees, and she had been terminated.

The Texas Whistleblower Act provides that, "[a] state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." TEX. GOV'T CODE § 554.002(a). Before an employee can file suit under the Whistleblower Act, the employee must show that he or she "initiate[d] action under the grievance or appeal procedures" of the employer. *Id.* § 554.006(a). This requirement gives the employer "the opportunity to correct its errors by resolving disputes

being subjected to the expense and effort of litigation.” *City of San Antonio v. Marin*, 19 S.W.3d 438, 441 (Tex. App.—San Antonio 2000, no pet.), disapproved on other grounds by 159 S.W.3d 631 (Tex. 2005).

The grievance procedure for the City of Crystal City states that: “Grievances can be appealed through the immediate supervisor to the City Manager whose decision is final.” The court held that the use of the term “immediate supervisor” could be interpreted to mean that only current employees, with “immediate supervisors”, could initiate a grievance. No other policy reviewed by the court clearly allowed a grievance by a terminated or former employee. The court stated that:

The plain language of the City’s Personnel Policy, read in its entirety, does not provide a clear grievance procedure for an employee to follow after the employee has been terminated or dismissed from employment.

When reviewing this same issue, the Austin Court of Appeals in *Curbo v. State, Office of the Governor*, held that the state employer’s grievance procedure was unclear and subject to two or more reasonable Interpretations because it continuously referred to “your section director” and never mentioned “terminated employees.” *Curbo v. State, Office of the Governor*, 998 S.W.2d 337, 341, 343 (Tex. App.—Austin 1999, no pet.), disapproved of on other grounds by *Tex. Dep’t Parks & Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004). According to the court in this case, Crystal City’s grievance procedure makes no reference to or provision for former or terminated employees, and even though the procedure did not preclude use by a terminated employee, an ambiguous interpretation means that the employee did not have to use the procedure in order to meet the statutory requirements of the Whistleblower Act.

This opinion should be a lesson to all cities in the writing and reviewing of their personnel grievance policies. Terminated and former employees should be specifically addressed to ensure that each city employer is given a chance to review a grievance before a court case is brought against a city. Not only could this be an issue under the Whistleblower Act, but this same reasoning could also be extended to other areas of employment law where initiation or exhaustion of administrative remedies is required before a civil case is brought against an employer. Thus, all cities should review their current grievance policies to ensure that the city is protected; it will not lead to complete protection from claims, but will give a city another chance to fix a potential employment problem.

## Recent Texas Cases of Interest to Cities

**Utilities: *Atmos Energy Corporation v. Cities of Allen*, No. 10-0375 (Tex. November 18, 2011).** In 2003, the Texas Legislature amended the Gas Utility Regulatory Act (GURA) to allow gas utilities (Utilities) an opportunity to recover capital investments in Texas’ gas pipeline infrastructure made during the interim period between rate cases. This legislation is referred to as the Gas Reliability Infrastructure Program (GRIP) statute. The GRIP statute permits a gas utility to file a new tariff adjusting its base rates to recover the costs of new capital investment made in the preceding calendar year, without the necessity of filing a rate case. Only a utility that has had a rate case within the preceding two years may utilize the GRIP statute. TEX. UTIL. CODE § 104.301(a). (The adjustment is based upon the utility’s investment subsequent to that recent rate case, the return on investment, depreciation and federal income tax factors established in the rate case, and the ad valorem and revenue-related taxes in effect at the time of the adjustment.)

The statute is supposed to create an incentive for investment in Texas’ gas pipeline infrastructure to meet continuing growth in the state and to enhance safety by replacing aging facilities. If a subsequent contested rate

proceeding determines that the prior interim rate adjustments are disallowed, those amounts may be recovered in the subsequent contested rate case.

To give effect to the administrative rate change process envisioned by the GRIP statute, the Texas Railroad Commission (Commission) promulgated Rule 7.7101, titled “Interim Rate Adjustments” and known as the “GRIP rule.” 16 TEX. ADMIN. CODE § 7.7101. The GRIP rule lists the requirements for processing a utility’s application to amend its tariff or rate schedule under the GRIP statute. *Id.*

When several Utilities filed interim rate adjustments under GRIP, fifty-one cities (Cities) denied those filings for non-ministerial reasons. The dispute before the Texas Supreme Court concerns the appellate jurisdiction of the Commission to review the Cities’ decisions on the Utilities’ interim rate adjustments and the breadth of that jurisdiction.

A city has original jurisdiction over a rate filing if the utility’s customers are within municipal boundaries, or the Commission has original jurisdiction over the filing if the utility’s customers are outside municipal bounda-

ries. After passage of the GRIP statute, Atmos Energy Corporation (Atmos) filed interim rate adjustments, or GRIP filings, with the Commission and several cities to charge adjusted rates. The Commission approved Atmos' GRIP filings, but numerous cities denied Atmos' filings. (The Cities found the proposed rate increases to be unjust and unreasonable.)

Atmos appealed the Cities' denials to the Commission, which exercised appellate authority under section 102.001(b). The Cities then sought to intervene in the appeals to the Commission and to require the Commission to hold contested case proceedings in the appeals. The Commission denied their interventions and requests for evidentiary hearings on the ground that neither the GRIP statute nor the GRIP rule authorizes contested case proceedings in connection with GRIP filings.

Fifty-one Texas cities then pursued a declaratory judgment action in district court against the Commission, challenging the validity of Commission Rule 7.7101, the GRIP rule. The Cities argued that the GRIP rule was void because it does not provide for an adjudicatory hearing in a utility's appeal of a city's denial of the utility's GRIP filing. The Cities argued that the Commission created a rule that allows the Commission to issue a final order approving interim rate adjustments without providing the city an opportunity to respond and present evidence, exceeding the statutory authority delegated to it by the GRIP statute. Atmos, CenterPoint Energy Resources Corporation, and Texas Gas Service Company intervened in support of the validity of the Commission's rule.

The trial court issued a final judgment denying the Cities' request for declaratory relief, but issued findings of fact and conclusions of law stating that subsections 7.7101(g)(2)(B) and (g)(2)(C) of the Commission's GRIP rule were void. The trial court held that the legislature did not intend to authorize cities to conduct a substantive review of GRIP filings, only a "ministerial review of the compliance with basic requirements." However, the trial court also held that a utility does not have the authority to appeal an improper denial to the Commission because the legislature did not provide an appellate mechanism in the GRIP statute (section 104.301(a)), and the Commission does not have the authority to apply its Rule 7.7101 to the action of a city.

Based on its stated deference to the district court's conclusions of law, the Commission began to decline jurisdiction over appeals brought by the utilities after cities denied their GRIP filings. The court of appeals affirmed the judgment of the trial court, holding that a ministerial review for compliance "is all that is required." Additionally, the court of appeals held that appellate review by the Commission is "not available when a municipality denies a GRIP filing after con-

ducting. a ministerial review for compliance with the statute" because there is "no indication that a municipality's denial of a GRIP filing for failure to comply with the statutory requirements is considered 'an order or ordinance of a municipality' as contemplated by section 102.001."

Atmos and the gas company intervenors appealed to the Texas Supreme Court, which held that the view that the legislature had withheld appellate jurisdiction in this case from the Commission could frustrate GRIP's purpose. The court cites legislative testimony to conclude that the legislature designed GRIP to incentivize gas utilities to expand infrastructure and empowered them to file interim rate adjustments in between rate cases. Thus, the Cities' position is rebutted by the language of section 102.001(b) and is inconsistent with the legislature's objective of expediting recovery of such investments as a means of encouraging infrastructure investment. The Supreme Court reversed the court of appeals on this point, concluding that the Commission has appellate jurisdiction over interim rate adjustments under section 102.001(b).

The second issue presented to the Supreme Court is the breadth of the Commission's appellate jurisdiction under section 102.001(b). The Commission and the utilities argue that GRIP does not provide for evidentiary hearings, and that a substantive review of the interim rate adjustment is reserved instead for the next rate case.

The Supreme Court concluded that it would invade the legislature's province if we were to take the Cities' invitation to create an evidentiary hearing supported by neither the text nor the purpose of the GRIP statute. According to the Court, the legislature "implemented protections for the ratepayers when a utility makes a GRIP filing. A utility may not avail itself of the interim rate adjustment unless that utility brought a rate case pursuant to Chapter 104, Subchapter C, within the two years prior to its GRIP filing. TEX. UTIL. CODE § 104.301(a)." Further, the Court notes that "a gas utility seeking to implement an interim rate adjustment must electronically file with the Commission an annual earnings monitoring report as part of the application describing the investment projects completed and placed in service. *Id.* § 104.301(e). This report includes a statement of the reasons the rates are not unreasonable or in violation of law."

Under GURA, a city retains authority to institute a proceeding, either on its own or at the complaint of a party, to determine if a utility's rates are unreasonable or in violation of the law. *Id.* §§ 104.301(I), 104.151. Therefore, the Court held, a city could file a rate case on its own motion whenever it perceives the need after a GRIP filing. *Id.* § 104.151. "These protections further reinforce our view that the interim GRIP filings are subject only to a ministerial review of the statutory requirements by the Commission."

**Takings:** *City of Cibolo v Koehler, No. 04-11-00209-CV (Tex. App—San Antonio November 23, 2011) (mem. op.)*. Property owners, the Koehlers, sued the city after the city allegedly violated an easement agreement between the parties. The Koehlers argued that the city's violation of the agreement resulted in the agreement being void, and therefore the use the city made of the Koehlers' property was a taking. The city argued that because there was an agreement, the Koehlers' consented to the city's action, and therefore there could be no taking. The city pursued a dismissal in the trial court based on this argument, but the trial court denied the city's plea to the jurisdiction and the city appealed. The court of appeals held that the trial court needed to make the determination of whether the agreement was void or not before a determination of whether the Koehlers consented to the city's actions could be made.

**Attorney's Fees:** *The City of China Grove v Morris, No. 04-10-00763-CV (Tex. App—San Antonio November 23, 2011) (mem. op.)*. The court of appeals held that the trial court was correct in giving Morris attorney's fees against the city because a declaratory judgment action, which allows for attorney's fees, was the appropriate cause of action when trying to determine the validity of a public easement, not a trespass to try title suit as argued by the city.

**Collective Bargaining:** *City of Laredo v. Sarmiento, No. 04-11-00371-CV (Tex. App—San Antonio November 23, 2011) (mem. op.)*. Court of appeals held that the officer did not have to exhaust his administrative remedies before filing suit in his collective bargaining case because the exhaustion of remedies would have caused irreparable injury to his claim.

**Governmental Immunity-Tort:** *City of Houston v. Cooper, No. 14-11-00092-CV (Tex. App—Houston [14<sup>th</sup> Dist.] November 17, 2011) (substitute mem. op. on rehearing)*. The court of appeals held that the plaintiff did not make an irrevocable election under the Tort Claims Act when it sued both the city and an employee in her injury claim because the city consented to suit under the Tort Claims Act. The court relied on the reasoning in *Amadi v. City of Houston*, No. 14-10-01216-CV, 2011 WL 5099184 (Tex. App.—Houston [14<sup>th</sup> Dist.] Oct. 27, 2011), as discussed in last month's TCAA newsletter.

**Governmental Immunity-Tort:** *City of Houston v. Johnson, No. 14-11-00220-CV (Tex. App—Houston [14<sup>th</sup> Dist.] November 17, 2011) (substitute mem. op. on rehearing)*. The court of appeals held that the plaintiff did not make an irrevocable election under the Tort Claims Act when it sued both the city and an employee in her injury claim because the city consented to suit under the Tort Claims Act. The court relied on the reasoning in *Amadi v. City of Houston*, No. 14-10-01216-CV, 2011 WL 5099184 (Tex. App.—Houston [14<sup>th</sup> Dist.] Oct. 27, 2011), as discussed in last month's TCAA newsletter.

**Property Tax:** *City of Clarksville v. Drilltech, Inc., No. 06-11-00054-CV (Tex. App—Texarkana November 15, 2011)*. The court of appeals held that a tax certificate showing the amount of property taxes owed during a sale under Texas Tax Code Section 31.080 foreclosed any future suit for additional taxes owed for the same time frame.

**Governmental Immunity-Tort:** *City of Houston v. San Miguel, No. 01-10-011071-CV (Tex. App.—Houston [1<sup>st</sup> Dist.] November 10, 2011) (mem. op.)*. Under Section 101.106 of the Texas Civil Practices and Remedies Code, the court of appeals held that the plaintiff's claims against the employee were barred because the individual was dismissed from the suit, but that, so long as she complied with the Tort Claims Act, her claims against the city were still allowable.

**Condemnation:** *City of Laredo v. Montano, No 04-10-00401-CV (Tex. App.—San Antonio November 9, 2011) (mem. op.)*. The court of appeals dismissed a landowner's intervenor's brief in a condemnation suit because the landowner did not file a notice of appeal in the suit.

**Governmental Immunity-Tort:** *City of Houston v. McClain, No 01-11-00194-CV (Tex. App.—Houston [1<sup>st</sup> Dist.] December 1, 2011) (mem. op.)*. Under Section 101.106 of the Texas Civil Practices and Remedies Code, the court of appeals held that the plaintiff's claims against the employee were barred because the individual was dismissed from the suit, but that, so long as he complied with the Tort Claims Act, her claims against the city were still allowable.

## Attorney General Opinion of Interest to Cities

*Note: Included opinions are from the period beginning on the 10<sup>th</sup> of the previous month through the 10<sup>th</sup> of the current month.*

**Opinion No. GA-0893 (Civil Service):** The Attorney General concluded that a city that has adopted chapter 143 of the Texas Local Government Code may create and maintain a reserve police force in addition to its regular civil service force.

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