

1992

West Valley Fraternal Order of Police Lodge #4, a  
nonprofit Utah corporation and Jim Crowley v.  
Dennis Nordfelt, West Valley City Chief of Police,  
and West Valley Civil Service Commission : Brief  
of Appellee

Utah Court of Appeals

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Attorneys for Defendants and Appellees.

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Priority Classification 16

On Appeal from the Third Judicial District Court  
of Salt Lake County, State of Utah  
Honorable LESLIE A. LEWIS, District Judge

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**FILED**

SEP 29 1992

**COURT OF APPEALS**

*WEST VALLEY FRATERNAL ORDER OF POLICE LODGE #4, ET AL.,  
V.  
DENNIS NORDFELT, ET AL.*

Appellate No. 920276-CA

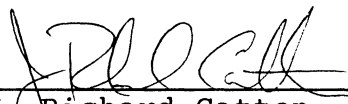
APPELLEES' DETERMINATIVE PROVISIONS

Utah R. Civ. P. 12 . . . . .	See Exhibit C
Utah R. Civ. P. 65B (1988) . . . . .	See Exhibit D
West Valley City Civil Service Policy and Procedures Manual, Rule II-32(2) . . . . .	See Exhibit E
West Valley City Civil Service Policy and Procedures Manual, Rule III-1 . . . . .	See Exhibit E
West Valley City Civil Service Policy and Procedures Manual, Rule III-2 . . . . .	See Exhibit E
West Valley City Civil Service Policy and Procedures Manual, Rule III-6 . . . . .	See Exhibit E
West Valley City Civil Service Policy and Procedures Manual, Rule III-7 . . . . .	See Exhibit E

CERTIFICATE OF SERVICE

I, J. Richard Catten, certify that on the 29th day of September, 1992, I served four (4) copies of the attached Appellees' Determinative Provisions upon Jerrald D. Conder and Peter L. Rognlie, counsel for the Appellants in this matter, by mailing said Provisions to them by first class mail, with sufficient postage prepaid, to the following address:

Jerrald D. Conder, Esq.  
Peter L. Rognlie, Esq.  
Conder & Wangsgard  
4059 South 4000 West  
West Valley City, Utah 84120

  
\_\_\_\_\_  
J. Richard Catten



LIST OF ALL PARTIES TO THE PROCEEDING  
IN THE THIRD JUDICIAL DISTRICT COURT

Pursuant to Rule 24(b) of the Utah Rules of Appellate Procedure, the parties to the action in the Third Judicial District Court captioned, *West Valley City Fraternal Order of Police Lodge #4 and Jim Crowley v. Dennis Nordfelt and West Valley Civil Service Commission*, Civil No. 89-0907667, in Salt Lake County, are as follows:

West Valley City Fraternal Order of Police Lodge #4	Plaintiff/Appellant
Jim Crowley	Plaintiff/Appellant
William Salmon	Motion for Joinder as Plaintiff
David N. Shopay	Motion for Joinder as Plaintiff
Dennis Nordfelt	Defendant/Appellee
West Valley Civil Service Commission	Defendant/Appellee

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## ADDENDA

- Exhibit A: Trial Court Ruling
- Exhibit B: Findings of Fact, Conclusions of Law, Decision and Order
- Exhibit C: Rule 12, Utah Rules of Civil Procedure
- Exhibit D: Rule 65B, Utah Rules of Civil Procedure
- Exhibit E: West Valley City Civil Service Policy and Procedures Manual:  
Rule II-32  
Rule III-1  
Rule III-2  
Rule III-6  
Rule III-7
- Exhibit F: West Valley Police Department Manual, Section 1700.23
- Exhibit G: Affidavits of Cory Ervin (2)
- Exhibit H: Affidavit of J. Stephen Shreeve
- Exhibit I: Affidavit of Larry L. Moody
- Exhibit J: Affidavit of Terry Keefe
- Exhibit K: Affidavit of Dennis J. Nordfelt
- Exhibit L: Affidavit of Craig Gibson
- Exhibit M: Affidavit of Charles Illsley
- Exhibit N: June 6, 1989, Promotion Announcement Memorandum
- Exhibit O: 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3531.9, pp. 617-23

## JURISDICTION

Appellate jurisdiction over this case is rested in the Utah Court of Appeals, pursuant to Utah Code Ann. § 78-2a-3(2).

## STATEMENT OF ISSUES

1. Should the trial court's findings of fact be affirmed because Appellants West Valley Fraternal Order of Police Lodge #4 (FOP) and Jim Crowley failed to marshal the evidence that supports the findings of fact?

- a. Standard of Appellate Review. The trial court's findings of fact are reviewed under the "clearly erroneous" standard. Rule 52(a), Utah Rules of Civil Procedure. A finding is considered "clearly erroneous" when, based upon the entire evidence, the reviewing court has a firm and definite conviction that a mistake was made. *Peterson v. Peterson*, 818 P.2d 1305, 1308 (Utah App. 1991). In order to demonstrate that factual findings are clearly erroneous, Appellants must marshal the evidence supporting the trial court's findings, and then show that those findings are so lacking in support as to be clearly erroneous. *West Valley City v. Majestic Investment Company*, 818 P.2d 1311 (Utah App. 1991). If Appellants fail to marshal all of the evidence in support of the findings of fact, the trial court's findings of fact are conclusive and should not be disturbed. *West*



*Valley City v. Majestic*, at 1313; *Bhatia v. Department of Employment Security*, 188 Utah Adv. Rep. 40, 42 (Utah App. 1992); *Horton v. Gem State Mutual*, 794 P.2d 847 (Utah App. 1990).

2. Is there sufficient evidence in the Record to support the trial court's findings of fact?

a. Standard of Appellate Review. The appellate court views the evidence in a light most favorable to the judgment of the trial court. *Harline v. Campbell*, 728 P.2d 980 (Utah 1986). Findings of fact will not be disturbed by the appellate courts unless there is no substantial evidence in the Record to support the findings. *Bennion v. Hansen*, 699 P.2d 757 (Utah 1985).

3. Did the trial court correctly determine that Appellant FOP did not have standing to bring this action in its representative capacity?

a. Standard of Appellate Review. The trial court's conclusions of law are reviewed independently by the appellate court for correctness. *Eskelsen v. Perry*, 819 P.2d 770, 771 (Utah 1991); *Scharf v. BMG Corporation*, 700 P.2d 1068, 1070 (Utah 1985).

4. Did the trial court correctly decide that Plaintiff Crowley did not have standing to bring this action as an individual?

- a. Standard of Review. The trial court's conclusions of law are reviewed independently by the appellate court for correctness. *Eskelsen*, at 771; *Scharf*, at 1070.

5. Did the trial court correctly decided that Appellants FOP and Crowley did not have standing to bring an action in the nature of an extraordinary writ?

- a. Standard of Review. The trial court's conclusions of law are reviewed independently by the appellate court for correctness. *Eskelsen*, at 771; *Scharf*, at 1070.

6. Can Appellants FOP and Crowley appeal the trial court's denial of William Salmon and David Shopay's Motion for Joinder?

- a. Standard of Review. Parties cannot appeal trial court decisions which are not adverse to the appellant. *Farmers' Loan and Trust Co. v. Waterman*, 106 U.S. 265 (1882); *Utility Contractors Association of New Jersey, Inc. v. Toops*, 507 F.2d 83 (3rd Cir. 1974); *International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local Union No. 523, of Tulsa, Oklahoma, v. Keystone Freight Lines, Inc.*, 123 F.2d 326 (10th Cir. 1941).

7. Did the trial court correctly deny William Salmon and David Shopay's Motion for Joinder?

- a. Standard of Review. The trial court's conclusions of law are reviewed independently by the appellate court for correctness. *Eskelsen*, at 771; *Scharf*, at 1070.

#### STATEMENT OF THE NATURE OF THE CASE

This action was commenced by the FOP, an association, and Jim Crowley, an individual Police Officer, to review the actions and decisions of the West Valley City Civil Service Commission and the West Valley City Police Department with respect to an examination for promotion to Sergeant that occurred in July, 1989. The Complaint, Amended Complaint and Corrected Amended Complaint all sought to have the results of the promotion examination nullified, and the Commission and Police Chief ordered to conduct a new, different promotional process.

#### A. PROCEEDINGS IN THE TRIAL COURT.

The original Complaint was filed on December 21, 1989. During 1990, Plaintiffs conducted discovery by way of depositions, interrogatories and requests for production of documents. During February, 1991, the FOP and Crowley filed a Motion for Summary Judgment, and the Commission and Nordfelt filed a Motion to Dismiss for Lack of Standing. All parties provided the court with affidavits and documents in support of their respective positions. In March, 1991, William Salmon and David Shopay, West Valley City Police Officers, filed a Motion for Joinder to join the action as plaintiffs. On August 23, 1991, the court held a hearing on Plaintiffs' Motion for Summary Judgment and Defendants' Motion to

Dismiss. At that hearing, the trial court denied Plaintiffs' Motion for Summary Judgment, and took Defendants' Motion to Dismiss under advisement. Following the hearing, the parties were allowed to again supplement the Record by way of additional memoranda and affidavits.

**B. NATURE OF PROCEEDING AND BURDEN OF PROOF IN THE TRIAL COURT.**

Plaintiffs' Motion to Dismiss was a facial and factual attack on the standing of the FOP and Crowley to bring this action. The Motion was made pursuant to Rule 12(b)(1), Utah Rules of Civil Procedure (Exhibit C). The Appellants, while acknowledging that Defendant's Motion to Dismiss was made pursuant to Rule 12(b)(1), incorrectly provide the court with the standard and case citations that relate to motions to dismiss brought pursuant to Rule 12(b)(6). (Appellants' Brief, pp. 17-18.) The two types of motions have different standards and are not interchangeable.

The relevant case law clearly distinguishes between motions made under Rule 12(b)(6) and other Rule 12(b) motions. This Court may look to the federal courts for assistance in determining the proper interpretation of the Utah Rules of Civil Procedure. *Winegar v. Slim Olson*, 252 P.2d 205 (Utah 1953). 12(b)(6) motions alone necessitate a ruling on the merits of the claim; the other available motions, including a 12(b)(1) motion such as this, deal with procedural defects. *Mortensen v. First Federal Savings and Loan Association*, 549 F.2d 884 (1977). The *Mortensen* decision explains that there are two types of 12(b)(1) motions. First, there are motions which attack the complaint on its face. The

facial attack offers safeguards similar to those found in a 12(b)(6) motion in that the court must consider the allegations and evidence in a light favorable to the plaintiff. *Mortensen*, at 891.

The second type of 12(b)(1) motion discussed in *Mortensen* is a factual attack on subject matter jurisdiction. The court stated that:

Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction -- its very power to hear the case -- there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

*Mortensen*, at 891 (footnote omitted; emphasis added).

The Fourth Circuit Court of Appeals, in *Adams v. Bain*, 697 F.2d 1213 (1982), came to a similar conclusion regarding a 12(b)(1) motion and stated that, "The burden of proving subject matter jurisdiction on a motion to dismiss is on the plaintiff, the party asserting jurisdiction. The trial court may consider evidence by affidavit, depositions or live testimony without converting the proceeding to one for summary judgment." *Adams*, at 1219.

The United States Supreme Court, in *Warth v. Seldin*, 422 U.S. 490, 45 L.Ed.2d 343, 95 S. Ct. 2197 (1975), a case cited approvingly by Plaintiffs, states that in ruling upon a motion to dismiss for lack of standing:

. . . it is within the trial court's power to allow or to require the plaintiff to supply,

by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.

*Warth*, at 45 L.Ed.2d 356 (emphasis added).

It is the trial court's prerogative to examine all the evidence that had been presented by both parties during the course of the litigation. In addition to the evidence presented in conjunction with Plaintiffs' Motion for Summary Judgment, the court allowed Plaintiffs two opportunities to provide additional evidence specifically on the standing issue. The first opportunity came in response to Defendants' Motion to Dismiss, and the second opportunity came by way of supplemental memoranda and affidavits submitted following oral argument on the standing issue. The trial court concluded that Plaintiffs had presented the court with no evidence which established standing, and based its findings of fact upon the substantial body of evidence submitted by Defendants by way of documents and affidavits relating specific facts based upon personal knowledge.

#### C. DISPOSITION.

The court, the Honorable Judge Leslie A. Lewis presiding, issued a ruling on November 15, 1991, granting Defendants' Motion to Dismiss and denying the Motion for Joinder. Findings of Fact, Conclusions of Law, Decision and Order in this action were entered by the trial court on March 26, 1992. From that trial court Order, the FOP and Crowley now appeal on issues of fact and law.

## SUMMARY OF ARGUMENT

### POINT I

THE TRIAL COURT'S FINDINGS OF FACT SHOULD BE AFFIRMED BECAUSE APPELLANTS' BRIEF FAILS TO MARSHAL THE EVIDENCE THAT SUPPORTS THE FINDINGS OF FACT.

The FOP and Crowley's Brief fails to marshal the evidence that supports the finding of fact of the trial court. Each disputed finding of the trial court is supported by substantial evidence in the Record; however, the FOP and Crowley only provide the court with argument and evidence which support their position. Because of their utter failure to comply with the appellate court's procedural standards, the trial court's findings of fact should be conclusive and should not be disturbed.

### POINT II

THE TRIAL COURT'S FINDINGS OF FACT SHOULD BE AFFIRMED BECAUSE THEY WERE MADE WITH RELIANCE UPON SUBSTANTIAL EVIDENCE BEFORE THE COURT.

The trial court in this case made 16 specific findings of fact. Each of those facts is based upon substantial, competent evidence contained in the Record and presented to the trial court by all parties. The Commission and Nordfelt's argument provides specific examples of evidence, cited to the Record, which support each finding of fact being disputed by Appellants.

### POINT III

PLAINTIFF FOP DOES NOT HAVE STANDING TO BRING THIS SUIT IN ITS REPRESENTATIVE CAPACITY SINCE THERE EXIST OBVIOUS CONFLICTS AMONG ITS MEMBERS.

The Commission and Nordfelt contend that the FOP cannot meet the association standing test set forth by the United States Supreme Court in *Warth v. Seldin*, 422 U.S. 490, 45 L.Ed.2d 343, 95 S. Ct. 2197 (1975); and adopted by the Utah Supreme Court in *Utah Restaurant Association v. Davis County Board of Health*, 709 P.2d 1159 (Utah 1985); and *Society of Professional Journalists v. Bullock*, 743 P.2d 1166 (Utah 1987). The trial court found that the FOP did not have standing, either on the face of the Complaint or after an investigation of the facts of the case. The conflicts within the FOP are numerous and obvious. The FOP has named one of its own members, Nordfelt, as a Defendant. Also, it has deposed its own members as hostile witnesses. And, if the FOP is successful in this action, the result would be a loss of property rights for certain FOP members, who are not parties, who would be demoted from their positions as Sergeant.

### POINT IV

APPELLANT CROWLEY SUFFERED NO INJURY, AND, THEREFORE, DOES NOT HAVE STANDING TO BRING THIS ACTION AS AN INDIVIDUAL.

The trial court correctly found that Crowley has suffered no particularized injury as a result of the actions of the Commission and Nordfelt, and, therefore, did not have standing to bring this suit. Crowley failed to pass the written examination for promotion to Sergeant. Crowley's failure on the written test is fatal to his



standing, since that failure alone precluded him from being promoted to Sergeant. Even if all of Crowley's allegations were true, his failure on the test eliminated him from any possibility of being promoted. Therefore, he could not have been injured by any actions of the Commission or Nordfelt.

#### POINT V

#### **THE TRIAL COURT WAS CORRECT IN APPLYING THE EXTRAORDINARY WRIT STANDING TEST.**

The trial court applied a third standing test to the FOP and Crowley. This test was set forth in the *Society of Journalists* case, and applies to actions for extraordinary writs. In this case, the Complaint filed by the FOP and Crowley may be considered to be an extraordinary writ under Rule 65B, Utah Rules of Civil Procedure, since it is asking the trial court to review and direct the actions of a lower board, the Civil Service Commission, and a public officer, the Police Chief. The trial court correctly found that the FOP could not meet the extraordinary writ standing test, because it did not have standing before the Civil Service Commission due to its obvious conflicts of interest which are discussed under Point III. Also, the ruling of the Civil Service Commission was not adverse to the FOP, and the FOP failed to present its claims to the lower body, the Commission.

Crowley also fails to meet this test, since he lacked standing to proceed before the Commission on the same basis that he lacked standing to proceed before the trial court, as is set forth in Point IV. Also, he did not suffer an injury as a result of the

Commission or Nordfelt's actions, and, therefore, the rulings of the Commission were not adverse to Crowley.

#### POINT VI

APPEAL OF THE TRIAL COURT'S DENIAL OF SALMON  
AND SHOPAY'S MOTION FOR JOINDER IS NOT  
PROPERLY BEFORE THIS COURT, AND SAID MOTION  
WAS PROPERLY DISMISSED BY THE TRIAL COURT.

The FOP and Crowley are clearly not the proper parties to bring an appeal of the denial of Salmon and Shopay's Motion for Joinder. The denial of that Motion did not affect the standing or rights of the FOP or Crowley, and is adverse only to Salmon and Shopay. Salmon and Shopay are not parties to this appeal.

Assuming that the FOP and Crowley can bring an appeal of the denial of Salmon and Shopay's Motion for Joinder, the trial court's denial of that Motion was correct. Once the trial court had determined that the FOP and Crowley did not have standing, the trial court's only course of action was to dismiss the original Complaint. Once that Complaint had been dismissed, the Motion for Joinder became moot. In effect, once the trial court determined that the FOP and Crowley did not have standing, the court had no jurisdiction to grant a Motion for Joinder, since there was no action to join.

Motions to join are permissive, and it was within the sound discretion of the trial court to deny the Motion for Joinder.

#### STATEMENT OF FACTS

1. On June 6, 1989, the West Valley City Police Department issued a memorandum notice announcing a promotional examination for the position of Sergeant in the West Valley City Police Department

(Exhibit N). (R. 006) This notice set forth the qualifications necessary to compete for the position of Sergeant, and also provided information regarding the testing process. More specifically, the notice stated that:

- a. The passing grade for all tests was 75 percent.  
(R. 006, 185)
- b. The applicant must be off probation. (R. 006)  
This meant that the applicant was required to have one or more years of service with West Valley City before qualifying for promotion, since the Civil Service Commission Rules establish the probationary period as one year. (R. 282, 286)
- c. The written examination was to be conducted first, and the top 15 candidates with a passing score on the written examination would be invited to attend a two-day assessment center. (R. 006, 185)

2. Utah Code Ann. § 10-3-1010 and Rule III-1, West Valley City Civil Service Policy and Procedures Manual, provide that promotion shall be made from members of the next lower rank, when practicable (Exhibit E). (R. 284)

3. The rank immediately below Sergeant in the West Valley City Police Department is Police Officer. Within the rank of Police Officer, there are three subdivisions known as "grades" -- Police Officer I ("P.O. I"), Police Officer II ("P.O. II") and Police Officer III ("P.O. III") (Exhibits F, G and J). (R. 109, 277, 279, 283-285)

4. On previous tests for the rank of Sergeant, the Civil Service Commission limited the applicant pool to those individuals with the grades of P.O. II or P.O. III within the rank of Police Officer. (R. 310)

5. On or about June 6, 1989, Defendant Dennis Nordfelt requested, in writing, Civil Service Commission approval to change the qualification criteria to allow P.O. I officers with sufficient seniority to qualify as P.O. II officers to test for the Sergeant position. Nordfelt made this request because there were several P.O. I officers with sufficient experience and time in service to be promoted to P.O. II positions, who had not been promoted due to budgetary constraints. (R. 110, 279-280)

6. Nordfelt's request was forwarded to Guy Kimball, Civil Service Commission Chairman, who then consulted with the other members of the Commission. (R. 123-124) The Commission approved the Police Department's change in the qualification criteria, and P.O. I officers with sufficient experience and time in service to be P.O. II officers, who had not been promoted due to budgetary constraints, were allowed to compete for the position of Sergeant. (R. 110, 123)

7. On July 20, 1989, the written promotional examination was given to those qualified applicants who appeared for testing. (R. 006, 008, 185)

8. Plaintiff Jim Crowley took the written promotional examination and received a score below the passing grade of 75 percent. (R. 185, 338) Crowley did not participate in the

remainder of the promotional process due to his failure to pass the written examination. (R. 185, 338)

9. The top 15 officers with passing grades (above 75 percent) on the written examination participated in a two-day assessment center. (R. 006, 008)

10. Following the examination process, a promotional roster was issued and the top two officers were promoted to the rank of Sergeant. Those two officers were Charles Illsley and Guy Dodge. (R. 181, 186)

11. On July 1, 1991, Officer Craig Gibson was promoted from the promotional roster to the rank of Sergeant. (R. 183)

12. In August, 1991, the Sergeant's promotional roster became invalid due to the fact that it was more than two years old. Utah Code Ann. § 10-3-1009.

13. On August 23, 1989, a group of Police Officers addressed the Civil Service Commission in writing, asking the Commission to "look into" what they perceived to be improprieties in the promotional process. (R. 010)

14. The Civil Service Commission investigated the officers' complaints by making inquiries of Police Department administrative personnel and directing the City Personnel Department to evaluate test data. (R. 013) Following the investigation, the Commission issued a letter responding to the officers' complaints and upholding the validity of the promotional roster. (R. 013)

15. On December 21, 1989, Plaintiffs filed the original Complaint in this action. (R. 002-014) During 1991, Plaintiffs

pursued various means of discovery, including Interrogatories (R. 024, 041) and Requests for Production of Documents (R. 023, 041). Plaintiffs also took depositions from the following individuals (R. 47-48):

- a. Defendant Dennis Nordfelt (R. 61-62), West Valley City Police Chief and member of Plaintiff association, the Fraternal Order of Police (R. 175-176, 186).
- b. J. Stephen Shreeve (R. 59-60), West Valley City Assistant Police Chief and member of Plaintiff association, the Fraternal Order of Police (R. 186, 189). Shreeve was involved in formulating and administering the promotional process. (R. 189)
- c. Larry L Moody (R. 92-93), West Valley City Police Department Lieutenant and member of Plaintiff association, the Fraternal Order of Police (R. 178, 186). Moody was involved in formulating and administering the promotional process. (R. 178)
- d. Guy Dodge (R. 50-51), West Valley City Police Officer promoted to Sergeant as a result of the July, 1989 Sergeant's promotional examination (R. 186), and member of Plaintiff association, the Fraternal Order of Police (R. 186).
- e. Sue (Mooney) Pipkin (R. 55-56), West Valley City Police Department Executive Secretary (R. 135).

- f. Guy Kimball, West Valley City Civil Service Commission Chairman. (R. 63-65)
- g. Don Meyers, West Valley City Civil Service Commissioner. (R. 68-69)
- h. Elaine Powell, West Valley City Civil Service Commissioner. (R. 66-67)
- i. Cory Ervin (R. 52-54), Personnel Generalist in the West Valley City Personnel Office and Secretary to the West Valley City Civil Service Commission (R. 184-185, 281-282).

16. On or about February 15, 1991, Plaintiffs filed Plaintiffs' Motion for Summary Judgment. (R. 94-95)

17. On or about February 19, 1991, Defendants filed Defendants' Motion to Dismiss for Lack of Standing. (R. 162-163)

18. On or about March 28, 1991, West Valley City Police Officers David Shopay and William Salmon filed a Motion for Joinder. (R. 216-217)

19. Following the submission of memoranda, affidavits and documents by the parties, on August 23, 1991, the Court held a hearing on Plaintiffs' Motion for Summary Judgment and Defendants' Motion to Dismiss. (R. 264) At that hearing, the trial court denied Plaintiffs' Motion for Summary Judgment, and took Defendants' Motion to Dismiss under advisement. (R. 313) Both parties were allowed to supplement the record by way of additional memoranda and affidavits. (R. 379) Plaintiffs filed a Supplemental Memorandum in Opposition to the Motion to Dismiss and

additional affidavits. (R. 330-339, 344-358) Defendants filed a reply to Plaintiffs' Supplemental Memorandum. (R. 362-370)

20. On November 15, 1991, the trial court issued its ruling granting Defendants' Motion to Dismiss, denying Defendants' Motion to Strike Plaintiffs' Supplemental Memoranda and denying the Motion for Joinder (Exhibit A). (R. 428-430)

21. On March 26, 1992, the trial court entered its Findings of Fact, Conclusions of Law, Decision and Order in this action (Exhibit B). (R. 438)

### **ARGUMENT**

#### **POINT I**

**THE TRIAL COURT'S FINDINGS OF FACT SHOULD BE AFFIRMED BECAUSE APPELLANTS' BRIEF FAILS TO MARSHAL THE EVIDENCE THAT SUPPORTS THE FINDINGS OF FACT.**

The trial court's findings of fact that support its ruling are reviewed under the "clearly erroneous" standard. Rule 52(a), Utah Rules of Civil Procedure. A finding is considered "clearly erroneous" when, based upon the entire evidence, the reviewing court has a firm and definite conviction that a mistake was made. *Peterson v. Peterson*, 818 P.2d 1305, 1308 (Utah App. 1991). This court has consistently held that in order to demonstrate that factual findings are clearly erroneous, the appellant must marshal all of the evidence supporting the trial court's findings and then show that those findings are so lacking in support as to be clearly erroneous. *West Valley City v. Majestic Investment Company*, 818 P.2d at 1313. The marshaling requirement allows the court to consider the findings of fact from the standpoint of the supporting



evidence, and not from the appellants' view of how the facts should have been found. *Saunders v. Sharp*, 793 P.2d 927 (Utah App. 1990).

While Plaintiffs acknowledge and give lip service to the marshaling requirement (Appellants' Brief, p. 3), their Brief utterly fails to provide this Court with the evidence which supported the trial court's decision. If this Court were forced to decide the issues based solely upon Appellants' Brief, the Court would be entirely unable to determine whether or not there is any evidence to support the trial court's findings and decision. Appellants have consistently emphasized or stated only the evidence which supports their position, and have left it to the Court to determine what evidence provided the basis for the trial court's ruling. Therefore, the trial court's findings of fact should be conclusive and should not be disturbed. *Bhatia v. Department of Employment Security*, 188 Utah Adv. Rep., at 42; *Horton v. Gem State Mutual*, 794 P.2d at 849.

Also, Appellants' Brief fails to present the evidence in the proper light. "Under familiar rules of appellate review, the Court views the evidence in the light most favorable to the judgment of the trial court . . . ." *Harline v. Campbell*, 728 P.2d, at 982; *Bennion v. Hansen*, 699 P.2d, at 759. The Supreme Court in *Harline* also stated, "It is incumbent upon the appellant to marshal all of the evidence in support of the trial court's findings and then to demonstrate that even when viewed in the light most favorable to the factual determination made by the trial court, that the

evidence is insufficient to support its findings." (Footnote omitted.) *Harline*, at 982.

## POINT II

### **THE TRIAL COURT'S FINDINGS OF FACT SHOULD BE AFFIRMED BECAUSE THEY WERE MADE WITH RELIANCE UPON SUBSTANTIAL EVIDENCE BEFORE THE COURT.**

The trial court in this case made numerous specific findings of fact (Exhibit A). (R. 431-433) Each of those facts is based upon evidence presented to the trial court by all parties. Those findings will not be disturbed unless there is no substantial record evidence to support them. *Bennion*, at 759. Notwithstanding their selective recitation of the facts, Appellants' Brief completely fails to carry the burden of demonstrating that the trial court's findings of fact were clearly erroneous.

The trial court made 16 specific findings of fact. (R. 431-433) Plaintiffs specifically attack findings no. 2, 3, 4, 7, 8, 10 and 11. (Appellants' Brief, pp. 21-22, 26, 39.) Each of these findings of fact is supported by the following competent evidence:

#### **A. FINDING OF FACT NO. 2: ONE YEAR OF SERVICE WITH THE WEST VALLEY CITY POLICE DEPARTMENT WAS REQUIRED IN ORDER TO BE ELIGIBLE FOR PROMOTION TO SERGEANT. (R. 432)**

The fact that one year of service with West Valley City was required in order to qualify for promotion to Sergeant is unquestioned, despite Appellants' statement that, "There is no evidence in the record indicating that the probationary period was one year," (Appellants' Brief, p. 22). The June 6, 1989 memorandum which stated the qualifications for promotion clearly states that candidates "must be off probation" (Exhibit N.) (R. 006) The

trial court was presented with competent evidence which indicated that the probationary period for West Valley City Civil Service employees is one year. The Civil Service Rules clearly state, in Rule II-32(2), that, "All Civil Service employees shall serve a one-year probation." (Exhibit E.) (R. 286) Also, Cory Ervin, who worked in the West Valley City Personnel Office and who also served as Civil Service Commission Secretary, swore by Affidavit that, "Based upon my experience as Civil Service Secretary and Personnel Generalist, I have personal knowledge that Police Officers are required to have at least one year of service with the West Valley City Police Department prior to being removed from probation." (Exhibit G.) (R. 282-283) Appellants' Brief presents no evidence to dispute the existence of the one-year probationary period, and instead relies on the totally unsupported allegation that "a requirement that all candidates have one year of service with the Department is not adequate consideration of seniority." (Appellants' Brief, p. 23.)

**B. FINDING OF FACT NO. 3: THE REQUIREMENTS FOR PROMOTION TO SERGEANT REQUIRED THAT APPLICANTS HOLD THE RANK OF POLICE OFFICER WITHIN THE WEST VALLEY CITY POLICE DEPARTMENT. (R. 432)**

**C. FINDING OF FACT NO. 4: WITHIN THE RANK OF POLICE OFFICER, ALL GRADES (P.O. I, P.O. II AND P.O. III) WERE ELIGIBLE FOR PROMOTION TO SERGEANT, WITH NO GRADE PREFERENCE GIVEN TO THE MEMBERS OF ANY ONE GRADE. (R. 432)**

Appellants' Brief does not directly attack the factual basis of these two related findings of fact, but instead argues that, ". . . only officers of the next lower rank, P.O. II, be allowed to compete for the promotion." (Appellants' Brief, p. 24.) While

Nordfelt and the Civil Service Commission readily agree that both Utah Code Ann. § 10-3-1010 and Civil Service Rule III-1 (Exhibit E) provide that promotions should be made from the next lower rank when practicable, there was no evidence presented to the trial court that P.O. II was the next lower rank beneath Sergeant. The evidence presented to the trial court, which Plaintiffs have failed to marshal, fully supports the trial court's finding that the applicants for promotion to Sergeant were required to hold the rank of Police Officer, and that within the rank of Police Officer there existed three grades. The Civil Service Rules clearly differentiate between ranks and grades. Civil Service Rules III-2, III-6 and III-7 define promotions in grade and promotions in rank, and describe the differences between the two (Exhibit E). (R. 284-285) Also, the Affidavit of Terry Keefe (Exhibit J), West Valley City Assistant Police Chief, sets forth the following evidence:

4. I have personal knowledge that in the West Valley City Police Department the rank immediately below Sergeant is the rank of Police Officer.

5. I have personal knowledge that only officers holding the rank of Police Officer were promoted to Sergeant following the 1989 Promotional Examination.

6. I have personal knowledge that the rank structure in the West Valley City Police Department is set forth in the West Valley City Police Manual at Section 1700.23, and that a copy of this rank structure is issued to every officer within the Department.

7. I have personal knowledge that within the rank of Police Officer there are three grades consisting of Police Officer I, Police Officer II and Police Officer III.

8. I have personal knowledge that job duties within the rank of Police Officer are essentially similar, involve no supervisory duties and do not vary based upon an officer's

grade designation as a P.O. I, P.O. II or P.O. III.

(R. 279) Section 1700.23 of the West Valley City Police Department Manual (Exhibit F), which is referred to in ¶ 6 of the Affidavit of Terry Keefe, states:

Rank structure is the hierarchial arrangement of ranks within the Department. The ranks of this Department are listed below in descending order:

Police Chief  
Lieutenant  
Sergeant  
Police Officer

(R. 277) Also, the Affidavit of Cory Ervin, Personnel Generalist and Civil Service Commission Secretary (Exhibit G), states:

9. Based upon my experience as Civil Service Secretary and Personnel Generalist, I have personal knowledge that Police Officer is the rank immediately below Sergeant in the West Valley City Police Department.

10. Based upon my experience as Civil Service Secretary and Personnel Generalist, I have personal knowledge that the rank of Police Officer in the West Valley City Police Department is divided into grades known as Police Officer I, Police Officer II and Police Officer III.

(R. 282-283)

None of this supporting evidence was marshaled by the FOP and Crowley, nor do they present any evidence, other than unsupported allegations, which contradicts the finding of the trial court. Plaintiffs provide absolutely no factual basis for their argument that the finding of fact is wrong because the rank below Sergeant is the rank of P.O. II. Their argument arises from a complete misstatement of the rank structure within the Police Department.

They wrongly point to the grades of P.O. I and P.O. II as "ranks." These are clearly not ranks, but are grades within the rank of Police Officer. As set forth in the Civil Service Rules, grades are easily differentiated from ranks in that grade status is primarily related to salary level, not job duties, and a change from the grade of P.O. I to P.O. II requires no change in job duties or position within the Department (Exhibit E). (R. 284-285) The functions of P.O. I and P.O. II officers are the same, and one is not supervisory or superior to the other. (R. 279) Conversely, changes in rank are characterized by a substantial change in job duties, such as the supervisory responsibilities that differentiate a Sergeant from a Police Officer. (R. 285)

By making this argument that P.O. II is a "rank," the FOP and Crowley have painted themselves into a corner which demonstrates the absurdity of their position. They completely ignore the existence of the P.O. III grade officers. The FOP and Crowley's failure to recognize P.O. III officers places them in a dilemma. If their argument that P.O. II grade officers constitute a "rank" is assumed to be correct, then they have again ignored the facts when they skip over P.O. III's and assert that the "rank" immediately below Sergeant is P.O. II. Under their mistaken version of the ranking structure the rank immediately under Sergeant would be P.O. III. If this were true, then Crowley is arguing that he is ineligible to take the Sergeants promotional examination since he is a P.O. II officer and would not be "from the next lower rank." (R. 337)

The FOP and Crowley surely know that P.O. II is not the "rank" immediately below Sergeant. Appellants are all West Valley City Police Officers who possess the departmental manual and Commission Rules which set forth the rank and grade system. They presented the trial court with no evidence regarding the rank structure in the Police Department. Clearly, this argument is not made in good faith.

**D. FINDING OF FACT NO. 7: PLAINTIFF CROWLEY DID NOT RECEIVE THE MINIMUM REQUIRED PASSING SCORE ON THE WRITTEN EXAMINATION AND, THEREFORE, DID NOT PROCEED FURTHER IN THE PROMOTIONAL PROCESS. (R. 432)**

Crowley admits that the Affidavit of Cory Ervin, Personnel Generalist and Civil Service Commission Secretary, provided evidence which supported this finding of fact (Exhibit G). (Appellants' Brief, p. 37.) Ervin stated in her Affidavit that she was the custodian of all records of the West Valley City Civil Service Commission, and that the Commission records in her possession indicated that the minimum passing score on the written examination was a score of 75 percent. She also indicated that Plaintiff Crowley applied for and took the written examination, but that he did not receive a score of 75 percent or above and, therefore, did not advance to the next phase of the testing process. (R. 185)

Crowley fails, however, to marshal the remaining supporting evidence. For example, he omits his own sworn statement which supports this finding. As Crowley stated in his Second Affidavit, "I failed to pass the written examination by 1 point and was not allowed to proceed to the next level of consideration." (R. 338)

Crowley attempts to demonstrate that this finding of fact is clearly erroneous by directing the Court's attention to the promotional examination announcements, which he asserts are better evidence than Ervin's sworn statement. Based on the two promotional announcement memoranda, Crowley now argues that there was no minimum passing score and that the top 15 scores on the written examination would advance to the assessment center. (Appellants' Brief, p. 37.) This is patently untrue, as can be demonstrated by examining the documents upon which he relies. The June 6, 1989 memorandum announcing the promotional examination for Sergeant clearly and unequivocally states in ¶ 1, line 3, that, "Passing grade for all tests will be set at 75%." (Exhibit N.) (R. 006) Also, on the second page of the June 6 memorandum, under the heading "Assessment Center," appears the following statement: "Only the top 15 candidates (with a passing score) on the written examination will be invited to attend a two-day assessment center." (Emphasis added.) (R. 007) The documents cited by Crowley support the finding of fact.

Crowley produced no evidence or argument before the trial court that the minimum passing score was not 75 percent.

**E. FINDING OF FACT NO. 8: PLAINTIFF CROWLEY DID NOT SUFFER A DISTINCT, PARTICULARIZED AND PALPABLE INJURY RELATED TO THE CONDUCT OF DEFENDANTS. (R. 432)**

This finding of fact is supported by the same evidence which supports the other findings of fact related to Plaintiff Crowley. Crowley believes that, "The trial court's misperception that a minimum passing score existed is the primary reason that finding



no. 8 is erroneous." (Appellants' Brief, p. 38.) As was shown in ¶ D above ("Finding of Fact No. 7"), the trial court's finding that Crowley did not receive the minimum required passing score of 75 percent on the written examination is supported by evidence contained in the Record.

In attacking this finding of fact, Crowley makes the additional argument that he has established evidence of injury by alleging that seniority was not considered in the promotional process. He provided the court with absolutely no evidence to support this bare allegation, and his citations to the Record are simply to where the same allegation is made in the original Complaint, the Amended Complaint and his Affidavit. (Appellants' Brief, p. 38; R. 6-9, 113-118, 339.) While Crowley admits that, "Seniority may be considered in myriad ways" (Appellants' Brief, p. 38), he completely ignores the court's finding of fact and the evidence which supports it, which clearly indicates that one year of service (seniority) with the West Valley City Police Department was required as a threshold qualification for entering the examination process. Crowley has provided this Court with no basis upon which it can find that finding of fact no. 8 is clearly erroneous.

**F. FINDING OF FACT NO. 10: MEMBERS OF PLAINTIFF ASSOCIATION FRATERNAL ORDER OF POLICE LODGE #4 ("FOP") DID NOT SUFFER DISTINCT, PARTICULARIZED AND PALPABLE INJURY RELATED TO THE CONDUCT OF DEFENDANTS. (R. 433)**

Plaintiff FOP attempts to demonstrate that this finding of fact is clearly erroneous by providing the Court with a laundry list of the allegations contained in their Complaint. (Appellants'

Brief, pp. 24-26.) Conclusory allegations not supported by specific facts are not sufficient to meet the standing test requirement of a particularized injury. *York v. Unqualified Washington County Elected Officials*, 714 P.2d 679 (Utah 1986). Despite conducting discovery and having multiple opportunities to present evidence to the trial court, the FOP produced virtually no evidence to support its standing to bring this action. To the contrary, Defendants provided the trial court with evidence upon which it could base its decision that the FOP did not suffer an injury that would provide it with standing in this case.

Much of the evidence, which has been set out previously in support of the other challenged findings of fact, support this finding. For example, the fact that one year of service was required in the testing process provides the Court with a basis for determining that the FOP was not injured through the lack or the use of seniority in the testing process. Also, the evidence clearly established and the trial court found that the rank immediately below Sergeant is the rank of Police Officer. That evidence supports the court's determination that the FOP was not injured when all three grades within the rank of Police Officer were allowed to compete for promotion. Virtually all of the remaining allegations regarding injuries suffered by the FOP relate back to the seniority and rank issues for which they can provide no factual support.

Plaintiff FOP has failed to provide this Court with any evidence upon which it could find trial court's finding of fact no. 10 to be clearly erroneous.

**G. FINDING OF FACT NO. 11: PLAINTIFF FOP DID NOT PRESENT ITS CLAIMS TO THE CIVIL SERVICE COMMISSION PRIOR TO THE COMMENCEMENT OF THIS LAWSUIT. (R. 433)**

As the FOP and Crowley's Brief acknowledges, the Affidavit of Cory Ervin establishes that as custodian of the records of the Civil Service Commission she has no knowledge or record of the Commission receiving any communication from Plaintiff FOP regarding the 1989 Sergeants examination, nor does she have any record or knowledge of the Commission transmitting any information to the FOP regarding the examination, with the exception of information supplied in connection with this lawsuit (Exhibit G). (R. 184-186)

Appellant FOP now makes the strained argument that the August 23, 1989, letter to the Civil Service Commission, which was signed by a group of officers, constituted an appearance by the FOP. This argument is made despite the fact that the letter itself is not on FOP letterhead, nor does the body of the letter contain any representation whatsoever that the officers are acting as the FOP, on behalf of the FOP or are even all members of the FOP. (R. 010) Even Crowley, President of the FOP, simply states the following in his Affidavit:

19. I signed a letter to the Commission objecting to the procedure followed in the Sergeants promotion evaluation process.

(R. 339) The fact that Crowley does not indicate that the letter was signed in his capacity as FOP President, as a FOP member or in

any manner on behalf of the FOP is a clear indication that the August 23, 1989 letter was submitted to the Commission on behalf of the individual officers who signed the letter. This comports with the language of the letter itself, where the officers simply refer to themselves as "we the undersigned officers of West Valley City." (R. 010) Although many or all of the signees of the letter may have been FOP members, that certainly does not make it an action of the FOP as is now being suggested.

Plaintiff FOP makes a sidebar argument that there existed no process by which the FOP could have improprieties in the testing process reviewed by the Civil Service Commission. This argument is obviously absurd, since the 30 officers who signed the August 23, 1989 letter did successfully bring alleged improprieties to the Commission and received a response from the Commission following the Commission's investigation. (R. 10-13) By making this argument, the FOP is in the ludicrous position of simultaneously arguing that no process exists for presenting claims to the Commission, and that they did, in fact, present their claim to the Commission.

The Affidavit of Cory Ervin supplies support for the court's finding of fact, and Plaintiff FOP has provided this Court with no evidence from which it could find that finding of fact no. 11 is clearly erroneous.

### POINT III

PLAINTIFF FOP DOES NOT HAVE STANDING TO BRING THIS SUIT IN ITS REPRESENTATIVE CAPACITY SINCE THERE EXIST OBVIOUS CONFLICTS AMONG ITS MEMBERS.

The test to determine whether or not an association such as Plaintiff FOP has standing to bring an action in its representative capacity is set forth in two Utah cases, *Utah Restaurant Association v. Davis County Board of Health*, 709 P.2d 1159 (Utah 1985), and *Society of Professional Journalists v. Bullock*, 743 P.2d 1166 (Utah 1987). These two decisions follow the association standing test set by the United States Supreme Court in *Warth v. Seldin*, 422 U.S. 490, 45 L.Ed.2d 343, 95 S. Ct. 2197 (1975). The three cases mentioned above set forth a two-prong test for determining when an association can represent its members in court. The first prong of the test is that the individual members of the association must have standing to sue. The second prong of the test is that the nature of the claim and of the relief sought does not require the individual participation of each injured party.

The Utah Supreme Court, in its cases adopting the *Warth* test, provides insight as to what is necessary to meet this standing test. Specifically with respect to the second prong of the test, the relief sought by the association must not require the individual participation of each injured party. The court, in *Society of Professional Journalists*, found that the Society met the second prong of the test, since ". . . the relief it sought would have benefitted all its members . . . ." (emphasis added); and, ". . . the association was fully capable of presenting to the

district court the factual and legal access issues about which its members were concerned." *Society of Professional Journalists*, at 1175. In the *Utah Restaurant* case, the Supreme Court found the plaintiff association to have met the second prong of the test because, "The questions raised as to the validity of the Board's enactment are common to all Davis County members of the Association" (emphasis added); and, "Nothing suggests that their individual interests will not be adequately protected . . . ." *Utah Restaurant Association*, at 1163.

In this case, individual members of the FOP have diverse interests which create internal conflicts such that the FOP cannot represent all of its members. The courts have consistently held that this second prong of the association standing test cannot be met when conflicts of interest exist within an association. The action then cannot be for the common good or benefit of all members of the association. For example, the United States Supreme Court found that a women's association lacked standing with regard to Medicaid abortions because of a diversity of views within the membership of the association. *Harris v. McRae*, 448 U.S. 297, 321 (1980). The Eighth Circuit Court of Appeals denied standing to a contractors' association and stated:

Moreover, the claim asserted requires the participation of the individual members of the association. The association is clearly not in a position to speak for its members . . . . Their status and interests are too diverse and the possibilities of conflict too obvious to make the association an appropriate vehicle to litigate the claims of its members . . . . Some stand to benefit from working on the project under the agreement and still others

will be heard by not being able to do so . . .  
. It is for the court, not the members of the  
association, to determine whether their  
interests require individual representation.  
Here in view of the actual and potential  
conflicts, they clearly do.

*Associated General Contractors v. Otter Tail Power Company*, 611  
F.2d 684, 691 (1979) (footnote omitted; emphasis added).

An excellent discussion of the effects of conflicts within an  
association is found at 13 Wright, Miller & Cooper, *Federal  
Practice and Procedure: Jurisdiction* 2d § 3531.9, at 617-623  
(1984) (Exhibit O).

In this case, Appellant FOP is acting as a representative for  
its members, the West Valley City Police Officers. This is  
precisely the type of association that is subject to the test set  
forth in the *Utah Restaurant and Society of Professional  
Journalists* cases. The 12(b)(1) Motion to Dismiss brought by  
Nordfelt and the Civil Service Commission attacked the standing of  
the FOP, both on the face of the Complaint and factually. The  
trial court correctly found that, under either type of attack, the  
FOP failed to meet the minimum requirements for association  
standing.

When a complaint is attacked on its face, the court assumes  
the facts as set forth in the complaint to be true. *Mortensen v.  
First Federal Savings and Loan*, 549 F.2d, at 891. Even given this  
advantage, the FOP failed to meet the test. The original Complaint  
and the Amended Complaints are devoid of any allegation regarding  
individual members of the FOP having the capacity to bring this  
action, nor do they describe specific damage to any FOP member.

(R. 2-14, 73-77, 113-118) Also, the FOP fails to allege that this action can be prosecuted by the FOP without requiring the individual participation of its members. All of these elements are necessary and their lack of pleading makes the FOP's Complaint defective on its face, as was found by the trial court. (R. 411-412, 431-437)

The FOP's standing was also attacked on a purely factual basis. When attacked in this manner, the FOP's Complaint is given no deferential treatment. The Court may investigate the facts to determine if jurisdiction exists, and the burden to prove jurisdiction is on the party asserting it. *Adams v. Bain*, 697 F.2d, at 1219; *Mortensen*, at 891. As was found by the trial court, the facts support a finding that the FOP cannot meet the minimum standing requirements of the association test.

The FOP clearly cannot meet the second prong of the test, which requires that the action not require the individual participation of members of the association. Courts consistently deny standing where there are conflicts of interest within the association itself. In this case, the trial court correctly found that there were clear conflicts. (R. 411-412, 431-437) This case falls squarely within the example provided by Justice Stewart, when he stated that, ". . . individual participation may be required if conflicts of interest exist between the members of an association." *Society of Professional Journalists*, at 1182. (J. Stewart Dissent.)



The most dramatic example of this conflict lies on the very face of the Complaint itself, where Nordfelt, a dues-paying FOP member in good standing, was made a defendant (Exhibit K). (R. 002, 176, 186) The FOP sued one of its own members and put itself in the absurd position of claiming to be suing in its representative capacity, when it has members as both plaintiffs and defendants in the same case.

Also, the trial court found in finding of fact no. 14 (R. 433) that the FOP was put in a position of deposing its own members as hostile witnesses. (R. 47-48, 50-51, 59-62, 92-93, 175-176, 178, 186, 189) The testing process which is being disputed was formulated and administered by members of the FOP. (R. 178, 189) (Finding of fact No. 12, R. 433) The allegations of improper actions during the testing process necessarily means that the FOP is alleging that it was wronged by its own members who approved and administered the test. Those officers, Defendant Chief Nordfelt, who approved the test, and Assistant Chief J. Steven Shreeve and Lieutenant Larry L. Moody, who formulated and administered the Sergeant's test, were deposed by the FOP. (R. 59-60, 92-93, 178, 189) Even the FOP recognized the conflict by refusing to provide Shreeve and Moody with legal counsel during the depositions (R. 178, 189), and, in the case of Shreeve, specifically telling him that it would not provide him with legal counsel at the deposition due to a "conflict of interest." (R. 189) Both Shreeve and Moody are dues-paying FOP members in good standing (Exhibits H and I). (R. 178, 186, 189)

Also, if the FOP is successful in nullifying the 1989 Sergeant's test and resulting promotions, the result would be dramatic, adverse consequences to certain individual members of the FOP association. FOP members Charles Illsley, Guy Dodge and Craig Gibson were promoted to the rank of Sergeant as a result of the 1989 test. The trial court found, in finding of fact no. 13, that the FOP members will lose rank, pay and benefits if the FOP successfully nullifies the promotions. All three individuals are dues-paying members of the FOP (Exhibits L and M). (R. 181, 183, 186) Finally, the FOP has produced no evidence that would indicate that, if it is not granted standing, the issues are not likely to be raised at all or that the issues are so unique and important that an exception should be made to the standing test. To the contrary, there are obviously other Plaintiffs (Crowley) and potential Plaintiffs (Salmon and Shopay) who are willing to take action.

An association with internal conflicts of interest simply cannot meet the standing test. The trial court correctly found that the FOP failed the second prong of the association standing test, since there are serious, obvious conflicts of interest within the FOP and it cannot act for the benefit or common good of all of its members. The FOP lacks standing both on the face of the Complaint itself and upon the facts of the case as found by the trial court.

#### POINT IV

APPELLANT CROWLEY SUFFERED NO INJURY, AND,  
THEREFORE, DOES NOT HAVE STANDING TO BRING  
THIS ACTION AS AN INDIVIDUAL.

In order to carry his burden of proof that he had the necessary standing to bring this action, Appellant Crowley had to provide the court with evidence demonstrating that he has suffered a distinct and palpable injury that gives him a personal stake in the outcome of the legal dispute. *Jenkins v. Swan*, 675 P.2d 1145 (Utah 1983); *Wade v. Burke*, 800 P.2d 1106 (Utah App. 1990). Also, there must be a causal relationship between any injury to Crowley and the actions of Nordfelt and the Civil Service Commission.

The Utah Supreme Court discussed the standing test at length in the *Jenkins* case, and stated:

. . . this Court will not readily relieve a plaintiff of the salutary [sic] requirement of showing a real and personal interest in the dispute. . . . the inquiry will be directed to the traditional criteria of the plaintiff's personal stake in the controversy. One who is adversely affected by governmental actions has standing under this criterion. One who is not adversely affected has no standing. A mere allegation of an adverse impact is not sufficient. There must also be some causal relationship alleged between the injury to the plaintiff, the governmental actions and the relief requested.

*Jenkins*, at 1150.

This test requires an injury particular to the plaintiff by virtue of the claimed wrong, not a general injury. Absent a claim of specific injury related to the alleged illegal activity, this standing test has not been met. *Jenkins*, at 1151.

The 12(b)(1) Motion to Dismiss brought by Nordfelt and the Civil Service Commission attacked Crowley's standing both on the face of the Complaint and factually. The Complaint and the Amended Complaints are devoid of any allegations that Crowley received a particularized injury, or that any injury was caused by the actions of Nordfelt and the Civil Service Commission. (R. 2-14, 73-77, 113-118) Therefore, the trial court correctly found that the Complaint, on its face, failed to establish Crowley's standing to sue. (R. 411-412, 431-437)

Crowley's standing was also attacked factually. The facts, as found by the trial court, support a finding that Crowley cannot satisfy either factor required in *Jenkins*. Crowley took the 1989 Sergeant's promotional written examination, which required a minimum score of 75 percent to advance to the next level of testing. (R. 006, 186) As Crowley admits in his Second Affidavit, he failed to reach the required score of 75 percent on the written section of the examination, and, therefore, did not proceed further in the testing and was not listed on the promotional roster. (R. 338) He has not alleged, nor is it conceivable, how he suffered a particularized injury in this case. Even if the court assumes that Crowley suffered an injury in failing the test, it is clear that there is no causal relationship between any injury he may have suffered and any alleged improper action by the Commission or Nordfelt. Crowley's failure on the written examination was solely the result of his personal knowledge, ability and effort in taking the examination. Even if the actions complained of in the

Complaint were true, none of those actions affected Crowley's performance on the written test. The alleged improper actions by Nordfelt and the Civil Service Commission did not and could not affect Crowley's test score one iota.

In his brief, Crowley makes two arguments to assert his standing. First, in the face of overwhelming evidence, including his own Affidavit, he makes the allegation that there was no minimum passing score on the written examination. As was demonstrated earlier on pages 24 and 25 of this brief, that argument simply has no factual support.

Crowley's second argument is based upon the notion that he has standing because he is a member of a class which has an interest in the proper administration of the Civil Service Rules. He then relies on a non-standing case, *Hayward v. Pennock*, 444 P.2d 59 (Utah 1968), to advance the rationale that all officers have an interest in proper administration of the Civil Service Rules. In fact, *Hayward* recognizes, in the quote provided by Plaintiffs, that this is an interest shared by both "employees and the public." *Hayward*, at 60. This type of general interest or grievance cannot form the basis for standing before the court.

An attempt to confer standing by merely having a general interest common to the public or a class of individuals is exactly the type of case that the "distinct and palpable injury" test is designed to screen out. The United States Supreme Court has held that:

Petitioners must allege and show that they personally have been injured, not that injury

has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, "none may seek relief on behalf of himself or any other member of the class."

*Warth*, at 502 (emphasis added).

The *Warth* court also stated that:

. . . the Court has held that when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.

*Warth*, at 499. In *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 41 L.Ed.2d 706, 94 S. Ct. 2925 (1974), the Supreme Court expressed its reluctance to entertain "generalized grievances about the conduct of Government," and also, in defining the type of injury required to establish standing, stated flatly that, "Abstract injury is not enough." *Schlesinger*, 418 U.S., at 220.

The Utah Supreme Court also rejected the generalized grievance argument and held that it is generally insufficient for the plaintiff to assert a general interest. *Jenkins*, at 1149. The Court has also stated that, ". . . this Court will not lightly dispense with the requirement that a litigant have a personal stake in the outcome of a specific dispute." *Terracor v. Utah Board of State Lands*, 716 P.2d 796 (Utah 1986). Also, conclusory allegations which are not supported by specific facts which show injury do not meet the standing test. *York v. Unqualified Washington County Elected Officials*, 714 P.2d 679 (Utah 1986).

Finally, Crowley has produced no evidence that would indicate that if he is not granted standing, then these issues will not be raised or that the issues are so unique and important that an exception to the standing test should be made. Obviously, there are other Plaintiffs (FOP) and potential Plaintiffs (Salmon and Shopay) who are willing to take action. Crowley's contention that he meets the exception criteria of the *Jenkins* case is not well founded or supported.

Crowley failed to carry his burden of providing the trial court with facts which form a basis for his standing before the court. Furthermore, such facts simply do not exist. The trial court correctly found that both on the face of the Complaint and upon the facts, as investigated and found by the trial court, Crowley did not have standing to bring this action.

#### POINT V

#### **THE TRIAL COURT WAS CORRECT IN APPLYING THE EXTRAORDINARY WRIT STANDING TEST.**

The Complaint filed by the FOP and Crowley is clearly in the nature of the now abolished writ of *mandamus*. It asked the court to order a lower board, the Civil Service Commission, and a public officer, the Police Chief, to take certain actions. Rule 65B of the Utah Rules of Civil Procedure (1988) (Exhibit D) provides that there shall be no special forms of writ such as writs of *mandamus*. Rule 65B provides a remedy to replace the writ of *mandamus*, and specifies that it shall be commenced by complaint. Courts have traditionally treated appeals from decisions of civil service commissions as being governed by Rule 65B. For example, *Lee v.*

*Provo City Civil Service Commission*, 582 P.2d 485 (Utah 1978); *Child v. Salt Lake City Civil Service Commission*, 575 P.2d 195 (Utah 1978). The trial court correctly applied the extraordinary writ standing test as an alternative standing test, and determined that the FOP and Crowley could not meet the minimum standing requirements.

The Utah Supreme Court has determined that the standing requirements necessary to obtain review of a lower board decision under Rule 65B are the following:

1. The plaintiff has standing before the lower body.
2. A ruling by the lower body was adverse to the plaintiff.
3. The plaintiff presented the claim to the lower body.

The court stated that if a plaintiff fails to establish any one of those requirements, the Rule 65B claim will not be considered. *Society of Professional Journalists*, at 1172.

Based upon the findings and conclusions discussed earlier in this brief, Appellant FOP cannot meet the first two prongs of this test. If the FOP has no standing to appear before the trial court as a plaintiff, it follows that it would have not standing to appear before the Appellee Civil Service Commission. Also, the ruling of the Commission was not adverse to the FOP. Some members of the FOP association, those promoted or high on the roster, were not adversely affected by rulings of the Commission. However, it is the third prong of the test which the FOP obviously cannot meet. The trial court correctly found that the FOP had not presented its claim to the Commission. (Finding of fact no. 11; R. 433) The



only evidence presented to the trial court on this issue supported that finding. Also, the Supreme Court has denied standing to a party on an appeal because the party failed to take action at the administrative level. *S & G v. Morgan*, 797 P.2d 1086 (Utah 1990).

Appellant Crowley also fails to meet the *Society of Professional Journalists'* Rule 65B test. Crowley does not meet the first or second prongs of the test. Based upon the same rationale set forth above regarding his individual jurisdiction before this Court, Crowley also lacks standing to proceed before the Commission. He simply did not suffer a particularized injury as a result of the Commission's or Police Chief's actions. Also, as set forth above, the rulings of the Commission were not adverse to Crowley. Neither the Commission nor the Chief in any way affected Crowley's performance on the written examination.

#### POINT VI

#### **APPEAL OF THE TRIAL COURT'S DENIAL OF SALMON AND SHOPAY'S MOTION FOR JOINDER IS NOT PROPERLY BEFORE THIS COURT, AND SAID MOTION WAS PROPERLY DISMISSED BY THE TRIAL COURT.**

This Court cannot consider the trial court's denial of William Salmon and David Shopay's Motion for Joinder, since Salmon and Shopay are not parties to this appeal. Standing to prosecute an appeal must be based upon an interest in the trial court's decision which is "direct, immediate and substantial." *Creamer v. Bucy*, 700 P.2d 668, 670 (Okla. App. 1985). The only parties below which chose to file an appeal were the FOP and Crowley (R. 439-440), and they have no standing to assert the rights of other parties who choose not to file an appeal.

It is clear that an appellant cannot prosecute an appeal on an issue which is not adverse to the appellant. *Utility Contractors Association of New Jersey, Inc. v. Toops*, 507 F.2d 83, 86 (3rd Cir. 1974); *International Brother of Teamsters, Chaffeurs, Stablemen and Helpers of America, Local Union No. 523, of Tulsa, Oklahoma, v. Keystone Freight Lines, Inc.*, 123 F.2d 326 (10th Cir. 1941). As the Supreme Court has stated, "Only parties to a decree can appeal. If a party to the suit is in no manner affected by what is decreed, he cannot be said to be a party to the decree." *Farmers' Loan and Trust Co.*, 106 U.S. 265, 269 (1882). Whether or not Salmon and Shopay are joined as parties in this case has absolutely no affect upon the Court's decision as to whether or not the FOP and Crowley have standing. There are few cases upon this procedural issue and no Utah cases, but the rationale is clear. As the Third Circuit stated in the *Utility Contractors* case, "This small point of appellate procedure has not often been litigated, probably because it is so elementary." *Utility Contractors*, at 85.

Assuming *arguendo*, that the court determines it is proper to rule upon the propriety of the trial court's denial of Salmon and Shopay's Motion for Joinder, it is clear that the trial court's decision was correct. First, the cases establish that standing is an issue which directly affects the subject matter jurisdiction of a court to hear a lawsuit. *Heath Techna Corporation v. Sound Systems International*, 588 P.2d 169, 170 (Utah 1978). If the trial court finds that the original plaintiff does not have standing, then dismissal of the case is the only action available to the

court. Rule 12(h)(2) of the Utah Rules of Civil Procedure clearly mandates that whenever it appears that a court does not have subject matter jurisdiction, then, ". . . the court shall dismiss the action." (Exhibit C.) (Emphasis added.) Also, the cases are clear that when a court lacks subject matter jurisdiction, its authority extends no further than to dismiss the action. *Deschenes v. King County*, 521 P.2d 1181 (Wash. 1974); *Minter-Wilson Drilling Company, Inc. v. Randall*, 675 P.2d 365 (Kan. 1984).

Perhaps the most concise statement regarding this area of law was made by the Supreme Court of Wyoming in *Matter of Contempt Order (Anderson)*, 765 P.2d 933 (Wyo. 1988), when the court stated:

It is fundamental, if not axiomatic, that, before a court can render any decision or order having any effect in any case or matter, it must have subject matter jurisdiction. (Citation omitted.) Jurisdiction is essential to the exercise of judicial power. (Citation omitted.) Once the court has jurisdiction, it lacks any authority to proceed, and any decision, judgment or other order is, as a matter of law, utterly void and of no effect for any purpose.

*Matter of Contempt Order (Anderson)*, at 936. These cases are consistent with Rule 12(h)(2) of the Utah Rules of Civil Procedure (Exhibit C).

When the trial court determined that the FOP and Crowley did not have standing, then the court had no jurisdiction to grant the Motion for Joinder of potential plaintiffs, Salmon and Shopay. Salmon and Shopay were always free to file their own action against the Defendants; however, they cannot join a nonexistent lawsuit and

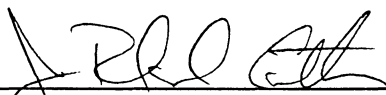
thereby bootstrap the action into a position of potential jurisdiction.

It was within the discretion of the trial court and based upon sound legal principles that the Motion for Joinder was denied.

#### CONCLUSION

For the reasons advanced above, the Findings of Fact, Conclusions of Law, Decision and Order of the trial court should be affirmed in all respects.

DATED this 28<sup>TH</sup> day of SEPTEMBER, 1992.

  
\_\_\_\_\_  
J. Richard Catten  
Attorney for Defendants/Appellees

CERTIFICATE OF SERVICE

I, J. Richard Catten, certified that on the 28<sup>TH</sup> day of September, 1992, I served four (4) copies of the attached Brief of Appellees upon Jerrald D. Conder and Peter L. Rognlie, counsel for the Appellants in this matter, by mailing the Briefs to them by first class mail, with sufficient postage prepaid, to the following address:

Jerrald D. Conder, Esq.  
Peter L. Rognlie, Esq.  
Conder & Wangsgard  
4059 South 4000 West  
West Valley City, Utah 84120

  
\_\_\_\_\_  
J. Richard Catten

## ADDENDA

- Exhibit A: Trial Court Ruling
- Exhibit B: Findings of Fact, Conclusions of Law, Decision and Order
- Exhibit C: Rule 12, Utah Rules of Civil Procedure
- Exhibit D: Rule 65B, Utah Rules of Civil Procedure
- Exhibit E: West Valley City Civil Service Policy and Procedures Manual:  
Rule II-32  
Rule III-1  
Rule III-2  
Rule III-6  
Rule III-7
- Exhibit F: West Valley Police Department Manual, Section 1700.23
- Exhibit G: Affidavits of Cory Ervin (2)
- Exhibit H: Affidavit of J. Stephen Shreeve
- Exhibit I: Affidavit of Larry L. Moody
- Exhibit J: Affidavit of Terry Keefe
- Exhibit K: Affidavit of Dennis J. Nordfelt
- Exhibit L: Affidavit of Craig Gibson
- Exhibit M: Affidavit of Charles Illsley
- Exhibit N: June 6, 1989, Promotion Announcement Memorandum
- Exhibit O: 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 2d § 3531.9, pp. 617-23

Exhibit A: Trial Court Ruling

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----

WEST VALLEY FRATERNAL ORDER	:	COURT'S RULING
OF POLICE LODGE #4, a	:	
nonprofit corporation, and	:	CIVIL NO. 890907667
JIM CROWLEY,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
DENNIS NORDFELT, West Valley	:	
City Chief of Police, and	:	
WEST VALLEY CIVIL SERVICE	:	
COMMISSION,	:	
	:	
Defendants.	:	

-----

Defendants' Motion to Dismiss is granted. The Court finds that the plaintiffs, who have the burden of establishing standing, have not established standing to bring this lawsuit.

The facts set forth in the Complaint fail to establish that the plaintiff, Jim Crowley, has personally suffered some distinct, particularized and palpable injury that is related to defendants' conduct. The Court further finds that the individual members of the Fraternal Order of Police must have standing, and FOP likewise lacks standing. There is no showing that the members of FOP have particularized specific injuries



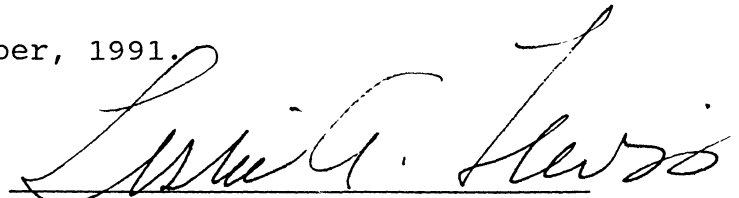
that were presented in a claim to the lower body. Further, it appears clear, that conflicts of interest exist within the association and its members. The standard for examining standing, set forth in Society of Professional Journalists v. Bullock, 743 P.2d 1166 (Utah 1987), and Utah Restaurant Assoc. v. Davis Co. Bd. of Health, 709 P.2d 1159 (Utah 1985), makes it clear that these plaintiffs have no standing on the face of the Complaint and on a closer examination of the facts of the case.

Defendants' Motion to Strike plaintiffs' supplemental memorandum is denied.

The Complaint in this matter is dismissed. The motion for joinder is denied.

Mr. Catten to prepare detailed Findings and an Order for the Court's signature.

Dated this 15<sup>th</sup> day of November, 1991.

  
LESLIE A. LEWIS  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy  
of the foregoing Court's Ruling, to the following,  
this 15 day of November, 1991:

J. D. Conder  
K. C. Bennett  
Attorneys for Plaintiffs  
4059 South 4000 West  
West Valley City, Utah 84120

J. Richard Catten  
Assistant City Attorney  
Attorney for Defendants  
3600 Constitution Boulevard  
West Valley City, Utah 84119

Eaulin Matheson

Exhibit B: Findings of Fact, Conclusions of  
Law, Decision and Order

E Matheson

• • • • •

Judge Leslie A. Lewis

110431

## FINDINGS OF FACT

1. On or about July 20, 1989, West Valley City conducted a promotional examination for the position of Sergeant in the West Valley City Police Department.

2. One year of service with the West Valley City Police Department was required in order to be eligible for promotion to Sergeant.

3. The requirements for promotion to Sergeant required that applicants hold the rank of Police Officer within the West Valley City Police Department.

4. Within the rank of Police Officer, all grades (POI, POII and POIII) were eligible for promotion to Sergeant with no preference being given to the members of any one grade.

5. On or about March 28, 1991, FOP members William Salmon and David Shopay filed a Motion for Joinder as additional Plaintiffs in this action.

6. Plaintiff Jim Crowley participated in the written examination portion of the Sergeant promotional process.

7. Plaintiff Jim Crowley did not receive the minimum required passing score on the written examination and, therefore, did not proceed further in the promotional process.

8. Plaintiff Jim Crowley did not suffer a distinct, particularized and palpable injury related to the conduct of Defendants.

9. The Fraternal Order of Police Lodge #4 (FOP) is an association consisting of a majority of the officers of the West

Valley City Police Department, including both officers who participated in the Sergeant promotional process and officers who did not.

10. Members of the FOP did not suffer distinct, particularized and palpable injury related to the conduct of Defendants.

11. Plaintiff FOP did not present its claims to the Civil Service Commission prior to commencement of this lawsuit.

12. Members of the FOP were involved in formulating and conducting the Sergeant promotional process.

13. Members of the FOP would lose their promotion to Sergeant should Plaintiff FOP's action be successful.

14. Members of the FOP were deposed as adverse witnesses by Plaintiffs.

15. Defendant Dennis Nordfelt was a member of the FOP at the time the action was filed and until October, 1991.

16. On or about August 23, 1991, this matter was orally argued before the Court. Subsequent to that argument, Plaintiffs submitted a Supplemental Memorandum in Opposition to Defendants' Motion to Dismiss. Defendants thereupon filed a Motion to Strike Plaintiffs' Supplemental Memorandum.

#### CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court hereby enters the following Conclusions of Law:

1. Plaintiffs appearing before the Court must have standing in order to bring a lawsuit.

2. The burden of establishing standing is upon the plaintiffs.

3. To establish standing, individual plaintiffs must show that they have personally suffered some distinct, particularized and palpable injury that is related to the defendant's conduct.

4. To establish standing, plaintiff associations must show that individual members of the association have suffered distinct, particularized and palpable injuries related to the defendant's conduct, thereby showing that individual members of the association have standing.

5. To establish standing, plaintiff associations must show that the action does not require individual participation of the members of the association. This standard is not met if conflicts of interest exist within and between the association and its members.

6. To establish standing, plaintiffs who challenge or seek review of the actions or orders of a lower commission must show that:

- a) the plaintiff had standing before the appropriate lower body;
- b) the plaintiff presented the claim to the lower body;
- c) a ruling by the lower body was adverse to the plaintiff.

7. Plaintiff Crowley has failed, both on the face of the complaint and on the facts of the case, to meet his burden to

establish that he suffered a distinct, particularized and palpable injury related to the conduct of Defendants, and therefore does not have standing in this case.

8. Plaintiff FOP has failed, both on the face of the complaint and on the facts of the case, to meet its burden to establish that individual members of the FOP suffered distinct, particularized and palpable injuries related to the conduct of Defendants, and therefore does not have standing in this case.

9. Plaintiff FOP has failed, both on the face of the complaint and on the facts of the case, to meet its burden to establish that the FOP presented its claims to the Civil Service Commission, and therefore does not have standing in this case.

10. Plaintiff FOP has conflicts within and between the association and its members that preclude the association from representing its members and requires the individual participation of the members of the association, and therefore does not have standing in this case.

11. Standing is an issue of subject matter jurisdiction.

12. The Court's determination that Plaintiff FOP and Plaintiff Crowley do not have standing and the subsequent dismissal of their complaint renders William Salmon and David Shopay's Motion for Joinder moot.

13. It is within the discretion of the Court to accept supplemental memoranda and affidavits provided by the parties.



## DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, it is the decision of the Court that Plaintiff FOP and Plaintiff Jim Crowley have not established standing necessary to bring this lawsuit. Based upon the facts set forth in the complaint, and upon a close examination of the facts of the case, the Court finds that Plaintiff Jim Crowley has not personally suffered a distinct, particularized and palpable injury related to Defendants' conduct which would provide him with standing in this case. The Court further finds that Plaintiff FOP has not established that individual members of the FOP have suffered distinct, particularized and palpable injuries related to Defendants' conduct. The Court further finds that clear conflicts of interest exist within and between the FOP association and its members, which prevent it from meeting the established criteria for standing of an association. In addition, the Court finds that the FOP has failed to present its claims to the appropriate lower body, the Civil Service Commission.

It is the decision of the Court to accept Plaintiffs' Supplemental Memorandum in Opposition to Defendants' Motion to Dismiss.

It is the Decision of the Court to deny the Motion for Joinder since the Court has determined that Plaintiffs lack standing and the Court, therefore, lacks jurisdiction over the action.

ORDER

Based on the foregoing Findings of Fact, Conclusions of Law and Decision:

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Strike Plaintiffs' Supplemental Memorandum in Opposition to Defendants' Motion to Dismiss is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss is granted, and that the complaint in this matter is dismissed without prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion for Joinder is denied.

MADE and ENTERED this 26<sup>th</sup> day of March, 1991.

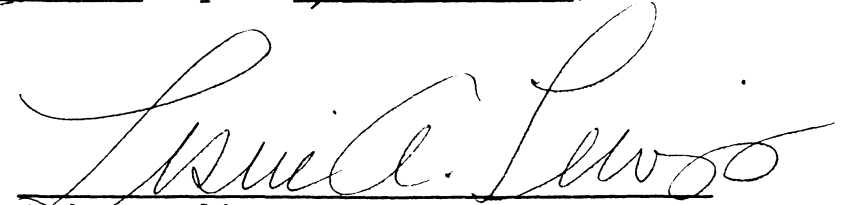
  
\_\_\_\_\_  
Judge Leslie A. Lewis

Exhibit C: Rule 12, Utah Rules of Civil  
Procedure

## Rule 12 Defenses and objections.

(a) **When presented** A defendant shall serve his answer within twenty days after the service of the summons and complaint is complete unless otherwise expressly provided by statute or order of the court. A party served with a pleading stating a cross claim against him shall serve an answer thereto within twenty days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action.

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) **How presented** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) **Motion for judgment on the pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) **Preliminary hearings.** The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) **Motion for more definite statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) **Motion to strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading upon him, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) **Consolidation of defenses.** A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) **Waiver of defenses.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) **Pleading after denial of a motion.** The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) **Security for costs of a nonresident plaintiff.** When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a \$300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) **Effect of failure to file undertaking.** If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action. (Amended effective Sept. 4, 1985; April 1, 1990.)

**Amendment Notes.** — The 1990 amendment inserted “and complaint” in the first sentence.

**Compiler’s Notes.** — Except for minor variations, this rule follows Rule 12, F.R.C.P.

**Cross-References.** — Motions generally, Rule 7.

## NOTES TO DECISIONS

### ANALYSIS

Jurisdiction over the person.  
 Motion for judgment on pleadings.  
 —Matters outside of pleadings.  
 —Answers to interrogatories.  
 —Rights of opposing party.  
 Motion for more definite statement.  
 —Bill of particulars.  
 —Criteria.  
 —Motion to dismiss distinguished.  
 —Purpose.  
 —Delay.  
 —Obtaining evidence.  
 Motion to dismiss for failure to state a claim.  
 —Explained.  
 —Improper.  
 —Standard of review.  
 Presentation of defenses.  
 —How presented.  
 —Affirmative defenses.

—Divorce.  
 —Election of remedies.  
 —Failure to state claim upon which relief can be granted.  
 —General and special appearances.  
 —Statute of frauds.  
 —Venue.  
 —When presented.  
 —Amended answer.  
 Security for costs of nonresident plaintiff.  
 —Failure to file.  
 Summary judgment.  
 —Conversion of motion to dismiss.  
 —Court’s discretion.  
 —Court’s initiative.  
 —Defenses.  
 —Opportunity to present pertinent material.  
 —Preclusion.  
 —Issues of fact.  
 Waiver of defenses.

Exhibit D: Rule 65B, Utah Rules of Civil  
Procedure

## IVIL PROCEDURE

## Rule 65B

(4) in all other cases where an injunction would be proper in equity.

### **Rule 65B. Extraordinary writs.**

(a) **Special forms of writs abolished.** Special forms of pleadings and of writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, and other extraordinary writs, as heretofore known, are hereby abolished. Where no other plain, speedy and adequate remedy exists, relief may be obtained by appropriate action under these rules, on any one of the grounds set forth in Subdivisions (b) and (f) of this rule.

(b) **Grounds for relief.** Appropriate relief may be granted:

(1) where any person usurps, intrudes into, or unlawfully holds or exercises a public office, civil or military, or a franchise, or an office in a corporation created by the authority of this state; or any public officer, civil or military, does or permits to be done any act which by the provisions of law works a forfeiture of his office; or an association of persons act as a corporation within this state without being legally incorporated; or any corporation has offended against any provision of the law, as it may have been amended, by or under which law such corporation was created, altered or renewed; or any corporation has forfeited its privileges and franchises by nonuser or has committed an act amounting to a surrender or a forfeiture of its corporate rights, privileges and franchises or has misused a franchise or privilege conferred upon it by law, or exercised a franchise or privilege not so conferred; or

(2) where an inferior tribunal, board or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion; or

(3) where the relief sought is to compel any inferior tribunal, or any corporation, board or person to perform an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully excluded by such inferior tribunal or by such corporation, board or person; or

(4) where the relief sought is to arrest the proceedings of any tribunal, corporation, board or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

(c) **Action by attorney general under Subdivision (b)(1) of this rule.** The attorney general may, and when directed so to do by the governor shall, commence any action authorized by the provisions of Subdivision (b)(1) of this rule. Such action shall be brought in the name of the state of Utah.

(d) **Action by private person under Subdivision (b)(1) of this rule.** A person claiming to be entitled to a public or private office unlawfully held and exercised by another may bring an action therefor. A private person may bring an action upon any other ground set forth in Subdivision (b)(1) of this rule, only if the attorney general fails to do so after notice. Any such action commenced by a private person shall be brought in his own name. Upon filing the complaint, such person shall also file an undertaking with sufficient sureties, in the same form required of bonds on appeal under the provision of Rule 73 and conditioned that such person will pay any judgment for costs or damages recovered against him in such action.

(e) **Nature and extent of relief under Subdivision (b)(2) of this rule.** Upon the filing of a complaint seeking relief under Subdivision (b)(2) of this rule, the court may require notice to be given to the adverse party before issuance of the writ, or may grant an order to show cause why such writ should not be issued, or may grant the writ without notice. If the writ is granted, it shall be directed to the inferior tribunal, board, or officer, or to any other person having the custody of the record or proceedings, commanding such tribunal, board or officer to certify fully to the court issuing the writ, within a specified time, a transcript of the record and proceedings, describing or referring to them with sufficient certainty; and if a stay of proceedings is intended, requiring the party in the meantime to desist from further proceedings in the matter to be reviewed. The review by the court issuing the writ shall not be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer.

(f) **Habeas corpus.** Appropriate relief by habeas corpus proceedings shall be granted whenever it appears to the proper court that any person is unjustly imprisoned or otherwise restrained of his liberty. If the person seeking relief is imprisoned in the penitentiary and asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or under the Constitution of the state of Utah, or both, then the person seeking such relief shall proceed in accordance with Rule 65B(i). In all other cases, proceedings under this subdivision shall be conducted in accordance with the following provisions:

(1) The complaint seeking relief shall, among other things, state that the person designated is illegally restrained of his liberty by the defendant and the place where he is so restrained, if known (stating wherein and the cause or pretense thereof, according to the best information of the plaintiff, annexing a copy of any legal process or giving a satisfactory explanation for failing so to do); that the legality of the imprisonment or restraint has not already been adjudged upon a prior proceeding; whether another complaint for the same relief has been filed and relief thereunder denied by any court, and if so attaching a copy of such complaint and stating the reasons for the denial of relief or giving satisfactory reasons for the failure to do so.

(2) The complaint shall be filed in the court most convenient to the plaintiff.

(3) Upon the filing of the complaint the court shall, unless it appears from such complaint or the showing of the plaintiff that he is not entitled to any relief, issue a writ directed to the defendant commanding him to bring the person alleged to be restrained before the court at a time and place therein specified, at which time the court shall proceed in a summary manner to hear the matter and render judgment accordingly. If the writ is not issued the court shall state its reasons therefor in writing and file the same with the complaint, and shall deliver a copy thereof to the plaintiff.

(4) If the defendant cannot be found, or if he does not have such person in custody, the writ (and any other process issued) may be served upon any one having such person in custody, in the manner and with the same effect as if he had been made defendant in the action.

(5) If the defendant conceals himself, or refuses admittance to the person attempting to serve the writ, or if he attempts wrongfully to carry the person imprisoned or restrained out of the county or state after service of the writ, the person serving the writ shall immediately arrest the defendant, or other person so resisting, and bring him, together with the person designated in the writ, forthwith before the court before which the writ is made returnable.

(6) At the time of the issuance of the writ, the court may, if it appears that the person designated will be carried out of the jurisdiction of the court or will suffer some irreparable injury before compliance with the writ can be enforced, cause a warrant to issue, reciting the facts, and directing the sheriff to take such person and forthwith bring him before the court to be dealt with according to law.

(7) The defendant shall appear at the proper time and place with the person designated or show good cause for not doing so and must answer the complaint within the time allowed. The answer must state plainly and unequivocally whether he then has, or at any time has had, the person designated under his control and restraint, and if so, the cause thereof. If such person has been transferred, the defendant must state that fact, and to whom, when the transfer was made, and the reason or authority therefor. The writ shall not be disobeyed for any defect of form or misdescription of the person restrained or defendant, if enough is stated to show the meaning and intent thereof.

(8) The person restrained may waive his right to be present at the hearing, in which case the writ shall be modified accordingly. Pending a determination of the matter the court may place such person in the custody of such individual or individuals as may be deemed proper.

(g) **When counsel appointed for petitioner.** Any person filing a petition for habeas corpus may be appointed counsel whenever the district court, upon examination of the petition, determines that the petition is not frivolous and that such person is financially unable to obtain representation. If the petition for habeas corpus is frivolous, the district court shall, without further action, dismiss the petition.

(h) **When writ returnable.** Any alternative writ issued by a court or a judge thereof, may be made returnable, and a hearing thereon may be had, at any time as such court may in its discretion determine.

(i) **Postconviction hearings.**

(1) Any person imprisoned in the penitentiary or county jail under a commitment of any court, whether such imprisonment be under an original commitment or under a commitment for violation of probation or parole, who asserts that in any proceedings which resulted in his commitment there was a substantial denial of his rights under the Constitution of the United States or of the state of Utah, or both, may institute a proceeding under this rule.

Such proceedings shall be commenced by filing a complaint, together with a copy thereof, with the clerk of the court in which such relief is sought. The complainant shall also serve a copy of the complaint so filed upon the attorney general of the state of Utah if imprisoned in the state prison, or the county attorney of the county where imprisoned if in a county jail. Such service may be made by any of the methods provided for



service in Rule 4 of the Utah Rules of Civil Procedure, or by mailing such copy to the attorney general or county attorney by United States mail, postage prepaid, and by filing with the clerk of said court a certificate of mailing certifying under oath that a copy was so mailed to the attorney general or county attorney. Upon the filing of such a complaint, the clerk shall promptly bring the same to the attention of the presiding judge of the court in which such complaint is filed.

(2) The complaint shall state that the person seeking relief is illegally restrained of his liberty by the defendant; shall state the place where he is so restrained; shall state the dates of and identify the proceedings in which the complainant was convicted and by which he was subsequently confined and of which he now complains; and shall set forth in plain and concise terms the factual data constituting each and every manner in which the complainant claims that any constitutional rights were violated. The complaint shall have attached thereto affidavits, copies of records, or other evidence supporting such allegations, or shall state why the same are not attached.

The complaint shall also state whether or not the judgment of conviction that resulted in the confinement complained of has been reviewed on appeal, and if so, shall identify such appellate proceedings and state the results thereof.

The complaint shall further state that the legality or constitutionality of his commitment or confinement has not already been adjudged in a prior habeas corpus or other similar proceeding; and if the complainant shall have instituted prior similar proceedings in any court, state or federal, within the state of Utah, he shall so state in his complaint, shall attach a copy of any pleading filed in such court by him to his complaint, and shall set forth the reasons for the denial of relief in such other court. In such case, if it is apparent to the court in which the proceeding under this rule is instituted that the legality or constitutionality of his confinement has already been adjudged in such prior proceedings, the court shall forthwith dismiss such complaint, giving written notice thereof by mail to the complainant, and no further proceedings shall be had on such complaint.

(3) Argument, citations and discussion of authorities shall not be set forth in the complaint, but may be set out in a separate supporting memorandum or brief if the complainant so desires.

(4) All claims of the denial of any of complainant's constitutional rights shall be raised in the postconviction proceeding brought under this rule and may not be raised in another subsequent proceeding except for good cause shown therein.

(5) [Deleted.]

(6) Within ten days after service of a copy of the complaint upon him, the attorney general, or the county attorney, as the case may be, shall answer the complaint or otherwise plead thereto. Any further pleadings or amendments shall be in conformity with the Utah Rules of Civil Procedure.

(7) When an answer is filed, the court shall immediately set the case for a hearing within twenty days thereafter unless the court in its discretion determines that further time is needed

Prior to the hearing, the state or county shall obtain such transcript of proceedings or court records as may be relevant and material to the case. The court, on its own motion, or upon the request of either party, may order a prehearing conference if good reason exists therefor; but such conference shall not be set so as to unreasonably delay the hearing on the merits of the complaint. The complainant shall be brought before the court for any hearing or conference.

If the court in which the complaint is filed determines that in the interest of convenience and economy, the hearing should be transferred to the district court having jurisdiction over the place of confinement of complainant, the court may enter a written order transferring such case and shall set forth in such order its reasons for so doing.

(8) In each case, the court, upon determining the case, shall enter specific findings of fact and conclusions of law and judgment, in writing, and the same shall be made a part of the record in the case.

If the court finds in favor of the complainant, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such further orders with respect to rearraignment, retrial, custody, bail or discharge as the court may deem just and proper in the case.

(9) If the complainant is unable to pay the costs of the proceedings, he may proceed in forma pauperis upon the filing of an affidavit to that effect, in which event the court may direct the costs to be paid by the county in which he was originally charged.

(10) Any final judgment entered upon such complaint may be appealed to and reviewed by the Supreme Court of Utah as an appeal in civil cases.

(Amended effective Jan. 1, 1985; March 1, 1988.)

Exhibit E:       West Valley City Civil Service  
Policy and Procedures Manual:

Rule II-32  
Rule III-1  
Rule III-2  
Rule III-6  
Rule III-7

II-30. Lay-Off Lists.

Any employee laid off because of force reductions, abolition of position, or other reasons not the fault of the employee, may be restored to the top of the applicable eligible list.

II-31. Probationary Period.

The probationary or working test period shall be regarded as an integral part of the examination process and shall be utilized for training and for closely observing the employee's work and ability, securing the most effective adjustment of a new or promoted employee, and for rejecting any employee whose performance does not meet the required work standards.

II-32. Duration.

- (1) All sworn police officers and firefighters certified and appointed or promoted to a Civil Service position shall be required to successfully complete a work and training test during a probationary period of one year to enable the appointing power to observe the employee's ability to perform the various duties pertaining to the position.
- (2) All Civil Service employees shall serve a one-year probation. The work and training test shall begin immediately upon appointment and shall continue for a period of time appropriate to the duties of the position involved.
- (3) If the department requests an extension of the established probationary period before the expiration thereof, the Commission may approve the extension of the probationary period or may take such action on its own initiative.

II-33. Dismissal.

At any time during the probationary period, the Chief, after consultation with the Personnel Officer and City Attorney's Office, may remove a probationary employee from employment without cause or may return a prior Civil Service employee to a previous position without cause. Removal of such employee shall be effective upon written notification from the Chief, and is not subject to appeal.

II-34. Leave During Probationary Period.

Time spent on any leave of absence without pay shall not be considered as part of any probationary period.

II-35. Probationary Period Reports.

At least ten (10) days prior to the expiration of an employee's probationary period, the Chief shall notify the Personnel Department and the Commission in writing whether the services of the employee have been

#### II-44. Change of Address.

All Civil Service employees, probationary or otherwise, must advise the Personnel Officer of any change of residence or address within ten days following such changes.

### III. PROMOTIONS

#### III-1. Basis and Classification.

The Commission shall provide for promotion in the Civil Service on the basis of ascertained merit, seniority in service and standing obtained by competitive examination, and shall provide, in all cases where practicable, that vacancies shall be filled by promotion from the members of the next lower rank as submit themselves for the examination and promotion. The Commission shall certify to the Chief from an eligibles list the names of not more than 5 applicants having the highest rating for each promotion.

#### III-2. Types of Promotions.

Promotions shall be designated as promotions in grade or promotions in rank. Promotions in grade shall be those promotions made in recognition of superior skills in the performance of duties achieved through experience and proficiency, but which do not involve a substantial change in duties. Promotions in rank shall be those promotions which result in a substantial change in assigned duties, requiring supervisory and administrative skills or substantially different training skills.

#### III-2. Physical Examination Requirements for All Promotions.

All applicants for promotion must have passed a physical examination prescribed by the Commission within one year prior to the date such promotion is made. Such physical examination shall determine that the applicant has no non-correctable physical disorders or handicaps which would disqualify the applicant for the position sought, or which would interfere with the applicant's maximum performance in the position being sought. If it is determined that the applicant has some correctable physical disorder or handicap which disqualifies the applicant from promotion or would prevent the applicant from giving the maximum performance in the position being sought, the commission may refuse to certify such applicant as being eligible for promotion until such disorder or handicap is corrected or the Commission may waive the requirement.

#### III-3. Failure on Physical or Mental Examinations for Promotion.

Whenever a Civil Service employee fails to pass a physical or mental examination by a physician, the examining physician shall make a report to the Commission setting forth the following information:

### III-5. Relative Weights of Various Phases.

A. Testing weight is not to exceed 60% for any of the following categories:

- (1) Performance Ratings: The performance ratings (merit) of the respective departments dealing with leadership and administrative abilities for the immediate past years required for promotion candidacy.
- (2) Written Examination.
- (3) Oral Assessment: Applicants may be involved with an assessment board to determine their self-confidence, bearing, personality traits, leadership qualities, supervisory abilities, determination of intelligence, aptitudes and abilities in dealing with problem situations.
- (4) Promotability: An assessment of the candidate's ability to perform in the desired position by a board of higher-ranking officers.

Weights shall be approved prior to examination by Civil Service.

### III-6. Promotions in Grade.

Promotions in grade are designed to provide persons in Civil Service with the opportunity to obtain progressive salary increases based upon a combination of longevity in service, physical fitness, and proficiency in performance of duties as ascertained by the Commission from the periodic merit ratings, written and oral examinations, and other required data. All in-grade advancements are to be handled in a uniform manner. All merit pay increases shall be handled in accordance with the guidelines set forth in the West Valley City Personnel Policy and Procedures Manual.

Whenever a member of the Civil Service shall have the necessary requirements for a promotion in grade and shall have passed such examination as provided in these rules, or as prescribed by the Commission, if any, the Personnel Officer shall certify to the Chief that such person is eligible for promotion in grade. Upon certification, the Chief may, at any time thereafter, promote such person to the grade for which he is certified. The City Manager may approve or disapprove any merit increase or in-grade promotion for good cause. Whenever the Chief, with the City Manager's approval, shall make the promotion in grade, notice of the action and the date on which such promotion is effective is to be given to the Commission.

### III-7. Promotions in Rank.

Promotions in rank shall be those promotions which result in a substantial change in assigned duties, requiring supervisory and administrative skills or substantially different training skills.

Exhibit F: West Valley Police Department  
Manual, Section 1700.23

Rank is a designation of a specific level of responsibility for execution of work, supervision, command, management, or administration specifically distinguished from other levels by class specifications and name.

**1700.22      Rank Order**

Rank order is the vertical relationship of the several ranks of this department in respect to levels of authority and responsibility.

**1700.23      Rank Structure**

Rank structure is the hierarchial arrangement of ranks within the department. The ranks of this department are listed below in descending order:

Police Chief  
Lieutenant  
Sergeant  
Police Officer

**1700.24      Services Line**

Line services are functions and activities which are basically concerned with fulfilling primary police responsibilities.

**1700.25      Services, Staff**

Staff services are non-line functions and activities which serve the purposes of developing personnel into effective patrol officers, supervisors, commanding officers, administrators, and of developing this department to most effectively meet its responsibilities in fulfilling the police purposes or missions.

**1700.26      Watch**

A watch designates one of the three basic time units for assignment of personnel, usually specified in terms of eight or ten hour periods.

Exhibit G: Affidavits of Cory Ervin (2)



PAUL T. MORRIS, #3738  
City Attorney  
J. RICHARD CATTEN, #4291  
Assistant City Attorney  
Attorneys for Defendants  
West Valley City  
3600 Constitution Boulevard  
West Valley City, UT 84119  
Telephone: (801)966-3600

COURT  
10/10/89  
BY Bohne DEPUTY CLERK

---

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

WEST VALLEY FRATERNAL ORDER	:	
OF POLICE LODGE #4,	:	
a nonprofit Utah corporation,	:	AFFIDAVIT OF CORY ERVIN
AND JIM CROWLEY,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
DENNIS NORDFELT, West Valley	:	
City Chief of Police, AND WEST	:	Civil No. 89-0907667
VALLEY CIVIL SERVICE	:	
COMMISSION,	:	Judge Leslie Lewis
	:	
Defendants.	:	

---

STATE OF UTAH            )  
                              : ss.  
COUNTY OF SALT LAKE )

I, CORY ERVIN, being duly sworn, do hereby depose and say as follows:

1. I have worked for West Valley City since September, 1984.

2. My current position with West Valley City is Personnel Generalist in the Administration Department.

3. Since January, 1986, I have served as Secretary to the West Valley City Civil Service Commission. The duties of that position include being the custodian of all records of the West Valley City Civil Service Commission.

4. The Civil Service Commission records in my possession indicate the following:

- a. The written examination for promotion to sergeant in the West Valley City Police Department was given on Thursday, July 20, 1989.
- b. The minimum passing score on the written examination was a score of 75.
- c. Officer Jim Crowley applied and took the written examination.
- d. Officer Crowley did not receive a score of 75 or above the written examination, and therefore, did not advance to the assessment center portion of the testing.
- e. Officer Crowley, because of his below passing score on the written test, is not listed on the promotional roster which resulted from the 1989 sergeants' examination.

5. As custodian of the records and Secretary to the Commission, I have no record, nor do I have any knowledge, of the Commission receiving any request, appeal, or other communication

from the organization known as "West Valley City Fraternal Order of Police Lodge #4" regarding the 1989 sergeants' examination, except in connection with the above-encaptioned lawsuit.

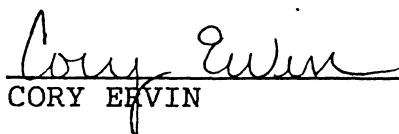
6. As custodian of the records and Secretary to the Commission, I have no record, nor do I have any knowledge of the Commission sending any information, ruling, or other communication regarding the 1989 sergeants' examination, except information supplied in connection with the above-encaptioned lawsuit.

7. The records of the Civil Service Commission also reflect that Charles Illsley and Guy Dodge were promoted to sergeant as a result of the 1989 sergeants' examination. Also, Craig Gibson is currently listed as Number One on the sergeants' promotional roster.

8. As Personnel Generalist for West Valley City, one of my job duties is to track employee payroll deductions and to enter and delete such deductions from the payroll system.

9. As of the payroll period ending February 8, 1991, Dennis Nordfelt, Guy Dodge, Charles Illsley, Craig Gibson, Stephen Shreeve, and Larry Moody have all authorized and are paying dues to the West Valley City Fraternal Order of Police Lodge #4 by payroll deduction.

DATED this 19 day of February, 1991.

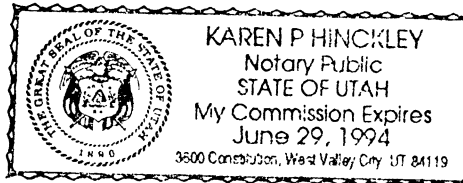
  
CORY ERVIN

Subscribed and sworn to before me this 19<sup>th</sup> day of February, 1991.

Karen P. Hinckley  
NOTARY PUBLIC  
Residing at: Salt Lake County,  
Utah

My Commission Expires:

June 29, 1994



PAUL T. MORRIS, #3738  
City Attorney  
J. RICHARD CATTEN, #4291  
Assistant City Attorney  
Attorneys for Defendants  
West Valley City  
3600 Constitution Boulevard  
West Valley City, UT 84119  
Telephone: (801)966-3600

---

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

WEST VALLEY FRATERNAL ORDER	:	
OF POLICE LODGE #4,	:	
a nonprofit Utah corporation,	:	AFFIDAVIT OF CORY ERVIN
AND JIM CROWLEY,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
DENNIS NORDFELT, West Valley	:	
City Chief of Police, AND WEST	:	Civil No. 89-0907667
VALLEY CIVIL SERVICE	:	
COMMISSION,	:	Judge Leslie Lewis
	:	
Defendants.	:	

---

STATE OF UTAH                    )  
                                      : ss.  
COUNTY OF SALT LAKE    )

I, CORY ERVIN, being duly sworn, do hereby depose and say as follows:

1. I have worked for West Valley City since September, 1984.
2. My current position with West Valley City is Personnel Generalist in the Administration Department.

3. Since January, 1986, I have served as Secretary to the West Valley City Civil Service Commission. The duties of that position include being the custodian of all Commission records, preparing minutes of all Commission meetings and providing the necessary clerical support to Commission members.

4. As Personnel Generalist, my duties include the coordination and administration of promotional examinations and entry level examinations for City employees.

5. As Civil Service Secretary, I have been present on numerous occasions when the Civil Service Commission discussed and approved testing criteria for various promotional tests, including the 1989 Sergeants' Promotional Examination.

6. It has been my experience and personal observation as Civil Service Secretary that prior to each promotional examination the Civil Service Commission approves various testing criteria, including those eligible for promotion, the testing topics and questions, the use of assessment centers and the weights given to the various elements of the testing and evaluation process.

7. Based upon my participation in the 1989 Sergeant promotion process, which included screening applications to ensure the applicants met the minimum requirements, I have personal knowledge that every police officer who tested for Sergeant was required to be off probation in order to be eligible to test.

8. Based on my experience as Civil Service Secretary and Personnel Generalist, I have personal knowledge that police officers are required to have at least one year of service with the

West Valley City Police Department prior to being removed from probation.

9. Based upon my experience as Civil Service Secretary and Personnel Generalist, I have personal knowledge that Police Officer is the rank immediately below Sergeant in the West Valley City Police Department.

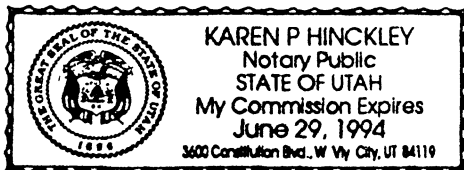
10. Based on my experience as Civil Service Secretary and Personnel Generalist, I have personal knowledge that the rank of Police Officer in the West Valley City Police Department is divided into grades known as Police Officer I, Police Officer II and Police Officer III.

11. The Civil Service Commission records in my possession indicate that Officer Jim Crowley holds the rank and grade of Police Officer II.

DATED this 14 day of August, 1991.

Cory Ervin  
CORY ERVIN

Subscribed and sworn to before me this 14<sup>th</sup> day of August, 1991.



Karen P. Hinckley  
NOTARY PUBLIC  
Residing at: Salt Lake County,  
Utah

My Commission Expires:

June 29, 1994

Exhibit H:       Affidavit of J. Stephen Shreeve



FILED  
COURT

FEB 23 9 10 AM '91

PAUL T. MORRIS, #3738  
City Attorney  
J. RICHARD CATTEN, #4291  
Assistant City Attorney  
Attorneys for Defendants  
3600 Constitution Boulevard  
West Valley City, UT 84119  
Telephone: (801)966-3600

THIRD JUDICIAL DISTRICT  
SALT LAKE COUNTY  
BY B. Bohue  
DEPUTY CLERK

---

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

WEST VALLEY FRATERNAL ORDER	:	
OF POLICE LODGE #4,	:	
a nonprofit Utah corporation,	:	AFFIDAVIT OF J. STEPHEN SHREEVE
AND JIM CROWLEY,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
DENNIS NORDFELT, West Valley	:	
City Chief of Police, AND WEST	:	Civil No. 89-0907667
VALLEY CIVIL SERVICE	:	
COMMISSION,	:	Judge Leslie Lewis
	:	
Defendants.	:	

---

STATE OF UTAH            )  
                              : ss.  
COUNTY OF SALT LAKE )

I, J. SHEPHEN SHREEVE, being duly sworn, do hereby depose and say as follows:

1. I am currently employed as a police officer by West Valley City, and have been so employed since July 1, 1980.

2. My current position with West Valley City is Assistant Police Chief, and I have held that position since 1987.

3. As part of my duties as Assistant Chief, I participated in formulating and administering the 1989 testing for promotion to the position of Sergeant within the West Valley City Police Department.

4. On August 16, 1990, I was deposed by the Plaintiffs in the above-entitled action with regard to my actions during the formulation and conduct of the 1989 sergeants promotional process, including the written test and materials, and the assessment center.

5. I am a dues-paying member of the West Valley Fraternal Order of Police Lodge #4 (hereinafter FOP), and have been such since the Lodge was formed.

6. Immediately prior to my deposition on August 16, 1990, I requested that the FOP provide me with legal counsel at the deposition in order to protect my interests.

7. The FOP refused to provide me with legal counsel at my deposition because of a conflict of interest.

8. I made a statement, on the record, regarding my request for counsel and the conflict of interest at the commencement of my deposition.

DATED this 19<sup>th</sup> day of February, 1991.

  
J. STEPHEN SHREEVE

Subscribed and sworn to before me this 19<sup>th</sup> day of February, 1991.

Karen P. Hinckley  
NOTARY PUBLIC  
Residing at: Salt Lake County,  
Utah

My Commission Expires:

June 29, 1994

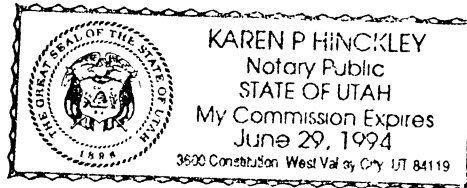


Exhibit I:       Affidavit of Larry L. Moody

FILED  
COURT

FEB 20 9 15 AM '91

THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY  
BY DeBorne  
CLERK

PAUL T. MORRIS, #3738  
City Attorney  
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Assistant City Attorney  
Attorneys for Defendants  
3600 Constitution Boulevard  
West Valley City, UT 84119  
Telephone: (801)966-3600

---

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

WEST VALLEY FRATERNAL ORDER	:	
OF POLICE LODGE #4,	:	
a nonprofit Utah corporation,	:	AFFIDAVIT OF LARRY L. MOODY
AND JIM CROWLEY,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
DENNIS NORDFELT, West Valley	:	
City Chief of Police, AND WEST	:	Civil No. 89-0907667
VALLEY CIVIL SERVICE	:	
COMMISSION,	:	Judge Leslie Lewis
	:	
Defendants.	:	

---

STATE OF UTAH                    )  
                                      : ss.  
COUNTY OF SALT LAKE    )

I, LARRY L. MOODY, being duly sworn, do hereby depose and say  
as follows:

1. I am currently employed as a police officer by West  
Valley City, and have been so employed since October 20, 1980.

2. My current position with West Valley City is Lieutenant, and I have held that rank since 1987.

3. As part of my duties as Lieutenant Chief, I participated in formulating and administering the 1989 testing for promotion to the position of Sergeant within the West Valley City Police Department.


4. On November 27, 1990, I was deposed by the Plaintiffs in the above-entitled action with regard to my actions during the formulation and conduct of the 1989 sergeants' promotional process, including the written test and materials, the assessment center, and the basic promotional standards.

5. I am a dues-paying member of the West Valley Fraternal Order of Police Lodge #4 (hereinafter FOP), and have been such since the Lodge was formed.

6. Immediately prior to my deposition on November 27, 1990, I requested that the FOP provide me with legal counsel at the deposition in order to protect my interests in this matter.

7. The FOP refused to provide me with legal counsel at my deposition.

DATED this 19 day of February, 1991.

  
\_\_\_\_\_  
LARRY E. MOODY

Subscribed and sworn to before me this 19<sup>th</sup> day of February, 1991.

Karen P. Hinckley  
NOTARY PUBLIC  
Residing at: Salt Lake County,  
Utah

My Commission Expires:

June 29, 1994

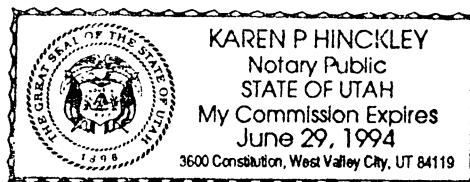


Exhibit J:       Affidavit of Terry Keefe



PAUL T. MORRIS, #3738  
City Attorney  
J. RICHARD CATTEN, #4291  
Assistant City Attorney  
Attorneys for Defendants  
West Valley City  
3600 Constitution Boulevard  
West Valley City, UT 84119  
Telephone: (801)966-3600

---

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

WEST VALLEY FRATERNAL ORDER	:	
OF POLICE LODGE #4,	:	
a nonprofit Utah corporation,	:	AFFIDAVIT OF TERRY KEEFE
AND JIM CROWLEY,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
DENNIS NORDFELT, West Valley	:	
City Chief of Police, AND WEST	:	Civil No. 89-0907667
VALLEY CIVIL SERVICE	:	
COMMISSION,	:	Judge Leslie Lewis
	:	
Defendants.	:	

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STATE OF UTAH            )  
                              : ss.  
COUNTY OF SALT LAKE )

I, TERRY KEEFE, being duly sworn, do hereby depose and say as follows:

1. I have been employed as a Police Officer in the West Valley City Police Department since October 20, 1980.

2. Since October 4, 1987, I have held the rank of Assistant Chief in the Department.

3. At the time of this deposition, Chief Dennis Nordfelt is absent from the Department and I am Acting Police Chief of West Valley City.

4. I have personal knowledge that in the West Valley City Police Department the rank immediately below Sergeant is the rank of Police Officer.

5. I have personal knowledge that only officers holding the rank of Police Officer were promoted to Sergeant following the 1989 Promotional Examination.

6. I have personal knowledge that the rank structure in the West Valley City Police Department is set forth in the West Valley City Police Manual at Section 1700.23, and that a copy of this rank structure is issued to every officer within the Department.

7. I have personal knowledge that within the rank of Police Officer there are three grades consisting of Police Officer I, Police Officer II and Police Officer III.

8. I have personal knowledge that job duties within the rank of Police Officer are essentially similar, involve no supervisory duties and do not vary based upon an officer's grade designation as a P.O. I, P.O. II or P.O. III.

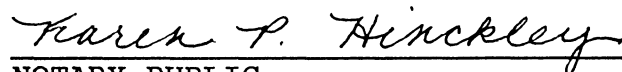
9. I have personal knowledge that promotions in grade from P.O. I to P.O. II within the rank of Police Officer are primarily dependant upon the funds available in the Police Department budget

and are not determined by a set number of positions within each grade.

DATED this 14<sup>th</sup> day of August, 1991.

  
TERRY KEEFE

Subscribed and sworn to before me this 14<sup>th</sup> day of August, 1991.

  
NOTARY PUBLIC  
Residing at: Salt Lake County,  
Utah

My Commission Expires:

June 29, 1994

Exhibit K:       Affidavit of Dennis J. Nordfelt

FILED  
COURT

FEB 20 9 35 AM '81

THIRD JUDICIAL DISTRICT  
SALT LAKE COUNTY  
BY B. Bohn  
DEPUTY CLERK

PAUL T. MORRIS, #3738  
City Attorney  
J. RICHARD CATTEN, #4291  
Assistant City Attorney  
Attorneys for Defendants  
West Valley City  
3600 Constitution Boulevard  
West Valley City, UT 84119  
Telephone: (801)966-3600

---

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

WEST VALLEY FRATERNAL ORDER	:	
OF POLICE LODGE #4,	:	
a nonprofit Utah corporation,	:	AFFIDAVIT OF DENNIS J. NORDFELT
AND JIM CROWLEY,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
DENNIS NORDFELT, West Valley	:	
City Chief of Police, AND WEST	:	Civil No. 89-0907667
VALLEY CIVIL SERVICE	:	
COMMISSION,	:	Judge Leslie Lewis
	:	
Defendants.	:	

---

STATE OF UTAH            )  
                              : ss.  
COUNTY OF SALT LAKE )

I, DENNIS J. NORDFELT, being duly sworn, do hereby depose and  
say as follows:

1. I am currently employed by West Valley City as Police  
Chief, and have been so employed since July of 1986.

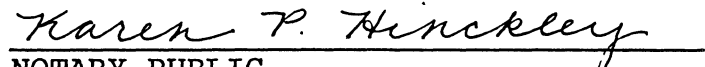
2. I am a Defendant in the above-encaptioned lawsuit.

3. I am a dues-paying member in good standing of the West Valley City Fraternal Order of Police Lodge #4, and have been such since June of 1987.

DATED this 19<sup>th</sup> day of February, 1991.

  
DENNIS J. NORDELT

Subscribed and sworn to before me this 19<sup>th</sup> day of February, 1991.

  
NOTARY PUBLIC  
Residing at: Salt Lake County,  
Utah

My Commission Expires:

June 29, 1994

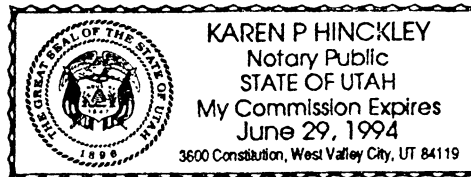


Exhibit L:       Affidavit of Craig Gibson

FILED  
COURT

FEB 23 9 15 AM '91

THIRD JUDICIAL DISTRICT  
SALT LAKE COUNTY  
BY B. Bohne  
DEPUTY CLERK

PAUL T. MORRIS, #3738  
City Attorney  
J. RICHARD CATTEN, #4291  
Assistant City Attorney  
Attorneys for Defendants  
West Valley City  
3600 Constitution Boulevard  
West Valley City, UT 84119  
Telephone: (801)966-3600

---

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

WEST VALLEY FRATERNAL ORDER	:	
OF POLICE LODGE #4,	:	
a nonprofit Utah corporation,	:	AFFIDAVIT OF CRAIG GIBSON
AND JIM CROWLEY,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
DENNIS NORDFELT, West Valley	:	
City Chief of Police, AND WEST	:	Civil No. 89-0907667
VALLEY CIVIL SERVICE	:	
COMMISSION,	:	Judge Leslie Lewis
	:	
Defendants.	:	

---

STATE OF UTAH            )  
                              : ss.  
COUNTY OF SALT LAKE )

I, CRAIG GIBSON, being duly sworn, do hereby depose and say as follows:

1. I am currently employed as a police officer by West Valley City, and have been so employed since June 4, 1984.



2. During the Summer of 1989, I participated in testing for promotion to the position of Sergeant within the West Valley City Police Department.

3. As a result of the testing for promotion to Sergeant, I am currently Number One on the sergeants' promotion list, and am scheduled to be promoted to Sergeant on July 1, 1991.

4. I am currently a dues-paying member in good standing of the West Valley City Fraternal Order of Police Lodge #4, and have been such since its inception at West Valley City.

5. If the West Valley City Fraternal Order of Police Lodge #4 is granted the relief requested in the above-encaptioned lawsuit, I will be denied a promotion in rank and the accompanying salary and benefit increase.

DATED this 19<sup>th</sup> day of February, 1991.

Craig Gibson  
CRAIG GIBSON

Subscribed and sworn to before me this 19<sup>th</sup> day of February, 1991.

Karen P. Hinckley  
NOTARY PUBLIC  
Residing at: Salt Lake County,  
Utah

My Commission Expires:

June 29, 1994

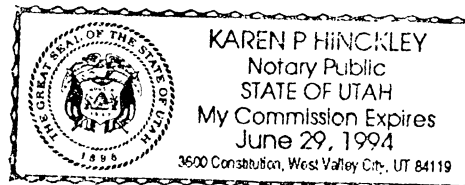


Exhibit M:       Affidavit of Charles Illsley

COURT

1989 03 15 AM 10:01

TH: ST: CT:  
BY: Bohne  
DEF: CLK:

PAUL T. MORRIS, #3738  
City Attorney  
J. RICHARD CATTEN, #4291  
Assistant City Attorney  
Attorneys for Defendants  
West Valley City  
3600 Constitution Boulevard  
West Valley City, UT 84119  
Telephone: (801)966-3600

---

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

WEST VALLEY FRATERNAL ORDER	:	
OF POLICE LODGE #4,	:	
a nonprofit Utah corporation,	:	AFFIDAVIT OF CHARLES ILLSLEY
AND JIM CROWLEY,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
DENNIS NORDFELT, West Valley	:	
City Chief of Police, AND WEST	:	Civil No. 89-0907667
VALLEY CIVIL SERVICE	:	
COMMISSION,	:	Judge Leslie Lewis
	:	
Defendants.	:	

---

STATE OF UTAH            )  
                              : ss.  
COUNTY OF SALT LAKE )

I, CHARLES ILLSLEY, being duly sworn, do hereby depose and say  
as follows:

1. I have been employed as a police officer with the West  
Valley City Police Department since January 19, 1981.

2. During the Summer of 1989, I participated in the testing process for promotion to Sergeant within the West Valley City Police Department.

3. On September 2, 1989, I was promoted to Sergeant in the West Valley City Police Department.

4. I am a dues-paying member in good standing of the West Valley City Fraternal Order of Police Lodge #4, and have been such since the Lodge was formed.

5. If the relief requested by the Fraternal Order of Police in the above-encaptioned lawsuit is granted, I will suffer a loss of rank from Sergeant to Police Officer III, and may also suffer a loss of pay and benefits.

DATED this 19<sup>th</sup> day of February, 1991

Sgt. Charles Illsley  
CHARLES ILLSLEY

Subscribed and sworn to before me this 19<sup>th</sup> day of February, 1991.

Barbara Holtry  
NOTARY PUBLIC  
Residing at: Salt Lake County, Utah

My Commission Expires:

11-21-92

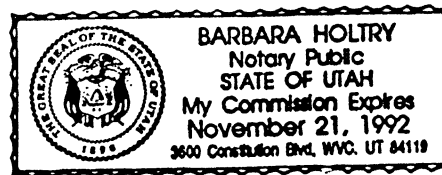
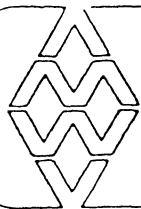


Exhibit N: June 6, 1989, Promotion Announcement  
Memorandum



West Valley City



POLICE DEPARTMENT

June 6, 1989

**MEMORANDUM**

TO: All Police Officers Eligible for Promotional  
Examination - Sergeant

FROM: Chief's Office *Dennis Nordfelt*

RE: Promotional Examination

This memorandum is to notify officers that there will be a promotional examination for an immediate Sergeant's position and to establish a roster. Passing grade for all tests will be set at 75%.

All qualified and interested candidates need to apply by submitting a to/from to Assistant Chief Shreeve indicating their interest and outlining qualifications no later than ~~5:00 PM~~ ~~Wednesday, June 16, 1989~~ NOON, ON MONDAY, JUNE 19, 1989.

**QUALIFICATIONS:**

- Must have four years of police service (plus two additional years police experience if substituting for college).
- Must have two years of college (two years police experience can be substituted).
- Must be off probation.
- Must have above average performance evaluation.

**WRITTEN EXAMINATION:**

All qualified candidates will be given two text books to study from 30 days prior to the written examination. This examination will consist of management concepts taken from this reference material, and will be the **ONLY** material needed to study for this examination. There will be no questions from the criminal code or the policy manual on the exam.

Promotional Examination/Sergeant  
June 6, 1989  
Page 2

Candidates may pick up their text books from Lt. Moody or Assistant Chief Shreeve on June 19th and 20th only.

**The written examination will be given on Thursday, July 20, 1989.**

**ASSESSMENT CENTER:**

Only the top 15 candidates (with a passing score) on the written examination will be invited to attend a two-day assessment center. **The assessment center will be July 25th and 26th, 1989.**

Times and places for both the written examination and assessment center will be announced later.

00007

Exhibit O: 13 Wright, Miller & Cooper, *Federal  
Practice and Procedure:*  
*Jurisdiction 2d* § 3531.9, pp. 617-23



Ch. 1                    **STANDING—RIGHTS OF OTHERS      § 3531.9**

the organization as representative is superior to an individual action.

Inquiry into the purpose of the organization also suggests that some inquiry be made into the nature of the organization. Some forms of organization may be more appropriate for representation than others. The cases, however, reflect little concern with this possibility. Most cases involve representation by environmental, neighborhood, political action, or trade organizations in traditional forms. The Hunt case involved a variation that does not provide any general lessons. The Apple Commission was a state agency, not a private association of the state growers and dealers. Examining the composition and activities of the Commission, however, the Court concluded that it was indistinguishable from “a traditional trade association representing the individual growers and dealers who collectively form its constituency.”<sup>140</sup> The general lack of attention to such matters may reflect the fact that there are few problems. Nonetheless, it is prudent to hold open the prospect that some forms of association may not warrant the assumption of adequate representation that is made for the more familiar forms. The greatest care should be taken with associations whose members have little choice whether to be members and have divergent interests. Like care should be taken with organizations that ordinarily would not be expected to undertake litigation on behalf of their constituents. An ordinary commercial corporation, for example, generally should not be permitted to borrow standing from injured stockholders.

The third prong of the test asks whether individual participation is required by the nature of the underlying claim or the relief sought.<sup>141</sup> The most compelling need for individual participation is likely to occur when there are conflicts of interest, or

**140. Commission as association**

97 S.Ct. at 2442, 432 U.S. at 345.

The Commission was composed of 13 apple growers and dealers. Apple growers and dealers financed the Commission by compulsory assessments, elected its members, and were alone eligible to become members. The Commission promoted the sale of Washington apples through advertising, market research and analysis, and public education. It engaged in scientific research on uses for apples.

**141. Individual participation**

An association may be an appropriate representative of its members “so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause \* \* \*.” Warth v. Seldin, 1975, 95 S.Ct. 2197, 2212, 422 U.S. 490, 511, 45 L.Ed.2d 343.

at least a divergence of views, between members of the organization or between the organization and its members. Several cases deny organizational standing in such circumstances.<sup>142</sup>

#### ✱ 142. Conflicting interests

The Women's Division of the Board of Global Ministries of the United Methodist Church lacked standing to advance a Free Exercise challenge under the First Amendment to the provisions of the Hyde Amendment that prohibit Medicaid funding of many medically necessary abortions. An organization can assert the rights of its members only if neither the claim asserted nor the relief requested requires the participation of individual members. The Women's Division had conceded that there was a diversity of views in its membership concerning the matter of abortions, and that the determination of the advisability or necessity of an abortion must lie in the conscience of the individual before God. Free exercise claims, moreover, require that the coercive effect of the enactment be shown as it operates against an individual in the practice of his religion, so that individual participation in the lawsuit must ordinarily be required. *Harris v. McRae*, 1980, 100 S.Ct. 2671, 2690, 448 U.S. 297, 320-321, 65 L.Ed.2d 784.

Although the court did not speak of conflicting interests, a good example is provided by the ruling that an employer who has addressed anti-union speeches and letters to employees lacks standing to assert the First Amendment rights of the employees. *International Union, United Auto. Workers of America v. Dana Corp.*, C.A.6th, 1982, 679 F.2d 634, 647. While employer and employees may have some common interests in sharing the communications, and employees may encounter some difficulty in advancing their own interests, the risks of allowing the employer to purport to represent the interests of employees as

well as its own interests are manifest.

An association of general contractors lacked standing to pursue claims that its members were entitled to injunctive relief under the antitrust laws against an agreement between a firm building a major generating plant and a number of unions that would require any subcontractor to negotiate with the unions as exclusive representatives of its employees. It was uncertain whether any individual member would in fact have standing. In addition, there was no showing that the litigation was germane to the organizational purposes of the association. Finally, the claim asserted was one that required participation of the members in the litigation in light of the obvious conflict of interests among the members. Some members might benefit from enforcement of the challenged agreement, while others might be injured by it. The fact that the members had voted unanimously to file the action, before this antitrust theory was articulated, did not alter this conclusion. *Associated General Contractors v. Otter Tail Power Co.*, C.A.8th, 1979, 611 F.2d 684.

An organization whose members included members of the police department that was being sued to obtain relief against asserted regular use of unconstitutional force by members of the department was properly dismissed as a plaintiff, because a clear potential conflict of interest resulted from the possibility that its police members might be adversely affected by the decision. *Calvin v. Conlisk*, C.A.7th, 1975, 520 F.2d 1, 11. Other organizations were allowed standing, but after the Supreme Court vacated, 1976, 96 S.Ct. 1093, 424 U.S. 902, 47 L.Ed.

Other cases have permitted standing after examination has dispelled the fear of conflict or has persuaded the court that the conflict would not injure dissenting members.<sup>143</sup> It is possible that cases may emerge in which it is practicable to reconcile the risk of conflict by permitting organization standing coupled with participation by individual members who represent the conflicting interests. It may be wondered, however, whether the concept of organization standing should be carried this far in preference to individual litigation by the members whose standing might be borrowed.

Individual participation also may seem required because of the need for specific fact information to illuminate the basis for decision. In such circumstances, it is apt to prove best to deny organization standing and to remit the organization to a role in support of individual litigation.<sup>144</sup> Organization standing is par-

2d 307, standing was denied all plaintiffs, C.A.7th, 1976, 534 F.2d 1251, certiorari denied 96 S.Ct. 1109, 424 U.S. 912, 47 L.Ed.2d 316.

#### 143. No injurious conflict

A union had standing to pursue employment discrimination claims on behalf of its members. There was nothing about the claims presented that made it necessary that individual employees be made plaintiffs. The counterclaim that had been made against the union did not involve any matters that would create a conflict of interest between the union and its members. The union, moreover, could act as a class representative despite the technical difficulty that it was not itself a member of the class. *International Woodworkers of America v. Chesapeake Bay Plywood Corp.*, C.A.4th, 1981, 659 F.2d 1259, 1266–1269.

*National Constructors Assn. v. National Elec. Contractors Assn.*, D.C. Md.1980, 498 F.Supp. 510, judgment modified C.A.4th, 678 F.2d 492, described in note 133 above.

An association of contractors had standing to challenge a statutory requirement that a portion of federal local public works grants be expended for minority business enter-

prises, even if it be assumed that no injury had accrued to its contractor member who had secured a specific job that had been denied to two other members who submitted lower bids that did not meet the minority business enterprise requirement. Any conflict of interest among its members did not limit its right to represent injured members in a suit for injunctive and declaratory relief. The association would not function as a class representative, and need not adequately represent the interest of all members. The effect of the association suit on its members would be no different than the effect of a like suit brought by any single member. *Rhode Island Chapter, Associated Gen. Contractors of America v. Kreps*, D.C.R.I. 1978, 450 F.Supp. 338, 346–347 n. 3.

#### 144. Individual fact need

See *Harris v. McRae*, 1980, 100 S.Ct. 2671, 2690, 448 U.S. 297, 320–321, 65 L.Ed.2d 784, described in note 142 above.

A society dedicated to the separation of church and state had standing to assert violation of its members' voting rights by a state constitutional requirement that holders of public office acknowledge the existence of

Some substantive claims may seem inherently so personal that individual participation should be required simply because of the nature of the claim. A few courts, for example, have suggested that some civil rights claims should be brought directly by the person injured, although it is difficult to support any general rule to this effect.<sup>146</sup> The theory of organization representation is indeed stretched thin if it is extended to substantially

#### 146. Civil Rights claims

In *Shaw v. Garrison*, C.A.5th, 1977, 545 F.2d 980, 983 n. 4, reversed on other grounds 1978, 98 S.Ct. 1991, 436 U.S. 584, 56 L.Ed.2d 554, the court noted that the question before it was whether an action instituted under 42 U.S.C.A. § 1983 survived in favor of the plaintiff's executor following the plaintiff's death, and that "[t]his is therefore not an attempt to sue under the civil rights statutes for deprivation of another's constitutional rights. Such suits are impermissible. *O'Malley v. Bri-erley*, C.A. 3 Cir.1973, 477 F.2d 785; *Brown v. Board of Trustees of LaGrange Indep. School Dist.*, 5 Cir. 1951, 187 F.2d 20." (per Wisdom, J.).

Although welfare rights organizations could achieve standing on the basis of member injury to pursue general federal question claims, and could assert claims of interference with rights of association deriving from injury to their members, they could not advance general claims arising from injury to their members under 42 U.S.C.A. § 1983. *Aguayo v. Richardson*, C.A.2d, 1973, 473 F.2d 1090, 1098-1101, certiorari denied 94 S.Ct. 900, 414 U.S. 1146, 39 L.Ed. 2d 101.

#### Compare

Standing has been allowed to pursue § 1983 claims based on injury to the members of an organization plaintiff without further discussion. See *Church of Scientology v. Cazares*,

C.A.5th, 1981, 638 F.2d 1272, 1276-1280, described in note 133 above.

Organization standing also has been allowed without difficulty in actions under Title VII of the Civil Rights Act of 1964. See *International Woodworkers of America v. Georgia-Pacific Corp.*, C.A.8th, 1977, 568 F.2d 64, 66-68, described in note 135 above.

Civil rights cases frequently involve circumstances that justify remedies in favor of nonparties without any formal need to attribute standing of members to an organization. As one example, in *Doe v. Gallinot*, C.A.9th, 1981, 657 F.2d 1017, 1024-1025, the plaintiff clearly had standing to challenge procedures under which he had been involuntarily committed seven times without a hearing. It was found proper to implement the declaratory judgment of invalidity by an injunction against applying the procedures to anyone. "The challenged provisions were not unconstitutional as to Doe alone, but as to any to whom they might be applied." Cases of this sort frequently arise in determining the need for certifying a class action; certification may be denied on the ground that the scope of the relief does not depend on the character of the action.

Collectively, these decisions suggest that there should not be a general rule denying organization standing in "civil rights" actions. Instead, it is better to ask whether individual participation is so important in a particular case as to defeat organization standing.

unique events affecting no more than a few people. Even if more people are affected, it may be better to force litigation into the formal representation procedures of a class action than to rely on the vague representation theory of organization standing.

Once the three prongs of the Apple Commission test are satisfied, a few barriers may remain. The most obvious is that it is not enough to show that an individual member would have standing; the other requirements of justiciability must be met as well. If the member's claim is not yet ripe or has become moot, the organization cannot maintain suit.<sup>147</sup> Procedural and jurisdictional requirements also carry over from the member to the organization. If a suit by the injured member would be stayed in deference to a pending state proceeding, for example, the same course may be taken with a suit by the organization.<sup>148</sup>

**147. Ripeness and mootness**

Both the problems of ripeness and mootness are illustrated in *Warth v. Seldin*, 1975, 95 S.Ct. 2197, 2214–2215, 422 U.S. 490, 516–517, 45 L.Ed.2d 343. One of the plaintiffs was an organization of building companies, claiming that restrictive zoning ordinances had impaired their business opportunities. The Court denied standing based on member injury upon concluding that none of the members had such concrete building plans as to demonstrate a ripe claim. Another plaintiff was an organization of groups that were involved in developing low-cost housing. As to this plaintiff, one member had undertaken to develop low cost housing in Penfield, but had abandoned the plan. The Court suggested that had suit been brought at a time close to this abandoned plan, the member and the organization might have had standing. As to a complaint filed three years later, however, it concluded that there was no sufficient basis to infer that “a live, concrete dispute” remained.

When bank depositors did not have ripe claims to challenge bank recordkeeping requirements on the basis of possible Internal Revenue

Service summonses, because no such summonses had yet issued, the bank could not assert their rights. *California Bankers Assn. v. Shultz*, 1974, 94 S.Ct. 1494, 416 U.S. 21, 39 L.Ed.2d 812.

**148. Abstention**

Chief Justice Burger has explored at length, in a separate opinion, the question whether a union, complaining of unconstitutional interference with the organizational rights of its members, should be able to invoke federal jurisdiction in circumstances in which federal courts would defer to pending state criminal prosecutions of the individual members. See *Allee v. Medrano*, 1974, 94 S.Ct. 2191, 2208, 416 U.S. 802, 830–831, 40 L.Ed.2d 566 (concurring and dissenting). He concluded that the union “stands in the place of its prosecuted members even as it asserts its own constitutional rights,” since any other result would permit an unwarranted evasion of federalistic deference. As to the union's claim of interference with its own constitutional rights to communicate with others, this conclusion seems warranted—at most—only if the union's rights cannot exist independently of the rights of individual members. If there