

1992

West Valley Fraternal Order of Police Lodge #4, a non-profit Utah corporation, and Jim Crowley v. Dennis Nordfelt, West Valley Chief of Police, and West Valley Civil Service Commission : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY FRATERNAL)
ORDER OF POLICE LODGE #4, a)
non-profit Utah corporation,)
and JIM CROWLEY,)

Plaintiffs/Appellants,)

-vs-)

DENNIS NORDFELT, West Valley)
Chief of Police, and WEST)
VALLEY CIVIL SERVICE)
COMMISSION,)

Defendants/Appellees.)

Appellate No. 920276-CA

Priority Classification 16

APPELLANT'S REPLY BRIEF

Appeal from final order entered in the Third Judicial District Court in and for Salt Lake County, the Honorable Leslie A. Lewis, presiding.

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DEC 9 1992

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and JIM CROWLEY,

-VS-

Defendants/Appellees.

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and JIM CROWLEY,)	
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Plaintiffs/Appellants,)	
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-vs-)	Appellate No. 920276-CA
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DENNIS NORDFELT, West Valley)	
Chief of Police, and WEST)	Priority Classification 16
VALLEY CIVIL SERVICE)	
COMMISSION,)	
)	
Defendants/Appellees.)	

Appellants, West Valley City Fraternal Order of Police Lodge #4 and Jim Crowley, will reply herein to certain of the arguments raised by Appellees in their brief:

ARGUMENT

I. IN THEIR OPENING BRIEF APPELLANTS
MARSHALED THE EVIDENCE THAT
SUPPORTS THE FINDINGS OF FACT

Plaintiffs, in sections II. A. and III. A. of their opening brief, satisfied this court's marshaling requirement by presenting the array of evidence presented to the trial court in conjunction with defendants' Motion to Dismiss.

Plaintiffs specifically challenged findings nos. 2, 3, 4, 7, 8, 10 and 11. Plaintiffs marshaled the evidence supporting those

findings and then supported their argument that those findings were erroneous, in part by pointing out that the trial court disregarded the affidavits supplied by plaintiffs [R.229-232, 330-369] despite their being specifically incorporated into Plaintiffs Supplemental Memorandum In Opposition to Defendants' Motion to Dismiss [R.345] and plaintiffs Reply Memorandum in Support of Plaintiffs' Motion for Joinder [R.341].

For example, finding of fact number 2 was challenged by plaintiffs because it was the trial court's springboard to the conclusion that seniority was properly considered in the promotion examination process. Defendants, in arguing plaintiffs' failure to marshal the evidence in support of finding number 2, fail to recognize that the only relevance this finding has to the case is in regard to the question of whether seniority was adequately considered. As such, the additional evidence defendants claim was not included in plaintiffs' opening brief regarding the one year probationary period serves only to establish the logical requirement that officers complete their probation before being promoted and is merely cumulative to the evidence marshaled by plaintiffs. The length of the probationary period is not an issue in this case. Whether seniority was properly considered is an issue raised by plaintiffs, and plaintiffs have demonstrated that finding number 2 is flawed both because it is clearly contradicted and because it cannot support

the trial court's legal conclusion that seniority was adequately considered. See Appellants' Opening Brief at 22-23.

In regard to findings of fact numbers 3 and 4, defendants conveniently ignore the fact that the thrust of plaintiffs' attack on those findings is that they fail to acknowledge that Chief Nordfelt and Guy Kimball recognized that P.O.I officers were not allowed to participate in the promotion examination process and then acted improperly to waive "the restriction in the Civil Service requirements stating that officers applying for the position of Sergeant be of a POII rank, be waived." [R.110]. Plaintiffs' challenges to findings numbers 3 and 4 are directed at what was omitted from those, and indeed all, of the trial court's findings and the fact that the findings only reflect the status of the facts after the illegal waiver obtained by Chief Nordfelt and Guy Kimball on June 6, 1989. [R.110]. Given the specific nature of plaintiffs' challenges to findings 3 and 4, plaintiffs have adequately marshaled the facts that tend to support them. See Appellants' Opening Brief at 23-24.

Plaintiffs adequately marshaled the evidence supporting findings numbers 7 and 8. See Appellants' Opening Brief at pp. 36-39. With respect to finding number 7, defendants point to supporting factual references that are not included in plaintiffs' original discussion of the evidence, but plaintiffs submit that should not be fatal to plaintiffs' challenge of or dispositive of the verity of finding no. 7. In light of plaintiffs'

claims that he was improperly required to compete against ineligible candidates and that his seniority was not considered, the fact Crowley failed the written examination by one point cannot properly be found to be the sole reason why Crowley "...did not proceed further in the promotional process." [R.432]. As to finding number 8, defendants fail to call the court's attention to any substantial evidence absent from plaintiffs' marshaling effort other than that discussed with respect to finding 7. The "threshold qualification" of a completed probation does not, as defendants argue, equate with proper consideration of seniority. Plaintiffs clearly demonstrated why finding number 8 is fatally flawed. See Appellants' Opening Brief at pp. 38-39.

Plaintiffs also sufficiently marshaled the evidence that tends to support findings numbers 10 and 11. Defendants' brief acknowledges that plaintiffs properly marshaled the evidence that tends to support finding number 11, and with respect to finding number 10, defendants suggest only that plaintiffs should have reiterated the evidence that tends to support the trial courts' findings with respect to the seniority and the improper waiver of the P.O.II requirement.

Plaintiffs presented the evidence before the trial court that tends to support the trial court's findings of fact and thereby satisfied this court's marshaling requirement.

II. THE TRIAL COURT'S FINDINGS OF
FACT ARE CLEARLY ERRONEOUS

The only finding of fact made by the trial court that even remotely addresses the issue of the consideration of the candidates' seniority was finding of fact number 2 which states:

One year of service with the West Valley City Police Department was required in order to be eligible for promotion for Sergeant. [R.432]

The requirement that candidates "must be off probation" was a minimum qualification, as stated in the June 6, 1989 memorandum:

- Must have four years of police experience (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.

[R.006]. The length of the probationary period is not an issue in this case. Plaintiffs challenge finding number 2 because it is patently erroneous insofar as the trial court used it to support the legal conclusion that seniority was properly considered.

Plaintiffs allege that the candidates' seniority in service was not considered as required by Utah Code Ann., § 10-3-1010 (1983), which states in pertinent part:

The civil service commission shall provide for promotion in the classified civil service on the basis of ascertained merit, seniority in service and standing obtained by competitive examination.... (emphasis added.)

Rule III-1, W.V.C.C.S.P.P.M. (1988), similarly states:

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....(emphasis added.)

While defendants go to great lengths to establish that the probationary period was one year, they present no evidence that minimum qualification was intended to be consideration of seniority. Neither the June 6, 1989 nor the July 7, 1989 memoranda make any reference to consideration of seniority. There is no evidence to indicate that seniority was considered.

The trial court, however, presumably determined seniority was considered when it concluded F.O.P. and Crowley did not suffer injury related to the conduct of defendants and therefore had no standing. To the extent the trial court and defendants relied on finding number 2 to support the conclusion that seniority was properly considered, it is clearly erroneous.

Findings of fact numbers 3 and 4 state:

[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]

[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].

The controversy regarding findings numbers 3 and 4 is caused, in part, by the variable uses and meanings ascribed to the term "rank" by the parties. Even Chief Nordfelt and Guy Kimball, however, within the specific context of the promotional

evaluation at issue here, referred to P.O.II as a designation of "rank." [R.110 (June 6, 1989 memorandum at para. 1, line 5; para. 2, lines 2, 7)]. While defendants now differentiate between "rank" and "grade," it is clear that they did not do so when they committed the acts plaintiffs complain of. The remainder of the controversy regarding findings 3 and 4 stems from the trial court's apparent failure to consider plaintiffs' allegation that Chief Nordfelt and Guy Kimball illegally waived the requirement that candidates be at least P.O.II officers in order to be eligible for promotion to sergeant. Although the illegal P.O.II waiver issue is one of the two principal improprieties plaintiffs alleged occurred in the design and administration of the promotion evaluation, it is not directly addressed in the trial court's findings and conclusions. Like the issue of seniority, consideration of the illegal waiver of the P.O.II requirement is necessary to a fair determination of whether F.O.P. and Crowley had standing. For that reason plaintiffs have challenged the findings that most closely approach the facts that bear on the P.O.II issue, findings 3 and 4.

The clearest evidence that candidates were initially required to be P.O.II officers comes from the June 6, 1989 request for waiver Chief Nordfelt addressed to the Commission which states:

The Police Department is considering offering a Sergeant's test to establish a promotional roster for that rank. As a result of this, we request that the

restriction in the Civil Service requirements stating that officers applying for the position of Sergeant be of P.O.II rank, be waived.

...Therefore, since the reasons for these officers not reaching the rank of P.O.II qualifying them for the Sergeant test is due to the Department's inability to offer such a position to them, we respectfully request that the Civil Service Board waive this restriction for the testing.

[R.110]. See also Chief Nordfelt's August 16, 1990 deposition testimony quoted at R. 293-295 (Addendum at A-C). On that same day, Guy Kimball approved the request by his signature on the letter [R 110, 117, 294-95]. The P.O.II requirement was thereby waived by a single Commissioner and without the benefits of the other Commissions' deliberation or a hearing of any kind. Obviously, both Chief Nordfelt and Guy Kimball recognized that P.O.I officers were not eligible for promotion to sergeant. Guy Kimball, as Chairman of the Commission, is the best source of interpretation for the rules and requirements the Commission adopted pursuant to statute. See McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977). The waiver effected by Chief Nordfelt and Guy Kimball was illegal. Rule I-6, W.V.C.C.S.P.P.M. (1988); Hayward v. Pennock, 444 P.2d 59, 61, 21 Utah2d 242 (1968). F.O.P. and Crowley suffered distinct and palpable injury when P.O.I officers illegally became eligible to compete in the evaluation process, and that injury is part of the basis for F.O.P.'s and Crowley's standing in this case. To the extent findings 3 and 4 fail to acknowledge the illegal waiver of the P.O.II requirement, they are clearly erroneous.

Plaintiffs submit that finding of fact number 7 is also clearly erroneous when it is examined in light of plaintiffs' claims that Crowley was required to compete against ineligible candidates and that his seniority was not considered. Finding number 7 states:

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 [R.432].

Crowley's failure, by one point, to pass the written examination portion of the evaluation does not support the trial courts' conclusion that Crowley was not injured and therefore did not have standing. Hayward v. Pennock, 444 P.2d at 60. In addition, because ineligible candidates were allowed to compete and seniority was not considered, plaintiffs submit Crowley's score on the written examination is irrelevant, and a new examination should be given. Hayward v. Pennock, 444 P.2d at 60. The primary flaw in finding number 7 is the statement that the written examination is the reason Crowley did not proceed further in the promotional process. That conclusion assumes the evaluation process was properly designed and administered and in so doing it ignores the very nature of Crowley's action. It is therefore clear erroneous.

Finding number 8 states:

Plaintiff Jim Crowley did not suffer a distinct, particularized and palpable injury related to the conduct of Defendants [R.432].

Plaintiffs' discussion of findings of fact numbers 2, 3 and 4, supra, and Point IV, infra, establishes that the trial court did not consider the nature of Crowley's claims or the evidence supporting those claims when it determined that Crowley was not injured by defendants' actions. Crowley was injured by the failure to consider his seniority and by being found to compete with ineligible candidates. It was improper for the trial court to ignore those claims based solely on Crowley's test score. Hayward v. Pennock, 444 P.2d at 60. Crowley was injured when he was not afforded a fair opportunity for promotion, and to the extent finding 8 states he was not, it is clearly erroneous.

Defendants misquote finding number 10. See Appellees' Brief at p. 26. It states:

Members of the F.O.P. did not suffer distinct, particularized and palpable injury related to the conduct of Defendants. [R.433].

As with finding number 8, finding number 10 is clearly erroneous because it fails to address the seniority and eligibility issues raised by plaintiffs and discussed more fully in appellants' opening brief and in conjunction with findings of fact 2, 3 and 4, supra. There is no evidence in the record to indicate the candidates' seniority was considered in the evaluation process. Defendants made the disingenuous assertion that because candidates were required to be off probation, their seniority was considered.

The one year of probationary service cannot substitute for proper consideration of each candidate's relative seniority in service. Defendants also cannot escape the fact that Chief Nordfelt and Guy Kimball illegally waived the requirement that candidates be at least P.O.II officers in order to be eligible for promotion to sergeant. The unimpeachable evidence that the P.O.II requirement exists is provided by the waiver itself. [R.110, 117, 293-95]. There would have been no need to waive that requirement if it did not exist. The trial court overlooked the injuries - the seniority and eligibility issues - when it adopted finding number 10.

Plaintiffs submit that finding of fact number 11 is clearly erroneous, and because the Society of Professional Journalists v. Bullock, 743 P.2d 1166, 1172 (Utah 1987), appellate standing test does not apply, that it is irrelevant. It states:

Plaintiff F.O.P. did not present its claims to the Civil Service Commission prior to the commencement of this lawsuit. [R. 433].

The fatal error of finding number 11 is amply discussed in appellants' opening brief and at point V, infra. The portions of Cory Ervin's affidavit [R.186] upon which defendants rely does not cancel the allegations and clear documentary evidence plaintiffs have presented [R. 10-12, 13, 110, 116, 332, 335, 338-39].

Plaintiffs have argued that the Commissions rules and regulations did not provide a means for Department officers to object to improprieties in the promotion examination process. In

their attempt to counter this argument, defendants first misconstrue it. In their opening brief, plaintiffs argued, "... the Commissions' rules and regulations did not provide a process..." See Appellants' Opening Brief at 27. That statement is true. The West Valley City Civil Service Policy and Procedures Manual contains no rules addressing officers' rights to seek review of the promotion examination process. Without Commission rules to guide them, the F.O.P. officers, including Crowley, presented their claims to the Commission as best they could. Appellees brief recognizes that fact. "...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 Commissions' investigation." Appellees' Brief at p.29.

It is clear the trial court did not adequately consider the claims raised by F.O.P. and Crowley when it determined that neither F.O.P. nor Crowley suffered injuries as a result of defendants' conduct. For that reason, plaintiffs submit that this court should conduct a de novo review of the trial court's dismissal of plaintiffs' claims. See, Moir v. Greater Cleveland Regional Transit Auth., 895 F.2d 266, 269 (6th Cir. 1990); Love v. U.S., 871 F.2d 1488 (9th Cir. 1989). The trial courts' findings of fact numbers 2, 3, 4, 7, 8, 10 and 11 are clearly erroneous and should be reversed.

III. EVEN ASSUMING CONFLICTS OF
INTEREST DO EXIST, F.O.P. HAS
STANDING TO BRING THIS ACTION
IN IT'S REPRESENTATIVE CAPACITY.

Even if it is assumed, arguendo, that conflicts of interest exist between individual F.O.P. members, those conflicts do not preclude F.O.P.'s standing. This is particularly true in this case where, as previously argued by plaintiffs, the "diverse interests", as they are characterized by defendants, stem primarily from the unfair advantage conferred upon three F.O.P. members because of the improper and illegal design and administration of the promotion examination process. R.I. Chapter, Association of General Contractors v. Kreps, 450 F.Supp. 338 (D.Ct.R.I. 1978), discussed in appellants' opening brief, makes it clear that an association need not adequately represent the interests of any association members who receive advantage or benefit by the illegal or improper acts complained of and that absence of injury to some members or discrepancies between the injuries suffered by an association's members are not fatal to the association's standing. The court stated:

Although one contractor member was awarded a contract upon satisfaction of the 10 percent requirement, the possible absence of economic injury to him with regard to this one project, out of a possible twenty, does not destroy the Contractor Associations' standing to seek generalized relief....

Any conflict among competing Contractor Association members over the Pawtucket project does not affect the standing of this Association to assert the rights of injured members. The Association does not function like a class representative, Fed.R.Civ.P. 23(a)(4), as

defendants suggest. It need not adequately represent the interest of the member who won the Pawtucket contract. That member can intervene to represent his own interests pursuant to Fed.R.Civ.P. 24 without the showing of inadequate representation required under Rule 23(d). The suit by the Association has the same effect on this member's rights as would any facial attack brought by single contractor on his own behalf. (citation omitted).

R.I. Chapter, 450 F.Supp. 338 at 347 n.3.

Defendants' assertion that the courts have consistently ruled to the contrary is incorrect. In Gillis v. U.S. Dept. of Health and Human Services, 759 F.2d 565 (C.A. 6th 1985), the court found that an association of nursing home residents, hospital patients, patients' relatives and health care professionals had standing to claim that the Department of Health and Human Services had failed to ensure that hospitals properly fulfilled their obligations under the Hill-Burton Act to provide services without charge or at reduced charges to eligible patients. Rejecting the argument that the association's members' interests were "...too diverse and the possibilities of conflict too obvious to make the association an appropriate vehicle to litigate the claims of its members," Gillis, 759 F.2d at 572 (quoting Associated General Contractors v. Ottertail Power Co., 611 P.2d 684, 691 (8th Cir. 1979)), the court stated:

Although there is a theoretical conflict between ...[the association's] members posited by HHS, it would not seem to be the type that should deprive an association of representational standing. See National Constructors Ass'n v. National Electrical Contractors Assn., 498 F.Supp. 510, 520-21 (D.Md. 1980). First the adverse effects to certain members of the relief being

sought are both speculative and indirect. Second, once an organization has alleged actual injury to 'its members, or any one of them', Warth v. Sedlin, 422 U.S. at 511, 95 S.Ct. at 2211 (emphasis added), it may argue on behalf of the 'public interest'. Sierra Club v. Morton, 405 U.S. at 737-38, 92 S.Ct. at 1367-68. Virtually any relief involving the expenditure of money that benefits some but not all of an organization's members potentially means that money will be unavailable to or in part exacted from the remainder of the membership. By joining an organization dedicated to a particular goal in the public interest, members indicate a willingness to make certain sacrifices productive of that goal. Carried to its logical extreme, evaluation of representational standing in terms of the adverseness of remote interests of discrete members would seriously undermine the ability of individuals through organizations to achieve public interest objectives through the system. Cf. NCAA v. Califano, 622 F.2d 1382, 1391-92 (10th Cir. 1980) (where one or more members of association support bringing suit, association has standing absent showing that more members oppose than support associations position).

Gillis, 759 F.2d at 572-73. Where, as here, the charge before the court is that classified civil service employees have lost the protections afforded by the merit system that governs their employment, the "public interest" is at issue.

The reasons for the adoption of a merit system are to protect employees and the public from the evils of the spoils system and to assure to each officer an orderly opportunity for promotion. (emphasis added.)

Hayward v. Pennock, 444 P.2d at 61. Furthermore, the individual participation of individual F.O.P. members is not required because appellants have not requested monetary damages. Utah Restaurant Association v. Davis County Board of Health, 709 P.2d 1159, 1163 (Utah 1985).

Appellees claim the most dramatic example of conflict is the fact that Chief Nordfelt was an F.O.P. member when the case was filed. Chief Nordfelt, however, resigned his membership in F.O.P. on October 3, 1991 [R.408-410 (Addendum at D-F)]. The fact that Chief Nordfelt was once a member of F.O.P. does not create a conflict that should now prevent F.O.P. from having standing in this case.

Any conflicts among F.O.P. members that may exist are not of the kind that prevent F.O.P. from meeting the association standing test first enunciated in Utah Restaurant Association, 709 P.2d at 1163 and Society of Professional Journalists, 743 P.2d at 1170.

IV. CROWLEY HAS STANDING TO BRING THIS ACTION

Defendants' primary argument in support of their contention that Crowley did not have standing is that Crowley suffered no injury and therefore has no personal stake in the outcome of the dispute. In making that argument, defendants ignore the nature of the factual support for the injuries Crowley has alleged.

Crowley alleged that he was improperly required to compete against ineligible candidates holding only the P.O.I rank [R. 113-118, 338] and that his approximately nine years of seniority was not considered in the promotion process as required by law [R. 6-9, 113-118, 338]. In addition, Crowley alleged the Commission was illegally constituted on October 4, 1989, when the

officers' complaints were summarily dismissed by the Commission, and that candidates were not allowed equal access to study materials [R. 10-13, 117]. Contrary to defendants' claim, Crowley's injuries are not merely generalized interests or grievances shared by the public. Furthermore, defendants have falsely stated that the quote from Hayward v. Pennock, 444 P.2d 59, 60, 21 Utah2d 242 (1968), provided in appellants' opening brief at p. 40, suggests Crowley's claims are "an interest shared by the 'employees and the public.'" Appellees' Brief at p. 38. The quote provided by plaintiffs does not contain that statement. In Hayward v. Pennock, the Utah Supreme Court recognized that every valid participant in a civil service promotional evaluation is personally injured if the evaluation is not conducted according to state law and commission rule and ruled this was no less true for applicants who did not pass the written portion of the evaluation. Hayward v. Pennock, 444 P.2d at 60. As discussed in Point II, supra, Crowley clearly suffered distinct and palpable injuries that gave him a personal stake in the outcome of this case. Crowley therefore has standing. The trial courts' ruling is incorrect and should be reversed.

V. THE TRIAL COURT ERRED IN APPLYING
THE APPELLATE STANDING TEST

Defendants argue that the F.O.P.-Crowley Complaint "...is clearly in the nature of the now abolished writ of mandamus"

[Appellees' Brief, p.40], presumably suggesting that the action was an attempt to obtain an extraordinary writ pursuant to Utah Rule of Civil Procedure 65B (1988) and Utah Supreme Court Rule 19 (1987). Based thereon, the trial court required plaintiffs to meet the appellate standing test stated in Society of Journalists, 743 P.2d at 1172 [R.434 at para. 6; 435 at para. 9]. Defendants' reliance on Lee v. Provo City Civil Service Commission, 582 P.2d 485 (Utah 1978) and Child v. Salt Lake City Civil Service Commission, 575 P.2d 195 (Utah 1978) in support of its argument that "courts have traditionally treated appeals from decisions of civil service commissions as being governed by Rule 65B" is misplaced. In both of those cases the officers petitioned the district court for extraordinary writs after they were discharged from their employment and pursued their appeal rights with the respective civil service commissions. Lee and Child were treated as extraordinary writ cases because that is how they were initiated. They were not converted into extraordinary writ proceedings as defendants argue is appropriate here. The instant case differs factually and procedurally because plaintiffs attempted to get the Civil Service Commission to adequately address their concerns despite the fact that the Commission's rules did not specifically provide for review of the promotion examination process. [R.10-12, 116, 332, 335, 339]. When the Commission summarily dismissed the issues raised, F.O.P. and

Crowley then filed a direct action. The Society of Journalists appellate standing test simply does not apply in this case.

Defendants in effect concede that the Commission considered the claims raised by F.O.P., but incorrectly assert that the Commission's ruling was not adverse to F.O.P. (Appellees' Brief at p. 41.) F.O.P. officers and Crowley initially brought their concerns to the attention of the Commission by letter dated August 23, 1989 [R. 10-12, 116, 332, 335, 339]. Those allegations were summarily dismissed by the October 4, 1989 letter signed by Commissioners Guy Kimball and Don Meyers [R. 113, 116]. A copy of that letter was delivered to an F.O.P. representative [R. 116]. Even if it was appropriate to apply the appellate standing test to plaintiffs in this case, F.O.P. and Crowley have met that test. Both F.O.P. and Crowley had standing to bring their claims before the Commission. They brought those claims before the Commission and they received an adverse ruling. Defendants cannot escape the fact that the Commission produced an adverse response to the officers' claims [R. 13].

Plaintiffs did not initiate this action under the authority of Rule 65B. The trial court erred in applying the appellate standing test and in determining that plaintiffs had not satisfied that test.

VI. THE TRIAL COURT ERRED IN
DENYING THE MOTION FOR JOINDER

Defendants misperceive the nature of the relief sought by

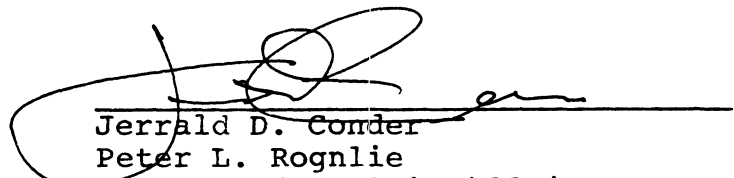
plaintiffs in regard to the motion for joinder. On appeal plaintiffs have requested that the trial court's subject matter jurisdiction rulings be reversed. If rulings are reversed and plaintiffs are found to have had standing in the court below, it necessarily follows that the motion for joinder was not moot and should have been granted.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully submit that the trial court's rulings with respect to F.O.P.'s and Crowley's standing be reversed, that the dismissal based on lack of standing be reversed and that the case be remanded back to the District Court for trial with direction to allow proposed co-plaintiffs Shopay and Salmon to join the action.

DATED this 9th day of December, 1992.

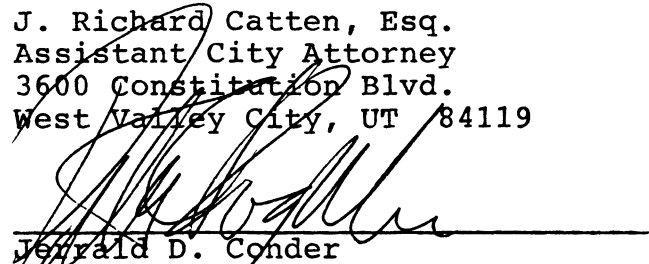
CONDER & WANGSGARD:


Jerrald D. Conder
Peter L. Rognlie
Attorney for Plaintiffs/
Appellants

CERTIFICATE OF SERVICE

I, PETER L. ROGNLIE, certify that on December 9th, 1992, I served two (2) copies of the attached Appellants' Reply Brief upon J. Richard Catten, Assistant City Attorney, counsel for the appellees in this matter by mailing them to him by first-class mail with sufficient postage prepaid to the following address:

J. Richard Catten, Esq.
Assistant City Attorney
3600 Constitution Blvd.
West Valley City, UT 84119



Jerrald D. Conder
Peter L. Rognlie
Attorneys for Plaintiffs/
Appellants

ADDENDUM

<u>Table of Contents</u>	<u>Page</u>
Chief Nordfelt's August 16, 1990 deposition testimony [R. 293-255].	A-C
William Salmon Affidavit re: Conflict of Interest, including October 3, 1991 letter of Chief Nordfelt [R. 408-410].	D-F

Defendants now argue in their memorandum that the Civil Service Commission did not waive a requirement to sit for the sergeant's examination. This disingenuous argument misleads the court and ignores the facts and documents on record which have been provided in discovery.

On August 16, 1990, Chief Dennis Nordfelt was deposed. The questions and responses regarding the requested waiver of the POII requirement are as follows:

Q. (BY MR. BENNETT) Chief, I hand you what has been marked as Exhibit 2 and ask you to examine that.

A. Yes.

Q. Can you tell us what that is?

A. This is a memorandum that was sent under my signature, my name, to the Civil Service Commission requesting a waiver for the sergeant's test.

Q. Did you prepare this letter, this memorandum?

A. Probably not. I probably directed either one of my staff or my administrative assistant to give them the content and said, "Write me a memo to the Civil Service Commission."

Q. You don't recall specifically who that would have been?

A. No.

Q. Can you tell us what problem it is addressing?

A. Yes. The previous requirement to become a candidate for sergeant had been and were at the time that an officer to be POII, a police officer 2. However, because of budgetary problems, there had been several officers in the office that were qualified, otherwise qualified to be POII's and should have been, but we had not been given the money in our budget to allow it to occur.

So other than penalize them over something which they had no control over, where they would otherwise be qualified had the money been in the budget, it was my opinion that they should be allowed to compete for the rank of sergeant.

Q. Can you recall how this problem came to your attention about the POI, POII requirements?

A. No.

Q. In the usual course of your duties, how would such a problem usually come to your attention?

A. Well, believe it or not sometimes I pick up on something like that.

Q. Every once in a while?

A. Every once in a while. Sometimes members of my staff, sometimes the personnel department, sometimes Mr. Catten. Quite often it comes from someone who is affected by this kind of a problem.

Q. This particular instance you don't recall how it came to your attention?

A. I do not.

Q. But you directed the letter to be prepared or it was just somehow generated after you and your staff became aware of the problem?

A. My recollection is that I was aware of the problem and I directed a memo to the Civil Service Commission.

Q. It's dated June 6th of 1989?

A. Yes.

Q. Can you tell us what the mechanics were in getting this thing to the Civil Service Commission, this letter?

A. As far as my mechanics were, it was to be put in my out tray after I had reviewed it.

Q. Now, this exhibit doesn't bear your signature, does it?

A. No.

Q. That's not unusual for a memorandum though, is it?

A. No, it is not.

Q. When something goes in your out tray and in particular this document, what do you expect to have happen to it?

A. I expect that it would be delivered to the Civil Service Commission. My guess is this was given to Cory, who is in the personnel department, who is the secretary to the Civil Service Commission. That is generally what happens with communications to the Civil Service Commission unless we mail them, which I don't think we have ever done. I think it would always go to Cory and she would probably distribute them to the Civil Service Commission.

Q. Now, the copy that we have has some handwriting down at the bottom?

A. Yes.

Q. Can you read what that says?

A. No.

Q. It seems to contain a date, doesn't it?

A. Yes, it does.

Q. What is that date?

A. It looks to me like it's the 6th of June, 1989.

Q. Did you see this memorandum returned to you after it had this writing put on it?

A. I don't recall.

Q. Are you familiar with the -- and I can't read it either and I am not familiar with the signatures.

A. As I look at it, I don't know whose it is.

Q. Who do you think it is?

A. I believe it's Guy Kimball.

Q. The first word on the first line, does that not appear to be the word approved?

A. Yes.

Q. So as best we can make out it says "approved 6-6-89, Guy Kimball"?

Nordfelt Deposition, pp. 30-34. It is clear from Chief Nordfelt's own sworn testimony that there was a requirement that any officer sitting for the sergeant's exam be a POII officer with one year's experience. Chief Nordfelt acknowledged that requirement and, in fact, requested to have it waived.

Guy Kimball, Chairman of the West Valley City Civil Service Commission, was deposed on August 16, 1990. In that deposition (at pp. 5-6, attached hereto as Exhibit "A") Mr. Kimball indicated that he read and signed the memorandum (attached hereto as Exhibit "B") discussed in Chief Nordfelt's deposition. In addition, the Civil Service document provided by counsel in discovery (attached hereto as Exhibit "C") identifies the Civil Service requirements to sit for the sergeant's examination.

There is no genuine issue that the Department and the Civil Service Commission required those sitting for the sergeant's exam to be of the rank of POII. The argument made by defendants is patently false and it not asserted in good faith. Because this argument violates Rule 11, U.R.Civ.P., plaintiffs request that

FILED
DISTRICT COURT

OCT 31 9 25 AM '91

THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY
BY [Signature]

Jerrald D. Conder (#0709)
K. C. Bennett (#3700)
of CONDER & WANGSGARD
4059 South 4000 West
West Valley City, UT 84120
Telephone: (801) 967-5500

Attorneys for Plaintiffs and William Salmon and David Shopay

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

WEST VALLEY CITY FRATERNAL)	
ORDER OF POLICE LODGE #4, a)	
non-profit Utah corporation,)	AFFIDAVIT RE: CONFLICT
and JIM CROWLEY,)	OF INTEREST
)	
Plaintiffs,)	
)	
-vs-)	
)	Civil No. 89-0907667 CV
DENNIS NORDFELT, West Valley)	
Chief of Police, and WEST)	
VALLEY CIVIL SERVICE)	Judge Leslie A. Lewis
COMMISSION,)	
)	
Defendants.)	

COUNTY OF SALT LAKE :
:
STATE OF UTAH :

William Salmon, under oath, deposes and states:

1. All statements made herein are based on my own personal knowledge and information.


2. I am the recording secretary of West Valley Fraternal Order of Police Lodge #4.

3. On October 3, 1991, I received the resignation of Chief Dennis J. Nordfelt as a member of our organization. (a copy of that resignation is attached).

4. Chief Dennis Nordfelt's name has been stricken from the membership roles of West Valley Fraternal Order of Police Lodge #4 effective October 3, 1991.

FURTHER AFFIANT SAYETH NOT.

DATED this 30th day of October, 1991.



William Salmon

SUBSCRIBED AND SWORN to before me this 30 day of October, 1991.

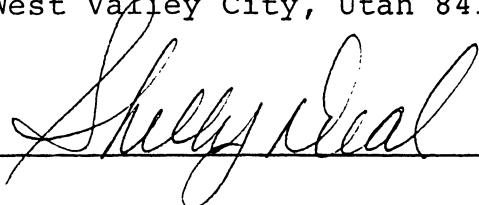


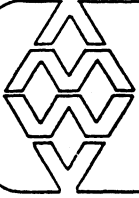
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on the 30 day of October, 1991, a true and correct copy of the foregoing AFFIDAVIT RE: CONFLICT OF INTEREST was mailed, first-class, postage prepaid, to the following counsel of record:

J. Richard Catten
Assistant City Attorney
3600 South 2700 West
West Valley City, Utah 84119






West Valley City



POLICE DEPARTMENT

M E M O R A N D U M

TO: Officer Jim Crowley. F.O.P. President
FROM: Chief Dennis J. Nordfelt 
DATE: 3 October, 1991
SUBJECT: F.O.P. MEMBERSHIP

After due consideration, I have come to the conclusion that I can better serve the members of the Department by not being a member of the Fraternal Order of Police. Therefore, I am resigning my membership in the F.O.P. effective immediately. If any additional action is required to consummate this resignation, please advise me.

It is my desire that we can continue to work together in harmony, and I look forward to meeting with you regularly for that purpose.

cc: Karen Leftwich, City Manager
Angela Reemo, Personnel Officer