

IN THE SUPREME COURT OF THE STATE OF OHIO

CASE NO. 2007-2269

FRATERNAL ORDER OF POLICE, QUEEN CITY LODGE NO. 69
Appellant,

-vs.-

THE STATE EMPLOYMENT RELATIONS BOARD
Appellee.

On Appeal from the Hamilton County Court of Appeals
First Appellate District
Case no. C-060782

BRIEF OF AMICUS CURIAE
FRATERNAL ORDER OF POLICE OF OHIO, INC.
ON BEHALF OF APPELLEE, FRATERNAL ORDER OF POLICE,
QUEEN CITY LODGE 69

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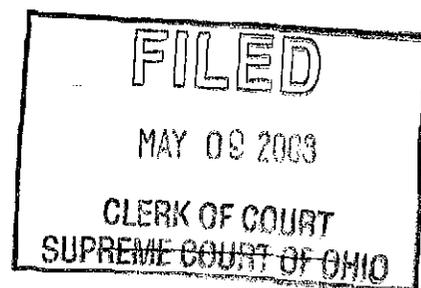


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STATEMENT OF THE CASE AND FACTS

The Statement of the case and Statement of facts provided by the Fraternal Order of Police, Queen City Lodge 69 (hereinafter Appellant) in this action will be sufficient and amicus curiae Fraternal Order of Police of Ohio, Inc. (FOP) will not duplicate those statements here.

ARGUMENT
PROPOSITION OF LAW NO. 1:

WHERE A DECISION OF THE STATE EMPLOYMENT RELATIONS BOARD VIOLATES THE FUNDAMENTAL PURPOSE OF O.R.C. CHAPTER 4117, THE DECISION IS CLEARLY NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND THEREFORE MUST BE VACATED.

The decision of the State Employment Relations Board (hereinafter SERB) sets a dangerous precedent by allowing Employers to ignore and effectively bypass the collective bargaining process by implementing unilateral changes whenever it sees fit without the benefit of negotiations. The Appellee and the Employer bargained for certain rights for these employees. Through the negotiation process the parties created a mutually agreed upon collective bargaining agreement. That agreement contains certain rights to which each of the members of this bargaining unit are entitled. The SERB has essentially given the Employer the unfettered right to expunge every benefit achieved for the membership and agreed upon by the Employer and the FOP during the negotiation process.

The Court of Appeals apparently understood that as a public employer the City of Cincinnati was required to bargain any matter effecting wages, hours terms and conditions of employment. (C.A. decision at page 10) Despite being armed with this knowledge, the court erroneously afforded deference to the decision of the SERB. It is abundantly clear that the SERB abused its discretion and that the decision is not supported by reliable, probative and substantial evidence and that it should be vacated. SERB itself admits that the Employer was required to negotiate with the FOP on "all matters relating to wages, hours, or terms and conditions of employment under O.R.C. § 4117.08 (A)". (SERB opinion at page 16 of 21)

In *City of Akron v. SERB* 1998 SERB 4-49 (CP Summit, 8-12-98) the court said that civil service rules relating to employee demotions and promotions are primary determinants of salary and working conditions; as a result, collective bargaining is required to change those rules. There can be no doubt that the City was required to bargain with Lodge 69 over this issue. There can be no doubt that the unilateral change made by the Employer affected the wages, hours as well as the terms and conditions for the employees in this bargaining unit. The employees were reclassified from classified employees to unclassified thereby putting their employment at risk and denying them the right to appeal any type of discipline under the collective bargaining agreement. In essence these employees now serve at the will of the Employer having lost the benefits negotiated by the parties.

The decision of SERB allowed the employer to unilaterally implement a new method for promotions without negotiating this mandatory subject with Lodge 69 and must be set aside. The decision here conflicts with prior SERB decisions, (see *In re City of Akron*, SERB 97-006 (5-17-97). It conflicts with the decision of the Supreme Court of Ohio as expressed in *DeVennish v. Columbus* (1990), 57 Ohio St.3d 163. Moreover, the SERB decision is contrary to law. O.R.C. § 4117.11(A)(5) states; It is an unfair labor practice for a public employer, its agents or representatives to: refuse to bargain collectively with the representative of his employees recognized as the exclusive representative or certified pursuant to Chapter 4117 of the Revised Code.

This court held in *DeVennish supra*. that “all matters affecting promotions are appropriate subjects of collective bargaining.” (id at page 167) This court further stated (quoting O.R.C. § 4117.10) that “An agreement between a public employer and an

exclusive representative entered into pursuant to Chapter 4117 of the Revised Code governs the wages, hours and terms and conditions of public employment covered by that agreement” and that O.R.C. Chapter 4117 prevails over conflicting laws, resolutions, provisions, present or future, except as otherwise specified in the act.

The parties have set forth in the collective bargaining agreement and through past practice the method by which promotions are to take place. The unilaterally implemented Charter Amendment directly conflicts with the negotiated and understood agreement of the parties. Contrary to the SERB’s arguments, the courts do not act as a rubber stamp for SERB’s interpretations of law but will instead, set aside interpretations that are improper, unreasonable, arbitrary, in conflict with law, or where its decisions are fundamentally inconsistent with the law’s structure. *New Miami Local School Dist. Bd. Of Ed .v. SERB*, 1989 SERB 4-17 (CP Butler 1-25-89). In this instance SERB’s interpretation is in direct conflict with O.R.C. § 4117.08 which required the employer to negotiate any matter that concerned wages, hours, terms and conditions of employment. The decision of the SERB in this case is not supported by the evidence or by law. First, the court should note that SERB initially found that probable cause existed to show that an unfair labor practice had been committed in each of the ULP charges filed by Lodge 69. Ostensibly there was a reason for these probable cause findings. We submit that the reason SERB was able to find probable cause was that an unfair labor practice had in fact been committed by the employer.

Second, even the SERB admits that a past practice concerning promotions exists between these parties. Under that practice the parties used the civil service rule of one for promotions to the position of Assistant Chief of Police. The rule of one was an

established and documented practice to which the City was bound absent negotiating this matter with Lodge 69 in accordance with O.R.C. Chapter 4117.

Decisions of the SERB are entitled to due deference only when those decisions are supported by reliable, probative and substantial evidence. The decisions here do not meet this requirement. The citizenry of the City of Cincinnati can by no stretch of the imagination be considered a "higher-level legislative body" as SERB has applied that term. A legislative body has the power to make, alter, amend and repeal laws. Local level legislative bodies generally carry titles such as City Council, Boards of Commissioners etc. These local bodies are usually elected officials responsible for creating and maintaining budgets for the municipality.

A legislative body can not delegate its rule making authority to the average citizen or to the electorate. Contrary to the definition offered by SERB, the citizenry of Cincinnati are not a branch of local government. As the court of common pleas expressed at page nine of its decision, "SERB's finding that electorates fall within the scope of "higher legislative body" cannot be reconciled with the explicit statutory definition of "legislative body" as the finding strains the plain meaning of "legislature" beyond the breaking point." Even if the citizens of Cincinnati are accepted as a higher legislative body that does not absolve the Employer of its obligation to negotiate with the FOP. If by some far stretch of the imagination the SERB is correct and the average citizen constitutes a higher legislative authority, they are no different than the city council and must therefore abide by the negotiated agreement and the collective bargaining process.

Ironically the legislative body standard applied by SERB in this case is applied when a party is found to have unilaterally modified a provision in a collective bargaining agreement. (see *In re Toledo City School District Bd. Of Edn.* SERB 2001-005 (10-1-01)) Apparently SERB is therefore conceding that the City modified the language in the collective bargaining agreement. It should be noted by this court that in *Toledo*, SERB found that the employer had committed an unfair labor practice by unilaterally implementing an extended school day proposal. The decision of the SERB in the present case is clearly contrary to its prior decisions.

O.R.C. 4117.22 mandates that SERB construe O.R.C. Chapter 4117 in a manner that promotes orderly and constructive relationships between public employers and their employees chosen representative. *Toledo, supra.* The statute requires negotiations concerning mandatory subjects of bargaining. SERB clearly abused its discretion by ignoring the statutory requirements contained in O.R.C. Chapter 4117. If permitted to stand the decision of the SERB will severely undermine the purposes for which the Collective Bargaining Act was created. Public Employers will no longer have the absolute duty to negotiate with representatives of their employees over the implementation of proposed changes in wages, hours, terms and conditions of employment. Instead, they will be able to unilaterally implement these changes by adopting a new policy, ordinance or amendment by a vote of the citizens. The legislative purpose of encouraging the expeditious, equitable and harmonious resolution of conflicts by unions and employers will be extinguished.

The City of Cincinnati and SERB argue that the questions involved in this issue were resolved through arbitration and that since an arbitrator determined that this single

grievant was not entitled to the position for which he applied, the issue of promotion has been resolved. We submit that the issue of promotions is directly tied to O.R.C. Chapter 4117 and therefore can not and were not resolved through the arbitration procedure. The issue of mandatory bargaining subjects such as promotions concerns more than a single bargaining unit member. The ramifications of the SERB decision are far reaching. This decision will affect public employees throughout the State of Ohio.

SERB's prior holdings concerning mandatory bargaining subjects require an employer to bargain, at the very least, the affects of its actions. *State Employment Relations Board v. Bedford Heights* (1987), 41 Ohio App.3d 21; *Gunn v. Euclid City School District Board of Education* (1988), 51 Ohio App.3d 41; *In re City of Lakewood*, SERB 88-009 (7-11-88); *Lakewood v. State Employment Relations Board* (1990), 66 Ohio App.3d 387. In this case the decision of the SERB fails to even meet this basic requirement.

O.R.C. 4117.11(A)(5) states that it is an unfair labor practice for an employer to refuse to bargain collectively with the recognized exclusive representative of its employees. Promotions are a mandatory subject of bargaining. O.R.C. 4117.12 (B)(3) states that if the Board is of the opinion that any person named in the complaint has engaged in any unfair labor practice, it shall issue an order requiring such person to cease and desist from that unfair labor practice and take affirmative action to effectuate the policies of the act.

The legislative intent is clear and unmistakable. Once SERB determined that the issue of promotions was a mandatory bargaining subject, as it did here, SERB should have entered an order requiring the City to negotiate with Lodge 69. Instead SERB

ignored its own decisions and the clear statutory requirements. In doing so the SERB has unjustly fashioned a new and unreasonable definition for mandatory bargaining subjects. The deference to which SERB is entitled clearly does not include the authority to circumvent statutory law. The decision of the trial court should be affirmed in order to maintain the effectiveness of the Collective Bargaining Act.

PROPOSITION OF LAW NO.2:

THE DECISION OF THE SERB AND THE DECISION OF THE COURT OF APPEALS ARE IN DIRECTCT CONFLICT WITH THE REQUIREMENTS OF O.R.C. CHAPTER 4117 AND MUST THEREFORE BE REVERSED.

Promotions are a mandatory bargaining subject therefore the City was required to bargain with Lodge 69 prior to implementing any change in the status quo concerning this subject. The City admits that prior to the Charter amendment the practice for promoting Assistant Chiefs of police was to use the civil service rule of one. (City's amicus brief at page7). O.R.C. 4117.08(A) requires an Employer to bargain with the exclusive representative on all matters relating to wages, hours, terms and conditions of employment. *In re City of Broadview Heights*, SERB 99-005 (3-5-99) The issue of promotions obviously concerns wages, hours, terms and conditions of employment as expressed in O.R.C. Chapter 4117.

Under its own three prong balancing test, SERB must concede that the issue of promotion to Assistant Chief is a mandatory bargaining subject. In fact at page 17 of its decision, the SERB says that "Examining the first prong, the promotional process in the City's police department was a term or condition of employment of bargaining-unit employees." Under prong one of its balancing test the issue of promotion to Assistant

Police Chief was a mandatory subject of bargaining. SERB also found that under prong two, there was no evidence demonstrating that inherent discretion on the part of the employer was necessary for filling vacancies in the position of Assistant Police Chief. Therefore under prong two of its test the employer was obligated to bargain this issue. Under the third prong of its test, SERB determined that mediations and negotiations would have been the ideal method to achieve the purposes of promoting an orderly relationship between the City and Lodge 69.

SERB specifically says at page 17 of its decision “The three-prong test reveals that, on balance, the promotional process for Assistant Police Chiefs is a mandatory subject of collective bargaining.” Once SERB determined as it did in this case, that a subject is a mandatory subject of bargaining under O.R.C. Chapter 4117, SERB should have ordered the parties to negotiate the matter. Instead SERB ignored its own precedent and dismissed this action. This court has previously held that where decisions of SERB are not supported by substantial evidence the SERB’s decision can be overturned. *State ex rel. Glass Molders, Pottery, Plastics & Allied Workers International Union Local 333, AFL-CIO, CLC v State Employment Relations Board* (1993), 66 Ohio St.3d 157.

There is no question that “wages” are affected by promotions, and that the criteria for promotions affect the terms and conditions of employment for Lodge 69’s membership. In a similar matter SERB has previously ruled that promotional examinations are a mandatory bargaining subject based upon past practice. (see *State Employment Relations Board v. City of Columbus*, Case No. 86-ULP-04-0122, 4 O.P.E.R. 5119, attached) The City appealed that order but later settled the case and agreed to bargain the issue of promotion.

The charter amendment as implemented goes further than Article 22. It not only affects the promotional language contained therein but reaches further to the wages, hours of work, grievance procedure, the disciplinary article as well as other entitlements contained in the four walls of the agreement. This court must re-establish the rights guaranteed to these employees under the Collective Bargaining Act that have been effectively destroyed by the decision of SERB and the court of appeals.

O.R.C. 4117.08 (C) permits an Employer to bargain away certain rights as defined by that statute. O.R.C. 4117.08(C)(9) specifically says; The Employer is not required to bargain on very limited subjects reserved to the management and direction of the governmental unit except as affect wages, hours, terms and condition of employment, and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement. Further support of this argument can be found in O.R.C. 4117.08 (A) which states that states that all matters pertaining to wages, hours, terms and conditions of employment are subject to collective bargaining.

The SERB and the Appellate court relied upon the *Lorain, Infra* case for support of their decisions. While Supreme Court stated that SERB decisions are entitled to due deference it did not hold that SERB decisions were untouchable on appeal. In fact this court interpreted O.R.C. 4117.08 to mean that an Employer must be allowed to manage its affairs as it sees fit except and until the Employer's decisions affect wages, hours, terms and conditions of employment. *Lorain City Bd. Of Edn. v. State Employment Relations Board* (1988), 40 Ohio St.3d 257,261. The decision of the court of common pleas in this case, embraces both the statutory law and the decision of the Supreme Court in *Lorain*. To the contrary the decision of the court of appeals renders the language in the

contract concerning vacancies/promotions and O.R.C. Chapter 4117 meaningless.

SERB argued and the court of appeals believed that there is no language covering promotions in the collective bargaining agreement. That is simply not true. SERB previously acknowledged that in reality the Charter amendment that was unilaterally imposed in this case affectively modified the collective bargaining agreement. Under the charter amendment, assistant Chief's of Police have been placed in an unclassified position, whereas they previously held classified positions. As an unclassified employee these employees will no longer be entitled to the protections of the collective bargaining agreement. For example these employees will no longer be entitled to use the grievance procedure to settle their disputes and will instead be considered "at will" employees nor will their wages be set by the terms of the collective bargaining agreement.

The decision of the court of appeals is in direct contravention of what the Supreme Court said in *Rocky River v. State Employment Relations Board* (1989), 43 Ohio St.3d 1. In *Rocky River* this court said that a home-rule provision can not be interposed to impair, limit or negate O.R.C. Chapter 4117. Article 22 of the collective bargaining agreement contains language pertaining to promotions. The fact that language concerning promotions already exists in this collective bargaining agreement shows the parties intent to negotiate issues surrounding promotions.

PROPOSITION OF LAW NO. 3

WHEN A PUBLIC EMPLOYER AND ITS CITY COUNCIL ENTER INTO A COLLECTIVE BARGAINING AGREEMENT WITH A PUBLIC EMPLOYEE UNION, THEY ARE BOUND BY THE TERMS OF THAT AGREEMENT AND THOSE TERMS CANNOT BE SET ASIDE BY A CONFLICTING SUBSEQUENT CHARTER AMENDEMENT.

In *City of Kettering v. SERB* (1986), 26 Ohio St.3d 50, the Supreme Court held that municipal corporations and their administrative agencies are each subject to the Collective Bargaining Act. The Court reasoned that the concerns addressed by this statute were of statewide concern and that those concerns prevail over any incidental effect upon the interest of a municipality in local self-government. Since promotions are a mandatory subject of bargaining, as in the present case, under O.R.C. 4117.08, the City no longer has exclusive control over the promotional process through its civil service commission or any other legislative authority.

In *State ex rel. Darrahan v. City of Youngstown*, 85 CA-131 (7th Dist. C.A., Mahoning, Jan. 27, 1987) the court of appeals addressed the conflict between a negotiated promotional procedure and municipal civil service commissions. The Seventh District Court of Appeals relied upon O.R.C. § 4117.10 to hold that bargaining under the Collective Bargaining Act supersedes conflicting language in a City Charter. By enacting O.R.C. § 4117.10 it is clear that the legislature sought to prevent the diminishment of the Collective Bargaining Act by the enactment of ordinances or charters that conflict with collective bargaining agreements.

The court of appeals here failed to recognize that a public employer binds its city council when it enters into a collective bargaining agreement with a public employee union. The city council is not separate and distinct from the employer and if the citizens of the City of Cincinnati are accepted as a higher level of legislative authority they too must be bound by the agreement adopted by city council. This agreement unlike some agreements actually provides language concerning vacancies/promotions. SERB agreed that the parties had an understanding regarding how promotions were to work in light of

their past practice. The Employer now seeks to escape its bargain by blaming the citizens of Cincinnati for its breach of the collective bargaining agreement. SERB and the court of appeals have both agreed that the Employer is permitted to ignore its bargain. This court must reverse those decisions and reinforce the statutory law requiring the parties to bargain this issue.

The ordinance enacted by the City of Cincinnati violates the right to contract contained in O Const II, § 28 which prohibits the abrogation of obligations pursuant to a contractual agreement. The Appellant had the right to enter into a collective bargaining agreement effecting the terms and conditions of certain employees employed by the City of Cincinnati. "The right to contract freely with the expectation that the contract shall endure is as fundamental to our society as the right to write and to speak without restraint" *Blount v. Smith* (1967), 12 Ohio St. 2d 41.

Section I of the Bill of Rights gives every citizen in the State of Ohio the right to acquire, possess and to protect property. *Palmer & Crawford v. Tingle* (1896) 55 Ohio St. 423. When parties enter into a collective bargaining agreement, that agreement and the articles contained in that agreement are considered property and are entitled to the same protection as any other property under the Ohio Constitution. *Cleveland v. Clements Bros. Construction Co.* (1902), 67 Ohio St. 197. The ordinance enacted by the City of Cincinnati, violates and abridges the rights and benefits negotiated by FOP Lodge 69 and extinguishes the liberty and property rights of the effected employees.

During the negotiations for this agreement each party was aware of the terms of the agreement and each understood the intentions behind the language contained therein. *Lake Ridge Academy v. Carney* (1993), 66 Ohio St. 3d 376. The Appellant further had a

right to expect that the terms of that agreement would be enforced. The right to determine the terms of a collective bargaining agreement is exclusive to the contracting parties. Neither the legislative authority for the City of Cincinnati, nor an imagined "higher legislative authority" has the authority to abridge the rights negotiated by the parties (*Cleveland v. Clements, supra* at page 218).

The facts in this case support a finding in favor of the Appellant:

1. The City of Cincinnati and the FOP are parties to a lawful collective bargaining agreement.
2. The Employer, the city council are bound by the collective bargaining agreement.
3. The members of this bargaining unit are entitled to each and every benefit negotiated under the collective bargaining agreement.
4. The issue of promotions is a mandatory bargaining subject under O.R.C. § 4117.08 (A).
5. The collective bargaining agreement contains language concerning vacancies/promotions.
6. The charter amendment adversely affects the wages, hours or terms and conditions of employment for the effected employees.
7. The collective bargaining agreement should prevail over conflicting ordinances and charter amendments.

The above facts are not disputed by the Employer or by SERB. These facts alone show that the court of appeals was wrong in concluding that the decision of the SERB was supported by Reliable, Probative and Substantial evidence since the evidence fails to support the SERB's decision.

Conclusion

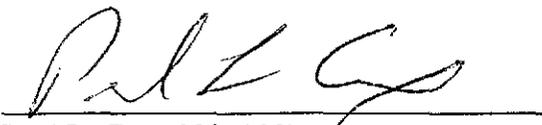
The decision of the SERB is inconsistent with the objectives of O.R.C. Chapter 4117 and the facts in this case. Its decision is therefore not supported by reliable, probative and substantial evidence. The decision of the SERB violates the strong public policy which favors the amicable and expedient resolution of disputes between parties to

a collective bargaining agreement. By ignoring the clear language and the intent of the statutes SERB has in affect rendered this language meaningless.

It is undisputed in this case that promotions are a mandatory bargaining subject. It is also undisputed that the City unilaterally imposed a change in the terms and conditions of employment for Lodge 69's membership concerning promotions. SERB itself stated that the issue of promotions was a mandatory bargaining subject. Once SERB reached that conclusion it was statutorily bound to issue an order requiring the City to negotiate this matter. The court of appeals erred in holding that the decision of SERB was entitled to deference in this case because the SERB decision usurps the duties to which SERB is bound by O.R.C. Chapter 4117.

For the foregoing reasons, Amicus Curiae FOP respectfully requests that this Court reverse the decision of the Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Brief Amicus Curiae was sent by regular U.S. mail this 9th day of May 2008 to Mr. Michael Allen, State of Ohio Attorney General's Office, 30 East Broad Street, Columbus, Ohio 43215 and to Mr. Stephen Lazarus, Hardin, Lefton & Marks, LLC, 915 Cincinnati Club Building, 30 Garfield Place, Cincinnati, Ohio 45202-4322.

A handwritten signature in black ink, appearing to read "Paul L. Cox", written over a horizontal line.

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Appendix

STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
 State Employment Relations Board,
 Complainant,
 v.
 City of Columbus,
 Respondent.

CASE NUMBER: 86-ULP-04-0122

ORDER

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;
 June 2, 1988.

On April 15, 1986, the Fraternal Order of Police, Capitol Lodge No. 9 (Charging Party) filed an unfair labor practice charge against the City of Columbus (Respondent). On May 7, 1986, the charge was amended. Pursuant to Ohio Revised Code (O.R.C.) Section 4117.12, the Board conducted an investigation and found probable cause to believe that an unfair labor practice had been committed.

Subsequently a complaint was issued alleging that the Respondent had violated O.R.C. Sections 4117.11(A)(1) and (5) by unilaterally discontinuing the practice of adding seniority points to the written promotional examination scores and by unilaterally changing the promotional examination and the manner in which it was graded. The case was heard by a Board hearing officer.

The Board has reviewed the record, the hearing officer's proposed order, exceptions and responses. The Board approves the agreed entry of the parties with regard to the substitution of the Petition for Clarification and grants the Respondent's Motion in response to the petition. The Board adopts the Admissions and Stipulations, Findings of Facts, Conclusions of Law and Recommendations as stated in the hearing officer's proposed order.

The Respondent is ordered to:

A. CEASE AND DESIST FROM:

- (1) Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Chapter 4117 of the Revised Code, and otherwise violating Revised Code §4117.11(A)(1).

- (ii) Refusing to bargain collectively with the representative of its employees and otherwise violating Revised Code §4117.11(A)(5).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (i) Post for sixty (60) days in all conspicuous locations throughout the Police Department, the NOTICE TO EMPLOYEES furnished by the SERB stating that the City of Columbus shall cease and desist from the actions set forth in Paragraph (A) and shall take the affirmative action set forth in Paragraph (B).
- (ii) Respondent and FOP Capital City Lodge No. 9 shall immediately engage in good faith collective negotiations regarding the continuation, modification or deletion of the promotions procedure, promotion examination and method of grading utilized prior to March 28, 1986, within the Division of Police.
- (iii) Respondent shall immediately reinstate the practice of adding seniority points to the promotional examination scores of candidates for promotions with the Division of Police which was in existence prior to March 28, 1986.

Additionally Respondent shall immediately reinstate the examination format and the method of grading the examination utilized prior to March 28, 1986. Said practice, examination format and method of grading to be reinstated until such time as an agreement is reached regarding this issue.

ORDER
86-ULP-04-0122
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It is so ordered.

SHEEHAN, Chairman; DAVIS, Vice Chairman; and LATANE, Board Member,
concur.



WILLIAM P. SHEEHAN, CHAIRMAN

I certify that this document was filed and a copy served upon each party
on this 15th day of June, 1988.


CYNTHIA L. SPANSKI, CLERK

2344o/LSI
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