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No. 84-1340 (4)

**IN THE
SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1984**

WENDY WYGANT, ET AL,
Petitioners,

v

JACKSON BOARD OF EDUCATION, ET AL,
Respondents.

**ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**BRIEF AMICUS CURIAE OF THE
MICHIGAN STATE POLICE
TROOPERS ASSOCIATION, INC.**

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With the written consent of the attorneys for the parties, the Michigan State Police Troopers Association, Inc. respectfully submits this Brief as Amicus Curiae.¹

INTEREST OF AMICUS CURIAE

The Michigan State Police Troopers Association, Inc. (the MSPTA) is a nonprofit Michigan corporation, having its principal place of business in Lansing, Michigan. The MSPTA has been certified as the exclusive collective bargaining representative of all troopers and sergeants in the Michigan Department of State Police, in accordance with provisions of Article 11, Section 5 of the Michigan Constitu-

¹ Amicus has filed the consents of the attorneys for the parties with the Clerk of the Court.

tion of 1963. The MSPTA represents approximately 1,750 troopers and sergeants in the Department of State Police. Among those police officers represented by the MSPTA, 60 are women, 113 are black, and 40 are of Hispanic origin.

In its most recent collective bargaining agreement with the Michigan Department of State Police (and at the adamant insistence of the Department), the MSPTA agreed to a contract provision regarding layoffs which is nearly identical to the provision currently before the Court.² The labor contract allows the Department of State Police to deviate from out-of-line seniority in laying off and recalling personnel in order to maintain the same percentages of persons in "underutilized categories³" as existed immediately prior to the layoff.

In addition, the police officers represented by the MSPTA, as well as all State employees in Michigan, are currently subject to a directive from the Michigan Equal Employment and Business Opportunity Council (MEEBOC)⁴ that all hiring and promotions within Michigan state government shall occur at a rate of two persons in underutilized categories for every white male hired or promoted until the percentages of underutilized persons equals certain goals established by MEEBOC, or until the directive expires or is replaced by a new directive. This is not a court

² Relevant portions are reproduced in Appendix 1.

³ Although the federal and state civil rights laws protect a variety of immutable characteristics from being grounds for employment discrimination, affirmative action is most often aimed at assisting blacks, women, Hispanics, and American Indians. Affirmative action to assist handicappers is also increasing. Hereafter, the terms "underutilized category" or "minority group member" should be construed as referring to persons possessing characteristics which are the focus of an affirmative action plan or program.

⁴ MEEBOC was created in its present form by gubernatorial Executive Order 1983-4 as an advisory body to Michigan's governor. It has no statutory or constitutional authority. It has assumed an active role in overseeing the state civil service, particularly its hiring and promotional practices.

ordered plan or part of a consent decree, but an effort undertaken by MEEBOC to create statistical parity between the state civil service work force and the available labor pool in Michigan.⁵

The MSPTA is directly impacted by each of the described "affirmative action" procedures. It has recently found itself an unwilling participant in a battle over the legality of what is euphemistically referred to as "affirmative action," but what is undeniably reverse discrimination. It has been accused of being an accomplice by virtue of its agreeing to the contract language regarding layoffs and recall. Its white male members have demanded that the MSPTA insure that they are treated equally (not worse) than persons in underutilized categories. This seems like a most reasonable request. On the other hand, its minority members have made the countervailing demand that the MPSTA protect their interests and oppose the efforts of those who would dismantle affirmative action or interfere with their promotions made under an affirmative action plan. Assuming such plans pass statutory and constitutional muster, these requests are equally reasonable.

The MSPTA, like other public sector labor unions throughout the country, is caught in an untenable position. The controversy surrounding the legality of reverse discrimination threatens to factionalize the Association. The MSPTA is requesting this Court to address and answer the practical problems which have been created, not only for employers and employees, but for public sector unions, as a result of the blurred distinctions between legitimate affirmative action and illegal reverse discrimination. This case provides an ideal vehicle for the Court to do so.

⁵ Excerpts from the directive are set forth in Appendix 2. The directive was prompted by "early retirement" legislation which was passed by the Michigan legislature in 1984.

INTRODUCTION

For reasons which are unclear, the Jackson Education Association was apparently not sued by Petitioners in this case. The MSPTA is appearing as an amicus curiae to request the Court to consider and address the problems confronted by all public sector unions, including the Jackson Education Association and the MSPTA, who cooperate (or refuse to cooperate) with an employer's affirmative action efforts. The MPSTA recognizes that this Court will not directly pass judgment on the propriety of any action of a non-party to this case, including the Jackson Education Association. However, the Court's disposition of the issues raised by Petitioners, the MSPTA submits, will necessarily affect public sector labor unions in a profound manner. It is hoped that the Court will use this case to settle as much of the affirmative action controversy as possible. Hopefully, amicus can alert the Court to some tangential issues that might otherwise be obscured since the Jackson Education Association is not a party in the case.

Furthermore, the parties and other amicus curiae will provide the Court with an abundance of citations and authorities to substantiate their positions. The purpose of this brief is not to reiterate the case law or persuade the Court to adopt a particular position, but to give the Court a perspective of the issue from a public sector union's point of view, which is not adequately represented in the case due to the absence of the Jackson Education Association as a party.

The MSPTA has diligently attempted to represent the legitimate employment expectations of all of its members since it was founded in 1964, but has come under increasing attack recently from members who demand its intervention because of claims that employment decisions have been made by the Michigan Department of State Police solely on the basis of race, sex, or national origin.

As indicated, the MSPTA has agreed to a collective bargaining agreement nearly identical to that in the case presently before the Court which freezes the proportion of

minorities in the Michigan State Police work force in the event of a layoff. Since the provision became effective, the Department of State Police has been fortunate in avoiding the need to reduce its work force by laying off employees. However, the Department has had to lay off employees in the recent past. Hence, the MSPTA has escaped the possibility that it will be made a litigant arising out of its agreement to allow the Department of State Police to consider race, sex, and national origin to determine who will be laid off. Nevertheless, this provision in the collective bargaining agreement remains a very controversial topic among the rank and file of the MSPTA.

In addition, as is discussed elsewhere in this brief, the State of Michigan has imposed a controversial promotion quota upon the Department of State Police and all other departments within the classified civil service of the State of Michigan. The quota requires that two minority persons be promoted⁶ for every white male until the percentage of minorities in state government reach stated goals or until the directive expires. The MSPTA (as well as other state employee labor organizations) has been beset with internal discord and strife as a result of the "two for one" promotion policy. White male officers with scores of 99 on the promotional roster scream "discrimination" when they see blacks and women with scores in the low 80s promoted over them. (While promotions were formerly made on the basis of narrow score bands in the Michigan classified civil service, minority group members with promotional scores of 80 or above are now deemed as "qualified" as a white male with a score as much as 20 points higher.) These officers have demanded legal representation and financial assistance from the MSPTA, insisting that the promotions are not consistent with the type of affirmative action that this Court has previously held to be valid. On the other hand, the black and women officers also seek help from the MSPTA to fend off the legal attacks brought by their white male brethren, who are increasingly resorting to the use of private lawyers and

⁶ Promotions are specifically excluded as a collective bargaining topic for troopers and sergeants of the Michigan State Police by the Michigan Constitution of 1963, art 11, § 5, which is set forth in Appendix 3.

the courts in attempts to enjoin "affirmative action" promotions. (At least one Michigan court has already enjoined the promotion of lower scoring black officers in favor of a white sergeant with a higher score. More suits have been threatened.)

The MSPTA finds itself caught between divergent interests, not unlike a very large number of public sector labor associations throughout the nation. On the one hand, the MSPTA leadership is committed to equal employment opportunity and to eliminating the effects of past societal discrimination. On the other hand, the MSPTA has striven for absolute fairness and objectivity in employment decisions within the Michigan Department of State Police. All forms of discrimination are deplored, whether perpetuated upon blacks, women, or white males.

The problems confronted by the MSPTA in the context of affirmative action/reverse discrimination are due to the uncertainty in this area of the law. Two major issues need final judicial resolution by this Court to protect unions and employes who act in good faith:

(1) If explicit racial and sexual discrimination by government employers is ever constitutionally permissible, guidance from this Court is necessary to clarify exactly when and under what circumstances this may occur. Although prior decisions of this Court have only approved certain narrow forms of affirmative action, the only real prerequisite the lower courts seem to require in practice is demographic statistical imbalance between the work force and the labor pool.

(2) Assuming that racial- and sex-determinative employment decisions by public employers are constitutional in limited circumstances, the legitimate roles and responsibilities of public sector unions as they relate to affirmative action must be clarified. Unions must be free to negotiate conditions of employment and to oppose what they perceive to be unlawful employment practices without fear of being accused of breaching the duty of fair representation to the group adversely affected by its position.

**IF RACE- AND SEX-DETERMINATIVE
EMPLOYMENT DECISIONS ARE CONSTITUTIONAL,
CONCISE STANDARDS MUST BE
ADOPTED TO PREVENT OVERREACHING**

Affirmative action has undergone a major evolution since this Court first approved the consideration of race, sex or national origin under very limited circumstances in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Mr. Justice Powell's controlling opinion in that case would have allowed a government to consider race as one criteria for admission to medical school when it could demonstrate that to do so promoted a substantial state interest (Opinion of J. Powell at 438 U.S. 320). Five members of the Court, however, flatly rejected the concept of racial quotas, at least insofar as it would preclude an individual from participating in a federally funded program solely on account of race.

Today, of course, the governmental work place from Maine to Alaska is replete with demographic quotas adopted under the auspices of affirmative action. In most instances, the governmental employer is insulated from Title VII liability by Section 713(b)(1) of the Act, due to the promulgation of liberal, but vague, affirmative action guidelines by the EEOC.⁷ A governmental agency can compare the demographics of its own work force to the population at large, the available work force, or some other group, depending upon the result it wishes to reach, and conclude that a statistical disparity exists, suggesting past or present discrimination. A "temporary"⁸ affirmative action plan may then be put into place which requires the hiring, promotion, training, or layoff of a certain number of persons on the basis of their race, sex or national origin. Although prior cases and even the EEOC emphasize that affirmative action

⁷ 29 C.F.R. Part 1608.

⁸ All affirmative action plans can be considered temporary because they expire by their own terms when a demographic goal in the work force is reached. Depending upon individual employers' work force transiency, identical plans may be in place for 6 months or 20 years!

plans must be "reasonable", reasonable is whatever the government employer says it is. Plans requiring one minority promotion for every two majority promotions are common; one for one plans are increasingly used; however, Michigan State government has now adopted a "two for one" plan, which is believed to be the highest voluntary affirmative action quota in the country. It is not surprising that Michigan furnishes the case which it is hoped will be this Court's most important and decisive pronouncement on the subject of affirmative action.

The Michigan Constitution has prohibited racial discrimination in the state civil service since 1940.⁹ Michigan has also had a comprehensive statute prohibiting discrimination based on race, sex and national origin since 1955.¹⁰ Notwithstanding the existence of these protections against discrimination in state government for over 30 years, Michigan concluded in 1984 that 66% of all future civil service positions should go to persons in underutilized categories until demographic balance is achieved or until the plan expired. Michigan has undertaken this quota, not because it has concluded that intentional discrimination has existed in state government, but to rectify injustices perpetuated upon minorities by our society in the past, as well as to insure their increased participation in government:

It is well settled by the courts that affirmative use of race and gender conscious employment goals to alleviate the underutilization of protected groups is not violative of federal or state law or of the Michigan or Federal Constitutions. The purpose and effect of the adopted procedures is to overcome the present consequences of past discrimination against women, minorities and handicappers as a group and to assure equal participation of

⁹ MICH. CONST. of 1908, art. VI, § 22; MICH. CONST. of 1963, art XI, § 5.

¹⁰ Fair Employment Practices Act, 1955 Mich. Pub. Acts 251; Elliott-Larsen Civil Rights Act, 1976 Mich. Pub. Acts 453.

women, minorities and handicappers in state government.¹¹

This Court must be aware that state and local governments have construed *Bakke*¹² and *Weber*¹³ to allow reverse discrimination without restriction so long as the goal of the discrimination is to create a civil service work force that mirrors the characteristics of the available work force in the general population, or in the alternative, seeks to remedy past societal injustices to particular groups. *That is the reality of affirmative action programs in 1985.*

The MSPTA is not suggesting that this Court abolish all types of race- or sex-determinative employment decisions. On the contrary, the MSPTA recognizes the value of affirmative action in the recruitment of qualified persons in underutilized categories to compete equally with all candidates for positions in state or local government. The MSPTA appears as amicus curiae to urge this Court to adopt clear and unequivocal standards for determining if and when a governmental employer may make race- or sex-determinative employment decisions and to what extent.

The standards which have been developed by the lower courts in response to *Bakke* and *Weber* are subject to manipulation and vagaries in application; furthermore, they can be used to validate virtually any affirmative action plan which seeks simply to have an employer's work force mirror the local labor force. The test which has been distilled from this Court's prior decisions has been stated to be the following:

The courts in post-*Weber* decisions generally have upheld action taken pursuant to a formal affirmative action plan against claims of reverse discrimination

¹¹ Memoranda from Lt. Governor Martha Griffiths to Michigan Agencies and Departments (May 21, 1984).

¹² *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

¹³ *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

where the plan (1) is remedial (i.e., in response to a conspicuous racial imbalance in the employer's work force or a finding of discrimination); (2) is reasonably related to the remedial purpose; (3) does not unnecessarily trammel the interests of white employees; and (4) does not continue beyond a period reasonably required to eliminate the conspicuous imbalance or correct the discrimination. Schlei and Grosman, *Employment Discrimination Law* (2d ed., 1983); BNA, ch. 24, p. 854.

This test is a virtual tautology which can be used to justify any sex or racial preference made in the name of affirmative action: (1) If the employer's work force does not closely mirror the available labor force in the local population, a "conspicuous imbalance" may be said to exist, thus automatically making the plan "remedial". (2) Any affirmative action plan that raises the percentage of underutilized persons in the employer's work force must be found "reasonably related" to the remedial purpose. (3) If the lay off of white males with high seniority in favor of new hires who are predominantly members of underutilized categories does not "unnecessarily trammel" the interests of the white employees, it is hard to imagine that any activity undertaken in the name of affirmative action would ever be found to unnecessarily trammel the interest of white male employees. (4) Since no proponent of affirmative action has argued that persons in heretofore underutilized categories in government employment should exceed their proportion in the relevant population, this prong of the test becomes meaningless.

If this Court is to constitutionally sanction explicit acts of racial discrimination by government employers, the permissible boundaries of this activity must be unmistakably clear. They must not be allowed to shift and change with every new presidential or gubernatorial administration. They must be susceptible to judicial analysis that will yield similar results in federal district courts and state courts across the nation. Terms which cannot be quantified, such as "rea-

sonable" and "unnecessarily trammel", should be avoided, if possible, for such terms can be assigned a meaning that is result-oriented. Just as this Court has been meticulous in defining the legal parameters of capital punishment, no doubt because of the gravity of the consequences, so too must the Court approach the problem posed by this case. If racial and sexual discrimination by government is constitutional because it is remedial of past societal wrongs, the harshness of the remedy requires, at the very least, the strictest and clearest of standards to prevent overreaching and abuse by the government in its day-to-day application.

AFFIRMATIVE ACTION AND THE UNION'S DUTY OF FAIR REPRESENTATION

One would expect that a labor union which vigorously opposed any type of preference with respect to promotions and layoffs of members in the bargaining unit on the basis of their race or sex would be acting within its lawful authority (particularly if no identifiable victims of illegal discrimination were in the bargaining unit). This is a decision, however, that may be quite contrary to the best interests of the union's minority members. Based upon the prevalence and judicial acceptance of affirmative action in the public sector, the decision might be successfully attacked as breaching the union's duty to fairly represent those minority members. See *N.A.A.C.P. v. Detroit Police Officers Assoc.*, 591 F. Supp. 1194 (E.D. Mich. 1984), discussed *infra*.

Conversely, the Jackson Education Association and the MSPTA have both contractually agreed to employment preferences for minority group members, notwithstanding the absence of any finding of intentional discrimination by the employer or existence of any identifiable victims of discrimination. The two unions have clearly granted a preference to their minority group members on the basis of race, sex and national origin, thus presenting an arguable case of a breach of the duty of fair representation to those white employees whose seniority would have otherwise protected them from

layoff. Absent compelling reasons that survive Fourteenth Amendment scrutiny, the unions may be found equally as liable as the employers in depriving these persons of the equal protection of the law, notwithstanding the laudable motives of the unions.¹⁴

What standards are to be used to determine if and when a union may turn its back on the will of the majority of its members and agree to a contract provision which it is not legally required to accept, but which it may believe is morally appropriate? Conversely, when is a union free to oppose race- and sex-determinative employment decisions adopted by the employer because they are inappropriate and a form of illegal discrimination? The answers are not provided by existing law!

A related and equally important question is whether a union which sincerely believes that an affirmative action plan affecting its membership exceeds the legal parameters established by this Court may use union dues or agency shop fees to finance litigation challenging such a plan. The Detroit Police Officers Association (DPOA) was recently found to have breached its duty of fair representation to minority group members in just such a case. (In fact, the union's appearance as an amicus curiae in other cases opposing affirmative action despite the objection of its minority members was strongly criticized by the Court.) *N.A.A.C.P. v. Detroit Police Officers Assoc.*, 591 F. Supp. 1194 (E.D. Mich. 1984). District Judge Horace Gilmore rebuked the DPOA for its overall attitude toward affirmative action, and ordered the union to take several internal steps to protect its minority members and insure that they would assume a greater future role in the union.

The result in the *N.A.A.C.P. v. D.P.O.A.* case has paralyzed public sector unions because of the potential con-

¹⁴ See *Lyon v. Temple Univ.*, 543 F. Supp. 1372 (E.D. Pa., 1982) (union could be held liable under § 1983 for affirmative action provisions of collective bargaining agreement allegedly discriminatory to males).

sequences of becoming involved, one way or the other, in the affirmative action controversy. Few subjects, however, are more closely related to "terms and conditions of employment" than promotions and layoffs. It is an intolerable situation when public sector unions become hesitant to act in areas which should be among their foremost concerns. The clear guidance of this Court is needed to restore the confidence of the nation's public sector unions to negotiate without hesitation for what they believe to be in the best interest of their members.

Compounding the problem which public sector unions face is the reaction of many public employers to *Griggs v. Duke Power Co.*, 404 U.S. 424 (1971), and *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Civil service systems across the country had used competitive examinations as a basis for hiring and promoting employees, at least until it became evident that Title VII liability lurked behind the use of such tests if they adversely impacted upon minority applicants and were found not to be job-related. In Michigan, civil service appointments and promotions are constitutionally required to be determined on the basis of competitive examinations and performance. The Michigan response to the problem has not been atypical. Instead of restructuring entrance and promotional tests to eliminate perceived cultural bias, the band of qualified scores has simply been expanded whenever needed until it includes sufficient minorities or women to allow affirmative action appointments to be made.

For example, the Michigan Department of State Police uses a single promotion list for all troopers who are candidates for promotion to the rank of sergeant. White males are uniformly selected on the basis of their competitive scores, with the highest scores being exhausted before lower scores are used. Minorities and women, however, are eligible for promotion so long as they receive a minimum score of 80 (out of a possible 100). Hence, it is not uncommon for a black male or a woman with a score in the 80s to be pro-

moted over a hundred white males with scores in the 90s. A white male with a score of 89, however, is not even eligible for consideration for promotion as long as there are persons on the promotional list with higher scores.

While most white male troopers would accept a form of affirmative action that would allow the Department of State Police to select a person on the basis of their minority status from a group of promotional candidates with *identical* scores, a far different reaction occurs when the minority individual is selected when he or she has a substantially lower promotional examination score. Not only is the minority individual with an inferior score stigmatized, but so are all other minority group members whose scores would have entitled them to promotions on their own merits, but who are assumed to have been promoted solely on the basis of their race, sex or national origin.

A white trooper with a 99 promotional score who is bypassed for promotion in favor of a black trooper with a score of 80 does not accept (or believe) the employer's explanation that the promotional exam is unreliable enough to warrant the conclusion that the two are *equally* qualified. Instead, the trooper perceives a blatant act of racial discrimination, and turns to the union for remedial action. The response of the union is often less satisfactory than the response of the employer: "Sure it is not fair, but it seems to be legal." It certainly makes no more sense to the affected trooper.

Public sector unions in Michigan are held to a higher standard of conduct than unions under the jurisdiction of the NLRB. The Michigan Supreme Court adopted the following standard in *Lowe v. Hotel and Restaurant Union Employees Union*, 389 Mich. 123, 145-147, 205 N.W.2d 167 (1973):

A labor union has a duty fairly to represent its members.

This duty arises from the nature of the relationship between the union and its members. The union and its members do not deal at arms length.

The union speaks for the member. It makes a contract of employment on his behalf. The union offers its member solidarity with co-workers, expertise in negotiation, and faithful representation. In exchange, the member pays his union dues, and gives his support and loyalty to the union.

In many ways, the relationship between a union and its member is a fiduciary one. Certainly, it is a relationship of fidelity, of faith, of trust, and of confidence.

If the courts have stopped short of declaring the union and member relationship a fully fiduciary one, it is because the union, by its nature, has a divided loyalty.

It must be faithful to each member, to be sure, but it must be faithful to all of the members at one and the same time.

The union must be concerned for the common good of the entire membership. This is its first duty.

That duty of concern for the good of the total membership may sometimes conflict with the needs, the desires, even the rights of an individual member.

When the general good conflicts with the needs or desires of an individual member, the discretion of the union to choose the former is paramount.

When the general good conflicts with the legal or civil rights of an individual member, the courts will recognize those rights and enforce them as against the will of the majority of the union membership.

The MSPTA has always undertaken its duty of fair representation conscientiously and vigorously. Now, however, it is confronted by competing demands: the demands of the majority (white males) to abolish race- and sex-determinative employment decisions and the demands of the minority (persons in underutilized categories) to the con-

trary. It faces anger and criticism, not to mention potential liability, no matter which way it turns. It is unfair to expect any public sector union, including the MSPTA, to predict how a court will view the legality of a public employer's affirmative action efforts, particularly when there has never been a finding of past discrimination on the part of the employer and affirmative action as practiced today far exceeds that which has ever been considered and approved by this Court in the past. Labor unions, who have been said to owe a higher standard of conduct to their members than do employers to their employees,¹⁵ are entitled to know in advance: (1) when they *must* cooperate in affirmative action efforts of the employer; and (2) when they *may* oppose such efforts, through litigation or otherwise, because they constitute reverse discrimination.

CONCLUSION

If this Court concludes that race- and sex-determinative employment decisions by public employers, in the absence of identifiable victims of past discrimination, are violative of the Fourteenth Amendment, the concerns raised in this brief by amicus will be rendered moot. If, on the other hand, the Court approves of any form of governmental race or sex preferences without requiring identifiable victims of past discrimination, the Court is urged to speak decisively regarding the tolerable limits of such conduct.

The interpretations placed upon the past decisions of this court by the majority of federal circuit courts have seemed to approve virtually any form of affirmative action plan that seeks to achieve statistical parity between the employer's work force and the available labor pool. Yet a careful reading of this Court's past decisions on the subject reveals that each was decided on extremely narrow grounds. This case presents an opportunity for the Court to defini-

¹⁵ *N.A.A.C.P. v. Detroit Police Officers Assoc.*, 591 F. Supp. 1194, 1212 (E.D. Mich., 1984).

tively settle one of the most controversial and divisive issues of our times. Affirmative action/reverse discrimination touches almost every American family in one way or another. In the past, the subject has been politicized. This Court is urged to take the politics out of this subject by clearly and unequivocally establishing the boundaries between legitimate affirmative action and illegal reverse discrimination.

In so doing, the Court is urged to consider the implications of its ruling upon public sector labor unions, who have a duty to both majority and minority members within the union. The court can resolve the dilemma faced by unions, such as the MSPTA, by making it clear when a union is obligated to cooperate with affirmative action efforts by an employer and when it is free to oppose such efforts. The issues posed by amicus are not merely tangential to this case, but are inherently intertwined with those presented by Petitioners. Direct confrontation and resolution of these issues will reduce litigation in our overcrowded judicial system.

Respectfully Submitted,

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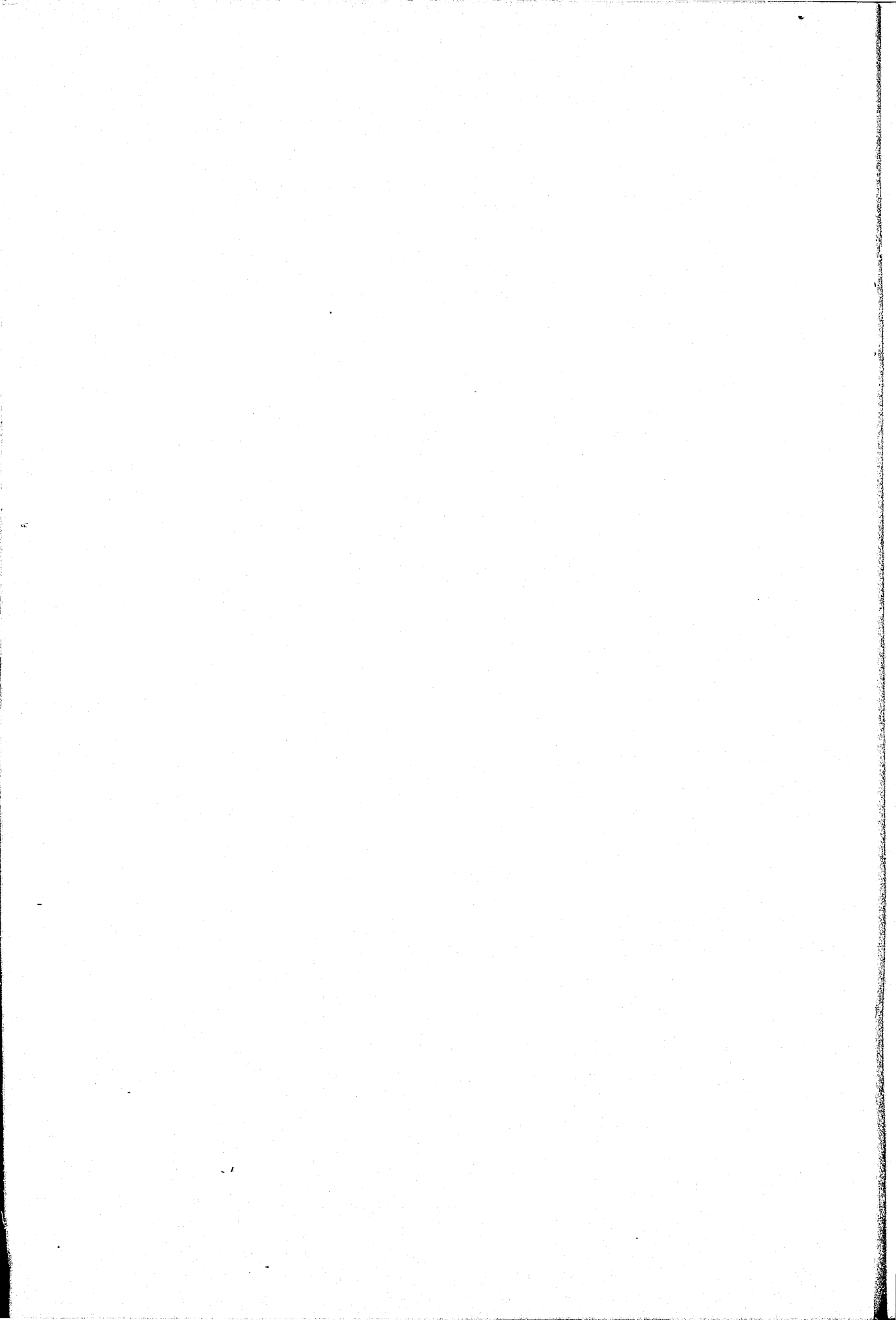
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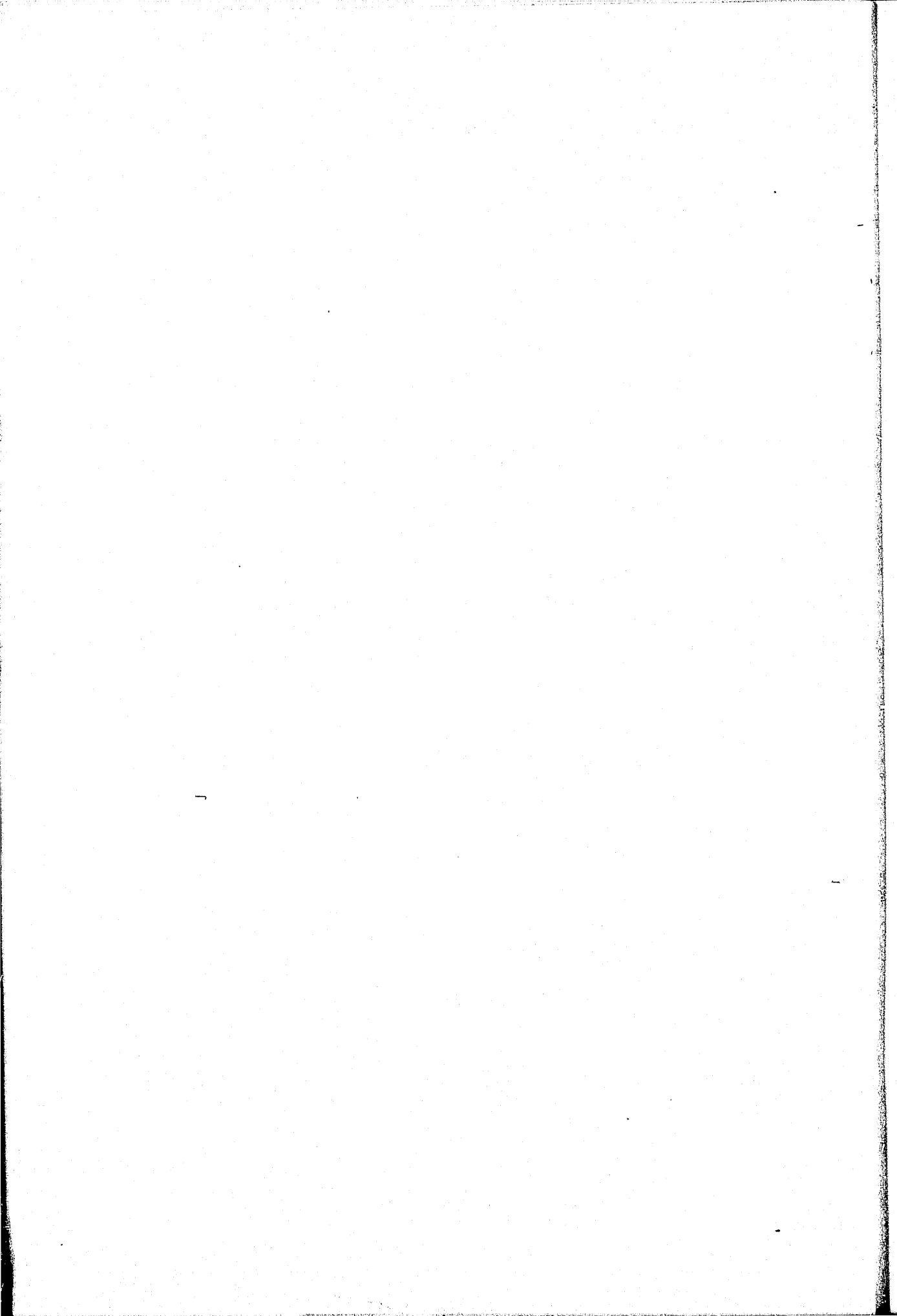
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APPENDIX



APPENDIX 1

EXCERPT FROM ARTICLE 12 OF COLLECTIVE BARGAINING AGREEMENT (1984-1986) BETWEEN MICHIGAN DEPARTMENT OF STATE POLICE AND MSPTA.

b. *Layoff Implementation.*

- (1) Notwithstanding other Sections of this Article pertaining to seniority in layoffs and recall, the employer may layoff, bump and recall out-of-line seniority to continue or initiate a Department of Civil Service-approved selective certification, or to administer an affirmative action program in accordance with Executive Order 1983-4, or its successor, and pursuant to Civil Service Commission approved guidelines and procedures.
- (2) The affirmative action exception to seniority provided herein may only be exercised when employment in the bargaining unit is in a condition of underutilization or, by virtue of the seniority criterion, would be placed in a condition of underutilization of protected group members. Under no circumstances may the Department use the out-of-line seniority provision where the necessary result would be to increase the protected group's utilization rate in the bargaining unit above that in effect on the date of the layoff (or recall), except as the layoff, bumping, or recall of one protected group member may affect such ratios.
- (3) The standard to be used in determining whether there is or would be underutilization of the protected group shall be the standard adopted pursuant to Executive Order 1983-4.
- (4) The Employer shall give notice of its intent to use the affirmative action seniority exception to the Association and shall meet and discuss the impact of such determination pursuant to Part A above.

APPENDIX 2

**EXCERPTS FROM DIRECTIVE FROM MICHIGAN
LIEUTENANT GOVERNOR AND MEEBOC CHAIR-
PERSON MARTHA GRIFFITHS TO MICHIGAN
DEPARTMENT AND AGENCY HEADS (MAY 21, 1984).**

In response to the above and in accordance with the Guidelines adopted by MEEBOC on March 6, 1984, for the purpose of increasing protected group representation in underutilized classes, the following has been promulgated and are being issued as MEEBOC's Review and Approval Procedures to be followed during the early retirement period (June 2, 1984 to September 30, 1985).

1. All departments shall prepare and submit by June 10, 1984, to MEEBOC for approval, an Early Retirement Hiring and/or Replacement Plan which incorporates:
 - a. A statement of the present status of affirmative action goals of the department.
 - b. An indication of the existing under-utilization by payroll agency, by job category, by group and by class.
 - c. A determination (calculation) of the percentage of goals which has not been met for the above indicated units.
 - d. An indication of the impact of Early Retirement in terms of:
 - (1) anticipated early retirements
 - (2) anticipated hires and/or replacements
 - (3) commitment to goals

(Procedures for preparing the above indicated statement on present status of affirmative action goals in the department is included as Attachment No. 2).

2. Based on the established goals reflected in required Early Retirement Hiring and/or Replacement Plans,

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departments will be expected to hire at a ratio of two (2) protected group persons for every one (1) non-protected group person hired or promoted until the goals reflected in the plan have been achieved, or a request to deviate from the ratio has been sought from MEEBOC and granted.

This required hiring ratio is predicated on a presumption of availability of protected group individuals which are certified for appointment consideration and the expectation that the hiring goal commitments set by the individual departments will be realistic. If a department needs to deviate from the 2 of 3 ratio, the department head must personally make the waiver request in writing to the Executive Director of MEEBOC which must then be reviewed and approved by MEEBOC before the appointment.

The above waiver provision is provided for purposes of addressing those instances where departments are unable to meet the hiring ratio requirement despite documented good faith efforts to do so.

3. Each department must file an Early Retirement Replacement Report Form with MEEBOC on the filling of all affected position vacancies which relate back to the MEEBOC approved Early Retirement Plan (See Attachment No. 3) for the form to be used.

The MEEBOC Liaison Staff will monitor these hiring report forms for compliance with the 2 of 3 hiring/replacement commitment, until the goals of the departments are achieved.

The 15 level equivalent and 12 level equivalent and above review process has been modified to accommodate the Early Retirement Program (See Attachment No. 4). These modifications will allow for reduced documentation and expedited processing where the 2 out of 3 hiring/replacement ratio is being met. Where the 2 out of 3 hiring/replacement ratio is

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not being achieved, the revised review process must be followed.

It is well settled by the courts that affirmative use of race and gender conscious employment goals to alleviate the under-utilization of protected groups is not violative of federal or state law or of the Michigan or Federal Constitutions. The purpose and effect of the adopted procedures is to overcome the present consequences of past discrimination against women, minorities and handicappers as a group and to assure equal participation of women, minorities and handicappers in state government.

The United States Supreme Court has held that the use of affirmative action to overcome under-utilization of protected groups in the employer's workforce does not constitute discrimination within the meaning of Title VII of the Civil Rights Act of 1964.

The review and approval procedures under the Early and Out Retirement Program are specifically tailored and designed to remedy present consequences of past discrimination in employment against minorities, women and handicappers as a group and eliminating under-utilization. By working together we can achieve a racial and gender balance in the State of Michigan's Classified Civil Service workforce which roughly approximates but does not unreasonably exceed the balance that would have been achieved absent the past discrimination.

I look forward to your continued cooperation and I want to assure you that members of my staff will be available to provide assistance in every way possible in the achievement of this most important goal.

Appendix 3

APPENDIX 3

ARTICLE XI, SECTION 5 OF THE MICHIGAN CONSTITUTION OF 1963.

State civil service; exemptions. The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the legislature, employees of the state institutions of higher education, all persons in the armed forces of the state, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department.

Civil service commission; members, terms. The civil service commission shall be non-salaried and shall consist of four persons, not more than two of whom shall be members of the same political party, appointed by the governor for terms of eight years, no two of which shall expire in the same year.

State personnel director. The administration of the commissioner's powers shall be vested in a state personnel director who shall be a member of the classified service and who shall be responsible to and selected by the commission after open competitive examination.

Commission's duties as to classification, compensation, examinations, personnel transactions and conditions of employment. The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competi-

Appendix 3

tive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.

State police troopers and sergeants; collective bargaining; subjects covered. State Police Troopers and Sergeants shall, through their elected representative designated by 50% of such troopers and sergeants, have the right to bargain collectively with their employer concerning conditions of their employment, compensation, hours, working conditions, retirement, pensions, and other aspects of employment except promotions which will be determined by competitive examination and performance on the basis of merit, efficiency and fitness; and they shall have the right 30 days after commencement of such bargaining to submit any unresolved disputes to binding arbitration for the resolution thereof the same as now provided by law for Public Police and Fire Departments.

Certification of appointments or promotions; discrimination. No person shall be appointed to or promoted in the classified service who has not been certified by the commission as qualified for such appointment or promotion. No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations.

Increases or decreases in compensation. Increases in rate of compensation authorized by the commission may be effective only at the start of a fiscal year and shall require prior notice to the governor, who shall transmit such increases to the legislature as part of his budget. The legislature may, by a majority vote of the members elected to and serving in each house, waive the notice

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and permit increases in rates of compensation to be effective at a time other than the start of a fiscal year. Within 60 calendar days following such transmission, the legislature may, by a two-third vote of the members elected to and serving in each house, reject or reduce increases in rates of compensation authorized by the commission. Any reduction ordered by the legislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The legislature may not reduce rates of compensation below those in effect at the time of the transmission of increases authorized by the commission.

Creation or abolition of positions. The appointing authorities may create or abolish positions for reasons of administrative efficiency without the approval of the commission. Positions shall not be created nor abolished except for reasons of administrative efficiency. Any employee considering himself aggrieved by the abolition or creation of a position shall have a right of appeal to the commission through established grievance procedures.

Compensation for unclassified service, recommendations. The civil service commission shall recommend to the governor and to the legislature rates of compensation for all appointed positions within the executive department not a part of the classified service.

Appropriations; return of unexpended moneys. To enable the commission to exercise its powers, the legislature shall appropriate to the commission for the ensuing fiscal year a sum not less than one percent of the aggregate payroll of the classified service for the preceding fiscal year, as certified by the commission. Within six months after the conclusion of each fiscal year the commission shall return to the state treasury all money unexpended for that fiscal year.

Appendix 3

Reports and audits of expenditures. The commission shall furnish reports of expenditures, at least annually, to the governor and the legislature and shall be subject to annual audit as provided by law.

Payments for personal service; judicial remedies. No payment for personal services shall be made or authorized until the provisions of this constitution pertaining to civil service have been complied with in every particular. Violation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state.

