STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of THE MILWAUKEE TEACHERS' EDUCATION ASSOCIATION Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats. Involving a Dispute Between Said Petitioner and the MILWAUKEE BOARD OF SCHOOL DIRECTORS	Case 194 No. 38540 DR(M)-426 Decision No. 24748-A

Appearances:

Perry, First, Lerner, Quindel & Kuhn, S.C., by Mr. Richard Perry and Mr. Curry First, on the brief, 823 North Cass Street, Milwaukee, Wisconsin 53202-3908, for the Association.

Mr. Stuart S. Mukamal, Assistant City Attorney, City of Milwaukee, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, for the Board.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

The Milwaukee Teachers' Education Association having on March 19, 1987 filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling as to whether a portion of a layoff and recall provision in a collective bargaining agreement between the Association and the Milwaukee Board of School Directors was an illegal subject of bargaining because said provision violated the constitutional rights of certain employes represented by the Association; and the Board having on April 30, 1987 filed a Motion to Dismiss or Defer to Federal Court Jurisdiction; and the parties having filed written argument as to said Motion, the last of which was received on September 14, 1987; and the Commission having on September 17, 1987, issued an Order Denying Motion to Dismiss or Defer to Federal Court Jurisdiction; and hearing having been held on November 9, 1987 in Milwaukee, Wisconsin before Examiner Peter G. Davis; and the parties thereafter having submitted written argument, the last of which was received on July 12, 1988; and the Commission having considered the matter, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the Milwaukee Board of School Directors, herein the Board, is a municipal employer having its principal offices at 5225 West Vliet Street, Milwaukee, Wisconsin.

2. That the Milwaukee Teachers' Education Association, herein the Association or the MTEA, is a labor organization having its principal offices at 5130 West Vliet Street, Milwaukee, Wisconsin; and that the Association is the collective bargaining representative for certain professional employes of the District including teachers and social workers.

3. That since 1981, the collective bargaining agreements between the Board and the Association have contained the following provision:

> All layoffs shall be based on inverse order of seniority within qualifications as set forth in the following procedures provided that the racial balance of schools is not disturbed.

that this provision was first included in a collective bargaining agreement between the parties pursuant to an interest arbitration award; and that as to this disputed provision the arbitrator's award stated:

The Racial Balance Criterion

Issue

The MTEA final offer provides that "All layoffs shall be based on the inverse order of seniority within certification/ licensure ..." The offer does not include race as a factor in identifying teachers for layoff.

The Board's final offer provides that "All layoffs shall be based on inverse order of seniority ... providing that the racial balance of schools is not disturbed."

Position of the Parties

MTEA Position

The MTEA final offer enables the District to comply with the Federal Court Faculty Desegregation Order even though the Court indicated the Order would not affect the method to be utilized in the event of layoff.

If there were no racial exemption in the layoff procedure, it is clear from the evidence introduced by both parties that the overall percentage of Black faculty members in the District would not be significantly affected. In fact, in no example cited by either party was the overall percentage of Black teachers in the District reduced by more than .65%. Therefore, there is no demonstratable need for any exemption from layoff based upon racial considerations.

A loss of less than one percent of the Black teachers in the District will still allow the District to easily meet the racial balance ranges set by the Federal Court.

In analysis of 97 comparable school districts by geographic location, size, and other criteria indicates that the large majority of such districts do not use either race or affirmative action as a basis for selecting teaching employees for layoff.

During the entire process of negotiations, the Board never proposed anything that would indicate that the number of Blacks to be laid off in the faculty would not occur in an amount greater than their present representation, which is the current Board position. The Board has therefore violated ground rule 11 by never presenting in writing and negotiating what it now says its final offer means.

The Board is incorrect in asserting that Black teachers are concentrated near the bottom of the seniority list. In fact, in all of the hypothetical layoffs introduced by both parties, where race was not considered, the overall impact of such layoffs on the racial composition of the teachers would be negligible.

Board Position

It is reasonable and appropriate to structure the layoff procedure so that the percentage of Black teachers employed by the System is not adversely affected.

The MTEA proposal would permit a layoff to ignore the impact on the racial breakdown of the faculty. On the other hand, under the Board's proposal, layoffs of Black teachers would not occur in an amount greater than their present representation in the faculty.

The Board's Affirmative Action Policy Statement for Personnel indicates that it is the Board's objective "to achieve a staffing pattern which is reflective of our community." This is defined as meaning a staffing pattern in which the percentage of Black teachers lies between the Black population of the City of Milwaukee, which is approximately 23 percent, and the percentage of Black students in the system, which is approximately 47 percent.

It is highly desirable to have an adequate representation of Blacks on the school faculty, especially in view of the desegregation process in which the school system is presently involved. Adequate representation of minorities helps dispel myths regarding racial inferiority and confidence. It provides positive role models for all students. It eases the adjustment to desegregation of minority students, their parents, and majority teachers. It also helps provide a multi-cultural curriculum. Moreover, it is important that the representation be in sufficient numbers so that Black teachers can exercise power and influence in the System.

Although the Federal Court Order does not deal with the overall system-wide percentage of teachers who are Black or white, the potential for litigation in the event the proportion of Black teachers declines is clear.

Black teachers are concentrated near the bottom of the seniority list, and therefore, without special provisions being made to allow for the consideration of the racial composition of the group of employees that are to be laid off, the overall percentage of Black teachers in the District could drop as much as one-half of a percentage point, or greater.

Increasing the percentage of Black teachers in the system is a high priority of the Board. The percentage of Black teachers must continue to rise if the staffing pattern is to be reflective of the racial composition of the student population and the population of the City of Milwaukee.

An analysis of the experience in comparable Districts indicates that those which do not consider race or affirmative action in the order of layoffs are in communities which have negligible Black populations and few Black teachers. On the other hand, Wisconsin communities with significant Black populations and other communities of similar size and demographic makeup often incorporate race or affirmative action in their layoff decisions.

Although it is true that the Federal Court Order under which the District is operating could be followed even if the MTEA proposal were adopted, this fact is irrelevant to the issue since that is not the objective the District is trying to accomplish. The objective the Board is trying to achieve is that of increasing the percentage of Black teachers in the system so that it is better reflective of the community. To achieve that goal, any drop in the employment of Black teachers due to layoff which results in a decline of the overall percentage of Black teachers cannot be tolerated.

Discussion

On its merits, the Board's final offer on this issue is the more reasonable of the two. In so concluding, the undersigned is relying primarily upon the following statutory

criterion: The interests and welfare of the public. Although it is apparent that any layoff occurring in the near future which did not consider race as a legitimate criterion to be utilized in identifying the population to be laid off would not have a significant harmful effect on the overall percentage of Blacks on the District's faculty, the same conclusion would not necessarily apply in the more distant future as the percentage of Black teachers in the District continues to grow and as a larger percentage of Black teachers will be the least senior teachers in the System. Thus, a decision must be made on this issue based not only on past and current experience, but also upon the expectation that the District's affirmative action objectives will be given high priority in the future staffing of the District's schools. Those objectives, as set forth in the District's arguments, are both meritorious and commendable. In the undersigned's opinion, the need for such an affirmative action program in the District, with its history of litigation on the racial integration issue and with its multi-racial composition, cannot be reasonably questioned. The problems related to the achievement of those objectives are no less important during periods of retrenchment than they are during periods of growth. Thus, consideration of race in the identification of employees for layoff is legitimate, and the District's final offer, particularly when it is construed in the manner described by the District in the hearing, is clearly the more preferable of the two positions on this issue.

In so deciding this issue, it is important to note that the District clearly indicated in the arbitration hearing that in implementing the provision regarding racial balance, it intends to first identify the population to be laid off without giving consideration to the race of the identified population; and only after the population to be laid off is finally identified, which will occur after bumping has taken place, will the racial composition of the population be laid off be analyzed. If the percentage of Blacks in said population exceeds the overall percentage of Black teachers in the system at the time, as reflected in what has been referred to as an E.E.O. 5 Report, the most senior Black teachers identified for layoff will be exempted and replaced by the least senior non-Black teachers with similar certification/licensure and other qualifications where relevant. The number of Black teachers to be exempted will be determined by the District's stated objective not to reduce the overall percentage of Black teachers in the system by virtue of the layoff.

While it is true that the above explanation was not communicated to the MTEA during the negotiation or mediation process, there was ample opportunity for both parties to obtain full explanations as to the meaning of the other party's proposals during the process. The parties' mutual failure to fully communicate their intent with respect to specific proposals, including the definition of all ambiguous terms utilized, cannot fairly be construed as a violation of the parties' ground rules requiring the negotiation of the contents of their final offers.

The undersigned's conclusion with respect to this issue is not based upon the legality of either party's position, but instead, is based upon the merits of the District's arguments that its affirmative action goals are just as legitimate when applied to this issue as they are when applied to all other issues in the operation of the District.

Lastly, although it is clear that consideration of race is not the norm in layoff plans in public education, the consideration of race in such plans is less unusual particularly

> in larger multi-racial communities. Furthermore, in the undersigned's opinion, it is the responsibility of the parties in such communities to address this issue through the use of voluntary mechanisms, even though it is difficult and controversial, and even though there may be sparce (sic) comparable precedent. Such voluntary agreements are clearly preferable to the lengthy, disruptive, complex, and expensive litigation which the parties in this relationship have heretofore experienced.

4. That in September 1981, following issuance of arbitration award referenced in Finding of Fact 3, the Board sent the Association the following letter:

> This letter is to inform you that we must contact 20 school social workers in accordance with the Yaffe award concerning Part XII of the contract between the Milwaukee Board of School Directors and the Milwaukee Teachers' Education Association and notify them that they are laid off in accordance with that award.
>
> This letter commences the five days' notice to the Milwaukee Teachers' Education Association of these circumstances of layoff and will be followed in five days by individual letters to the affected school social workers. Copies of the correspondence to affected school social workers and the seniority list of school social workers upon which these decisions are based are enclosed for your review.
>
> It should be noted in accordance with the provisions maintaining racial balance, a maximum of three black school social workers are included in the list of those to be laid off. To include more black school social workers would involve the layoff of a percent greater than 17.4%, the current EEO-5 ratio of record for the 1981-82 year.

That thereafter the Board proceeded to lay off social workers represented by the Association; and that because of the contract language in dispute herein, one hispanic social worker and one white social worker were laid off while two less senior black social workers were retained.

5. That in 1982, the Board laid off teachers represented by the Association; and that because of the contract language in dispute herein, three white teachers were laid off while three less senior black teachers retained their employment.

6. That the Board has never asserted that it has discriminated against black applicants for positions within the MTEA bargaining unit; that there has been no administrative or judicial determination that the Board has discriminated against black applicants for positions within the MTEA unit; and that this record does not contain any convincing evidence of prior discrimination against black applicants for positions within the MTEA unit.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

That the portion of the layoff clause in dispute violates the rights of non-black Board employes under the Fourteenth Amendment of the United States Constitution.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

DECLARATORY RULING 1/

That the portion of the layoff clause in dispute is a prohibited subject of bargaining within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats.

Given under our hands and seal at the City of Madison, Wisconsin this 3rd day of April, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By S. H. Schoenfeld
S. H. Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the

(Footnote 1/ continued on page 7)

1/ continued

county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MILWAUKEE BOARD OF SCHOOL DIRECTORS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

POSITIONS OF THE PARTIES

The MTEA

The race-conscious layoff clause violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and thus should appropriately be ruled void by the WERC pursuant to its statutory authority under Sec. 111.70(4)(b), Stats. This case is controlled by the United States Supreme Court decision in Wygant v. Jackson Board of Education, 106 S.Ct. 1842 (1986). Subsequent to Wygant, the United States Court of Appeals for the Seventh Circuit (covering Wisconsin, Illinois, and Indiana) in an en banc decision, under circumstances compellingly similar to that herein, followed Wygant and nullified a similar public education seniority clause, Britton v. South Bend Community School Corp., 819 F.2d 766 (1987).

In Wygant, the Supreme Court plurality held that before a government interest in a racial preference, such as an affirmative action layoff clause, can be accepted as "compelling," there must be findings of prior discrimination by that employer. Findings of societal discrimination will not suffice; the findings must concern "prior discrimination by the government unit involved." Wygant, 106 S.Ct. at 1847. In this case, it is undisputed there have been no prior findings of race discrimination in hiring by the Board. In Wygant, the Supreme Court was very sensitive to the dislocation and harm caused to workers by layoffs as contrasted to the much less onerous burden of promotion or hiring affirmative action programs. Further, the Supreme Court in Wygant required employers, before undertaking affirmative action plans, to consider more narrowly focused alternatives.

This clause would not even have been sustainable under the Wygant dissent because central to that analysis was an affirmative action layoff provision that had been fully negotiated and agreed upon between all members of the collective bargaining unit. That is, an affirmative action plan having the mutual and joint endorsement of a majority of the union and the employer. See Wygant, 106 S.Ct. at 1858, 1860, 1866, and 1869-70. In this case, the MTEA did not agree to the arbitrator imposed layoff clause.

The constitutional analysis and ratio decidendi throughout Wygant, Regents of the University of California v. Bakke, 438 U.S. 265 (1978) and Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) is that reverse discrimination and affirmative action programs in certain, although by no means all, situations either harm workers who are innocent and/or provide remedial affirmative benefits to parties who are unable to prove legally that they individually have been victims of past discriminatory conduct by a particular person or institution. This dual concept of identifiable minority victims in fact and remedies at the expense of parties not shown to have been personally at fault constitutes the tension over affirmative action and reverse discrimination. This tension often surfaces in the contrast between (1) a vision of the federal judiciary as an administrator of strictly neutral principles and (2) a vision of the federal courts as one of a number of possible tools for achieving social justice. The arguments supporting and opposing this tension have continued to trouble courts and commentators. "(I)t is clear that impressive arguments can be marshalled under the Fourteenth Amendment and the civil rights statutes either to uphold or to invalidate minority admission programs." Bell, Bakke, Minority

Agency, 107 S.Ct. 1442 (1987); none of those cases involved the constitutionality of affirmative action layoff plans. In fact, those decisions reaffirmed Wygant by noting Wygant involved layoffs whereas these subsequent cases involved hiring and/or promotion affirmative action programs. E.g., Local 28, 106 S.Ct. at 3052. Equally compelling is that those recent four affirmative action cases also involved compelling findings of intentional employer race discrimination in hiring and/or promotions. This critical constitutional factor is absent in this case where the Board has argued previously (and always successfully) that it not only never discriminated in hiring based on race but in fact undertook pervasive and good faith affirmative action hiring efforts.

When examined under the strict scrutiny standard of the Fourteenth Amendment, as well as Title VII of the 1964 Civil Rights Act, the race-conscious affirmative action layoff clause lacks any compelling or substantial government interest, because there is no evidence of past teacher discrimination in hiring. The policy reasons asserted by Board for its layoff clause provide an inadequate predicate to give the clause a constitutional remedial purpose. Even if the Board had established a compelling (or substantial) governmental interest, the layoff clause is still invalid because it is not narrowly tailored to avoid unnecessarily trammeling the rights of innocent teachers. These characteristics, when coupled with the lack of a termination date and absence of waiver provisions, also render the clause invalid under Wygant. For these reasons, the MTEA urges this Commission to invalidate the arbitrator imposed layoff clause.

In attacking on constitutional grounds the layoff clause, the MTEA has not, other than by implication, set forth its agreement with certain affirmative action concepts. As an important introductory matter, the MTEA agrees with the words of Justice O'Connor, concurring in part and concurring in judgment, in Wygant, 106 S.Ct. at 1853: "The court is in agreement that . . . remedying past or present racial discrimination . . . is a sufficiently weighty state interest to warrant the remedial use of a carefully construed affirmative action program." The MTEA also agrees with the analysis in Wygant that "(n)o one doubts that there has been serious racial discrimination in this country." Id. at 1848 and that where there is in fact prior discrimination by an employer, "it may be necessary to take race into account." Id. at 1850. "It is now well established that government bodies including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination." United States v. Paradise, 107 S.Ct. 1053, 1064 (1987) (plurality opinion).

The MTEA expressed its position and support early in these proceedings; see page 3 of its correspondence to Examiner Davis of May 26, 1987:

> In this regard, it is to be noted that the MTEA does not question the racial criteria set forth in the assignment, transfer, and excessing sections of the contract since those are carefully drafted to remedy the unlawful conduct of the employer as found by the United States District Court. It is because of express holdings by the United States Supreme Court that racial layoff quotas are unlawful, that the MTEA finds it necessary to seek a declaratory ruling to determine whether its present contractual language is unlawful.

Accordingly, the MTEA joins with the Board in advancing agreement for the continuation of affirmative action in hiring. "Appreciation of the facts about seniority encourages a shift of attention from race-based layoffs to affirmative discrimination in hiring. The enlistment of black workers not only puts them in jobs but also places them on the seniority ladder. There they accumulate service with a firm, establish rights of recall during temporary layoffs, and eventually secure the kind of tenure that may insulate them from job loss even if the employer must institute a severe, long-term layoff." Fallon & Weiler, Conflicting Models of Racial Justice, 1984 S.Ct. Rev. 1, 65.

In concluding, one sees not simply a United States Supreme Court emerging constitutional doctrine but rather what appears to be the concluding position of the United States Supreme Court. The principles at play are the effective remedial administration of statutory and constitutional mandates versus the avoidance of harm to innocent parties. Indeed, Wygant reaffirms the holding in Firefighters Local Union No. 1784 v. Stotts that the latter principle will

normally prevail over the former when statutory language does not provide clear answers. In practical terms, Wygant and Stotts demonstrate the Supreme Court is moving toward a compromise on affirmative action that (1) permits race-conscious relief in the form of quotas and hiring goals, but (2) forbids race-conscious relief that entails actual harm to individuals who did not participate in the institutional discrimination at issue. The most recent Supreme Court decisions on affirmative action confirm this trend without altering this analysis of harm. See Johnson v. Transp. Agency, supra; United States v Paradise, supra. At first blush, this compromise seems rational, especially considering the special status accorded seniority systems by Sec. 703(h) of Title VII.

The Court is astonishingly clear in its position that affirmative action hiring quotas are permissible under the circumstances carefully delineated by the Court but that layoffs implicate interests upon which neither Title VII nor the Fourteenth Amendment permit infringement.

In response to the Board's arguments regarding "ripeness" and the propriety of the Commission's ruling upon constitutional issues, the MTEA asserts that the Commission has previously ruled upon said arguments.

Given the foregoing, the MTEA asks that the Commission find the provision in question to be a prohibited subject of bargaining.

The Board

It is the Board's position that because the Commission possesses neither the jurisdiction nor the lawful authority to do so, the Commission must not even reach the constitutional issues raised by the MTEA and must summarily dismiss the petition. This stems from two premises: (a) that this matter is not presently "ripe" for adjudication because no actual layoff or other factual context against which the operation of the clause may be measured is currently pending, imminent, or even contemplated; and (b) that the Commission, as a quasi-legislative agency (and thus not a judicial body), lacks authority to rule on questions of "pure" constitutionality and/or to declare a provision of a collective bargaining agreement to be unconstitutional.

Should the Commission erroneously conclude that it is appropriate to rule upon the merits of the MTEA's petition, the Board contends that the layoff provision in dispute is not a prohibited subject of bargaining. The Board takes issue with the MTEA assertion that Wygant requires a finding that the proposal is unconstitutional. In this regard, the Board asserts that the lack of a finding of prior discrimination against black applicants for teaching positions is not required by Wygant and thus is absolutely irrelevant to the issues raised by the MTEA's petition. The Board also argues that Wygant is anything but "clear precedent" upon which the Commission should rely. As to the operation of the clause itself, the Board asserts that although "race-conscious," the actual operation of the clause will depend upon the facts and circumstances at any given time. Indeed, the Board asserts that the clause could conceivably favor white teachers in certain circumstances. Thus the Board argues that the clause is both "dynamic" in nature and deliberately and judiciously tailored to meet the particular desegregation goals of the Board that have in turn been pursued over the years in pain-staking and laborious fashion.

The Board alleges that the promotion of "racial diversity among faculty" was found to be a constitutionally permissible rationale for a voluntary affirmative action layoff program by Justice O'Connor in Wygant. The Board contends that the promotion of such "racial diversity" is one of the five separate rationales which supported the Board's original desire to incorporate the clause in the collective bargaining agreement. Thus, while the remediation of past discrimination in hiring by the employer may be one of many permissible bases for the establishment or implementation of a voluntary affirmative action layoff program, it is by no means the only permissible basis therefor.

The Board contends that the MTEA has attempted to draw a spurious distinction between the societal value of "affirmative action and hiring" as opposed to "affirmative action in layoff." The Board asserts that the distinction is ill-founded. The Board asserts that the clause in question seeks to preserve the concept of "racial balance as applied to a particular population" (i.e., the Board's faculty). The Board argues that the concept of faculty "racial balance" is not only important in and of itself as a public policy objective, but is also a

necessary and specific component of the continuing Board desegregation effort. The Board contends that removal of the clause from the collective bargaining agreement would cripple the Board's ability to maintain its adherence to faculty desegregation objectives during periods of retrenchment.

For the foregoing reasons, the Board respectfully requests that the Commission dismiss the MTEA's petition.

DISCUSSION:

Jurisdiction and Ripeness

We have already ruled upon the Board's jurisdictional argument in our earlier Order Denying Motion to Dismiss or Defer to Federal Court Jurisdiction. In that Order we commented:

Section 111.70(4)(b), Stats., provides:

> (b) Failure to bargain. Whenever a dispute arises between a municipal employer and a union of its employes concerning the duty to bargain on any subject, the dispute shall be resolved by the commission on petition for a declaratory ruling. The decision of the commission shall be issued within 15 days of submission and shall have the effect of an order issued under s. 111.07. The filing of a petition under this paragraph shall not prevent the inclusion of the same allegations in a complaint involving prohibited practices in which it is alleged that the failure to bargain on the subjects of the declaratory ruling is part of a series of acts or pattern of conduct prohibited by this subchapter.

Here, the Association has advised the Board that it believes the clause in question 1/ is illegal and thus unenforcable and that pursuant to the Savings Clause 2/ in the parties' agreement, the Board must bargain a legal replacement provision. The Board has refused the Association's demand for bargaining. In such circumstances we think it is clear that there is a "dispute . . . between a municipal employer and a union of its employes concerning the duty to bargain. . . ."

. . .

As to the Board's argument that this matter would be more appropriately deferred to the federal courts, we note that when we are confronted with contentions that a matter is a permissive or prohibited subject of bargaining, we are often of necessity obligated to examine external law, both statutory and constitutional, to resolve the dispute. 3/ (footnote text 1/ and 2/ omitted)

3/ School District of Drummond v. WERC, 121 Wis.2d 126 (1984); Teamsters Local No. 695 v. WERC, 121 Wis.2d 29 (1984) West Bend Education Association v. WERC, 121 Wis.2d 1 (1984); Milwaukee Board of School Directors, Dec. No. 23208-A (WERC, 2/87); Racine Unified School District, Dec. No. 20652-A (WERC, 1/84); aff'd (CtApplI) No. 85-0158 (3/86); Crawford County, Dec. No. 20116 (WERC, 12/82).

As we continue to be persuaded by the rationale expressed above, we will make

Turning to the issue of "ripeness", in our earlier Order we also responded to a large extent to the argument made again by the Board herein. We stated:

> As to the Board's contention that a "dispute" cannot exist until a factual context involving actual layoffs exists, we find such an argument misses the jurisdictional mark and is most appropriately considered as part of our determination on the merits of the dispute before us. The requisite jurisdictional factual context has been established by the Association's demand and the Board's refusal to bargain over the clause. We would also note that in the majority of instances in which our Sec. 111.70(4)(b), Stats., jurisdiction is invoked, we are asked to rule upon the parties' duty to bargain on proposals which one side or the other seeks to place in a collective bargaining agreement. In such instances, we are obligated to determine the parties' duty to bargain over contract language which may never be "applied" in a factual context because it may never even become part of a contract. Furthermore, it should be noted that the MTEA asserts that the manner in which the clause in question has been applied in the past provides ample guidance as to the clause's interpretation.

As indicated in the above quoted text, we are often obligated to proceed under Sec. 111.70(4)(b), Stats., in a "factual vacuum" as to the manner in which a proposal has been interpreted. Nonetheless, in cases where we have felt the record to be insufficient for us to definitively rule upon the status of a proposal or a contract provision, we have so advised the parties and, if necessary, taken additional evidence. Here, the Board in essence asserts that until the clause actually functions in a teacher layoff context, it is speculative as to whether the clause will even adversely affect non-black teachers. We disagree. It is clear from the language of the clause itself and from the manner in which it was applied in 1981 and 1982 layoffs that non-black employes are subject to layoff because of their race. As the impact of the clause is clear, 3/ we have an adequate record upon which to proceed to determine whether the clause is constitutionally invalid.

It is undisputed that if the clause in question is unconstitutional, it is a prohibited subject of bargaining. Our role in this proceeding is to determine and apply existing constitutional law to the clause in question. As the parties have emphasized, personal views as to what the law should be play no role in this proceeding.

In Wygant v. Jackson Board of Education, 106 S.Ct. 1842 (1986), the Court was confronted with a clause strikingly similar to that at issue herein. The Wygant clause stated:

> "In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.

Thus, while the parties herein obviously disagree as to the impact of the Court's decision in Wygant, the Wygant decision clearly controls the outcome of this case. The task of deciphering Wygant for the purposes of the case before us is made easier by the presence of the two Seventh Circuit Court of Appeals decisions - Britton v. South Bend School Corp., 819 F.2d 766 (1987) and

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3/ The Board argues that because other portions of the layoff clause have changed since the 1982 layoffs, the impact of non-black employes is presently less than clear. We disagree. While the changes referenced by the Board may change the manner in which the individuals facing layoff will be identified, once the layoff pool is established the clause continues to protect less senior employes because of their race.

Janowiak v. City of South Bend, 836 F.2d 1034 (1987). As these decisions constitute post-Wygant law in Wisconsin, we will herein apply the interpretations given Wygant in these two cases.

In Janowiak, the Seventh Circuit Court of Appeals reviewed Wygant and Britton and stated:

> In Wygant, five Supreme Court Justices in three separate opinions held that a race-preferential layoff provision in a collective bargaining agreement between school teachers and Jackson, Michigan violated the fourteenth amendment's equal protection clause. Wygant, 106 S.Ct. at 1852. The provision, designed to safeguard the City's affirmative action hiring goals, stated that in the event layoffs were necessary, a greater percentage of minority personnel could not be laid off than the current percentage of minority personnel employed. Wygant, 106 S.Ct. at 1845.
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> Because there was no majority opinion in Wygant, the Court did not elaborate a clear constitutional standard applicable to all affirmative action plans. We have already noted, however, that a "'lowest common denominator' majority position can be pieced together" from the Wygant opinions. Britton v. South Bend Community School Corporation, 819 F.2d 766, 768, (7th Cir. 1987). We start with the benchmark standard agreed upon by the members of the majority (and apparently, according to Justice O'Connor, by all members of the Court): (1) the plan must be justified by a compelling government interest and (2) the means chosen by the government must be narrowly tailored to effectuate the plan's purpose. See Wygant, 106 S.Ct. at 1852 (O'Connor, J., concurring in part and concurring in the judgment).

The remedying of prior hiring discrimination was clearly recognized by the Wygant Court as a "compelling government interest." As the Janowiak Court stated:

> Justice O'Connor, the fifth member of the Wygant majority, reserved the question whether a racially preferential layoff plan designed "to correct apparent prior employment discrimination against minorities while avoiding further litigation" might ever be constitutionally permissible. See Britton, 819 F.2d at 769 (citing Wygant, 106 S.Ct. at 1854, 1857 (O'Connor, J., concurring in part, and concurring in the judgment)). Because she concurred in the judgment of reversal on the narrowest ground, her opinion is critical to our determination of Wygant's lowest common denominator holding and our disposition of the present case. See id., 819 F.2d at 769.
>
> Justice O'Connor agreed with the plurality that "remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program," Wygant, 106 S.Ct. at 1853.

However, even where such a compelling government interest is established, the remedial means must be narrowly tailored. Thus, when remedying prior hiring discrimination, a race-preferential layoff clause must seek to maintain minority employment levels which are established by reference to the minority percentage in the employer's work force and the percentage of minorities in the relevant labor pool. As noted in Janowiak:

> Thus, for our purposes, the lowest common denominator holding of Wygant is that a statistical comparison upon which an affirmative action plan is based must compare the percentage of minorities in employer's workforce with the percentage of minorities in the relevant qualified area labor pool before it can establish the predicate past discrimination required to justify an affirmative action remedy under the fourteenth amendment." We therefore hold that the City's plan here runs afoul of the fourteenth amendment's equal protection

> clause and that the district court erred in granting the City summary judgment. It is clear under Wygant that, at a minimum, the statistical comparison proffered by the City to justify its affirmative action program cannot focus on general population statistics alone. The City's comparison does just that.

Thus, if the Board were herein premising the validity of its race-preferential layoff clause upon the remedying of past hiring discrimination, the clause would not pass constitutional muster because the percentage of black teachers the layoff clause seeks to maintain is not related to a relevant labor pool and thus the clause is not "narrowly tailored."

Here, the Board has never asserted that it seeks to remedy past hiring discrimination with the race-preferential layoff clause. The record before us contains no persuasive evidence of such discrimination. Thus, we must turn to the rationale advanced by the Board herein to determine whether it constitutes a "compelling government interest" and, if so, whether the clause is "narrowly tailored" to meet the interest.

As noted in the arbitrator's summary of the Board's argument before him, which is set forth in Finding of Fact 3 herein, the Board sought the race-preferential layoff clause as a means of obtaining and maintaining an "appropriate" percentage of black teachers as measured against the percentage of black citizens in Milwaukee and the percentage of black students in the public school system. The Board believed that the maintenance of sufficient numbers of black teachers was desirable because: (1) positive role models would be provided for black students; (2) myths of racial inferiority would be dispelled; (3) desegretation efforts would be enhanced; (4) the viability of a multi-cultural curriculum would be improved; and (5) black teachers would be more likely to successfully exercise power and influence in the school system.

In Wygant, Justices Powell, Burger, Rehnquist, White and O'Connor found the governmental interests in providing "role models" 4/ and "remedying the effects of societal discrimination" to be insufficiently "compelling" to pass constitutional muster. The Court's holding in this regard is dispositive of virtually all of the bases set forth by the Board in support of the layoff clause in dispute herein. To the extent that the Board relies upon Justice O'Connors distinction between "role models" and "racial diversity among faculty" 5/ it is clear from her opinion

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4/ We can understand and appreciate why a school board in a racially diverse district might well regard providing qualified racial "role models" as essential to its ultimate objective of more effectively educating its students, thus constituting a compelling governmental interest. Nonetheless, it is clear to us from Wygant that a majority of justices do not give this view any Constitutional credence. Hence, we cannot.

5/ Justice O'Connor stated:

> The goal of providing "role-models" discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty. Because this latter goal was not urged as such in support of the layoff provision before the District Court and the Court of Appeals, however, I do not believe it necessary to discuss the magnitude of that interest or its applicability in this case. The only governmental interests at issue here are those of remedying "societal" discrimination, providing "role models," and remedying apparent prior employment discrimination by the School District.

Justice O'Connor also stated as a preliminary matter in her opinion:

> Additionally, although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently "compelling," at least in the context of higher education, to support the use of racial considerations in furthering that interest. See, e.g., Bakke, 438 U.S. at 311-315.

(Footnote 5/ continued on page 15)

that the Court was not reaching any conclusion as to the magnitude of this separate interest.

However, even assuming that this interest were to be found "compelling" or that some separate educational policy interest can be refined from the Board's stated justifications which would be found "compelling," we further believe the clause would still be unconstitutional because it is not a "narrowly tailored" to accomplish the "compelling" interest. 6/ In this regard, the record does not contain any persuasive evidence which establishes why the precise percentage level of black employes which the clause protects based on each year's EEO-5 report is essential to meeting any of the interests put forth by the Board. Even assuming the need for such precision, the evidence placed before the arbitrator in 1981 by the MTEA and the evidence herein as to the layoffs in 1981 and 1982 strongly suggests that the Board's aggressive hiring posture as to black applicants is sufficient to maintain virtually the same percentage level of black staff as has been produced through the protection of the race-preferential clause. Thus, the record does not warrant the conclusion that the job loss for non-blacks caused by the disputed clause has enhanced any of the interests advanced by the Board herein. Indeed, when the clause functions as it did in 1981 to cause the layoff of a more senior hispanic employe and the retention of a less senior black employe, it can reasonably be argued that the clause does not promote "racial diversity among faculty," a "multi-cultural" curriculum, empowerment of minority staff members or enhancement of desegregation.

Given the foregoing, we find the clause to be violative of the Fourteenth Amendment rights of non-black employes and, as such, a prohibited subject of bargaining.

Dated at Madison, Wisconsin this 3rd day of April, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By S. H. Schoenfeld
S. H. Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

5/ continued

However, as the Bakke case referenced in her opinion involved questions regarding the "racial diversity" among students, her remark does not seem directly probative of the constitutionality of a race-preferential layoff clause.

6/ The Board has made some reference to the desirability of the disputed clause