BEFORE THE ARBITRATOR

In the Matter of the Arbitration of A Dispute Between	
THE MILWAUKEE TEACHERS' EDUCATION ASSOCIATION	
and	Layoff Procedure Mediation/Arbitration
THE MILWAUKEE BOARD OF SCHOOL DIRECTORS	

APPEARANCES: Richard Perry, Esq., on behalf of the Milwaukee Teachers' Education Association (MTEA)

Jeffrey L. Bassin, Assistant City Attorney, on behalf of the Milwaukee Board of School Directors

The 1980-1982 collective bargaining agreement between the parties contains the following reopener provision regarding layoffs:

> I. LAYOFF
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> If during the term of the contract, the administration recommends a layoff of bargaining unit employes to the Board, the MTEA will be notified of the recommendations at least ten (10) working days prior to committee consideration. The MTEA shall be notified within five (5) working days after Board adoption of the policy decision to effectuate a layoff. Thereafter there would be thirty (30) calendar days to negotiate terms and at the end of the thirty (30) day period either party may request mediation/arbitration. If neither party requests mediation/arbitration after the thirty (30) day period, within five (5) working days the Board may implement its offer. Once the mediator/arbitrator is selected the parties agree to contact the mediator/arbitrator to request to the extent possible that he/she expedite the mediation/arbitration process. The MTEA may introduce proposals related to the impact of the Board's decision to lay off as it relates to wages, hours and working conditions of the bargaining unit employes. The Board may also make proposals. If after a reasonable period of negotiations the Board and the MTEA are unable to reach agreement, the matter will be referred to the mediation/arbitration process specified below.
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> The mediator/arbitrator will be responsible for both mediation and arbitration and will be selected by the process established in Part VII, Section D(2) of the

contract. The authority of the mediator/arbitrator shall be as follows:

a. The mediator/arbitrator is confined to considering the resolution of disputes that were raised in writing by either party, except as otherwise agreed.

b. The mediator/arbitrator shall first attempt to mediate the dispute and encourage a voluntary settlement by the parties. If the parties fail to reach a voluntary settlement after a reasonable period of mediation as determined by the mediator/arbitrator, the mediator/arbitrator will call for final offers from each party.

c. The mediator/arbitrator will consider final offers related to the impact on wages, hours, and conditions of employment.

d. Upon receipt of final offers from each party, the mediator/arbitrator acting as arbitrator shall set a time and place for a hearing and an opportunity for the parties to explain their final offers and rationale. The mediator/arbitrator, acting as arbitrator, shall adopt without modification the final offer of one of the parties on the issues in dispute. The decision shall be final and binding on both parties. The arbitrator shall select a date on which the implementation is to be effective.

e. Criteria to be considered by the arbitrator in determining which final offer will be selected will be those contained in 111.70 (4) (cm).

f. If the statutory provisions of 111.70 (4)(cm) expire during the term of this agreement, the terms of 111.70 (4)(cm) as they existed will nevertheless be utilized in the above procedure and the above procedure will be considered a voluntary impasse procedure between the parties.

Pursuant to said Section, after the Board decided to initiate layoffs of teacher bargaining unit personnel, the parties entered into the following Memorandum of Understanding:

1. It was agreed that President Riley would send the Milwaukee Teachers' Education Association a letter indicating that the Committee on Personnel and Negotiations is the Committee on behalf of the Board that will be handling the negotiations under Part I, Section I of the Contract. Further, that the layoff proposal approved by the Personnel and Negotiations Committee on Saturday, February 28, 1981 represents the Board of

of School Director's position on the matter.

2. Part I, Section I of the Contract provides, "Thereafter there would be thirty (30) calendar days to negotiate terms..." It was agreed that the thirty (30) calendar day period to negotiate terms would begin when the Board and the MTEA exchanged proposals, on a mutually agreeable date.

3. It was agreed that both parties would introduce their original set of proposals in writing. These proposals would be exchanged during the first meeting that sets the thirty (30) day period of negotiations in motion.

4. It was agreed that the thirty (30) calendar days to negotiate terms are consecutive days.

5. It was agreed that neither party could refuse to meet during the thirty (30) calendar day period of negotiations if the other party requested to meet. It was clear that the parties did not necessarily have to meet every day, however, it was agreed that neither party would stall negotiations meetings during the thirty (30) calendar days.

6. It was agreed that neither party could request mediation/arbitration until after the thirty (30) day period of negotiations was exhausted, unless there was mutual agreement between the parties to request mediation/arbitration.

7. It was agreed that after the thirty (30) days of negotiations that either party could request mediation/arbitration within the five (5) working day period immediately following the conclusion of the thirty (30) day period of negotiations. If, after the five (5) working days, neither party requests mediation/arbitration the Board may implement its final offer.

8. It was agreed that whether one party by itselr or the other party by itself requested mediation/arbitration both parties would jointly sign and send a letter to the Wisconsin Employment Relations Commission for it to submit a panel of five (5) mediator/arbitrators to the parties in accordance with Part VII, Section D(2)(a) of the Contract.

9. It was agreed that the procedures under Part VII, Section D(2)(b) would be utilized to select the mediator/arbitrator from the panel of five (5) mediator/arbitrators received from the Wisconsin Employment Relations Commission.

10. If was agreed that once the mediator/arbitrator is selected the parties would jointly contact the mediator/arbitrator to request that he/she expedite the mediation/

arbitration process to the extent possible.

11. It was agreed that any disputes that are directed to the mediator/arbitrator, must have been presented in writing and negotiated in good faith with the other party during the thirty (30) calendar day period of negotiations.

12. It was agreed that after the thirty day calendar day period of negotiations, the mediator/arbitrator would receive from the parties the stipulations between the parties and the remaining disputes that existed after the conclusion of the thirty (30) day calendar period of negotiations. The mediator/arbitrator would mediate these disputes under Part I, Section I(b).

13. It was agreed that any agreements reached in pre-final offer mediation would become stipulations between the parties.

14. Final offers will be presented simultaneoulsy to the mediator/arbitrator at a joint meeting. It was agreed that if the parties fail to reach a voluntary settlement after a reasonable period of mediation as determined by the mediator/arbitrator, the mediator/arbitrator will call for final offers from each party.

15. It was agreed that once the mediator/arbitrator receives the final offers of both parties, neither party can change its final offer without the mutual consent of the other party.

16. It was agreed that after the mediator/arbitrator receives the final offers of both parties that the mediator/arbitrator could continue mediation up to the time that the mediator/arbitrator issues the final and binding decision to both parties.

17. It was agreed that when a mutually agreeable date to begin the negotiations was established that the meetings would be held at the Central Office until the parties entered into mediation at which time a mutually agreeable facility would be utilized for further meetings.

During the month of March 1981 the parties held discussions about the issues involved herein, wherein they discussed the impact on layoffs of the Federal Court Order on Faculty Desegregation. The District's interpretation of the Court Order's impact on the layoff issue was sent to MTEA by letter dated March 24, 1981, wherein, the District stated, in pertinent part:

"In response to your request for an interpretation of the court order as it applies to layoff, we have reviewed the matter with the City Attorney's Office. As a result of this review, we believe we are in a position to offer you the following interpretations:

1. Part V, Miscellaneous Provisions, Section C of the court order on Faculty Desegregation clearly states that the order shall not affect the method of teacher layoff.

   'In the event there is a reduction in the Milwaukee Public Schools Systems' teacher compliment, this order shall not affect the method of teacher layoff'.

2. Part V, Miscellaneous Provisions, Section A of the court order on Faculty Desegregation as it relates to the annual official EEO-5 report is to be used in determining teacher assignments only."

The parties negotiated the layoff issue between March 25, 1981 and April 23, 1981.

On April 23, 1981 the parties requested a panel of mediator/arbitrators from the Wisconsin Employment Relations Commission, from which they selected the undersigned.

Thereafter, the undersigned engaged in mediation efforts and facilitated the exchange of the parties' final offers from the period beginning May 8, 1981 through June 10, 1981.

During said period, the District filed a petition for a declaratory ruling contesting the allegedly permissive nature of certain of the MTEA's proposals. Said matter was informally resolved by the parties with the assistance of the Commission's General Counsel.

On June 10, 1981 the undersigned received the final offers of both parties.

During the course of the parties' negotiations, and during the period in which mediation and final offer exchanges occurred, the parties reached agreement on approximately 30 issues related to the

layoff procedure in dispute. However, several issues remained unresolved after the last exchange of the parties' final offers, which issues constitute the subject matter of the instant proceeding.

As indicated in the aforementioned agreement and ground rules, the undersigned must select the complete final offer of one of the parties to the instant dispute.

An arbitration hearing was conducted by the undersigned in Miwaukee, Wisconsin on July 20, 22, and 24, 1981, during the course of which the parties presented evidence and arguments in support of their respective positions. Briefs and reply briefs were filed by both parties by August 19, 1981.

Based upon a review of the evidence and arguments, and utilizing the criteria set forth in 111.70 (4) (cm) Wis. Stats., the undersigned renders the following award.

OTHER PERTINENT CURRENT CONTRACTUAL PROVISIONS:

V. J. ASSIGNMENT TO A PARTICULAR SCHOOL

1. Teachers shall be assigned to a particular building ing where a vacancy exists, as long as the teachers are qualified within their teaching certificates issued by the Department of Public Instruction or their major or minor field of certification and special skills and training needed. [1]Where teachers have left an assignment, pursuant to a specific provision of this contract, they shall be assigned in accordance with the following order of priorities.

a. Teachers displaced from a particular building due to a reduction in enrollment in accordance with Part V, Section G(1), teachers requesting reassignment in accordance with Part V, Section G(3), teachers requesting reassignment in accordance with Part V, Section G(2), teachers returning from a leave of absence, and teachers being reassigned in connection with the section on evaluation. Exceptions to this section may be made to provide meaningful assignments to those teachers being transferred as a result of evaluation.

b. Unassigned teachers as a result of premature curtailment of leave and unassigned teachers as a result of overhiring.

c. New teachers in the system who have not as yet taught in the Milwaukee Public Schools system.

2. Whenever there are two (2) or more qualified teachers to fill a vacancy in any one of the above categories, preference shall be given to the teacher or teachers with the greatest system-wide seniority. The MTEA recognizes that there may be an occasion where departmental, extracurricular, kindergarten, primary, intermediate, upper grade level or counseling needs cannot be met in a specific instance through the provisions of this section. In such instance, the administration will give the teacher, upon request, reasons for the departure from these provisions. If the teacher requests, such reasons shall be reduced to writing.

V. K. STAFFING OF SPECIALTY SCHOOLS

1. EXISTING TOTALLY SPECIALIZED BUILDINGS. In any school which has a program in a special mode of instruction such as but not limited to open education, fundamental education, continuous progress, multi-unit Individually Guided Education, Teacher Pupil Learning Center, gifted and talented, and creative arts, vacant positions will be filled from a list of qualified applicants.

A qualified applicant is a teacher who has expressed an interest in the vacancy by filing an application, has the basic DPI certification required, and who meets at least one of the following conditions:

a. Previous experience in the particular speciality.

b. Has taken, or completes before the beginning of the next semester, college courses in the specialty, or vocational-technical courses where applicable, or inservice training in the particular specialty. When the necessary college courses, vocational-technical courses or inservice training are not reasonably available to the teachers wishing to participate, the school administration will establish inservice programs that fulfill the training requirements.

For elementary specialities or modes of instruction, a qualified applicant is a teacher who has the applicable qualifications set forth above. For secondary specialties, the applicant must also have the applicable qualifications set forth in paragraph above, but in particular instances may also be required to have specific training or a specific skill.[2]

Teachers assigned to a specialty school during the 1976-77 school year are qualified for that specialty

in terms of the above criteria. One inservice program designed for that specialty and offered for the teachers in the specialty, may be required. Said programs shall not exceed sixty (60) hours over the three years of the contract, the dates of said programs to be negotiated with MTEA.

In any school which has a Montessori program, vacant positions will be filled from a list of qualified applicants.

A qualified applicant is a teacher who has expressed an interest in the vacancy by filing an application, has both the basic DPI and AMS or AMI certifications required and is willing to participate in inservice programs designed for teachers in the specialty, if such inservice is deemed to be necessary.

In any elementary school which is a second language proficiency school, vacant positions will be filled from a list of qualified applicants. A qualified applicant is a teacher who has expressed an interest in the vacancy by filing an application, has the basic DPI certification required for the grade level and subject, and can speak, read and write the school's second language.

For paragraph (1), assignments will be made in accordance with system wide seniority to vacancies known by July 1, or by the date on which the general assignment of students to schools occurs, whichever date comes later.

2. EXISTING SPECIALTY PROGRAMS WITHIN BUILDINGS. In any school which has specialized courses, programs or modes of instruction in addition to the regular program, vacancies shall be filled in the following order:

a. Qualified applicants currently at the school.

b. Other qualified applicants.

For elementary specialties or modes of instruction, a qualified applicant is a teacher that has the applicable qualifications set forth in paragraph (1). For secondary specialities, the applicant must also have the applicable qualifications set forth in paragraph (1), but in particular instances may also be required to have specific training or a specific skill.[3]

In any school which has a bilingual program, vacant positions requiring the second language will be filled from a list of qualified applicants. A qualified applicant is a teacher who has expressed an interest in the vacancy by filing an application, has the basic DPI certification required for the grade level and subject, and can speak, read and write the school's second language.

Assignment of qualified applicants to vacancies will be made first, from applicants within the school in the order of system wide seniority, and, secondly from other applicants on the basis of system-wide seniority to vacancies known by July 1, or by the date on which the general assignment of students to schools occurs, whichever date comes later.

3. NEW SPECIALTY SCHOOLS AND PROGRAMS. When a new specialty school or program is created, notice of the program and teacher qualification criteria will be publicized at the earliest possible opportunity. Teacher positions shall be filled in the following order:

a. From qualified applicants currently at the school in order of system-wide seniority.

b. From other qualified applicants in order of system-wide seniority.

For an elementary program or school, a qualified applicant is a teacher that has the applicable qualifications set forth above in paragraph (1). For secondary programs or schools, the applicant must also have the applicable qualifications set forth in paragraph (1), but in particular instances may also be required to have specific training or a specific skill.[4] In any school which has a bilingual program, a qualified applicant for vacant positions requiring a second language will be the same as that set forth in paragraph (2). The cut-off date for the use of the seniority provision is the same as that described in paragraph (2).

In the special case of Rufus King College Preparatory School to be opened for the 1978-79 school year, teacher qualifications (as defined in (1) with the exception of inservice training) based upon curricular needs, will be used. In all other respects paragraph (3) applies.

4. STAFF COMPATABILITY WITH A SPECIALIZED PROGRAM. If a teacher feels that he/she is incompatible with the mode of instruction to which he/she is assigned, that teacher shall at the earliest opportunity inform the principal so that the principal can confer with the teacher. If the principal perceives that a teacher is incompatible with a particular mode of instruction, the principal shall observe and evaluate in accordance with Part IV, Section Q. If after the result of either of these actions, the teachers and the principal concur in the recommendation to transfer, the transfer will be initiated without reflecting upon the permanent evaluation file of the teacher. If the principal initiates the action and the teacher does not concur, the procedures incorporated in Part IV, Section Q, shall be followed. In either case, the

provisions of Part V, Section J(1)(a) which provide meaningful assignments for those transferred as a result of evaluation shall apply.

Nothing in this paragraph should be interpreted as preventing the principal from filing a regular evaluation.

5. QUALIFICATIONS IN REDUCTION. In the event there is a reduction in the MPS system's teacher complement, the special qualification standard established by paragraph (1), (2) and (3) shall not affect the order in which teachers are laid off.

V. F. SENIORITY DEFINITION

Seniority shall mean the number of years of service commencing the first day of the semester in which the employe begins working after the first day of the semester. Service rendered beyond the normal work year of the employe shall not be counted toward seniority. For purposes of reduction in enrollment, layoff and transfers, seniority shall further be determined among those of equal semester seniority by next considering the date the employe actually began working, if this date precedes the first date of the semester. If this date also coincides, the date on which the employe was offered employment shall be considered. Leaves of absence for whatever reason shall not be considered a break for seniority purposes whether or not increments are granted for such leave.

Resignation causes a break in seniority. If the teacher is rehired within one year following the resignation, accumulated sick leave benefits are restored. If the resignation exceeds one year and the teacher is rehired, he/she has the same benefits as a new teacher with no seniority, except as to the experience credit on the salary scale. A former teacher is allowed credit for all Milwaukee experience regardless of the period of time between the resignation and date of reemployment. Teachers who have tenure prior to resigning are employed with tenure. Teachers who do not have tenure prior to resigning receive no credit for their previous Milwaukee service toward the six (6) semesters required for tenure.

PART III

H. LEAVES OF ABSENCE

10. DURATION OF LEAVES.

a. No leave of absence, except for maternity or adoption, shall continue in force beyond one year. The total time allowed for leaves of absence, except for legislative leaves, shall not exceed three (3) years in the aggregate

within any seven (7)-year period, except to meet professional study requirements.

The total time allowed for maternity, adoption, and paternity leaves shall not exceed four (4) years in the aggregate within any seven (7) year period.

If required by the Superintendent, a period not to exceed one semester after the termination of leave, and prior to reassignment, may be granted by the Superintendent for the purpose of the above professional study of six (6) semester hours related to the field of preparation.

b. When leaves bccome effective during a semester and continue into succeeding semesters, absence of thirty-six (36) school days or more of such initial semester shall be considered as a full semester for the purpose of interpreting these rules applicable to leaves. A shorter time shall not be considered in determining the duration of a single leave or the total time granted for leaves of absence. Nothing in this rule shall be applicable to the Board's resolution on war service leaves.

BOARD RULES

Assistant Principals

Initial appointment as assistant principal, or promotion from a position of teacher to that of assistant principal, shall be for a probationary period as required above. In the event any probationary assistant principal shall previously have acquired permanent employment as a teacher and fails to receive a permanent appointment as an assistant principal, he shall be restored to the status of a permanently employed teacher and to the teachers' salary schedule.

On being restored to a teaching position, any such person shall be entitled to annual automatic salary increments as a teacher for such probationary period as assistant principal.

A person who has acquired permanent tenure as a teacher before appointment as a probationary assistant principal shall be deemed to have a leave of absence from his or her teaching position while serving as assistant principal on probation.

Principals

Initial appointments as principal, or promotion from the position of teacher to that of principal, shall be for a probationary period as described above. In the event any probationary principal shall previously have acquired permanent employment as a teacher and fails to receive a permanent appointment as a principal, he shall be restored to the status of a permanently employed teacher and to the teachers' salary schedule.

A person who has acquired permanent tenure as a teacher before appointment as a probationary principal shall be deemed to have a leave of absence from his or her teaching position while serving as principal on probation.

[1]For example, a physical education teacher position in one particular school may require the services of a teacher with life guard training and water safety skills. Qualified applicants for this position must express interest in this vacancy by filing an application, have the basic DPI physical education certification for the secondary level, and must either have acquired life guard training and water safety skills or will have acquired the above skills before actually beginning said assignment.

[2]See footnote 1.

[3]See footnote 1.

[4]See footnote 1.

The merits of the parties' final offers on each issue in dispute will be discussed initially on an individual basis before the undersigned discusses the relative merits of each party's total final offer. The issues in dispute involve:

1. The consideration of the racial balance criterion in the identification of personnel for layoff.
2. The consideration of special qualifications in the identification process.
3. Bumping rights.
4. Prior notice to MTEA.
5. Failure to respond to recall.
6. Health, Dental, and Life Insurance for employees on layoff.
7. Seniority for administrators/supervisors.

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 demonstrable 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.

An 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 to 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 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.

Consideration of Special Qualifications

Issue

The Board's final offer provides that "All layoffs shall be based on inverse order of seniority within qualification...."

The MTEA final offer does not include "qualifications" as a factor in identifying teachers for layoff, but instead utilizes "Inverse order of seniority within certification/licensure...."

Positions of the Parties

MTEA Position

The restaffing and recall provisions applicable during layoffs are essential in the identification of qualified individuals to fill positions in specialty schools and programs and other positions dealt with in Part V, Section J since the Administration does not know all of the qualifications of all of the teachers in the unit. The District's computer printouts do not contain such information, nor should the District be allowed to rely on the recollections of its administrators. The MTEA is unaware of any surveys or computer printouts that would show the special qualifications of all teachers in the system.

The time needed to identify qualified teachers during a restaffing process would be minimal. During the thirty-day period between the employee's notice of layoff and the effective date of said layoff, the Administration could determine if other teachers were qualified and available to fill positions requiring special qualifications, as defined in Part V, Section J and K. If there were no teachers qualified to fill the positions requiring special qualifications through the restaffing process, then teachers who had been sent layoff notices and who were so qualified could be properly recalled.

This entire process could take place in less than thirty days before the effected teachers ever spent a single day on actual layoff. It would be entirely an "on paper" procedure which would not be overly cumbersome to the District.

The MTEA final offer would also insure that an oversight or lack of information on the part of the Administration does not result in a qualified, more senior teacher being improperly laid off,

and would assure that such positions requiring special qualifications would be properly staffed and that the least senior teachers would be properly laid off.

The Board's final offer ignores Part V, Sections J and K of the agreement and substitutes instead the broad, undefined phrase, "within qualifications." In this same regard, the Board's final offer did include a definition of the term "qualifications" which incorporated Part V, Sections J and K; however, said definition was ultimately deleted from the offer.

Furthermore, it is apparent that the District intends to use the undefined phrase "within qualifications" as a very flexible and subjective standard in making its staffing decisions.

Although the Board contends that unless its proposal with respect to "qualifications" were accepted, special programs might have to be curtailed, when teachers have left specialty programs in the past, there has not been a situation where a class or program has had to be curtailed.

Furthermore, it is clear that many teachers have not been required to have the special qualifications until after they are in the program teaching the class.

In this same regard, the agreement provides that where specialized training is not available in existing college courses, technical training, or inservice programs, the Administration must provide such training to interested teachers who wish to qualify for specialized programs and classes.

The Board has also exaggerated the difficulty of obtaining the type of training which permits a teacher to stay in a specialized program.

Although the Board expresses concern about causing needless distress and alarm to less senior employees who may be notified of layoff and later recalled because no one else had the qualifications to fill a particular position, the MTEA argues that it is likewise distressful to a senior employee to be notified of layoff only to be recalled later when it is learned that the employee had special qualifications that the Administration did not know about. It is even more distressful for a senior qualified employee who is laid off and not recalled because his/her qualifications were not known.

District Position

In certain District programs, DPI certification/licensure does not adequately affect the skill an employee needs in order to teach in courses involved. It is therefore more logical to consider in the layoff decision the special qualifications that an employee may need to perform in a teaching assignment, and not base the layoff decision solely on DPI certification/licensure.

There are many kinds of specialty programs in the system. Each high school has a career specialty including performing arts, applied technology, communications and media, and computer data processing, among others. At the elementary level, special programs include a Montessori Program and foreign language immersion schools.

In addition to the specialty programs, there are non-specialty programs where special qualifications are required, including swimming teachers who serve as lifeguards and who must have life-saving certification.

The agreement recognizes the need for such special qualifications. Part V, Section J pertains to special qualifications that may be necessary in non-specialty programs, and Part V, Section K sets forth special qualifications that may be required in specialty

programs.

The Board made clear during negotiations that the standards included in Part V, Sections J and K pertain to the term "qualifications" in its final offer.

When a position requires an employee to have special qualifications beyond DPI certification/licensure in order to teach the course, and the employee occupying the position is the only or most senior employee who has those special qualifications, the Board should be able to exempt said employee from layoff.

The District is able to determine which positions are staffed by employees who have such unique qualifications because it is the responsibility of the curriculum specialists in the Division of Curriculum and Instruction to be aware of which employees have the special qualifications which are needed for these programs. To accomplish this end numerous surveys are done and a printout indicates the extra training that teachers receive and the special qualifications they therefore possess.

The MTEA's proposal does not recognize the special qualifications criteria at all in terms of the layoff decision, only for the specialty programs at the bumping step, and does not fully recognize special qualifications until the restaffing or recall steps.

It is the MTEA's position that where the District knows that an employee has such unique qualifications that he cannot be replaced by another employee, it should nonetheless lay off this employee and then recall the employee. This is unduly disruptive to the effected employee and causes needless distress.

To accomplish a layoff of a given number of individuals, the Board, under the MTEA proposal, would have to send layoff notices to more people than it actually intended to lay off so that some

with special qualifications could be recalled, or it would have to engage in successive layoffs until the desired number of individuals were actually laid off. The MTEA's proposal would needlessly alarm more teachers than necessary and would unduly delay the Board in implementing the layoff decision.

Discussion

On this issue, like several others in this dispute, the positions of the parties are not as different substantively as the parties contend they are. Here, both parties agree that the District retains the right under either proposal to staff specialty programs and positions requiring special qualifications in regular schools by utilizing the criteria set forth in Part V, Sections J and K. In fact, though the parties are reluctant to concede this fact, the ultimate difference between the parties is almost entirely procedural rather than substantive. However, the procedural differences and their implications are quite substantial.

In this respect, neither party has adequately addressed what is perhaps the most complex issue between them.

The District's final offer, through it does not define "qualifications," does in fact clearly refer to the standards set forth in Part V, Sections J and K. This was unequivocally admitted by the District in the arbitration proceeding. Although the parties may not be in complete accord as to how Part V, Sections J and K may apply to given factual situations, such disputes which may arise in the future may readily be resolved through the grievance and arbitration procedure.

Although the District contends that it only intends to exempt individuals from layoff if they are uniquely qualified to fill their

positions, it has failed to demonstrate in a persuasive manner that it has adequate information available as to the eligibility of more senior teachers identified for layoff to fill such positions, again applying the standards set forth in Part V, Sections J and K. The District's position then is deficient in that it allows it to exempt uniquely qualified individuals using the standards set forth in Part V, Sections J and K where there is no assurance that more senior teachers identified for layoff may be similarly qualified. In addition, the District's proposal does not provide a mechanism by which such individuals may indicate that they wish to fill such positions and that they are qualified to do so. In fact, no where in the District's proposal is there a specific provision under which the identity of individuals exempted because of their special qualifications and the reasons for said exemptions are shared either with the MTEA or the teachers identified for layoff, at least some of whom might be eligible to fill such positions under Part V, Sections J or K, whichever is applicable. Although the MTEA will have the opportunity ultimately to identify exempted individuals by carefully checking the layoff lists, in all probability, if a question arises over a more senior laid off individual's eligibility to fill such a position, said questions will have to be resolved through the grievance and arbitration procedure after the layoff has been implemented, which might result in greater disruption of personnel and costs than would otherwise be necessary.

On the other hand, the MTEA's proposal fails to recognize, in the identification of individuals for layoff, that there may be legitimate circumstances in which indviduals uniquely qualfied for their positions, within the meaning of Part V, Sections J and K,

must be retained in their positions in order not to jeopardize the programs in which they are teaching. Although MTEA concedes that such may be the case, at least in isolated circumstances, its proposal mandates that the District lay off and subsequently recall such individuals, at least in a paper transaction. This artificial transaction is not fair to such individuals and makes an already complex and cumbersome procedure even more difficult and potentially lengthy.

A reasonable system for the identification of individuals for layoff should allow for the exemption of uniquely qualified individuals under Part V, Sections J and K, and it also should assure that qualified individuals, again within the meaning of Part V, Sections J and K, who are more senior than those who have been exempted because of their special qualifications, be granted the opportunity to express their interests in said positions and to demonstrate that they are qualified to fill them, before they have been laid off. Neither party's final offer satisfies both of these objectives. Accordingly, the undersigned finds neither to be substantially more reasonable than the other.

Bumping Rights

Issue

Once employees have been initially identified for layoff under both parties' proposals, both sets of proposals afford said employees certain bumping rights.

The MTEA proposal provides as follows:

The employees identified...shall use their additional certification/licensures to displace the least senior

bargaining unit employees in their additional certification/licensures, if they are more senior.

Bargaining unit employees who have been displaced shall use their additional certification/licensures to displace the least senior bargaining unit employees in their additional certification/licensures.

. . .

Where the above procedure allows an employee to exercise his/her additional certification/licensures to displace the least senior bargaining unit employee in specialty schools, the provisions of Part V, Section K of the contract shall be followed.

The District's final offer provides that "Bargaining unit members who have additional certification/licensure may use this certification to displace less senior employees in those areas of licensure."

Position of the Parties

MTEA Position

When an individual exercises his/her bumping rights under the MTEA proposal and the bumped least senior teacher is in a speciality school or program or in a position requiring the special skills defined in Part V, Section J of the agreement, then the provisions of Part V, Sections J and K of the contract are to be followed.

With respect to the question whether the MTEA bumping procedure incorporates the District's right to require special qualifications for certain positions under Part V, Section J of the agreement, the MTEA argues that it does by virtue of the fact that its proposal incorporates Part V, Section K, which in turn, by footnote, incorporates

Part V, Section J.

The MTEA's final offer on this issue is clearer than the District's in that the MTEA clearly specifies that the least senior employee is the one to be bumped, while the District's offer refers to the bumping of less senior employees.

District Position

The MTEA proposal would permit employees to bump into programs requiring special qualifications that are not in specialty schools without regard for whether special qualifications were, in fact, needed since it does not incorporate Part V, Section J into its bumping proposal.

The Board's proposal, which permits displacement of "less" senior employees is preferable to the MTEA's proposal, which specifies displacement of the "least" senior employee. It must be assumed that more than one person will be laid off at a time. Pursuant to the Board's proposal, a rigid matching process is not required; there is no requirement that the most senior teacher on the layoff list bump the least senior teacher in assignment, with the second most senior teacher bumping the second least senior teacher, etc. The Board will thus have some flexibility in making assigments.

Discussion

Again, on this issue the parties are not as far apart as they indicate, except with respect to the issues over exemptions for racial balance and special qualifications which are discussed elsewhere herein.

With the above exceptions, both procedures allow for similar bumping privileges. However, several less significant issues distinguish the parties' positions.

Although MTEA's proposal only makes reference to the applicability of Part V, Section K to the bumping process, it is clear from the record that its proposal contemplates the applicability of Part V, Sections J and K and therefore, there is no substantive difference between the intent of either party on this specific issue.

The MTEA's proposal calls for the creation of two lists; one including the initial population identified for layoff, and the second including the list identified for layoff after bumping has taken place. The District's proposal on the other hand consolidates the identification process and calls for the preparation of a final list of those ultimately identified for layoff, after the bumping process has occurred.

Because of the complexity of the process of identification of individuals for layoff and the need for the parties to share as much pertinent information as possible to assure that the appropriate individuals have been so identified, and to minimize the likelihood that disputes will arise after the layoff has been implemented, the MTEA's two step proposal is deemed the more reasonable of the two in this regard.

Lastly, although both proposals contemplate that after bumping has occurred the least senior teachers will be laid off, except for the exemptions referred to elsewhere in the District's offer, the District's proposal allows it to exercise some discretion in assigning teachers with bumping privileges to other positions held by less senior teachers, while the MTEA's proposal provides that the most senior teacher with bumping privileges be assigned to a position held by the least senior teacher the individual is eligible to bump. The District's position would appear to be the more reasonable of the two in this regard in that it

does not require the rigid matching of the most senior teachers with bumping privileges with the least senior teachers they are eligible to bump, which might prove to be both inequitable and harmful to some of the teachers involved as well as to the District. Flexibility in making such assignments might prove to be in everyone's interest since it allows for the consideration of both the teachers' and District's interests. So long as there is no evidence that such discretion would be exercised in an arbitrary, capricious, or discriminatory manner, and so long as the least senior teachers are those who are ultimately laid off, the District's proposal in this regard is deemed the more reasonable of the two.

On this issue then the MTEA's proposal is more reasonable as it pertains to the development of lists for the identification of teachers for layoff, while the District's is more reasonable as it pertains to the assignment of individuals with bumping rights. Because the latter issue is more substantive than procedural, the District's position is deemed slightly more reasonable than MTEA's. This conclusion however, does not remedy the fact that a serious deficiency exists with respect to the amount of information the District proposes to share with MTEA as the representatiave of the effected teachers regarding the process of identifying teachers for layoff.

Notice to MTEA

Issue

The MTEA final offer provides that "at least ten (10) working days prior to written notification of layoff to employees..." the Administration shall provide the MTEA with a list of employees initially identified for layoff, and a second list of employees identified for layoff after employees have been allowed to exercise bumping rights.

"When funding for a federal or state program is reduced or curtailed due to unforeseen circumstances with less than thirty(30) days notice to the District, and the Board decides to lay off as a result of the reduced or curtailed funding, ...the notification to MTEA... shall occur at least two (2) days prior to the date that the employees to be laid off are notified."

The Board's final offer provides that "The MTEA will be given a list of those employees who have been tentatively identified for layoff at least five (5) days prior to the notice to the employee.

Positions of the Parties

MTEA Position

It is essential that the MTEA have both lists referred to in the final offer so it can determine whether the correct teachers were initially identified for layoff and whether the correct teachers were identified for layoff after the bumping process has been concluded. The Board's final offer, with only one list, would make it extremely difficult for the MTEA to determine if the correct teachers were identified for layoff.

The MTEA, with two or three staff members devoting all of their time to this task, would need the ten working days to thoroughly complete the task.

District Position

The Board proposal provides the MTEA with more than sufficient time in order to check any layoff lists to determine if any mistakes have been made. In fact, contractual provisions giving prior notice to the Union regarding specific employees to be laid off are extremely rare.

The Board's proposed five-day notice is more generous than the

three days the MTEA has to check the District's staffing lists under the Federal Court Order to make sure that individuals receive the choices they are entitled to, that the seniority dates are correct, and that assignments are processed in a proper fashion, all of which is more complicated than the checking of a potential layoff list.

In providing for ten working days prior notice to the MTEA, which amounts to fourteen calendar days, plus the thirty-day notice to the effected employees, the MTEA unjustifiably delays the Board's ability to implement a layoff.

Discussion

On this issue the position of the District, in emergency situations, is more reasonable and generous than that of the MTEA. However, under normal circumstances, neither party's final offer adequately addresses the problem.

If the District were to lay off a small number of individuals, the District's notice to MTEA would clearly be sufficient and the MTEA's proposed ten-day notice would clearly be excessive. On the other hand, if the District proposed laying off a significant number of individuals and provided MTEA only with the final list, without identifying what bumping took place, who was exempted from the layoff, and for what reasons, the checking of such information and the canvassing of individuals identified for layoff to determine if they were qualified within the meaning of the contract to fill positions in which the incumbents were exempted because of allegedly unique qualifications would probably require the full ten days requested by the MTEA. Thus, although neither final offer is deemed to be significantly more reasonable than the other, the MTEA's is deemed to be more reasonable,

particularly in the event of large layoffs, where the accumulation and verification of information would be a voluminous and complex task.

Although it is true that prior notice to the employees' representative is not the norm in comparable layoff plans, such prior notice would seem to be desirable from both parties' perspective in that it allows for the identification and hopefully the resolution of problems before the layoff is implemented, instead of prolonged litigation over the correctness of the decisions made and the potential costs and disruption of personnel that may result therefrom.

Failure to Respond to Recall

Issue

The MTEA final offer provides that "In the event that an employee is unable to report within the prescribed time limits by reasons of illness, injury, or other personal emergency, he/she shall not forfeit his/her recall rights provided notice of such circumstances is given to the employer in writing within the time period that the employee is required to respond to the recall notice and provided he/she notifies the employer when he/she is able to be recalled.

The Board's final offer provides that "In the event that an employee is unable to report within the prescribed time limits by reason of illness, injury or other personal emergency, he/she shall not forfeit his/her recall rights provided notice of such circumstances is given to the employer in writing within the time period that the employee is required to respond to the recall notice and provided he/she notified the employer when he/she is able to be recalled.

Positions of the Parties

MTEA Position

The Board's final offer, literally read, would require an employee

to notify the Administration within ten days of the recall notice of the date when he/she will be able to return. Although the District admitted that its proposal does not have this intent, the MTEA final offer is more carefully drawn and more accurately reflects the intent of the parties. The Board's final offer, at best, creates an ambiguity which must be resolved in order to equitably protect employees in certain emergency situations.

District Position

The Board's proposal does not require that an employee who cannot accept a recall because of a personal emergency notify the District at the time he refuses the recall when he will be able to report for work. If the employee knows when he/she will be able to return to work, that information should be provided to the District; if the employee does not know, the District should be provided that information as well.

Discussion

On this issue there is no substantive difference between the parties' positions and therefore, both are deemed to be equally reasonable. Both proposals require that an individual who cannot accept a recall because of emergency situations so advise the District in a timely manner. Similarly, both require said individuals to advise the District when they will be able to be recalled when such information is known. The ambiguity in the District's proposal does not negate its clearly expressed intent in this regard.

Health, Dental, and Life Insurance for Employees on Layoff

Issue

The MTEA final offer provides that "An employee who is laid off

shall be treated in the same manner as an employee on unpaid leave for the purposes of health insurance, life insurance, dental insurance and any other benefits available to any employee on unpaid leave from the bargaining unit."

The Board's final offer in this regard provides:

Health Insurance - An employee who is laid off shall be treated inthe same manner as an employee on an unpaid leave. Self-paid coverage must be continuous from the time of layoff. Eligibility ceases after the 36th month following the month in which Board paid coverage stopped.

Dental Insurance - An employee who is laid off shall be treated in the same manner as an employee on an unpaid leave. Self-paid coverage must be continuous from the time of layoff. Eligibility ceases after the 36th month in which Board paid coverage stopped. If the carrier rules limit coverage to a period of less than 36th (sic) months, these rules will apply providing that the coverage extends at least 24 months following the month in which Board coverage ceases.

Group Life Insurance - Employees enrolled in the group life insurance plan at the time of layoff may continue in the plan. These employees will be treated in the same manner as an employee on unpaid leave. Self-paid coverage must be continuous from the time of layoff. Eligibility ceases after the 36th month following the month in which Board paid coverage stopped. If carrier rules limit coverage to a period of less than 36 months, these rules will apply providing that the coverage extends at least 24 months following the month in which Board coverage ceases.

Position of the Parties

MTEA Position

The MTEA final offer directly ties laid off employees' entitlement to certain fringe benefits into the existing contract and past practice which clearly define the rights of employees on unpaid leaves.

The MTEA final offer provides that recall rights and layoff status would terminate at the end of 36 months, or earlier in the event of a refusal of recall. Both would be treated the same as a termination of employment of a person on unpaid leave. Thus, laid off employees would be allowed the same level of benefits as employees on unpaid leave. This benefit is essentially a no cost item to the Board.

The MTEA final offer also insures that a laid off employee's statutory rights are the same as those of employees on unpaid leaves. Thus, when an employee loses his/her recall rights, an additional one-year period of group coverage and the subsequent right to apply for conversion to an individual policy would commence in accordance with State statutes.

At present, there are no two-year limitations in either the life or dental insurance programs which are enforced by carriers. If such limitations were legitimately implemented by the carrier, employees on layoff status would be subject to them to the same extent that employees on unpaid leave status would be subject to them.

In the area of insurance benefits, the Board's final offer specifically limits the rights of a teacher on layoff to less than the rights of other teachers on a leave status.

The Board incorrectly states that the contract does not define the rights of employees on unpaid leave as to participation in the health, life and dental insurance plans.

PART III
B. HEALTH AND DENTAL INSURANCE
1. The Board shall continue to provide hospital-surgical and major medical benefits for its employees as at present, subject to the following changes: ...

PART III
C. LIFE INSURANCE
The Board shall continue in effect its present policy of providing group life insurance for employes in an amount of coverage equal to annual earnings to the next even thousand dollars subject to the following changes: ...

PART I
F. AGREEMENT, RULES, POLICIES AND PROCEDURES
1. AGREEMENT AND EXISTING RULES. This contract shall, wherever the same may be applicable, including existing rules of the Board at the time the agreement is entered into. Where the contract requires changes in rules, 'existing rules' shall mean the rules as amended as required by the contract.

2. AMENDMENTS TO RULES OR BOARD POLICIES. Where any rule or Board policy is in conflict with any specific provision of the contract, the contract shall govern. Where there is any new rule or Board policy or amendment to any rule or Board policy which will have a major effect on wages, hours, and working conditions of the members of the bargaining unit and the contract is silent, no such rule or Board policy shall be effective until after negotiations with the MTEA. If after a reasonable period of negotiations with the Board or its representative, no agreement has been reached, the MTEA may immediately proceed to mediation prior to the implementation of such rule or Board policy. The MTEA may proceed to advisory fact finding if the matter is not resolved in mediation. In an emergency situation which would interfere with the orderly operations of the schools, the administration may temporarily implement emergency action prior to mediation.

3. ADMINISTRATIVE PROCEDURES.
a. A number of major administrative procedures affecting wages, hours, and working conditions of members of the bargaining unit have been codified. As additional procedures are reduced to writing, they shall be added to the booklet containing such codified procedures.

b. Where any new procedure or amendment of procedure conflicts with any specific provision of this contract, the contract shall govern.

c. If, during the term of the contract, any administrative procedure is changed by amendment or by a new procedure, on which the contract is silent, which has a major effect on wages, hours and working conditions of the

> members of the bargaining unit, no such procedure shall be effective until after negotiations with the MTEA. If, after a reasonable period of negotiation, no agreement has been reached, the MTEA may proceed to mediation prior to the implementation of such procedure. The MTEA may proceed to advisory fact finding if the matter is not resolved in mediation. In an emergency situation which would interfere with the orderly operations of the schools, the administration may temporarily implement emergency action prior to mediation.

In addition, the Board's policies and administrative procedures regarding health insurance and term life insurance are found in the Board pamphlets entitled "Blue Cross/Blue Shield United Group Health Protection Program" and "Group Life Insurance For Employes of MPS".

The practice of the system is clear in these areas. Teachers on unpaid leaves are permitted to remain in these programs on a self-paid basis.

In addition, there is an admission in the record that teachers on unpaid leave or layoff could participate in the current plans on a self-paid basis.

District Position

While the Board's proposals regarding laid off employees' entitlement to benefits is clear, the MTEA proposal is vague. Their proposed contract does not define the rights of employees on unpaid leave regarding participation in health, life, and dental insurance.

Furthermore, the MTEA proposal does not define the length of eligibility for benefits, and thus presumably, their duration could be unlimited.

The MTEA's proposal is totally unclear as to the effect of a refusal to respond to a recall order on benefits. While it does specify what happens to an employee's recall rights if the employee refuses a

recall or does not respond, it does not specify what the effect of said action would be on the employee's entitlement to benefits.

The rules of the current life insurance carrier for the District limit to 24 months an employee's ability, after layoff, to participate on a self-paid basis. A possibility exists that a similar restriction could occur in the case of dental insurance.

The MTEA claims that its proposal indirectly incorporates this feasibility when it results from carrier rules. It therefore makes more sense to so provide, as the Board proposal does.

The Board's proposal deals only with employee's contractual rights, it does not void any rights said employees have under Wisconsin Statutes to continue in a group health plan for one year after termination and then to apply for a conversion to an individual policy.

Discussion

Although the parties go to great lengths to distinguish their positions on this issue, there is really only one substantive difference between them, and that is of much less consequence than the parties contend.

Both positions allow for health, dental, and life insurance coverage for the 36 months that laid off employees are entitled to be recalled and that such entitlement will terminate if said employees waive their recall rights under the contract by their own conduct. Similarly, neither position waives laid off employees' statutory rights to continue self-paid coverage for a fixed period of time and to certain conversion privileges.

Although the language of the parties' proposals in this regard differs, it is clear from the record that the intent of both parties is the same.

The difference between the parties pertains to the effect of carrier rules on the coverage provided. Under the District's proposal, it is obliged to try to obtain 36 months self-paid insurance coverage for laid off employees. Since the District is self insured for purposes of health insurance, there is clearly no problem on this issue. It is also clear from the record that the District's current dental insurance carrier would also provide 36 months coverage. However, the District's current life insurance carrier may limit coverage to 24 months. The record indicates that the District intends to let its life insurance program contract out for bid, and that in doing so, it will seek 36 months coverage in this regard.

The MTEA's position recognizes that changes in carrier rules applicable to individuals on leaves of absence would also be applicable to individuals on layoff, but fails to recognize the possibility that some carrriers may apply different rules to people on layoff status than to individuals on leaves of absence. Although it seems unlikely that the District will not be able to find a carrier to provide such coverage, contractual recognition of the unlikely event that it cannot does not seem to be unreasonable. Accordingly, the District's position is deemed to be slightly more reasonable than MTEA's in this regard.

Seniority for Administrators/Supervisors

Issue

The MTEA final offer is silent with respect to said issue.

The Board's final offer provides as follows:

> Employees who formally (sic) served as tenured teachers in the Milwaukee Public School and who may have been promoted to administrative/supervisory positions in the Milwaukee Public Schools, shall retain and continue to accumulate seniority while serving in an administrative/supervisory position. Said seniority shall be equal to the number of years of continuous full-time service. In assignment to

positions in the bargaining unit and while serving in said positions, former administrators/supervisors will be subject to all aspects of the contract.

Position of the Parties

MTEA Position

The current agreement should determine the amount of seniority administrators/supervisors who have left and returned to the bargaining unit have for layoff purposes. The issue regarding the seniority rights of such individuals is currently before a grievance arbitrator in another proceeding. In that proceeding the MTEA has argued that an administrator/supervisor does not continue to accumulate seniority in the teacher unit beyond three years. It has relied on the following sections of the agreement in doing so: Part V, Section F, Part II, Section H(10); Part I, Section F. It has also relied on the following Board Rules: 3.09 and 3.10.

In the instant proceeding, the MTEA would similarly argue that administrators/supervisors should retain all of the seniority they acquired as members of the teacher bargaining unit plus up to three years seniority while serving as an administrator/supervisor on leave from the teacher unit, but it would allow the decision rendered in the pending grievance arbitration proceeding on the seniority issue to govern in layoff situations.

The District's exhibits do not support its contention that there is a well established past practice in the District which supports and is consistent with its final offer on this issue.

Irrespective of who prevails in the pending grievance arbitration proceeding,the MTEA final offer in this proceeding guarantees the least violence to the current collective bargaining agreement on this issue.

If the Board does not prevail in the grievance arbitration proceeding however, it will be asking the arbitrator herein to render an award granting seniority rights to administrators/supervisors inconsistent with those set forth elsewhere in the agreement.

Neither Section 118.23(4) Wis. Stats. nor the Attorney General's opinion which deals only with the legislative intent behind Sec. 118.23, Wis Stats. has any bearing on this case because neither apply to teachers and administrators in the City of Milwaukee.

District Position

In proposing to grant administrators/supervisors who left and returned to the bargaining unit full seniority for their years of employment in the District, the Board is codifying a practice that has been followed in the District for decades.

The agreement is silent as to the seniority rights of employees who formerly served as tenured teachers and who have been promoted to administrative/supervisory positions and then return to the teacher bargaining unit, particularly as to their right to continue to accumulate seniority while serving in the administrative/supervisory position.

Advancement from a teaching position to an administrative/supervisory post represents a promotion for a teacher, and that teacher should not be penalized for accepting such a promotion to administrative/supervisory ranks by being placed in greater jeopardy of being laid off due to a failure to accrue seniority after being promoted. Persuasive authority in support of this view is provided by 118.23, Wis. Stats. and the opinion of the Attorney General interpreting this statute. While said statute only governs communities in Milwaukee County other than the City of Milwaukee, the policy expressed by the legislature and the Attorney

General that it is inappropriate to penalize employees for accepting promotions from teacher to administrative ranks is equally valid in the City of Milwaukee.

Discussion

On this issue, MTEA's position is clearly the more reasonable of the two. This is so since it does not have the potential, as does the District's final offer, of creating two definitions of seniority for administrators/supervisors in the collective bargaining agreement.

The parties are herein negotiating a layoff plan and not other provisions in their agreement. If the MTEA prevails in the pending grievance arbitration seeking a definition of the seniority rights of administrators/supervisors who leave and then return to the teacher bargaining unit, and the District prevails in the instant proceeding, administrators/supervisors will have different seniority rights for purposes of layoff than they have for any other purpose in the agreement. Such a result generates inequities and problems for all parties which could be avoided if the parties applied the same definition of seniority for said individuals for all purposes under the agreement.

Clearly there are competing legitimate interests when considering the issue of seniority rights of such individuals. However, such questions should be addressed in the negotiations between the parties over seniority rights, not in the negotiations of a layoff plan, where one party seeks to define such seniority rights differently for a single purpose.

If of course the District prevails in the pending grievance arbitration over this issue, its position in this proceeding would be applicable to layoffs. If it does not prevail, and it believes

inequities to said individuals result therefrom, the issue should properly be addressed in the next round of negotiations. This is the inappropriate forum to raise the question that has been presented herein.

Total Package

Discussion

A review of all of the foregoing places the undersigned in a most distressful situation. On the issue relating to the relevance of racial considerations, the District's final offer is clearly preferable. On the issue relating to the seniority rights of administrators/supervisors, the MTEA's position is clearly the more reasonable. On the issue relating to the consideration of special qualifications, neither party has presented a persuasive argument supporting the selection of their respective final offers. The above issues would appear to be the more significant substantive issues in dispute in terms of their ultimate impact on effected individuals and the District's educational program.

Of less importance are the following issues: On the bumping rights question the District's position is slightly more preferable, however it is deficient procedurally in that the necessary information to make correct decisions regarding the identification of personnel for layoff may only surface in a grievance and arbitration proceeding after the layoff has been implemented. The MTEA's position is slightly preferable on the issue of prior notice, however it may be excessive in many situations. Neither party's position is more reasonable than the others' on the issue relating to the failure of a laid off individual to respond to recall. And lastly, on the issue relating to the entitlement of laid off individuals to self-paid insurance benefits, the

District's position is slightly more reasonable.

As one can discern from the above summary, the total package of neither party is totally acceptable, and more importantly, on the critical issues, each party has a preferable position on one major issue and neither party has a totally acceptable position on the third.

Because the undersigned is confronted with the mandatory selection of one of the party's total final offer, the undersigned has decided that of the critical issues in dispute, the issue relating to the achievement of racial balance in the District will have a more significant impact on the District, its employees, and the community it serves than the issue relating to the seniority rights of administrators/supervisors for purpose of layoff. Because the merits of the parties' positions on the remaining issues in dispute are relatively balanced, the undersigned selects the District's total final offer as the more reasonable of the two, with several serious reservations and concerns.

The selection of the District's total final offer requires several points of clarification to minimize ambiguity, potential disagreement, and inequity. Furthermore, the undersigned believes that consideration of the following suggestions might minimize the number of disputes that are likely to arise in the implementation of the procedure.

It is anticipated that the racial balance criterion will be implemented in the manner set forth by the District in the arbitration proceeding and discussed herein, and that the data supporting the need for exemptions based upon racial considerations will be made available to MTEA upon request.

On the issue relating to the consideration of special qualifications as a basis for exempting individuals for layoff, the term qualification

is to be construed in accord with the standards set forth in Part V, Sections J and K of the agreement, whichever is applicable. Furthermore, individuals are not to be exempted from layoff unless they are uniquely qualified, within the meaning of said provisions. Thus, if teachers identified for layoff are more senior than teachers the District wishes to exempt because of special qualfications and are qualified to fill such positions within the meaning of Part V, Section J or K, whichever is applicable, said teachers, under the District's final offer, are entitled to fill such exempted positions.

Although the District's final offer does not oblige it to provide the MTEA or the effected teachers with specific information regarding the identification of exempt teachers and the reasons therefor; in order to properly administer the contract and enforce the rights of its members, the MTEA should be entitled to such information upon request. It might therefore be preferable, though not required by the agreement, for the District to provide MTEA with such information at the time MTEA is provided with a list of employees tentatively identified for layoff to facilitate agreement on whether individuals tentatively exempted because of their allegedly unique special qualifications are in fact unique in that regard. It is also suggested, though not mandated by the terms of the agreement, that if the District wishes to exempt individuals because of unique qualifications, a timely canvas be made by the District of more senior teachers with interchangeable certifications/licensures who have been identified for layoff, to ascertain whether they are interested in and qualified, within the meaning of the contract,for such positions.

The undersigned encourages the parties to work out informal extra

contractual arrangements which will facilitate the sharing of information in order to implement the procedure with as little error and disruption as possible.

If such procedures prove to be workable, the parties should subsequently codify such arrangements in the agreement in future negotiations.

With respect to the seniority rights of administrators/supervisors, if the MTEA prevails in the pending grievance arbitration involving said issue, in the undersigned's opinion, the matter is an appropriate subject for renegotiation in future negotiations.

Regarding bumping rights and notice to the MTEA, the District is encouraged, though not required by the agreement, to provide MTEA with as much specific information as possible regarding how bumping assignments were made, in addition to the information regarding proposed exemptions from layoff which have been discussed above. The parties should work diligently to work out problems before any layoff is implemented, and the sharing of specific information pertinent to the identification of the population to be laid off is an essential ingredient to accomplish that end. As indicated above, absent such cooperation, the likelihood that mistakes will be made in the identification process is significantly enhanced.

Absent such cooperation, MTEA should be entitled to such information, upon request, if a question arises as to whether individuals' contractual rights were violated in the identification process. In such a case, disputes would probably have to be resolved in the grievance and arbitration process after the layoff has been implemented.

If problems arise in implementing MTEA's review of the layoff list furnished by the District, the issue of the sufficiency of prior

notice to MTEA may also be an appropriate subject for future rounds of negotiations.

Employees who cannot respond to a recall because of an emergency situation will only be required to provide the District with information as to when they can return to work when such information is known to them. In the event individuals cannot accept a recall for the reasons prescribed in the agreement, said individuals must so notify the District in a timely manner and should notify the District whether or not they know when they can return to work. If they know when they can, of course they should so notify the District.

Lastly, the District is obligated by its proposal to make a good faith attempt to provide the 36-month self-paid insurance coverage for laid off employees set forth in its final offer. Furthermore, the limitations set forth in said coverage do not negate any statutory rights said employees have to extend such coverage for an additional year or to have certain conversion privileges related thereto.

For all of the foregoing reasons, the undersigned renders the following

AWARD

Effective September 7, 1981 the Board's final offer in this proceeding, under the terms and conditions set forth above, shall be incorporated into the parties' current collective bargaining agreement.

Dated this _____ day of September, 1981 at Madison, Wisconsin.

BY _____

Byron Yaffe, Arbitrator