STATE OF WISCONSIN STATE PERSONNEL BOARD

* * * * * * * * * * * * * * * * * * * * *

MARK KRAJCO,

Appellant,

v.

C. K. WETTENGEL, Director
State Bureau of Personnel and
JOHN C. WEAVER, President,
University of Wisconsin,

Respondents.

Case No. 74-68

* * * * * * * * * * * * * * * * * * * * *



OPINION AND ORDER

Before: JULIAN, STEININGER and WILSON

## OPINION

### NATURE OF THE CASE

The Bureau of Personnel refused to allow Appellant to compete for a position as an electrician apprentice at the University of Wisconsin-Madison because of the designation of the position as an exceptional employment situation limited to certain minority groups and women pursuant to Pers 27, W.A.C., and S. 16.08 (7), Wis. Stats. Appellant then petitioned the Director of the Bureau for a declaratory ruling in accordance with S. 227.06, Wis. Stats., with regard to the legality of his exclusion from competition for this position and the legality of Pers 27 generally. The Appellant and the Director stipulated that the Director would decide the petition without a hearing and in letter form, and that the letter would constitute a decision of the Director for purposes of appeal to the State Personnel Board pursuant to S. 16.05 (1), Wis. Stats.

In a letter dated June 24, 1974, to Appellant's attorney, the Director ruled that Pers 27 was a necessary and lawful enactment and was properly utilized in the specific case affecting the Appellant.[1] The Appellant then appealed this decision to the State Personnel Board which held a de novo hearing at which all parties presented evidence. The Appellant contends that his exclusion from competition for the position and the enabling provisions for the exclusion violate his right to the equal protection of the laws secured by the Fourteenth Amendment and violates other provisions of state law.

## FINDINGS OF FACT

The Appellant is a white male. On May 23, 1974, he attempted to apply for employment with the State of Wisconsin as an electrician apprentice at the University of Wisconsin-Madison. The Bureau of Personnel refused to accept his application inasmuch as the position had been designated an exceptional employment situation pursuant to Wis. Stats. S. 16.08 (7) and S. Pers 27 W.A.C. with recruitment limited to specific minority groups -- women, blacks, American Indian, Spanish surnamed, and Asian American. The position was so designated pursuant to a request from the University of Wisconsin-Madison Director of Affirmative Action. The background for the request was as follows:

As of November, 1972, there were no women or minorities employed by the University of Wisconsin-Madison Division of Physical Plant in the craft trades out of about two hundred positions. There had never been any referrals of women or minorities to that division by the Bureau of Personnel through normal recruitment channels. There had been a relatively pervasive expectation among women and minorities

---

[1] A copy of this letter is attached as Appendix A. This was also a part of the record as an attachment to Appellant's appeal letter which was marked as Board's Exhibit 1.

in the Madison area that they would not be certified for positions in the trades because of a general history of discrimination in these areas, and few if any minorities or women had ever competed for such positions, based at least in part on this expectation.

The zero per cent representation of women and minorities in the craft trades of the Division of Physical Plant in November, 1972, is considerably less than their representation in the general population and the work force (minorities-2.85%) of Dane County and the State of Wisconsin (minorities-3.6%) at that time. This under-utilization existed despite previous efforts by the University of Wisconsin-Madison at affirmative action recruitment, such as, for example, the notification of groups like the Urban League and NAACP of openings, and University conducted educational and training programs for minorities. At the time of the Pers 27 designation for the job in question, it was correctly anticipated that budgetary considerations would lead to reduced state hiring, including the University of Wisconsin-Madison trades classifications.

A minority, Spanish-surnamed individual, was hired for the electrician's apprentice position in question. Six other trades positions that opened up were recruited for pursuant to Pers 27 classification subsequent to November 1972, and as of February 1974 women or minority group members had been so hired in all six positions. All of these and the person hired as the electrician apprentice met all the normal requirements for their position including any tests involved and have been performing their duties in at least an average manner. The University intends to continue using Pers 27 only until an approximate balance of minorities in the work force is achieved.

The Appellant would still apply for the position of electrician apprentice, and would accept the position if offered.

## CONCLUSIONS OF LAW

### EQUAL PROTECTION

The Fourteenth Amendment's Equal Protection Clause provides as follows:

> . . . nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

While the equal protection clause has been interpreted as a mandate for equality of treatment by the government, it is clear that the government lawfully can and does treat persons in different ways.

Persons are taxed, regulated, punished and paid differently depending on their individual actions and characteristics. A guiding principle frequently stated by the United States Supreme Court is that all persons must be treated alike under like circumstances and conditions, both in terms of the privileges conferred and in the liabilities imposed. 16 Am. Jur. 2d Constitutional Law S. 488.

Just as all individuals are not required to be treated alike by the state under all circumstances, so all classes are not required to be treated the same. Classifications may be made and the resulting classes treated differently depending on the facts and circumstances involved. It is not impermissible per se to classify on the basis of race or sex. The United States Supreme Court has refused to adopt such a rule on a number of occasions, when it was faced with legislation primarily directed against a minority, although it has subjected such legislation to close scrutiny. See Korematsu v. United States, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944); Hirabayashi v. United States, 320 U.S. 81, 65 S. Ct. 1375, 87 L. Ed. 1774, (1943); McLaughlin v. Florida, 379 U.S. 184, 85 S. Ct. 283 (1964); Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817 L. Ed. (1967); Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583

(1973). In Korematsu and Hirabayashi the Court upheld the confinement in concentration camps of Japanese-Americans solely on the basis of their ancestry, a measure that was enacted at an extremely low ebb in American fortunes in the Pacific theatre in World War II. In McLaughlin and Loving the Court subjected anti-miscegenation statutes to close scrutiny and found them unconstitutional. However, the Court refused to apply a per se rule of invalidity to this racial classification which involved criminal sanctions.[2]

Numerous courts have required or upheld government racial classifications as a response to past or present discrimination against minorities. In Norwalk CORE v. Norwalk Redevelopment Agency, 395 F. 2d 920, 931-932 (2d Cir. 1968), plaintiffs alleged that relocation standards connected with an urban renewal project, ostensibly color-blind, violated the equal protection clause because discrimination in the housing market would result in a shortage of approved available housing in the city of Norwalk for relocating non-whites, which would in turn drive them from the city. In determining that such an allegation constituted a claim, the Court stated:

> What we have said may require classification by race. That is something which the Constitution usually forbids not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required.

---

[2]Compare the concurring opinion of Justices Stewart and Douglas in McLaughlin with Justice Douglas' dissent in De Funis v. Odegard, 416 U.S. 312, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974). In the former, the per se test was limited to a criminal statute. In the latter, Justice Douglas did not apply a per se test: "A finding that the state school employed a racial classification in selecting its students subjects it to the strictest scrutiny under the Equal Protection Clause." 94 S. Ct. at 1714.

Preferential treatment on account of race in employment practices including in many cases ratio or quota hiring also has been frequently approved or required. See, e.g., Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F. 2d 9, 16 (1st Cir. 1973):

> (O)ur society cannot be completely color-blind in the short term if we are to have a color-blind society in the long term . . . . Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities.

See also, Contractors, Assn. of Eastern Pennsylvania v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970), aff'd., 442 F. 2d 159 (3rd Cir. 1971); Weiner v. Cuyahoga Community College District, 19 Ohio St. 2d 35, 249 NE 2d 907 (1969); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970); Local 53 of Intl. Assn. of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F. 2d 1047 (5th Cir. 1969); United States v. Intl, Brotherhood of Electrical Workers, Local No. 38, 428 F. 2d 144 (6th Cir. 1970); United States v. Ironworkers Local 86, 443 F. 2d 544 (9th Cir. 1971); United States v. United Brotherhood of Carpenters and Joiners, Local 169, 457 F. 2d 210 (7th Cir. 1972); Southern Ill. Builders Assn. v. Ogilvie, 471 F. 2d 680 (7th Cir. 1972); NAACP v. Allen, 493 F. 2d 614 (5th Cir. 1974); Carter v. Gallagher 452 F. 2d 315 (8th Cir. 1971); Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commin., 482 F. 2d 1333 (2d Cir. 1973).

Thus we cannot find any support for a "color-blind" approach for this case that would foreclose further inquiry after a finding of a race (or sex) preference in a scheme of government employment. The question is whether the classification or preference meets the appropriate standard of review.

In constitutional analysis under the equal protection clause, adjudicative bodies normally require that the state demonstrate that a racial classification is necessary to the accomplishment of a compelling state interest. See McLaughlin v. Florida, supra; Warshafsky v. The Journal Co., 63 Wis. 2d 130, 137-138, 216 N.W. 2d 197 (1974). This rather difficult burden is required on the theory that race is intrinsically a "suspect" criterion because of the notions of equality embodied in the Fourteenth Amendment. See Hirabayashi v. United States, 320 U.S. 81, 100, 65 S. Ct. 1375, 87 L. Ed. 1774 (1943):

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.

The question posed on this record is whether the Board should impose a lesser burden of justification on the state in this case because of the fact that the classification in question purports to be benign as opposed to invidious -- i.e., its purpose is to attempt to achieve equality by recognizing years of oppressive treatment of minorities and enhancing their employment opportunities.

The short answer is that the distinction between benign and invidious discrimination is somewhat artificial. There is no question but that the enhancement of minority opportunities in the present case was and is at the expense of the majority. To label this as benign discrimination ignores the very real fact that the operation of S. 16.08 (7) and Pers 27 has an invidious effect on Mr. Krajko's economic interest based solely on his genetic and racial makeup. See Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F. 2d 9, 18 (1st Cir. 1973). It is also sometimes somewhat difficult to determine what is invidious and what is benign. See Kaplan, Equal Justice in an Unequal World: Equality for the Negro -- the Problem of Special Treatment, 61 N.W. U.L. Rev. 363, 382-383 (1966).

Furthermore, a relaxed standard of review in such a case would undermine the function of the equal protection clause as an abstract legal standard by which to measure government action. The legislature can classify people and groups of people differently consistent with the equal protection clause if different circumstances warrant it. In the field of racial classifications, for example, the state may consider all sorts of social and economic factors in determining whether under the circumstances one group should be treated differently than other groups, and courts and administrative bodies will consider on review of such classifications whether these factors create sufficient real differences to justify the difference in treatment. However, the equal protection clause should require that the members of the various classes affected should have the benefit of the same standard of review when they invoke the jurisdiction of courts or administrative bodies to review such governmental enactments. The facts and circumstances peculiar to the particular groups are relevant to whether the classifications meet the standard of review, and not in determining which standard of review should apply.

As noted above race and national origin classifications are considered suspect and subject to the rigid scrutiny of the compelling state interest test on review. Our Supreme Court held recently that sex classifications are not suspect and hence subject to the less rigid rational relationship test[3] on review. Warshafsky v. The Journal Co., supra. Therefore, we will first consider the race and national origin aspect of the classification

---

[3]This upholds the legislative classification unless it is "patently arbitrary and bears no rational relationship to a legitimate governmental interest . . . ," Warshafsky, 63 Wis. 2d at 140.

pursuant to the compelling state interest test and then consider the sex component pursuant to the rational relationship test.

We have no difficulty finding a compelling state interest in the economic and social integration of minorities into the mainstream of our society. The history of the deprivations that have been and continue to be inflicted on minorities is familiar and will not be repeated here. It is sufficient to say that if any state interest is compelling, it is the interest in eliminating all vestiges of racism from our society. Integration into the work force not only promotes economic equality but also provides role models which are essential for long-term improvement. See, e.g., Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F. 2d 9, 18 (1st Cir. 1973):

> In the present instance, there is no question that a compelling need exists to remedy serious racial imbalance in the construction trades . . . . Such an imbalance within the relatively lucrative, highly visible and expanding construction trades undermines efforts at achieving equal opportunity elsewhere in the economy and contributes to racial tensions.

As an initial proposition, there is no question but that the restriction of an employment opportunity to particular minority groups has the effect of ensuring that the position will be filled by a member of those groups. Secondarily, there is no question but that this will have the effect of enhancing the economic and sociological position of the group in question, and the classification in that sense bears a rational relationship to the state's interest in getting more minorities into the trades and promoting their integration into our economic structure. However, the proposition that the state must justify a challenged racial classification as being necessary to a compelling state interest requires more than a showing of mere causality. The state must also show that there is no alternative means that would reach the same end without the

utilization of a racial classification. See Dunn v. Blumenstein, 405 U.S. 330, 343, 92 S. Ct. 995, 1003, 31 L. Ed. 2d 993 (1972); Shelton v. Tucker, 364 U.S. 479, 488, 81 S. Ct. 247, 252, 5 L. Ed. 2d 231 (1960).

The record in this case reflects a total absence of racial minorities in the University of Wisconsin-Madison Physical Plant trades classifications as late as November, 1972, despite affirmative action recruitment by the university, and the prospect of a near freeze on hiring which would perpetuate the racial imbalance.[4] We feel that this is an adequate showing that alternative means would have been ineffective in meeting the state's goal of a more integrated work force. The state was not required to have continued their affirmative action programs on the basis of the bare possibility that they would eventually produce the desired results in light of the past history of their lack of success. The Appellant has not suggested other approaches that might have had a reasonable chance of success, and we are aware of none.

With regard to the sex classification component of the recruitment procedure, review is pursuant to the rational relationship test in accordance with Warshafsky v. The Journal Co., 63 Wis. 2d 130, 140, 216 N.W. 2d 197 (1974):

> This court is also reluctant to deviate from the traditional test of upholding a legislative classification unless said classification is patently arbitrary and bears no rational relationship to a legitimate governmental interest in the instant action.

---

[4]Compare Crockett v. Green, 388 F. Supp. 912, 921 (E. D. Wis. 1975), where the court imposed ratio hiring as "the only possible means to provide relief for racial discrimination," noting "the small number of vacancies in each skilled craft job classification."

Applying this test to this classification, we conclude that it is not "patently arbitrary" and that it does bear a "rational relationship to a legitimate governmental interest." The state clearly has a legitimate interest in enhancing the status of women and effectuating their integration into the economic mainstream. See generally Murphy, Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970, 39 U. of Cincinnati L. Rev. 615 (1970); U.S. Dept. of Labor, Fact Sheet on the Earning Gap (February 1970); Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harvard L. Rev. 1109, 1166-1169 (1971). The means chosen to effectuate this government interest bears a clear relationship to the achievement of this end. While in this instance it is not necessary for the respondents to demonstrate that they are utilizing the least restrictive alternative, we note that our remarks on this point with regard to race and national origin aspect of this classification apply equally to the sex restriction.

Appellant has also alleged a violation of state law. Wis. Stats. S. 111.32 (5) (a) provides in part as follows:

> 'Discrimination' means discrimination because of age, race, color, handicap, sex, creed, national origin or ancestry, by an employer or licensing agency individually or in concert with others, against any employe or any applicant for employment or licensing, in regard to his hire, tenure or term, condition, or privilege of employment or licensing . . . ."

A recent Supreme Court decision held that the state and state agencies are not included within the terms of this act. State ex rel Wisconsin Department of Public Instruction v. Wisconsin Department of Industry, Labor, and Human Relations, 68 Wis. 2d 677 (1975). Thus at the time of the recruitment for the electrician apprentice position the above statute did not apply to the University of Wisconsin-Madison, a division of the state.

However, we also note that a number of federal courts have upheld court orders and executive plans imposing ratios or quotas on employment practices against charges that the ensuing limitation on opportunities for white males violated a similar federal provision, Title VII of the Civil Rights Act of 1964, 42 U.S.C. S. 2000e-2:

> (a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such indivdual's race, color, religion, sex, or national origin.

For example, Contractors Assn. of Eastern Pa. v. Secretary of Labor, 442 F. 2d 159, 172-173 (3d Cir. 1971), reviewed the "Philadelphia Plan," promulgated by the United State Department of Labor pursuant to the authority of Executive Order No. 11246. The plan required that certain contractors bidding on federal contracts submit affirmative action programs that included specific goals for the utilization of minorities in the various skilled trades. The plaintiff contractors contended that the remedial quotas required that they refuse to hire some white tradesmen and that they classify their employees by race, in violation of 42 U.S.C. S. 2000e-2 (a), (1) and (2).

In dealing with this contention the Court of Appeals noted that there was a marked underrepresentation of minorities in the trades in question, and that this underrepresentation was due to exclusionary practices of the unions representing those trades.

The Court held:

> To read S. 703 (a) [42 U.S.C. s. 2000e-2 (a) (1) and (2)] in the manner suggested by the plaintiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention either from the language of the statute or from its legislative history. Clearly the Philadelphia Plan is color conscious . . . In other contexts color-consciousness has been deemed to be an appropriate remedial posture . . . We reject the contention that Title VII prevents the President acting through the executive order program from attempting to remedy the absence from the Philadelphia construction labor of minority tradesmen in key trades.

Under the Philadelphia Plan and in most other quota-hiring situations whites are not explicitly prevented from applying for employment in the affected trades. However, the imposition of quotas inevitably has the effect of favoring one race at the expense of others. For example, if the first three persons hired for a job are white and the employer then hires three blacks to meet a 50% quota, a white applicant who is passed over or held in abeyance while the three blacks are being hired is in reality just as subject to a "refusal to hire because of his race" as if he were not allowed to apply for the position at all. We do not feel that these ratio hiring requirements, frequently approved or required by the courts, can be meaningfully distinguished from Pers 27 hiring.

We also feel that the Third Circuit was correct in its holding that the anti-discrimination provisions of Title VII do not prevent some form of preferential treatment in employment, which inevitably must ultimately be at the expense of other groups to correct the effects of past discrimination. Any other interpretation would both

cripple the equitable powers of the judiciary and frustrate the grand design of the legislation. See United States v. Internal Bro. of Electrical Workers, Local No. 38, 428 F. 2d 144, 149 (6th Cir. 1970), holding that some preference to minorities might be required to remedy the present effects of past discrimination and that "any other interpretation would allow complete nullification of the stated purpose of the Civil Rights Act of 1964." These observations also apply to S. 111.32 (5) (a) and related statutes. They must be interpreted to except limited term preferential recruitment to correct the results of past discrimination. Compare NAACP v. Allen, supra:

> The use of quota relief in employment discrimination cases is bottomed on the chancellor's duty to eradicate the continuing effects of past unlawful practices. By mandating the hiring of those who have been the object of discrimination, quota relief promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices. It is a temporary remedy that seeks to spend itself as promptly as it can be creating a climate in which objective neutral employment criteria can successfully operate to select public employees solely on the basis of job-related merit. For once an environment where merit can prevail exists, equality of access satisfies the command of the Constitution.

It is of further interest in analogizing to the present case that the requirements of affirmative action of the Philadelphia Plan were directed at the contractors while the imbalance in the work force was attributable to the unions. It is not necessary that the person, body, or institution responsible for discrimination effectuate the affirmative action program aimed at rectifying that discrimination in order that the program pass muster under Title VII. In Contractors Assn. of Eastern Pa. v. Secretary of Labor, the executive branch of the federal government ordered the implementation

of a plan by private contractors to remedy the effects of discrimination by unions. In the instant case, the University - employer initiated an affirmative action plan to remedy the effects of discrimination by various elements of the trades. Neither plan offends Title VII or similar state provisions.

This position is butressed by the fact that a violation of Title VII can be posited on a facially neutral employment practice that serves to perpetuate past discrimination. See Carey v. Greyhound Bus Co., Inc.; 500 F. 2d 1372, 1377 (5th Cir. 1974); where the invalid employment practice divided employees into two groups, Class A (agents) and Class B (porters). A Class B employee could not bid for a Class A position unless no Class A employee bid for it. When a Class B employee obtained a Class A job, his seniority only ran from the date of his Class A status. Until 1964, only whites had been hired in Class A, only blacks in Class B. The Court of Appeals affirmed an order that the plaintiff's seniority be computed from the date of his original employment with Greyhound (plant seniority) as opposed to the date of his employment as a Class A employee. (departmental seniority). The Court held:

> The determining issue here is not whether the unions or Greyhound intended to discriminate against Carey and those employees who were at one time in Class B. Congress directed the thrust of the Civil Rights Act of 1964 to the consequences of employment practices, not simply the motivation, Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971).
>
> * * *
>
> Plaintiff Carey does not have to prove that either or both of the unions discriminated against black employees. All that need be shown is that the employer discriminated against black employees prior to the passage of the Act and that the present system perpetuates that discrimination.

Therefore the unions, who were not found to have discriminated, were required to effectuate the change in the seniority date in derogation of their contract with the employer, and at the expense of the white employees whose position on the seniority list would have been correspondingly lowered. As in the case before us, the remedial action need not be required strictly of a party who had been guilty of discrimination, nor on a finding of present, purposeful discrimination.

Further, based on the University's history of a total absence of women and minorities in the physical plant trades combined with the general history of discrimination in the trades and the reluctance of women and minorities to apply for these positions, the University's posture invites a Title VII challenge by a minority. *Compare* Carter v. Gallagher, 452 F. 2d 315 (8th Cir. 1971). If relief were ordered, it might well include directions for quota or ratio hiring which would have the effect of limiting the employment opportunities of white males. We do not believe that either Congress or the Wisconsin legislature intended in enacting Title VII or S. 111.32 that the University, on a finding of underutilization based on past discrimination, could not take these remedial steps itself and of its own volition.

ORDER

IT IS ORDERED that the Director's decision set forth in his letter of June 24, 1974, attached as an appendix hereto, is sustained.

Dated July 30, , 1975.

STATE PERSONNEL BOARD

Percy L. Julian, Jr., Chairperson

State of Wisconsin \ DEPARTMENT OF ADMINISTRATION

STATE BUREAU OF PERSONNEL
C. K. WETTENGEL, DIRECTOR
9 WEST WILSON STREET
MADISON, 53702

June 24, 1974

Mr. Jack McManus
Attorney at Law
235 King Street
Madison, Wisconsin 53703

In Re: Petition of Mark Krajco for a Declaratory Ruling

Dear Mr. McManus:

On June 17, 1974 a prehearing conference was held in connection with the above entitled matter. At that time it was stipulated that a decision would be made on the petition and the record of the prehearing conference.

Upon investigation I have determined Mr. Krajco did try to apply for the position of Electrician Apprentice with the University of Wisconsin as described in the current Opportunities Bulletin dated May 20, 1974, and his application was rejected by an agent of the State Bureau of Personnel because he is a white caucasian male and not a woman or one of the minority groups indicated on the job announcement. This restriction was made with my concurrence after a showing by the University of Wisconsin-Madison that at no time in the past have regular recruitment efforts enabled the University to appoint a female or a minority person in this category. Therefore, to rectify this situation and to provide for a better balance of the agency's work force, Chapter Pers. 27 of the Wisconsin Administrative Code was utilized only for this one announcement. Pers. 27 provides for an exceptional method of employment by limited recruitment to specific applicant target groups.

You are referred to Section 16.08(7) of the Wisconsin Statutes which provides as follows:

> "EXCEPTIONAL EMPLOYMENT SITUATIONS. The director shall provide, by rule, for exceptional methods and kinds of employment to meet the needs of the service during periods of disaster or national emergency, and for other exceptional employment situations such as to employ the mentally handicapped, the physically handicapped and the disadvantaged."

Pursuant to the authority in Section 16.08(7) and Section 16.03(6), I have promulgated Chapter Pers. 27 of the Wisconsin Administrative Code. It is my belief that Pers. 27 is in conformance with Section 16.08(7) and as such is not in violation of any provision of the Constitutions of the United States or the State of Wisconsin nor is there any violation of Chapter 111 of the Wisconsin Statutes or the Common Law of Wisconsin and the United States. It is my belief that Pers. 27 is a legal and necessary provision to be utilized in certain situations when properly justified for the purpose of balancing an agency's work force and to meet valid affirmative action goals.

I have also examined the University of Wisconsin-Madison Campus affirmative action goals as applied to this particular situation and I believe them to be legal and proper. In my opinion use of the minority groups designated by the EEOC as disadvantaged for target purposes is also proper and legal.

You may consider this letter to be my final decision for purposes of appeal to the Personnel Board or the Courts as might be appropriate.

Sincerely,

C. K. Wettengel

C. K. Wettengel
Director

cc: Mike Liethen