STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PHELPS EDUCATION ASSOCIATION
and **NORTHERN TIER UNISERV,** Complainants,

vs.

PHELPS SCHOOL DISTRICT, Respondent.

Case 13
No. 67110
MP-4361

Decision No. 32262-A

Appearances:

Gene Degner, Director, Northern Tier UniServ, 1901 West River Street, Post Office Box 1400, Rhinelander, Wisconsin, appearing on behalf of Phelps Education Association.

Attorney Scott Mikesh, Staff Counsel, Wisconsin Association of School Boards, 122 West Washington Avenue, Suite 400, Madison, Wisconsin 53703, appearing on behalf of the Phelps School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On July 12, 2007, the Phelps Education Association and Northern Tier UniServ filed a complaint of prohibited practices alleging that the Phelps School District had violated Secs.111.70(3)(a)4 and 5, Stats., by initiating a dress code policy without having bargained it with the representatives of the employees. (In post hearing argument the Union alleged a violation of Sec. 111.70(3)(a)1, apparently as a derivative violation.) Informal attempts to resolve the matter failed and the Commission, on November 7, 2007, appointed a member of its staff, Steve Morrison, to act as the Examiner to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Sec. 111.07, Stats.

Pursuant to notice, a hearing on the matter was scheduled in Siren, Wisconsin, on December 20, 2007. The hearing was re-scheduled to February 13, 2008. A transcript of that hearing was provided to the Commission on February 18, 2008. Briefing was completed by April 25, 2008, with supplements to the District's briefs submitted by June 15, 2008, marking the close of the record.

The Examiner has considered the record evidence and arguments submitted by the parties. On the basis of the record, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Phelps School District , hereinafter referred to as the Employer or the District, is a municipal employer, with its principal offices located at 4451 Old School Road, Phelps, Wisconsin 54554.

2. The Phelps Education Association, hereinafter referred to as the Union, is a labor organization represented by Northern Tier UniServ with offices located at P.O. Box 1400, Rhinelander, Wisconsin, 54501-1400. The Union is the exclusive representative of unit of the District's teaching personnel. The Union and the District have been, at all times material herein, parties to a collective bargaining agreement covering all certified teachers in the District. The agreement provides in pertinent part as follows:

ARTICLE II - NEGOTIATIONS PROCEDURE

. . .

C. The parties recognize the statutory requirement of collective bargaining set forth in Wisconsin Statute 111.70; the parties, however, also recognize that from time to time changes must be effectuated in working conditions to meet unforseen problems. The parties, therefore, agree that if at any time during the term of this Agreement the Board of Education wishes to change, modify or alter any working conditions not covered by this Agreement, the adjustment shall only be made after consultation, negotiation, and subsequent agreement between the parties.

ARTICLE III - SCHOOL BOARD RESPONSIBILITIES

A. The Board of Education of the School District of Phelps on its own behalf and the electors of the District retains and reserves unto itself, except as herein otherwise specifically provided and agreed to, all powers, rights, authority, duties and responsibilities as stated by the Statutes of the State of Wisconsin. These rights include, but are not limited by enumeration, the right to:

1. Direct all operations of the school system;

2. Maintain efficiency of school system operations;

. . .

ARTICLE VII - GRIEVANCE PROCEDURES

A. Definitions

1. A "Grievance" is a claim based upon an event or condition which affects the wages, hours and (sic) conditions of employment of a teacher, group of teachers or the Association and/or the interpretation, meaning or application of any of the provisions of this Agreement.

. . .

C. Initiation and Processing

1. Level One. The grievant will first discuss his/her grievance with the Administrator, either directly or through the Association's designated representative within twenty (20) workdays after the grievant knew or should have known the occurrence of event(s) giving rise to the grievance.

2. Level Two. If the grievant is not satisfied with the disposition of this grievance at Level One, he/she may file the grievance in writing with the Administrator. The Administrator has ten (10) days to respond in writing.

3. Level Three. If the grievant is not satisfied with the disposition of his/her grievance at Level Two, he/she may file the grievance in writing with the Board. Within ten (10) days after receiving the written grievance, the Board will meet with the grievant and the Administrator and Association Representatives for the purpose of resolving the grievance. The Board shall answer the grievant (sic) within ten (10) days following the meeting.

. . .

ARTICLE XI - DISCIPLINE PROCEDURES

. . .

B. No teacher shall be dismissed, suspended, reduced in rank or compensation or otherwise disciplined without cause. . .

. . .

ARTICLE XIX - GENERAL PROVISIONS

A. Proper dress will be the standard for the teachers in the School District of Phelps.

. . .

3. At all material times grievant, Laura Erhart, was a certified teacher in the District. During the 2005-2006 school year Erhart wore a pair of "camo" (camouflage) pants to school on several occasions and was not informed by anyone that such attire was not appropriate.

4. At some time prior to October 19, 2006 District Superintendent Richard Parks was notified by the School District Board of their concerns about the dress habits of some of the teaching staff. Board members had received complaints from parents in the community about inappropriate dress. The Board specifically referenced camouflage pants, cargo pants, T-shirts with writing on them, and blue jeans, and asked the Superintendent if he could work on a more professional look for teachers in response to these concerns. The Board asked that Parks uphold the appropriate or proper dress requirements in the collective bargaining agreement.

5. During the late start meeting on October 19, 2006 Parks informed the teaching staff of the concerns of the Board regarding T-shirts without a cover shirt, camouflage pants, cargo pants and blue jeans.. Erhart was present at this meeting. Parks explained that the Board wanted the teachers to be more "business oriented" in their dress and that they not wear blue jeans, camouflage pants, cargo pants or T-shirts during regular instructional days. He told the teachers that he would meet with them individually for clarification.

6. Another late start meeting was held on November 15 or 16, 2006 during which Parks further discussed the dress code issue. Prior to this meeting Parks spoke with Dorothy Kimmerling, at that time President of the Association, who had asked for some clarification on the issue of appropriate clothing. She specifically wanted clarification on the issue of "blue jeans" and whether that included green, tan, and black. She also asked about T-shirts she had received at a conference through her curricula area. She further informed Parks that she understood the issue about the camouflage pants, the cargo pants and the T-shirts with other writing on them and Parks told her they would clarify that at the next meeting.

7. At some time prior to Friday, March 9, 2007, most likely during the meeting on November 15 or 16, 2006, Parks and the Union agreed that it would establish "dress down Friday". This agreement followed discussions between the Union and Management. On "dress down Friday" the teaching staff was authorized to wear more casual types of clothing otherwise barred on Monday through Thursday. Specific items which were barred even on "dress down Friday" were not delineated, resulting in some confusion over what could be worn and what could not be worn on "dress down Friday."

8. At the November 15 or 16, 2006 meeting Parks clarified that blue jeans would not be appropriate on Monday thru Thursday but would be acceptable on "dress down Friday". No one voiced concern at the time although there were some individual questions. Kimmerling was present at this meeting and there was no indication from her that the Union opposed "dress down Friday." The record supports the conclusion that camouflage clothing was not to be worn by teachers on Monday through Thursday but is not clear on the wearing of camouflage clothing on "dress down Friday".

9. On March 12, 2007, Erhart received a memo from Superintendent Parks which stated:

> I have a concern regarding your wearing camouflage pants to school last week Friday, March 9, 2007. My expectation is that you will come to meet with me at 8:30 a.m. during your preparation period on Tuesday, March 13, 2007.
>
> You are entitled to have union representation present.

10. On March 13, 2007, Erhart met with Parks and with Kimmerling pursuant to Parks' expectation as set forth in Finding 10, at which time she received a letter of reprimand from Parks which stated in pertinent part:

> This is a letter of reprimand regarding your lack of cooperation with requests to not wear camouflage pants to school. On Friday, March 9, 2007, I observed you at the conclusion of the school day wearing camouflage pants.
>
> I gave the staff notification at the October 19, 2006, and November 16, 2007, late starts regarding the desire of the school board to inform the teachers of improving their professional dress. Again, on November 22, 2006, I informed you personally that you should not wear camouflage pants to teach. Additionally, Page 11, Article XIX(A) of the Collective Bargaining Agreement states that, "Proper dress will be the standard for the teachers in the School District of Phelps."

11. Prior to March, 2007, Parks, and thus the District, did not inform Erhart that she was not to wear camouflage pants on "dress down Friday". The District's failure to inform Erhart that she was not to wear camouflage pants on "dress down Friday" followed by her discipline for doing so, constitutes a violation of the just cause provision in Article XI of the agreement.

12. The Union filed its initial grievance on April 23, 2007. The grievance stated in pertinent part::

> STATEMENT OF GRIEVANCE:
>
> The District is violating the rights of the Phelps Education Association members by initiating a dress code policy without having bargained it with the representatives of

the employees. This is in violation of Articles II, VI, and XI of the collective bargaining agreement and Wisconsin Statutes 111.70.

. . .

REMEDY REQUESTED:

That the Phelps School District cease and desist from attempting to implement a dress code inconsistent with past practice until such has been bargained with the PEA representatives. Further, any actions resulting from this alleged violation that had a negative affect on any bargaining unit member(s) shall be removed from their files and the member(s) shall be made whole.

13. The grievance was processed through the steps of the grievance procedure noted in Finding 2 and was denied by the Board on May 30, 2007, thus completing the final step of the parties' contractual grievance procedure.

14. On July 12, 2007 the Association filed a prohibited practice complaint with the Wisconsin Employment Relations Commission seeking to resolve the grievance referenced in Finding 13 and alleging violations of Sec. 111.70(3)(a)4 and 5. In its post hearing arguments it added an allegation of a derivative violation of Sec.111.70(3)(a)1.

Based on the foregoing Finding of Facts, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Complainant is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

2. Respondent is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

3. The parties' collective bargaining agreement referenced in Finding 2 does not provide for the final and binding arbitration of claims alleging violations of the agreement and it is therefore proper for the Commission to exercise its jurisdiction to resolve the merits of the allegations that the District violated Sec. 111.70(3)(a)5.

4. The parties' agreement under Article XIX contains an agreement on the subject of dress code that fulfills any Sec. 111.70(3)(a)4, Stats. duty to bargain the District might otherwise have had concerning that subject during the term of the agreement.

5. The District's action in disciplining Erhart in violation of Article XI of the collective bargaining agreement constitutes a violation of Sec. 111.70(3)(a)5 and, derivatively, Sec. 111.70(3)(a)1, Stats.

6. The District's actions in failing to bargain the issue of camouflage clothing with the Union does not violate the provisions of Sec. 111.70(3)(a)4, Stats.

ORDER

It is hereby ORDERED that:

1. Those portions of the complaint which allege that Respondent committed a violation of Sec. 111.70(3)(a)4, Stats., and to the extent that Complainant argues an independent violation of Sec.111.70(3)(a)1 as a consequence thereof, when Respondent refused to bargain the issue of camouflage, or other specific types of clothing, with the Complainant are hereby dismissed.

2. The Phelps School District, its officers and agents, shall immediately:

   a. Remove the Letter of Reprimand, and all evidence relating to it, from Erhart's file(s).

   b. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

      1. Notify the Phelps Education Association personnel by conspicuously posting the attached APPENDIX "A" in places where notices to such employees are customarily posted, and take reasonable steps to assure that the notice remains posted and unobstructed for a period of thirty days.

   c. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Wausau, Wisconsin this 18th day of July, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steve Morrison /s/

Steve Morrison, Examiner

APPENDIX "A"

NOTICE TO PHELPS EDUCATION ASSOCIATION

As ordered by the Wisconsin Employment Relations Commission, the Phelps School District notifies you as follows:

The Phelps School District will not violate the Discipline Procedures provision of the Collective Bargaining Agreement with the Phelps Education Association.

PHELPS SCHOOL DISTRICT

By

Name Title

Date

THIS NOTICE IS TO REMAIN POSTED FOR 30 DAYS
AND IS NOT TO BE REMOVED OR OTHERWISE OBSTRUCTED OR DEFACED

PHELPS SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, the Association alleged that the District violated Sec. 111.70(3)(a)4 and 5, Stats.

Complainant's Position

The District does not have the right to interpret what constitutes "proper dress" under the terms of the collective bargaining agreement because that interpretation has been left to the teachers discretion for 30 years. This is so because no teacher has ever been reprimanded or otherwise disciplined because of their attire for that period of time. Consequently, the District's attempt to define "proper dress" now violates a long standing past practice of professional judgement regarding dress in the Phelps School District.

The action of the District represents a unilateral change in conditions of employment without bargaining same with the Union in violation of Sec. 111.70(3)(a)1, 4 and 5. Prior to the 2006-2007 school year the "proper dress" standard was left to the professional judgment of each individual teacher. When "dress down Friday" or "casual Friday" was implemented unilaterally by the District in that year it was done without bargaining the change with the Union. This change was implemented at a monthly staff meeting in the Fall of 2006 and was attended by Dorothy Kimmerling, among others. She was the Union President at the time and she recalls that District Administrator Parks informed the teachers of the Board's concern over the dress of the teachers and the fact that they had received some complaints from parents about the issue. She recalls Parks mentioning cargo pants, blue jeans and T-shirts and the fact that the Board wanted to have the teachers dress up a little better. At this meeting she recalls the issue of "dress down Friday" being discussed with the group and that there was no discussion about what would or would not be acceptable dress on "dress down Friday." Parks did not ask to bargain the issue with the Union. Nothing was ever reduced to writing. Because of the confusion (over particular items of clothing), Parks tried to establish a committee to further discuss the issues. In order to reprimand the Grievant, Parks "had to unilaterally impose a change in the conditions of employment midterm of the contract" in violation of Sec. 111.70, Stats.

The Union argues that this case is similar to SCHOOL DISTRICT OF RHINELANDER, DEC. NO. 29716-B (Emery, 3/2000). There, the District had a long standing policy of granting excused absence with pay above and beyond the contract in order to attend events of honor or competition for their children resulting from excellence in academics or achievement. Examiner Emery did not find a past practice to exist in the RHINELANDER case, but he did address the issue of unilateral managerial discretion as follows:

> First, the District never drafted nor issued a formal statement of policy on this issue. Nor does the evidence indicate that anyone, other than the Superintendent

> and the Human Resources Director, was even aware of any specific criteria for determining when extra ordinary leave was to be with pay and when not. More to the point, Superintendent Jensen never articulated to the Bigleys, before the fact, that benefit to the District was the basis for distinguishing between a grant of additional paid leave and a grant of unpaid leave. So far as the record shows, this distinction was first made in the District's response to the grievance at Step 2 (Jt. Ex. 2-5)

Examiner Emery noted that an additional complication was that the Bigleys received paid leave the previous year to attend such an event under identical circumstances, just as Erhart had worn camouflage clothing the year before she was disciplined for it. In fact, she wore camouflage pants every other week with no objection. Hence, she would have had no reason to believe that her camouflage attire would be objectionable now.

Examiner Emery also discussed managerial rights in the RHINELANDER case:

> Management does, by contract, however, retain the right to direct the operations of the District and in this case the parties have apparently construed that right to include the authority to grant extra-contractual leave requests. This is consistent with general arbitral thought, nevertheless, the exercise of such authority may not be unreasonable or discriminatory. . .The most telling evidence in this regard is the fact that the District granted the identical request from the Bigleys the previous year. Further, when their request in 1999 was denied, no explanation was given to justify the different outcome and none appears in the record other than a change in administration. . .
>
> . . .Regardless, when such a policy is an apparent departure from previous practice, it is incumbent on the District to give notice to the bargaining unit and the Union of the change or modification, particularly when any such change will have a different impact on the employes (sic) than it has done in the past. . .

Parks' new standard of dress was never understood by the teachers. They thought it was nothing more than a "conversation about dress and a wish of the Board" while Parks "viewed it as his divine right to dictate new rules that he could then blame on the Board without ever having to negotiate."

District's Position

In the absence of any showing of a longstanding past practice regarding camouflage clothing the District did not violate its requirement to bargain collectively when it took early and affirmative action to exclude camouflage clothing from consideration as "proper dress." This case is not about the District changing the dress policy, rather, it is about the Board, in reaction to public complaints regarding the way the teachers were dressing, directing Parks to let the teachers know that camouflage clothing, and other items worn by some teachers, did not fit the definition of

"proper" dress. It is not about changing the dress code but about "a newly introduced fashion choice failing to live up to the previously established contractual requirement that teachers wear 'proper dress.' "

It is also not about the District's refusal to bargain. The parties have already bargained the dress code and they agreed that "proper dress" is the standard. While a level of professional discretion is required to eliminate the need for Parks to become a fashion "hall monitor", this does not mean that the teachers have a free pass to choose their dress code. Professional discretion must be balanced with professional responsibility. In this case, management had to step in to address Erhart's new fashion choice and it did so in making the determination that camouflage clothing fell outside of the contractual requirement for teachers to wear "proper dress" and the Management Rights clause contemplates this level of oversight when it says that management shall retain the right to "direct all operations of the school system" unless the contract dictates otherwise, which it does not. In this case, the District's concerns were born from public commentary that camouflage was inappropriate attire for teachers and in the absence of a past practice favoring camouflage the District had the right to address public concern and interpret "proper dress" to exclude camouflage. The Union has failed to show that there has been a mutually binding acceptance of camouflage as "proper dress."

Pursuant to the widely accepted general principal requiring employees to "obey now, grieve later" the District's decision to issue Grievant a written reprimand for her continued refusal to stop wearing camouflage was appropriate. The District anticipates that the Union might argue that the District's "actions were unreasonable in light of there being no history of the District ever telling teachers their dress was improper or issuing reprimands to teachers." The fact that the District and the teachers had, prior to the camouflage incident, been in agreement as to the teachers' dress at school does not preclude the District from stepping in once concerns are raised about Grievant's attire.

It is important for the District to have the ability to discipline teachers for violations of the dress code and Kimmerling (the Union President) testified that she would expect Parks to pull aside a teacher wearing inappropriate clothing and, if the teacher continued to wear inappropriate clothing, and "if everyone was treated in the same way," Kimmerling would expect Parks to discipline that teacher.

During the period between early Fall and the time the discipline was issued, the Union took no action to file a grievance or to demand bargaining on the matter. It sat on its hands. If it had not done so there is a strong possibility that the issues herein would have been resolved months ago sans discipline. Hence, the District should not be held responsible and it should not have to remove the discipline from Erhart's file.

Complainant's Reply

The District did not give clear and concise directives to the teachers about camouflage pants. Kimmerling's testimony on cross examination contradicts Parks' testimony to the effect that he had outlawed camouflage pants all together:

Q. And just so I'm clear, I think I understood your testimony was that camouflage was not something that you and Mr. Parks had ever discussed prior to the March 13th reprimand?

A. Not as - No. Well, I'm sure we discussed it; but at that point - Until we had that letter of reprimand, I did not - I did not clearly understand that camo was not to be worn on dress-down Fridays. Even after we had the discussion of the letter that night, Laura, Rick and I - I went back and said, "Please, I want clarification of what you're telling me/you're telling me no camo on dress-down Fridays?" Yeah.

Tr. p. 47, lines 15-25 and p.48, lines 1-5.

The testimony makes it reasonable to conclude that Parks told the teachers not to wear blue jeans, camouflage pants, cargo pants, hooded sweatshirts, and T-shirts on Monday through Thursday but that they were permissible on dress-down Fridays.

By limiting the type of dress the teachers could wear, the District in effect changed the dress code. By creating a list of clothing which cannot be worn you are *de facto* stating what can be worn. There has been no "nexus between the effect on the classroom, the parents, or any teacher/learning environment that exists in Phelps which reflects the need for a change in the dress code." The District simply carried out a change in the "proper dress" standard merely based upon the pattern and color of the slacks rather than anything that establishes a nexus between the learning environment and the clothing teachers wear.

In response to the District's assertion that it exercised it's management right to exclude camouflage when it discovered that Erhart's fashion choice stood in contrast to public opinion of "proper dress" the Union asks "What constitutes public opinion? One opinion? Two opinions? Can anyone from the public lead the Board? Can the employees find public opinion that disagrees with the Board's public opinion? Will this have an effect on what will become the weekly dress code?" The very purpose of bargaining is to answer these questions so that a mutual agreement can be arrived at.

Regarding the issue of "work now, grieve later," rules must be clear and concise and be made to the members so they understand. That was not the case here.

District's Reply

Parks was, at all times, acting on behalf of the Board, not on his own. Personal attacks have no place in the record and the Examiner should ignore them.

The teachers were told in the Fall staff meeting that "camo was out." The meeting was not merely conversational in nature as the Union suggests. Kimmerling testified that she thought the change was grievable but the Union failed to grieve it. Further, the Union failed to tell its

members to follow the reasonable requests of the Board while it took the issue through the grievance procedure.

The District did not change a condition of employment. Proper dress remains the dress code and has been for several decades. In the absence of "specifically provided and agreed to" language, the District has the right to oversee and to determine what is proper or not. The ability to wear camouflage clothing is not now, nor has it ever been, a condition of employment and, thus, subject to bargaining. There is no binding past practice regarding the wearing of camouflage clothing. There is no evidence that any such practice was 1) unequivocal; 2) clearly enunciated and acted upon; or 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties. Without these three elements there can be no past practice.

The RHINELANDER case cited by the Union illustrates why the Examiner should dismiss this complaint. Examiner Emery's discussion of unilateral managerial discretion, set forth in the body of the Union's brief, supports dismissal here.

The Grievant was clearly informed, in advance, of the District's ban on camouflage clothing and chose to ignore it. She stopped wearing camouflage pants between November 22, 2006 and March 9, 2007 evidencing her understanding of the rule. The rule was clear and Parks never vacillated on the ban against camouflage.

The Union argues that proper dress has always been left to the professional interpretation of the individual teacher. If this is true, why did the Union fail to grieve the issue when Parks told them that "camo was out"? The Union now attempts to minimize its own responsibility by asserting that the District needed to "put it in writing" (i.e. the rule against camouflage clothing) before a grievance could be filed.

The Union failed to show that the restriction on camouflage clothing was unreasonable or that it discriminated against the Grievant in any way. Further, the record is devoid of any evidence that any of the past six administrators had allowed camouflage clothing. The Union wrongly suggests that because teachers behaved in the past the District is unable to take corrective action when they misbehave now.

DISCUSSION

Alleged violation of Secton 111.70(3)(a)4, Stats.

Sec. 111.70(3)(a) 4, Stats., states, in relevant part, that it is a prohibited practice for a municipal employer, individually or in concert with others:

> 4. To refuse to bargain collectively with a representative of a majority of its employes (sic) in an appropriate collective bargaining unit. . .

A violation of Sec. 111.70(3)(a)4, Stats., results in a derivative violation of Sec. 111.70(3)(a)1, Stats. Section 111.07(3), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., provides that "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence." The Union has failed to sustain its burden.

Generally speaking, a municipal employer has a duty to bargain collectively with the representative of its employees with respect to mandatory subjects of bargaining during the term of an existing collective bargaining agreement, except as to those matters which are embodied in the provisions of the agreement, or where bargaining on such matters has been clearly and unmistakably waived. CITY OF RICHLAND CENTER, DEC. NO. 22912-A (Schiavoni, 1/86) affd. 22912-B (WERC, 8/86). Under Wisconsin law, a matter which is primarily related to wages, hours and conditions of employment is a mandatory subject of bargaining, while a matter which is primarily related to the formation and choice of public policy is a permissive subject of bargaining. CITY OF BROOKFIELD V. WERC, 87 Wis. 2D 819 (1979); UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 Wis. 2D 89 (1977); BELOIT EDUCATION ASSOCIATION V. WERC, 73 Wis. 2D 43 (1976) In applying the "primary relationship test", the Wisconsin Supreme Court concluded that bargaining is not required with regard to "educational policy and school management and operation" or the "management and direction of the school system." BELOIT, *supra* at 52, 56.

Here, the parties have bargained and agreed upon a "dress code". Article XIX - GENERAL PROVISIONS, provides that the dress standards for teachers will be "proper dress". The contract does not, more specifically define the word "proper". The contract does not specifically give the teachers the right to determine what is proper and what is not. The contract does not address camouflage or other specific types of clothing. In the absence of such contractual direction, the determination of what constitutes proper dress falls squarely within the area of "management and direction of the school system" and the "operation" of the school reserved to the District in Article III, but subject to challenge through the grievance procedure.

The dress code is embodied in the agreement such that the District was not required by Sec. 111.70(3)(a)4 and 1, Stats. to bargain with the Union during the term of the agreement before enforcing that code. However, the District's enforcement of the code is subject to challenge under the agreement's grievance procedure. For those reasons the Examiner finds no district violation of Sec. 111.70(3)(a)4 and 1, Stats. in the instant circumstances.

The Union argues that the teachers have always been the arbiters of making the determination as to what constitutes "proper" attire and the District has always allowed them to do so. Thus, says the Union, there now exists a binding past practice which works to prevent the District from exercising its management rights to determine what dress is proper and what is not. The record does not support the Union's conclusion though. "In the absence of a written agreement, 'past practice', to be binding on the Parties, must be 1) unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties." CELANESE CORP. OF AM., 24 LA 168,

172 (Justin, 1954). These three elements are absent here. The record establishes that, in the years prior to the events giving rise to this complaint, the teaching staff had always dressed in a manner generally viewed as "proper" and the District had no reason to exercise its right to enforce the dress code or to direct the operation of the school by instituting a rule against the wearing of camouflage clothing. When the District Board began receiving negative comments from members of the public about the way the teachers were dressed at school (specifically referencing camouflage clothing) it initiated steps to enforce the contractual dress code and barred the wearing of certain types of clothing, including camouflage. Article III, A, 1 provides the District with the right to direct all operations of the school system and by not exercising that discretionary right in a certain manner in the past it is not precluded from exercising that discretionary right in the instant case. Consequently, there has never been an unequivocal acceptance of camouflage clothing or of the right of teachers to determine what constitutes proper dress, and because the issue had never been raised prior to this time nothing had been clearly enunciated or acted upon. The Union seems to argue that because Erhart had worn camouflage clothing during the past year and had not been disciplined for it, this shows a fixed and established practice accepted by both parties. The record does not support this conclusion. At best it supports the conclusion that she had worn camouflage clothing a number of times during the preceding year and it had not been brought to the attention of the District because no one had complained about it. For the reasons stated above, there is no binding past practice here. The District's interpretation of "proper dress" is reasonable and the refusal of the District to bargain for a change in such practice does not constitute a violation of Sec. 111.70(3)(a) 4 and 1, Stats.

Alleged violation of Section 111.70(3)(a)5, Stats.

The Union contends that the District violated Sec. 111.70(3)(a)5, Stats. by issuing discipline to the grievant due to her camouflage attire on "dress down Friday", March 9, 2007. That section provides that it is a prohibited practice for a municipal employer:

> 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . .

Simply put, this provision makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. The most common mechanism for enforcing a collective bargaining agreement is via final and binding grievance arbitration. The Commission does not ordinarily exercise its jurisdiction to determine the merits of a Sec. 111.70(3)(a)5, Stats. breach of contract dispute where the parties' collective bargaining agreement provides for arbitration of unresolved grievances. Here, though, it is undisputed that the parties' collective bargaining agreement does not provide for arbitration of unresolved grievances, so the Examiner will exercise the Commission's jurisdiction under Sec. 111.70(3)(a)5, Stats. to determine if the District's conduct breached the collective bargaining agreement.

Article XI, B of the parties' CBA provides that:

> No teacher shall be dismissed, suspended, reduced in rank or compensation or otherwise disciplined without cause.
>
> . . .

The word 'cause' in the quoted portion above means just cause. Under the just cause standard the District has the burden to prove wrongdoing and justification for its actions by a preponderance of the evidence. Once the Union meets its statutory burden of proof obligation by establishing the applicability of the just cause standard as to Erhart's discipline, as it has done here, the burden then shifts to the District to go forward and demonstrate the existence of just cause for its actions. "To hold otherwise is to obligate the Complainant to come forward and attempt to show that certain facts, claims, and testimony not yet in the record are either untrue or inadequate to warrant (discipline)." TOMAHAWK SCHOOL DISTRICT, DEC. NO. 18670-D (WERC, 8/86) and BROWN COUNTY, DEC. NO. 31511-D (WERC, 8/07)

The District has failed to prove that it met the just cause standard here. Just cause requires a finding that the employee is guilty of the conduct in which she is alleged to have engaged and that the level of discipline imposed as a result of that conduct is reasonably related to the severity of the conduct. Just cause mandates not merely that the employer's action be free of capriciousness and arbitrariness but that the employee's performance be so faulty or indefensible as to leave the employer with no alternative except to impose discipline. (See Platt, "Arbitral Standards In Discipline Cases", in *The Law and Labor-Management Relations*, 223, 234 (Univ. of Mich., 1950). Fully incorporated in this definition are the core concepts of due process and fair dealing.

In the instant case, the Examiner has found that the District failed to give Erhart notice of the prohibition against wearing camouflage clothing on "dress down Fridays". (Finding 12) The record is clear enough regarding the rule against wearing it on Monday through Thursday and the District has the right under Article III to establish such work rules. Of course, in establishing such rules the District must ensure that the rules are reasonable and not applied in a discriminatory manner. There is no evidence that the District's rule barring camouflage clothing on Monday through Thursday, or on "dress down Fridays" for that matter, is unreasonable or discriminatory. The problem with this discipline rests exclusively with the District's failure to give proper notice to the grievant prior to issuing the written reprimand. In other words, the District failed to give the grievant due process prior to issuing the discipline thus depriving her of just cause in violation of Article XI of the CBA and, consequently, in violation of Sec. 111.70(3)(a)5 and, derivatively, Sec. 111.70(3)(a)1, Stats. The Examiner does not ascribe an element of maliciousness to the actions of the District. On the contrary, the actions of the District were innocent and the Examiner is convinced that Superintendent Parks believed he was on firm footing in issuing the discipline. But the record establishes to the Examiner's satisfaction that there was ample confusion over the rule concerning what could and could not be worn on "dress down Friday" and the Examiner gives the benefit of the doubt to the grievant. This is not to say that, with proper notice and a clear understanding of what is expected of the teachers relating to what constitutes proper dress on

"dress down Fridays", the District is prevented from issuing a reasonable work rule in the future. The Examiner commends the parties on the formation of the joint committee to address these matters and anticipates that they will be able to arrive at a workable solution to these issues soon.

The Union's reliance on the SCHOOL DISTRICT OF RHINELANDER, DEC. NO. 29716-B (Emery, 3/8/00) is misplaced. That case stands, among other things, for the proposition that management retains the right to direct the operations of the District so long as it does so in a reasonable and non-discriminatory manner.

The District argued at hearing that the underlying grievance giving rise to this complaint was untimely but failed to develop that argument in post trial briefing. The Examiner therefore considers that argument to be abandoned.

The District argued that the failure of the grievant to "obey now and grieve later" supports the discipline issued in this matter. That theory presupposes that the grievant was aware of the wrongfulness of her conduct and violated the rule anyway as a form of self-help in derogation of the CBA. As has been shown, the grievant here was not aware that her actions were wrongful and thus the "obey now, grieve later" theory does not apply.

On the basis of the foregoing, the Examiner has concluded that the District has not been shown to have violated Sec. 111.70(3)(a)4 and, accordingly, that allegation is dismissed. The District has been shown to violate Sec. 111.70(3)(a)5, and, derivatively, Sec. 111.70(3)(a)1. A conventional remedy has accordingly been ordered.

Dated at Wausau, Wisconsin this 18th day of July, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steve Morrison /s/
Steve Morrison, Examiner

SM/gjc
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