

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PHELPS SCHOOL DISTRICT

and

PHELPS EDUCATION ASSOCIATION

Case 14
No. 68119
MA-14128

Appearances:

Gene Degner, UniServ Director, Northern Tier UniServ Council, 1901 West River Street, Rhinelander, Wisconsin, appeared on behalf of the Association.

O'Brien, Anderson, Burgy & Garbowicz, LLP, Attorneys at Law, by **Jack O'Brien**, 221 First Street, Eagle River, Wisconsin, appeared behalf of the Employer.

ARBITRATION AWARD

At all relevant times, the Phelps Education Association, herein referred to as the "Association," and Phelps School District herein referred to as the "Employer," were parties to a collective bargaining agreement covering the period from July 1, 2007 to June 30, 2009 and providing for binding arbitration of certain disputes between the parties. On June 30, 2008, the Association filed a request for arbitration with the Wisconsin Employment Relations Commission ("WERC") concerning the non-renewal of Association member Laura Erhart, herein referred to as the Grievant. The parties selected John R. Emery from a panel of WERC staff to serve as the impartial arbitrator to hear and decide the dispute. A hearing was conducted on October 8, 2008, in Phelps, Wisconsin. The parties filed briefs by December 2, 2008 and reply briefs by December 19, 2008, whereupon the record was closed.

ISSUES

The parties were unable to stipulate to the issues in dispute. They agreed that I might state them. I state them as follows:

1. Did the Employer violate the collective bargaining agreement when it nonrenewed Grievant E for wearing camouflage pants on a Friday dress down day?

2. If so, what is the appropriate remedy?

BACKGROUND

The Employer is a Wisconsin school district. The Association represents various professional employees of the Employer including teachers. The Grievant, Laura Erhart, was hired in February, 2005, as mathematics teacher and served in that position until her nonrenewal which is the subject of this dispute. She was a member of the bargaining unit represented by the Association.

The position of teacher requires that the employee have a teaching license issued by the Wisconsin Department of Public Instruction (herein DPI). The issue of licensure is not directly involved in this matter but is background for the issues which did arise in this matter. DPI had issued the Grievant a provisional or emergency license at the time of her hire because she had not yet completed the professional course work to qualify her for a regular teaching license. The license required that she reapply each year until she obtained a regular license. It also required that the Employer provide her with a written confirmation that it had unsuccessfully attempted to fill the position with a regularly licensed teacher. This certification was required as part of the annual application process. She had not completed her course work at the end of her first school year, June, 2005. She was rehired anyway with the understanding that she would promptly complete her course work and obtain her regular license.

On March 9, 2006, the Employer notified the Grievant that it intended to offer her a teaching contract for the 2006-07 school year. She accepted that offer on March 14, 2006.

The Grievant testified that on April 26, 2006, she had a verbal confrontation with the wife of District Administrator Rick Parks' ¹ in the hallway in front of her classroom shortly before the lunch hour while students were present in her room. The Grievant attributed this outburst to an e-mail she had sent to a parent about a student's behavior. She stated that Mrs. Parks' was "yelling and shouting at her." She left shortly thereafter for the day. The next day, she received a memorandum from District Administrator Parks dated the day before which stated:

There have been some concerns brought to my attention regarding your interactions with students and staff. My expectation is that you will come to meet with my (sic) during your preparation period on Thursday, April 27, 2006.

As District Administrator, I fully intend to work with you to develop strategies that will work to address the multiple serious concerns that have been brought to me within the past week.

The Grievant responded to the memorandum:

¹ Mrs. Parks was at the time a teacher employed by the District.

I am in receipt of your April 26, 2006 memo. I will be unable to meet with you until we can set up a time that my union representative is able to meet with us.

Please let me know what times you have available so that we can coordinate a meeting.

On April 27, Parks sent the Grievant another letter which provided as follows:

Your past practice indicates that you have taken care of your licensure expectation relative to February and March 2006 (sic) for this current school year. I have received copies of your Department of Public Instruction "Emergency Permits" from the department of licensing that gives you a valid emergency teaching permit until June 30, 2006.

The district requests a written response regarding the progress you have made in conjunction with your certification. This should indicate the courses completed and timeline for future coursework to the completion of the program.

If you have questions, please let me know.

The Grievant believed that the foregoing two actions by Parks were intended to retaliate against her on behalf of his wife.

Sometime prior to May 1, 2006,² the Grievant, her Association representatives and District Administrator Parks met in response to Parks' letter of April 26 expressing concerns about her relationships with students and staff. The meeting involved at least a discussion of the incident with Mrs. Parks. District Administrator Parks viewed the delay in holding the meeting as "uncooperative in something that was not more than fact finding."³

On May 1, 2006, the Grievant, after consulting with the Association, filed a written complaint to Parks and the School Board in which she alleged that Mrs. Parks' behavior in the incident of April 26, 2006, listed above, as "unprofessional, violated my civil rights, and created an unsafe environment for our students." This was an unusual situation and required the expenditure of Board time and Employer resources. On May 3, 2006, the School Board sent a letter to the Grievant establishing the procedure which it, in fact, did use to address that complaint. It removed District Administrator Parks from involvement in the matter. It assigned Mr. Chuck Skurka, a retired superintendent of another school district, to act as an independent investigator for the Board. He conducted an investigation but could reach no

² E. testified that this meeting took place in the first week of May, 2006 (tr. 51), but must have occurred a week earlier if the letter of complaint was made on May 1 as a result of that meeting.

³ See, tr. p 14. The choice to be represented by the Association in that meeting was activity which is protected under Sec. 111.70, Stats.

conclusion as to the credibility of the differing versions of what had occurred.⁴ The Employer took no further action with respect to that complaint.

The Grievant testified at hearing herein that the Employer had not previously evaluated her. She testified essentially as to her belief that the Employer first started evaluating her in retaliation for having had the conflict with Mrs. Parks.⁵ District Administrator Parks assigned another person to perform the professional evaluation of the Grievant to avoid potential claims of bias because of the history of conflict between the Grievant and his wife. The evaluation was conducted May 10, 2006. The Employer concluded that the Grievant's performance was adequate.

The Grievant was off for the summer and returned in August, 2006. She did not obtain her regular teaching license before the beginning of the 2006-2007 school year, although she had completed all of the educational requirements to do so. Prior to the beginning of the school year, Parks told her she would not be continued in employment. The Grievant, with the advice of the Association, sent a letter dated August 31, 2006 which stated in relevant part that she had completed the academic course requirements for her regular teaching certificate and would obtain her regular teaching certification within two weeks. In response thereto Parks wrote a letter dated September 5, 2006, in which he concluded that because she had not received her initial teaching license by the beginning of the school year, she would not receive a teaching contract for the 2006-07 school year, and that the Employer would post (seek applicants) for her position. It noted that she wished to continue as a substitute teacher until she received her initial license. The Employer refused to employ her as a substitute teacher, thereby effectively attempting to terminate her employment.

On September 7, 2006, the Grievant notified the Employer that she objected to having her employment terminated for the reasons set forth in her August 31 letter. The School Board held a meeting thereon on or about September 27, 2007, which was attended by the School Board, the Grievant and her Association representative. The Association argued that the Grievant was not the only teacher who had not completed her regular license certification, but that none of the other 4 or 5 teachers who had not done so had been denied a teaching contract.⁶ The parties reached an agreement under which the Grievant would act as, and be paid as, a substitute teacher. She would be made whole for all lost wages and benefits and returned to the status of regular teacher when she presented her regular teaching license. They also agreed that "a two year probationary period would commence September 1, 2006." The parties did not discuss the meaning of the word "probationary" as used in this context. The Grievant presented a regular license to the Employer sometime thereafter and was reinstated as a regular teacher and made whole for all lost wages and benefits.

⁴ Tr. 52

⁵ Tr. 56

⁶ Tr. 64-69, 89-90

On January 10, 2007, the Grievant was formally evaluated by a person other than District Administrator Parks. The evaluation found her teaching skills to be adequate. The evaluation contained the following highly unusual reference:

During the activity and work time, you walked around the room answering student questions. However there were multiple times when you rested your hands on the front of both and boys' girls' desks and leaned forward over them. Especially considering your choice of attire, having a low-cut zipper top, this is not appropriate. Added discretion and modesty will make students more comfortable."

The Grievant responded as follows:

Regarding the clothing issue, I wore the clothes in the picture to the left. I was NOT wearing a low cut shirt, and the shirt I wore was NOT a zipper front shirt.

I do not lean over in front of student's (sic) desks. The reason's (sic) are multiple, however suffice [it] to say, this would be an impractical way to maintain view of the room, and the room's configuration does not provide 'space' to lean over the front of 16 of the 20 desks.

During the verbal discussion Rick Parks made the comment that I 'tend to wear form fitting clothes' I wear clothes that fit, not that are form fitting. . . . The pants I wore that day were a loose fit pair of side pocket pants.⁷

The only reasons the Employer has stated for the subject nonrenewal related to professional staff members' dress on "casual" Fridays. Parks stated the background of that situation at the arbitration hearing.⁸ The Board discussed teacher dress at its board meeting in October, 2006. As a result thereof, employees were to wear professional dress at all times, except "casual Fridays." On regular days, dress could not include T-shirts, jeans, camouflage pants, cargo pants, etc. It directed that the dress allowed on casual Fridays would include only jeans and Phelps logo clothing. In its view, camouflage pants or cargo pants were never to be worn.⁹ Parks discussed this in meeting with the professional staff present, including, but not limited to the Grievant. He met with individual teachers who had been wearing informal wear on regular days prior to the Board's October meeting. All teachers except the Grievant complied. The Grievant wore camouflage pants after the discussion with her on a second and

⁷ There was no evidence presented to evaluate this transaction and the evidence is insufficient to demonstrate that the evaluation and/or response were ever shared with the Board. No inference can be conclusively drawn from this exchange. The foregoing is offered to show the context of this dispute.

⁸ See, tr. 15 et seq.

⁹ As noted further, the view of the Board as expressed in its Findings of Fact conflicts with the Findings of Fact by Hearing Examiner Morrison in PHELPS SCHOOL DISTRICT, DEC. NO. 32262-A (7/08). This decision was rendered after the Board decision to nonrenew. Examiner Morrison's findings are stated in the discussion below.

third time, after which Parks again corrected her about the matter. He stated her attitude was “non-cooperative.”

It is undisputed that the Grievant wore camouflage pants on the casual Fridays of October 26, November 22, 2006, March 9, 2007 and October 12, 2007. On March 13, 2007, Parks met with the Grievant and her Association representative concerning that incident at the conclusion of which he issued her the following reprimand:

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.

The Association filed a grievance dated April 23, 2007, in which it alleged that the Employer violated its duty to bargain under Sec. 111.70, Stats, by unilaterally establishing a dress policy and that the dress policy violated various provisions of the collective bargaining agreement. It sought an order prohibiting the Employer from enforcing its policies until it met its bargaining obligation and to rescind the discipline imposed on employees under that policy. [the Grievant was the only person who had been disciplined.]

The Board denied the grievance at the final step of grievance procedure on May 30, 2007. It stated in relevant part:

Your requested remedy consisted of two parts. First, 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. Second, that the Board remove actions from the files of PEA members who may have been negatively impacted.

Regarding the first part of your requested remedy, although the Board strongly disagrees that there is an established past practice regarding the Agreement’s Article XIX, Section A requirement that the employees wear “proper dress,” that began in January, 2007. The initial decision to table this was made at the April 25, 2007, regular school board meeting. The Board would like to confirm that there is a desire to work further on updating the information in the Collective Bargaining Agreement.

The Board went on in its answer to decline to remove the reprimand against the Grievant from her file because she had been told twice not to wear camouflage pants and only on the third occasion was she disciplined. It concluded that her first obligation was to follow the direction under the “work now, grieve later” rule.

The Association filed a complaint with the WERC on July 12, 2007, alleging that the Employer violated Sec. 111.70(3)(a)1, 4 and 5, Stats. It alleged that the Employer violated its duty to bargain in violation of Sec. 111.70(3)(a)4, Stats. by unilaterally establishing a dress code and enforcing it against the Grievant. It also alleged that the Employer violated the collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats. by the same conduct. Examiner Morrison held a hearing thereon on February 18, 2008.¹⁰ No evidence was presented at the hearing about the October 12, 2007 date on which the Grievant wore camouflage pants.

On February 21, 2008, District Administrator Parks in a letter addressed to the Board, but which is not in evidence, requested that the Board nonrenew the Grievant’s teaching contract. On February 26, he confirmed the specific charges in a letter addressed to the Grievant which states in substance as follows:

You failed to adhere to Article XIX (A) of the negotiated agreement as it pertains to “proper dress”. I informed the faculty, with you present, regarding the board and administrative expectations as set out in the contract. When I addressed the faculty in October and November, I specifically addressed this issue of not permitting blue jeans and camouflage pants during the week and that blue jeans could be worn on casual Friday only. You failed to cooperate with this specific reasonable request on a number of occasions. You failed to cooperate with a professional development presenter(s) on two occasions. On May 9, 2007, you sent an e-mail to all faculty that contained incorrect information and were requested to send a retraction to the teachers and you failed to do so. Following a WERC hearing you addressed an office staff member in the administration office causing her discomfort.

The Grievant responded to that by obtaining Association representation. She and her representative requested a public meeting (hearing) with the Board which was conducted on February 27, 2008. District Administrator Parks stated that at that meeting he specified the reason he sought her nonrenewal as her “being non-cooperative” and her repeated violations of the dress code.¹¹

The Board made the following decision:

¹⁰ PHELPS SCHOOL DISTRICT, DEC. NO. 32262-A (7/08)

¹¹ All references to the transcript of proceeding are specified herein as “tr. X.” See, tr. 16-8

FINDINGS OF FACT, CONCLUSIONS OF LAW

At a special meeting held on the 27th day February 2008, commencing, at six o'clock p.m. in the Phelps School building, the Phelps School Board considered nonrenewal of the teaching contract of Laura Erhart. As part of said meeting the School Board hereby makes the following:

FINDINGS OF FACT

1. That Laura Erhart is employed by the Phelps School District as a Math teacher.

2. That she first began teaching in the Phelps School District on the 5th day of February 2005; at that time she did not hold Wisconsin Licensure and taught under emergency licensure provisions.

3. That she began teaching on a full year contract beginning the fall of 2006-2007 school year. At this time she had not obtained licensure from the State of Wisconsin and was teaching under emergency licensure provisions. That she obtained her licensure with the State retroactive to July 2006.

4. That she is a probationary teacher pursuant to the provisions of the Collective Bargaining Agreement between the Phelps Education Association and Phelps Board of Education and Letter of Agreement between Gene Degner on behalf of the WEAC Uniserv Council #8 and the Phelps School District.

5. That at all times as an employee at the Phelps School District she was a probationary teacher.

6. That the Collective Bargaining Agreement between the Phelps Education Association and the Phelps Board of Education does not set forth any mandated requirements for nonrenewal of a probationary teacher.

7. That the aforesaid collective bargaining agreement, in Article XIX.A. states as follow (sic):

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

8. That at a faculty meeting held the 19th day of October 2006, at which Laura Erhart was present, all the faculty was notified that an exception would be made to the "proper dress" standard in that on Fridays blue jeans, sweatshirts and Phelps logo clothing would be permitted on Fridays.

9. That at a further faculty meeting held on the 16th day of November, 2006, at which Laura Erhart was present, all faculty members were again reminded of the only exception to the proper dress rule in that blue jeans, sweatshirts and Phelps logo clothing would be permitted on Fridays; on the same date a number of the teachers, including Laura Erhart, were personally advised of the Friday relaxation of dress requirements as set forth herein.

10. That on the 22nd day of November 2006, she was told personally of the aforesaid dress requirements, including that camouflage pants and cargo pants were not permitted.

11. That on a number of occasions including, but not limited to, November 22, 2006, October 26, 2006, March 9, 2007, October 12, 2007, Laura Erhart was observed wearing camouflage pants.

12. That she was fully advised as to the dress requirements of the Phelps School District, including the requirement that camouflage pants would not be worn; that she disregarded said requirement and wore camouflage pants on a number of occasions in direct violation of said rule.

13. That Laura Erhart received written reprimands for the dress standard violations on the 13th day of March 2007 and the 19th day of October 2007.

CONCLUSIONS OF LAW

1. That Laura Erhart is a probationary status teacher.
2. That the School District rule against wearing camouflage pants by teachers was well publicized and understood by Laura Erhart.
3. That Laura Erhart directly disregarded the rule on a number of occasions.
4. That Laura Erhart was uncooperative with the Administration.
5. That Laura Erhart was insubordinate in her disregard of rules set forth in the collective bargaining agreement and administered by the School Board and Administration.

DECISION

It is the unanimous decision of the Phelps School Board that the teaching contract of Laura Erhart with the Phelps School District not be renewed following the 2007-2008 school year.

The Grievant's ability to teach was not an issue in the decision to nonrenew and she meets the Employer's professional standards as a teacher.¹²

On March 6, 2007, the Union filed the grievance protesting the Grievant's nonrenewal. This grievance is the subject of this case. The grievance was properly processed to arbitration.

On July 18, 2008, Examiner Morrison issued a written decision regarding the complaint. Examiner Morrison found that the Employer did not violate Sec. 111.70(3)(a)4, by unilaterally establishing a dress code. He concluded that the Employer violated the just cause provision of the collective bargaining agreement by issuing the warning of March 13, 2007, to the Grievant because she had not been specifically told that wearing camouflage pants on "casual Fridays" violated the dress code. He ordered that the letter of reprimand be removed from her file. Neither party sought a review of the decision. The decision was affirmed by the WERC by operation of law.¹³ Additional facts are stated, as necessary, in the **DISCUSSION** section of this award.

PERTINENT CONTRACT LANGUAGE

ARTICLE XI – DISCIPLINE PROCEDURES

- A. The Board, in recognition of the concept of progressive correction, shall notify the teacher in writing of any alleged delinquencies, indicate expected correction, and indicate a reasonable period for correction. Alleged breaches of discipline shall be promptly reported to the teacher.
- B. No teacher shall be dismissed, suspended, reduced in rank or compensation or otherwise disciplined without cause. After serving a two-year probationary period, no teacher shall be nonrenewed without cause.
- C. The following procedures shall also apply:
 - 1. The Board shall notify a teacher in writing of any alleged delinquencies, indicate expected correction and indicate a

¹² Cf., tr. 79-80

¹³ PHELPS SCHOOL DISTRICT, DEC. NO. 32262-B (8/08).

reasonable period of time for correction of said discrepancy. Such alleged delinquencies shall be reported promptly to the teacher.

2. The Board will investigate any allegation against the teacher.
3. The teacher shall be given notice five (5) days prior to a hearing by the full Board.
4. The hearing - the Board will not rule against the teacher unless there is reasonable evidence of proof that the employee is guilty of the allegations.
5. The Board will apply its rules, orders and penalty without discrimination.
6. The degree of discipline administered by the Board will be reasonably related to the seriousness of the offense and could result in suspension or reduction in pay.

D. Items to be considered for dismissal:

1. The teacher availability in school from 7:45 a m to 3:30 p.m.
2. Cooperation
3. Organization in classroom teaching
4. Classroom neatness
5. Preparation of weekly lesson plans
6. Discipline in classroom and any areas assigned—such as playground, halls, lunchroom, etc.

...

ARTICLE XIX – GENERAL PROVISIONS

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

POSITIONS OF THE PARTIES

The Employer

Grievant and the Union voluntarily extended her probation. Accordingly, the arbitrator is bound to apply the terms of the agreement as if she was on initial probation. The agreement to extend her probation was not limited to obtaining her teaching license. Grievant's nonrenewal was not the result of retaliation. Grievant contends that the real reason that the District Administrator recommended, and the Board approved, her nonrenewal was the fact that she had an altercation with the District Administrator's wife in April, 2006. The actions of the District Administrator and the Board which followed that altercation were all taken for legitimate business reasons. It is entirely unreasonable to think that the animosity between her and the District Administrator and his wife would carry over for two years, from 2006 to 2008. The Board's action to hire an independent investigator to respond to her complaint to the Board specified in Union exhibit 2 is entirely an appropriate business response to the situation. Similarly, the fact that she was evaluated after the incident and questioned about her license by the District Administrator were all actions he was required to perform at the time he did perform them.

The issue with respect to the camouflage pants relates not to wearing the camouflage pants but to the fact that she choose to seek conflict rather than comply with District Administrator's direction to not wear them and pursue a grievance. There were other situations in which Grievant had conflict with District Administrator Parks for which he appropriately issue disciplinary warnings to her. The Board found that she was insubordinate and uncooperative. These are reasons well within the Board's discretion.

The Association

This case boils down to the fact that the Board nonrenewed a fourth year teacher for wearing camouflage slacks in violation of a policy that was unclear at best and set aside by the Board of Education one year earlier. The just cause standard specified in Article XI. The sole reason that the probation was extended for this teacher was for her to get a regular teaching license. The Union admits that Grievant wore camouflage pants on two occasions on "dress down" Fridays. The first occasion occurred on Friday, March 9, 2007. She was disciplined for this action which discipline was reversed by Arbitrator Morrison in July, 2008. The second occurrence was on Friday, October 19, 2007. The Board specifically sent a letter to Grievant suspending the applicable dress policy on May 30, 2007, well before the second incident. The Board never took the actions outlined by Arbitrator Morrison. At the time of the second incident, the teachers were left with the Board's May 30, 2007, letter as guidance. The Employer has failed to show just cause because:

1. The rule was ambiguous, and

2. The rule was not enforced or enforced differently for different people, and
3. The penalty is excessively harsh,

In fact, the real reasons for this nonrenewal are unrelated to the alleged dress code violation. The real reason is that she had a run-in with the District Administrator's wife in April, 2006, which led to retaliation and other proceedings with the Board. In any event, the parties have agreed the procedures of Article XI, Section C and standards therein apply to nonrenewals as well as discipline. The Employer did not follow these procedures in this case because they did not investigate, but merely accepted the word of the District Administrator. The Board did not apply its rules without discrimination. Grievant was the only one called into question about her dress. None of the items of Article XI, Section D apply. The Union seeks to have Grievant reinstated and made whole for all lost wages and benefits.

DISCUSSION

1. Statement of the Issues

The Association stated the issues as follows:

1. Did the Employer, when it nonrenewed the grievant for wearing camo slacks on dress down Fridays, violate her rights provided for in the collective bargaining unit?
2. If so, what is the appropriate remedy?

The Employer stated the issues as follows:

1. Did the Employer follow the correct contractual procedures in nonrenewing the grievant, who is a probationary teacher?

The difference between the parties' statements of the issue is whether the arbitrator has any authority to substantively review the decision of the Board to nonrenew Grievant. This is essentially the main issue in this proceeding. I have phrased the issue accordingly.

2. Settlement Agreement

It is well settled that parties to a collective bargaining agreement may modify the agreement's terms or agree on its application or meaning under a given set of circumstances. On or about September 28, 2006, the parties expressly agreed to extend Grievant's "probation." There was no discussion as to what that term meant, but in the absence of that

discussion, it could only refer to that same term as it appears in the collective bargaining agreement. Any other use would have required elucidation.

The Association has offered evidence of what the Grievant and the Association representatives “thought” this agreement meant as evidence that the agreement ought to be construed in accordance with those thoughts. There is no evidence of any mutual discussion in the negotiation of the settlement agreement concerning any limitations on the Employer’s discretion to nonrenew under the collective bargaining agreement. Under what is known as the “parole evidence rule” evidence of discussions which were not shared with the other side are not admissible to vary the plain terms of an agreement. Thus, these “thoughts” are not available to vary the terms of the agreement.

More importantly, it is important for arbitrators to enforce agreements the way they are written so that parties can have confidence in resolving their own disputes. In this case, the terms of the agreement to extend are clear and will be enforced. Accordingly, Grievant was on “probation” within the full meaning of the collective bargaining agreement at the time of her nonrenewal.

2. Reasons for the Nonrenewal

It is undisputed that Grievant’s licensure and her professional abilities were not any part of the basis of this nonrenewal. The reasons that District Administrator Parks recommended nonrenewal are stated in his February 26, 2008, letter (Association Exhibit 24). Grievant believes that the reasons that District Administrator Parks recommended her nonrenewal were motivated by her conflict with his wife.

The decision of the Board (Employer Ex. 2) sets forth its reasons for its actions which I conclude solely deal with its view that Grievant insisted on again wearing camouflage pants after being repeatedly told not to. The Board’s decision as stated appears to relate to its conclusion that it was unlikely that the Grievant would be able to maintain successful business relationships within the school system.

3. Meaning of “Probationary”

The concept of a “probationary period” appears in the agreement without definition. Its immediate context indicates that a probationary teacher can be nonrenewed without the Employer meeting the burden of showing in arbitration that it has “cause.” The Employer has assumed that since it does not have to meet that well-established standard, it is free to nonrenew a probationary teacher without any evaluation by an arbitrator. This assumption is not correct.

The term “probationary period,” is a concept well-recognized in labor relations as an opportunity for the Employer to hire and evaluate the teaching skill of employees and their

ability to maintain appropriate relationships with students, staff, supervisors, the Board and the public. That purpose is in the interest of everyone and is respected herein.

However, this particular agreement is unusual. There is considerable ambiguity in this agreement as to what the parties themselves meant when they used the term. For example, Article VI, Section A generally provides that the Employer will not engage in invidious discrimination against any teacher¹⁴ and Section C requires that that rules and regulations shall be interpreted and applied uniformly. Section C would effectively prohibit retaliation against a probationary teacher by an invidious interpretation of the Board's rules and regulations. Both of these provisions apply to probationary teachers. The first sentence Article XI, Section B provides that:

No teacher shall be dismissed, suspended, reduced in rank or compensation or otherwise disciplined without cause. After serving a two-year probationary period, no teacher shall be nonrenewed without cause.”

Under this provision the “cause” standard of review applies to disciplinary incidents involving probationary teachers. There is an ambiguity as to under what circumstances, if any, the Employer may nonrenew a probationary teacher solely on the basis of one or more disciplinary incidents without showing cause. In this case, for example, the Employer has nonrenewed the Grievant on the basis of prior disciplinary incidents for which there has been a prior adjudication that the Employer lacked cause.

Section C and D provide a procedure for nonrenewing teachers. The Employer has adhered to this procedure in nonrenewing Grievant. It is unclear as to whether the parties intended that the non-procedural substantive provisions apply¹⁵ to nonrenewals. By choosing to establish a specific procedure for nonrenewals, I conclude that the parties intended that the process be rational and based upon facts and sound reasons. The balancing of the other terms of the agreement with the purpose of probation would require that the Employer must show that it followed the contractual procedure and its decision to nonrenew is rational,¹⁶ that the decision does not violate or unduly conflict with the other terms of the collective bargaining agreement, and that the decision was legitimately directed toward one of the permitted objectives of nonrenewal. The analysis is made with great deference to the broad authority the parties intended to reserve to the Board.

4. Application to Facts

a. Disputed Facts

Hearing Examiner Morrison made the following findings of fact. The Grievant had worn camouflage pants prior to the October, 2006, Board meeting at which appropriate dress

¹⁴ Article XI, Section C requires that the Board not engage in discrimination in its actions.

¹⁵ i.e. C. 4, 5, 6

¹⁶ See, *NICOLET HIGH SCHOOL V. NICOLET EDUCATION ASSOCIATION*, 118 Wis.2D 707 (1984).

was discussed. The Board directed District Administrator Parks to discuss improving the level of dress. He held a meeting with professional staff on October 19, 2006, at which he told the staff about the Board's concerns that teachers not wear casual wear such as blue jeans, t-shirts and camouflage pants on regular instructional days at school. He again discussed this concern at a meeting with the teachers on November 15 or 16, 2006. Either at that meeting or some other time prior to March 9, 2007, the Union and he agreed that they would establish a "casual Friday." Teachers would be allowed to wear jeans and Phelps School District logo t-shirts on the casual Friday, but no one specifically discussed what could not be worn on those days. He concluded that it was not clear from the result of those meetings as to whether or not camouflage pants could be worn on "casual Fridays." Examiner Morrison found, however, that no one on behalf of the Employer, including Parks, ever told the Grievant that she could not wear camouflage pants on "casual Fridays." Examiner Morrison found that the Employer did not violate Sec. 111.70(3)(a)4, by unilaterally establishing a dress code. Examiner Morrison concluded that the Employer violated the just cause provision of the collective bargaining agreement by issuing the warning of March 13, 2007, to the Grievant because she had not been specifically told that wearing camouflage pants on "casual Fridays" violated the dress code. He ordered that the letter of reprimand be removed from her file.

The parties agree that on October 12, 2007, the Grievant again wore camouflage pants on a "casual Friday." This occurrence is not addressed by Examiner Morrison's decision.

I conclude that Examiner Morrison's decision should be given preclusive effect under the doctrine of *res judicata* in a number of ways. First, I conclude that the decision interprets Article XI B to mean that the Employer may not discipline probationary employees without cause (other than nonrenewing them). Second, the Employer lacked cause to discipline the Grievant for wearing camouflage pants on any occasion prior to October 12. Third, the Employer never told the Grievant that she could not wear camouflage pants on casual Fridays prior to the disciplinary incidents which were the subject of that decision.

Therefore, it would unduly conflict with the administration of this agreement to permit the Employer to nonrenew the Grievant based in any part of those incidents. First, it would undermine the cause provision to allow the nonrenewal where it was determined that the Employer lacked cause for the discipline and where it was determined that material facts did not occur. Second, it would not serve the purposes of nonrenewal to allow a nonrenewal where the employee was not told and had no reasonable way of knowing the Employer's expectations. If an employee could not know what the Employer's expectations were, the employee could not have exhibited a lack of proper relationships by the mistaken conduct.

Turning to the October 12, 2007 incident in which she again wore camouflage pants on a "casual Friday," I conclude that the Association is also correct that the Board's answer of May 30 was ambiguous as to whether the Grievant could wear camouflage pants on casual Fridays. It indicates that the Board has deferred action on clothing. It is not clear from that document whether the Board intended to require her to not wear camouflage on casual Fridays after May 30. The "work now, grieve later rule" primarily applies to a situation in which an

employee is given a clear direction from his or her supervisor to which the employee has an objection. It does not apply when the employee was not told she should not wear camouflage.¹⁷

In any event, the Board's decision to nonrenew the Grievant is so predicated on the prior conduct, I conclude that it would not have acted solely upon the single event. The Employer has failed to show that nonrenewal would serve any of the legitimate purposes of nonrenewal. One incident hardly could demonstrate that it is unlikely the Grievant could maintain appropriate workplace relationships.

5. *Appropriate Remedy*

I conclude that the appropriate remedy is to order that the Grievant be reinstated and made whole for all lost wages and benefits. This is the customary remedy. However, I conclude that it is necessary to address the clothing issue underlying this dispute to determine if there should be conditions to reinstatement.

I conclude that the Board had intended at all relevant times that the Grievant not wear camouflage pants at any time while at work or on school property. This is true even though the message appears to have not gotten through to her. This aspect of the dispute requires an interpretation of Article XIX, Section A.

Under Article III and by law, it is the Board which is responsible for setting the level of decorum in its schools. The level of dress by its professional employees is well within its responsibility. This is, of course, subject to its duty to bargain working conditions under Sec.111.70, Stats. The Board did precisely that when it negotiated Article XIX, Section A. This is an unusual provision and a fair reading of this unusual provision is that the parties recognized some level of unilateral control of this sensitive subject in the Employer.

The Board, not the Administrator, decided that camouflage pants should not be worn at all inside its schools by professional staff. Under Article XIX, the Board may act to prohibit all teachers from wearing certain articles of clothing or to prohibit an individual teacher from wearing specific clothing if the Board makes a decision based upon its legitimate concerns and there are facts to support the decision that the item should not be worn. For the purpose of this decision, I assume the Board actually made a decision even though it acted somewhat informally.

The Board's stated reason for its decision is that members of the public complained about teacher dress and it took action. It appears that the Grievant's camouflage pants were a significant part of that complaint. Two reasons for this complaint appear in the record, but were not briefed. The first reason appears to be based in the fact that the pants are

¹⁷ NAA, *The Common Law of the Workplace*, (BNA 2d Ed.), Sec. 6.8

camouflage. The second appears to be based upon the fact that these particular pants are perceived as immodest.¹⁸

The Association has argued that the Board invidiously discriminated against Grievant by imposing this requirement or that its action was arbitrary. The Association has never shown any reason why it was necessary for the Grievant to wear camouflage pants. Her written explanation in the January 10, 2007, response is inadequate to provide a reason why she should wear them.

I cannot conclude that the choice to ban camouflage pants was arbitrary. Camouflage is closely associated in the public mind with hunting and/or paramilitary activities. It takes only a short reflection on recent history in schools to recognize that the Board has a legitimate concern as to the tone of wearing camouflage in a classroom. It is unclear whether any others of the professional staff have ever worn camouflage pants in the school.

The Association argued that the Employer's actions were "discriminatory." I agree that the Board's actions appear directed at the Grievant. However, I conclude that the Board's action was not invidiously discriminatory. There is evidence that male teachers were allowed to wear camouflage coats during work while supervising students on the playgrounds and going to and from school. Obviously, they must then be worn going through the school buildings on the way to or from those activities. That clothing is sufficiently distinguishable to overcome the *prima-facie* showing of discrimination prohibited by the collective bargaining agreement. The clothing is outdoors clothing relating to, and meant to be, used outdoors. While it does overcome the *prima facie* showing of discrimination, the disparity shows the wisdom of discussing clothing issues with the Association and everyone concerned and making sure everyone is heard.¹⁹ In any event, the Association has failed to show any disparate treatment sufficient to trigger an inference of discrimination prohibited by the collective bargaining agreement.

It is undisputed that camouflage pants are an exception to normal teaching attire limited only to casual Fridays. The Association has shown no particular reason why the Grievant should be allowed to wear these. There is enough evidence that this clothing is provoking enough of a response in the public that the Board has a legitimate interest in asking her to not wear them. I conclude that the Board has expended enough time and resources on this dispute and I have, therefore, concluded that the Grievant should not be permitted to wear camouflage pants again while at a school function or on school property unless she is authorized to do so by the Board or its designee. I have entered an appropriate condition subsequent for her reinstatement and reserved jurisdiction over any issue which should arise from my order.

¹⁸ This is referenced by E in her response to the January 10, 2007 evaluation.

¹⁹ The Association has shown no reason why Grievant felt compelled to wear camouflage to school other than her personal preference.

AWARD

The Employer violated the agreement when it nonrenewed Laura Erhart. It shall reinstate her and make her whole for all lost wages and benefits. The order of reinstatement is made with the following condition: Laura Erhart shall not wear camouflage pants on the Employer's premises or while at work for the Employer without the express written permission of the Board or its designee.

The Arbitrator reserves jurisdiction for a period of sixty (60) days to resolve any issues arising in the implementation of the award.

Dated at Fond du Lac, Wisconsin, this 26th day of May, 2009.

John R. Emery /s/

John R. Emery, Arbitrator