(2)

AMERICAN ARBITRATION ASSOCIATION
CASE NUMBER 13 390 1993 97

----------X

In the Matter of the Arbitration between

UNITED FEDERATION OF TEACHERS, LOCAL 2,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO
(Grievant: Michael Ferrazzano, A-075-15411)

-vs-

THE BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF NEW YORK,

----------X

Before: Rosemary A. Townley, Esq., Ph.D.
Arbitrator

Appearances:

For the Union
Gary Rabinowitz, Advocate-UFT
Michael Ferrazzano, Teacher-Grievant
Emily Allen, Student Intern, Observer
Dan Drellich, Student Intern, Observer

For the Board
Thomas A. Liese, Esq., Office of Labor Relations and Collective Bargaining
Sharon Meyers-Izzo, Principal, P771K
Marta Rojo, District 75, Representative of Superintendent's Office

OPINION AND AWARD

INTRODUCTION

The undersigned arbitrator was selected to hear this matter and render a binding determination in accordance with Article 22 (C)-Arbitration-of the 1995 - 2000 collective bargaining agreement between the Board of Education of the City School District of the

City of New York ("the Board") and the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO ("the Union").

Hearings were held on January 9 and January 23, 1998 at the American Arbitration Association ("AAA"), 140 West 51st Street, New York, New York at 10:00 a.m. and the New York State Employment Relations Board, One Penn Plaza, New York City, at 9:00 a.m., respectively.

The hearing was closed upon receipt of oral summations from the parties on January 23, 1998.

RELEVANT PROVISIONS OF THE AGREEMENT

ARTICLE TWO - FAIR PRACTICES

> The Union agrees to maintain its eligibility to represent all teachers by continuing to admit persons to membership without discrimination on the basis of race, creed, color, national origin, sex, marital status, sexual orientation, handicapping condition or age and to represent equally all employees without regard to membership or participation in, or association with the activities of, any employee organization,
>
> The Board agrees to continue its policy of not discriminating against any employee on the basis of race, creed, color, national origin, sex, marital status, sexual orientation, handicapping condition, age of membership or participation in, or association with the activities of, any employee organization.
>
> The Board agrees that it will not require any teacher to complete an oath or affirmation of loyalty unless such requirement is established by law.
>
> The Board of Education agrees that, as a result of the strike and its related activities, it will not dismiss, demote, discipline, or otherwise act against any staff member

because of his or her participation in said strike or related activities. Specifically excluded from the foregoing are any and all provisions of the Taylor law (New York Civil Service law, Section 200 et seq.), none of which are waived hereby.

Any records of court proceedings or other memoranda relating to job action or strike shall not be put in a staff member's permanent file, except as required by law.

ARTICLE TWENTY - MATTERS NOT COVERED

With respect to matters not covered by this agreement which are proper subjects for collective bargaining, the Board agrees that it will make no changes without appropriate prior consultation and negotiation with the Union.

The Board will continue its present policy with respect to sick leave, sabbatical leaves, vacations and holidays except insofar as change is commanded by law.

All existing determinations, authorizations, by-laws, regulations, rules, rulings, resolutions, certifications, orders, directives, and other actions, made, issued or entered into by the Board of education governing or affecting salary and working conditions of the employees in the bargaining unit shall continue in force during the term of this agreement, except insofar as change is commanded by law.

STIPULATED FACT

In September of 1997 Grievant was employed as a teacher in the 683 program at I303K. (Jt. Exh. 7).

ISSUE STATEMENT

The parties were unable to agree upon the formulation of the issue statement and presented the following proposed statements:

Union:

Did the Board violate Articles Two and Twenty of the 1995 - 2000 collective bargaining agreement by prohibiting Grievant, Michael Ferrazzano, from wearing a tank top in school during July 1997? If so, what shall be the remedy? (Un. Exh. 1)

Board:

In July 1997, in I303K did the Board implement a dress code in violation of Articles Two or Twenty of the 1995 - 2000 collective bargaining agreement? If so, what shall the remedy be? (Brd. Exh. 1)

The Arbitrator, after reviewing the evidence, has adopted the issue statement as set forth by the Board in order to fully resolve all the questions set forth in this matter.

STATEMENT OF FACTS

Michael Ferrazzano ("Grievant") is a Special Education teacher. He testified that he works during the summer months as part of the Chapter 683 federally funded program which provides for a year-round education program for SIE 6 - 7 handicapped students. He is a tenured teacher who has been consistently rated as "satisfactory." He holds retention rights as a Chapter 683 teacher pursuant to Article 12 of the Agreement.

Principal Meyers-Izzo, who is chief administrator of I303K, issued a "Summer 1997 Agenda" which read, in relevant part:

> III. Rules
>
> . . .
>
> I. Please look professional and presentable while on duty.
>
> Summer program is a school program, not a day camp.
>
> (Jt. Exh. 6)

This agenda item was identical to one which was issued by the principal for the Summer 1996 program. (Un. Exh. 8)

Grievant received a warning by letter dated July 16, 1996, which was the subject of an earlier grievance, from Assistant Principal Oswaldo Roman, which confirmed a meeting between him and Grievant on that same date. This letter read, in relevant part:

> [T]o address the fact that you have continued to disregard our summer dress code which was clearly stated in our Summer Orientation Agenda dated June 27, 1996 . . . this is a final warning and should you continue to violate and defy this policy you will be terminated from the Chapter 683 Program effective immediately.
> (Un. Exh. 7)

At the hearing, Grievant testified that he filed the 1997 grievance because he received a reprimand during the summer of 1996 for wearing a tank top in violation of the Summer 1996 Agenda and that the 1997 Summer agenda contained the same language regarding dress. He also feared that he would be reprimanded or terminated if he wore a tank top shirt during the school day, given that the language of the agenda was the same with respect to this rule.

On July 2, 1997, Grievant sent a grievance letter to Principal Meyers-Izzo requesting a conference with her to discuss the school's "dress code." (Jt. Exh. 2).

An appeal was filed by Grievant dated July 17, 1997 with the Chancellor's office, alleging a violation of Articles 2 and 20 of the Agreement. (Jt. Exh. 3)

Chancellor's Representative James. J. Meehan issued a decision on August 1, 1997 denying the grievance, finding that Grievant was not singled out with regard to his attire because the principal spoke to other employees, including females, regarding the appropriateness of their summer attire. (Jt. Exh. 4)

A Demand for Arbitration dated October 30, 1997 was filed with the American Arbitration Association. (Jt. Exh. 5)

During his testimony, Grievant presented a series of photographs which were taken during the Summer of 1996 depicting various female staff members wearing tank tops. The photographs also showed Grievant in the type of tank top shirt he wore on the day which resulted in the issuance of a reprimand by Assistant Principal Roman. (Un. Exh. 9 A - 9L)*[1]

Grievant also maintained a handwritten log during part of the Summer of 1997 identifying those staff members who wore tank tops on various dates, among other types of clothing. (Union Exh. 10)

He also made brief notes at the top of the log regarding his discussion with Assistant Principal Roman.

The Union also presented Special Education teacher **Sara DiMaria** as a witness. She taught at the school until September of 1997, including the summers of 1996, prior to her transfer. During this time, she served as Chapter Leader at the school.

Ms. DiMaria testified that she wore tank tops to school during the summer of 1997, which were similar in style and cut to that depicted in the photograph of Grievant. She did not receive any warning from anyone in administration that she was not to wear

---

*Some of the photographs also depicted some of the students in the program. In light of the Buckley Amendment regarding the confidentiality rights of students, the Arbitration affirmed to the parties that she would physically destroy the photographs upon the issuance of the Opinion and Award.

such tank tops. She also noted that many other staffers wore tank tops and sundresses during the summers. Nor did any unit members complain to her, in her official capacity as chapter leader, that they had been reprimanded for wearing tank tops to school.

She further testified that she, along with Grievant, attempted to seek clarification from the principal after the filing of the 1997 grievance, but was informed by the principal's secretary that the principal would not meet with them on the matter.

The Union also presented **Albert Normandia,** who is a Special Education Teacher at P.S. 370 K in Brooklyn. He taught at the school during the summer of 1997 as a Chapter 683 teacher at the same time Grievant worked in the program.

Mr. Normandia testified that he normally rides his bicycle to work during the summer and wears a tank top when doing so. One day, while signing in at the office, Assistant Principal Roman told him that he noticed that "[Mr. Normandia] was not wearing a shirt" and asked him whether he had another one with him. Mr. Normandia told him that he regarded Assistant Principal Roman's remark as a command that he was not allowed to wear tank tops to school. He never wore a tank top after that point because he did not want any trouble with the administration.

He further testified that he did not see other male staffers wear tank tops to school during the summer sessions but noticed that the females did so on various days. He did not believe that such a situation was fair, given that men were not allowed to wear tank tops to school.

On cross-examination, Mr. Normandia noted that he intended to change into his tee shirt even before speaking to Assistant Principal Roman on the day of their conversation.

The Board presented **Assistant Principal Oswaldo Roman,** who works at P.S. 224 in Queens and was the Assistant Principal at the school in Brooklyn during the 1996 and 1997 summer programs.

Assistant Principal Roman testified that he attended the principal's orientation meeting at the beginning of both summer sessions. He also conducted his own meeting with the special education teachers that he supervised, including Grievant. He never met with Grievant on a one-to-one basis any other time thereafter.

With respect to the wearing of tank tops, Assistant Principal Roman said that he told the entire staff that they were to dress appropriately so that he would not have to discipline them and that he never specifically told Grievant that he could not wear a tank top.

On cross-examination, Assistant Principal Roman testified that he issued a letter to Grievant during the summer of 1996 regarding the prohibition against the wearing of a tank top. (Un. Exh. 7)

The Board also presented **Christine Liantonio**, a Special Education at the school since October of 1991. She noted that some time during the summer of 1992 or 1993 she wore a tank top shirt to school which was cut low in front and that part of her breast

was visible. Principal Meyers-Izzo told her to cover up. Thereafter, she made sure that she wore a higher cut of shirt so that her breasts would be covered. She did not believe that the principal's comment was unreasonable in nature.

On cross-examination, Ms. Liantonio testified that she believed that her tank top shirt was appropriate for school wear on the day that she wore it and noted that she did not work at all during the summers of 1996 and 1997.

The Board also presented **Principal Sharon Meyers-Izzo,** who is Principal of the school and has held that position for the past seven years. Previous to that time, she worked as an assistant principal in two different schools, as well as a Supervisor for Special Education. She has worked for the Board of Education for 22 years.

She testified that the Chapter 683 program was funded so that children would be able to continue their academic work during the summer and not lose any continuity in the program. She emphasized that the program was academic in nature with certain physical educational activities included, such as aquatics and gymnastics.

She noted that the school was assigned five student teachers from Long Island University. She received a packet from the university indicating the appropriate dress code for the student teachers. (Bd. Exh. 6)

With respect to the entry on the summer agendas, Principal Meyers-Izzo indicated that she included Section (I) because she is aware that summertime weather is hot and that teachers want to be comfortable. She also noted that, on certain occasions, some teachers dressed in an inappropriate manner and consequently did not serve as proper role models for the students. She noted that she has used the same agenda

language since 1991 when she first began with the summer program. She further testified that she spoke in a general manner with the staff with respect to compliance with the dress standard during the orientation session but she never spoke to any individual staff members about it. She did not give any written reprimand to Grievant during the summer of 1997 regarding his manner of dress, nor did she remove him from the program.

With respect to the receipt of the step one grievance, Principal Meyers-Izzo testified that she received it sometime during the beginning of summer of 1997 and that she did not schedule a step one hearing. The district office told her that a similar issue regarding the wearing of tank tops had been addressed by a letter to Grievant's file the previous year. Therefore, there would be no reason to hold a step one hearing at the building level as the district office would do so.

With respect to the photographs of staffers at the school dressed in various clothing during the summer of 1997, Principal Meyers-Izzo testified that while the clothing of the individuals depicted in Union's Exh. 9A & B were not acceptable, that which was depicted in remaining photographs was unobjectionable. With respect to the female staff member shown in Union Exhibit 9, who was wearing shorts, the principal testified that she told that staffer that the shorts were too revealing in nature because part of the staffer's buttocks was exposed, which was inappropriate dress for school. After their discussion, the teacher did not appear in such clothing again.

Regarding Grievant's wearing of a tank top as depicted in Union's Exh. A, the Principal testified that Grievant had progressed from wearing tee shirts to tank tops to muscle shirts which exposed his whole torso and revealed more of his body parts. She

believed that the same was not professional clothing for work in a school, especially a muscle shirt similar to one that would be worn in a gym, which is what he wore the day Assistant Principal Roman issued the letter. Grievant did not wear any similar clothing during the summer of 1997.

On cross-examination, Principal Meyers-Izzo testified that she did not know if the paraprofessional wearing a tank top with a scoop neck and cutoff arms as shown in Union Exhibit 9A had shaved under her arms or not and acknowledged that the female teacher could have had displayed armpit hair which was not clearly shown on the photograph. She said that if the female teacher did not shave her armpits, she would have objected to it, as she did Grievant's exposure of his armpit hair, because her staff members must be well groomed. She also noted that even if the female teacher did not shave her armpits, that teacher's armpit hair did not stick out of her shirt, while Grievant's armpit hair did so. Staffers often lift their arms during the course of instruction or while outside with the students and consequently their armpit hair could be seen by the students.

She also acknowledged that the student teachers do not work at the school during the summer months and that they are not employed by the Board. She also noted that she is unaware of any Board's rules pertaining to staff member or student teacher dress.

The Board also presented **Marta Rojo**, who is the Executive Assistant to the Superintendent in District 75 and is responsible for the Chapter 683 program. She noted that her duties include the processing of all grievances and that she received a copy of the instant grievance. She had a discussion with the Union's District Representatives,

Lisa Mendel and Garry Sprung, regarding this grievance and told them that she believed that it would be appropriate to move directly to step three, given that the grievance dealt with the same issue that had proceeded to step 3 in 1996.

On rebuttal, the Union recalled Grievant as a witness with respect his photograph wearing a tank top as found in Union Exh. 9A. He noted that he did not display any armpit hair in that photograph because he is a body builder and, as is the custom in that sport, shaves all his armpit and chest hair in order to present a clean image. He was clean shaven on the day the photograph was taken and maintains that none of his armpit hair was showing in the photograph. He also points out that he is "moderately hairy" and that his armpit hair would grow long if he did not shave it.

He also testified that the district office did not hold a step two hearing and that he was instructed to proceed directly to step three at the Chancellor's office.

ARGUMENTS OF THE PARTIES

Position of the Union

The Union argues that the Board discriminated against Grievant, in violation of Articles Two and Twenty of the Agreement, by prohibiting him from wearing a tank top shirt during the summer of 1997, while allowing females the right to do so.

It further maintained that Grievance's attire was wholly "professional" in cut and nature, as the tank top shirt was not obscene, dirty, torn, or contained any inappropriate slogan or political message.

The Union also questions the findings contained in the Chancellor's decision in this matter, given that the principal did not appear at the hearing and the findings make reference to the latter's position. Moreover, it maintains that the Board's claim that a "dress code" has not been implemented is contradicted by the warning contained in the letter given to Grievant by Assistant Principal Roman in July 1996 which used that exact phrase to describe the dress standard at the school

Furthermore, the Union argues that the existence of any dress code violates Board regulations and New York State Education Department Commissioner's rulings which have not condoned the establishment of a dress code, excepting certain circumstances which are not present in this matter, such as presenting a disruption to the school. It also points out that the Agreement is silent on the issue of a dress code and that the Board has not issued any circulars or policy memoranda on the issue. Nor has any such claim had been made against Grievant.

The Union further argues that the evidence shows that the policy and practices of the Board over the past three decades, as indicated in Board rulings as well as in New York State Commissioner's decisions, indicates that there can be no establishment of a dress code. Moreover, Article 20 demonstrates that any matter which is not covered by the agreement must be subject to negotiations and that this instant case would present such a circumstance.

It also argues that the PERB decision involving the Catskill School District (Un. Exh. 11) supports its contention that the implementation of a dress code is subject to collective bargaining and that there can be no unilateral imposition without such

negotiations. Nor was there any showing that the tank top in question presented a disciplinary problem.

The Union further maintains that the events of 1996 are relevant to this matter because it underscores Grievant's state of mind with respect to his actions during the summer of 1997. He was explicitly told in writing during 1996 that he was not to wear tank tops and that the letter from the assistant principal clearly refers to school policy regarding clothing and refers to the policy being "clearly" stated in the summer "agenda." The use of the phrase "dress code" by the assistant principal in the letter further proves that the wearing of a tank top was based on the agenda rule of "professionalism."

Grievant's testimony that he feared being terminated was not an irrational reaction in light of the letter he received the previous year from the assistant principal, according to the Union. He knew that he would have no further warning after receiving that letter and thus did not wear any tank top to school during the summer of 1997, but nonetheless continued to see women wearing tank tops during that same time frame. Given that the agenda was the same in 1997 as it was in 1996, and that women were allowed to wear tank tops, Grievant had a reasonable basis to conclude that the school policy remained unchanged. While he attempted to seek out Assistant Principal Roman to discuss this matter, Mr. Roman told him that he had to speak to the Principal, which would be a logical statement by the assistant principal given the circumstances.

The Union further contends that the testimony of Grievant and Ms. DiMaria shows that they attempted to meet with the principal to discuss the matter, but were told by her secretary that she would not do so. Therefore, an opportunity to possibly settle

this matter was missed by the principal, who could have indicated the non-existence of a dress code.

It also maintains that, on its face, the issuance of the 1997 agenda, in light of the previous action by the administration, would constitute a violation of the collective bargaining agreement. Otherwise, Grievant would have had to have worn a tank top in 1997 in order to "force the issue." However, he would have been fired from the program as a result and the Board would have referred to the 1996 letter as proof of a warning. Hence, Grievant was caught in a "Catch-22" situation in July of 1997, given that he was unable to wear a tank top because he was warned not to do so and was faced with the same agenda which prohibited him from doing so.

The Union further argues that the Board's precedent of record clearly shows that there is no dress code in effect in the schools and that it is merely a "matter of propriety" subject to certain exclusions. Therefore, it would be permissible for the principal to take action against the teacher if the wearing of certain clothing resulted in a disturbance in the school, as noted in the Matter of Lungo. Here, however, there is no showing that Grievant's clothing resulted in any impact or disturbance upon the educational program.

Nor does any decision of the Commission of Education support the Board's contentions. For example, in the Case of Martin, the wearing of a bikini by a teacher to a junior high school boys' swimming class in 1969 was not found to be indecent in nature. The Union questions why the wearing of a tank top in 1997 would be found to be offensively indecent in nature, if the wearing of a bikini in 1969 under the circumstances as noted in Martin was not found to be inappropriate. The Union further claims that another decision of the Commissioner of Education, the Matter of Collins,

further supports its argument because that holding provides for the establishment of appearance standards only where some educational impact is at issue.

The Union also maintains that the most cogent discussion of the Board's policy on dress is summed up in the 1976 Pantelis decision issued by the Chancellor's office. In that decision, the Chancellor found, in relevant part, "that the Principal can make . . . comments . . . only to the extent that it impairs teachers effectiveness." There is no showing that Grievant was charged with the violation of such a standard. Nor was there any showing that Grievant's manner of dress detracted from the school's tone or was demeaning to the profession in any way or impacted upon the students, pursuant to the standards set forth in Pantelis. Moreover, the principal herself testified that there are no Board rules for dress.

The evidence clearly shows, according to the Union, that female staffers were allowed to wear sun dresses, tube tops and tank tops to school during the time at issue. It must be assumed that such clothing was acceptable, in light of the testimony of the principal that she did not speak to one staffer during the summer of 1997 regarding their attire. Nor was there any distinction between the tank top worn by Grievant which gave rise to the letter of warning and the types of clothing worn by the female staffers.

The photographs show that the woman were wearing tank tops similar to that worn by Grievant. The females wore tank tops with scoop necks and arm cutouts. In addition, there was armpit exposure and, in some cases, bra strap exposure on the part of the female staffers. Yet, the principal testified that she did not find any such displays to be offensive in nature.

Furthermore, Chapter Leader DiMaria testified that she asked the principal to distinguish between Grievant's attire and her own on a day when she was wearing a tank top and received no response. Ms. DiMaria also testified without contradiction that she wore the same type of tank top to school during the same time frame and received no complaints from anyone in administration. Nor did she receive any comments from staff members that they had been reprimanded with respect to their clothing.

The Union further contends that Article II of the Agreement has been violated because the Board has engaged in discrimination on the basis of sex. The evidence clearly shows that the male staff members were prohibited from wearing tank top shirts while the female members were allowed to do so. If the exposure of arms and armpits is the basis of discipline, then the women who expose the same amount of arm and chest area, as well as armpits, should also have been reprimanded by the administration, which was never done at any time.

Accordingly, Article 2 and 20 have been violated when the Board of Education prohibited Grievant from wearing tank tops. The Union seeks a cease-and-desist order from the Arbitrator in this matter.

Position of the Board

The Board argues that this case displays a basic unwillingness of the Union to recognize that men and women dress differently both at school and in other settings.

The Board further argues that it agrees with the Union that this case turns upon the question of whether a dress code is in existence at the school and, if so, is such a code unreasonable in nature. It maintains that the general language contained in the

summer 1997 agenda merely establishes a requirement for dressing in a professional manner and does not set forth a "code." The use of the word "code" would imply a regulated set of dress, pursuant to the dictionary meaning or legal meaning of the word (Brd. Exhs. 2 - 3) and that no such regulation is evidenced here. The use of the phrase "dress code" in the 1996 letter of Assistant Principal Roman was merely an "unwitting" one.

It also argues that any decisions of the Commissioner of Education or PERB regarding the establishment of a dress code are of no relevance here, as there has been no showing of a violation of law or the Board's duty to bargain. Nor is any evidence of the 1996 grievance relevant here because the facts in the instant matter are different. Moreover, Grievant did not wear a tank top shirt during the Summer of 1997 and makes no claim of any directive by an administrator not to do so at that time. Thus, this case involves a "non-event" because the testimony shows that the only thing that happened during the summer of 1997 was the issuance of an agenda which referred to certain dress which would be inappropriate in nature.

In addition, the Board maintains that any step two decisions which were presented by the Union are irrelevant. While a community superintendent can make rules for his or her district, that person is not empowered to interpret citywide Board policy. Thus, such decisions are of no authority in the instant matter.

The Board also argues that the case turns on Grievant's credibility and that the testimony shows that he lied with respect to a number of points. For example, a review of the photograph contained in Union Exh. 9A indicates a dark shadow under his arm,

which can only indicate that he did have armpit hair at that time, contrary to his testimony that he had been clean-shaven at the time it was taken. It also maintains that his log does not contain any critical information with respect to his conversations with Assistant Principal Roman.

With respect to the Union's claim of sexual discrimination that men are being held to a different standard than women, the Board argues that men are different from women and that such a difference could be reflected in clothing. Moreover, the testimony of Ms. Liantonio that she wore a tank top to school which revealed too much and was told to change her clothing indicates that female teachers are held to the same standards of dress. Therefore, there is no workplace sexual discrimination on the basis of dress at the school.

OPINION

Based upon the evidence of record, the grievance is sustained. The school administration implemented a dress code in 1997 in violation of the standard set forth in the Pantelis decision of the Chancellor. Furthermore, the dress code was implemented in a disparate manner, as men were held to a different standard than women with respect to the wearing of tank tops to school during the summer months.

Accordingly, Articles Two and Twenty of the Agreement were violated when Grievant was denied the right to wear a tank top shirt to summer school sessions, while female staffers were allowed the right to work in similar clothing. The school

administration is to cease-and-desist from implementing such a discriminatory dress code.

One of the threshold questions essentially raised by the Board's arguments is whether the grievance is one which is "ripe" for hearing, in light of its contention that "nothing happened" to Grievant during the summer of 1997 which would have provided a basis for the filing of a grievance. However, the evidence shows that the issuance of the Summer 1997 Agenda contained the same language in Section III, Rules (I), dealing with looking professional, which was cited in Grievant's 1996 letter of reprimand for the wearing of a tank top. The issuance of the agenda, coupled with the 1996 letter of warning from the assistant principal which referred to the existence of a summer dress code based upon the agenda language, gave Grievant a basis for filing a claim, as it presented a live controversy as of the summer of 1997.

As just noted, the language found in the Summer 1997 Agenda regarding looking professional was identical to that found in the Summer 1996 Agenda, which was cited in the letter of warning to Grievant. Assistant Principal's Roman's letter stated that Grievant's clothing violated the school's "[s]ummer dress code . . which was clearly stated in the [S]ummer Orientation Agenda dated June 27, 1996." (Un. Exh. 7) This letter of warning further stated that Grievant was being given a "final warning" and "[s]hould you continue to violate and defy this policy" he would be immediately terminated from the summer program. (Un. Exh. 7)

Thus, Grievant had a reasonable and logical basis to conclude that if he wore a tank top shirt to school following the issuance of the 1997 agenda, he would be terminated from his position. Grievant need not be officially terminated before

challenging the issuance of the agenda in 1997, especially where the relief sought is declaratory in nature. Accordingly, the issuance of the 1997 agenda which contained the same language regarding "looking professional", coupled with the warning letter from the assistant principal to the Grievant that he would be terminated if he wore a tank top shirt again, provides a basis for the filing of a grievance for declaratory relief as to whether the 1997 issuance of the agenda violated the Agreement.

The next issue is whether a dress code was actually in existence at the school and, if so, whether it was contrary to central Board pronouncements on this matter.

The Board's policy regarding dress is clearly enunciated in the well-reasoned January 1976 decision of the Chancellor in Pantelis which states, in relevant part:

> [I]t has been previously been held at Step 3 decisions affirmed by the State Commissioner of Education that the Principal may make reasonable and appropriate written comments to a teacher, when his dress is inappropriate to the extent of impairing his teaching effectiveness. It has also been held at Step 3 that it is not Board policy to establish a dress code for teachers, although the commissioner has held that the Board (not an individual Principal) has the authority to set dress standards . . . (Emphasis added)
>
> (Un. Exh. 6)

Therefore, in order for a principal to "make reasonable and appropriate written comments to a teacher" regarding inappropriate dress, such comments may only be made when the dress "[i]s inappropriate to the extent of impairing his teaching effectiveness."

It is clear that the facts of this matter do not meet the Pantelis standard. Of great significance is the fact there was no claim by Assistant Principal Roman in his 1996 letter to Grievant, or during his testimony at the hearing, that Grievant's wearing of a tank top either did or would impair Grievant's teaching effectiveness in any way. Nor was any such claim made by Principal Meyers-Izzo at any time during the hearing.

Furthermore, the evidence strongly supports the Union's argument that the school administration implemented a summer dress code in 1996 and 1997. Assistant Principal Roman's 1996 letter clearly informed Grievant that the wearing of a tank top violated the school's "summer dress code" which was "clearly stated in our Summer Orientation Agenda dated June 27, 1996 " and that the same was regarded as "policy." (Un. Exh. 7) Such clear and unambiguous language leaves no doubt in the mind of the reader that a dress code had been adopted which essentially turned upon the administrator's belief that the staff member looked professional, without any consideration of the Chancellor's Pantelis standard of "impairment of teaching effectiveness." Therefore, absent a consideration of the standard, such a code would be violative of long-standing central Board policy, which is supported by ample decisions of the State's Commissioner of Education, that a dress standard must be related to the impairment of teaching effectiveness.

Therefore, Article Twenty of the Agreement had been violated because the terms and conditions of employment at the school had been changed without negotiations.

The next question is whether Article Two of the Agreement had been violated because the evidence shows that women were allowed to wear tank tops to school during the summer of 1996 and 1997, while men were not allowed to do so. The evidence

clearly indicates that such discrimination did take place between the sexes regarding the wearing of tank tops. The principal testified that the tank tops worn by the female staffers as depicted in the photographs were all "unobjectionable." On the other hand, she found the tank top worn by Grievant as depicted in the photograph to be "objectionable" apparently because of the extent of exposure of his arm, underarm area, armpit hair, and chest area.

However, a review of the photographs in evidence, coupled with the testimony of record, indicates that there is little, if any, relevant distinction between the type of tank tops worn by men and women at the school during the time frame in question. All such clothing, whether worn by males or females, revealed the full arm, upper chest/shoulder area, and underarm areas. While certain of the women appear to be wearing tank tops which are a bit more form-fitting and of more expensive cut and fabric than the basic cotton-type tank top worn by Grievant, such are distinctions without significance. In short, the amount of skin exposed by the womens' tank tops, at minimum, was similar to that as depicted in the photograph of Grievant in a tank top. Moreover, in some cases, the female staffers wore tank tops that exposed more skin than did Grievant's clothing.

While the principal testified that the photograph of Grievant did not accurately show the type of tank top worn by him on the day of the letter of warning, it is noted that the assistant principal did not make such a claim or describe the tank top in the letter. Moreover, the unrefuted evidence of record was that female staffers who wore the same type of tank top as shown in the photograph of Grievant did not receive any warnings from administration. Furthermore, it is logical to assume that if such warnings occurred, the chapter leader would have been privy to complaints from the staffers. The only

evidence of a warning was that a female teacher whose breasts were exposed when wearing a tank top was told by the principal to cover up. The photographs in evidence do not show any such similar breast exposure on the part of female staffers.

Finally, with respect to the claim by the principal that any exposure of Grievant's armpit hair was objectionable, the Arbitrator fails to see the relevance of such a claim, especially where it has been shown that one of the female staffers apparently exposed a similar display of armpit hair. (Un. Exh. 9K)

Therefore, if women are allowed to wear tank tops which expose the same areas of their bodies as would be exposed by men wearing similar garb, but men are not allowed to do so, then Article II of the Agreement is violated because such action rises to the level of discrimination against the male staffers based upon their gender.

While the Board properly argues that there are times when it would be proper for men and women staff members to be differently attired, the foregoing facts indicate that this is not one of those cases. Nor are the facts analogous to the situation reported in an article cited by the Board as persuasive authority which appeared in the *New York Law Journal,* wherein a federal judge reprimanded an attorney for appearing in court wearing a tee shirt. In that situation, male and female attorneys are subject to equal treatment as they are both expected to appear in court dressed in professional attire.

Here, the facts show that men and women working in the same school environment were not allowed to wear similar clothing for reasons which did not take into consideration the Board's Pantelis standard. Therefore, the prohibition of the wearing of tank tops by men violated the discrimination clause of the Agreement.

AWARD

Based upon the evidence of record, the grievance is sustained. The school administration implemented a dress code in 1997 in violation of the standard set forth in the Pantelis decision of the Chancellor. Furthermore, the dress code was implemented in a disparate manner, as men were held to a different standard than women with respect to the wearing of tank tops to school during the summer months.

Accordingly, Articles Two and Twenty of the Agreement were violated when Grievant was denied the right to wear a tank top shirt to summer school sessions, while female staffers were allowed the right to work in similar clothing. The school administration is to cease-and-desist from implementing such a discriminatory dress code.

STATE OF NEW YORK)
COUNTY OF BRONX) SS:

On this 19th day of February, 1998, I, ROSEMARY A TOWNLEY, ESQ., Ph.D. affirm, pursuant to Section 7507 of the New York Civil Practice Law and Rules, that I have executed the foregoing, as my OPINION AND AWARD.

Dated: February 19, 1998

Rosemary A. Townley, Esq., Ph.D.