In the Matter of the Arbitration between
Perth Amboy Smelter & Refinery
Workers Union Local 365
United Steelworkers of America
AFL-CIO

and

American Smelting & Refining Company

The stipulated issue is:

Did the Company violate the contract and the practice thereunder by not assigning carpenters to certain work in connection with the scale house on November 4, 1969? If so what shall be the remedy?

There is no doubt that the dismantling or disposal of the wooden scale house did not require the skill of carpenters. In terms of skill only laborers were required.

However, the record discloses that by long standing practice, the parties have agreed that where a structure has been built by carpenters, its disposal or dismantlement has and shall be the work of carpenters as well, irrespective of the skill required.

Accordingly, on the basis of this past practice, the dismantling or removal of the wood debris resulting from the destruction of the scale house should have been performed on November 4 by carpenters. Therefore a number of carpenters equivalent to the number of laborers who performed the work shall be paid on a straight time basis for the amount of time on that day that the laborers did that work.

Award

Eric J. Schmertz
Arbitrator
DATED: February 22, 1971
STATE OF New York )  s.s.:  
COUNTY OF New York)

On this 22nd day of February, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me the be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration between

Local 484, American Bakery & Confectionery Workers Union, AFL-CIO (representing the grievants at and through the first hearing on October 1, 1971); Local 50, American Bakery & Confectionery Workers Union, AFL-CIO (representing the grievants at and through the remaining hearings on October 13 and October 15, 1971)

-and-

The Great Atlantic & Pacific Tea Company, Inc. National Bakery Division

The Undersigned Arbitrator, having been duly designated under the Arbitration Agreement between the above named parties, and having duly heard the proofs and allegations of the parties makes the following AWARD.

1. The discharges of P. Budniak, W. O'Brien, V. Ricciardi, F. McGowan, W. O'Niell, G. Drowne, P. Cristiano, L. V. Bernacke, L. Donaldson, E. Brick, J. Giordano and J. Hill were for just cause and are upheld.


DATED October 20, 1971
STATE OF New York)ss.: COUNTY OF New York)

On this 20th day of October, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration between

UNITED STORE WORKERS, Union,

-and-

BLOOMINGDALE BROS., Employer.

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ISSUE

WHAT SHALL BE THE GENERAL INCREASE, IF ANY, IN THE STRAIGHT TIME HOURLY RATES OF PAY FOR ALL EMPLOYEES (INCLUDING STUDENTS AND CONTINGENTS BUT EXCLUDING STRAIGHT COMMISSION EMPLOYEES) WHO ARE REGULAR EMPLOYEES ON THE PAYROLL AS OF MARCH 1, 1971, EXCEPT THOSE WHOSE RATES ARE RELATED TO OUTSIDE RATES, FOR THE PERIOD FROM MARCH 1, 1971 TO FEBRUARY 29, 1972?

Bloomingdale Bros. operates a large, modern, full-service department store in midtown Manhattan. For many years, the Company’s employees have been represented by the United Store Workers and its predecessor. And, this
relationship has produced a series of collective agreements that has spanned more than a quarter century.

The last stipulation in the series was entered into on April 30, 1970. It provided, among other things, for two 13.333 cents an hour wage increases; the first to be effective March 1, 1970, the second to be implemented on May 1, 1970. These two hourly wage adjustments represented a weekly wage increase of $10 and were made payable to all employees (including students and contingents, but excluding straight commission employees) who were regular employees on the payroll as of the date of the signing of the agreement.

Although the parties' 1970 negotiations produced an agreement on the wage increases that were to be made effective in 1970, there was no agreement on the amount of the increases, if any, that would become effective between March 1, 1971 and February 29, 1972. The parties did, however, provide a procedure for the peaceful resolution of this problem. Section 7 of the April 30, 1970 stipulation provides:

"The Employer and the Union shall, immediately after January 1, 1971, or as soon thereafter as possible, confer only with respect to a general increase in the straight time hourly rates of pay for all employees (including
students and contingents but excluding straight commission employees) who are regular employees on the payroll as of March 1, 1971, except those whose rates are related to outside rates, for the period from March 1, 1971 to February 29, 1972.

"The parties agree that the negotiations in regard to this matter shall be resolved as quickly as possible; and in the event that they fail to agree by March 1, 1971, either party shall have the right to refer this matter to arbitration before Eric Schmertz or his designee in accordance with the provisions of this Agreement. It is understood that the Arbitrator shall schedule hearings expeditiously and issue his award on or before May 1, 1971."

The parties met pursuant to Section 7 but were unable to agree. Thereafter, their dispute was presented to me for final and binding arbitration. A hearing was held on March 25, 1971, at which the parties were offered a full opportunity to present all their proofs and arguments.

These different contentions touched on a number of areas, to wit:

1. Whether the amount of prior settlements at Bloomingdale's was part of a pattern established at Gimbels or was part of a pattern related essentially to Macy's;
2. The long and short-term effect of increases in the cost of living, viewed in the light of actual increases in earnings by Bloomingdale's employees, and taking into account the fact that those employees have fully paid medical and hospital coverage;

3. Prior wage increases related to standards as opposed to raises limited to increases in the cost of living;

4. The degree to which productivity had or had not increased since March, 1970; and

5. The effect of competition in this vigorously competitive industry.

The various arguments related to these areas were ably and vigorously presented and I have given them all careful consideration.

The uncontroverted evidence shows that Bloomingdale's employees are currently earning, on average, $117 a week, i.e., $3.12 an hour. Similarly situated employees working for Macy's and in Gimbels are earning, on average, $111.75 ($2.98 an hour) and $111.38 ($2.97 an hour) a week, respectively. Bloomingdale's average weekly earnings thus exceed Macy's and Gimbels by over five dollars a week. This is a substantial differential given the highly competitive nature of the industry.
The evidence further shows that the two five dollar a week increases given by Bloomingdale's in 1970, when taken together, were essentially the same in amount as the ten dollar increase that became effective at Macy's on February 1, 1970. That ten dollar wage increase was subsequently converted into a $10.50 increase in average weekly earnings at Macy's, a figure that takes into account increases in commission income and the effect of turnover. At Bloomingdale's, the two five dollar increases resulted in an $11.25 increase in average weekly earnings, a differential from the Macy's figure that is significant.

Further, the evidence shows that from 1965 through 1970, average weekly earnings at Bloomingdale's increased $22.50, while average weekly earnings at Macy's went up $16.12.* These increases resulted from general wage increases at Bloomingdale's amounting to $25.62 and from general increases at Macy's amounting to $17.00.

Given this history and the fact that Bloomingdale's is providing the highest average weekly earnings in the

* The increase in average earnings at Gimbels during the same period was $22.87, but Gimbels started from a much lower base.
organized segment of the industry, I have concluded, despite the Union's vigorous arguments to the contrary, that the increase that is to be effective retroactive to March 1, 1971 should be $6.00 a week, i.e., 16¢ an hour. This is the same wage increase that was made effective at Macy's on February 1, 1971. Given all the facts and circumstances, and particularly the fact that Bloomingdale employees are currently earning so much more than their fellows at other stores,* this increase appears to be equitable.

In reaching this conclusion, I have been fully aware of the effect of the increase in the cost of living upon the employees involved. The $6.00 increase, coupled with the $10.00 granted in 1970, more than offsets the increase in the cost of living; indeed, provides a meaningful increase in standards. This is particularly so because Bloomingdale employees have not been affected by any of the steep increases in medical and hospital costs, an important component of the consumer price index; have benefited from

* This opinion should not be construed as approving that differential or as a precedent which impliedly looks to its continuance. Whether or not the differential is or is not maintained or, for that matter, is increased or decreased, will depend on future decisions made in collective bargaining, not arbitration.
increases in commission income; and are able to fulfill some, but obviously not all, their consumer needs at a discount by purchasing in the store.

AWARD

Those employees (including students and contingents but excluding straight commission employees) who were regular employees on the payroll as of March 1, 1971, except those whose rates are related to outside rates, shall receive as of March 1, 1971 an increase of sixteen cents (16¢) per hour.

Eric J. Schmertz
Arbitrator

April 30, 1971

State of New York )ss.: County of New York)

On this 30th day of April 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same

Case # 1330 0205 71
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Mrs. Harold Braverman and Anti-Defamation League of B'Nai Brith

Award

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated January 1, 1970 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards, as follows:

The claim of the Estate of Harold Braverman for vacation pay for the year 1970 is granted. The Employer shall pay Mrs. Harold Braverman on behalf of the Estate, vacation pay at the appropriate rate for 22 working days.

The claim for vacation pay for the year 1971 is denied.

Eric J. Schmertz
Arbitrator

DATED: December 27, 1971
STATE OF New York )ss.:
COUNTY OF New York)

On this 27 day of December, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1330 0925 71
In the Matter of the Arbitration between

Mrs. Harold Braverman

and

Anti-Defamation League of B'Nai Brith

In accordance with Article XI of the contract between the Anti-Defamation League of B'Nai Brith and Professional Staff Personnel Committee dated January 1, 1970, the undersigned was designated as the Arbitrator to hear and decide a dispute between Mrs. Harold Braverman (on behalf of the Estate of the late Harold Braverman), hereinafter referred to as "Braverman," and the Anti-Defamation League of B'Nai Brith, hereinafter referred to as the "Employer."

A hearing was held at the offices of the American Arbitration Association on November 17, 1971 at which time representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

The issue as stipulated is:

Did the Employer violate the contract with regard to vacation pay for Braverman for the years 1970 and 1971? If so, what shall be the remedy?

The main thrust of the Employer's case is that because it granted the late Harold Braverman an extended period of sick leave with pay from the time he suffered a stroke, throughout the many months of his disabiling illness and until his death - a period of time far in excess of the contractual sick leave
benefit — his Estate has no justifiable claim for vacation pay for the years 1970 and 1971.

Though I recognize the Employer's equitable argument, it is neither supported by the facts nor the contract, and it is to these to which this Arbitrator is bound.

I find that at no time, when Mr. Braverman was placed on sick leave by the Employer on July 12, 1970, when his sick leave was extended in January 1971, or throughout the period of that sick leave until February 27, 1971 when he died, did the Employer condition the granting of that extended sick leave with pay on a waiver, relinquishment or use of any vacation entitlement.

The contract provisions for sick leave and vacation are separate. One is neither conditioned upon nor subsumed by the other. Therefore absent some clear understanding to the contrary, I cannot find that the granting of sick leave or even its gratuitous extension beyond the contract time limit automatically works to vitiate an accrued vacation benefit. The evidence in this case does not disclose any such contrary understanding.

When Mr. Braverman suffered his stroke the day before he was to officially begin his vacation, the Employer placed him on a six month sick leave with pay beginning with the "onset of his illness." Therefore, instead of either commencing or using any of his vacation for the year 1970, his status was changed, by the action of the Employer, to that of "sick leave."

There was no agreement with Mr. Braverman or his wife, either expressed or implied at that time, that any portion of the sick leave would consume the 1970 vacation. The same was true in January of 1971 when the Employer agreed to extend Mr. Brav-
erman's sick leave after he had suffered a heart attack. And though I consider it probable that the Employer was willing to go well beyond the contractual sick leave entitlement in order to put Mr. Braverman in the most favorable position for pension purposes in the event he was permanently disabled, together with commendable humanitarian reasons prompted by Mr. Braverman's many years of service, none of this constituted an agreement between the Employer and the Bravermans to use or extinguish, or subsume within the sick leave, Mr. Braverman's vacation rights.

The Employer also contends that its check dated April 19, 1971 in the amount of $13,142.75 to the order of Mrs. Braverman constituted full payment and settlement of all claims of the Estate against the Employer including all claims for vacation pay.

I cannot agree. The check contains no explanatory statement whatsoever. The Employer relies on its covering letter of the same date to Mrs. Braverman in which it stated that "the enclosed check represents payment in full of all sums due." However, that statement refers to the immediate preceding paragraph in the letter which delineates specifically the purpose of the check, namely for moneys due for the period February 22 through February 26, 1971 - i.e. salary while still on sick leave - and the balance, severance pay upon death, pursuant to Article VI Paragraph D of the contract. So, as specifically expressed by the Employer in its letter, the check covered salary and severance pay, and was in full payment of those amounts. It
did not purport to cover any vacation claim. Moreover, in timely manner thereafter counsel for Mrs. Braverman, in a letter dated April 23, 1971 to the Employer, expressly stated that vacation money was still owed the Estate for the years 1970 and 1971. Accordingly I do not see how the negotiation of that check by Mrs. Braverman can be construed either as an abandonment of or as prejudicial to her claim in this proceeding for her husband's vacation entitlement.

Nor do I find that Braverman's vacation rights were either granted or prejudiced by the fact that he drew vacation pay the last day worked on July 10, 1970 before commencing his planned vacation three days later. Obviously that money was retained by him as salary during the first month of his sick leave after being placed in that status as of July 12, 1970. It is undisputed that during that first period of his illness he did not receive a salary check though he was on sick leave with pay. Clearly, as a bookkeeping matter, the vacation money which he drew was deemed by the Employer and recorded as salary for that period of time. Thereafter his regular salary payments resumed. Consequently I fail to see how his retention of the vacation money, in lieu of salary payment by the Employer during a comparable period when he was on sick leave with pay, can be interpreted as receipt of vacation pay for the year 1970.

For the foregoing reasons I find neither a waiver, relinquishment or use during his sick leave period from July 12, 1970 until his death on February 27, 1971, of any vacation benefit to which Braverman was entitled.
Remaining is the question of the amount of vacation entitlement. It is clear that for the vacation year 1970 his Estate is entitled to the full amount of vacation pay under Article VIII Section B of the contract - or in other words 22 working days (based on Mr. Braverman's more than 10 years of service). He had earned and accrued a full vacation because of his active employment during the full vacation year prior to July 1, 1970. (It is stipulated that the measuring service period for vacation benefits is July 1 through June 30.)

But had he earned vacation for the year 1971? In other words was he entitled to pro rata accrued vacation for the period July 1, 1970 until his death on February 27, 1971? I conclude not. Section C of Article VII expressly provides for the payment of pro rata vacation, where the full prior year of service from July 1 through June 30 has not been completed, only "in the event of dismissal or resignation of a staff member." It does not provide for payment of a pro rata vacation in the event of death. Clearly, the possibility of death during a 12 month period prior to a full vacation entitlement was foreseeable by the parties when that Section C was negotiated. And if payment of a pro rata vacation in the event of death was intended, Section C could easily have said so. That it did not leads to only one logical conclusion - that the parties intended to limit vacation pay on a pro rata basis only to dismissals or resignations. Accordingly Braverman's claim for a pro rata vacation for the year 1971 must be denied.

Apparently the provisions for severance pay under Article VI, which by the express terms of that Article, is not avail-
able to employees who quit or retire or are discharged under specified circumstances, is however extended to any employee who dies, and therefore represents a substitute for pro rata vacation pay.

It should be clear however, that the foregoing interpretation of the relationship between vacation pay and severance pay applies, so far as the instant case is concerned, only to Braverman's claim to pro rata vacation for the year 1971.

In short it is clear to me that the severance pay clause, interpreted together with Section C of the vacation clause, represents a substitute only for pro rata vacation in the event of death. Manifestly it does not constitute a substitute for vacation pay fully earned as a result of full service during the 12 month period July 1 through June 30 immediately preceding the vacation in question. Hence the Employer's payment of severance pay to Mrs. Braverman disposed of the claim for pro rata vacation for the year 1971, but in no way affected her claim for Braverman's full vacation entitlement for the year 1970.

Accordingly the Employer is directed to pay Mrs. Braverman on behalf of the Estate of the late Harold Braverman, 22 days vacation pay at the appropriate rate for the year 1970.

Eric J. Schmertz
Arbitrator
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Anita Zakin and

Board of Higher Education of the City of New York

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated September 15, 1969 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards, as follows:

Within the meaning of the Nota Bene there was an arbitrary use of procedure in connection with the denial of the reappointment of Anita Zakin. A hearing on the matter of remedy shall be scheduled.

Eric J. Schmertz
Arbitrator

DATED: December 6, 1971
STATE OF New York ss.
COUNTY OF New York

On this 6 day of December, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1339 0732 70
In the Matter of the Arbitration
between
Anita Zakin

and
Board of Higher Education of the
City of New York

In accordance with Article VI of the Agreement between
The Legislative Conference of the City University of New
York and the Board of Higher Education of the City of New
York, the Undersigned was selected as the Arbitrator to hear
and decide the grievance of Miss Anita Zakin.

Hearings were held at the offices of the American Arbi-
tration Association on December 10, 1970, May 10, June 1,
June 16, June 25, August 4 and August 18, 1971. The arbitra-
tion is between Miss Zakin individually, hereinafter referred
to as the "grievant," and the Board of Higher Education of
the City of New York, hereinafter referred to as the "Board."
The grievant, her attorney, and representatives of the Board
appeared at all hearings and were afforded full opportunity
to offer evidence and argument and to examine and cross exam-
mine witnesses. The grievant and the Board filed post hearing
briefs. The stenographic record of the hearings consists of
820 pages. Over 60 exhibits were introduced into evidence.

The grievant was an Instructor of Music at Kingsborough
Community College, serving in that capacity during the acad-
Department (Division) Personnel and Budget Committee (P&B
Committee) voted not to reappoint her for the academic year
1970-1971 (under the existing By-law provisions, had the grievant been reappointed for that year she would have received tenure.) The grievant requested a re-hearing, and on December 15, 1969 that Committee re-affirmed its denial of her reappointment. The grievant then appealed to the College P&B Committee, which voted to deny her appeal on January 20, 1971. On March 16, 1970 she filed a Step 1 grievance under the grievance provisions of the Agreement, which the President of the College denied on March 28, 1970. On April 22, 1970 she filed a Step 2 grievance which the University Vice-Chancellor denied on March 13, 1970. She then submitted her grievance to arbitration.

Based on the record I determine that the grievant and the Board agreed to the following issue and procedure regarding remedy, if any:

Whether within the meaning of the Nota Bene there was an arbitrary or discriminatory use of procedure in connection with the grievant's denial of reappointment.

If that question is determined in the grievant's favor the matter of remedy is to be the subject of a further hearing(s).

The grievant charges violation of Article XVII, Sections 17.1, 17.3, 17.4, 17.5; Article XVIII, Sections 18.1 and 18.2 of the Agreement and Section 9.3 of the Board's By-laws referred to in Article 1 and Article VI Section 6.2 of the Agreement, as constituting arbitrary or discriminatory uses of procedure within the meaning of the Nota Bene. Additionally the grievant charges that the then Chairman of her Department was biased and prejudiced against her and that
his influence played a significant part in the denial of her reappointment.

The Board defends on several grounds. It denies the facts as alleged by the grievant; asserts that if there were procedural mistakes they were inconsequential and not of an arbitrary or discriminatory magnitude; that any procedural errors were cured at the higher levels of the grievant's appeal; and that her denial of reappointment and tenure was based on "academic judgment" within the meaning of the first sentence of the Nota Bene and therefore not subject to review in arbitration.

My original drafts of this Opinion set forth in considerable detail the specific alleged contract and By-law violations claimed by the grievant. I have decided however that in its final form this Opinion need not recite all those details, for two reasons. First, the stenographic record and the grievant's brief contain the full specifics of each charge. Second, and most important, it is my conclusion that if I find any one or some of the charges as an arbitrary or discriminatory use of procedure within the meaning of the Nota Bene, this case, at that point, is transformed fully to its remedial stage. As I see it, it makes no difference whether there was a single or multiple arbitrary or discriminatory use of procedure with regard to the denial of the grievant's reappointment, for in either event the scope of my authority to fashion a remedy if any, is equally as complete and is neither enlarged nor narrowed by how many times the Nota Bene was violated.
Accordingly I choose to address this Opinion to certain charges where I find an arbitrary or discriminatory use of procedure. With that finding, it becomes unnecessary, because it would be potentially superfluous and cumulative, for me to determine one way or the other whether the balance of the charges reached the arbitrary or discriminatory level as alleged by the grievant.

The pertinent part of the Nota Bene reads:

Grievances relating to appointment, reappointment, tenure or promotion which are concerned with matters of academic judgment may not be processed by the Conference beyond Step 2 of the grievance procedure. Grievances within the scope of these areas in which there is an allegation of arbitrary or discriminatory use of procedure may be processed by the Conference through Step 3 of the grievance procedure.

I find an arbitrary use of procedure with regard to the denial of the grievant's reappointment with tenure because of the Board's failure to follow certain pertinent prescribed provisions of Articles XVII and XVIII of the Agreement; and I find the errors specified below not to be matters of academic judgment within the meaning of the Nota Bene. The pertinent sections of Articles XVII and XVIII read:

17.1 All evaluations of the professional activities of the employees shall be in writing. An evaluation conference of professional activities shall be based on total academic performance, including such elements as:
(a) Classroom instruction and related activities
(b) Administrative assignments
(c) Research
(d) Scholarly writing
(e) Departmental, college and university committee assignments
(f) Student counseling
17.2 At least once each semester non-tenured employees shall, and tenured employees may, be evaluated on the basis of at least a one hour observation of the work of the employee. The employee shall be given at least twenty-four (24) hours of prior notice of observation.

17.3 The department chairman within a period of three (3) weeks from the date of observation shall discuss the evaluation with the employee who shall have the right to present any material he feels is pertinent to the proper consideration of the nature and scope of the evaluation. Immediately following discussion of the evaluation with the employee, the chairman shall prepare a record of the discussion in memorandum form.

17.4 Such memorandum shall become a part of the employee's personnel file in accordance with the conditions for making it a part of such file as set forth under provisions made for Personnel Files (Article XVIII).

17.5 At least once each year, each employee shall have an evaluation conference with his department chairman. At such conference, the employee's total academic and professional progress for that year and cumulatively to-date shall be reviewed. Immediately following this discussion, the chairman shall prepare a record of the discussion in memorandum form.

17.6 Such memorandum shall become a part of the employee's personal file in accordance with the conditions for making it a part of such file as set forth under provisions made for Personnel Files (Article XVIII).

18.2 ....

No materials shall be placed in the employee's personal file until the employee has been given the opportunity to read the contents and attach any comments he may so desire. Each such document shall be initialed by the employee before being placed in his file as evidence of his having read such document. This initialing shall not be deemed to constitute approval by the employee of the contents of such document. If the employee refuses to initial any document after having been given an opportunity to read the same, a statement to that effect shall be affixed to the document.
18.3 There shall be a separate administration file which shall contain:
(a) All materials requested by the unit of the City University or supplied by the employee in connection with the employee's original employment.
(b) All observation reports of the employee's academic and professional performance.

The administration file shall be available only to the committees and individuals responsible for the review and recommendation of the employee with respect to appointment, reappointment, promotion or tenure.

A major contention of the grievant is that her files, when presented to the committees and individuals for evaluation in connection with her reappointment did not contain certain materials which should have been included.

During the grievant's first two years the only "formal" observation were those of Drs. Mauzey and Jacobs in the first year and Jacobs in the second year, all of which were favorable to the grievant. Clearly, observation reports of this type are an important part of a teacher's file and material to an evaluation of an employee's performance for purposes of reappointment and/or tenure. There is no dispute that reports of this type should be made available to the committee(s) evaluating a teacher for retention, reappointment and tenure.

Yet the weight of the evidence is that these observation reports were not in the grievant's file when the Division P&B Committee reviewed those files and made its initial determination to deny her reappointment on November 3, 1969.

The grievant who was given an opportunity to review her files on March 26, 1970, asserts she never saw the Mauzey report and that she saw the Jacobs observation only after the adverse decision of the Vice-Chancellor in May, 1970.
Professor Katherine Barry testified that as a member of the Legislative Conference she accompanied the grievant in March 1970 to review the files in connection with this grievance. She stated that she examined the files and although she was not sure of the exact date, Dr. Mauzey's observation was not there.

Professor Irene Kiernan testified that as a member of the College P&B Committee which heard the grievant's appeal on January 13, 1970, she reviewed the files and did not find there either the Jacobs or Mauzey observations. She further testified that she learned that Mauzey's observation was missing some time in December, 1970 and that somewhat earlier the Jacobs observation was missing.

Dr. Wolkenfeld, the then Department Chairman, did not rebut this testimony. He could not testify with assurance that the Mauzey and Jacobs observations were in the files when the Division P&B Committee considered the grievant's reappointment. All that Dr. Wolkenfeld could say was "that what was before the Committee were all the files that were, as far as I know available at the School on Miss Zakin." He testified that as Chairman it was his duty to prepare the files for the Committee. The Fall of 1969 when the grievant's appointment was up for review, was the first year of the Agreement with the Legislative Conference. The time was, as conceded by Dr. Wolkenfeld, "quite hectic with a lot to do" and "the contract had gone into effect in September of 1969 ... nobody knew very much about how to implement the contract actually." He testified that in preparing the grievant's files he followed the applicable
procedure but that because her file was so voluminous he was unable to tell if anything was missing and "it is quite possible that a specific piece of paper was not available."

Accordingly I conclude, based on the evidence on this point, that two important evaluations, favorable to the grievant, were not in her file when the Division P&B Committee considered her for reappointment. Manifestly this error is procedural and not an exercise of "academic judgment." And the failure of the College to see to it that two such consequential reports were among the papers considered in the evaluation is, in my view a procedural breach of arbitrary proportions, even if unintentional.

In addition I find an arbitrary breach of Section 18.2 of the Agreement. In the third year the grievant was observed by Dr. Sherker, Professor Slatin and observed and evaluated by Dr. Wolkenfeld. There was much testimony concerning the propriety and usefulness of the Sherker observation since it was made on the final day of the World Series involving the New York Mets. But Professor Slatin testified that her observation was favorable to the grievant.

Dr. Wolkenfeld's observation of the grievant was on October 26, 1969 following which he had a conference with her. By letter dated October 27, 1969 she stated her position regarding his expressed criticism at that meeting of her teaching.

On November 20, 1969 after the Division P&B Committee met Dr. Wolkenfeld had another conference with the grievant. In the course of that Conference he advised her of the P&B Committee's decision and of the options available to her. He
then prepared a "Memorandum of Observation and Evaluation" which was to be a summary of that meeting.

Under the provisions of Section 18.2 of the Agreement, the Chairman's memorandum of that conference was not to be placed in the grievant's personal file until she had been given the opportunity to read the contents and attach comments. Wolkenfeld did not give the grievant a copy of his memorandum but rather merely notified her that it was available for her to see and sign. In my view, in order that the provisions of Section 18.2 be complied with, a Department Chairman should make every reasonable effort to place his memorandum before the employee involved or at least forward it to him so that it can be read and initialed, and the employee's comments can be attached. Mere notification by the Chairman, as in this case, that the memorandum is available in the Chairman's office for the employee to see, does not, in my view meet the Chairman's responsibility under Section 18.2 and does not afford the employee the safeguards specified therein, especially when, as here the memorandum purported to summarize a meeting in which the grievant was told of her unfavorable evaluation.

The grievant testified that she first saw the memorandum when she reviewed her files on March 26, 1970; and it "had very little in common with my conference with Chairman Wolkenfeld." She further testified that the College President had made a determination of her Step 1 grievance before she had an opportunity to see the evaluation and reply to it.

With respect to Dr. Wolkenfeld's summary memorandum,
Professor Slatin, one of the three whose observation was covered in the evaluation conference, testified that the memorandum did not reflect her observation report. As to almost every critical statement in the memorandum, Dr. Slatin testified that it was incorrect as far as her observation was concerned. She categorically stated that the summary statement "nevertheless my judgment is that your teaching in the observed classes was not effective" was not her judgment and "I do not feel that at all."

On December 16, 1969 Dr. Wolkenfeld prepared a memo to the files in which he stated that the grievant should have been presented with a copy of his summary memorandum before the committee "reached a decision on her reappointment." Thus Wolkenfeld admits this error.

His memo to the files stated however that the committee still got a pretty full view of her objections since she had sent a memo dated October 27, 1969 (referred to as October 22 in Mr. Wolkenfeld's memo to the files) subsequent to Wolkenfeld's observation. In the face of the explicit provisions of Section 18.2, I cannot accept Dr. Wolkenfeld's statement that the committee was therefore already familiar with the grievant's objections. It had before it Dr. Wolkenfeld's written summary of his evaluation meeting with the grievant. There is Professor Slatin's testimony that that written summary did not coincide with her observation report. The committee did not have before it the grievant's written comments or objections to either the evaluation or the summary memorandum. The grievant's objections which she should have been given an opportunity to
attach in writing, had the summary been sent to her or placed before her to be read and signed, were not before the committee on the same formal and official basis as was Dr. Wolkenfeld's memorandum and evaluation. So I fail to see how any informal knowledge that the committee or its members may have had about the grievant's objections could carry the same weight as if those objections had been filed with the Committee as Section 18.2 intended.

So again, I find a procedural error which does not involve "academic judgment" and which, no matter what the cause, was of sufficient potential prejudice to a full and fair evaluation of the grievant's record to be arbitrary. I reach the same conclusion and for the same reasons with regard to a procedural error concerning the "self evaluation" form in the grievant's third year.

Each year teachers fill out a self evaluation form which lists "services beyond the line of duty." The purpose of the form is to provide information about the teacher that only the teacher is aware of and which may not be known to others. In addition, it affords the teacher an opportunity for a type of "selective self-selling."

In her first two years the grievant completed such forms. She testified that she had "always received it prior to any conference." She claims that in the third year she did not receive the form prior to her conference with Dr. Wolkenfeld on November 20, 1969, and that therefore at that conference he did not have before him the evaluation sheet listing her services.
other than teaching for that academic year. She testified that at that conference she asked Dr. Wolkenfeld to give her the form but that she did not get one until later. She testified that she received the form on November 25, 1969 and submitted a completed one on November 28, 1969. In a covering letter she complained about not having received the form prior to the conference of November 20 and that Dr. Wolkenfeld's summary had dismissed her non-teaching service to the school as "none." She testified that at least five non-teaching services which she listed on the form were performed between the commencement of the school year in September, 1969 and November 3, the date the Division P&B Committee passed on her reappointment. In short she complained, quite properly, that the Division P&B Committee did not have before it her completed "Instructional Staff Information Sheet" listing her non-teaching service to the College, but instead had Dr. Wolkenfeld's summary statement that those services were "none."

I am of the view that such information, especially where it tends to contradict the Chairman's evaluation, should have been before the Division P&B Committee. Clearly if the self evaluation form asks for pertinent information regarding non-teaching service to the College, that information is of consequence and as Dr. Wolkenfeld stated in his memo of November 17, 1969 to the staff, this information "is really important." Obviously then, it is of importance to any Division P&B Committee evaluating a candidate for reappointment and tenure. I conclude that the College should have placed the self evaluation form in the grievant's hands well enough in advance of the
Division P&B Committee meeting in order to afford her the opportunity to place before that committee that important information. And I put this burden on the College because only the Department Chairman and the members of the P&B Committee knew when that Committee would actually meet to consider the grievant's re-appointment.

I reject the assertion that the error was non-prejudicial. I do not agree that it was "cured" by the fact that the material was thereafter made available to the P&B Committee at its re-hearing on December 15, 1969 and available at the subsequent appeal levels.

The purposes and intent of Articles XVII and XVIII as I read them, is that the pertinent material be available in a candidate's file and before the appropriate committees at each step of the evaluation and reappointment procedure; not simply available at the time of a re-hearing or an appeal to the next level. The "record below" i.e. the first determination of the Division P&B Committee establishes a presumption, favorable or adverse to a candidate, in all subsequent hearings or steps. If an adverse presumption is based on all pertinent material and information required by the Agreement, a candidate cannot complain if the burden is on him to overcome it, in a re-hearing or on appeal. But if, as here, an adverse presumption may well have been created because pertinent information favorable to the grievant's case was either missing from her files or not before the Committee because the Department had not sought it from her in time, then it is unfair to place upon her the burden to over-
come it. If material errors can be cured at the point of appeal, there would be no need for a several stage evaluation process. Instead one determination, at the highest level would suffice. But under the evaluation procedure involved here, I think it realistic to assume a presumption towards affirmation by the higher levels, of the initial P&B determination. And where that initial determination was made in the absence of significant and relevant material favorable to the grievant, I cannot agree that that error is cured merely because the missing information became subsequently available either at a re-hearing or on appeal.

I also find an arbitrary use of procedure in connection with the re-hearing before the Division P&B Committee in December, 1969. The grievant appeared and attempted to rebut criticism that she had led classes in which there was "no teaching and no learning." In her defense she made reference to students' notes that were made during the observed classes and read from some of them. The Committee asked her to produce the notes and she stated that she would submit copies to the Committee and would include other notes as well. She agreed to submit them soon but no precise time was fixed. Yet the Committee reached its determination that very night, before the grievant had an opportunity to produce the notes, which she was led to believe the Committee wished to have before it acted. When Dr. Wolkenfeld was asked in the course of the hearings why a determination was made before the grievant was given a chance to submit the students' notes, he was directed
by counsel not to answer and did not (the contention was that that information encroached on the confidentiality of the Committee's deliberations), but conceded that the decision was made that very evening.

Regardless of the weight that the Committee might ultimately have given to the students' notes, the fact is that the grievant requested and received permission to submit that material in support of her appeal, and there is no doubt that she was led to believe that no decision would be made by the Committee until she submitted those notes or until a reasonable time for her to do so had elapsed. Such action was clearly contrary to a fair and objective determination of the merits of the grievant's case on re-hearing; and in my judgment inconsistent with procedural "due process" implicit in Articles VI, XVI, XVII and XVIII of the Agreement. And in that context I find the action of the Division P&B Committee on re-hearing to be an arbitrary use of procedure within the meaning of the Nota Bene.

As previously indicated the foregoing findings are enough to transform this case fully into its remedial stage. Whether or not there were additional breaches of the Nota Bene by the Board is immaterial because my power to fashion a remedy and the scope of that remedy would be no different. Accordingly a hearing on the question of remedy for the grievant will be scheduled promptly.

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration between
Herricks Teachers' Association
and
Board of Education Union Free
School District #9

In accordance with Article XXVIII of the contract dated July 1, 1970 between Herricks Teachers' Association, hereinafter referred to as the "Association" and Board of Education Union Free School District #9, hereinafter referred to as the "District," the Undersigned was selected as the sole Arbitrator to hear and decide the following stipulated issue:

Did the District violate the contract when it scheduled the guidance counsellors for 10-1/2 months effective July 1, 1971? If so what shall be the remedy?

A hearing was held at the offices of the District on June 7, 1971 at which time representatives of the Association and the District, hereinafter referred to jointly as "the parties," appeared and were afforded full opportunity to offer evidence and argument. The parties waived both the Arbitrator's oath and the contract provision calling for a tripartite Board of Arbitration.

I am satisfied that this dispute is properly determinable within the confines of the contract without resort to the Education Law or court decisions.

The District's action and the grievance which arose therefrom occurred during the effective period of the contract dated July 1, 1970; hence it is to the provisions of that contract
to which we must look for applicability, conformity or violations.

The District argues that Article XXII (Salary) Section A Paragraph 2 which reads:

Except where the annexed schedules specifically note otherwise, all schedules are based upon ten (10) month school year from September through June in accordance with the agreed calendar annexed to this agreement, and those who are employed on an eleven (11) months contract shall be compensated on the basis of ten percent (10%) of the annual schedule payment for such month, does not constitute a guarantee of 11 months work for guidance counsellors. Rather the District asserts it merely fixes the compensation of those employees scheduled to work 10 months or employed to work 11; but that it is within the District's managerial discretion to determine whether more than 10 months will be scheduled. Or in short, the District is not required to schedule a guidance counsellor beyond 10 months; only if it does must it compensate him in accordance with the foregoing contract provision.

I find I need not determine whether the District's interpretation of Article XXII is correct, or whether, contrarywise as the Association contends that Article represents a contractual confirmation of a guaranteed 11 month work year for guidance counsellors (the only employees covered by the contract who have previously worked 11 months) because even if I accepted the District's interpretation, its case in this arbitration fails.

In advancing its interpretation, the District asserts that the contract neither covers nor limits the District's right to determine the work year of the guidance counsellors. It is the District's position that that question was never negotiated; is
not encompassed within the contract, and consequently remains a managerial prerogative. However there can be no real dispute with the conclusion that the length of a work year is a "condition of employment" in the traditional and well established collective bargaining sense. Also it is undisputed that without exception, for at least the last five years and perhaps for as long as since 1954, the District has employed guidance counsellors for 11 months each year. It follows, and therefore I conclude, based, in part at least on the District's own argument, that the 11 month work year of guidance counsellors meets the test of a "condition of employment prior to this Agreement and not covered by this Agreement ..." within the meaning of Article XXIX of the contract.

Article XXIX (Maintenance of Standards) reads:

Established policy as to rates, hours, benefits, and conditions of employment prior to this Agreement and not covered by this Agreement shall not be reduced or withdrawn during the term of this Agreement.

Its mandate and proscription are clear. Applied to the instant dispute it means, even under the District's theory, that for the term of this contract the 11 month work year of guidance counsellors may not be reduced.

As previously indicated, Article XXIX is applicable because it was in full force and effect at the time that the District took its action and when the grievance resulting therefrom arose. At that time, Article XXIX, by its own language, was enforceable "during the term of this Agreement." That the parties under the re-opening provisions of Article XXXII subsequently negotiated a "change in the language of Article XXIX effective July 1, 1971
does not change the applicability of the prior language to the instant case. As I see it the new language, effective July 1, 1971 is prospective, i.e. covering only disputes which may arise on and after July 1, 1971. But prior thereto, when the instant grievance arose, the foregoing language of Article XXIX remains fully controlling.

Also undisputed is that during the negotiations under the re-opening clause which resulted in a change in the language of Article XXIX, the District did not indicate any plan to reduce the work year of the guidance counsellors from 11 to 10-1/2 months effective July 1, 1971. Therefore, absent any such notice to the Association, I find neither an equitable nor contractual basis upon which the new language of Article XXIX effective July 1, 1971, can be made retroactive to the action which the District chose to take prior to the effective date of the newly negotiated clause, despite the fact that the new work schedule of the guidance counsellors was not to begin until July 1, 1971.

I make no judgment on what the result would have been had the District waited until July 1, 1971 (if that was practicable) to announce a reduction in the work year of guidance counsellors. In that event the meaning and interpretation of the newly negotiated language of Article XXIX might have been at issue. Whether or not the result would be the same is not before me.

This is not to say that the District did not have sound economic reasons to reduce the work year of the guidance counsellors together with the other educational and administrative cut-backs it undertook. I am persuaded that the District is
confronted with a tight economic condition and that savings where possible are warranted and needed. But a saving or cut-back which turns out to be violative of a bilaterally negotiated contract cannot be sustained unless agreed to by the parties to that contract, despite its economic merit.

Also this is not to say that the District is obligated to guarantee full employment to all its employees. Clearly it has the right to effectuate whatever layoffs are necessary. Article XXIX deals with "conditions of employment," which requires employment as a condition precedent to its applicability. And therefore it has no bearing on the number of employees the District chooses to or must lay off or not rehire. But so far as the guidance counsellors are concerned, though the District retains the unrestricted right to determine the number of guidance counsellors it will employ, those it does retain must be employed for 11 months as a "prior condition of employment not covered by the (contract) which may not be reduced during the (contract)"

Accordingly the Undersigned Arbitrator having been duly designated in accordance with the Arbitration Agreement dated July 1, 1970, and having duly heard the proofs and allegations of the parties makes the following Award:

The District violated the Agreement when it scheduled guidance counsellors for 10-1/2 months effective July 1, 1971. The District shall schedule the guidance counsellors for 11 months work commencing and effective July 1, 1971.

Eric J. Schmertz
Arbitrator
DATED: June 10, 1971
STATE OF New York )ss.:
COUNTY OF New York)

On this 10th day of June, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.
In accordance with the Arbitration Provisions of the Collective Bargaining Agreement dated November 11, 1969 between Branglebrink Dairy, hereinafter referred to as the "Employer," and Local 584 IBT, hereinafter referred to as the "Union," the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Has the Employer violated the Milk Industry Collective Bargaining Agreement in connection with the sale of a route? If so what shall be the remedy?

A hearing was held at the offices of the American Arbitration Association on November 23, 1970 at which time representatives of the parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses.

The pertinent contract sections are Sections 8(a) and (b) which read:

(a) Before any change in the production or distribution methods or operations of the Employer which may affect employees covered by this contract is effectuated by the Employer, the Employer shall first notify the Union in writing by certified mail at least ten (10) days prior to the proposed change and explain the reasons that prompted the proposed change and its probable effects.
(b) The Employer shall not sell any of its retail or wholesale routes to any of its employees and shall not lease its retail or wholesale routes to any person. In the case of persons other than employees, the Employer shall not, during the term of this Agreement, sell any of its retail or wholesale routes except to a purchaser who will execute this Agreement and who will employ routemen subject to the terms and conditions of this Agreement. In the event of the Purchaser fails to execute such an Agreement, the Employer shall be fully responsible for damages to the Union, provided, however, that if the purchaser executes this Agreement the Employer shall have no further obligation or liability under this Agreement except for matters occurring prior to the execution of the Agreement by the Purchaser. Routes which were heretofore leased or sold, shall, upon release to the Employer or resale to the Employer or any other person, be classified as Company Routes and shall be subject to the terms of this Agreement.

and the following paragraph, part of Section 16(a)

To the extent permissible under law, arbitration shall be the exclusive remedy for claim for money damages by the parties against each other arising under Sections 301 or 303 of the Labor Management Relations Act or equivalent provisions of state law, and for all claims for money damages for breach of this Agreement.

I find that the Employer violated Sections 8(a) and (b) of the contract when, without notice to the Union it transferred one "leg" of a route to Oaktree Dairy, a company which was not a signatory to the Collective Bargaining Agreement and has not become a signatory thereto. And the Employer violated Section 8(a) of the contract when it transferred the other "leg" of the route, without notice to the Union, to Sagtikos Dairy, who is a signatory to the Collective Bargaining Agreement.

I find that both transfers were "sales" of the route within the meaning of Section 8 of the contract, because the Employer received, as consideration, the outstanding accounts receivables. There is no dispute that such a sale or transfer con-
stitutes a change in "distribution methods or operations of the Employer which may affect employees covered by this con-
tract" within the meaning of Section 8(a).

In accordance with my authority to fashion a remedy as set forth in the stipulated issue, and pursuant to the fore-
going paragraph of Section 16(a) of the contract, I direct the following which shall constitute my AWARD:

1. The employee(s) who serviced either or both legs of the route(s) involved prior to trans-
fer to Oaktree and Sagtikos Dairies, shall be paid commissions on the accounts receivables outstanding at the time of the transfers pur-
suant to Schedule "A" of the contract.

2. The Employer is directed to take all steps possible to re-acquire the leg of the route transferred to Oaktree Dairy. If unable to do so within 20 calendar days from the date of this AWARD, the Employer shall pay to the Union the sum of One Thousand Seven Hundred Ten Dollars and seventy-six cents ($1710.76) as damages.

DATED: January 11, 1971
STATE OF New York )ss.:
COUNTY OF New York)

On this 11th day of January, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he execu-
ted the same.

Case No. 1330 0795 70
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

The Legislative Conference of the City University of New York

and

The City University of New York

The Undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated September 15, 1969 and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards, as follows:

In the denial of reappointment of Professor Alexander Obolensky for the 1970-71 academic year there was not an arbitrary or discriminatory use of procedures. The grievance is denied.

Eric J. Schmertz
Arbitrator

DATED: March 29, 1971
STATE OF New York ) ss.: 
COUNTY OF New York)

On this 29th day of March 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Case No. 1339 0818 70
In the Matter of the Arbitration
between
The Legislative Conference of the City University of New York and The City University of New York

The stipulated issue is:

Whether in the denial of reappointment of Alexander Obolensky for the 1970-71 academic year there was an arbitrary or discriminatory use of procedure? If so, what shall be the remedy within the provisions of the Nota Bene?

A hearing was held on November 13, 1970 at which time Professor Obolensky, hereinafter referred to as the "grievant," and representatives of the Legislative Conference, hereinafter referred to as the "Conference," and the City University, hereinafter referred to as the "University," appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Conference and the University filed post hearing briefs.

Under the Nota Bene the Arbitrator's authority in this proceeding is limited. It is not to judge the substantive correctness or merits of the University's decision not to reappoint the grievant for the 1970-71 academic year. Nor is it to determine simply whether there were procedural defects in reaching that decision. Rather the Arbitrator has the narrow authority to decide whether, if there were procedural defects, such defects were arbitrary or discriminatory.

In the instant case, though I find some imperfections in
carrying out the procedures leading to the University's decision not to reappoint the grievant, I do not find that those defects reached an arbitrary or discriminatory level.

There is no dispute that the various and proper committees authorized to pass on the grievant's reappointment (and tenure) met at the proper times; and there is no evidence that their internal procedures were improperly carried out.

Though argued at length in the Conference brief, the allegation that the grievant was inadequately observed, counselled and informed of his status and teaching abilities prior to consideration for reappointment for the 1970-71 academic year, was only touched on lightly in testimony at the hearing. As such there is not sufficient evidence in the record to find this pre-reappointment procedure to have been inadequate, let alone arbitrary or discriminatory.

The reference to the grievant's book on Gogol as "work in progress" was inaccurate, in that it had been completed, accepted for publication, and in the hands of the publisher. But I do not consider this characterization, which was before the Appointments Committee, as arbitrary or discriminatory or even fatal. It could not be said that the book was a published work, because it had not been published at the time the grievant's evaluation for reappointment took place. Indeed it had not been published at the time of this arbitration hearing. So, though it should not have been characterized simply as "work in progress" it would have been equally inaccurate to refer to it as "work published."
More significant is the fact that the grievant was urged, and had the opportunity to show his book to the members of the committee which would evaluate him for reappointment, and declined to do so. The unrefuted evidence is that his Chairman urged him to circulate the completed draft of his book among the committee members well prior to the time the committee was to meet to consider the reappointment, but that the grievant did not do so because "the committee members would not understand it." Consequently any possible prejudice resulting from the imprecise reference to the status of the book, could have been dissipated by the grievant himself had he acquainted the committee members with what he had written in completed form.

I am not persuaded that the "ranking" of the untenured members of the Russian section of the department was binding on the committee which passed on the grievant's reappointment or even material to its deliberations. It is true that the grievant had been ranked by the Committee on Appointments as first in the Russian section. But that ranking was specifically for the purpose indicated - namely to establish a preference among the untenured faculty, for retention on an untenured basis, among those similarly situated in the event of a cut-back in personnel. If it represented a guarantee at all it was that on an untenured basis the grievant would enjoy a priority over other non-tenured but rated faculty members. Clearly it was not a guarantee of tenure. As it turned out the grievant's reappointment for the 1970-71 academic year became a matter of tenure under the rules of the University. Had he been reappointed he would have been granted tenure automatically. If the
University decided, as it did, not to grant him tenure, it could not reappoint him. I do not find that the action of the Committee on Appointments in ranking the non-tenured faculty was intended or can be construed implicitly to cover subsequent appointments which carry automatic tenure.

Also, in the alternative, if the ratings of the Committee on Appointments had a binding or precedential effect, it would be on that or a successor Committee on Appointments. Here the Committee on Appointments which passed on the grievant's re-appointment recommended his reappointment (and tenure) by a 3 to 2 vote. That can be construed as compliance with the rating of that Committee. But it was the next higher level, namely the P and B Committee which voted down the recommendation. Even if the rating of the untenured faculty was binding on the Committee that made it (the Committee on Appointments) I can not find it binding on the higher level reviewing P and B Committee. In short either way I do not conclude that the decision not to reappoint the grievant constituted either an arbitrary or discriminatory disregard of the rated list of the non-tenured members of the Department.

Nor can I find an arbitrary or discriminatory motive in the appointment of a second non-tenured professor of Russian with less seniority than the grievant. Clearly there is no rule or procedure which prohibits the University from doing so. Professor Bormomshinov was not hired for no purpose at all. He taught classes in Russian as did the grievant. Had the grievant been granted tenure, and had there been no need for two professors of Russian, Professor Bormomshinov would have
been terminated. So in that regard his employment was not prejudicial to the grievant. And even if Professor Bormomshinov was hired in anticipation of the denial of tenure to the grievant, that reason and the plan to have another Russian professor in readiness, could be as much a matter of "academic judgment" (which is beyond the scope of this Arbitrator to rule on) as it would be discriminatory or arbitrary. In the absence of evidence supporting the latter motive, and I find none in this record, I cannot conclude that the bare hiring of Professor Bormomshinov, even if in anticipation of the grievant's denial of tenure, was any more than the consequence of an academic judgment.

Finally, the University's declination of the grievant's offer to accept reappointment for the 1970-71 academic year on a non-tenured basis cannot be deemed an arbitrary or discriminatory procedural defect. In point of time, because of his prior contractual appointments, the University was obliged to grant the grievant tenure had he been reappointed for the 1970-71 academic year. The question before the University was the reappointment of the grievant with tenure or not to reappoint him at all. In short under the University rules it was "tenure or out." The University was not required to continue the grievant for an additional year on a non-tenured basis. Presumably it could have done so had it wished to. But because it was not obliged to do so I cannot find that its refusal or failure to do it constituted an improper procedural decision.
For the foregoing reasons the denial of reappointment of Professor Anexander Obolensky for the 1970-71 academic year was not an arbitrary or discriminatory use of procedures. The grievance is denied.

Eric B. Schmertz
Arbitrator
In the Matter of the Arbitration between

Trustees, Taxicab Industry Pension Fund;
Trustees, Taxicab Industry Health & Welfare Fund

and

Checker Garage Service Corp.

The Undersigned as Impartial Chairman under the contract between the above named parties, and having duly heard the proofs and allegations of the parties at a hearing on July 14, 1971, makes the following AWARD:

For half the month of January; the full month of February; and as of March 1, 1971, Checker Garage Service Corp. owes the Taxicab Industry Pension Fund the total sum of $2477.52.

For half the month of January; the full month of February and as of March 1, 1971, Checker Garage Service Corp. owes the Taxicab Industry Health & Welfare Fund the total sum of $5780.90.

The above sums owed are past due. Therefore Checker Garage Service Corp. is directed to pay the above amounts to said Funds forthwith with interest.

DATED: July 23, 1971
STATE OF New York )ss.: COUNTY OF New York)

On this 23rd day of July, 1971, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same,