Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration
between

Local 540, United Plant Guard Workers of America

and

Globe Security Systems, Inc.

The stipulated issues are:

1. Is the grievance arbitrable?

2. Did the Company violate the contract when it went from fixed shifts to rotating shifts beginning July 7, 1980? If so what shall be the remedy?

3. Did the Company violate the contract by having supervisors perform bargaining unit work? If so what shall be the remedy?

A hearing was held in Boston, Massachusetts on May 14, 1981 at which time representatives of the above named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator’s Oath was waived.

The Company contends that the grievance is not arbitrable because it was not filed for arbitration with the American Arbitration Association within the contractually prescribed twenty (20) days following the Step 3 grievance meeting. The Company notes that assuming the time limit began to run at the latest, from its third step answer, said answer was given on September 10, 1980, and the Union’s communication to the American Arbitration Association was not until five months later, on February 20, 1981.
The controlling contract language on this question is not clear. It provides for "notice of the request to appeal the case to an impartial umpire ... in writing not later than twenty (20) days after the meeting provided for in Step 3." (Emphasis added.) This could be logically interpreted either as requiring notice, by the Union to the Company (i.e. a "request to appeal") within the prescribed twenty days, or that it be filed with the arbitrator or the arbitration forum within said twenty days.

Though the Company asserts the latter argument, the former is equally plausible. It is noted that the contract does not require that the grievance be appealed to the arbitrator or the arbitration forum within the time limit, but rather that a request to appeal be given within that time.

To whom is a request to be made? Logically, it is made by the moving party, here the Union to the responding party, here the Company. As an appeal is made to the arbitrator or the arbitration forum, the request to appeal, preliminary to the appeal, may logically mean notice by one party to the other.

On this latter basis, the Union complied with the time limit. It gave written notice to the Company on July 21, 1980 that the grievance was "being submitted to Step 4 of the collective bargaining agreement." Step 4 is the arbitration step. That notice followed what appears to have been a Company answer at the Step 3 level dated July 15, 1980, and was within the prescribed twenty days.

Thereafter, following what appears to have been another,
or more formal third step meeting on August 26, 1980, the Company's answer dated September 10, 1980 not only upheld the Company's position on the grievance, but stated significantly "we are prepared to handle through arbitration if this becomes necessary." I deem this last statement as constituting an acknowledgement by the Company that the grievance was ready for arbitration; that the Union had previously given notice of a request to appeal it to arbitration, by its earlier letter of July 21, 1980; and that no further notice was required by the Union to the Company to comply with the twenty day time limit.

On the foregoing basis the grievance is arbitrable.

The Company's unilateral installation of rotating shifts had the obvious effect of nullifying that part of the contract which gives employees the right to select their shifts on the basis of seniority. Under the rotating shift procedure, all employees are required to rotate on and among each and all of the shifts on a regular around-the-clock schedule. No employee gets any preference of shift, nor can any remain on a particular shift based on seniority as was the case when the shifts were fixed.

Article XXI Section 3 of the contract provides in pertinent part:

Employees will be given an opportunity to select their shifts, on the basis of seniority with the Employer once each six (6) months.

Manifestly the introduction of rotating shifts nullified this contract provision. Equally manifest is that a unilateral
act which renders a bilaterally negotiated provision inoperative or void, is inconsistent with the contract and hence a contract violation. The Arbitrator understands and appreciates the Company's business reasons for installing the rotating shifts, but the Arbitrator is bound to enforce the contract. And where the business needs (here the apparent wish of Boston Edison for rotating shifts, by the contract security force) and the contract are in conflict, the arbitrator must uphold the contract as bilaterally negotiated.

The exceptions set forth in Section 3 to "strict seniority" for the selection of shifts do not include the introduction of rotating shifts which perforce totally eliminate any shift selection by seniority. Those exceptions, not involved in this case apply to "training" and to special circumstances involving the numbers and qualifications of employees on any given shift. But those exceptions are all within the frame of a "fixed shift schedule.

Accordingly the Company is directed to cease and desist from further implementation of the rotating shifts; to return to the fixed shifts that obtained previously; and to permit employees to exercise their seniority rights under Article XXI Section 3 of the contract, subject to the specific exceptions therein.

The matter of "supervisors performing bargaining unit work arose as a consequence of the rotating shifts. Employees declined to work overtime and the Company used supervisory employees to fill the overtime needs. It appeared at the hearing that inasmuch as this part of the grievance was a result of and attendant
to the complaint over rotating shifts, and because employees had worked overtime under the fixed shifts, the issue would resolve itself satisfactorily with a return to fixed shifts. Therefore compliance with my Award by the Company and the reestablishment of fixed shifts is all that need be said and done about issue #3 in this arbitration.

Eric J. Schmertz
Arbitrator

DATED: June 22, 1981
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Local 540, United Plant Guard Workers of America

and

Globe Security Systems, Inc.

AWARD
Case #1130 0851 79

The Undersigned, duly designated as the Arbitrator and having duly heard the proofs and allegations of the above named parties, makes the following AWARD:

1) The grievance is arbitrable.

2) The Company violated the contract when it went from fixed shifts to rotating shifts beginning July 7, 1980. The Company shall forthwith discontinue rotating shifts and shall forthwith restore the fixed shifts which previously existed.

3) The Union's grievance that "supervisors are performing bargaining unit work" is granted to the following extent.

With compliance with Award #2 above the problem of "supervisors performing bargaining unit work" and the grievance relating thereto should automatically resolve itself. Under that circumstance, (i.e. the restoration of fixed shifts) employees may be required, and should expect to be required to work reasonable amounts of overtime provided they are given reasonable notice.

DATED: June 22, 1981

STATE OF New York )ss.: Eric J. Schmertz
COUNTY OF New York ) Arbitrator

On this 22nd day of June, 1981, 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.
Voluntary Labor Arbitration Tribunal
In the Matter of the Arbitration
between
Communication Workers of America
and
ITT World Communications

OPINION AND AWARD
Case #1330 0766 80

Only Arbitrator Thomas A. Knowlton knows whether, as the Union contends, his Award dated May 10, 1978 in case #1330 1035 77 between the above-named parties unintentionally overlooked or forgot to deal with the question of damages or to retain jurisdiction over that question; or whether, as the Company contends, he intended to deny any claim for monetary relief by making no reference to or provisions for damages.

Only Dr. Knowlton can give an authoritative answer to those questions. Dr. Knowlton is alive, well, practicing arbitration in this area and is available to provide a clarification of his Award.

As the issue of what Dr. Knowlton intended with regard to damages is a dispute between the parties, I am persuaded that that question should be resolved by inquiry to and an answer by him. My Award in the instant case is designed and intended to achieve that result.

Therefore the Undersigned, having been duly sworn and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

The parties shall jointly and in writing reinstate Arbitrator Thomas A. Knowlton's authority in case #1330 1035 77 and shall jointly ask him for a clarification of his Award in that case regarding the matter of damages or monetary relief as asserted and litigated in that case.

Dated: February 23, 1981
STATE OF New York )
COUNTY OF New York ) SS:

On this 23rd day of February, 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

International Ladies' Garment
Workers' Union

and

Jonathan Logan, Inc.

AWARD

In accordance with Article XLII of the collective bargaining agreement between the above named Union and Company the Undersigned, designated as the Arbitrator, held a hearing on October 12, 1981 in Atlanta, Georgia on the Union's claims on behalf of certain employees for severance pay, length of service payments and holiday pay resulting from the shut-down of the Company's Butte Knitting Mills Division.

Having considered the entire record before me, I make the following AWARD:

1. Severance Pay

The Union's claim for severance pay is denied.

2. Length of Service Payments

The Union's claim for length of service payments is granted as follows:

a. In accordance with Section 15b of the Butte Knitting Mills Supplemental Agreement effective June 1, 1979 the Company shall make contributions to the Health and Welfare Fund of 2% of the payroll of all employees who have been terminated in the calendar year 1981 in connection with
the shut-down of a plant or facility, and who, but for such termination would have been employed three or more years on December 1, 1981.

3. Holiday Pay

The Union’s claim for holiday pay is granted as follows:

a. Under Article XIII Section 2b of the Master Agreement the Company shall grant to the employees holiday pay for all paid holidays which have occurred or will occur within ninety (90) days following the last day of work of said employees.

4. In full response to all the Union’s claims in this case the forgoing Awards 1 through 3 shall apply to employees of the Company’s Butte Knitting Mills Division who are terminated in calendar year 1981 in connection with the shut-down of a plant or facility, provided such termination was neither voluntary nor for good and sufficient cause and provided further that such terminated employee is not and has not been offered other permanent employment with the Company.

Eric J. Schmertz
Arbitrator

DATED: October 21, 1981
STATE OF New York )
COUNTY OF New York )

On this 21st day of October, 1981, 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 forgoing instrument and he acknowledged to me that he executed the same.
On October 21, 1981 I rendered an Award in which I denied the Union's claim for severance pay, and, as particularized in that Award, granted the Union's claim for Length of Service Payments and Holiday Pay for certain employees affected by the shut-down of the Company's Butte Knitting Mills Division.

The following is my Opinion on those issues.

Severance Pay

The contract contains no provision for severance pay. It is universally well settled, and I have repeatedly so stated in other decisions, that the Arbitrator is bound to the explicit terms and conditions of the collective bargaining agreement and may not legislate provisions therein which the parties have not bilaterally negotiated.

Also, whether on an overall basis the Company has the financial ability to grant severance pay is immaterial. The fact is, and the record establishes, that the Company's Butte Knitting Mills Division has lost large sums of money over the last several years. The Company has established an economic justification for closing that Division.
I appreciate and am sympathetic to the economic difficulties which confront the employees, some of long service, who have been terminated as a result of the closing. The Union has made an eloquent equitable plea on their behalf. No matter how moved I may be by that plea, for the reasons indicated I am without authority to order payment of severance pay.

Those examples pointed to by the Union in which in other instances the Company granted severance allowances where the collective bargaining agreements contained no such explicit benefit, involved different contracts, a long standing practice in a different market or bilaterally negotiated arrangements between the parties involved. Here there is no such practice, supportive contract or arrangement. Hence those cited practices are inapplicable.

Length of Service Payment

Section 15b of the Butte Knitting Mills supplemental agreement effective June 1, 1979 reads:

(b) The Employer shall also contribute toward the appropriate Health and Welfare Fund two (2%) percent of a payroll consisting of all employees who will be employed three (3) or more years as of December 1st of that year. Such payments shall be made not later than October 1st to permit the Fund to provide eligible employees with a length of service payment.

The Division was closed prior to December 1, 1981. The Company asserts that because the employees were terminated before
and therefore not employed as of that date, it is not required to make payments for them to the Health and Welfare Fund under the foregoing contract provision.

The Company’s position is not persuasive. In my view the December 1st date presupposes that the Company’s Division will be in existence as of that date. It presupposes that some employees will be working on December 1st and that some others, who had been laid off or otherwise terminated under customary termination or lay off procedures would not be employed as of December 1st. In my judgement it was not intended nor does it contemplate the unusual circumstance of the closing of an entire Division, thereby foreclosing any of the affected employees from employment as of December 1st. Indeed, but for the Company’s decision to close the Division, it is logical and reasonable to assume that the affected employees would have continued to be employed as of December 1st. There is no evidence to conclude otherwise. In short, I am not persuaded that where employment as of December 1st has been totally obviated solely by the Company’s decision to close the Division, the Company can avoid its obligations under the foregoing clause. As I have ruled that the clause was not intended to cover terminations due to a total plant closedown, the Company remains obligated to make the required contributions to the appropriate Health and Welfare Fund covering the affected employees who were terminated in calendar year 1981 as a result of the shutdown of a Company plant.
or facility and who but for such termination would have been employed three or more years on December 1, 1981.

**Holiday Pay**

Article XIII Section 2b of the Master Agreement reads:

(b) An employee on leave of absence because of his own illness or death in his immediate family or on layoff shall be eligible for holiday pay if a paid holiday occurs within ninety (90) consecutive calendar days following the last day of work.

The narrow question is whether the affected employees were "on layoff" within the meaning of the foregoing clause. I am satisfied that they were, both in a contractual and well accepted labor relations sense. Their terminations were not due to their own fault or misconduct, but rather because there was a lack of business to make the Division sufficiently profitable to remain in operation. The Division was closed because of a lack of available, profitable work. The traditional characteristic of a layoff is when there is a diminution or cessation of available work. In my view that is what happened here.

Additionally, the foregoing contract provision does not make a distinction between a temporary or a permanent layoff. If the affected employees have contractual recall rights, whether as a practical matter they would ever be recalled, their terminations would meet the definition of a "layoff"
and they would be eligible for the holiday pay within the explicit language of the contract. Even if they do not have recall rights, their terminations, due to a cessation of available work still meet the classical definition of a "layoff", albeit permanent. And as the determinative contract clause makes no distinction between temporary or permanent layoffs, I am persuaded that the affected employees are eligible for holiday pay under either theory. Therefore the Company remains obligated and shall grant to the employees terminated in the calendar year 1981 as a result of the shutdown of a plant or facility, holiday pay for all paid holidays which have occurred or will occur within ninety (90) consecutive calendar days following the last day of work of said employees.

Eric J. Schmertz
Impartial Chairman

DATED: December 11, 1981
In the Matter of the Arbitration:

between

International Ladies' Garment Workers' Union

and

Jonathan Logan, Inc.

AWARD

In accordance with Article XLII of the collective bargaining agreement between the above named Union and Company the Undersigned, designated as the Arbitrator, held a hearing on October 12, 1981 in Atlanta, Georgia on the Union's claims on behalf of certain employees for severance pay, length of service payments and holiday pay resulting from the shut-down of the Company's Butte Knitting Mills Division.

Having considered the entire record before me, I make the following AWARD:

1. **Severance Pay**
   
The Union's claim for severance pay is denied.

2. **Length of Service Payments**
   
The Union's claim for length of service payments is granted as follows:

   a. In accordance with Section 15b of the Butte Knitting Mills Supplemental Agreement effective June 1, 1979 the Company shall make contributions to the Health and Welfare Fund of 2% of the payroll of all employees who have been terminated in the calendar year 1981 in connection with
3. Holiday Pay

The Union's claim for holiday pay is granted as follows:

a. Under Article XIII Section 2b of the Master Agreement the Company shall grant to the employees holiday pay for all paid holidays which have occurred or will occur within ninety (90) days following the last day of work of said employees.

4. In full response to all the Union's claims in this case the foregoing Awards 1 through 3 shall apply to employees of the Company's Butte Knitting Mills Division who are terminated in calendar year 1981 in connection with the shut-down of a plant or facility, provided such termination was neither voluntary nor for good and sufficient cause and provided further that such terminated employee is not and has not been offered other permanent employment with the Company.

Dated: October 21, 1981
State of New York )
County of New York )

On this 21st day of October, 1981, 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 forgoing instrument and he acknowledged to me that he executed the same.

 Eric J. Schmertz
 Arbitrator
In accordance with Article 10 of the collective bargaining agreement dated May 1, 1980 between the above named Union and Company, the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Did the Company violate the collective bargaining agreement when it assigned to Alice Seppell, an Administrative Secretary excluded from the bargaining unit, the work she previously performed when she held the position of General Secretary Senior in the bargaining unit? If so, what shall be the remedy?

A hearing was held at the offices of the Company in Irvington, New York on February 25, 1981 at which time representatives of the Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The propriety of Ms. Seppell's change of status from that of General Secretary Senior to Administrative Secretary is not disputed. When the executive for whom she worked became an officer of the Company she was reclassified as an Administrative Secretary in accordance with the Company's policy to exclude secretaries to Company officers from the bargaining unit.

What is challenged by the Union is her continued performance of much of the same work she performed when she was a bargaining unit General Secretary Senior. Citing various sections of the contract, the Union argues that Ms. Seppell is performing work which belongs to the bargaining unit; that as a result the bargaining unit has been reduced by one secretarial job (inasmuch as her previous bargaining unit job was not filled); and that the unit is thereby impermissibly eroded.
It is stipulated that between 80 and 85 per cent of the work which Ms. Seppell performs as a non-bargaining unit Administrative Secretary is the same work which she handled when she was in the bargaining unit. The other 15 or 20 per cent is undisputedly non-bargaining unit work and is not involved in this case. With regard to the disputed 80 to 85 per cent, the Company asserts that it was Administrative Secretary's duties all along and never bargaining unit work even when performed by Ms. Seppell while she was a bargaining unit employee.

I do not accept the Company's latter contention. Neither the contract nor any other document in evidence precisely defines work that properly belongs to either the bargaining unit or to those excluded from the unit. Nor are there job descriptions which would assist in any such definition. Therefore the question of whether specific duties are properly within a job classification, or in or out of the bargaining unit, is best answered by the specific duties which an employee performs and to which he or she is assigned in any given classification. That Ms. Seppell performed the disputed duties for a significant period of time while she was a bargaining unit General Secretary Senior is evidence that those duties were properly a part of that job classification.

However this does not mean that the disputed work must be assigned only to a bargaining unit General Secretary Senior. For the Union to prevail in that argument it must show by contract, by job description and/or by practice that the bargaining unit enjoys exclusivity with regard to that specific work.

The Union has not met that test. The evidence shows that as a practice there has been a distinct overlap in the performance of these varied duties by both bargaining unit General Secretaries Senior and non-bargaining unit Administrative Secretaries. In the absence of a specific contract clause prohibiting this overlapping jurisdiction and in the absence of delineated job descriptions which distinguish the work of the General Secretary Senior from that of the Administrative Secretary, the regular practice of having assigned the same duties to both job classifications establishes joint jurisdiction in both the bargaining unit and at the non-bargaining unit level.

That the Union did not complain of prior instances in which this work was performed by non-bargaining unit Administrative Secretaries because in those cases it did not result in a
diminution of the number of bargaining unit jobs, (i.e. the
bargaining unit vacancy created by the change was filled by
another employee) does not lessen the fact that by practice both
classifications, within and outside of the bargaining unit, did
the same work. That practice established joint or concurrent
jurisdiction, and though the Union's prior acquiescence is ex-
plained, its inactivity can hardly serve as a reservation of
rights it attempts to assert in this case.

Accordingly, the Undersigned duly designated as the
Arbitrator, and having duly heard the proofs and allegations
of the above named parties makes the following AWARD:

The Company did not violate the
collective bargaining agreement
when it assigned to Alice Seppell,
an Administrative Secretary ex-
cluded from the bargaining unit,
the work she previously performed
when she held the position of General
Secretary Senior in the bargaining
unit.

Eric J. Schmertz
Arbitrator

DATED: May 29, 1981
STATE OF New York ) ss.:
COUNTY OF New York )

On this 29th day of May, 1981 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.
The stipulated issue is:

Whether the Employer took wrongful disciplinary action against employee Dorothy Lane? If so should the thirty day suspension be rescinded and should she be made whole for the time and wages lost?

Hearings were held at the Hospital and at the Office of Collective Bargaining respectively on November 18 and December 9, 1980 at which time Ms. Lane, hereinafter referred to as the "grievant" and representatives of the above named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The accusation against the grievant, a nurses aide, for which she was suspended thirty days is that she repeatedly slapped a patient, Anna Eschert. The grievant denies the charge.

The Employer's case against the grievant is based on the reports and testimony of Rosemarie Bohen who was Mrs. Eschert's roommate at the hospital and who reported and testified that she witnessed the grievant slap Mrs. Eschert on the night of April 30, 1980. (Mrs. Eschert died of natural causes prior to this
The Union contends that because of her advanced age, the effects of a stroke and her withdrawn and unsettled demeanor resulting from her new arrival as a patient in the hospital at the time of the alleged incident, Mrs. Bohen is not a reliable or credible witness. I do not agree. I found her to be rational, lucid, calm and determined in her testimony and unimpeached in cross-examination. I accept her testimony as truthful and accurate.

It is significant to me that Mrs. Bohen has been both consistent and persistent in what she reported. Initially she told the grievant at the time she claims the incident occurred that she "would report" her. Thereafter, a day or so later she recited what she saw to one of her relatives, who in turn reported it to the Employer. Thereafter Mrs. Bohen repeated it to representatives of the Employer when they interviewed her. And subsequently she testified about the incident at this arbitration hearing. Her consistency in each of these settings over the period of time involved persuades me that she was determined to report and correct a wrong, and if what she claims she saw was only imagined or contrived, I do not think she would have been so persistent or remembered so well.

I also consider significant the exchange between the grievant and Mrs. Bohen at the time involved. It is undisputed that Mrs. Bohen stated to the grievant that she "would report her" when Mrs. Bohen claimed she saw the grievant slap Mrs. Eschert. It is
acknowledged that the grievant immediately replied to Mrs. Bohen
"I will report you." I construe the grievant's reply as defensive, argumentative and even threatening. Had there been no slapping I do not think the grievant would have so replied. Rather the reply if any, would have been questioning and of a surprised nature and tone. But to reply to the statement "I will report you" with the counter-threat "I will report you" leads me to believe that the grievant had something to hide and had done something about which she was spontaneously defensive. I conclude that what she was defensive about was the slapping.

I discount the testimony of Naomi Black another nurses aide. She testified, as did the grievant, that the grievant had some difficulty with Mrs. Eschert, because Mrs. Eschert would not remain in the bathroom as instructed while the grievant changed the bedding; and that each time Mrs. Eschert came out of the bathroom the grievant led her back into the bathroom by her nightgown, but at no time did she slap her. Ms. Black states that she saw this activity because she had completed her work in the room directly across the corridor and stood in the doorway of Mrs. Eschert's room and watched the grievant so engaged. Ms. Black states that it is the practice of the nurses aides to work in rooms parallel and across the corridor so that if either of them needs assistance the other aide would be available at approximately the same location. This last explanation is probative in my conclusions regarding this case. If, as Ms. Black states, she had finished her work and thereafter watched the grievant having difficulty keeping Mrs. Eschert in the bathroom, she would and should have then assisted
the grievant. That would have been the simple and expected implement-
tation of the stated purpose of two nurses aides working in
rooms parallel to each other. That Ms. Black now only reports that
she stood in or by the doorway and observed the difficulty the
grievant had with Mrs. Eschert, and did nothing to assist, leads
me to conclude that that is not the way it happened. Instead, I
believe that Ms. Black was at work in an opposite room assigned to
her and saw none or only part of what the grievant was doing and was
not in a position to observe or know the full events and more partic-
ularly whether the slapping took place.

Under all the circumstances I find that the Employer has
met the requisite burden of proof in a discipline case to sustain
its disciplinary action.

The Undersigned, duly designated as the Arbitrator, and
having duly heard the proofs and allegations of the above named
parties makes the following AWARD:

The Employer did not take wrongful
disciplinary action against Dorothy
Lane. The thirty day suspension was
for just cause and is upheld.

DATED: January 2, 1981
STATE OF New York )ss.:  
COUNTY OF New York )  

On this 2nd day of January, 1981, 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 Article III of the collective bargaining agreement dated September 17, 1979 between the above named Union and Employer, the Undersigned was designated as the Arbitrator to hear and decide the following stipulated issue:

Does the letter dated October 6, 1980 from Stanley Kern to Kevin Berry violate Article V A and/or Article XI A, B and H of the Agreement? If so, what shall be the remedy?

A hearing was held at the New York City office of the Employer on February 11, 1981 at which time the grievant and representatives of the Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs.

The grievant, Kevin Berry, is a Field Representative who the Employer has assigned to its Mid-Hudson Regional Office in Kingston, New York for the past four years. The grievant requested the Mid-Hudson assignment even though he resides in Albany, New York and had formerly been assigned to the Employer's Albany office. The grievant testified that the prior Regional Coordinator, John Fallon, afforded him a great deal of flexibility in determining whether to be physically present at the Mid-Hudson office on a daily basis. The grievant therefore frequently worked out of the Albany Regional Office, NYSUT Headquarters in Albany, and his Albany home.

Stanley Kern became the Mid-Hudson Regional Coordinator approximately three years ago. He became concerned about the grievant's practice of working in the Albany office rather than
Kingston. Kern indicated this concern to the grievant in December 1977. The grievant claims that he complied with Kern's instruction except on two special occasions. The grievant, however, did continue to work at his home. Kern objected to this practice and orally informed the grievant in the late winter or early spring of 1980. Kern stated that a review of the grievant's weekly activity report by the Albany Headquarters called attention to this practice. The grievant testified that he understood the objection to be solely the way he completed the weekly activity report and so he continued to work at his home. Kern orally warned the grievant again in May 1980 that "You are going to have to stop working from your home." The grievant asserts that he complied with this instruction between May 1980 and October 1, 1980. It is undisputed that the grievant received an approved, 11 week vacation during the summer of 1980.

On October 1, 1980 the grievant telephoned the Kingston office and reported that he would be at home that day. On October 2, 1980 he reported to the Kingston office and requested Kern to treat October 1 as a schedule readjustment day. Kern refused to do so and issued the October 6, 1980 letter that is the subject of the instant grievance.

During its opening statement at the arbitration hearing, the Union indicated that it was not challenging the Employer's action of docking the grievant one day's pay for an unauthorized absence on October 1, 1980, which is referred to in the first paragraph of the letter. Therefore that issue is not before the Arbitrator.

The second paragraph of the October 6 letter sets forth daily reporting procedures for the grievant. It, together with Paragraph 5, which reviews certain job requirements of the grievant, I find to be proper and reasonable exercises of managerial authority. The grievant testified that on October 1, 1980 he stayed at home because he had nothing to do that day for NYSUT and it was therefore unnecessary for him to come into the office. He further testified that he spent the day caulking windows at his home "thinking about NYSUT," and that "part of his job is to think about NYSUT." I consider this a violation by the grievant of previous instructions regarding "working at home" and a misuse
of his work time and responsibilities as a field representative. Indeed it appears to me to have been a defiant reaction to the verbal instructions that he was no longer to work at home. Therefore Kern's decision to address the grievant's job requirements in the letter and to set forth reporting procedures, albeit specifically for the grievant, are both understandable and reasonable under those circumstances and consistent with the Employer's authority under Article XI F and H of the Agreement. Accordingly my Award shall provide that Paragraphs 2 and 5 remain intact.

The third paragraph of the letter indicated the possibility of future schedule readjustments. Article V A provides in pertinent part:

"When an inordinate amount of time is spent in the performance of his/her assignment, an employee, upon notifying the office of his/her immediate supervisor, shall readjust his/her schedule if there does not exist an organizational need for such employee's services."

Vito DeLeonardis, Executive Director of the Employer, testified that this provision was designed to deal with the issue of "compensatory time" and has not been interpreted by an arbitrator heretofore. The clause expressly requires the employee to prove that an "inordinate amount of time" has been spent in performing an assignment before the clause is triggered. The employee must then notify the office of the immediate supervisor before readjusting the schedule. Whether the employee must secure prior approval from the supervisor depends upon the meaning of the clause "if there does not exist an organizational need for such employee's services." That clause is noticeably silent as to who is to make that determination. I therefore conclude that initially an attempt is to be made to arrive at a decision jointly. The employee must be able to establish to his/her supervisor that a schedule readjustment will not compromise the needs of the organization. In the absence of an objection by the supervisor, the employee may make the adjustment. If the supervisor does object to the schedule readjustment because from the supervisor's perspective the organization's needs would be prejudiced, then the employee and the supervisor should attempt to resolve the deadlock on a joint basis. If there is no
resolution of this impasse, the employee must comply with the employer's instruction subject to challenge through the grievance procedure. On this basis, my Award shall provide that paragraph three remain unchanged.

The fourth paragraph of the letter found the grievant to be derelict in his duty because he did not establish visual contact with his locals during September 1980. The testimony proved that the grievant did establish visual contact with 5 of his 12 locals during the month of September. The testimony also showed that the grievant had written a letter in the beginning of September to the presidents of each local in order to re-establish contact. On cross-examination Kern testified that he had been unaware that the grievant had sent that letter to each local president. Although the letter did not constitute visual contact, the purpose of the letter was to establish a relationship between the grievant and the local presidents for the coming school year. Having done this and in the absence of a clear requirement that each representative must visit each local on a monthly basis, I am unable to find the grievant derelict in his duties solely for failing to visit 7 locals during the month of September. As a result, the Employer's action in this regard is not reasonable and is therefore violative of Article XI H of the Agreement. My Award shall therefore order that paragraph four be deleted.

Paragraph six deems the letter to be a written warning. The Employer and the grievant had had previous discussions regarding where the grievant is to report to work. It is undisputed that the grievant's office is located at the Mid-Hudson Regional Office. Although the record reveals that at one time there was a problem with the grievant working at the Albany Regional Office and at NYSUT Headquarters, the grievant eliminated this problem. I view the two incidents when the grievant used the Albany Office--once for an arbitration witness' convenience and once for contract negotiations involving a teachers union in West Rutland, Vermont--to be proper and not subject to discipline within Article XI H. However, my previously stated opinion on the issue of "working at home" supports Management's corrective discipline as envisioned by Article XI F and H. Therefore, the reference and objection to "working at home" as a basis of a written warning is a proper exercise of managerial authority.
Accordingly, my Award shall order the reference to "the Albany Regional Office, or Albany Headquarters" to be deleted and the balance of paragraph six to remain intact.

With the foregoing decision, the Arbitrator makes the following observation. For members of NYSUT to be serviced effectively, the Regional Coordinator and the grievant must establish an appropriate working relationship. The differences that are the subject of this case have been adjudicated by this Opinion and Award. For the future I encourage Messrs. Berry and Kern to put these disagreements behind them and to proceed cooperatively in fulfilling their fundamental and mutual responsibilities to serve the needs of the NYSUT members.

The Undersigned, duly designated as the Arbitrator and having duly heard the proofs and allegations of the above named parties, makes the following AWARD:

The letter dated October 6, 1980 from Stanley Kern to Kevin Berry does or does not violate the Agreement as specified below and shall be revised as indicated:

1. Paragraph 1 is unchallenged and shall remain unchanged.
2. Paragraphs 2 and 5 do not violate the Agreement and shall remain unchanged.
3. Paragraph 3 does not violate the Agreement and shall remain unchanged.
4. Paragraph 4 violates Article XI H and shall be deleted.
5. In part, Paragraph 6 violates Article XI F and H and shall be amended by deleting the phrase "the Albany Regional Office, or Albany Headquarters." The balance of Paragraph 6 does not violate the Agreement and shall remain unchanged.

Eric J. Schmertz
Arbitrator

DATED: May 15, 1981
STATE OF New York )ss.: COUNTY OF New York 

On this 15th day of May 1981, 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:  
Communication Workers of America:  
AFL-CIO:  
and:  
New York Telephone Company:  

OPINION AND AWARD  
Case Nos.  1-80-140  
A-79-104

The stipulated issue is:

Was there just cause for the suspension of William Moody? If not what shall be the remedy?

Hearings were held on February 2, February 4 and March 23, 1981 at which time Mr. Moody, hereinafter referred to as the "grievant" and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. Both sides filed briefs. The Company filed a reply-brief.

On January 31, 1979, the grievant, a building mechanic, drove his Company truck while intoxicated and had a chargeable accident. Immediately thereafter he entered South Oaks, an alcoholic rehabilitation facility. When released from South Oaks in April, 1979, the Company discharged him. Some twenty-one months later, on January 26, 1981, he was reinstated by the Company without back pay, with the interim period treated as a disciplinary suspension. The propriety of that disciplinary action is the issue in this case.

Though the evidence discloses that the grievant had a drinking problem for some time, it was not authoritatively known that he was an alcoholic until treated at South Oaks.
That he is an alcoholic was both acknowledged and undisputed in the course of the arbitration hearing.

Absent a contract provision, other bilateral arrangements, or a binding practice to the contrary, an employer has the right to discharge an employee who drives a company vehicle while intoxicated and who, as a consequence, causes an accident. In that circumstance, mitigation of that penalty because the employee suffers from the disease of alcoholism is a matter within the employer’s discretion and not for the arbitrator.

If the employer exercises that discretion by establishing circumstances or criteria for the imposition of the penalty less than discharge, the union’s right to challenge is limited to whether the circumstances and criteria are arbitrary, capricious or unreasonable and/or if those established conditions and standards are unevenhandedly or discriminatorily applied or denied to employees similarly situated.

Here there is no special contract provision dealing with the matter of disciplinary penalties for an alcoholic. Nor do I find any bilaterally negotiated or agreed to arrangement or a practice of mitigation applicable to the essential facts of this case.

Instead, the Company has established a Policy under which it will consider mitigating or not imposing disciplinary penalties for employees who are alcoholics and who commit disciplinary offenses. Relevant to this case are two specific Policy conditions, both of which the grievant failed to meet. One is that the affected employee undertake an alcoholic rehabilitation program that is under the control of or approved by
the Company's Medical Department. The other is that the affected employee be in such rehabilitation program before or at the time the disciplinary offense occurs. This latter "umbrella" of protection is referred to in the Company "Policy" as follows:

During the period of cooperative rehabilitation (in which the employee is cooperating with the program of rehabilitation specified or approved by Medical) the Company recognizes that occasional lapses may occur but no disciplinary action should be taken by supervision without consultation with the Medical Department.” (emphasis added)

The foregoing means to me that the matter of a penalty in response to a disciplinary offense will be considered only when participation in the rehabilitation program predates or coincides with the offense. In the instant case the grievant entered a rehabilitation program after the incident for which he was disciplined.

As the Company's policy with regard to help and consideration accorded an employee who is an alcoholic or who suffers from a drinking problem comes into play only when and after the employee qualifies for the "umbrella" protection, I cannot find that the Company violated its Policy by disciplining the grievant for an offense which took place before his rehabilitative effort, and before the effective point of that Policy.

The South Oaks rehabilitation facility was not a program under the auspices of or approved by the Company's Medical Department. However I do not have to decide whether its program was better or as good as the program sponsored by the
Medical Department or any other program approved by Medical, or whether it was arbitrary or discriminatory for the Company to fail or to decline to give its approval to South Oaks. Nor need I decide whether earlier referrals of Company personnel to South Oaks on an informal or even organized basis constituted "constructive" approval. Such determinations are not necessary because the grievant did not meet the earlier condition, namely the requirement that he be "cooperating with (a) program of rehabilitation..." when the "lapse" or offense took place.

That the Company knew of the grievant's drinking habits before he committed this offense does not mean that it waived its right to impose discipline for the serious drinking-related incident involved in this case. It is well settled that an employer's willingness to help employees with drinking problems and institutionalized programs to assist them are designed for and applicable to normal employment circumstances, but not as substitutes for discipline including discharge if an alcohol-related disciplinary offense occurs. In short, I view any such program by an employer, and more particularly the Company's program herein as preventative and rehabilitative, not as a bar to the exercise of the Company's inherent disciplinary authority, when preventive procedures and rehabilitation fail.

Considering the Company's legitimate interest in according its employees preventive and rehabilitative programs for drinking problems and alcoholism, so as, in part at least, to obviate disciplinary difficulties, I cannot find the requirement that the employee be under the "umbrella" of protection before he
is eligible for mitigation or waiver of a disciplinary penalty, to be an arbitrary or unreasonable exercise of the Company's discretion in determining the conditions under which any such consideration or mitigation will apply.

Examples cited by the Union of cases in which discharge or other discipline was not imposed for alleged alcohol-related offenses, and where the affected employees were not at the time in an approved alcohol rehabilitation program are different or unclear factually, and/or involve employees not similarly situated to the circumstance of the grievant's case. As such they do not support the claim that the grievant was discriminatorily treated.

As the Company had the right to impose the penalty of discharge under the circumstances of this case, it follows that it committed no violation by transforming that discharge into a twenty-one month suspension—a penalty less than discharge.

The Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

There was just cause for the suspension of William Moody.

ERIC J. SCHMERTZ  
DATED: August 12, 1981  
STATE OF New York  
COUNTY OF New York  
Arbitrator

On this 12th day of August, 1981, 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
Communication Workers of America and
New York Telephone Company

The stipulated issue is:
Was the grievant, Shawn Sullivan suspended for just cause?

Hearings were held on August 11 and September 2, 1981 at which time the grievant and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievant, a steward, was suspended five days for improperly taking a Company record from a fellow employee who was responsible for maintaining that record; retaining the record in his exclusive possession (by placing it in his truck) without authority; and refusing or failing to return the record to the Company when directed to do so by supervision. The Company asserts that the grievant's conduct in this connection was in violation of rules set forth in the booklet "The Codes We Work By," particularly the section requiring all employees to "be alert at all times to safeguarding records...."

Some of the elements of the Company's case have been proved and some have not. I find it unnecessary to determine whether the grievant took the records directly from the person of the employee responsible for maintaining them or rather removed them from the cafeteria table where, the Union asserts, the latter
employee left them. That determination is unnecessary because I am not persuaded that at the time the records came into the grievant's possession he knew it was "an official Company record." The documents in question were on hand drawn charts with handwritten notations, and not on any formal printed form. By appearance alone it is questionable whether the grievant knew or should have known at that point that the documents were official records of the amount of time certain employees took to complete assignments, recorded at the specific request of supervision. Though the testimony at the hearing by Mr. Beckford, the employee responsible for keeping the records, was that he told the grievant that he was keeping the time records at the specific request of supervision, there is substantial evidence to the contrary. Not only the grievant but several other employees who claimed they were present in the cafeteria at the time that the grievant challenged Beckford regarding the propriety of keeping such records, stated that Beckford said he was doing it on his own and was not instructed to do so by supervision.

I am inclined to credit the latter testimony as accurate. In view of the fact that the Union, and particularly the grievant in his capacity as a shop steward, objected to surveillance by one union member of the amount of time other bargaining unit employees took to complete assignments, I think it probable that faced with an accusation that he was doing something contrary to Union policy, Beckford chose to avoid criticism from his peers by explaining that he was not keeping the records for any official or objectionable purpose, but rather "on his own."
Under the forgoing circumstance I cannot conclude that at the time the grievant took the records from Beckford or removed them from the cafeteria table, (assuming Beckford left them at that location), he knew it was an official Company record.

However he is not excused. Thereafter he was interviewed by a representative of management about the incident and instructed to return the records forthwith. With that directive he knew or should have known that the documents involved were Company records, maintained in accordance with managerial instructions. He should have then returned them without failure or delay. I hold him responsible for not doing so. He explained that in some manner unknown to him the records which he had placed in his truck were removed from the binder and disappeared. And it was the binder alone which he gave to the management representative. I do not accept his claim of innocence. It was his truck in which he placed the records. I am not persuaded that the records were removed from the binder and from inside the truck without his participation, knowledge or responsibility. By returning only the binder to the Company he exhibited a defiance of managerial instructions, and by doing so demonstrated his knowledge or recognition, at least at that point that the documents were "Company records." His retention of the records in his possession when he was not the person authorized to maintain custody thereof is inconsistent with the Code duty of "safeguarding."

In short, the grievant committed part of the offense charged, namely his retention of and refusal to return an official Company
record when directed to do so. He did not commit that portion of the offense charging him with taking or removing an official Company record without authorization. Under the circumstances a portion of the disciplinary suspension imposed is appropriate and a portion should be reversed. I conclude that the appropriate penalty under these particular circumstances is to reduce the five day suspension by one-half to a suspension of two and one-half days.

The Undersigned, duly designated as the Arbitrator and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

The five day suspension of Shawn Sullivan was not for just cause. There is just cause for a suspension of two and one-half days. Accordingly the suspension is reduced to the latter amount and Mr. Sullivan shall be made whole for the difference.

Eric J. Schmertz
Arbitrator

DATED: October 20, 1981
STATE OF New York  
COUNTY OF New York  

On this 20th day of October, 1981, 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 forgoing instrument and he acknowledged to me that he executed the same.
AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration

-between-

NORTH MERRICK FACULTY ASSOCIATION

-and-

BOARD OF EDUCATION NORTH MERRICK U.F.S.D.

Re: Evaluation of Ms. Annette Montanile

In accordance with the applicable provisions of a contract existing between the North Merrick U.F.S.D. and the North Merrick Faculty Association, hereinafter referred to as "District" and "Association" respectively, and in accordance with the arbitration rules of the American Arbitration Association, Eric J. Schmertz, Esq., having been selected as Arbitrator, a hearing was held in Merrick, New York, on September 17, 1981.

The Association and the Grievant were represented by Jeffrey P. Englander, Esq. of Friedlander, Gaines, Cohen, Rosenthal & Rosenberg. The District was represented by Richard S. Naidich, Esq. of Naidich & Smolev, P.C.

Ms. Annette Montanile, the Grievant, appeared and testified as a witness for the Association.

The District's witnesses were Dr. Joseph Tucker, a principal and Dr. June Irvin, Superintendent of Schools.

FACTS:

The Grievant, Annette Montanile, has been a teacher in the North Merrick U.F.S.D. for 25 years. On June 11, 1980, a year-end evaluation was made by Dr. Tucker, Building Principal,
of Ms. Montanile's performance during the preceding school year. The evaluation consisted of two type-written pages together with photostatic copies of seven letters purportedly annexed as substantiation of the contents of the evaluation made by Dr. Tucker.

Each of the letters annexed to the evaluation appear to have been from parents of children taught by Ms. Montanile and bear dates of March 20, 1980 (two letters), March 21, 1980, March 22, 1980, April 28, 1980, April 30, 1980 and May 19, 1980. In each instance the names of the students and the names of the parents have been deleted.

In June of 1980, the original letters, copies of which were annexed to the evaluation, were placed by the District in Ms. Montanile's personnel file in a sealed envelope and have remained there through the date of the Arbitration. The parties agree that Ms. Montanile was given a copy of the evaluation together with the annexed copies of the letters, the names of the students and parents having been deleted. The parties further agree that Ms. Montanille was not shown the original letters.

DISPUTE:

The dispute, as submitted by the Association, involved the meaning, interpretation and application of ARTICLE XXIV, Paragraphs A, B and C of the contract between the parties (a successor agreement was in effect at the time of the Hearing, however the parties agree that the applicable provisions are identical in both contracts). Specifically the Association claims that the evaluation, in the form submitted to Ms. Montanile, denied her rights and protections accorded under the various paragraphs of ARTICLE XXIV.

The Grievant claims that the evaluation should be removed from her file and thereafter be rewritten to delete all references to the letters or their substance, and that the copies of the parents' letters should not be annexed to such redrafted evaluation. The Grievant further urges that the original letters should be removed from her personnel file. Furthermore, the Grievant asks that reference to a prior incident involving one particular student, likewise be deleted from the evaluation since that incident was the subject of a prior grievance proceeding which was subsequently resolved by the parties in a manner favorable to the Grievant.
The District argues that the evaluation is proper as contemplated by the contract between the parties and that the reference to, and inclusion of, copies of parents letters, albeit with the names of parents and students deleted, does not violate the agreement between the parties.

The District contends that the deletion of the names in the copies submitted to Ms. Montanile was done so for the protection of the rights of the students involved. The District urges that even in the event that the evaluation is found to have been improper, that the original letters should be maintained in the personnel file.

DECISION:

The Arbitrator finds that the evaluation dated June 11, 1980 is improper. While it is understandable that the District would seek to protect the identities of the children and parents who complain of or criticize a school teacher, the rights of that teacher in responding to such criticism must be considered paramount.

Article XXIV of the contract provides in pertinent part that "any teacher dissatisfied with his evaluation shall have the right to file a written reply which shall be appended to the evaluation." I specifically find that it was not possible for the grievant to compose effectively a written reply in this case, since the identities of the children and parents were withheld from her.

For that reason, I order that the evaluation be removed from the Grievant's personnel file and redrawn removing the last paragraph of such evaluation. Since that portion of the evaluation specifically refers to the letters received by the District, I also direct that the amended evaluation should not contain the copies of letters previously annexed. Additionally, since it is clear from the evidence that the substance of the first complete sentence on the second page of the evaluation, beginning "This year it was necessary . . . " was aired and informally resolved through prior exercise of the contractual grievance machinery, I will also order that that sentence of the evaluation be deleted with the understanding that the redrawn evaluation shall make no reference to the incident in question. Once the evaluation has been amended in accordance with the foregoing it should be delivered to Ms. Montanile who shall then have a reasonable opportunity to comment on its contents in accordance with the terms of the contract.
Notwithstanding the foregoing, I find that the original letters have been properly placed in Ms Montanile's personnel file. It appears to me that they were filed within three months of their receipt by the District in accordance with the requirements of the contract. I see no sense or purpose to require the District to remove these letters since the weight of the testimony at the hearing clearly indicated that it has been the District's practice and policy to include letters from parents where deemed appropriate, in teachers personnel files. It further appears from the testimony that on prior occasions such letters have been included in Ms. Montanile's personnel file. Without characterizing the contents of such letters, I can find no reasonable basis to exclude them since it is acknowledged that on prior occasions favorable as well as unfavorable letters from parents have been included in this Grievant's file.

The Association argues that in failing to show to Ms. Montanile the original letters, the District waived its right to retain them in the file since the contract requires that any material of a derogatory nature placed in a teacher's personnel file must be submitted to the teacher. I need not determine whether or not in other instances the District has the right to place material of a derogatory nature in a teacher's personnel file and subsequent thereto allow the teacher an opportunity to read the material. I am satisfied that in this case the teacher was made aware of the contents of the letters, prior to the letters having been placed in her file and do not believe that the deletion of the names of the parents and students should be a basis for ordering the District to remove the original letters.

As a safeguard to Ms. Montanile's rights, I order that the District forthwith permit her to view the original letters and allow her reasonable time thereafter to comment on their contents should she so desire.

Eric J. Schmertz, Arbitrator

DATE: January 15, 1982
STATE OF New York )ss.:
COUNTY OF New York )

On this 15th day of January, 1982, 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
Paper Handlers' Union No. 1 and
Pennsylvania Truck Lines, Inc.

The stipulated issue is:

Whether Michael Castella was terminated on April 7, 1980 for just cause?
If not what shall be the remedy?

A hearing was held on December 1, 1980 at which time Mr. Castella, hereinafter referred to as the "grievant" and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs.

The grievant, a fork lift truck driver, was terminated because he did not meet the physical requirements of that job.

When he was 13 or 14 years old the grievant lost the sight in his right eye. This disability was not known to the Company when he began employment as a lift truck driver ten years ago in 1971. It came to the Company's attention in March of 1980 when the sightless eye was surgically removed because of an infection.

The Company's physical qualifications for drivers includes "vision...of at least 20/40 in each eye...." or in other words sight with both eyes.

The Company stipulates that the grievant had a good driving and operating record, had no accidents, and that though he did not disclose his disability to the Company when originally hired, the instant termination was not for that reason and that this is not a disciplinary case.

The record also shows that the grievant drives a car and has done so without accident, and that subsequent to his termination he obtained jobs driving a fork lift truck without accident
or incident for other employers.

Though the grievant's work for ten years was unblemished by accident or other incident which could relate to his monocular vision, and though he is to be commended for apparently overcoming this disability in connection with his employment, I cannot find the Company's minimum qualifications for drivers of vehicles to be arbitrary or unreasonable. The fact is that from the time the Company learned of his monocular condition it legally exposed itself to liability if an accident related to that condition thereafter occurred. Nor is it unreasonable for the Company to have higher physical standards for the operators of its trucks, including a fork lift truck, than is required by regulations applicable to the operation of automobiles by the general public.

Therefore the Company had the right to remove the grievant from the job of fork lift operator. But I am not persuaded that it had the right to terminate him from its employ at that point. His disability, in light of the Company's physical qualifications for drivers, meant that work as a fork lift operator was no longer available to him. I deem it comparable to when there is a diminution or lack of available work in a particular job classification. Under that circumstance, employees affected by the unavailability of work have the opportunity to be placed in other vacant job classifications in which work was available and/or the right, based on seniority, to bump into other eligible positions which they are qualified to perform and which are occupied by less senior employees.

Section 18 (PRIORITY) of the collective bargaining agreement between the above named parties supports the latter procedure. It provides for plantwide seniority in cases of layoffs. It means that where there is a lack of work or a diminution of work the "last man employed", or in other words the employee with the least seniority shall be "the first to be laid off." (i.e. the first to lose his active employment). Hence, if an employee is removed from the job of fork lift operator because work in that classification is no longer available to him, he should be allowed to bump into another job in the plant which he is capable of performing and which is occupied by a junior employee. Having interpreted the grievants removal from the fork lift driver job because of his monocular condition as synonymous with a lay off for lack of available work in that classification, he should have
been advised of and given the opportunity to retain employment under the provisions of Section 18 of the contract. Also the Company should have determined whether there was a vacant job into which the grievant could be placed, and if so it should have offered him that chance.

Though the record does not disclose whether there were any such vacancies, or whether the grievant could have bumped into some other job and if so which, I am satisfied that with ten years of seniority he could and should have been retained in one capacity or the other and that under either or both circumstances there was some other job, either equally rated with the fork lift driver position or of lesser rank, which the grievant could have performed and to which his seniority would have entitled him. There is no evidence that the Company offered him either opportunity or accorded him either right.

Under the foregoing circumstance the grievant's termination was not proper. He should have been continued in the Company's employ until the Company closed its plant and ended its operations on June 29, 1980. Therefore his discharge is reversed and his employment record should show a continuity of employment until that latter date. Inasmuch as the evidence shows that the grievant secured employment elsewhere during the period of his termination, my Award will not provide for back pay.

The Undersigned, duly designated as the Arbitrator and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

There was not just cause for the termination of Michael Castella on April 7, 1980. His discharge is reversed. His records should show a continuity of employment until the Company closed its terminal on June 29, 1980. He shall not receive back pay for the period April 7 to June 29, 1980.

Eric J. Schmertz
Arbitrator

DATED: March 23, 1981
STATE OF New York )
COUNTY OF New York ) ss.
On this 23rd day of March, 1981, 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.
The stipulated issue is:

Did the Company violate Article 6.03 d of the collective bargaining agreement in connection with the termination of Max D. Creviston? If so what shall be the remedy?

A hearing was held in Nashville, Tennessee on June 16, 1981 at which time Mr. Creviston, hereinafter referred to as the grievant and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. A stenographic record was taken and both sides filed post-hearing briefs.

Article 6.03 d of the contract reads:

An employee shall have his seniority and his name removed from the seniority list for any of the following reasons:

   d. Failure of a laid-off employee to return to work within five (5) working days after being notified by certified mail to report to work.

The Company contends that the grievant was "notified" of his recall to work within the meaning of the foregoing contract provision, but failed to respond. Following expiration of the specified time limit the Company notified him of his termination.

There is no question that the Company mailed a recall
notice to the grievant by certified mail. It is undisputed that he did not personally receive it.

The Union contends that not only did the grievant not receive the certified letter but did not know of its existence or that he had been recalled. The Company asserts that from common knowledge in the community he knew of the recall; knew that a certified letter had been sent to him; that the letter contained a recall notice and that that knowledge constituted notification within the meaning of the contract.

Based on the record I conclude that the grievant knew that a certified letter had been sent to him by the Company and that the certified letter contained notice of his recall to work. Under those circumstances I find that the notification requirement of Article 6.03 d was met.

I accept as accurate the testimony of the employee of the postal service who stated that two attempts were made to deliver the certified letter to the grievant personally at his home and that on both occasions the usual post office notice was left advising that a certified letter was at the post office.

I accept as accurate and credible the testimony of Evelyn Parker, a Company timekeeper, that while attending a junior high school football game she saw the grievant, whom she did not then know but later identified, and heard him state to a companion that he "had a registered letter", that he "had not picked it up yet", and "was not ready to return to work yet."

Though Miss Parker's initial identification of the grievant by a single photograph shown to her by a Company personnel officer might not meet the requisite standard in a criminal
investigation, the parties need not be reminded that this is not a criminal case and that the evidentiary standards in an arbitration are less rigid. More important however is that Miss Parker's proximity to the grievant at the football game was a matter of feet, and that her later and in-person identification was positive and unequivocal. I find no reason in the record why she would fabricate or misrepresent what she saw and heard. Therefore I conclude that her observations and what she overheard were accurately reported both to the Company and at the arbitration hearing. Even the single photograph shown to her by the personnel officer was not as unorthodox as it might seem. Only a few employees had not responded to the recall notices, and the evidence indicates that the grievant was the only one who fit Miss Parker's description. Hence it was not unreasonable albeit perhaps imprudent for the personnel officer to show her only one photograph.

The results of the polygraph test which the Union offered in evidence in an effort to show that the grievant told the truth when he stated that he was not at the football game, is not probative evidence in refutation. The administrator of the test was not present at the hearing and did not testify how the test was given and under what conditions. The test was arranged by the Union without notice to or participation or observation by the Company leaving questions of its self-serving nature, if not credibility, unanswered. The results of the test were in typed transcript form unsupported by the underlying tape recordings or testimony of those recordings. These questionable aspects of
the test, viewed in the light of the debatable conclusiveness of polygraph tests generally and their questionable admissibility into evidence, nullifies its evidentiary value in this proceeding.

I do not find that the Company "discriminated" against the grievant with regard to the recall procedure. All employees in this particular recall were recalled in the same manner, by certified letters. Only in a few prior recalls did it also or alternatively, in a few instances, use the telephone. I do not find those few cases to constitute a practice contrary to the use of certified mail, and especially not in the instant case when all the recall notices were by certified mail as mandated by Article 6.03 d of the contract.

Finally, under the particular circumstances of this case I do not find that Article 6.03 d requires that the certified letter physically reach the addressee. Here, a certified letter was sent to the grievant. The post office made efforts at delivery. With my finding that the grievant knew of the letter and its contents, notification as contemplated by Article 6.03 d was satisfied by that knowledge.

Accordingly the Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

The Company did not violate Article 6.03 d of the collective bargaining agreement in connection with the termination of Max D. Creviston.

DATED: August 11, 1981
STATE OF New York ) ss.: Eric J. Schmertz
COUNTY OF New York ) Arbitrator

On this 11th day of August, 1981 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.
The stipulated issue is:

Did the District violate Article XI of the collective bargaining agreement in assigning teachers of special subjects at the Eastplain School to duties of attending to student arrivals and performing after school bus duties?

A hearing was held at the District offices in Hicksville, New York on July 30, 1981 at which time representatives of the above named Union and District appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The Union claims that the assignment of the disputed "bus duty" was a "new rule...and policy" which "substantially affect the wages, hours or terms of conditions of employment of the teaching staff" within the meaning of Article XI of the contract and hence may not be unilaterally promulgated or implemented by the District. Additionally the Union contends that the assignment of the disputed work just to teachers of special subjects and not to classroom teachers is discriminatory as to the former and hence prohibited.

The Union's two contentions are rejected. The collective bargaining agreement is applicable to all of the schools of the
District, not just to the Eastplain School. The evidence shows that at the other schools covered by the contract teachers are assigned to and regularly perform "bus duty" on the arrival and departure of students, as a regular part of their duties and assignments. This has gone on for some time without objection from or protest by the Union. Hence, based on practice as well as on substantive safety considerations, this type of work is and has been among "duties properly assigned" within the meaning of Part II Section 1 of the collective bargaining agreement. Additionally the assignment falls within the regular working hours and regular work day of the teachers involved and hence does not have a substantially new affect on the wages and hours of the employees involved. And because both by practice and substantively it is a "proper assignment", it is not a new rule or policy that substantially affects conditions of employment.

The issue narrows to whether the District acted discriminatorily by assigning the work to just the teachers of special subjects and did not rotate the assignment amongst all the teachers including classroom teachers. Though the record shows that at the other schools in the District this type of bus duties is assigned to all members of the faculty on a rotating basis, the evidence also shows that certain duties such as supervision of the cafeteria, is performed at other schools by classroom teachers but not teachers of special studies. The Union does not claim that this latter circumstance discriminates against the classroom teachers. It seems to me that if teachers of special studies can be excused from cafeteria duty it is not discriminatory to require them to perform bus duty at the Eastplain School without the participation in that assignment of
classroom teachers. I am satisfied that the District makes these types of work assignments depending on the availability of time and personnel. Whereas much of the work involving the supervision of study halls, corridors, the cafeteria and the arrival and departure of buses is parceled out to all teachers on a rotational basis, I do not find it discriminatory, within the traditional meaning of that word, for certain of these duties to be assigned only some of the teachers as in the case of cafeteria duty at many of the schools and bus duty at the Eastplain School. In the instant case the District has shown that the teachers of special studies at the Eastplain School had the available time within their regular work day to take on this assignment, which for each teacher when so assigned amounted to approximately ten minutes a day.

Accordingly the Undersigned duly designated as the Arbitrator and having heard the proofs and allegations of the above named parties makes the following AWARD:

The District did not violate Article XI of the collective bargaining agreement in assigning teachers of special studies at the Eastplain School to the duties of attending student arrivals and performing after school bus duties.

DATED: August 5, 1981
STATE OF New York )ss.: COUNTY OF New York )

On this fifth day of August, 1981, 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.

Eric J. Schmertz
Arbitrator
The stipulated issue is:

Did the District violate the contractual salary schedule in its implementation thereof during the 1980-1981 school year? If so what shall be the remedy?

A hearing was held at the District's offices on June 17, 1981 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 Arbitrator's Oath was waived.

I do not find any contractual obligation or promise on the part of the District to "expend," in its implementation of the negotiated salary and increment increases, the total amount of money which the District told the Union said increases would cost. Rather the parties negotiated for and agreed on certain benefits, namely a specified percentage wage increase and incremental movements for those eligible. That the cost calculated and discussed at negotiations could and probably would change between then and the time of implementation of the new contract, due to layoffs, replacements, and other cost saving methods was well within the expectations and contemplation of the parties.

Had the Union intended that the District be bound to spend or "expend" the total amounts of the then projected costs, the Memorandum of Understanding and/or the contract should have explicitly so provided. They do not.

Instead, what is called for and required is a 6 per cent salary increase and increment step-ups equivalent, on the average to an additional 3 per cent. Those percentages, as is customary, and in the absence of specific provisions otherwise, are based on
the payrolls in existence at the time of implementation. The District has complied with that requirement and I find no contractual provision requiring a different method of calculation or implementation. In the absence of any such special requirement, and in the absence of any specific contract language on how and to whom the increments were to apply, I cannot find that the District erred in not moving all employees at Step 15 to Step 20.

Accordingly, the Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above named parties, makes the following expedited AWARD:

The District did not violate the contractual salary schedule in its implementation thereof during the 1980-1981 school year.

Eric J. Schmertz
Arbitrator

DATED: June 18, 1981
STATE OF New York } ss.:
COUNTY OF New York } ss.:
FEDERAL MEDIATION AND CONCILIATION SERVICE, ADMINISTRATOR

In the Matter of the Arbitration:
between:
United Steelworkers of America, Local 15135
and:
Sherwood Medical Industries

The stipulated issue is:
Was there just cause for the disciplinary suspensions of a total of eight days and two five hour Saturday shifts of Phoebe Gannon? If not what shall be the remedy?

However, for initial determination is whether a reprimand given Ms. Gannon prior to the aforementioned disciplinary suspension is substantively subsumed within the stipulated issue and arbitrable thereunder.

A hearing was held in Glen Falls, New York on June 4, 1981 at which time Ms. Gannon, hereinafter referred to as the "grievant" and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. Both sides filed post-hearing briefs.

The grievant's suspensions referred to in the stipulated issue were imposed on June 27 and August 15, 1980 respectively. It is undisputed that the Company and the Union agreed to merge the two grievances which arose therefrom into the issue for determination in this arbitration.

Previously, on June 13, 1980, the grievant received a reprimand. The Union contends that that reprimand is a part of
the "progressive discipline" leading to and culminating in the two suspensions; that the propriety of the suspensions rest in part at least, on the prior reprimand, and that all three disciplinary penalties must therefore be adjudicated on their merits; and that at the grievance meetings on the suspensions, the Union proposed and the Company agreed to include the reprimand as part of the issue in this arbitration.

The Company denies that there was any agreement to include the reprimand on its merits as part of the suspension grievances or as part of this arbitration. It asserts that the Union grieved the reprimand separately from the subsequent suspensions; that the reprimand grievance went through the steps of the grievance procedure, but was not filed for arbitration thereafter. The Company argues that the reprimand grievance is no longer arbitra-ble because it was not submitted to arbitration as required by Article 6 Sections 6.07 and 6.08 of the contract. Those sections require that the "appeal to arbitration" be by written notice from the Union International Staff Representative and given to the Industrial Relations Manager within thirty (30) calendar days after receipt of the Company's written answer in Step 3."

The relevant portions of Section 6.08 provide that

"If the employee or the Union fails to follow the foregoing grievance procedure in accordance with the... time limits and conditions contained therein, the grievance shall be deem-
ed settled on the basis of the Company's last answer, and shall not be subject to further appeal or review."

There is no question that the Union did not formally appeal
the reprimand grievance to arbitration in accordance with the precise time limits and procedures set forth above.

The Union's position on the arbitrability of the reprimand grievance is understandable, logical and reasonable. However it is not in accord with the bilaterally negotiated provisions of the contract, nor is it supported by sufficient probative evidence to establish a bilaterally agreed to variation of the contract. And it is to the contract and the evidence that the arbitrator is bound.

The reprimand preceded the first suspension by only a few days. It was and is part of the "progressive discipline" formula applied to the grievant by the Company. The subsequent, more severe penalties of three and five day suspensions were founded both procedurally and substantively on the previous discipline, including the first - the reprimand. As all three grievances involved the same employee, were close in time, and as such could be construed as arising from the same or closely related circumstances, I can understand, logically, how the Union deemed that all three should go to arbitration together, and why it tried and probably believed that an agreement to do so was reached with the Company.

However the contract requires that each grievance be processed through a prescribed procedure and submitted to arbitration within prescribed time limits. The reprimand was the subject of a separate grievance which, independent of the subsequent suspensions, was processed through the grievance procedure. It
was answered separately by the Company at the last step of the grievance procedure. The contract requires that at that point it be appealed to arbitration. If not, it loses its arbitrability.

The reprimand grievance was not made part of the written suspension grievances in and through the grievance steps of the latter two. So procedurally the Union did not join or even attempt to formally join all three grievances at that level. Apparently it included the reprimand grievance for the first time as a written part of the suspension grievances when it filed the latter for arbitration with the Federal Mediation and Conciliation Service. In response the Company wrote the Union stating that in its view the reprimand grievance was no longer arbitrable.

Hence I find no written agreement, or mutually agreed to amendment of the suspension grievances which included the reprimand for arbitration. In that respect therefore, the strict provisions of the grievance and arbitration procedures of the contract were not met by the Union with regard to the arbitrability of the reprimand issue.

That leaves the question of whether there was a binding oral agreement between the Union and the Company at the grievance meeting(s) on the suspension issues to include the earlier reprimand in a single subsequent arbitration. As I stated earlier, I can understand how, under these particular circumstances the Union tried and even thought that such an agreement had been reached. No doubt at that time it seemed expeditious, economical and logical to proceed to arbitration that way. But the evidence
in this record falls short of proving that any such agreement was reached. The Company denies it vigorously. There is no written stipulation or memorandum supportive of the Union's claim. The testimony of those at the meeting(s) is offsetting, indeterminative and hence inconclusive either way. On this question the burden is on the Union to show a verbal variation of the contract. The evidence adduced by the Union does not meet that test.

Based on the foregoing, I must conclude that the reprimand grievance was and remained separate and apart from the suspension grievances; that under the contract requirements it should have been but was not appealed to arbitration as prescribed; and that there is insufficient evidence to prove a contrary agreement between the Union and the Company.

Accordingly the Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above named parties, makes the following AWARD:

The reprimand grievance of Phoebe Gannon is not arbitrable.

Briefs on the merits of the suspension grievances of Phoebe Gannon shall be submitted to the Undersigned postmarked no later than September 15, 1981.

DATED: August 13, 1981
STATE OF New York )
COUNTY OF New York ) ss:

Eric J. Schmertz
Arbitrator

On this 13th day of August, 1981, 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 Steelworkers of America, Local 15135  
and  
Sherwood Medical Industries  

OPINION AND AWARD  
Case #80K/28657

The stipulated issue is:

Was there just cause for the three day suspension and the five day suspension of Phoebe Gannon? If not what shall be the remedy?

A hearing was held on June 4, 1981 at which time Ms. Gannon, hereinafter referred to as the "grievant" and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. Both sides filed post-hearing briefs.

The grievant was suspended for three working days for improperly failing to perform a certain re-work assignment after being instructed to do so by supervision. She was subsequently suspended for five working days for turning out work with a high level of defects.

The facts surrounding the three day suspension involve an evidentiary issues on which I shall give the grievant the benefit of the doubt. She denies that she was told or understood that she was to perform the re-work assignment. The Company's testimony, from supervision is that the assignment was unquestionably given to her. Though I think there is little doubt that she was
instructed to perform the re-work, I conclude it to be plausible and hence believable that she did not hear or comprehend that assignment. Some time earlier she had received a written warning. Against the backdrop of that warning I do not think she would have willfully ignored or refused to carry out instructions from supervision had she heard or comprehended those instructions. With the testimony on this critical point offsetting, I am prepared to hold that she may not have heard, paid attention to or understood what was expected of her in connection with the re-work, and that the Company's evidence falls short of meeting the requisite burden of proof. Therefore I shall reverse that disciplinary suspension.

However, the facts surrounding the subsequent five day suspension are different. There is no dispute that the grievant's work was about 75% defective. The only question is whether the machine and/or other working conditions were such as to excuse this extremely high percentage of poor quality. I conclude in the negative. I reject as unproved, the Union's claim that the grievant was "harrassed" by her foreman. I find neither the machine nor the working conditions to be the fault because the unrefuted evidence shows that other operators, on the same machine and working under the same conditions on shifts before and following the grievant, performed the work and produced the product involved without any significant amount of defects. Hence I conclude that the grievant's defective work was solely a result of her inability or failure to perform her duties satisfactorily.
As it is well settled that an employee's inability to perform work assignments satisfactorily is grounds for disciplinary action, the Company had cause to discipline the grievant. Although the five day suspension was based, in part, on the principle of progressive discipline and is founded not only on the warning (which I found in an earlier decision to be time-barred from arbitration) but also on the immediately proceeding three day suspension (which I have reversed herein), I do not find that a five day suspension, following the aforementioned warning is either unwarranted or excessive even with the reversal of the proceeding three day suspension. Accordingly the five day suspension is upheld.

The Undersigned, duly designated as the Arbitrator and having duly heard the proofs and allegations of the above named parties, makes the following AWARD:

(1) The three day suspension of Phoebe Gannon is reversed. She shall be made whole for the time lost.

(2) The five day suspension of Phoebe Gannon was for just cause and is upheld.

Eric J. Schmertz
Arbitrator

DATED: November 11, 1981
STATE OF New York )ss:
COUNTY OF New York )

On this 11th day of November, 1981 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
Communications Workers of America
and
Southern Bell Telephone and
Telegraph Company

This case involves the grievances of Althea Decker, Mary Ann Marshall and Barbara Wegrzyn, hereinafter referred to as the grievants. They and the Union on their behalf claim that they were improperly denied promotions to the job Coin Telephone Consultant, and that junior employees were appointed instead, in violation of the contract.

A hearing was held on March 26, 1981 in Miami, Florida at which time representatives of the Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Each side filed a post-hearing brief together with certain arbitration decisions on which they rely as binding or as persuasive precedent. The Arbitrator's Oath was waived.

The pertinent contract provisions are:

Article 12

Section 12.02C: In the selection of employees within the bargaining unit for promotions within the bargaining unit, seniority shall govern if other necessary qualifications of the individuals are substantially equal.

Section 12.04 Appeal Rights: The determination of the Company on any of the factors in 12.03 and 13.06 shall be subject to the grievance procedure set forth in Article 21, and after the exhaustion of such procedure a charge of
Arbitrary action or bad faith shall be subject to the arbitration procedure set forth in Article 23.

If the arbitrator finds that the Company did act arbitrarily or in bad faith, the Company will promptly take the necessary steps to correct such action.

The parties were unable to stipulate a precise issue for determination. The Union stated the issue as:

"Was the selection procedure in which the grievants were denied promotion to the position of Coin Telephone Consultants tainted by arbitrary action?"

The Company states the issue as:

"Did the Company act arbitrarily when it selected someone other than the three named grievants for the positions of Coin Telephone Consultants?"

I do not find any substantive difference in the respective issues proffered by the parties. The question as I see it is whether the Company's action in evaluating the grievants, in denying them the promotions and in selecting persons less senior to fill those jobs was arbitrary.

There is no claim by the Union of "bad faith" within the meaning of Section 12.04 of the contract. Also the parties have stipulated that the Arbitrator is not to fashion a remedy in the event he finds arbitrariness in the Company's decision. Hence the question is simply whether the Company's decision was arbitrary or not.

The meaning of "arbitrary" is well settled generally by arbitral decisions as well as by cited prior cases between the
parties. A Company decision which is unsupported by any logical, rational or principled reason is arbitrary. A decision which fails to take into consideration all material information and which, as a consequence, is adverse to the affected employee, is arbitrary. A quality differentiation between and amongst employees which is unsupported by facts or evidence warranting that differentiation, is arbitrary.

Also, where employees as here are judged on the basis of certain specified factors, an arbitrary determination with regard to one, several or all of the factors would be prejudicial to the overall evaluation and hence would taint that evaluation with arbitrariness. In other words, if the Company acted arbitrary in connection with one or more of the factors, it would be my determination that the selection process in toto was arbitrary. This is to be distinguished from the Company's assertion that arbitrariness must be found as an overall judgment of the affected employees qualifications rather than a piecemeal assessment, factor by factor. In my view my determination that no factor may be judged arbitrary in order for the total evaluation to be sustained is supported by Section 12.04 of the contract. That Section, as set forth above, permits the Union to grieve the Company's determination "on any of the factors..."(emphasis added). If the overall judgment was determinative rather than a factor-by-factor analysis, the Union's right to appeal determinations of any factor would be meaningless.

Also it is well settled that when an arbitrator is
determining the question of arbitrariness, he may not substitute
his judgment for that of the employer if he merely concludes
that on the merits he would have reached a different conclusion.
An honest disagreement on the merits must be decided in favor
of the employer. Only where the employer's decision is devoid of
a rational or principled basis and where there is no evidentiary
reason or justification for that decision, may it be overturned
as arbitrary.

Facts and Contentions

On or about January 10, 1979, there was posted a notice
of a job vacancy in the Miami Exchange for the job title "Coin
Telephone Consultant." It indicated there were two to six
positions to be filled. All employees could "bid" for the job.
The closing date for bids was January 28, 1979 and it was expect-
ed that the vacancies would be filled within 60 days of the post-
ing. There were 234 bids for the positions. Three vacancies
were filled and the selectees were Haley, Moore and LaFleur whose
dates of seniority were May 15, 1960, September 26, 1960 and
October 6, 1960 respectively, all junior to the grievants.

Mr. DeCaso, the individual to whom the duty of selection
was assigned and who acted as the "selector," testified about
his background with the Company and how he went about selecting
the employees to fill the vacancies. The training which a
selector undergoes and the procedure prescribed for selection
was described in some detail by Mr. Choate who was charged with
training selectors. The job of "selector" has been a full-time
position since 1965 when the current plan was adopted. The plan
implements the provisions of the collective bargaining agreement and includes "a performance appraisal, a performance evaluation plan, and a personnel selection guide, two items which have remained essentially unchanged except for minor revisions since 1965."

The Personnel Selection Guide is a "guide for selecting employees for promotion within the bargaining unit" but the selector has the responsibility for making the final decision concerning the selection. However, the guide provides "that the selection method should be in general conformity with the principles expressed in (the) guide." The guide identifies five factors or qualifications to be considered with respect to individuals who bid for the vacancy.

Production Expectancy in Proposed Job
Training Required in Proposed Job
Attendance Expectancy in Proposed Job
Punctuality Expectancy in Proposed Job
Job Conduct-Behavior Expectancy in Proposed Job

The guide mandates the selector to "gather and consider all reasonably available and meaningful information on each candidate relative to the factors."

The selector must render a judgment on each of the five factors as part of the implementation of the "substantially equal" provision of the collective bargaining agreement quoted above. The object is to discern substantial differences in overall qualifications, if any, among the candidates. A substantial difference, according to the guide, "though not definable in precise terms, means a difference which is not so slight
as to cause doubt or leave room for reasonable question." The guide also stresses that "the appropriateness of the selection of an individual remains dependent upon whether that individual can be shown to be substantially better qualified than any unsuccessful bidder, such judgments or ratings (concerning the factors) notwithstanding." The judgments or ratings "are not in themselves a proper basis for making selections."

"Production-expectancy," "generally speaking" usually is deserving of greater weight than the other information. However, a rigid statement of relative importance of the factors is eschewed in favor of emphasizing the need to make the ultimate judgment on the basis of over-all qualifications.

The guide describes the characteristics to be considered with respect to each of the five factors and establishes a rating system for each.

Mr. DeCaso described his selection process as beginning with the requisition of the personnel records of the bidders from the respective Company departments. He conducted what he described as a "background investigation" of the job vacancy after reading and familiarizing himself with the selection guide, the description of the vacant positions in the so-called "Agreement Interpretation" and the "description of the job as it appears in the promotion and transfer plan." He went "out and personally (saw) the job himself" and spoke to the manager in coin telephone. He also spoke to some supervisors and coin telephone consultants in order to obtain a picture of the day to day duties of the Coin Telephone Consultant. He did not
interview any of the applicants, but he did review their requisitioned personnel records and interviewed their supervisors.

Based on the foregoing, DeCaso reached the following conclusion:

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* 0 = outstanding; S = satisfactory; F = fair

** Indicates degree of training required and is described in greater detail herein.

Production expectancy rates "one degree of success which can logically be expected of the candidate in the productive aspects of the job, with normal training." There are three possible ratings:

"Outstanding" means "expected to be among the distinctly superior employees in that job as to quality and quantity of work."

"Satisfactory" means there is "no substantial basis on which "outstanding" expectancy could be supported; nor on which a "fair" one could be justified."

"Fair" means "expected to be marginal performer. Substantial deficiencies exist relative to production potential."

The vacant position of Coin Telephone Consultant is
described as follows in the Agreement interpretation:

**COIN TELEPHONE CONSULTANT** - (4/1/78) Negotiates with business customers, or their designated representatives, for the placement, removal, relocation, change or maintenance of coin telephone service and equipment. Makes field visits to premises to evaluate profit potential of general location, including interview with customer. Selects specific site for coin telephone enclosure and makes field sketch for subsequent preparation of service order and documentation records. Prepares service order memo, location diagram and other related records. Analyzes market coverage provided by existing coin accounts to evaluate profitability and recommends appropriate action, either corrective or original. Handles a variety of customer inquiries regarding coin telephone matters, including but not limited to commissions, deposits, burglaries, etc. Analyzes technical data from outputs originated from mechanized coin programs. Provides input data relative to mechanized coin programs. Provides interdepartmental liaison as required. Drives a Company vehicle.

A key feature of the position is the face-to-face customer contacts for the purpose of making sales.

DeCaso testified that he had rated the three selectees "outstanding" for the Coin Telephone Consultant position based on their previous backgrounds and the information in their personnel records. Each had served for a period of 11 to 12 years as service representatives which required handling a variety of customer inquiries on the telephone and selling while on the telephone. The position, according to DeCaso required a certain degree of decision making, experiencing pressure because of constant telephone contact with customer and familiarity with the Universal Service Order Code Book (USOC). These were all transferrable skills. Haley had been a business office supervisor for three years which required leadership, analytic
and other qualities. LaFleur had been a service representative in a coin telephone group from 1975-79 and worked with coin telephone consultants on a daily basis.

Haley had been rated "more than satisfactory" in quality of work on 2 of 3 prior ratings. There was insufficient opportunity to observe quality for the other evaluations. She received three satisfactory ratings for quality of work.

Moore had one rating of "more than satisfactory" in quality and "satisfactory" in quantity and another of "more than satisfactory" in quantity and "satisfactory" in quality. LaFleur was rated "more than satisfactory" on both counts in two evaluations. By his grade of "outstanding," DeCaso testified he expected each of the selectees to be outstanding in both quantity and quality.

The three grievants received "satisfactory" with respect to the bid position on the following basis:

According to DeCaso, Decker and Marshall had received "satisfactory" ratings on quality and quantity. He did not testify on direct concerning Wegrzyn's ratings, but Union Exhibit 7, the performance evaluation for October 25, 1978, shows she was rated "more than satisfactory" in quality and "satisfactory" in quantity.

Decker and Wegrzyn were customer instructors and Marshall a service assistant. DeCaso concluded these did not involve readily transferrable skills. He believed that Decker's position of service representative for one year in 1961 was not
material because the job probably had changed a great deal in the intervening 17 years.

DeCaso concluded that the basic differences between a coin telephone consultant and a service representative was that the former dealt face-to-face with the customer while the latter dealt with the customer over the telephone. The basic similarities and transferrable skills or experience involved selling, basic knowledge of how to deal with customers and working in a high pressure environment.

The Union points out that customer instructor, the positions held by two of the grievants involved on-premises face-to-face dealing with customers. They also were required to have insights as to likely customers for additional sales by virtue of their analysis of the customer's requirements.

DeCaso rated the selectees as "major" with respect to training needs and the grievants were rated "all." The highest is "minor." "Major" means the individual would "need a substantial portion of the formal and/or on-the-job training prior to being given a full productive assignment." "All" means the individual "would need all, or practically all of, the formal and/or on-the-job training and would be completely ineffective if immediately placed on the assignment."

The training required for coin telephone consultant is eight days of formal training with regard to sales, fact-finding, negotiations, sketching premises and USOC. The selectees were rated "Major" because of the 6-8 weeks of formal training in
sales, dealing with customers, and USOC and other matters they had undergone as service representatives. DeCaso con-
cluded that neither the formal training nor the experience of the three grievants bore sufficient relationship to the coin telephone position as to avoid the necessity for all of the formal and practically all of the informal training required for that position. The selectees would require all the formal training and major informal or on-the-job training.

DeCaso stated that the main difference in the training of the customer instructor and that of the coin telephone representatives was that the latter dealt with sales and persuasiveness while the former instructed as to use. However, he seemed unaware of the length of training received by two of the grievants and had no detailed knowledge of the kind of training they had received. Wegrzyn testified she had received 13 weeks of initial formal training and Decker had had 4 weeks of training. Although the Wegrzyn personnel record used by DeCaso did not contain this fact, there was no con-
trary evidence. And the record he received by the Company began at a point subsequent to the time she claimed she had received the training. It also appears that the training record he received dealt with non-Miami based training and did not include the Miami based training. Wegrzyn had been loaned to the United Way and receiving Company wages to en-
gage in telephone solicitations. Consequently, there were several Company sponsored programs which DeCaso did not
consider for one or more of the grievants simply because they did not appear on the record provided him by the Company.

He also did not take into account their off-duty experience. Marshall had a series of leadership and advanced leadership programs in her capacity as a Union Steward and then union representative. The latter at the University of Georgia. Among her duties are the "selling" of the union to new members and service as a lobbyist at Tallahassee. She also successfully completed a Company sponsored management course. It does not appear that these were in the record examined by the selector.

With respect to these off-duty experiences DeCaso did not ask for the records in which they might have appeared if recorded. He considered outside activities as something to be brought to his attention by the bidder and not to go out of his way to learn of those activities.

Also the Union contends that the Company had engaged in several instances of "arbitrary action" when the selector failed to follow either the letter or the spirit of the Personnel Selection Guide and thereby committed a contractually proscribed "arbitrary action." In particular, it claims that the rating of Haley and Moore as "outstanding" on productivity expectancy was "clearly erroneous" and that all three grievants ratings of "all" on the training factor was clearly erroneous underrating. The Union also claims that either or both of Marshall's and Haley's ratings on the "attendance expectancy" factor was arbitrary.
The Company claims that in substance the Union is merely attacking the selector's judgment on each of the factors and with respect to his overall judgment in selecting the three selectees. It argues that to honor the Union's claim would be to arbitrate the issue of relative qualifications of the candidates which is beyond the arbitrator's authority.

**OPINION**

Based on the record I can find no evidentiary, principled or supported basis for the selector's determination that Haley and Moore be rated "outstanding" in Production Expectancy. Neither received "more than satisfactory" ratings on both quantity and quality of their prior work. Hence, on this basis alone it would not be reasonable to conclude they would be "among the distinctly superior employees in (the position of coin telephone consultant) as to quality and quantity of work." The fact they had performed the task of service representative which provides some experience for the new position, and had performed at a "more than satisfactory" level on both counts provides no additional basis for an "outstanding" rating. "Outstanding" is a prediction. With no such rating in the past and in the absence of any special basis of quality or uniqueness in their qualifications for the new job there is no logical basis to predict or conclude they would be "outstanding." Indeed, according to DeCaso, the new and distinctive element in the promotion is face-to-face customer encounters, and their prior
record does not include this experience.

As to training expectancy, no evidentiary, principled or supported basis is provided in the record for concluding that the grievants require "all training" and the selectees only "major" training. The former have had extensive training and experience in face-to-face on premises customer contact. The latter in telephone sales, but not face-to-face customer contact. Both qualities are required for the position of coin telephone consultant and no reason appears to suggest that the prior face-to-face training and experience will result in requiring more training for sales than the converse would be for the selectees.

In short some of the facts adduced at the hearing concerning the grievants prior training was not received or otherwise considered by the selector and those facts are relevant to a full and fair selection. Many of these facts should properly have been in the grievants' personnel file and the grievants had a right to assume that that information was transmitted to the selector. Indeed, the record of Wegrzyn described above, and limited in span of time, precluded consideration of some of the very experience which, because of that grievant's seniority and experience, would work in her favor.

In addition, if interviews are not to be held, the employee should at least be able to rely on complete Company records concerning Company sponsored training being made available to the selector or the selector at least making inquiry
of district supervisors who would have information about relevant activities.

There is another difficulty with the ratings on training. The Personnel Selection Guide defines the rating "all", as follows:

"Would need all, or practically all, of the formal and/or on-the-job training. Would be completely ineffective if immediately placed on productive assignment."

DeCaso concluded that all of the selectees and the grievants would require all of the formal training. Literally this means that all six would be rated "all" under the first sentence. This is the Company's regulation and it should be held to the standards it promulgated. While I might have my personal doubts that any of the individuals "would be completely ineffective if immediately placed on productive assignment," the language of the standard seems to suggest that if they need all of the formal training they would be "completely ineffective" under its terms. On this basis, as well as the others discussed above, there is no principled basis in the record for his distinguishing between the selectees and the grievants with respect to training.

I do not hold that a failure to interview, as such, is an arbitrary action. The Personnel Selection Guide recommends its use as one of a number of tools. Whether it should be used is a judgment call. However, interviews in this case might well have revealed the information Company records should, but did not contain. Further, the limited notice to bidders that
they can submit additional information themselves is, in my view, insufficiently highlighted, and misplaces the burden. For if there is no interview, the selector should make some effort to obtain additional information, which he failed to do in this case. His failure to do so, the apparently incomplete records in this case plus the failure to interview constitute a failure to meet the mandate that "the selector should gather and consider all reasonably available and meaningful information on each candidate relative to the factors." If he is not going to interview, more than the effort reflected in this record is required. It is no excuse that many had bid and that he was trying to fill the jobs within 60 days. Neither the grievants nor any other bidders should suffer the consequence of a selector's perception that he would be overburdened if he was thorough.

Accordingly the Undersigned, duly designated as the Arbitrator and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

Based on my findings with regard to the factors noted, together with the failure of the Company to consider relevant information, the Company's action in denying the grievants, Althea Decker, Mary Ann Marshall and Barbara Wegrzyn promotions to the job Coin Telephone Consultant was arbitrary and hence in violation of Article 12 of the contract.

Eric J. Schmertz
Arbitrator
DATED: October 8, 1981
STATE OF New York )ss.:
COUNTY OF New York )

On this 8th day of October, 1981, 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:

Printing Specialties' and Paper Products' Union No. 594, Chapel No. 1

and:

The Standard Register Company

The stipulated issue is:

What shall be the disposition of the grievance of Darrell Lewis dated January 8, 1980?

A hearing was held in York, Pennsylvania on March 18, 1981 at which time Mr. Lewis, hereinafter referred to as the "grievant" and representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. A stenographic record was taken and the parties filed post-hearing briefs.

The grievant was laid off from the pressman job due to a decrease in available work, and based on his seniority was required to bump into the job of press trainee. The Union claims that he should have been transferred to or allowed to bump into the job of PCM press operator, where employees with less seniority remained at work. Alternatively the Union contends that the layoff should not have been made within the pressman classification but rather from within "related classifications" including the PCM job, where employees junior to the grievant were at work. Thereafter, asserts the Union, the Company should have rearranged the remaining personnel to cover the available work. This procedure argues the Union, would have resulted in the layoff of an
employee junior to the grievant and preserved the grievant's employment status as a pressman.

Neither position by the Union is contractually tenable. By title, pay rate, the history of its bilaterally negotiated establishment and by practice, the job of PCM press operator is in a different classification from that of pressman. Hence a layoff declared in the pressman classification is not a layoff within the PCM classification, and employees in both separate classifications are not contractually grouped together for purposes of layoff. Consequently the grievant's layoff within the pressman classification was consistent with the provisions in Article IV of the contract for "layoffs by seniority lists within such job classification" even though less senior employees were retained in the different PCM classification.

Also, as the PCM press operator classification carries a higher rate of pay because of its greater complexities and responsibilities, a bump or movement from pressman to PCM operator would be not only a movement from one classification to a different classification, but "upward" from a lower to a higher rated job.

The question narrows to whether, as the Union claims, that upward bump or movement should have been allowed in the instant case. I do not find that the layoff procedures under Article IV Section 4 of the contract, contemplate or allow for an upward bump or transfer from a lower rated to a higher rated job whether the layoff be temporary or permanent. Article IV Section 4G explicitly provides that in the case of a permanent layoff "the lowest seniority employee shall move down to a lower rated job
classification. . . .” (emphasis added). Therefore if the instant layoff was "permanent," the Union's claim that the grievant should have been allowed to bump upward must be denied, without any need to consider whether a bump can be achieved between two different job classifications. The same is true, albeit impliedly, with regard to a "temporary" layoff. Under the temporary layoff provisions of the contract, specifically Article IV Section 4A5, pay adjustments are accorded an employee who is "bumped back to a lower paying classification, due to layoff in his classification. . . ." This provision follows the work sharing arrangements which may precede reductions in the work force, and means to my mind, that when layoffs finally occur the bumping rights of employees laid off within their classification are limited to lower rated jobs or at least do not include the right to move or bump upward. Again, therefore, because an upward bump is precluded, what the grievant seeks must be denied without any need to determine whether under other circumstances a bump from one classification to another would be allowed. And it is also unnecessary to determine whether the instant layoff was contractually "temporary" or "permanent."

Also, it is well recognized that bumping rights are generally limited to movement laterally or downward unless there is some express contractual authority for bumps to higher rated and higher paid positions. I find no such special provision or arrangement in the instant contract and hence I conclude that any such right is a matter for subsequent collective bargaining and not arbitration.

The Union's alternative argument, namely that the layoff
should have been declared not within the pressman classification but within "related classifications" where less senior employees were at work, is not determinable in this arbitration. The fact is that under the contract the decision of whether the layoff is to take place within a classification or within related job classifications is made by the Joint Standing Committee. There is no evidence in the record that that was not done here and there and is no challenge by the Union in this case to that action or decision by the Joint Standing Committee. In other words, absent evidence to the contrary I must conclude that the Joint Standing Committee decided this layoff would occur within the job classification of pressman and not within related classifications. The Joint Standing Committee is authorized to decide one way or the other. That determination, not challenged at the time that it was made, and not challenged in the course of this arbitration hearing, cannot be impeached by simple argument. Therefore the Union's alternative argument herein lacks evidentiary standing and must be rejected.

For the foregoing reasons the Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

The grievance of Darrell Lewis dated January 8, 1980 is denied.

Eric J. Schmertz
Arbitrator

DATED: July 7, 1981
LABOR COST REVIEW PANEL

Greater New York Health Care Facilities Association, Inc.; on behalf of its Members

Petitioner

and

The State of New York

The Undersigned members of the Labor Cost Review Panel having duly heard the proofs and allegations of the above named parties, and having met and deliberated in executive session, make the following AWARD:

Subject to final decision on the pending alleged "windfall and hardship" cases the State shall forthwith implement and grant to the Members of the petitioner the 1980 mid-year trend factor adjustment in the same manner and to the same extent it would have been implemented and granted had it not been withheld.

Eric J. Schmertz
Chairman

Bartholomew J. Lawson
Concurring

William J. Gormley
Dissenting

DATED: February 9, 1981
STATE OF New York ) ss.
COUNTY OF New York )

On this 9th day of February, 1981, 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.

DATED: February 9, 1981
STATE OF New York ) ss.
COUNTY OF New York )

On this 9th day of February, 1981, before me personally came and appeared Bartholomew J. Lawson 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.
DATED: February 1981
STATE OF New York ) ss.:
COUNTY OF

On this day of February, 1981, before me personally came and appeared William J. Gormley 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.
The issue is whether the State wrongly failed to implement the 1980 mid-year trend factor adjustment applicable to the relevant portions of the medicaid reimbursement rates for the Members of the Greater New York Health Care Facilities Association, Inc.

Hearings were duly held and the members of the Labor Cost Review Panel met and deliberated in executive session.

The State contends that the grant of a mid-year trend factor adjustment is discretionary with the Commissioner of Health and that he need not do so if no significant financial burden results to the Homes and facilities affected. Additionally the State asserts that a ruling on this question should await final determinations of the alleged "windfall" cases now pending before the Panel.

The State's reference to the aforementioned discretionary authority is accurately cited, but under present circumstances it is misplaced in these proceedings before this Panel. The fact is that under its jurisdiction and considering the nature of its prior interim award(s) the Panel is the pre-eminent authority on the financial status of the Homes and facilities before it and it is for the Panel not the State to determine whether the Homes and facilities petitioned for are affordable or non-affordable. More specifically the State representatives acknowledge that the mid-year trend factor adjustment was not granted because the State believes that many of the Homes and facilities are enjoying "windfall profits" from the prior interim award(s) of this Panel, and that under that circumstance the State declines to make a mid-year trend factor adjustment that would give those Homes and facilities additional revenue and increased "windfall profits."

By taking that position the State has made a unilateral determination of affordability when that precise issue is pending for determination by this Panel. Put another way, the State has usurped the Panel's exclusive jurisdiction over that question under the instant circumstances.
The Panel's prior interim award(s) was expressly subject to later and final determinations of the "windfall and hardship cases." Until those determinations are made by the Panel the State cannot unilaterally decide that question. That the State did so by withholding the mid-year trend factor adjustment for the reasons given is a wrongful exercise of the discretion it asserts. This is not to say that the State has permanently relinquished that discretion to this Panel, but rather that at the present time, with the questions of affordability specifically before the Panel in "windfall" cases alleged by the State, the State must defer to and await the Panel's decisions on that question and not pre-judge it. Therefore I consider it inappropriate for the State to ask that the issue of the mid-year trend factor adjustment be held in abeyance until the "windfall" cases are decided.

Also, had the mid-year trend factor adjustment been granted as had been the unvaried practice in each prior year since the State promulgated its current reimbursement formula, it too would have been subject to final decisions by the Panel on the alleged "windfall" cases and hence would have been without financial prejudice.

Accordingly, for the reasons set forth above, and subject to the final decisions on the affordability or non-affordability of the Homes and facilities before this Panel, the State shall forthwith implement and grant to the Homes and facilities which are members of the Greater New York Health Care Facilities Association and which otherwise would have received that adjustment, the 1980 mid-year trend factor adjustment in the same manner and to the same extent that it would have been implemented had it not been withheld.

Eric J. Schmertz
Chairman

February 9, 1981
Greater New York Health Care Facilities Association, Inc., on behalf of Hillside Manor Skilled Nursing Facility, Hillside Manor Health Related Facility, River Manor Nursing Home, Kings Terrace Skilled Nursing Facility, Kings Terrace Health Related Facility, Petitioner and The State of New York

The Undersigned members of the Labor Cost Review Panel having duly heard the proofs and allegations of the above named parties and having met and deliberated in executive session make the following AWARD:

1. This Labor Cost Review Panel has jurisdiction to consider and rule on the petition.

2. The labor cost component of the medicaid reimbursement rate of each of the above named Homes and facilities shall be increased in the amount and for the periods set forth below:

   a. For the period April 1, 1979 through December 31, 1979 the labor cost component of the medicaid reimbursement rate of Hillside Manor Skilled Nursing Facility shall be increased by 29.76 percent.

   b. For the period April 1, 1979 through December 31, 1979 the labor cost component of the medicaid reimbursement rate of Hillside Manor Health Related Facility shall be increased by 10.19 percent.

   c. For the period April 1, 1980 through December 31, 1980 the labor cost component of the medicaid reimbursement rate of Hillside Manor Skilled Nursing Facility shall be increased by 103.52 percent.
d. For the period April 1, 1980 through December 31, 1980 the labor cost component of the medicaid reimbursement rate of Hillside Manor Health Related Facility shall be increased by 46.9 percent.

e. For the period April 1, 1979 through December 31, 1979 the labor cost component of the medicaid reimbursement rate of River Manor Nursing Home shall be increased by 10.12 percent.

f. For the period of April 1, 1980 through December 31, 1980 the labor cost component of the medicaid reimbursement rate of River Manor Nursing Home shall be increased by 42.96 percent.

g. For the period April 1, 1979 through December 31, 1979 the labor cost component of the medicaid reimbursement rate of Kings Terrace Skilled Nursing Facility shall be increased by 10.92 percent.

h. For the period of April 1, 1979 through December 31, 1979 the labor cost component of the medicaid reimbursement rate of Kings Terrace Health Related Facility shall be increased by 14.82 percent.

i. For the period April 1, 1980 through December 31, 1980 the labor cost component of the medicaid reimbursement rate of Kings Terrace Skilled Nursing Facility shall be increased by 78.66 percent.

j. For the period April 1, 1980 through December 31, 1980 the labor cost component of the medicaid reimbursement rate of Kings Terrace Health Related Facility shall be increased by 70.20 percent.

3. It expressly ordered that the foregoing increases shall be used by the Homes and facilities only to meet and pay the labor cost obligations of their collective bargaining agreement with Local 144 SEIU. The Panel retains jurisdiction for that express purpose as well as for general implementation of this Award. So that the Panel’s retained jurisdiction may be effective, the above named Homes and facilities must remain members in good standing of the Greater New York Health Care Facilities Association, the petitioner herein, for at least the entire period of the upcoming Industry-Local 144 collective bargaining agreement, commencing April 1, 1981.
On this 9th day of February, 1981, 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.

DATED: February 9, 1981
STATE OF New York ) ss.:
COUNTY OF New York )

On this 9th day of February, 1981, before me personally came and appeared Bartholomew J. Lawson 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.

DATED: February 9, 1981
STATE OF New York ) ss.:
COUNTY OF New York )

On this 9th day of February, 1981, before me personally came and appeared William J. Gormley 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.
The issue is whether the above named Homes and facilities are entitled to an upward adjustment in the labor cost component of their medicaid reimbursement rates for the relevant periods in 1979 and 1980 because of the increased labor costs generated and ordered by the arbitration Awards of a Board of Arbitration headed by Burton B. Turkus, Esq.

Hearings before this Labor Cost Review Panel were duly held and the Panel members met and deliberated in executive session.

The State contends that this Labor Cost Review Panel lacks jurisdiction over the issue because the collective bargaining agreements legislated and completed by the Turkus decisions had their origins in the year 1979, whereas the authority of this Panel is over multi-year contracts entered into between April 1 and December 31, 1978; that the authority of the Panel is limited to the industry contract between Local 144 SEIU and the Greater New York Health Care Facilities Association whereas the contract covering the above Homes and facilities with Local 144 are separate and independent from the industry contract; and that in any event and alternatively, if the Homes and facilities are deemed "affected" by the Industry-Local 144 contract, the Panel's authority is limited to the bare dollar increases of that master agreement as applied to the Homes and facilities involved herein, and does not extend to the retroactive and cumulative adjustments between the previous benefit levels and the new benefit levels resulting from the Turkus decisions.

The State's jurisdictional and restrictive assertion are not tenable. The contracts concluded by the Turkus decisions had their origins in 1978.
and were not newly negotiated in 1979 as a consequence of those decisions. In some relevant manner the above named Homes and facilities were signatories to and bound by the strike settlement, thereby accepting a multi-year contract with Local 144 for a term commencing during the "window period", April 1, 1978 through December 31, 1978, which included wage adjustments. Remaining issues were, as was the case with the entire Industry, subject to later negotiations and arbitration. The Turkus decisions were merely the culmination of those subsequent negotiations between Local 144 and each Home and facility. In those negotiations and in the arbitrations Local 144 demanded not only increase and improvements in certain benefits but also sought to bring the benefit levels of the contracts with these Homes and facilities to the full substantive level of the Industry contract. This has been referred to colloquially as "parity."

The State is in error in claiming that the Panel's jurisdiction is limited to the Industry contract between Local 144 and the Association. The Regulations expressly grant the Panel authority to deal with increased labor costs of contracts affected by the Industry agreement. Manifestly the individual collective bargaining agreements between Local 144 and the above Homes and facilities, completed as to outstanding terms and conditions by the Turkus decisions, were affected by the Industry contract. Indeed it was the Industry contract with which Local 144 sought "parity" in its negotiations with these Homes and facilities. The Industry contract was the standard the union sought to achieve. And the Turkus decisions granted that demand by directing increases in benefits up to and synonymous with the Industry contract. Hence the resulting contract between Local 144 and these Homes and facilities, as determined by the strike settlement agreement and as subsequently legislated by the Turkus decisions, were not only profoundly affected by the Industry agreement but constitute a de facto incorporation of these Homes and facilities into that Industry contract. Therefore the Panel has jurisdiction on that statutory basis.

The retroactive, cumulative effect of the Turkus decisions are bona fide labor costs within the meaning of the Regulation and therefore are eligible for reimbursement. Increases in actual gross wage rates and wage retroactivity as well as a bare dollar wage increase are all examples of labor costs attendant to wages. The same is true for fringe benefits and other recognized labor costs of the Turkus decisions.

Though I realize that the increases on a cumulative and retroactive basis are considerable, in bringing these Homes and facilities to "parity" with the rest of the Industry, the union's demands in that regard and the Turkus decisions granting those demands are legitimate and bargainable issues and represent traditional increased labor costs within the jurisdiction.
of this Panel and within the meaning of the Regulations. Hence the full labor cost increases of the Turkus decisions are eligible for reimbursement.

Using basically the same methodology the petitioner and the State have submitted varied cost calculations into evidence. Based on the entire record a majority of the Panel have reconciled those differences as set forth in the Award.

Eric J. Schmertz
Chairman

February 1981
In the Matter of the Arbitration:  

between

Office and Professional Employees: International Union, Local 14, AFL-CIO

and

Texaco, Inc.

The Undersigned duly designated as the Arbitrators and having duly heard the proofs and allegations of the above named parties, make the following AWARD:

The grievance of Cynthia Lee Bobo is arbitrable.

There was not just cause for the suspension of Cynthia Lee Bobo. The suspension is reversed and she shall be made whole for the time off.

Eric J. Schmertz  
Chairman

G. D. Iushewitz  
Concurring

P. H. Lister  
Dissenting

DATED: August 5, 1981  
STATE OF New York )ss.:  
COUNTY OF New York )

On this fifth day of August, 1981, 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.
DATED:
STATE OF
COUNTY OF

On this day of August, 1981, before me personally came and appeared G. D. Iushewitz 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.

DATED:
STATE OF
COUNTY OF

On this day of August, 1981, before me personally came and appeared P. H. Lister 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.
The stipulated issue is:

Whether the grievance of Cynthia Lee Bobo is arbitrable?

If so was there just cause for the suspension of Cynthia Lee Bobo and if not what shall be the remedy?

A hearing was held on May 20, 1981 in Bellmawr, New Jersey at which time Ms. Bobo, hereinafter referred to as the grievant and representatives of the above named Union and Company appeared. Messrs. G. D. Iushewitz and P. H. Lister served respectively as the Union and Company arbitrators on the Board of Arbitration. The Undersigned served as Chairman. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The Company filed a post-hearing brief.

The grievant was suspended on June 9th, 10th and 11th, 1980 for leaving the plant during working hours without permission. The Company claims that the grievance dated June 25, 1980 is untimely under the provisions of Article X Section A of the contract. Said clause reads:

Discharge, Suspension and Resignation

A. In all cases of complaints arising over an alleged unjust discharge, suspension or layoff, a written notice of such complaint
must be filed with the Company within ten days after notice to the employe affected.

The grievant was told she was suspended on June 9th, and served the balance of the suspension on the subsequent two days. Obviously she knew of that disciplinary penalty. The record also establishes that on June 9th the Company verbally informed the Union steward of the grievant's disciplinary suspension. The question is whether the grievance dated June 25 met the ten day time limit under the foregoing contract provision.

I judge the relevant contract language to be ambiguous. The phrase "notice to the employe affected" can be interpreted, logically and reasonably, and within the context of the rest of Section A, as meaning written notice. Section A requires the grievance to be in written form. It provides that "a written notice of such complaint must be filed with the Company within ten days..." Applying fundamental contract interpretation, the language immediately following, which repeats the use of the word "notice" (i.e. "after notice to the employe affected") could well mean, on the basis of reciprocity and the fact that both notices are related to each other, that the second notice was also intended to be in writing albeit impliedly. In short, if the grievance must be by written notice why should not notice of the action of the discipline to which the grievance is responsible also be in writing. Standing alone the word "notice" is unquestionable satisfied by verbal or constructive notice as well as by written notice. But here the word does not stand alone. It is used twice. In that respect the second use of the word can be construed the same as first, and that notices in both instances are to be in
writing. Under this interpretation, and in view of the stipulation that the grievant received written notice of her suspension on June 16, 1980 the grievance dated June 25 was within the prescribed ten days. Hence the grievance is arbitrable.

On the merits the Company has not proved the grievant's misconduct by the clear and convincing standard required in disciplinary cases. Following a discussion with her supervisor concerning the quality of her work, the grievant became upset and said she felt ill. She claims that she asked for permission to go home and was granted that permission. The Company claims that she asked to go to the dispensary, was granted that right, but went home instead, (after possibly stopping at the dispensary). The grievant's testimony and that of her supervisor are respectively offsetting. Indeed, considering the unrefuted evidence that she was so upset by what she viewed as unexpected and unfounded criticism of her work, and that the circumstance caused her to cry, it is quite possible that she honestly believed that she asked to be allowed to go home even though her request may have been otherwise. I do not conclude that she willfully disobeyed instructions or left the plant without believing that she had permission to do so.

Also, it appears that the grievant's prior disciplinary record has been clear. This supports her testimony that the meeting at which her work was criticized surprised and upset her and her emotional reaction to the meeting may well have led to an unintentional misunderstanding.

Accordingly the grievance is granted; the suspension is reversed and the grievant shall be made whole for the time lost.
In the Matter of the Arbitration:

between

American Federation of Government Employees, Local No. 2094

and

Veterans Administration Medical Center, New York, New York

The stipulated issue is:

Did the Agency violate the Agreement of November 8, 1979 and the pertinent government regulations in removing Mrs. Je-Lain Ringgold Hunter from her employment as a clerk-typist in the surgical service of the Medical Center in New York City effective November 20, 1980? If so what shall be the remedy?

A hearing was held at the offices of the Agency on November 12, 1981 at which time Mrs. Hunter, hereinafter referred to as the "grievant," and representatives of the above named Agency and Union appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

This is a discharge case. The grievant was discharged for being absent without authority from September 22 to October 14, 1980. Previously, in 1978 she was twice suspended for the same offense and on September 15, 1980 was reprimanded, again for being absent without authority.

The record clearly shows that during the critical period September 22 to October 14, 1980 the grievant failed to comply with the Agency rules concerning absences. She did not keep the Agency adequately informed of her absences, and whereabouts, and inaccurately or misleadingly reported when she would return to work.
Acceptance of her explanations is seriously prejudiced by the statement attributed to her regarding one of the absences on a Friday, which she does not seriously dispute or deny, that "because it was a Friday, it was not necessary to come in for a single day that week." I find nothing in the contract which excuses the grievant from failing to meet these obligations during the period of absences.

Also, the grievant's reasons and explanations for her absences are immaterial. It is well settled that unauthorized absenteeism, for whatever reason, and even if beyond the employee's fault or control, is grounds for discipline. The employer is entitled to and may require a reliable work force. Especially so here, in the sensitive surgical service, where the back-log of clerical work from the absence of the grievant, who was one of the two clerk-typists in the area, was seriously inimical to the proper functioning of the service, to the Hospital's continued surgical accreditation and compliance with requisite legal requirements.

Additionally, the grievant was given a chance by the Agency to substantiate her claim that part of the absence was due to illness, by producing a medical certification, but failed to do so.

The only remaining issue is whether discharge was the proper penalty. I find nothing in the contract or regulations which nullify or change the well settled industrial relations rule that discipline for absenteeism be applied progressively. The traditional progressive discipline procedure calls for increased penalties from reprimand, to suspension and finally discharge, over a relevant
period of time, if the offense continues. The question therefore is whether the grievant's two suspensions in 1978 are relevant and sufficiently proximate to the last incident in 1980 to serve as the necessary disciplinary foundation for the ultimate discharge, or whether they are stale because from two to two and one-half years elapsed between those suspensions and the later reprimand and the instant discharge.

I find that the Agency by its own act, has answered that question itself. Rather than relying on the 1978 suspensions and affirming their vitality by discharging the grievant early in September 1980 for unauthorized absences, the Agency reprimanded her. Instead of "progressing" with a more severe disciplinary penalty following the 1978 suspensions, the Agency began the disciplinary sequence de novo, by imposing the first recognized penalty in the progressive discipline sequence.

This is not to say that the Agency did not have grounds to discharge the grievant at the time the reprimand was given. Rather it is to say that reliance on the progressive discipline process requires compliance with its classical sequence. To impose only a reprimand, after earlier suspensions for the same offense, is to break the sequence, to cast doubt on the Agency's belief in the continued vitality of the 1978 suspensions, and to start the disciplinary process anew.

For this reason, I shall reverse the discharge and impose the penalty sequentially appropriate. The grievant's termination is modified to a suspension. However the grievant is expressly
warned that any further violations of the Agency's regulations concerning absences or any other disciplinary offenses committed by her would, in the opinion of this arbitrator, be grounds for summary discharge.

The Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

The termination of Mrs. Je-Lain Ringgold Hunter is reduced to a suspension. She shall be reinstated without back pay and the period of time from her termination to her reinstatement shall be deemed a disciplinary suspension.

Eric J. Schmertz
Arbitrator

DATED: November 30, 1981
STATE OF New York )ss.: COUNTY OF New York 

On this 30th day of November, 1981 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 forgoing instrument and he acknowledged to me that he executed the same.
In the Matter of the Arbitration:
between
Graphic Arts International Union:
Local 274-L
and
Western Publishing Co., Inc.

The Company has shown a bonafide business need for the elimination of the grievant's job. I do not find that the contract clauses cited by the Union barred the Company's action. Though the Company could have been magnanimous by waiting a relatively short period longer until the grievant was eligible to retire, it was not contractually required to do so. And it is to the contract and the rights under the contract that the Arbitrator is bound and to which his authority is limited.

Accordingly, the Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above named parties, makes the following AWARD:

The Company did not violate Articles 3, 10, 38 or 41 of the collective bargaining agreement when it eliminated Charles A. Conte's position as a lead man in the sheet fed pressroom effective May 1, 1980.

DATED: June 9, 1981

STATE OF New York )
COUNTY OF New York ) ss:

On this ninth day of June, 1981, 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.

Eric J. Schmertz
Arbitrator