The stipulated issue is:

Was the rating given the Grievant correct and in accordance with the agreed upon Performance Standards and appropriate regulations? If not, what shall the remedy be?

A hearing was held in New York City, New York on November 19, 1982, at which time representatives of the American Federation of Government Employees, Local 1917, hereinafter referred to as the Union, and of the United States Immigration and Naturalization Service, hereinafter referred to as the Service, appeared. All concerned were offered fully the 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 the Union and the Service filed post-hearing briefs.

Carl I. Johnson, hereinafter referred to as the "grievant," is a Criminal Investigator employed by the Service in the Frauds Section, Investigation Branch, in the New York City District. During the rating period in issue he also served as First Vice President of the National Immigration and Naturalization Council of the American Federation of Government Employees, AFL-CIO. Pursuant to the Civil Service Reform Act and the rules and regulations of the Office of Personnel Management, all employees of the Service,
including the grievant, were rated for job performance for the period from October 1, 1981 through March 31, 1982. The grievant was rated by his supervisor, William Slattery, on seven individual, critical job elements and received ratings of "Fully Successful" on two elements, "Excellent" on four elements and "Minimally Satisfactory" on one element. The grievant received an overall performance rating of "Fully Successful." The grievant claimed that his ratings on each individual element, as well as his overall rating were improper. He appealed to his second line supervisor, Mr. Rene Albina who affirmed Mr. Slattery's ratings in toto. Thereafter a formal grievance was filed with the District Director Charles C. Sava who upheld the ratings on the individual job elements but reduced the grievant's overall performance rating from "Fully Successful" to "Minimally Satisfactory."¹ The Service ultimately denied the grievance and the matter was referred to arbitration.

The Union requests that this Arbitrator order that the grievant's overall performance appraisal be upgraded to "Outstanding" or, at the very least, to "Excellent." The relevant section of the Administrative Manual provides that in order to receive either rating, all critical individual job elements must be rated "Excellent" or higher.² However, a careful and thorough review of

¹ The Administrative Manual provides that in order for an employee to receive an overall performance rating of "Fully Successful," all individual, critical job elements must be rated "Fully Successful," or higher. Since grievant was rated as "Minimally Satisfactory" on one such element, Mr. Sava lowered his overall rating.

² In order to achieve an overall performance rating of "Outstanding," the employee must also demonstrate outstanding performance in a majority of the critical elements of the position.
the evidence and argument in this proceeding has persuaded me that the Union has failed to satisfy its burden of proving that the grievant's ratings of "Minimally Satisfactory" with respect to job element (3) or of "Fully Successful" with respect to job element (1) were improper. Accordingly, it is unnecessary to decide upon the propriety of the rating for any other individual job element, as the grievant's request for an upgrading of his overall rating would be unaffected.

As noted above, the grievant was rated as "Minimally Satisfactory" on job element (3) which requires that an employee "complies with integrity standards, all applicable laws, regulations and instructions government employee standards of conduct." Appendix I of the Administrative Manual defines a "minimally Satisfactory" rating as "performance on an individual critical or non-critical element of the job which merely meets the performance standards . . . . " The performance standards for this job element provide:

3. Although Section 17 of the Administrative Manual provides that "overall performance ratings issued to employees, or the ratings assigned to the individual elements, are grievable," I note that all of the uses of the appraisal results, as set forth in Section 20 of the Manual, are keyed to the overall performance rating, rather than the individual ratings. In addition, the Union's brief requests, as a remedy, the upgrading of the overall rating.

Parenthetically I feel constrained to add, however, that I have serious doubts concerning the propriety, and certainly the advisability of performance ratings which do not specify the number of times an employee was critically corrected in the performance of certain elements. Similarly, such corrections should be immediately communicated to the affected employee. Yet, this latter reservation is not sufficient to change the outcome of this decision.
EXCELLENT - In addition to the "fully successful" standard, incumbent through his actions creates a positive atmosphere towards compliance with integrity standards.

FULLY SUCCESSFUL - Maintains high standards of integrity, honesty, impartiality, and conduct in the performance of his duties. Avoids taking any action or making any decision which results in or creates the appearance of

a. Using public office for private gain
b. Giving preferential treatment to any person
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MINIMALLY SATISFACTORY - Efforts to maintain the "fully successful" standard required more than open support from management officials.

The grievant's rating of "Minimally Satisfactory" was based on the fact that during the rating period he was suspended for five days without pay for refusing to cooperate in an official inquiry and for insubordination. That suspension was the subject of another pending arbitration at the time of the hearing in the instant proceeding. The Service conceded that the grievant's rating on this element would be upgraded, if grievance on the suspension was sustained. However, on December 3, 1982, Arbitrator Levin found that the grievant's suspension was "for just and sufficient cause and for only such reasons as would promote the efficiency of the Service" and he denied the grievance.

It is well settled that Arbitrator Levin's determination that
the grievant refused to cooperate in an official inquiry and was insubordinate should be honored by me, unless I determine that his decision was palpably wrong. A review of his opinion and award has persuaded me it is not palpably wrong. That is not to say that I necessarily agree with Arbitrator Levin's decision. I have only concluded that I am not free to make a de novo finding on the same issues. Since I am bound by the findings that the grievant refused to cooperate in an official inquiry and was insubordinate, I conclude that his rating of "Minimally Satisfactory" on Job Element (3) must stand. The grievant has not met the performance standard which requires for the next higher rating of "Fully Successful" that he or she "Maintains high standards of integrity, honesty, impartiality and conduct in the performance of his duties" and "avoids taking any action . . . . which results in . . . . impeding government efficiency and economy . . . ." A rating of "Excellent" would require satisfaction of the "Fully Successful" standard, as well as actions creating a positive atmosphere toward compliance with integrity standards.

The Union's contentions on the rating for Job Element (3) are unpersuasive. Although Mr. Slattery's written comments stated that the grievant did not take any action that "would create an adverse appearance," this job element, on its face, deals with all instructions governing employee standards of conduct and not just those which would create a poor public image for the Service. Further, the Union's contention that the grievant was suspended as a "union official," but should be rated only as an "employee"
ignores the fact that all employees are required as part of their duties to cooperate in official inquiries and follow instructions until and unless they are determined to be wrongfully issued. Although Arbitrator Levin's rational was based, in part, on the active role played by the grievant in Union decisions, he clearly recognized that the grievant, as an individual employee, was the subject of the scheduled interview and was guilty of the disciplinary violations previously set forth. Lastly, rating the grievant as "Minimally Satisfactory" does not constitute "double punishment" but rather reflects an appropriate appraisal of his performance on this job element.

Lest there be any doubt, I have also concluded that the Union failed to satisfy its burden of proving that grievant's rating of "Fully Successful" on Job Element (1) was improper. To receive a higher rating of "Excellent," performance standard (b) requires that an employee manage investigations so that he or she completes 4.0 - 5.0 cases per month with less than 10% rejected for informational deficiencies. The parties have stipulated that the grievant closed seven cases over the six month period for an average of 1.166 case closings per month. The Union contends, however, that the case closing requirements for ratings on Job Element (1) must be reduced to take account of the fact that the grievant, as a Union official, spent a substantial amount of  

4. As I have denied this grievance with respect to the rating for Job Element (3), grievant's overall performance rating of "Minimally Satisfactory" must stand. The Administrative Manual requires that for an employee to receive an overall performance rating of "Fully Successful," all critical elements must be rated "Fully Successful" or higher. In any event, grievant has not sought that upgrade as a remedy.
authorized time on official Union business. The Union relies specifically on an agreed upon award in another arbitration between the parties which provided:

"All employees must be rated exclusively in the actual time spent in the work activity. Approved time away from the activity must not be considered in any performance rating. All standards must be equaled to the percentage of time in the work activity."

Although I agree with the Union's contention that this award mandates that the case closing requirements of the rating for this job element must be prorated, the application of that principle to the facts of the instant proceeding demonstrates that the grievant's rating of "Fully Successful" was proper.

The parties have stipulated that during the rating period the grievant spent 431 hours of his total time of 1070 hours on non-union, non-leave matters. Thus, the grievant spent 40.28% of his total time on Fraud, CIN, Litigation and Surveys. If one prorates the 4.0 - 5.0 case closings per month generally required for a rating of "Excellent," the grievant should have closed between 1.611 to 2.014 cases per month to receive that rating. Indeed, the grievant's average of 1.166 cases per month would fall below the prorated equivalent required for a "Fully Successful" rating. The Union's argument that Litigation time and Survey time should

5. Thus, the grievant's rating of "Fully Successful on this element is proper even though his average hours required to complete cases is at least in the "Excellent" range.
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vincing in light of Mr. Albina's clear and uncontradicted testimony
that cases can be and are often closed during such time. Indeed,
the grievant conceded on cross-examination that it was possible
to close cases during litigation time.

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 rating given Carl I. Johnson was in
accordance with the agreed upon Perform-
ance Standards and appropriate regulations.

Eric J. Schmertz
Arbitrator

DATED: March 18, 1983
STATE OF New York )ss.:
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as
Arbitrator that I am the individual described in and who
executed this instrument, which is my AWARD.
In the Matter of the Arbitration between
American Federation of Government Employees, Local 1917
and
United States Immigration Service:

The stipulated issue is:

Was the rating given the Grievant correct and in accordance with the agreed upon Performance Standards and appropriate regulations? If not, what shall the remedy be?

A hearing was held in New York City, New York on November 19, 1982, at which time representatives of the American Federation of Government Employees, Local 1917, hereinafter referred to as the Union, and of the United States Immigration and Naturalization Service, hereinafter referred to as the Service, appeared. All concerned were offered fully the 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 the Union and the Service filed post-hearing briefs.

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The Union requests that this Arbitrator order that the grievant's overall performance appraisal be upgraded to "Outstanding" or, at the very least, to "Excellent." The relevant section of the Administrative Manual provides that in order to receive either rating, all critical individual job elements must be rated "Excellent" or higher. However, a careful and thorough review of

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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 rating given Carl I. Johnson was in accordance with the agreed upon Performance Standards and appropriate regulations.

Eric J. Schmertz
Arbitrator

DATED: March 18, 1983
STATE OF New York )ss.:
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
In accordance with Article 10 of the collective bargaining agreement dated July 1, 1977 to June 30, 1979 between the University of Connecticut, hereinafter referred to as the "University" and the American Association of University Professors, the University of Connecticut chapter, hereinafter referred to as the "Union", the Undersigned was selected as the Arbitrator to hear and decide a dispute involving the Union's grievance dated November 29, 1977 and amended December 19, 1977.

The present issue is whether the grievance is arbitrable.

A hearing was held at the offices of the University on January 23, 1978 at which time representatives of the Union and University 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 parties filed post hearing briefs.

The Union's grievance, filed on November 29, 1977 and amended on December 19, 1977 claims violations of Article 19.2 and 19.4
of the collective bargaining agreement by the University's action in prorating the cost of living adjustment and merit/inequity awards for those members of the bargaining unit employed less than full time. On both November 29 and December 19 the Union referred to its grievance as a "class action."

At the hearing the Union conceded that the grievance had not been filed by any individual or group members of the bargaining unit and that no bargaining unit faculty members employed less than full time had complained over how the University apportioned the disputed wage adjustments. With that concession the Union asked that the Arbitrator treat its grievance as a "Union grievance" in accordance with Section 10.11.6 of the contract which provides inter alia that "the AAUP on behalf of itself may initiate any contractual grievance...."

The University contends that the grievance is not arbitrable because there are no bargaining unit grievants to support the "class action" and the Union should not now be permitted to change its pleading; that the grievance was not filed within 37 days of the occurrence of the conditions giving rise thereto, but rather 121 days after the prorated wage adjustments were implemented in the pay checks of the affected employees. The University points out that the less than full time members of the faculty received the disputed wage adjustments on a pro rata basis on July 29, 1977; that the Union's grievance was not filed until 121 days later on November 29, 1977; and that Section 10.11.1 of the grievance
procedure of the contract explicitly provides that a grievance "shall not....be considered a grievance under this Agreement" if it is not presented for disposition within the time limits prescribed therein.

The Union asserts that the time limits set forth in Section 10.11.1 of the contract should begin to run only after the Union knew or had grounds to know of the occurrence of the condition giving rise to the grievance; that because no affected faculty member complained the Union did not immediately learn of the pro-rated wage adjustments for those working less than full time; that irrespective of the absence of individual or group grievants the Union has a contractual right, as an entity, to grieve contract violations; that the University's letters to the affected faculty members were ambiguous and misleading and that other payroll information sought by the Union from the University was incomplete, misleading, not sufficiently revealing and/or not transmitted on time and consequently not informative of the problem. The Union explains that when it learned of the circumstances it quickly grieved and that its grievance met the contractual time limits if measured from the point that it learned how the University apportioned the wage adjustments to the less than full time faculty. Alternatively the Union characterizes its complaint as a "continuing grievance", asserting that it is arbitrable from and after any point that the affected employees receive any pay check with less than the amount of wages prescribed by Sections 19.2 and 19.4 of the contract.
I reject the University's theory that the grievance should be dismissed because it was filed and amended as a "class action" when in fact there are no individual or group grievants. Arbitration is not bound by the rigid rules of historical common law pleading. Obviously the Union erred in its belief that a "Union grievance" was a "class action." But inasmuch as the contract permits the Union to grieve as an entity, whether or not there are individual grievants supportive of the grievance, the Union has the right in this instant proceeding to procedurally change its "class action" grievance to a grievance "on behalf of itself" in accordance with the contractual authority of Section 10.11.6.

However, for several reasons I find that the Union's grievance is untimely and barred from arbitration by the time limits of Section 10.11.1 of the contract.

As the parties know the Arbitrator's authority is limited to the application and interpretation of the contract. Indeed Section 10.9 of the contract cautions the Arbitrator not to "add to, subtract from, modify or alter the terms and provisions of this Agreement." Therefore, unless there has been an explicit waiver, a waiver by past practice or conduct, or special circumstances which suspend or toll them, the time limits for filing grievances, as negotiated by the parties as an integral part of the grievance machinery of the contract, must be adhered to and enforced. Neither in this case nor by practice in prior grievances is there any evidence of the University's agreement to waive the
time limits of Section 10.11.1. of the contract, nor has there been any practice or conduct from which waiver can be implied.

The question therefore narrows to whether because of special circumstances running of the time limit should be tolled from the date that the affected employees first received prorated wage adjustments in their pay envelopes (on July 29, 1977) until some time shortly before the grievance was filed, when, as the Union contends, it first learned of what it considered to be violations of Sections 19.2 and 19.4 of the contract; and alternately whether the grievance is a "continuing" one thereby permitting a prospective grievance any time after the affected employees receive any pay check with less pay than the Union believes to be their entitlement under those Sections of the contract.

I answer the latter point first. This is not a "continuing grievance." The University acted once. It made a decision that bargaining unit faculty members employed less than full time would receive a prorated share of the wage adjustments, commensurate with the percentage of time they worked. Thereafter it made no further decisions in that regard. The pay checks of the affected employees on and after July 29, 1977 reflected that basic and single decision. A "continuing grievance" requires a reiteration and renewal of the original decision or the implementation of a new decision having the same or similar adverse effect. A periodic reoccurrence of an event or situation rooted
in a single managerial determination is not a continuing grievance, but rather, within the language of Section 10.11.1 of the contract nothing more than a perpetuation of and synonymous with the original "occurrence or condition."

The instance case is no more a "continuous grievance" than a discharge, where an employer takes a single action terminating an employee, and the affected worker remains unemployed through a series of pay periods until his grievance is heard. Clearly, a time limit on filing that grievance is binding from the date of discharge, and may not be filed long after a time limit has expired merely because the grievant is "continuously" off the payroll, and even if his termination was without cause. Similarly here, the time limit on grievances concedely applicable to Union grievances as well as those of individuals or groups, relates to the University's single action in prorating the disputed wage adjustments, and not to each periodic pay check thereafter.

Based on the record before me I cannot conclude that the Union should be excused from the running time limits, or that the time should have tolled because of the Union's allegation that it did not and could not learn of the condition giving rise to its grievance until well past the expiration of the contract time limit. Aside from negotiating conditions of employment, a Union's next most important function is to police the administration of the collective agreement. In that latter regard there is no more important duty than to see to it that negotiated wage adjustments
are properly implemented and paid. In discharging that duty, the Union must assume the initiative, act diligently and seek information from its members as well as from the employer. In the instant case, the Union's responsibility in that regard is heightened by the explicit contract provision permitting the Union to grieve "on behalf of itself" regardless of whether there are member complainants. With that right (not usually so spelled out in contracts), the Union cannot wait until its members inform it of grievances, and cannot avoid time limits on "Union grievances" because individuals do not protest. Rather, in possessing that right the Union has the corresponding duty to ascertain the existence of grievances on its own initiative and investigation, including, in the instant case, an inquiry among its members on what amount of wage increase they received, with available payroll stub documentation. I conclude the Union could have and should have done so within the prescribed time limits.

If the print out sheets, payroll information and other relevant data requested of the University was willfully misleading, or negligently incomplete, inaccurate or withheld, I would be inclined to treat that as an acceptable excuse from the application of the time limits of Section 10.11.1. The Union makes that claim herein, but it has not been proved, at least not to that requisite level. The evidence regarding their content, interpretation, when supplied, etc., is sharply contradictory and disputed. From it I cannot find that the University misled the Union, or withheld
relevant information, or supplied information that was prejudicially incomplete or inaccurate. That the Union may have had to make interpretations and mathematical calculations therefrom, or that the data was not completely clear, does not mean that it was incorrect, misleading, or inadequate, let alone deceptive.

Moreover, I am not satisfied that the remedy the Union seeks is arbitrable. The grievance asks for pay adjustments for the less than full time faculty. In other words, if the Union prevailed on the merits, certain individual employees would receive upward wage adjustments, even though those employees had not grieved, and as individuals or as a group are now (and at the time of the Union's grievance) time barred from seeking such a remedy under the time limits of Section 10.11.1 of the contract. It is axiomatic that a result may not be achieved indirectly if it is not permitted directly. If the affected employees are now time barred from a wage adjustment, the Union, in a "grievance on its own behalf" should not be permitted to gain for them what they are foreclosed from gaining for themselves. Otherwise, the express time limits of the contract, as negotiated by the parties would be circumvented and reduced to a nullity. Consequently, the remedy available to the Union in a grievance on its own behalf must be a remedy "indigenous" to the Union as an entity, not a remedy prescribed for its members. In my view it is questionable whether the Union has been monetarily damaged, assuming an error by the University in prorating the wage increase for part time faculty.
As an entity, the calculable damage to the Union is only nominal. Its grievance on the merits if it prevailed, would entitle it to a bare ruling that the contract had been violated and an award of nominal damages, leaving the contractually barred remedy for the affected employees a matter for negotiations, not arbitration.

In sum, as the contract time bars the remedy sought to individual grievants, an arbitration of a "union grievance" seeking the same remedy is similarly enjoined.

Finally, lest the Union think that on technical grounds it has been denied its "day in court" on the merits of its grievance, this Arbitrator, having learned the substantive aspects of the grievance in the presentation of the arbitrability case, takes the unprecedented step of stating that he would not have upheld it on the merits. The "base salary: and "salaries" referred to in Sections 19.2 and 19.4 of the contract I interpret to mean "full time salary." Hence a covered employee working less than full time, draws, during his less than full time tenure, only a portion of "base salary." A negotiated wage adjustment, applicable to "base rate" or full time salary is therefore prorated for those working less than full time and receiving proportionately less than full time pay. (When they assume or resume a full time work schedule they would then receive the full wage increase applicable to their full time status and full time base salary.) I believe the wages and pay for less than full time employees involved in this case met that test.
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 Union's grievance dated November 29, 1977 and amended December 19, 1977 is not arbitrable.

Eric J. Schmertz
Arbitrator

DATED: March 28, 1978
STATE OF New York )
CITY OF New York )

On this twenty eighth day of March, 1978, 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 University violate Articles 11 and 13 of the collective bargaining agreement by the manner in which the Provost reversed the original faculty recommendation, thereby denying tenure to Dr. Anne Mochon? If so, what shall be the remedy pursuant to the contract?"

Hearings were held in Amherst, Massachusetts on October 25, 1982, January 13, 1983 and February 24, 1983 at which times Dr. Mochon, hereinafter referred to as the "grievant," and representatives of the above named Union and University appeared. All concerned were offered fully the opportunity to offer evidence and argument and to examine and cross-examine witnesses. A stenographic record was taken and the Union and the University filed post-hearing briefs. The parties waived any requirement of the Arbitrator's Oath.

**CONTRACTUAL PROVISIONS**

The relevant provisions of the collective bargaining agreement between the Union and the University provide in pertinent part:

**ARTICLE XI**

11.1 The Faculty shall have primary responsibility in the area of personnel matters. This shall mean the capacity to initiate
or review faculty personnel recommenda-
tions. Academic administrative officials
may make a recommendation or decision
counter to the original faculty recommen-
dation only in exceptional circumstances
and with compelling reasons in written
detail which shall specifically address
the content of that recommendation as well
as the established standards and criteria.

11.2 The faculty shall have the right to grieve
based upon the terms and conditions of
this Agreement any modification or reversal
of such recommendations.

ARTICLE XIII

13.1 High professional standards must be the
basis for all personnel decisions. Personnel
recommendations and decisions shall be made
only after a review of all of the qualifica-
tions and all the contributions of the indi-
vidual in the areas of teaching, or research,
creative or professional activity, and of
service. All three areas must be considered
but the relative weight to be given to each
can be determined in the light of the duties
of the faculty member.

13.2 In order to maintain the academic excellence
of the University, current academic standards
and criteria for faculty personnel actions,
except as modified in this agreement, shall
remain in effect for the duration of the
contract.

FACTS

The grievant is an art historian who was first appointed
by the University in 1971 as an Instructor in the Art Department.
She received her doctorate degree from Yale University in 1973
and the next year she was promoted to the rank of Assistant
Professor. The grievant was subject to the University's tenure
review process during the 1980-1981 academic year. Pursuant to
Article 13.1 of the collective bargaining agreement, that process
requires review of a tenure candidate's performance in the areas
of teaching; service; and, "research, creative or professional activities." The parties have agreed that to receive tenure, Section 4.9 of the Academic Personnel Policy requires that a candidate must have "convincing evidence of excellence in at least two, and strength in the third, of the areas...." and "reasonable assurance of continuing development and achievement leading to further contributions to the University."

On November 17, 1980, the Art History faculty recommended by a vote of 8-0 with no abstentions in favor of awarding the grievant tenure and promoting her to Associate Professor. The Committee found that the grievant's teaching and service were "uniformly excellent" and that her research showed "genuine strength as well as potential." With respect to research, the Art History faculty stated:

"Anne Mochon's position in the Department, as a historian of the art of the immediate present, as a scholar interested in ideas on the cutting edge of art-historical developments, and as a colleague who therefore in many ways stands between the academic world of the art historian and the creative world of the studio artist, has influenced her scholarly output in many ways. Her exhibitions at the University Gallery, her active participation in symposia of various sorts on both the local, regional and national levels, her dissertation on the German plein-air painting and her excellent catalogue of the important Gabriele Munter exhibition at Harvard and Princeton attest to the care and meticulousness of her scholarly work. These things also show the variety of directions which her research and thinking have taken, to some extent in response to the contemporary scene. And they attest to the reputation she has attained beyond the University in her chosen field, as several of the letters make clear.

Her work on the Munter exhibition demonstrates
the appeal and accomplishment of her scholarship. Her repeated trips to Germany and subsequent careful development of her ideas and approaches have led to a publication of great quality, "consonant with the best being done by young American scholars in the field tody" (Donald E. Gordon letter.)\(^1\) The Munter show, small and extremely astute, is the finest piece of work we know of for giving one a revealing and moving image of what it was like to be a woman's artist in the early 20th century. "Certainly the best study of the artist's work in English (Franciscono letter)\(^2\) and "a really first-rate monograph" (Herbert letter),\(^3\) it integrates biography and artist production in a particularly illuminating way.

Even before its consumation, the wide ranging importance of this exhibition and catalogue was demonstrated; it received two grants from the National Endowment for the Arts and both Harvard and Princeton, two of the most discerning museums in academic contexts, chose to display it. It has, in Professor Haxthausen's words,\(^4\) "established her without question as one of the brightest young scholars in a field in which there is a rapidly growing interest."

Professor Mochon has several options for her future development some stemming from her dissertation. These will no doubt build upon "the major contribution (she has now made) to the fields of early 20th-century European art, German Expressionism and....women's studies" (Oppler letter).\(^5\)

1. Donald E. Gordon is a Professor of Fine Arts at the University of Pittsburgh.
2. Marcel Franciscono is an Associate Professor of Art History at the University of Illinois.
3. Robert L. Herbert is the Robert Lehman Professor of the History of Art at Yale University.
4. Charles W. Haxthausen is Associate Curator and Associate Professor of Fine Arts at the Busch-Reisinger Museum at Harvard University.
5. Ellen C. Oppler is an Associate Professor in the Department of Fine Art Studies in Art History and Music History at Syracuse University.
By the Munter catalogue Anne Mochon has amply justified the faith of the German scholars who first asked her to undertake this project. She has proven her ability to bring to fruition a lengthy and major project, resulting in a publication of the highest scholarly standing. In addition, this project represents a significant departure from the work of her dissertation; it clearly demonstrates Professor Mochon's ability as a creative scholar to move beyond the parameters (sic) established during her graduate education. We commend her creativity and independence and believe along with Professors Gordon and Oppler and Comini that she would secure tenure at any institution where "scholarship in twentieth century German art is respected."

On November 21, 1980, George M. Wardlaw, the Chairman of the Department of Art, extended his "strongest possible support" to the grievant's candidacy for tenure and promotion. He stated in part:

"Dr. Mochon's organization of the Gabriele Munter retrospective exhibition was an impressive undertaking. Her sixty-four page catalogue which accompanies the show is extremely well written and beautifully presented. The text is interesting, penetrating and informative. I am especially impressed with the quality of research and the format. This endeavor makes a valuable contribution in presenting this important artist to the art community of this country. Dr. Mochon's work will certainly help bring attention to this artist, attention that is most deserved and long overdue."

On November 24, 1980, the Art Department Personnel Committee also unanimously recommended that the grievant be awarded tenure and promotion. Their report stated in pertinent part.

6. Alessandra Comini is a Professor of Art History at Southern Methodist University.

7. This quote is from the Gordon letter.
"It is significant to emphasize that every outside letter recognizes the fine quality of her scholarship, her vast knowledge of the contemporary field and her scrupulous integrity and devotion to her subject. One reference distinguishes her work as competitive with older established scholars in the discipline, while another cites her as a principle research source in 20th century European art."

On December 16, 1980 the Personnel Committee of the Faculty of Humanities and Fine Arts unanimously recommended to Dean Allen that the grievant be awarded tenure and promotion. The Committee agreed with the reasons set forth in the prior recommendations and further stated that it was impressed by "her publication record, especially by her catalogue on Gabriele Munter, in the Committee's view, a gem of Art History scholarship on this important German woman painter." The Committee also noted the "large organizational undertaking" involved in the Munter exhibition at Harvard.

On January 14, 1981, Dean Allen, after "careful reflection," also recommended tenure and promotion to Provost Loren Baritz. With respect to "research/scholarship," Dean Allen stated:

"The most difficult issue in this decision is the research/scholarship component of Dr. Mochon's achievement. As several of the outside evaluators mention, her publications to date are not numerous. There are, however, factors which counterbalance this quantitative limitation. First, as several of the outside reviewers mention, is the excellence of the work she has published, specifically the Munter catalogue. This production is widely and discerningly praised by those who have read it. As one external reviewer put it, "better one impressive publication of real value to the field -- as in the Munter catalogue -- than the buckshot approach.... appearing in article after article format." In the second place, the Munter
exhibition and catalogue are not based on Dr. Mochon's dissertation; they represent a new independent line of research for her. These two factors, combined with her colleague's opinions have persuaded me (and I am sure, the Faculty Personnel Committee) to agree with the assessment that Dr. Mochon is a serious, meticulous, committed scholar; who works very hard at her research and who therefore produces and will continue to produce work that will make up in quality what it may lack in quantity. She worked on the Munter project since at least as early as 1977, when she first delivered a paper on Gabriele Munter, stayed with it right up through 1980, and brought the work to fruition when the catalogue text appeared. This is not the pattern typical of the so-called pre-tenure spurt, which would much more likely have manifested itself by a quick mining of her dissertation for a clutch of articles. It is, rather the pattern one would expect from a dedicated scholar who cares enough about her subject to work at it over an extended period of years so as to produce a work that has real impact.

For the foregoing reasons, plus such other evidence as the fact that she has been awarded two NEH grants (substantial confirmation that external referees expect her achievements), I conclude that Dr. Mochon has demonstrated the requisite strength in research, which together with her clear excellence in teaching and service, means that she meets the criteria for the award of tenure as set forth in Section 4.9 of the Academic Personnel Policy (T76-081)."

On March 3, 1981, Provost Baritz wrote to Dean Allen, stating:

"Pursuant to 6.4 (g) 8, I invite you to provide additional information for the basic file which will clarify your judgment that Professor Mochon has demonstrated the required strength in scholarly research that qualifies her for tenure and promotion. Please forward such information to my office no later than March 10, 1981. Your Response may include analysis of the relative merits of the journals in which Professor Mochon has published, reviews, the published material, internal or external analyses of the material
and whatever else you may wish to include that will aid me in determining my recommendation to the Chancellor."

Although Dean Allen requested that the deadline be extended until April 1, 1981, the Provost agreed only to an extension until March 20, 1981, stating that the former date would be "too late a date for those materials to aid me in formulating my recommendation to the Chancellor." 9

On March 20, 1981, Dean Allen forwarded additional material to the Provost. In the accompanying memorandum, the Dean emphasized that portions of a March 18, 1981 memorandum from the Art History faculty which focused on "other evidence of the strength of Dr. Mochon's scholarly research" such as: (1) a proposal for a College of Art Association talk which was reviewed and accepted; (2) her proposals for two NEA grants which were refereed and approved and, (3) the Munter exhibition itself, which entailed a great deal of research and critical judgment. The Dean also forwarded five additional letters from outside evaluators, all of which praised the Munter catalogue and the exhibition and two of which praised the grievant's participation in the accompanying symposia. Dean Allen also forwarded the grievant's application

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8. Section 6.4 (g) of the Academic Personnel Policy provides: "Prior to a recommendation or decision that may be contrary to either the recommendation prepared at the school or college level, the Chancellor or Provost shall invite the Dean to provide additional information for the basic file on clarification of the recommendation."

9. However, the Provost did not write his decision on this matter until May 21, 1981.
for a sabbatical leave and the description contained therein of a proposed research project. The Dean concluded that the request for a leave and the proposal was "additional evidence that Professor Mochon will continue to pursue her scholarly research on a high level." He concluded:

"She has demonstrated the strength in scholarly research necessary to justify the award of tenure. Granted, this is a difficult case to judge, because the pattern of Professor Mochon's achievement is unusual, it therefore requires (and is receiving) more careful scrutiny than a more conventional case. But it is not a weak case; and the more closely it is examined, the more clearly its strength appears."

On May 21, 1981, the Provost informed Dean Allen that he was recommending against awarding tenure to the grievant. Accordingly, he requested that the grievant be notified that her appointment would terminate as of August 31, 1982. The Provost's determination was based on his conclusion that "convincing evidence of strength in the area of research, creative or professional activity has not been presented." More specifically, the Provost noted that even in Art History, it is usual to make a judgment in this area by examining the publications that have resulted. Thus, he asserted that the "primary evidence" of research and scholarship was the single publication of the Munter exhibition catalogue.

He stated "The question we must confront is whether this single

10. The memorandum was also signed by the Chancellor, but it is conceded that the decision was actually made by the Provost.

11. The Provost and the University have conceded that the grievant's performance in the areas of teaching and service was properly evaluated as excellent.
exhibition catalogue provides convincing evidence of strength in the area of research, creation, professional activity for a period of eight years. Although the Provost conceded that in Art History an exhibition catalogue is a "respectable vehicle for scholarly effort" he determined that, without "resting (his) conclusion on a quantative basis, it is obvious that a single, relatively short catalogue produced in the course of a decade does not lead to an acceptable prediction for the future." He further stated that his conclusion was based, "in part, on our own careful study of the catalogue plus a close reading of the letters of recommendations" which were noted in the November 17 memorandum from the Art Department Personnel Committee. Based upon some of the language in three of those letters which alluded to the limited quantity of published works, the Provost concluded that the grievant's peers do not see her scholarly record as constituting strength.

THE CONTENTIONS OF THE PARTIES

THE UNION

The Union contends that the Provost and thereby the University violated Article 11 and Article 13 of the collective bargaining agreement between the parties in the manner in which

12. The Provost's memo of May 21 made no specific reference to the evaluations of the catalogue made by the University's own faculty or to outside recommendations other than those noted in the November 17 memorandum.

13. The contents of these letters (from Professors Comini, Francisconco and Herbert) and letters from other outside evaluators are discussed in the November 17 memorandum from the Art History faculty and are analyzed in greater detail later in this Opinion.
he reversed the affirmative faculty tenure recommendations in favor of the grievant. First, the Union argues that the Provost violated that portion of Article 13 which states that "personnel recommendations and decisions shall be made only after a review of all of the qualifications and all of the contributions of an individual in the areas of...research, creative or professional activity...." It is clear, the Union asserts, that in his memorandum of May 21, 1981 the Provost exclusively reviewed the published, Munter catalogue. The contract mandates that the Provost should have reviewed other legitimate contributions of the grievant in this area of endeavor. More specifically, the Union points to the following contributions, all of which were noted in the tenure file but none of which were expressly addressed in the Provost's memorandum: (1) the extensive scholarly, research and organizational efforts which were required in developing, funding, organizing and curating the Munter exhibitions; (2) the planning of and participation in a symposium at Harvard on Woman Artists in Early Twentieth Century Germany which was offered in connection with the Munter exhibition; (3) the preparation and delivery of a paper at Temple University in 1974 on The Tradition of Plein-Air Painting in Munich, 1880-1900; (4) the preparation and delivery of a paper at the College Art Association Annual Meeting in 1977, entitled: Gabriele Munter and the Blaue-Reiter; (5) the grievant's dissertation; (6) an exhibition of artists co-organized by grievant for the University Art Gallery in 1973; and (7) the participation during 1975 and 1976 in various symposia and lectures on topics relating to contemporary women's art. In addition, the
Union contends that the Provost wrongly failed to consider the major importance and impact of the entire Munter project.

Second, the Union asserts that the Provost violated that portion of Article 13 which deals with the various areas to be evaluated, that "The relative weight to be given to each may be determined in light of the duties of each faculty member." The Union argues that the Provost should have given less weight to the grievant's performance in the area of scholarship in light of her very heavy teaching load.

Third, the Union contends that the Provost's actions in this case violated Article 13.2 which provides that the University's "current academic standards and criteria for faculty personnel actions...shall remain in effect for the duration of the Agreement." The Union points to the fact that Dean Allen who had also served as Acting Provost, was in favor of awarding tenure and the fact that none of the witnesses could recall a negative tenure decision by the Provost in light of unanimous affirmative recommendations from all of the various faculty committees, the Department Chairman and the Dean. Thus, the Union concludes that the Provost changed the relevant criteria for tenure.

Lastly, the Union asserts that the Provost violated Article 11.1 in that he reversed the faculty recommendation in favor of the grievant even though there existed no "exceptional circumstances" or "compelling reasons in written detail which shall specifically address the content of (the faculty's) recommendation as well as established standards and criteria." However, the Union concedes, based upon prior arbitration decisions under this
contract, that this Arbitrator has a limited review of the validity of the Provost's actions. More specifically, the Union accepts the standard articulated by Arbitrator Dorr:

"...the arbitrator literally may not substitute his judgment of a candidate's qualifications for that of the administration but must be open to the Union evidence that the administrator:

In exercising his judgment was arbitrary, capricious or acting in bad faith, or

Neglected to write out his reasons in detail addressing the content of the original recommendation as well as the established standards and criteria to be found in Red Book 4-9 and 4.2."

Nevertheless, the Union contends that the Provost violated Article 11.1 in that he was arbitrary and capricious in recommending against grievant's tenure. The Union bases this assertion on the Provost's decision to review only the Hunter catalogue; his failure to address or give weight to all of the favorable letters from outside evaluators; and his quoting other such letters "out of context."

The Union concedes, based upon a prior arbitration award, that this Arbitrator cannot actually award tenure. Accordingly, it requests that the grievant be reinstated with back pay and interest and that her tenure candidacy be re-evaluated in compliance with the contractual standards.

14. I assume that the Union is also requesting a re-evaluation of the grievant's promotion to Associate Professor.
The University contends that the Provost's decision to deny tenure to the grievant was in compliance with all provisions of the collective bargaining agreement between the parties. More specifically, the University asserts that the Provost did in fact review all of the qualifications and all of the contributions of the grievant in accordance with the requirements of Article 13.1. It notes that the Provost testified that he read and made his decision based upon the entire tenure dossier and that the Provost never placed any limitations on what he would consider as evidence under the category of research, creative or professional activity. Although in his May 21 memorandum, the Provost focused on the Munter catalogue as the "primary evidence of scholarship," this does not mean that he failed to review anything else. He simply attributed less weight to other evidence.

Further, the University vigorously resists the Union's contention that the Provost violated Article 13.1 by failing to give less weight to the grievant's scholarship in light of her heavy teaching load. The University relies on the grievant's own testimony during these hearings that she did not take the position that "because of (her) teaching or service activities....the requirements of strength in research, creative or professional activities should have been lowered in regard to (her)..." or that any "allowances should have been made in regard to quantity of....accomplishments in research creative or professional activities because of....teaching or service activities." Indeed, throughout her career at the University, the grievant was made aware of the
fact that she was expected to meet the usual criteria in this area and that she ought not to allow other activities to unduly hamper her scholarly development. The University also contends that the Provost's undisputed testimony establishes a University policy requiring that any re-allocation of "relative weight" pursuant to Article 13.1 be done by prior written agreement with the Provost. No such agreement exists in the instant case.15

In addition, the University argues that the Provost's action did not amount to any change or alteration of tenure standards which might possibly be in violation of Article 13.2. The University contends that the Union presented no evidence to support its claim in this regard, other than the mere fact that Dean Allen testified that if he were Provost, he would have decided the instant case in favor of the grievant. The University asserts that the exercise of discretion by the Provost in rendering his academic judgment of the quality and quantity of the candidate's work does not amount to an alteration of standards even if someone else would have decided the case differently in the past.

Lastly, the University contends that the Provost did not violate Article 11.1 in reversing the prior faculty recommendation because there existed "exceptional circumstances" and the Provost set forth "compelling reasons in written detail" for doing so. The University emphasizes that there is no contract violation since,

15. The Provost testified that he did not know whether this "policy existed when the grievant was appointed as an Assistant professor in 1974."
at the very least, the Provost was not arbitrary, capricious or in bad faith in concluding that his decision, based upon an evidence in the tenure file, differed from that of the original faculty recommendation. The University asserts that the Provost's decision in the instant case was based upon his reasonable conclusion that the primary evidence of research, creative or professional activity was the Munter catalogue; that he appropriately judged it not of sufficient significance or quality to outweigh an overall skeletal record; and that there was no other evidence to warrant a finding of strength. The Provost's conclusion was based upon his independent assessment of the catalogue, as well as a close reading of the letters of recommendation, some of which supported his negative conclusion, and none of which provided the detailed analyses, dissection and substantive evaluation which would have aided him in reaching a different judgment on the quality of the catalogue. Instead, the favorable letters of outsider evaluators contained mere conclusions or general descriptions tending to characterize the catalogue in glowing terms. Indeed, one letter criticized the content of the catalogue.16

Nor did the Provost limit his considerations to the Munter catalogue. Rather, he reviewed the "record in its entirety,"

16. The Gordon letter states in part: "There is weakness in Mochon's study, admittedly. This is her excessive caution in relating Munter's art to the broader tendencies of German Expressionism. Thus she misses the fascinating parallel of the Munter Girl With Doll of 1908-09 with woodcuts from 1910 by Heckel and Kirchner and, perhaps more seriously, the probable dependence of Munter's 1907 Bridge in Chartres on woodcuts by Kirchner and Bleye....More generally, she does not go into the general issue of naivete or primitivism in turn of the century German art....nor does she examine some of the reasons for the abstraction in the background in the 1906 Portrait of Kandinsky,"
including such of grievant's activities as the development and organization of the Munter exhibitions and other art exhibitions, participation in symposia, preparation and delivery of lectures, and preparation and delivery of papers to professional groups. Nevertheless, the Provost was unable to find that these contributions constituted convincing evidence of strength in scholarly work because the tenure file did not contain copies of the texts of the lectures, or papers or substantive information or evaluations relating to most of these activities. Those evaluations which did discuss one or more of these contributions were conclusory rather than substantive and detailed. Further, any deficiency in the evidence in the tenure file was the responsibility of the grievant or the faculty or the outside evaluators and not of the Provost. Section 6.4 (b) of the Academic Personnel Policy provides that "a faculty member shall submit to the Department Head any and all materials, for inclusion in the basic file, which he or she believes will be essential to an adequate consideration of the case." Section 3.1 provides that "The faculty has the obligation to present a clear, complete and convincing case for the recommendation so as to assure the faculty member of a complete presentation of his or her qualifications and achievements and so as to provide the basis both for full reviews of the recommendation, and the decision. Lastly, the letter sent by the Department Chairperson to outside evaluators stated in part: "if you would be willing to supply us with your evaluation of Dr. Mochon's scholarly contributions and the impact of her work on her area of speciality. Also your opinion as to Dr. Mochon's standing in comparison with
other scholars of her age and speciality would be of use to us." The word "evaluation" should have implied the kind of detailed analytical underpinnings which was sought by the Provost.

**OPINION**

The Union has not satisfied its burden of proving that the Provost's action in this case constituted a violation of Article 13 of the collective bargaining agreement. First, the Union has not established that the Provost failed to "review" all of the qualifications and all of the contributions of the grievant in the area of research, creative or professional activity. Although the Provost's memorandum of May 21, 1981 focuses almost exclusively on the Munter catalogue, it does make some reference to "the total record before us" and of "a careful and thorough review of the basic file in its original form, the various recommendations accompanying it, the responses provided to Provost Baritz's memorandum to Dean Allen pursuant to Section 6.4 (g) of the Academic Personnel Policy...." In addition, the Provost's unimpeached and uncontradicted testimony in this proceeding establishes that he did review and consider all of the grievant's qualifications and contributions. That is not to say that the Provost necessarily accorded those contributions appropriate weight in recommending against tenure. Indeed, that is one of the Union's strongest arguments in its claim of violation of Article 11. But Article 13 is designed to ensure that the decision maker "reviews" all of the relevant matter; it does not purport to assign any weight to that information.

Second, I am not persuaded that the Provost violated Article
13.1 by his failure to give less weight to grievant's contributions in the area of research, creative or professional activity because of her heavy teaching load. The contract language itself is permissive, i.e. it states that the "relative weight to be given to each may be determined in the light of the duties of the faculty member." Indeed, requiring excellence in only two of the areas, but only strength in the third may support the exercise of the discretion accorded to decision-makers by the language of Article 13.1. Most importantly, the evidence in this proceeding clearly establishes that the grievant did not expect the application of anything less than the normal requirements relating to quality and quantity of scholarship, even though she had an unusually heavy teaching load.17

Third, the Union has not satisfied its burden of proving that the Provost violated Article 13.2 by setting a new and higher criteria for reviewing scholarly work. The Union introduced no evidence tending to show that other tenure candidates who were similarly situated to the grievant with respect to the nature, quality and quantity research, creative or professional activity, were granted tenure in past years through the application of different criteria. The mere fact that a new Provost, who purports to apply the established criteria, reaches a decision which is different from that which would have been reached by a prior

17. Thus, I make no finding as to whether a prior written agreement signed by the Provost is a pre-requisite to altering the usual distribution of weight among those areas.
Provost, does not prove that the criteria has been changed. To
decide otherwise, would prevent a new academic administrator from
exercising independent judgment in the application of the criteria,
even if the evaluative result is different from that of his
predecessors. I cannot conclude that the parties intended to
foreclose that new and independent judgment under the language in
Article 13.2. Nor does the fact that no witnesses could recall a
negative tenure decision by the Provost in light of unanimous,
affirmative recommendations from all of the various faculty
committees, department chairmen and the Dean, satisfy the Union's
burden of establishing that the Provost used different "criteria"
than were used in the past. 18

The remaining issue is whether the Provost's action in
recommending against grievant and contrary to the prior faculty
recommendations constituted a violation of Article 11.1. The
express language of that provision, as well as the fact that
Article 11.2 specifically grants to faculty the right to grieve
such administrative actions, would appear to place the burden on
the University to establish that there existed "exceptional
circumstances" and "compelling reasons" to support the Provost's
decision. Yet, as noted previously, the Union, as well as the
University, have taken the position that this Arbitrator may find

18. Thus, I make no finding as to the relationship between Article
13.2 and that part of 13.1 which requires that "high professional
standards must be the basis for all personnel decisions."
a violation of Article 11.1 only if the Union has persuaded him that the Provost acted in bad faith or was arbitrary or capricious. The Union's concession of this limited standard of review is based upon the decisions in prior arbitration awards under this contract language.

The source of this restrictive interpretation of Article 11.1 is the opinion of Arbitrator Dorr in the Cleveland case. There, the arbitrator concluded:

"Thus, absent a showing that an administrator was arbitrary, capricious or in bad faith, a reversal of the original faculty recommendation on the grounds that the contents of the dossier do not support such recommendation, may be considered contractually an 'exceptional circumstance which, if accompanied in written detail addressing the 'content' of the original recommendation as well as 'established standards and criteria,' may also constitute 'compelling reasons'...."

....the arbitrator may not substitute his judgment on a candidate's qualifications for that of the Administration but must be open to Union evidence that the Administrator:

in exercising his judgment was arbitrary, capricious or acting in bad faith, or neglected to write out his reasons in written detail addressing the content of the original recommendation as well as the established standards and criteria to be found in Red Book 4.9 and 4.2."

Arguably, Arbitrator Stutz followed this interpretation in the Gengel arbitration. He stated that "whether (the dean's) reasons for disagreeing with the faculty recommendations were compelling is a matter of academic judgment," and that the "good faith conclusions of an administrator, based on evidence in the dossier, that his or her recommendation differs from that of the department is contractually, in and of itself, an exceptional circumstance."
However, Arbitrator Stutz does require in addition that "compelling reasons (be) indicated in writing." He also notes that Article 11.1 has not "bestowed unfettered discretion" upon the administrator. Thus it is not crystal clear that Arbitrator Stutz adopted all of Arbitrator Dorr's reading of Article 11.1.19

Arbitrator Dorr's interpretation of Article 11.1 is based upon "common usage" and Section 4.3 of the collective bargaining agreement which provides: "The judgment of an arbitrator shall not be substituted for that of the employer with regard to any complaints or grievance based upon a challenge of a management right, subject to the provisions of this Agreement...."

This Arbitrator does not agree with Dorr. Obviously, Section 11.1 is designed to limit "management rights" when a personnel decision is made contrary to the original faculty recommendation. In my view "exceptional circumstances" and "compelling reasons" are not synonymous with arbitrariness or capriciousness. It is well settled that the "arbitrary or capricious" standards of review would be implied even if there were no express contractual language limiting management's power. Thus, under the contract language there is a presumption in favor of affirmation of the

19. Arbitrator Zack's decision in the Lloyd arbitration does not expressly support or reject the arbitrary and capricious standard of review. He held only that an arbitrator may not actually grant tenure as a remedy. Zack stated that: "The Arbitrator has the contractual right to require adherence to the agreed upon standards for review in tenure cases and to enforce those standards with remedies other than the award of tenure....The Arbitrator....for example, may be asked to determine whether...there were in fact "exceptional circumstances and with compelling reasons" (Zack at page 28). In the most recent arbitration between these parties involving Article 11.1, Arbitrator Nadworny undertakes an independent review of an administrator's decision to determine whether there were "tangible, reasonable and objective reasons for disagreeing with a departmental recommendation."
faculty recommendation, rebuttable only in "exceptional circumstances" and for "compelling reasons." And the validity of the University's reliance on these latter circumstances is fully reviewable in arbitration. Arbitrator Dorr's standard of review makes meaningless the explicit requirements in Article 11.1 that there exist "exceptional circumstances" and "compelling reasons."

Despite the above reasoning, I am constrained to apply Arbitrator Dorr's standard of review in this proceeding. That is so because the Union specifically conceded the applicability of that standard. While the Union's concession was apparently based upon its erroneous belief that this Arbitrator is bound by the prior arbitration decisions, it would be unfair to the University to apply a different standard without fair notice and full opportunity for argument. Thus the issue in this arbitration narrows to whether the Union has satisfied its burden of proving that the Provost was arbitrary in finding that there existed "exceptional" and "compelling reasons" sufficient to reverse the prior unanimous faculty recommendations to grant the grievant tenure.

A careful and thorough review of the testimony, documents and arguments submitted in this proceeding has persuaded me that the Provost acted in an arbitrary manner in concluding that "compelling reasons" existed to disregard the affirmative faculty votes.

20. But for that concession I would have followed my interpretation of the contract.
In his testimony in these hearings, the Provost emphasized that in looking for a "record of continuing development such as would lead to a reasonable assurance of future continued productivity" and in judging "the quality of the work that has been done to date," he is dependent upon the "substantive evaluations that were in the dossier as it comes" to him. Thus he testified that published work is the "best kind of evidence" because it provides the "opportunity to have critical analysis by peers who are external to the campus" and that he is "dependent on the evaluation of others to a degree." And, in his memorandum of May 21, 1981, the Provost's judgment of lack of strength is based, in part, on "a close reading of the letters of recommendation."

The Provost also testified that he believed there were "many other vehicles for expression of either research, professional or creative activity that are equally acceptable," as they also could well result in the kind of evaluation by peers which he sought. Thus, the Provost included as relevant contributions, invited lectureships, art history exhibits and curatorships, and some kinds of participation in symposia or panels." He concluded, however, that the tenure dossier of the grievant did not provide convincing evidence of strength in these areas.

Specifically, with respect to the Hunter catalogue, the Provost's conclusion is based largely upon what he characterized as the "conclusory nature" of the outside evaluations.

Also, the Provost stated that he was unable to find convincing evidence of strength with respect to the grievant's curatorship.
of the Munter exhibit and participation in the accompanying symposia because the letters of evaluation which praised the grievant's efforts in these areas did not include enough detailed dissection of the work and its impact. And further, he testified that although he was aware that the grievant had delivered two papers to professional organizations, he could not find therein any additional evidence of strength because the file did not contain peer reviews or even copies of the texts.

In short, the Provost's own testimony establishes that the critical element in his decision was the lack of sufficient factual underpinnings and dissection to support the favorable evaluations contained in the tenure file.

The Provost's arbitrariness, in my view, is found in his selective use of the statements of the outside evaluators; his failure to accord the opinions of the outside evaluators the professional respect and credibility generally given recognized experts; and his failure to give fair and explicit notice to the grievant, the faculty, the Dean, the Department Chairperson or even the outside evaluators of what he perceived to be inadequacies in those evaluations and in the other aspects of the grievant's file.

Unevenhandedly, in my view, he relied on the "conclusory" language of the letters as to the quantity of the publications, but rejected conclusory statements on quality. For example he used the negative conclusions in the letters of Dr. Comini, Professors Franciscono and Herbert regarding quantity in support of his negative decision, but apparently did not give equal
consideration to the positive conclusions as to quality in those same letters.

Dr. Comini states: "As to the brevity of Dr. Mochon's use of publications, her Munter Catalog makes up admirably for this 'publish or perish' shortcoming. It has carried her far afield of her original dissertation topic and the scrupulous integrity and interesting scope of her approach shines out from every page of the publication, making it a pleasure to consult and a model of how devotion to subject can be tempered by even keeled methodology." Professor Franciscono states in part: "Dr. Mochon's Munter Catalog is, in my opinion, an exceptionally fine introduction to the work of an artist too little known. I was impressed by Dr. Mochon's clear, thoughtful and convincing evaluations...." And Professor Herbert noted that "the Munter Catalog is a really first-rate monograph, and alone is proof of (Dr. Mochon's) perceptions (as well as her hard work)....The Munter Catalog is full of facts, interpretations and ideas that are entirely new to me." Even the Gordon letter, discussed in footnote 16, supra, ultimately concluded that "Mochon's approach is consonant with the best that is being done by young American scholars in the field today" and that he would recommend the grievant for promotion "anywhere where careful and thorough scholarship in twentieth century German art is respect." The fact is that all the letters of the outside evaluators contained praise for her work.

All faculty committees, as well as the Dean, the Chair and the grievant reasonably believed that the outside evaluations in
the file constituted convincing evidence of strength since the evaluators were recognized experts in the field of art history. The letter soliciting outside reviews asked for an "evaluation of Dr. Mochon's scholarly contributions...." as well as an "opinion as to Dr. Mochon's standing in comparison with other scholars." (emphasis added). It is not at all surprising that their responses were "conclusory." In my view, as experts, their evaluations and opinions should be presumptively acceptable and persuasive, even if interpreted as conclusory. If the Provost thought he required more detailed delineation supporting those conclusions he should have specifically requested the desired information. His request of March 3, 1981 to Dean Allen for additional information was not adequate. Although that document referred to "internal or external analyses of the material," it did not reasonably indicate the "deficiency" of the analyses already submitted or those additional analyses submitted thereafter. It would have been both fair and simple for the Provost to have specified in that March 3, 1981 request the nature of the information which was missing and thereby afford the grievant a reasonable opportunity to supply the "shortcoming." By not doing that, 20. Similarly, the Provost should have requested evaluations and/or copies of those of grievant's contributions which were only referred to by way of reference in the tenure file.

21. Sec. 5.1(a) of the Academic Personnel Policy gives faculty members the "opportunity to supplement the original presentation with additional relevant information in the event that a review indicates shortcomings in the presentation."
the grievant, and those supporting her, had no way of knowing that the Provost wanted something different or more than what is traditionally submitted by outside experts. Nor should the Provost be relieved from his obligation in this regard because of Sections 3.1 and 5.1 (a) of the Academic Personnel Policy of the University. The Provost does not have an obligation to create a complete and convincing tenure file. He must, however, and to avoid arbitrariness, give fair notice of what he believes to be a relevant deficiency with respect to the lack of detailed information relating to the material already included in the file.  

For the foregoing reasons, I find the Provost acted arbitrarily in his evaluation of the grievant's tenure file and credentials, in violation of Article 11 of the contract.

22. Although the Cleveland, Gengel and Edwards arbitrations were decided in favor of the University, none of them turned upon the lack of fair notice of insufficient detail in favorable outside evaluations by recognized experts. In addition, those cases are otherwise distinguishable in significant respects. For example, in Cleveland, the grievant hadn't published at all since he completed his dissertation; the Collegiate Personnel Committee split 3-3 on whether to recommend tenure; and, the Dean found that the Department Personnel Committee based its rating of excellence in teaching on an insufficient sampling of student evaluations. In Gengel, the school personnel committee first voted against recommending tenure and then changed its view, but by a non-unanimous vote. In addition, the employee's only contribution in the area of scholarly work since joining the University was one co-authored article, one book review, one paper in conference proceedings and a chapter in a book of essays honoring one of the leaders in the area of speech and hearing. In Edwards, which did not involve tenure, the administrator's decision was upheld on the basis of reasonable concerns over budgetary and staffing problems.
The Union accepts the Lloyd decision which bars an arbitrator from awarding tenure. I do not choose to disregard or go beyond that decision, especially in view of the Union’s concession on the matter of remedy. Clearly, Lloyd is not palpably wrong, the standard upon which arbitrators in subsequent cases reverse prior decisions in point.

Therefore, and 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 University violated Article 11 of the collective bargaining agreement by the manner in which the Provost reversed the original faculty recommendation, thereby denying tenure to Dr. Anne Mochon. Dr. Mochon shall be reinstated for the 1983/84 academic year. She shall receive a de novo re-evaluation of her tenure and promotion candidacy in accordance with the contractual criteria and procedures. She shall receive back pay from the termination of her employment on August 31, 1982 to the date of her reinstatement, less her earnings, if any from gainful employment during that period. The request for interest on the back pay is denied.

Eric J. Schmertz
Arbitrator

DATED: July 30, 1983
STATE OF NEW YORK )
COUNTY OF NEW YORK )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The stipulated issue is:

Is the following arbitrable? Has the Employer failed to comply with its 1977-1980 collective bargaining agreement by failing to pay the total sum of $11,823.13 in pension contributions on behalf of those employees reduced to auxiliary status in January and April 1978? If so what shall be the remedy?

Hearings were held in New York City on January 7 and March 17, 1983 at which time representatives of the above named Union and Employer appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator’s Oath was waived. Both sides were afforded an opportunity to file a post-hearing brief. The Employer filed a brief.

I find the grievance time barred from arbitration and hence not arbitrable.

Section C of the Grievance Procedure of the contract provides in pertinent part:

1) In the event the grievance is not settled in Step 2, either the Employer or the Union may notify the other in writing within ten (10) days of its intent to submit the grievance to arbitration.

2) Any extensions to the time limit set forth in this Article must be by mutual agreement between both parties.
I conclude that the intent and effect of paragraphs 1 and 2 above are to make the ten day time limit to submit a grievance to arbitration mandatory and a statute of limitations.

With regard to the instant grievance, the Union did not comply with that time limit and there is no evidence in the record that the time limit was extended or waived, either in this situation or generally.

I find, as the Employer asserts, that the subject matter of the instant grievance was presented to Arbitrator Burton B. Turkus in September 1980. Turkus, who had previously ruled in November 1978 that the Employer had improperly classified a number of employees, stated in his second decision, in response to the Union's claim that the Employer failed to make pension contributions on behalf of those employees previously found to be improperly classified that he was "functus officio." He further stated that "if these... claims... are arbitrable... they must be raised and brought to arbitration in another and entirely independent proceeding."

With the forgoing ruling, Turkus gave the Union the opportunity de novo to submit to arbitration on the instant pension issue, over which he determined he had not retained jurisdiction. I conclude that that opportunity triggered the commencement of the mandatory ten day period under the contract for the referral of a grievance to arbitration. In short, Turkus' ruling of

1. Said pension claim is the issue in the instant arbitration.
November 20, 1980 constituted a constructive application and completion of the forgoing parts of the grievance procedure, setting the ten day time limit in motion.

The Union's notice of its intent to arbitrate was submitted almost a year later, by a Notice to the New York State Supreme Court, with service on the Employer. The Employer opposed the Notice on the grounds that the dispute was time barred. The Court referred the case, including the threshold issue of arbitrability to arbitration.

The forgoing facts show that the Union failed to comply with the contract time limit; that the Employer did not extend or waive the time limit, and did not acquiesce in the procedure followed by the Union. Having found the time limit to be mandatorily prescribed, I must conclude that the present grievance is no longer arbitrable.

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 Union's claim that the Employer failed to comply with its 1977-1980 collective bargaining agreement by failing to pay the total sum of $11,823.13 in pension contributions on behalf of those employees reduced to auxiliary status in January and April 1978, is not arbitrable.

DATED: May 31, 1983
STATE OF New York ) ss.: 
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
In the Matter of the Arbitration
between
Truck Drivers Local Union #807 IBT
and
Wells Fargo Armored Service Corp.

OPINION AND AWARD
Case #82K/20246
2-CA-19180

The stipulated issue is:

Is the following arbitrable?
Has the Employer failed to comply with its 1977-1980 collective bargaining agreement by failing to pay the total sum of $11,823.13 in pension contributions on behalf of those employees reduced to auxiliary status in January and April 1978? If so what shall be the remedy?

Hearings were held in New York City on January 7 and March 17, 1983 at which time representatives of the above named Union and Employer appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. Both sides were afforded an opportunity to file a post-hearing brief. The Employer filed a brief.

I find the grievance time barred from arbitration and hence not arbitrable.

Section C of the Grievance Procedure of the contract provides in pertinent part:

1) In the event the grievance is not settled in Step 2, either the Employer or the Union may notify the other in writing within ten (10) days of its intent to submit the grievance to arbitration.

2) Any extensions to the time limit set forth in this Article must be by mutual agreement between both parties.
I conclude that the intent and effect of paragraphs 1 and 2 above are to make the ten day time limit to submit a grievance to arbitration mandatory and a statute of limitations.

With regard to the instant grievance, the Union did not comply with that time limit and there is no evidence in the record that the time limit was extended or waived, either in this situation or generally.

I find, as the Employer asserts, that the subject matter of the instant grievance was presented to Arbitrator Burton B. Turkus in September 1980. Turkus, who had previously ruled in November 1978 that the Employer had improperly classified a number of employees, stated in his second decision, in response to the Union's claim that the Employer failed to make pension contributions on behalf of those employees previously found to be improperly classified that he was "functus officio." He further stated that "if these... claims... are arbitrable... they must be raised and brought to arbitration in another and entirely independent proceeding."

With the forgoing ruling, Turkus gave the Union the opportunity de novo to submit to arbitration on the instant pension issue, over which he determined he had not retained jurisdiction. I conclude that that opportunity triggered the commencement of the mandatory ten day period under the contract for the referral of a grievance to arbitration. In short, Turkus' ruling of

1. Said pension claim is the issue in the instant arbitration.
November 20, 1980 constituted a constructive application and completion of the forgoing parts of the grievance procedure, setting the ten day time limit in motion.

The Union's notice of its intent to arbitrate was submitted almost a year later, by a Notice to the New York State Supreme Court, with service on the Employer. The Employer opposed the Notice on the grounds that the dispute was time barred. The Court referred the case, including the threshold issue of arbitrability to arbitration.

The forgoing facts show that the Union failed to comply with the contract time limit; that the Employer did not extend or waive the time limit, and did not acquiesce in the procedure followed by the Union. Having found the time limit to be mandatorily prescribed, I must conclude that the present grievance is no longer arbitrable.

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 Union's claim that the Employer failed to comply with its 1977-1980 collective bargaining agreement by failing to pay the total sum of $11,823.13 in pension contributions on behalf of those employees reduced to auxiliary status in January and April 1978, is not arbitrable.

DATED: May 31, 1983
STATE OF New York ) ss.:
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Utility Workers Union of America, AFL-CIO, System Local 537

and

Western Pennsylvania Water Company

The stipulated issue is:

Whether the grievant Ronald Foil continued to qualify for a leave of absence under Section 25 of the 1979-82 contract after his term of office as Vice-President of Local 537 ceased?

A hearing was held in Pittsburgh, Pennsylvania on February 18, 1983 at which time Mr. Foil, 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. Both sides filed post-hearing briefs.

The pertinent part of Section 25 reads:

LEAVE OF ABSENCE FOR UNION BUSINESS

A Union officer shall be granted a leave of absence without pay for the purpose of carrying on union business for the duration of this Agreement, provided he has been appointed or elected to a full time position with the Union. This leave of absence shall be renewable automatically upon the execution of a new contract for the term of that contract. Such employee shall retain, but not accumulate seniority during the period of such leave.
The Union claims that to qualify for the leave of absence, an employee need only be a "Union officer" at the time that the leave of absence is applied for and granted, but that the leave continues thereafter so long as the employee serves in an appointed or elected full-time position with the Union. In the instant case the grievant was both the Vice-President of the Union and an appointed full-time business agent when his leave of absence was granted. Sometime thereafter his term as Vice-President ended but he continued as the business agent. At that point the Employer terminated his leave of absence and directed him to return to work.

The Employer's position is that throughout the leave of absence the employee must be a Union officer and also be appointed or elected to a full-time position with the Union. The Company claims that when the grievant ended his term as Vice-President, his eligibility for a continued leave of absence ended, despite the fact that he continued to serve as an appointed business agent.

Manifestly Section 25 is ambiguous. Logically and plausibly it can be interpreted either way. It could mean that the employee need only be a Union officer when granted the leave of absence, and thereafter retained eligibility for the leave, as in the case with the grievant, if he continued to serve in an appointed or elected full-time position with the Union. Or, as the Employer contends, it could mean that to be eligible for a
leave of absence an employee must be a Union officer who has been appointed or elected to a full-time position with the Union; whose officership as well as his appointed or elected position continues throughout the leave of absence; and that if any of these capacities no longer obtain, the leave of absence comes to an end.

Ambiguities in contract language are traditionally clarified by resort to past practice and/or to the history of the negotiation of that language. In the instant case neither method produces probative evidence. There has been no past practice; apparently this case is one of first impression. The only evidence regarding the negotiation of the critical language of Section 25 was testimony by a single Employer witness and it supported the Employer's interpretation.

In this type of grievance the burden is on the grieving party, namely the Union, to prove its case convincingly and by substantial evidence. In view of the evidentiary inadequacy, that burden has not been met. Therefore the grievance fails, and clarification of the inherent ambiguity of Section 25 remains a matter for collective bargaining and not for arbitration.

However, I conclude that the grievant and the Union on his behalf had reasonable grounds to interpret Section 25 as they did and that they believed in good faith that the grievant had the right to continue his leave of absence. Though that position is not sustained in this arbitration, I think it harsh and unfair for the grievant to lose his job on the theory that he "quit" when he did not return to work upon notice from the Employer.
that his leave of absence was ended. He should be given the opportunity, within one week from receipt of this decision, to return to his employment with the Employer.

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 Union has not met its burden of proving that the grievant Ronald Foil continued to qualify for a leave of absence under Section 25 of the 1979-82 contract after his term of office as Vice-President of Local 537 ceased.

However, the Employer's determination that he "quit" is reversed. Mr. Foil shall have one week from the date of receipt of this Award to return to his employment with the Employer.

Eric J. Schmertz
Arbitrator

DATED: May 9, 1983
STATE OF New York) ss.: 
COUNTY OF New York)

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.