In the Matter of the Arbitration between
Local 6 and Local 7, IUMSWA, AFL-CIO:
and
Bath Iron Works Corporation:

The stipulated issue is:

Did the Company have the right to implement
any or all of its Substance Abuse Policy?
If not, what shall be the remedy?

In deciding the foregoing issue, the Union and Company
stipulated and agreed that the Arbitrator should decide the
following as well:

1. The arbitrator should decide the Unfair
Labor Practice charges which cover both
the original and the revised substance
abuse policies.

2. The Unions and the Company differ as to
whether random testing is before the
arbitrator, either for a determination
on the merits as a part of the arbitra-
tion or for determination as part of an
Unfair Labor Practice charge.

3. The parties request that the arbitrator,
regardless of his decision on the Unfair
Labor Practice aspect or aspects of the
matter, proceed to decide on the merits
underlying questions presented.

Hearings were held on May 5, 6, 9, 10, 11, 14, 15 and 16,
1986, 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; a stenographic record of the
hearings was taken; and the Union and Company filed post-hearing
briefs and reply briefs.

The General Propriety of a Substance
Abuse Policy and Procedures

The Company builds, repairs and refurbishes fighting and
support ships for the United States Navy. The United States Navy, can withdraw or not place work with a contractor employing personnel who use illegal drugs or controlled substances.

The members of one of the Unions involved herein work primarily in skilled classifications. They weld, fabricate metal, deal with complex plans and other production drawings, and handle heavy machinery and specialized equipment under conditions that could be dangerous if their mental and physical capacities are impaired. Considering the nature of the Company's product, the importance of quality and quality control is manifest. My authorized observation of the work in progress has led me to conclude that the Company relies heavily on the abilities and individual responsibility of these skilled employees to maintain the quality of their work. Indeed, many of these employees perform their craft duties separately or singly, as distinguished from traditional mass production typical of the factories of other industries.

This Arbitrator accepts the view that the use of illegal drugs or controlled substances whether "hard drugs" such as cocaine, heroin, LSD or the lesser proscribed marijuana, can, depending on quantity and the user's metabolism, cause impairment of mental and physical capabilities. It cannot be seriously disputed that use of illegal drugs and substance abuse have become a national affliction with the gravest of consequences to the health, welfare and productivity of our society. Indeed it probably is one of the most tragic and perplexing problems we have ever faced. Unhappily the State of Maine, apparently like all other states, has not escaped the affliction, especially with regard to the possession and use of marijuana. Nor, from the record before me, has the Company escaped. This is not to say that the use of illegal drugs is widespread among Company employees. It is not.
Indeed there is little probative evidence of the use of or addiction to the so-called "hard drugs." Nor, apparently, is there wide-spread job related use of marijuana. But the evidence indicates some. High Navy officials report that they have observed incidents of marijuana smoking on the job. Certain employees have reported to the Company the use of marijuana on the job by some employees. Some employees have registered positive for the presence of marijuana in Company administered urine tests.

Under these circumstances, I consider it proper and appropriate for the Company to take steps to protect its work contracts; to protect the quality of its products; to protect the safety of its employees; and to protect its productive integrity and general reputation by having a policy and program designed to eliminate or reduce the possession and use of illegal drugs in the work place, and the off-property use when such use adversely affects the employee's job performance.

It should be noted that while marijuana has been decriminalized in Maine, its possession and use in proscribed quantities remains an "offense," and, together with the "hard drugs" is still an illegal substance.

That only a relative handful of employees may be using drugs, including marijuana, does not mean that there is not legitimate reason for a substance abuse policy and program. One purpose of the instant Policy is prophylactic, designed to stop and discourage what use presently obtains, and to prevent its proliferation. That is a legitimate objective. I am not persuaded that a condition must become extensive or chronic before

1. Overwhelmingly, this case has dealt with marijuana as the example of substance abuse.
management may make a response and seek a remedy. An employer may have policies and regulations which for example, prohibit excessive absenteeism, theft, insubordination, falsification of records and fighting, without first showing a prevalence of those activities. So too with regard to substance abuse. Therefore I consider the evidence regarding absenteeism at the Company, and any proximate relationship to the use of drugs to be immaterial one way or the other. Rather, considering all the foregoing, I find that in the instant case, a substance abuse policy and its purposes are sufficiently job related to the work and employment setting of the Company to meet the "job related" requirement of an enforceable work rule or condition.

The Original and Revised Substance Abuse Policies

I respectfully decline to decide the propriety of the "original substance abuse policy." That Policy has not been installed or implemented by the Company. It has been pre-empted and superceded by the revised Policy. It is the latter which the Company has put into effect, and it is the provisions of the latter which are in dispute and which were adjudicated in this arbitration. In short, the question of the original policy simply is not a justiciable issue at this time. If the original policy is ever effectuated and implemented, its propriety can then be tested and determined.

Random Testing

I rule similarly regarding whether the use of "random testing" for drugs is before me. It is not. The Company expressly withdrew random testing from the procedures of the Revised Substance Abuse Policy and Procedures. Random testing is not being done and the Company has stated that it has no present plan to introduce or require random testing. Again, that matter is not
now a justiciable dispute. The parties have not jointly vested me with the authority to render a "declaratory judgment" on that question, and absent mutual agreement on that authority Arbitrators should not venture into declaratory judgments on the request of one side. As stated before, if and when random testing is used, it will be a grievable and arbitrable matter for the Union, and the rights of the parties in that event, are expressly reserved.

May the Revised Substance Abuse Policy and Procedures be legislated and implemented by the Company unilaterally, or are they a "condition of employment" within the meaning of the National Labor Relations Acts, as amended, requiring bilateral bargaining?

Absent random testing for drugs, and against the backdrop of the pre-existing and continuing Company Rules and Regulations Nos. 18 and 19, I do not find that the Revised Policy and Procedures require bilateral bargaining under Sections 8(a)(5), 8(d) or 9(a) of the Act.

I so conclude because, contrary to the Union's assertion, I do not find the Revised Policy (as written, and as interpreted and modified by reference later in this Decision) to be a substantial or significant departure from Rules 18 and 19. Rules 18 and 19 read:

18. Use, possession, distribution, sale, or offering for sale, of narcotics, dangerous drugs including marijuana or alcoholic beverages on Company premises at any time.

   First Offense: DISCHARGE

19. Being on Company premises under the influence of alcohol, narcotics, or dangerous drugs including marijuana, or refusing to submit to a test administered by the Medical Department to determine if under such influence.

   First Offense: 5 days off.
   Second Offense: DISCHARGE
Those rules were not bilaterally bargained but rather unilaterally promulgated by the Company, and actively enforced, over a period of time. The Unions have not and do not in this proceeding challenge the propriety, effectiveness or validity of those Rules. Indeed, there is no question that those two Rules have been accepted by the Unions.

As I see it, the Revised Policy makes explicit, provides particularization and methodological implementation of managerial authority, that was and is implicit in Rules 18 and 19 standing alone.

Under Rules 18 and 19 the Company had the implicit right, under proper, relevant and reasonable circumstances to utilize methods to determine for example, if and when an employee did the proscribed acts of either or both Rules. To do so, I have little doubt that the Company may conduct investigations, use medical tests, and, in the most sensitive area, to make its own initial determinations, without expressed standards or guidelines, on whether an employee was "under the influence" of the proscribed substances. Indeed, though the carrying out of these implicit rights for the purpose of enforcing Rules 18 and 19 may be challenged by grievances and arbitration, the Company has uncharted leeway in its initial inquiries and determinations, creating presumptions which the Unions may find difficult to rebut.

By contrast, the Revised Policy, delineates the means, methods, procedures and standards that the Company will (and must) follow, and in some specific respects (including the modifications I make in this Decision) may be more protective of the due process rights and privacy considerations of the employees than Rules 18 and 19 standing alone. If the prescribed methods, standards and confidentiality aspects of the Revised Policy are not adhered to, the Unions have more explicit areas of complaint without the
burden of presumptions created by the Company's exercise of less defined powers under Rules 18 and 19 above.

A closer look at the revised Policy, juxtaposed with Rules 18 and 19 is in order. The Revised Policy (Company Exhibit #15) is incorporated by reference herein, and attached hereto and made a part hereof.

The "PHILOSOPHY STATEMENT" (page 1) is not inconsistent with Rules 18 and 19. I believe that the basic reasons for Rules 18 and 19 are now articulated in that "STATEMENT."

"NEED" (on page 2 and page 3) is consistent with my findings on the "propriety" of a Policy, and as modified by later reference in this Decision is not a working condition departure from Rules 18 and 19.

Page 4 entitled "PURPOSE" differs from Rules 18 and 19 only in the respect and by the fact that it provides for the use of supervisory employees as a method in detecting drug and alcohol use; reiterates the Company's right to discipline and discharge for offenses; sets up a counseling program and accords re-employment rights under certain specific conditions (including "testing at frequent intervals") for employees previously discharged for substance abuse.

I am satisfied that the Company has had the managerial right to use supervisory employees as a method to detect drug and alcohol use and therefore this specific provision is only a "fleshing out" of what had been an implicit power. That discipline, including discharge may be imposed for violation of the Policy is no different from the disciplinary penalties, including discharge set forth in Rules 18 and 19.
The establishment of a counseling service is something not provided under Rules 18 and 19. But clearly, if administered professionally and confidentially, it represents a benefit to the affected employee and not an added burden, restriction or unreasonable condition of employment. The addition of what is intended as a therapeutic benefit, if administered properly, can hardly be construed as the kind of major variation from Rules 18 and 19 that requires bi-lateral bargaining.

The same is true regarding the conditions imposed on an employee re-hired after being discharged for drug or alcohol abuse. Rules 18 and 19 do not accord the benefit of re-employment. This is a new provision that is both beneficial to an employee previously and properly discharged, and inasmuch as it is consistent with an employer's unquestioned right under the Act to hire and select new employees, may be enacted without dealing with the bargaining agent.

In sum, I find nothing in the "PURPOSE" section of the Policy which is at such variance from the explicit and implicit provisions of Rules 18 and 19 or which set forth new conditions that meet the definition of "conditions of employment" within the meaning of Section 8(a)(5) of the Act.

Sections A and C of the "DEFINITION OF SUBSTANCE ABUSE" (on page 5) are simply reiterations of certain parts of Rules 18 and 19. Section B can be construed to expand Rules 18 and 19 by regulating "off duty" and "off-premises" use of drugs and alcohol. However, I view it as a logical and understandable extension of the Company's right under Rule 19 to prohibit "being on Company premises under the influence..." Section B does not prohibit
off duty or off premises use of alcohol or drugs but rather their use when it "interferes with the individual's performance or social adjustment at work." Assuming the reasonableness of that concern, and the reasonableness and uniformity of its application, I conclude that the use of drugs and alcohol off-premises that impair an employee's job effectiveness and/or employment relationships is a matter about which an employer may promulgate a work rule without bargaining with the Union. Especially so, where, as here, the rule is a logical and reasonable extension of an existing, unilaterally promulgated work rule.

Section A of the DEFINITION OF UNDER THE INFLUENCE (on page 6) is not in dispute.

Section B, with its footnote 2 is very much in dispute. As set forth later, I have made modifications in Section B to accord with my views on due process and to accord with the evidence in this proceeding. With those modifications, I am satisfied that this part of the policy does not require bilateral bargaining. Also, procedurally, Section B is a definition, albeit a disputed definition, of that part of the existing Rule 19 that refers to "being...under the influence..." As The Company unilaterally promulgated Rule 19 prohibiting "being under the influence" I see no legal impediment to its unilateral promulgation of a rule or policy defining "being under the influence." What remains however, is whether the definition is "reasonable" and its implementation "reasonable," both of which are requirements for an enforceable work rule. That question is dealt with later. But the bare inclusion of a definition of "under the influence" in the Policy does not require bilateral bargaining.
The PRIOR TO HIRING procedures of Section A of HIRING AND RECALL PROCEDURES (on page 7) concern matters that are managerial prerogatives under the Act and not subject to mandatory bargaining. The PROCEDURES a, b, c, and d, regarding hiring or considering the re-application of an applicant are further implementations of the Company's managerial rights in the hiring process. As such, and again without dealing at this point with the reasonableness of those procedures, particularly procedure c which extends testing into and during the first year of employment for a re-applicant who was found to be a drug or alcohol user when originally rejected for employment, I find them to be sufficiently related to the Company's unrestricted right to hire without bargaining with the Unions, to be immune from the requirements of Section 8(a)(5) of the Act.

Section B RECALLS FROM LAYOFF (on page 7), is a methodological implementation of Rule 19 and hence immune from the bargaining requirements of Section 8 (a)(5) of the Act.

DETECTION AND ENFORCEMENT Procedures (on page 8), are express repeats of the existing Rules 18 and 19 and a reiteration of existing rules relating to alcohol and substance abuse. As such they only repeat what the Company did previously and unilaterally, and do not require bilateral bargaining under the Act.

Section A, REASONABLE BASIS FOR TESTING (on page 8), is an explicit methodological implementation of the Company's implicit right under Rules 18 and 19 to discover violations thereof and more specific implementation of that part of Rule 19 which accords the Company the right to require tests conducted by the Medical Department. Subject to the "reasonableness test" which
is determined later herein, and considering the modifications I have ordered in the procedures of Section A, I do not find that this Section requires bilateral bargaining for its effectuation.

The same applies to the PERFORMANCE PROBLEMS, examples and procedures (on page 9) and is also covered by my holdings set forth earlier under the PURPOSE section of the Policy.

Subject to the test of "reasonableness" and the requirement of reasonableness and uniformity in its application, I find that the remaining provisions of the Revised Policy, namely those under the headings of ACCIDENTS OR INJURY, INDUSTRIAL HEALTH EXAMINATION, VISIBLY UNDER THE INFLUENCE, WITNESSED USE, DISCIPLINE, INSPECTION OF PROPERTY, CONVICTION OF CRIME, and ADMINISTRATION OF POLICY, are all procedures, methods and implementations of the substantive provisions of Rules 18 and 19, consistent with the Company's implied managerial rights related thereto.

Again, as Rules 18 and 19 were validly promulgated by the Company on a unilateral basis, those more precise, delineated methods and procedures for the administration and enforcement of the Rules are not significant variations from those Rules nor are they new conditions of employment requiring bilateral bargaining under the Act.

The Unions argue that because the Company bargained on rules regarding an absentee program, work rules on drug and alcohol abuse become matters for mandatory bargaining as well. I find no persuasive authority for this concept. By bargaining with the Unions on an absentee program, the Company brought that subject matter into the arena of bilateral bargaining. But separate subject matters stand separately, and the Company must do the same with the subject of drug and alcohol abuse in order to
transform its unilateral rule making authority over that subject under Article III of the contracts into a subject that must be bilaterally bargained. The Company has not done so.

Accordingly, reserving the questions of "reasonableness" and recognizing that certain modifications in the Policy are made by this Decision, I do not find that the Company committed and unfair labor practice or violated the National Labor Relations Act by its unilateral promulgation and implementation of its SUBSTANCE ABUSE POLICY AND PROCEDURES (Revised).

Additionally, and largely for the same reasons I find that the unilateral promulgation and implementation of the Policy did not violate the collective bargaining agreement.

The Management Functions clauses in both Union contracts (Article III) expressly "require employees to observe the BIW's rules and regulations." Impliedly, a requirement that Company rules and regulations be observed, authorizes the Company to legislate those rules and regulations. I do not find that this traditional management function is limited by any express provisions of the contract, nor, in the case of Article III in the Local 6 contract, does the proper promulgation of rules and regulations by the Company represent an "exercise...of a) management functions in a manner which violates its obligations under this Agreement." As Rules 18 and 19 were consistent with management rights under Article III of both contracts, the unilateral, methodological, implementation of those rules under the Revised Policy is neither violative of the contract nor management's obligations thereunder.

Reasonableness

It is universally well settled that to be enforceable, rules
and regulations unilaterally promulgated and implemented by management must be job related, reasonable as to terms and conditions, well disseminated or published, and consistently and uniformly applied to all employees similarly situated.

I have previously held that the Revised Policy is adequately job related. There is no dispute over its publication and/or dissemination to the work force. The consistency and uniformity of application are matters for future observations and determinations on a case-by-case basis. What is to be decided herein is whether the Policy in whole or in part is or is not a reasonable response and a reasonable set of requirements to meet what I have held to be a proper purpose.

The EMIT Test and The GC/MS Confirming Test

The Unions have offered considerable testimony, evidence and argument designed to show that the EMIT test, even with GC/MS confirmation can, in a certain percentage of cases, produce results that are inaccurate, misleading or wrong. I accept this proposition that these types of tests are not fully accurate and that errors can and will be made. But my authority in this case is to decide whether the Policy and Procedures, which include these testing procedures is reasonable enough for Company-wide implementation. I do not conclude that the probability of some errors is enough to void these tests as part of the Policy and Procedures. Indeed, a percentage of error is probable for any type of test utilized. I am satisfied that the EMIT test, with confirmation by GC/MS are sufficiently accurate and reliable to warrant sustaining their reasonableness as a general part of the Policy and Procedures. Whether or not the EMIT Test and the GC/MS confirmation is accurate for a particular affected employee
and whether there are other acceptable explanations for any positive findings in any particular case are matters which may be contested and adjudicated on a case-by-case basis as individual cases arise from the implementation of the Policy and Procedure. In other words, I am not prepared to void the EMIT test and/or the GC/MS confirmation test as generally unreasonable in deciding the propriety of the Revised Policy and Procedure, but I expressly reserve the rights of any affected employee and the Unions on his behalf to contest the particular validity and accuracy of those tests in any particular situation in which that employee may be involved. I hold that the accuracy of the EMIT test and/or the results of the GC/MS confirmation test are matters which may be adjudicated as part of a grievance or an arbitration protesting the Company's action against an employee who tests positive.

I find that the Revised Policy and Procedure meets the test of reasonableness except as follows:

I. The quotations following "bullets" (on page 2) under NEED, are not fully supported by facts or probative evidence in the record. As they presently stand they are editorial in nature, subjective and debatable. They are quotations from a subjective and probably partisan report and though possibly consistent with general propositions, have not been proved to be statistically accurate or broadly accepted by recognized authorities.

Most significant is the fact that these statements are unnecessarily patronizing and provocative to a bilateral employment relationship, and unnecessary surplusage for the effectiveness and utilization of the Policy.
Accordingly I direct that the four quoted statements set off by the "bullets" under the heading NEED (on page 2) be deleted from the Policy.

II. I find Section B of Article V and footnote 2 (on page 6) and the standard adapted by the Company thereunder as constituting "under the influence of an illegal drug" to fall short of meeting the test of reasonableness.

Under this provision, an employee whose urine discloses the presence of 100 ng of Delta 9-THC acid metabolites following an EMIT test is presumptively "under the influence" of marijuana, and is deemed conclusively "under the influence" if the presence of Delta 9-THC is confirmed by the laboratory GC/MS test. The Company uses the 100 ng threshold level for the EMIT test, as footnote 2 states, to "eliminate questionable test results based on minute or trace amounts of illegal drugs..." and "to eliminate the possibility that a positive test might result only from indirect drug use (e.g. smoke filled room, car pools, etc.)." I have no quarrel with the use of a threshold quantity for referral of the EMIT test for laboratory confirmation and I have no quarrel with the 100 ng threshold level. My quarrel is with the Company's conclusion that a level of 100 ng in the urine in the EMIT test, if confirmed by the laboratory GC/MS test, means that the employee is "under the influence."

The expert testimony and evidence in this record is extensive and scholarly. But it is sharply conflicting and off setting. From the evidence I cannot conclude that a level of 100 ng of Delta 9-THC acid in the urine, if confirmed, produces impairment, mental or physical changes or other symptoms associated with being under the influence. In short, in this case as
in others I have heard involving the same question, the experts are in wide disagreement over what quantity of marijuana produces impairment, how quickly, and for what period of time. The evidence in this case does not conclusively show that a recording of 100 ng in the urine, if confirmed, is synonymous with any mental or physical impairment. Unfortunately medical and pharmacological experts have not been able to establish the quantity of marijuana in the urine, the blood, or the system generally, that produces impairment or constitutes "under the influence" as they have been able to do with alcohol. I deem "impairment" and "under the influence" to be synonymous.

If the Policy is left to stand unmodified in this regard, employees with confirmed positive tests at or above the 100 ng level will be absolutely determined to be "impaired" or "under the influence" regardless of their objective mental and physical conditions, and stigmatized with the "under the influence" diagnosis, when the medical evidence remains equivocal and disputed. I think this is arbitrary and unfair in a most sensitive and critical area. This is not to say that use of marijuana does not impair the faculties. I am convinced it does. Rather it is to say that the experts disagree on the quantity required for impairment or for being "under the influence" and for how long impairment lasts from any given quantity.

On the other hand, for the Company to have an effective policy, as it is entitled to have, some unacceptable or prohibited level of marijuana or other drugs must and may be fixed. While I consider it unreasonable for the Company to deem 100 ng synonymous with impairment or being under the influence of marijuana, with the social stigma that attaches to any such finding, I do not consider it unreasonable for the Company to deem an EMIT
test of 100 ng of Delta 9-THC acid, if confirmed, to be a prohibited or an unacceptable level of the drug, and to conclude that such a level may cause impairment or may result in being under the influence.

Therefore Section B, and the wording of the title of Article V (on page 6) shall be changed to reflect the foregoing. Section B shall read:

A prohibited amount of an illegal drug which may cause impairment or may result in being under the influence means the presence of any detectable amount of an illegal drug in an employee.

The title of paragraph 1 Section B DISCIPLINE (on page 11) shall be changed from "Under the Influence" to "Under the Influence of Alcohol or Prohibited Levels of Drugs."

The body of the first sentence of paragraph 1 shall be changed to read:

"Any employee who is under the influence of alcohol or who, by tests, has a prohibited level of drugs in his system shall be suspended for a minimum of five (5) days.

Footnote 3 (on page 11) shall be modified accordingly as well. The balance of paragraph 1 and all of paragraph 2 shall remain as presently written.

Footnote 2 (on page 6) may remain as presently worded, but in implementing the EMIT test and the GC/MS confirming test the 100 ng level shall not be deemed as constituting impairment or "being under the influence," but rather a "prohibited level because it may cause impairment or may result in being under the influence."

The title or heading of Article V (on page 6) which now reads:

DEFINITION OF UNDER THE INFLUENCE
shall be changed to read:

UNDER THE INFLUENCE OF ALCOHOL AND PROHIBITED LEVELS OF DRUGS

III. The phrase "reasonable basis" found in Section B of Article VI, in Section A of Article VII, in paragraphs 1, 2 and 3 of Section A of Article VIII, and wherever else used in the Policy, and the phrase "reason to believe" found in paragraphs 4 and 5 of Section A, Article VII and wherever else used in the Policy, shall be deemed synonymous as to meaning with the phrase "probable cause." The "belief" that an employee is "under the influence" or "visibly under the influence" may remain but the reference in paragraph 4 to a confirmation of the belief by testing is subject to the aforesaid "prohibited level" characterization.

IV. The potential seriousness of the consequences of urine testing for drugs requires in my judgment, some additional due process protection within the procedures of Section A of Article VII (on page 8) entitled REASONABLE BASIS FOR TESTING. Included therein shall be the provision that when an employee's urine is taken and initially tested for drugs or alcohol, a Company physician shall be present and supervise the process. This shall apply to times when a Company physician is on duty. If a physician is not on duty, and if practicable without prejudice to the validity of the specimen, the urine testing should await the regular arrival of a Company physician. Only if that is not practicable because of prejudice to the validity of the urine specimen shall a non-physician employee of the Industrial Health Department undertake the testing.

Additionally, in accordance with the foregoing conditions,
and again because of the serious consequences from a positive test, the Company physician shall also examine the affected employee physically for the presence or lack of presence of other symptoms of drug and alcohol use. By example, that examination should include a test of reflexes, examinations of eyes, gait, general demeanor, breath and condition of speech. If the urine EMIT test is positive and is referred for laboratory confirmation, the results of the rest of the aforesaid physical examination shall be included by the physician and the Industrial Health Department in a report to the Company and shall be made a part of the official record of any disciplinary action imposed on and/or counseling required of the affected employee and shall be available if the matter is grieved or arbitrated.

Also, if the affected employee makes the request, part of the sample of his urine taken by the Company shall be given to him. How and in what manner, if any, that sample may be used by him or the Union remains a matter for judgment and determination on a case-by-case basis in the implementation of the Revised Policy.

The Employee Assistance Counselor and Program

I am satisfied that the Company has good and positive intentions in referring employees with alcohol and drug problems to the Employee Assistance Counselor. Similarly, I am satisfied that the Counselor(s) intend to be helpful and that their objective and the objective of the plan or program is rehabilitative and therapeutic. These good intentions and any good work emanating from the referral program will be thoroughly dissipated if essential confidentiality is not maintained and safeguarded.

The Policy's statement in Section E of Article VII (on
page 13) is critical to the administration of the entire Revised Substance Abuse Policy and Procedures. The statement is worth repeating and emphasizing in this Decision. It says:

"BIW is committed to implementing this policy in a fair and equitable manner which respects the dignity and privacy of the individual."

The Company's failure to do so would not only subvert the purpose and objective of the Policy, but would constitute a grievable and arbitrable breach of the Policy.

Arbitrability

With this Decision and with the foregoing interpretations and modifications, the Revised Substance Abuse Policy and Procedures as a policy and procedure is no longer subject to arbitration. What remains grievable and arbitrable are allegations by the Unions of non-compliance with the Policy and Procedures in case-by-case implementation thereof. For example, grievable and arbitrable would be claims that the facts make the Policy inapplicable; that Company actions were not based on "probable cause" or "reasonable basis"; that testing was not carried out as prescribed; that there were fatal irregularities in the "chain of custody" of the urine; that the test results or the scientific methodology of the tests were faulty as to the employee involved; that the Policy and Procedures were not uniformly and consistently applied to all employees similarly situated; that a Company physician did not play the role I have prescribed; that safeguards to protect confidentiality were not followed. These are only examples and are not all inclusive of case-by-case grievable and arbitrable disputes arising out of the application of the Revised Policy.
In this regard, I take the liberty of making a recommendation. I strongly recommend that the parties establish an umpireship or impartial chairmanship for the adjudication of disputes arising out of the Policy. I would recommend that because of the obvious sensitive nature of certain aspects of the Policy and Procedures the umpire or impartial chairman selected by the parties be available to hear and decide the cases on short notice. It would appear preferable that the parties select such an arbitrator who is located in close proximity to the Company's facilities or who is able to travel to those facilities quickly and on short notice. If disputes can be resolved quickly (perhaps with the hearing scheduled within 24 hours after the dispute arises and a decision within 24 hours after a hearing), confidence in the need, fairness and due process of the Policy and Procedures will be enhanced. And the entire process should develop into a mutual endeavor by the Company and the Unions in this industrial setting to deal with or protect against one of the most devastating problems facing contemporary society.

Retention of Jurisdiction

To handle any unanswered question arising out of the instant case and for the resolution of questions over the interpretation and application of this Decision, I shall retain jurisdiction.

AWARD

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

With the modifications and interpretations set forth above the Company has the right to implement its Substance Abuse Policy (Revised).

Eric J. Schmertz
Arbitrator
DATED: June 30, 1986
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.
July 7, 1986

Patrick N. McTeague, Esq.
McTeague, Higbee, Libner, Reitman
MacAdam & Case
169 Park Row
P. O. Box 340
Brunswick, Maine 04011

Duane D. Fitzgerald, Esq.
Fitzgerald, Conley & Haley
746 High Street
Bath, Maine 04530

RE: Locals 6 and 7 IUMSWA —and—
Bath Iron Works

Gentlemen:

In my Opinion in the above matter, the word "undefined" at the beginning of the second sentence on page 7 should be "defined."

Also, the word "probably" in the sixth line from the bottom on page 13 should be "probable."

I regret these errors.

Very truly yours,

Eric J. Schmertz
Arbitrator

EJS:hl
I. PHILOSOPHY STATEMENT

All members of the shipyard community will contribute more effectively when free of substance abuse.

BIW believes its people are the most vital asset and key ingredient in a prosperous company. BIW acknowledges that some individuals may become victims of chemical dependency or abuse. As appropriate, they should be given the opportunity to restore themselves to a healthy condition and continued employment. The Company is convinced that a substance abuse free work environment is essential to a safe and productive shipyard.

Management, commitment, education, effective communication, respect for confidentiality, definition of responsibilities, consistently applied guidelines and discipline are all essential to a substance abuse free environment. Proper application of all of these actions helps lead the drug/alcohol abuser to treatment, improves the safety of the workplace, and helps to assure higher quality and increased productivity.

The combined approach of supportive counseling through the BIW Employee Assistance Program and adherence to the procedures and disciplines outlined in this policy are necessary to eliminate substance abuse from the workplace. This philosophy is the foundation on which a substance abuse policy shall be implemented, maintained and administered. It supports fair and consistent administration of rehabilitative services and disciplinary action necessary to assure a safe and productive environment for all BIW employees. This policy is intended to apply to all employees regardless of position.
II. NEED

The workforce at Bath Iron Works is similar to most heavy industrial corporations, where drug and alcohol abuse have become major problems. These problems affect security, safety, quality control, productivity and employee health. Current professional thinking on drug abuse (alcohol is considered to be a drug) supports the following:

"Drug users are almost four times as likely as non-users to be involved in a plant accident...and are five times more likely to file a workers' compensation claim than non-users."

"...drug abusers work at two-thirds of their potential. And they miss work more often...drug abusers received three times the average level of sick benefits and were 2.5 times as likely to be absent from work for more than a week than employees who didn't use drugs."

"A progressive approach to the problem calls for business to accept the reality of drug abuse; accept the limitations inherent in government policing of drug use; look upon prevention and treatment of the problem...and view the workplace as one of the most important places to begin turning the tide."

"Detection at work, with the threat of job loss, is probably the most effective motivation for a chronic drug abuser to seek help."

BIW has concluded that it must take positive action on its own to combat a serious threat to everyone. The workplace has been shown to be the setting where most effective action can take place.
BIW's responsibilities and legal obligations to the general public, its employees, contractors, the Department of the Navy and its other customers mandate the policy.
III. PURPOSE

It is the intention of this policy to eliminate substance abuse and its effects at Bath Iron Works. While the Company has no intention of intruding into the private lives of its employees, involvement with drugs and alcohol off the job can take its toll on job performance and employee safety. Our concern is that employees are in a condition to perform their duties safely and efficiently, in the interests of their fellow workers as well as themselves. The presence of drugs and alcohol on the job, and the influence of these substances on employees during working hours are inconsistent with this objective.

Employees who think they may have a problem are strongly urged to voluntarily seek confidential assistance through the Employee Assistance Counselor, extension 3479. BIW is committed to assist employees in a supportive way and without the fear of reprisal if they voluntarily request help. While BIW will be supportive of those who seek help voluntarily, the Company will be equally firm in identifying and disciplining those who continue to be substance abusers and do not seek help.

Supervisors will be trained to recognize abusers and become involved in this control process. EAP Helpers will help with difficult cases. Alcohol or drug abuse will not be tolerated at BIW, and disciplinary action, up to and including termination, will be used as necessary to achieve this goal.

If an individual is discharged for violating this policy, rehabilitation will be a factor considered if re-employment is possible at a later date. As a condition of any such re-employment, the returning employee must agree that for a period of one year BIW will have the right to a test at frequent intervals for the presence of alcohol and illegal drugs. Any such reinstated employee will be immediately discharged if testing is positive.
IV. DEFINITION OF SUBSTANCE ABUSE

Substance abuse at Bath Iron Works is defined as follows:

A. Use or possession of alcohol or illegal drugs\(^1\) on company premises, including parking areas.

B. Use of alcoholic beverages or illegal drugs while off company premises which interferes with the individual's performance or social adjustment at work.

C. Being under the influence of illegal drugs or alcohol while on Company premises.

\(^1\) "Illegal Drug" means: any drug (a) which is not legally obtainable or (b) which is legally obtainable but has not been legally obtained. The term includes prescribed drugs not legally obtained and prescribed drugs not being used for prescribed purposes. It also includes marijuana.
V. DEFINITION OF UNDER THE INFLUENCE

A. BIW's standard of measurement for evidence of being under the influence of alcohol will be the same as the Maine statutes for operating a motor vehicle under the influence of alcohol which means that blood alcohol in excess of 0.1% is defined as being under the influence. Moreover, blood alcohol in excess of 0.05% and less than 0.1% will be considered together with performance and/or behavior in deciding whether an employee is under the influence.

B. Under the influence of an illegal drug means the presence of any detectable amount of any illegal drug in an employee.²

---

² Tests conducted by BIW for illegal drugs establish threshold levels for positive readings that are sufficiently high to eliminate questionable test results based on minute or trace amounts of illegal drugs. This threshold level greatly increases the reliability of test results and eliminates the possibility that a positive test might result only from indirect drug use (e.g., smoke filled rooms, car pools, etc.).
VI. HIRING AND RECALL PROCEDURES

A. PRIOR TO HIRING:

A pre-employment physical will be given to all applicants being considered for employment. Included in the physical will be a test for the presence of illegal drugs. (The company also reserves the right to administer testing for the presence of alcohol in the blood during the pre-employment physical.) If the test proves positive, the following procedures will apply:

PROCEDURES:

a. The applicant will be refused employment.

b. The applicant may not re-apply for at least 90 days.

c. If such an applicant is subsequently hired, BIW reserves the right, at any time during the first year of employment, to periodically test that individual for the presence of illegal drugs or levels of alcohol.

d. If testing proves positive, that employee will be immediately discharged.

B. RECALLS FROM LAYOFF

When an employee with recall rights is being recalled from layoff, a test for the presence of illegal drugs and/or alcohol may be required if there is a reasonable basis for a test. If the test is positive, the recalled employee will be subject to discipline as described in Section VII(B).
VII. DETECTION AND ENFORCEMENT PROCEDURES

Bath Iron Works Corporation Rules and Regulations which directly relate to substance abuse are:

RULE #18 - Use, possession, distribution, sale, or offering for sale, of narcotics, or dangerous drugs including marijuana, or alcoholic beverages on Company premises at any time. The consequence for violating this rule is: Discharge.

RULE #19 - Being on Company premises under the influence of alcohol, narcotics, or dangerous drugs including marijuana, or refusing to submit to a test administered by the Industrial Health Department to determine if under such influence.

The consequence for violating this rule is: First offense, 5 days off; Second offense, discharge.

There are other rules which deal with the effects of substance abuse on performance. Those rules will apply as required.

A. REASONABLE BASIS FOR TESTING

Testing is the most valid objective method for determining the presence of alcohol or illegal drugs in the body. Therefore, testing will be an important tool in achieving our goal. BIW may require urinalysis or other drug/alcohol screening of those employees suspected of using or being under the influence of an illegal drug or alcohol. Supervising personnel will be trained to recognize and intervene where employees appear to be using or under the influence of illegal drugs or alcohol. The Industrial Health Department shall test for drugs and alcohol when employees are referred. If an employee refuses to submit to a test for alcohol content and/or illegal drugs, such action will be treated as if the testing occurred and was positive.
Listed below are illustrative examples of situations where referral for testing may be appropriate; they are not intended to be all inclusive:

1. PERFORMANCE PROBLEMS

Deterioration of work performance and absenteeism are indications that an employee may be abusing alcohol or illegal drugs. This may be a reasonable basis to justify the following procedures:

If performance deteriorates or if absenteeism becomes a problem, corrective action will include the following:

a. A supervisor will talk with the employee about his/her performance. This meeting may be led by an EAP Helper and may be attended by a designated union representative. If substance abuse appears to be a factor in the employee's performance, the employee will be urged to seek assistance from the Employee Assistance Counselor or other professional programs.

b. If performance continues at an unacceptable level, and there is a reasonable basis to believe that substance abuse is a factor, the supervisor in consultation with Human Resources will refer the employee for testing.

2. ACCIDENTS OR INJURIES

When an employee is involved in a work related accident or lost time injury a medical evaluation will be made. The Industrial Health Department in consultation with Human Resources may administer tests if there is a reasonable basis to believe that substance abuse is a factor.
3. INDUSTRIAL HEALTH EXAMINATION

When an employee receives treatment in the Industrial Health Clinic and a qualified medical professional has a reasonable basis to believe substance abuse is a factor, the employee will be tested.

4. VISIBLY UNDER THE INFLUENCE:

If a security guard, supervisor, medical professional, or another employee detects physical symptoms such as staggering, alcohol on breath, slurred speech, etc., that employee will be referred to Industrial Health and will be required to take a test.

When a security guard, supervisor or company official has reason to believe an employee is under the influence on company premises, he will escort the employee to Industrial Health for testing and notify his/her supervisor.

5. WITNESSED USE

Any employee who is witnessed by a supervisor, security guard or other company official using alcohol or illegal drugs on company premises will be subject to discharge under Rule 18.

Credible reports of employee use of illegal drugs or alcohol and credible reported observations where there is reason to believe there has been a violation of Company policy shall constitute a reasonable basis to test.
B. DISCIPLINE

1. Under the Influence

Any employee who is under the influence of alcohol or illegal drugs shall be suspended for a minimum of five (5) days. The employee will continue on suspension until a subsequent test discloses no presence of alcohol in amounts described earlier or illegal drugs. The employee will also be referred to EAP. Upon return to work, the employee will be subject to periodic testing for one year. A second positive test during this period will result in discharge.

2. Possession

Alcohol or illegal drugs, including drug paraphernalia as defined by Maine State law (17-A M.R.S.A. §1111-A) are prohibited on company property. If an employee is found having such substances or paraphernalia in his/her possession, the following procedures will apply:

3 In the event subsequent tests prior to reinstatement disclose that the employee is under the influence of another drug or alcohol, the employee will be subject to discharge.

If the suspension results from a positive test for marijuana, and if a subsequent test indicates the continued presence of marijuana, and if there is no reasonable basis to believe that the marijuana was taken after the suspension period began, it will be assumed that the marijuana is the same as was detected in the original test, and therefore, the employee will remain on suspension for a maximum of thirty (30) calendar days, but will not be subject to discharge. If the test results are positive beyond thirty (30) calendar days from the date of the original test the employee will be subject to discharge.
Procedures:

a. Supervisors will document the incident, notify the Security Department, and escort the employee out of the shipyard.

b. The employee will be disciplined under Rule 18.

C. INSPECTION OF PROPERTY

BIW reserves the right to inspect any company or personal property on the premises, including but not limited to briefcases, tool boxes, lockers, office furniture, etc. The following procedures will apply:

Procedures:

a. If practical, the employee will be present and the employee's supervisor will contact and have present the department head, security guard and if appropriate a shop steward when searching an employee's briefcase, locker, desk, tool box, or other office furniture.

b. If the employee is not present, a list of items found will be made and witnessed by three of the individuals present.

c. If alcohol or illegal drugs or drug paraphernalia are found, that employee will be questioned and may be suspended from work, and subject to discharge pending completion of the investigation.
D. CONVICTED OF CRIME

If an employee of BIW is convicted of a drug related crime (other than use) under Maine State law [Title 17-A M.R.S.A. Sections 1101-1116 (sale, theft, etc. of drugs)] or similar crimes in other jurisdictions, the employee will be discharged. An employee who is convicted of a crime for use of illegal drugs or alcohol related crimes will be subjected to periodic testing for one year following the date of conviction. The employee may be subject to discipline, based upon a consideration of the facts and circumstances involved, including the effect of the event and conviction on the conduct of company business.

E. ADMINISTRATION OF POLICY

BIW is committed to implementing this policy in a fair and equitable manner which respects the dignity and privacy of the individual.
The stipulated issue is:

Did the Employer violate Articles 8.10 and 21.3 of the collective bargaining agreement when it failed to approve graduate courses taken by the grievants; Germain Fontaine, Anton Gary, Renee Telsey and Maxine Wachter, for the purpose of lateral movement on the salary schedule? If so, what shall be the remedy?

A hearing was held on December 3, 1986 at the offices of the School District at which time 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.

Article 8.10 reads:

Effective September 1, 1984, abbreviated weekend courses must have the prior approval of the Superintendent of Schools in order to be accepted for movement on the salary schedule.

Article 21.3 reads:

This agreement may not be changed orally and may only be changed in writing and signed by both parties.

The courses taken by the grievants were not approved by the Superintendent of Schools because the Employer deemed them to be "abbreviated weekend courses" within the meaning of Article 8.10 of the contract. As a result, the grievants did not get credit for those courses for the purpose of lateral
movement on the salary schedule.

The issue is narrow. It is simply whether the courses involved were "abbreviated weekend courses" within the meaning and proscription of Article 8.10.

The Employer contends that the phrase "abbreviated weekend courses" is generic and was intended to mean courses of questionable pedagogical value; those with little academic demands; and completed over a short period of time, whether on "weekends" or at other times.

In his testimony, the Assistant Superintendent of Schools for Personnel defined "abbreviated weekend courses" as "cocka-mamie courses;" or courses which lacked accreditation (such as AZUZU courses). In summation, the Employer characterised "abbreviated weekend courses" as like those which were "museum tours" and like RITA courses for which an applicant got "20 warm fuzzies" upon enrollment.

The parties offered considerable testimony on the negotiation history of the contract phrase "abbreviated weekend courses." The Union asserts that the proscription is limited to the contract language, namely to courses "taken on weekends" and of a duration less than required by the offering institution for credit. The Union claims that the Employer wished to foreclose "weekend museum bus tours."

The evidence on what the parties intended when the contract language was negotiated is conflicting, offsetting and inconclusive. In that circumstance the Arbitrator is left to the base contract language.

The instant courses were not taken on weekends. So that express contract restriction is not applicable. The parties
stipulated that Article 8.10 does not require that courses enjoy certification or accreditation, so argument over whether the courses involved would be approved by the State Department of Education is immaterial.

Hence it would appear that a RITA course would not be ineligible. None of the courses were under the AZUZU program. The other contract word is "abbreviated." If that word is conjunctive with "weekends," the fact that the courses were not taken on weekends makes their time span also immaterial. If "abbreviated" is separated from "weekends," I am not persuaded that the instant courses in fact, were "abbreviated." It is true that the courses were completed within the short span of time of a week or so. But they met for full days Mondays through Fridays. Those for which two graduate credits were obtained required 20 hours of classroom work; and those for three credits required 35 hours of classroom work and, in some instances, 11 additional hours of non-classroom work. These required hours of attendance and work accord with what is usually required for courses with those credits, and in terms of the quantity of hours of classroom attendance and non-classroom assignments, cannot be deemed "abbreviated." In short, the course requirements may have been "concentrated" within a short chronological period, but were not "abbreviated."

Significant to my mind is the fact that the instant courses were all offered for credit by reputable and accredited institutions of higher education; the University of Bridgeport, Central Connecticut State University and Potsdam College. Under those auspices, I cannot find that they were "cockamamie" or of the "museum tour" type to which the Employer refers.
Bound as I am to the contract language negotiated by the parties, I do not find that the instant courses were "abbreviated weekend courses" within the language or meaning of Article 8.10 of the contract.

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 violated Article 8.10 of the collective bargaining agreement when it failed to approve graduate courses taken by the grievants; Germaine Fontaine, Anton Gary, Renee Telsey and Maxine Wachter. They shall be accorded credit for those courses for purposes of lateral movement on the salary schedule.

Article 21.3 is irrelevant.

DATED: December 29, 1986
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.
In accordance with Articles J and K of the collective bargaining agreement between the above-named Employer and Union, the Employer originally claimed before the Undersigned Reimbursement Review Panel that it is unaffordable to meet the wage increases under said contract for the years 1984 and 1985.

However, during the course of the hearings, following presentation of its economic case for the year 1984 and following the Union's rebuttal of that case, the Employer conceded that it was affordable to pay the contract wage increase for 1984 in 1984. It agreed to make those payments pursuant to the contract and withdrew its petition herein for relief from the 1984 wage increase in the year 1984.

That left in dispute the affordability of the Employer for the 1984 wage increase in the year 1985 and for the 1985 contractual wage increase.

Based on the record before us, we conclude that the Employer is affordable to the extent of, and has available for payment of the 1984 increase in 1985 and the 1985 wage increase, the total sum of $423,500 (four hundred and twenty three thousand and five hundred dollars.)

The Employer and the Union are directed to meet forthwith to work out how and to whom this money is to be paid and on what schedule. If the Employer and the Union fail to agree within
ten days from the date of this AWARD, the matters shall be referred back to this Panel for those determinations. For that purpose we retain jurisdiction.

Eric J. Schmertz
Chairman

Herbert Rothman
Concurring
Dissenting

Frank McKinney
Concurring
Dissenting

DATED: June 1986
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.

DATED: June 1986
STATE OF New York } ss.: COUNTY OF New York }

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

DATED: June 1986
STATE OF New York } ss.: COUNTY OF New York }

I, Frank McKinney 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 Articles J and K of the collective bargaining agreement between the above-named Employer and Union, the Employer originally claimed before the Undersigned Reimbursement Review Panel that it is unaffordable to meet the wage increases under said contract for the years 1984 and 1985.

However, during the course of the hearings, following presentation of its economic case for the year 1984 and following the Union's rebuttal of that case, the Employer conceded that it was affordable to pay the contract wage increase for 1984 in 1984. It agreed to make those payments pursuant to the contract and withdrew its petition herein for relief from the 1984 wage increase in the year 1984.

That left in dispute the affordability of the Employer for the 1984 wage increase in the year 1985 and for the 1985 contractual wage increase.

Based on the record before us, we conclude that the Employer is affordable to the extent of, and has available for payment of the 1984 increase in 1985 and the 1985 wage increase, the total sum of $423,500 (four hundred and twenty three thousand and five hundred dollars.)

The Employer and the Union are directed to meet forthwith to work out how and to whom this money is to be paid and on what schedule. If the Employer and the Union fail to agree within
ten days from the date of this AWARD, the matters shall be referred back to this Panel for those determinations. For that purpose we retain jurisdiction.

Eric J. Schmertz
Chairman

Herbert Rothman
Concurring
Dissenting

Frank McKinney
Concurring
Dissenting

DATED: June 1986
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.

DATED: June 1986
STATE OF New York ) ss.: COUNTY OF New York )

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

DATED: June 1986
STATE OF New York ) ss.: COUNTY OF New York )

I, Frank McKinney 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
Clove Lakes Nursing Home & Health Related Facility
and
Local 144, Hotel, Hospital, Nursing Home & Allied Services Union, SEIU
AFL-CIO

In accordance with Articles J and K of the collective bargaining agreement between the above-named Employer and Union, the Employer originally claimed before the Undersigned Reimbursement Review Panel that it is unaffordable to meet the wage increases under said contract for the years 1984 and 1985.

However, during the course of the hearings, following presentation of its economic case for the year 1984 and following the Union's rebuttal of that case, the Employer conceded that it was affordable to pay the contract wage increase for 1984 in 1984. It agreed to make those payments pursuant to the contract and withdrew its petition herein for relief from the 1984 wage increase in the year 1984.

That left in dispute the affordability of the Employer for the 1984 wage increase in the year 1985 and for the 1985 contractual wage increase.

Based on the record before us, we conclude that the Employer is affordable to the extent of, and has available for payment of the 1984 increase in 1985 and the 1985 wage increase, the total sum of $423,500 (four hundred and twenty three thousand and five hundred dollars.)

The Employer and the Union are directed to meet forthwith to work out how and to whom this money is to be paid and on what schedule. If the Employer and the Union fail to agree within
ten days from the date of this AWARD, the matters shall be referred back to this Panel for those determinations. For that purpose we retain jurisdiction.

Eric J. Schmertz
Chairman

Herbert Rothman
Concurring
Dissenting

Frank McKinney
Concurring
Dissenting

DATED: June 1986
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.

DATED: June 1986
STATE OF New York )ss.:  
COUNTY OF New York }

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

DATED: June 1986
STATE OF New York )ss.:  
COUNTY OF New York }

I, Frank McKinney do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument which is my AWARD.
As part of our Award of June 1986, the above-named Employer "conceded that it was affordable to pay the contract wage increase for 1984 in 1984" (emphasis added.)

What remained in dispute in the proceeding leading to the June 1986 Award was "the affordability of the Employer for the 1984 wage increase in the year 1985 and for the 1985 contractual wage increase" (emphasis added).

Based significantly on stipulated figures, a majority of the Board of Arbitration found, in its June 1986 Award, that the Employer "is affordable to the extent of, and has available for payment of the 1984 increase in 1985 and the 1985 wage increase, the total sum of $423,500" (emphasis added).

The entire arbitration case leading to the June 1986 Award dealt with the Employer's affordability to pay the wage increases called for under the collective bargaining agreement for the year 1984, and for the wage increase carried forward from 1984 into 1985 and the wage increase called for in 1985.

As such, the Panel was dealing with the question of funds available to the Employer to pay employees covered by the collective bargaining agreement. The employees so covered are bargaining unit employees.
The concession that the Employer was affordable to pay the 1984 wage increase in 1984 was a concession that it had the funds to pay wage increases for employees covered by the contract — namely those of the bargaining unit.

It follows therefore that the finding of affordability for the 1984 wage increase in 1985 and the 1985 wage increase, in the amount of $423,500 was in the same context, e.g., an affordability in that amount for the employees for whom the contract mandated those wage increases.

And, again those employees are members of the bargaining unit covered by that contract.

Nowhere in the record was there any evidence, or even discussion of whether the sum of $423,500 was enough to cover the contract wage increases in dispute. Hence a majority of the Board referred the matter back to the parties to attempt to negotiate how the available $423,500 would be allocated.

Under the foregoing circumstances, any such allocation would be necessary if the total sum available was not enough to pay to the bargaining unit employees the full wage increases in dispute. The record still does not show whether the sum of $423,500 is enough to cover these wage increases, and the record before us does not disclose why the parties were unable to agree on its disbursement. We only know that the parties did not agree, and the matter has been referred back to us for a determination.

Accordingly, it is our determination and Award, based on the nature of the case before us and leading to our June 1986 Award, that the total available $423,500 be first applied to satisfy fully or to satisfy as much as possible the wage increases for the bargaining unit employees called for under the collective
bargaining agreement for 1984 in 1985 and the wage increase called for under the collective bargaining agreement for the year 1985.

Eric J. Schmertz
Chairman

Frank McKinney
Concurring

Herbert A. Rothman
Dissenting

DATED: October 27, 1986
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.

DATED: 
STATE OF 
COUNTY OF 

I, Frank McKinney do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

DATED: 
STATE OF 
COUNTY OF 

I Herbert A. Rothman 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
Clove Lakes Nursing Home & Health
Related Facility
and
Local 144, Hotel, Hospital, Nursing;
Home & Allied Services Union, SEIU
AFL-CIO

In accordance with Articles J and K of the collective
bargaining agreement between the above-named Employer and Union,
the Employer originally claimed before the Undersigned Reimburse-
ment Review Panel that it is unaffordable to meet the wage in-
creases under said contract for the years 1984 and 1985.

However, during the course of the hearings, following
presentation of its economic case for the year 1984 and following
the Union's rebuttal of that case, the Employer conceded that it
was affordable to pay the contract wage increase for 1984 in 1984.
It agreed to make those payments pursuant to the contract and
withdraw its petition herein for relief from the 1984 wage in-
crease in the year 1984.

That left in dispute the affordability of the Employer for
the 1984 wage increase in the year 1985 and for the 1985 contract-
ual wage increase.

Based on the record before us, we conclude that the
Employer is affordable to the extent of, and has available for
payment of the 1984 increase in 1985 and the 1985 wage increase,
the total sum of $423,500 (four hundred and twenty three thousand
and five hundred dollars.)

The Employer and the Union are directed to meet forthwith
to work out how and to whom this money is to be paid and on what
schedule. If the Employer and the Union fail to agree within
ten days from the date of this AWARD, the matters shall be referred back to this Panel for those determinations. For that purpose we retain jurisdiction.

Eric J. Schmertz
Chairman

Herbert Rothman
Dissenting

Frank McKinney
Concurring

DATED: June 1986
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.

DATED: June 1986
STATE OF New York ) ss.: 
COUNTY OF New York 

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

DATED: June 1986
STATE OF New York ) ss.: 
COUNTY OF New York 

I, Frank McKinney 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

CLOVE LAKES NURSING HOME & HEALTH RELATED FACILITY,

-and-

LOCAL 144, HOTEL, HOSPITAL, NURSING HOME & ALLIED SERVICES UNION, SEIU, AFL-CIO.

On June 3, 1986, I was presented with a copy of the award in this matter, duly executed by Eric J. Schmertz as Chairman, and Frank McKinney, as the Union's Panel member. Mr. McKinney signed the award as concurring. At that time the award was complete and effective.

Now however, Mr. McKinney has chosen to pen a document which he entitles, "Concurring Opinion". That document is improper. It was not issued as part of the award of this Panel. Indeed, it is nothing but an after-the-fact effort to re-write the Panel's award.

Without any notice of Mr. McKinney's so-called Concurring Opinion, I executed the award and indicated that I dissented. The reason for my dissent was that I disagreed that the Employer has as much as $423,500.00 for payment of the 1984 wage increases in 1985 and the 1985 wage increase.

It is not true, as the so-called Concurring Opinion would have it, that this award leaves to another date any decision as to what relief should be granted in the event that Medicaid reimbursement is not used to pay wage increases, in whole or in part, to union members. Neither is it true that the
Panel has agreed to or may, in fact, consider arguments related to additional relief, either to be granted or denied the Employer, in the event current Medicaid reimbursement is inadequate to fund wage increases.

The award of this Panel is clear on its fact. It recited that the Employer has only $423,500.00 to pay any wage increases -- both the 1984 and the 1985 -- in 1985. If the total dollar amount necessary to pay full contractual wage increases is greater than the sum found by the award, the award plainly holds that the Employer is relieved of such obligations over and above $423,500.00.

The only matter with respect to which this Panel has retained jurisdiction pursuant to agreement among the panel is set forth in the fiscal paragraph of the award; namely, to resolve disputes about how and to whom the $423,500.00 is to be paid to both union and non-union employees and on what schedule.

As set forth above, because I believe that the Employer is affordable to a lesser extent than the $423,500.00 found by the Panel, I respectfully dissent.

Dated: June 11, 1986

STATE OF NEW YORK )
COUNTY OF NEW YORK )

I, HERBERT ROTHMAN, do hereby affirm upon Oath as Arbitrator that I am the individual described in and who executed this instrument.
September 5, 1986

Dean Eric J. Schmertz
Hofstra Law School
1000 Fulton Avenue
Hempstead, New York 11550

Mr. Frank McKinney
Local 144, SEIU
233 West 49th Street
New York, New York 10019

Herbert Rothman, Esq.
401 Broadway
New York, New York 10013

Re: Clove Lakes Nursing Home & Health Related Facility and Local 144, Hotel, Hospital, Nursing Home & Allied Services Union, SEIU, AFL-CIO
(Reimbursement Panel Proceedings)

Gentlemen:

In accordance with the arrangements made in the August 22, 1986 conference call in the above matter, in which Dean Schmertz and counsel participated, this letter brief sets forth the Union's position as to the action to be taken by the Panel pursuant to its retained jurisdiction in this matter.

PROCEDURAL HISTORY OF THIS MATTER

The Panel issued its initial award in this matter on June 3, 1986, in which it found that Clove Lakes had $423,500 available to pay the 1984 wage increase in 1985.1

1. Clove Lakes sought relief from the Panel with respect to its obligation to pay the full 6-1/2% contractual 1984 wage
Inasmuch as the Panel was not informed of the actual amount necessary to fund the 1984 wage increase in 1985, the Panel did not know whether the $423,500 it found available was less than adequate, more than adequate, or adequate to provide for the increase. It therefore directed the parties to meet and attempt to reach agreement with respect to the payment of the wage increase. Failing agreement, the Panel retained jurisdiction in this matter.

In a concurring opinion, dated June 3, 1986, the Union’s Panelist, Frank McKinney, explained that he concurred in the Panel’s award on the basis of his understanding that the award did nothing more than determine that there was then available the sum of $423,500 in Medicaid reimbursement with which to pay wage increases in 1985. Beyond that, the Panel left to another date “a decision as to what, if any, relief it should grant in the event that such Medicaid reimbursement is not used to pay such wage increases to Local 144 bargaining unit employees, or in the event that such Medicaid reimbursement is inadequate to pay such wage increases.” If requested, the Panel would consider arguments with respect to “what, if any, further award should issue, including the argument that under the circumstances of this case, the Employer should not be granted any relief from the contractual obligation to pay the full amount of such increases to Local 144 bargaining unit employees even if its Medicaid reimbursement is inadequate to fund such wage increases.”

After the Panel’s initial award, the parties met, but were unable to agree with respect to the payment of the 1984 wage increase in 1985. Based on wage increase calculations which the Union requested from the Employer, the Union established that it

(footnote continued from previous page)

increase. Ultimately, it withdrew its request for relief with respect to the payment of that wage increase in 1984. This left before the Panel the question of the payment of the 1984 wage increase in 1985 (no evidence was ever submitted, or argument made to the Panel, with respect to the payment of the 1984 wage increase in 1985). The Panel concluded that there was $423,500 available to pay wage increases in 1985.

2. In a dissenting opinion, dated more than a week later (June 11, 1986), Herbert Rothman, the Employer’s Panelist, disagreed with Mr. McKinney’s view of the award. According to Rothman, the award relieved the Employer of any wage increase obligations in 1985 over and above the $423,500 which the initial award held was available to pay wage increases.
would cost the Employer at most $369,000 to pay the full amount of the 1984 wage increase in 1985 to all bargaining unit employees. It therefore took the position that the Employer should pay the full amount of the 1984 wage increase in 1985 to the bargaining unit employees. The Employer did not dispute the Union’s $369,000 calculation. It stated, however, that it intended to pay the same wage increase to non-bargaining unit employees as it paid to bargaining unit employees and that it would cost approximately $523,000 to pay both bargaining unit and non-bargaining unit employees the full 6-1/2% 1984 wage increase in 1985. It therefore proposed to reduce the bargaining unit employees’ wage increase from 6-1/2% to approximately 5-1/4% and to pay this amount to both non-bargaining unit and bargaining unit employees.

Unable to agree, the Union, by letter dated July 9, 1986, requested that the Panel reconvene pursuant to its retained jurisdiction.

Prior to July 9, 1986, the Union advised counsel for the Employer that its Panel member and Dean Schmertz would be available on July 10, 1986 for this purpose. The Employer did not choose to appear before the Panel on the morning of July 10th and Mr. McKinney was unable to meet on the afternoon of that day, although, with the exception of a couple of hours during which Mr. McKinney would be in transit to a vacation in Tennessee, he agreed to remain available for a telephone conference call and to make himself available for a hearing on subsequent dates, returning if necessary to New York.

Ultimately, a hearing was scheduled for August 22, 1986.

Meanwhile, on July 28, 1986, United States District Court Judge William C. Conner, in contempt proceedings brought by the Union against the Employer for its failure to comply with a prior order and judgment of the court directing it to pay the 1984 wage increase, ordered the Employer to pay the full amount of the 1984 wage increase then unpaid, with interest, irrespective of the pendency of the proceedings before the Panel.

The Employer subsequently complied with the Court’s order to the extent of paying the 1985 portion of the 1984 wage increase to bargaining unit employees. It has not paid either

3. The Employer paid the 1984 portion of the 1984 wage increase shortly before the Judge entered his July 28, 1986 order
the interest on the 1984 wage increase, or the portion of the 1984 wage increase due for the period from January through mid-May, 1986.

The August 22, 1986 hearing before the Panel could not be held because of the illness of Dean Schmertz on that date. Instead, it was agreed in a conference call that day that no further evidence was required in this matter and that the parties would make their arguments in writing with respect to appropriate further action by the Panel. For the reasons set forth below, it is the Union’s position that the Panel should dismiss the Employer’s request for relief in this matter.

THE ISSUES

Preliminarily, it should be noted that since the Union’s July 9, 1986 letter was sent invoking the retained jurisdiction of the Panel, the Employer, as indicated above, has in fact paid the 1984 wage increase in 1985 to bargaining unit employees. The issue of whether the Employer should be relieved of the obligation to do so is thus, in the Union’s view, moot. Since the Employer withdrew its request for relief from the obligation to pay the 1984 wage increase in 1984, and since it never put before the Panel the issue of relief from the obligation to pay the 1984 wage increase in 1986, it seems to the Union that there are no issues presently before the Panel requiring Panel action.

Nevertheless, we understand that the Employer intends to request an award from the Panel permitting it to take back from the bargaining unit employees -- through a Panel authorized recoupment -- an amount equal to the difference between the full amount of the contractual 1984 wage increase it paid under court order to bargaining unit employees in 1985 (6-1/2%) and the percentage amount of the 1984 wage increase it contends it was obliged to pay in 1985 (5-1/4%). The Union has anticipated and addressed below some of the issues raised by such a request.

(footnote continued from previous page)

4. The Union has informed the Employer that its failure in these respects to comply with Judge Conner’s Order will be the subject of further contempt proceedings before the Judge.
1. Added Staff Issues

It was undisputed at the hearing that whatever shortfall may have been experienced by the Employer in 1985 was due to the Employer’s addition of staff in that year and its failure to file an added staff appeal with the State of New York with respect to the staff added. Under the circumstances, there are three separate and independent reasons why the Employer should not be relieved of the obligation to pay bargaining unit employees the full amount of the 1984 wage increase due them in 1985. These are as follows:

(a) The General Added Staff Issue Has Not Yet Been Resolved

The general question of whether reimbursement shortfalls due to added staff costs support a claim for reimbursement-based relief was the subject of extensive testimony and evidence in the Clearview and Shoreview Nursing Home Reimbursement Panel proceedings. The Union took the position in Clearview/Shoreview that added staff costs were not “labor costs” within the meaning of the collective bargaining agreement and that such costs could not support a claim for reimbursement-based relief. The employers took a contrary position.

An interim award was rendered by the Panel Chairman in Clearview/Shoreview declining to decide the added staff issue at that time, but providing for the Panel to reconvene to make that decision. The Panel has not yet reconvened for this purpose in Clearview/Shoreview.

Given the time and effort devoted to the added staff issue in Clearview/Shoreview and the extensive evidentiary presentation and argument made with respect to the added staff issue, as well as the thorough briefing of that issue, if the general added staff issue is to be resolved, it should be resolved by deciding Clearview/Shoreview. Alternatively, the Panel should review the evidence, arguments and briefs submitted in Clearview/Shoreview before rendering a decision in the instant case. The Employer Panelist’s dissenting opinion notwithstanding, the Panel in its initial award in the instant case could not have decided this issue sub silentio. Indeed, for the Panel to have done so would have been a grossly irresponsible act and it is nothing short of insulting to attribute such an act to the Panel Chairman or to its Union member.

For the reasons set forth in Clearview/Shoreview, it is the Union’s position that reimbursement shortfalls due to
added staff costs do not entitle an employer to reimbursement-based relief.

(b) Under the Particular Facts of This Case, Relief Based on Added Staff Costs Should Not Be Granted

(1) The Staff Added in this Case Was Added Beyond the Date for Which, Under Any View of the Added Staff Issue, Relief May Be Granted

A review of the evidence and testimony submitted in Clearview/Shoreview makes it clear that while the Union never agreed to consider added staff costs as "labor costs" within the meaning of the reimbursement provisions of the collective bargaining agreement and thus never agreed to their inclusion in a shortfall analysis, the employers at various times during the negotiations attempted to insert provisions in the collective bargaining agreement that would have that effect. Each time, however, they withdrew those provisions. Nevertheless, in none of the provisions inserted by the employers did they seek a "labor cost" inclusion for staff added after March 31, 1984, the expiration date of the prior collective bargaining agreement. Rather, in the employers' own view of what they were seeking in negotiations with respect to added staff, the employers sought only to include the costs of staff added up to March 31, 1984.

In none of the Reimbursement Panel proceedings thus far, has any employer claimed that the cost of staff added after March 31, 1984 should be considered as a labor cost. Only Clove Lakes has taken this position. It is axiomatic that Clove Lakes should not be permitted to get, through the vehicle of the instant Reimbursement Panel proceedings, more than the employers sought in negotiations.

(2) The Employer's Own Conduct Has Prevented It From Being Fully Reimbursed For Its Added Staff

The evidence in this matter is clear and unrebutted that the Employer failed to file an added staff appeal with the State of New York for staff added in 1985. The evidence is similarly clear and unrebutted that had the Employer done so it would likely have received added staff reimbursement for its added staff costs.5 Moreover, the evidence is clear and

5. Indeed, the unrebutted testimony in this proceeding is that receipt of the added staff monies for which the Employer failed
unrebutted that, even as late as the conclusion of the initial hearing in this matter on May 30, 1986, had the Employer filed the necessary appeal, it would likely have received such added staff reimbursement.

That the Employer seeks to have the employees represented by the Union pay through reduced contractual terms for a shortfall attributable to its own failure to apply for available reimbursement is nothing less than outrageous. Its position in this respect is totally lacking in equity and represents the ultimate perversion of the reimbursement provisions of the collective bargaining agreement. Surely, an employer which has failed to take reasonable steps to obtain reimbursement to which it is entitled may not be heard to claim a reimbursement-based shortfall on the basis of which the bargaining unit employees must suffer.

In this respect, the decision of Arbitrator Margery Gootnick in Local 144 v. CNH Management Associates (Concourse Nursing Home) is illustrative. In CNH, Arbitrator Gootnick stated, among other things, that:

The Arbitrator is persuaded that, when the Employer agreed to the parity provisions in the Collective Bargaining Agreement [parity reimbursement was at issue in that arbitration], they became contractually bound to take all [emphasis in original] necessary steps to secure reimbursement from the State.

*   *   *

Any other interpretation of the parity provisions would render the parity language meaningless and would enable the Employer to avoid the collectively bargained obligation.

In CNH, the Union argued that the well-established prevention doctrine required an award in favor of the Union. Under the particular circumstances of the CNH case, the Arbitra-

(footnote continued from previous page) to apply would not only eliminate any claimed shortfall, but would result in a substantial reimbursement windfall to the Employer.
tor directed CNH to immediately complete its pending application for the necessary reimbursement.

Under the prevention doctrine as applied to the facts of this case, the failure of the Employer to even apply for available staff reimbursement excuses the requirement that it be fully reimbursed for its 1985 labor costs and warrants the dismissal of its application for relief.

The prevention doctrine, which is based on the overriding principle of every contract that there is an implied covenant of good faith performance and fair dealing, requires a party not to act so as to defeat the purpose of the contract, or deprive the other party of the benefits of its provisions. Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 87 (1933); see also, Filner v. Shapiro, 633 F.2d 139, 143 (2d Cir. 1980). Where the provision is a conditional one, the requirement not to defeat the purpose or deprive a party of the benefits includes an obligation not to frustrate the occurrence of the condition. See e.g., Arc Electric Const. Co. v. George A. Fuller Co., 24 N.Y.2d 99, 299 N.Y.S. 2d 129, 132 (1969); International Fire Co. v. Kingston Tr. Co., 6 N.Y.2d 406, 410, 189 N.Y.S. 2d 911, 913 (1959).

In the instant case, when the Union agreed to the reimbursement provisions of the collective bargaining agreement, the Employer concomitantly agreed to take all necessary steps to procure such reimbursement since only the Employer can apply for and receive reimbursement. Accordingly, integral to the agreement that wage increases are subject to reimbursement is the understanding that the Employer is under the obligation to take all steps necessary to procure such reimbursement. As stated by the New York Court of Appeals:

The law looks with disfavor on contractual provisions that would allow one party, by its own unilateral act, to avoid its obligations by preventing or hindering the [fulfillment] of the conditions to the contract.

Arc Electric Const. Co. v. George A. Fuller Co., 24 N.Y.2d 99, 299 N.Y.S. 2d 129, 132 (1969). To permit the Employer here to unilaterally cease taking all necessary steps to procure reimbursement is to permit the foreseeable consequence of denying the employees the wage increases due them in compensation for their continued work.
Any ambiguity on this point, if any could exist, must be resolved against the Employer. It is a basic rule of contract interpretation that ambiguous language should be construed against the party who proposed it. Elkouri and Elkouri, How Arbitration Works, supra at 318-319. Here, where the Employer’s principal, as President of the Southern New York Residential Health Care Facilities Association, was one of the principal proponents of the subject to reimbursement provisions of the collective bargaining agreement, and the Employer’s counsel was the principal draftsman of those provisions, any doubt as to the existence of the obligation to take all necessary steps to procure reimbursement must be resolved in favor of the Union.

To the extent that the obligation is viewed as a conditional one -- whether as a condition precedent or a condition subsequent -- the general rule of contracts is that when a party has occasioned the non-performance of a condition, the condition is excused. Shear v. National Rifle Association of America, 606 F.2d 1251 (D.C.Cir. 1979). Accordingly, to the extent that the Employer in the instant case prevented by its conduct the receipt of what it believes to be adequate reimbursement to fully cover wage increases in 1985, the condition that such reimbursement be obtained is excused.

Nor are there any equitable considerations which justify excusing the Employer from the obligation to apply for necessary reimbursement. A party to a contract, especially one as sophisticated as the Employer in the instant case, must be presumed to have agreed to the legal and practical consequences of the obligations it has assumed. The Employer here assumed the obligations and risks which are inherent in and flow from the reimbursement provisions of the collective bargaining agreement: (1) that it is obligated to take all necessary steps to procure reimbursement, and (2) that, if it prevents reimbursement, the absence of such reimbursement will be excused.

2. The Retroactivity Issue

As is the case with respect to the general added staff issue, the retroactivity issue was fully addressed in Clearview/Shoreview. As established in Clearview/Shoreview, the collective bargaining agreement gives Panel decisions retroactive effect for not more than sixty (60) days prior to the date of decision. The Employer here did not even request relief under the reimbursement provisions of the collective bargaining agreement until well into 1985. Then, despite the Union’s repeated warnings about its delay in proceeding on its request,
did not open its case to the Panel until late March, 1986, at which time it was under the pressure of the judicial proceedings before Judge Conner.

Under the circumstances, to the extent that the Employer now seeks a retroactive recoupment of wage increases paid in 1985 to bargaining unit employees, it is not contractually entitled to such relief. Nor can there be any equitable basis for granting such relief. For a more complete discussion of this issue, the Panel is referred to the Clearview/Shoreview matter. The Panel is also referred to the correspondence introduced in evidence in the instant Panel proceedings with respect to the Employer’s delay in proceeding on its request for relief.

In addition to the above, the Union wishes the Panel to be aware of its position with respect to following issues:

3. The Non-Bargaining Unit Wage Increase

The Union understands that, in or around August 1986, after it invoked the retained jurisdiction of the Panel and after Judge Conner ordered the Employer to pay the unpaid portion of the 1984 wage increase to bargaining unit employees, the Employer decided to make a lump sum payment to its non-bargaining unit employees which it refers to as a 1984 non-bargaining unit wage increase in 1985.

The Union understands further that the Employer intends to seek from this Panel a partial recoupment of the 1984 bargaining unit wage increase in 1985 in order to fund this 1986 non-bargaining unit payment. This, of course, the Union opposes.

While it is true that the collective bargaining agreement provides that the Employer may be credited for reimbursement shortfall purposes with increases in wages and benefits to non-bargaining unit employees which are not greater than the increases in labor costs under the agreement, nothing in the collective bargaining agreement requires an Employer to pay wage increases to non-bargaining unit employees.

Moreover, the collective bargaining agreement clearly contemplates wage increases made to non-bargaining unit employees in the ordinary course. What has been paid to non-bargaining unit employees in 1986 is in effect a bonus which the Employer calls a 1984 in 1985 wage increase.
Unlike its bargaining unit employees, to whom it was contractually required to pay specific wage increases in 1985, the Employer was under no obligation to pay its non-bargaining unit employees a wage increase in 1985. The Employer could just as well have called the payment it made to its non-bargaining unit employees in 1986 a 1986 wage increase. In fact, that characterization would have been more accurate.

The strict year-by-year approach that the employers have adamantly insisted upon in connection with the reimbursement provisions of the collective bargaining agreement should not be permitted to be subverted because it now suits the Employer’s interest to call the payment made to non-bargaining unit employees in 1986 a 1984 in 1985 wage increase and thus claim a 1985 shortfall based on that payment.

Having paid the bargaining unit employees the 1984 wage increase in 1985 which ultimately was the subject of the application for relief pending before the Panel, and it being undisputed that it was adequately reimbursed for that purpose, the Panel need not, and indeed has no jurisdiction to, consider a request that it direct a recoupment of such increase so as to reimburse the Employer for the payment it made in 1986 to its non-bargaining unit employees after the retained jurisdiction of the Panel was invoked by the Union and after Judge Conner’s order in the contempt proceedings.

4. The 1984 Wage Increase in 1986 and the Interest Assessed By the Court Are Not Matters Before the Panel

The 1984 wage increase has now been paid in 1984 and 1985. To the extent that it has not been paid in 1986, this is a subject for the Court and has never been an issue before this Panel. To the extent that interest has been imposed against the Employer for its non-payment of that wage increase, this is similarly a subject for the court and has never been put before this Panel. Nor could such interest under any circumstances be considered a "labor cost" subject to this Panel’s jurisdiction.

5. The 1985 Wage Increase is Not Before the Panel

While it is understandable that in the context in which the Panel rendered its initial award it might have considered it appropriate to conclude that the $423,500 available to pay wage increases in 1985 was available to pay the 1984 and 1985 wage increases in 1985, the fact is that payment of the 1985
wage increase was never an issue before the Panel. The issue of the payment of the 1985 wage increase is at this point still before the Impartial Chairman and there is no pending application for relief from the obligation to pay that wage increase. The Panel should therefore make it clear that in determining that there was $423,500 available to pay wage increases in 1985, the Panel was not ruling in advance on issues that may yet come before it with respect to the 1985 wage increase.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Panel deny any application for relief with respect to the 1984 wage increase in 1985; refuse to consider as not before it at this time any application for relief with respect to the 1985 wage increase in 1985; deny any relief with respect to the 1984 wage increase in 1986 and the interest on the 1984 wage increase on the ground that no proper application for any such relief is before it and that no such relief has ever been considered by it, and on the additional ground that both of these matters are properly before the Court; and take such other and further action consistent with the above as the Panel may deem just and proper in the premises.

Respectfully yours,

Irwin Bluestein

IB:phk

cc: Jonathan L. Sulds, Esq.

6. In any event, as in the case of the added staff issue, this issue and issues 2 and 3 above become academic when the added staff money for which the Employer has not applied is taken into account.
Gentlemen:

This letter is submitted on behalf of Clove Lakes Nursing Home ("Clove Lakes" or "Employer") and sets forth its position in connection with those matters with respect to which the Panel retained jurisdiction following its June 3, 1986 award. By that award, the Panel decreed that Clove Lakes has only $423,500 to pay for any wage increases in calendar year 1985. Put another way, the Panel's award clearly holds that no increase in labor costs for calendar year 1985 may exceed the $423,500 figure.

A dispute has now arisen between Clove Lakes and the Union with respect to which Clove Lakes employees are to receive wage increase payments and in what amounts. More specifically, it is Clove Lakes' position that the $423,500 available for wage increases is payable to union and non-union employees alike, and in the same percentage increase. The effect of this would be that Clove Lakes would make a wage increase payment for the 1984 wage increase in 1985 of 5-1/2% approximately to union and non-union personnel, and would make no 1985 increase payments.
The Union, by contrast, contends that the entire sum of money found by the Panel to be available for wage increases must be paid to union employees. The $423,500 total, the Union contends, is more than sufficient to pay the 6-1/2% 1984 wage increase throughout calendar year 1985.

We show below that the Union's position is frivolous and disingenuous. The parties specifically negotiated that non-union costs were part of overall labor costs. They committed themselves to the proposition that non-union labor cost increases, which did not exceed union labor cost increases, had to be fully reimbursed by the State of New York, failing which the Employer would be entitled to a reduction in overall labor costs, pursuant to the terms of the Reimbursement Clause of the parties' agreement.

However, before turning to the lack of merit to the Union's position, it is appropriate to trace the procedural history of this matter from the time of issuance of the Chairman's award. The Panel's award was signed and affirmed on June 3, 1985. At that time, Mr. Frank McKinney, the Union's panelist, simply signed the award as concurring. Subsequently, Mr. McKinney constructed an opinion which, as Mr. Rothman's dissenting opinion properly points out, was an after-the-fact attempt to rewrite the Panel's award.

Based on the instruction of the Chairman, the parties met on June 25, 1986 to work out, in the terms of the Chairman's award, "[H]ow and to whom this money is to be paid and on what schedule". At that time, Clove Lakes provided the Union with a proposed schedule of payments to all employees of the $423,500, together with supporting papers. On July 9, 1986, the Union notified Clove Lakes that it would not agree to the schedule of payments proposed, because it objected that the schedule included payments to non-union employees together with union employees. The Union then pressed for a contempt citation before Judge Conner in connection with the United States District Court's confirmation of the Rappaport award to the effect that -- absent this Panel's proceedings -- Clove Lakes was obligated to pay 6-1/2% wage increases for 1984 in calendar year 1985. Significantly, the Union's effort to press for contempt came at a time when Mr. McKinney was unavailable for further Panel proceedings -- a fact not previously disclosed to Clove Lakes.
Rather than be placed in a potential contempt situation, Clove Lakes made payments totalling the entire 6-1/2% wage increase to bargaining unit members for calendar year 1985. At the same time, Clove Lakes made payments totalling 5-1/2% pay increase for all non-bargaining unit members for calendar year 1985. Both sets of payments were made on a lump sum basis. It is undisputed that the total amount of money expended by Clove Lakes is in excess of the $423,500 which the Panel found Clove Lakes possessed. In other words, Clove Lakes has now incurred labor costs for 1985 that, according to the Chairman's award herein, are not reimbursed. A fortiori, under the Panel's award, Clove Lakes is entitled to relief.

Thus, here, we request that the Panel direct that Clove Lakes' bargaining unit members' pay be reduced by the amount in which each bargaining member was previously overpaid for 1985 -- that is, that the difference between the 6-1/2% 1984 wage increase in 1985 already paid and the 5-1/2% wage increase for which the Panel has said Clove Lakes is affordable, be subtracted over a period of time the Panel may, in its discretion, set.

Without such relief, the Union's unsupportable position that labor reimbursement from the State of New York to Clove Lakes is available to pay wage increases to union members in the first instance will, de facto, be sustained. And as we now show, such a result would be in violation of the specific terms of the parties' collective bargaining agreement, as well as the governing law.

All concerned with this proceeding know without doubt that Clove Lakes and other Southern New York facilities bargained for and received the specific assurance that non-union labor costs had to be fully reimbursed, along with union labor costs, or the Employer would be entitled to relief under the terms of the Reimbursement Clause of the parties' agreement. The penultimate paragraph of the Reimbursement Clause provides:

"It is understood that the employer may increase wages and other benefits of non-bargaining unit employees during the period April 1, 1984 through March 31, 1987. To the extent that such increased wages and benefits are no greater than the increases in labor
"costs under the terms of this agreement, it is understood and agreed that these non-bargaining unit terms and conditions of employment must also be fully reimbursed by the State of New York."

Unless the parties meant by this language that a facility with a shortfall should reduce labor costs for union and non-union employees alike, in equal proportion, then the language has no meaning. Put another way, the parties plainly intended that in a situation such as here the available reimbursement dollars would be paid to union and non-union employees at the same percentage of total salary. The Union's after-the-fact position simply ignores the parties' clear language and cannot be sustained.

Significantly, in each Panel proceeding to-date, the Union itself has figured non-union costs as part of a facility's overall labor costs for which, by agreement, there must be full reimbursement or relief will be granted. The glaring inconsistency between the Union's methodology and its new position amply demonstrates that its contentions are constructed to serve political ends and not the agreement between the parties.

Moreover, one would have thought all this was settled in any event when the Reimbursement Review Panel here was modelled on the Labor Cost Review Panel. That body, existing between 1978 and 1981, time and again rejected New York State's position that the State's reimbursement methodology was required only to reimburse facilities for the costs of union labor, holding instead that all labor costs were properly reimbursable.

But it is not the model of the Labor Cost Review Panel alone which compels rejection of the Union's argument here. In Haven Manor Nursing Home, New York State specifically stipulated that under applicable reimbursement regulations (which apply with full force here), reimbursement from New York State had to be available to union and non-union employees alike and that the State could not meet its obligations under the statute by reimbursing a facility for union labor costs alone. A copy of the Haven Manor stipulation is enclosed.

Thus, as a matter of contract and as a matter of law, the $423,500 which this Panel found is the sum total available to Clove Lakes to pay increased wages to
its employees in calendar year 1985 must be paid to all employees without regard to representation by the Union.

As set forth above, Clove Lakes has already advanced monies to pay non-union employees wage increases for 1985 while, at the same time, under threat of contempt citation, paying a full 6-1/2% wage increase to union employees. The Reimbursement Clause provides in its first paragraph that Clove Lakes "[M]ust receive full reimbursement from the State of New York . . . for all its labor costs in order to implement the economic terms and conditions" of the agreement. The penultimate paragraph of the Reimbursement Clause continues that "[T]o the extent that such increased wages and benefits are no greater than the increases in the labor costs under the terms of this agreement, it is understood and agreed that these bargaining unit terms and conditions of employment must also be fully reimbursed by the State of New York".

Unless Clove Lakes receives the relief requested, namely, a reduction of currently paid union salaries in an amount equal to the overpayment to union employees for 1985, it will be out of pocket those costs and its non-union labor costs will not have been fully reimbursed. Because the agreement requires a different result, the relief sought should be granted in all respects.

Respectfully,

Jonathan L. Sulds

jls/eb
encls

cc: Mr. Frank McKinney
Herbert Rothman, Esq.
Irwin Bluestein, Esq.
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STIPULATION OF
SETTLEMENT AND
DISMISSAL

82 Civ. (ILG)

WHEREAS, an action has been commenced by Daniel Cantor d/b/a Haven Manor Health Related Facility, plaintiff for judgment declaring, among other things, that plaintiff is entitled to reimbursement for the costs of the District 1199 Pension Fund in its Medicaid program reimbursement rate; and

WHEREAS, it is the position of defendant Department of Health that the memorandum of agreement entered into between the State of New York and the Greater New York Health Care Facilities Association ("GNYHCFA") dated April 4, 1981, which provided for a Shortfall Annual Costs Supplement ("SACS"), was not intended to apply to new benefit programs instituted by residential health care facilities for its employees in order to provide those employees with the same benefits provided to employees by other residential health care facilities subject to a master union contract except for those referenced as covered by the Turkus award; and
WHEREAS, defendants, the Department of Health was not aware and not advised by GNYHCFA at the time it entered into the aforesaid memorandum of agreement that the plaintiff was a party to an agreement with District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO ("District 1199") made August 26, 1980, which obligated the plaintiff to initiate contributions to a National Pension Fund for Hospital and Health Care Employees at master contract levels; and

WHEREAS, despite the foregoing, the defendant, Department of Health believes that it is bound by the terms of the memorandum of agreement and that the plaintiff is in a unique situation which justifies the application of the SACS factor as set forth in the Department's agreement with GNYHCFA to plaintiff's labor costs including the pension plan contribution as provided for in its aforesaid agreement with District 1199, and to plaintiff's subsequent agreement with District 1199 dated January 3, 1983; and

WHEREAS, the parties hereto wish to settle this action on the terms and conditions set forth herein:

NOW, THEREFORE, the parties agree as follows:

1. The Department of Health expeditiously will apply SACS to the costs incurred by the plaintiff under its agreements with District 1199, including
pension costs, and will promulgate, subject to the approval of the Director of the Budget of the State of New York as required by New York Public Health Law § 2807(2)(a), revised 1982 and 1983 provisional Medicaid rates if warranted;

2. Nothing herein shall be construed as a waiver of plaintiff's right to have SACS applied to plaintiff's 1984 Medicaid rate; and

3. This action is hereby dismissed with prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure and without attorneys fees or costs by any party against any other party.

Dated: February 8, 1983

MARVIN NEIMAN, ESQ.
Attorney for Plaintiff
39 Broadway
Suite 2518
New York, New York 10006
Tel. (212) 269-2225

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Defendants
By:

SO ORDERED this day of March, 1983

BARRIE L. GOLSTEIN
Assistant Attorney General
Two World Trade Center
New York, New York 10047
Tel. (212) 488-4940

U.S.D.J.
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DANIEL CANTOR d/b/a HAVEN MANOR
HEALTH RELATED FACILITY,

-against-

ARTHUR Y. WEBB, Acting Commissioner
of THE STATE OF NEW YORK DEPARTMENT
OF SOCIAL SERVICES; and DAVID AXELROD,
M.D., COMMISSIONER OF THE STATE OF
NEW YORK DEPARTMENT OF HEALTH,

Defendants.

WHEREAS, a motion has been filed by the plaintiff dated
January 6, 1983, for an Order adjudging the defendants in civil
contempt of this Court for the alleged failure to comply with
an Order of this Court dated May 9, 1983;

WHEREAS, the defendants do not admit the allegations made
in support of the motion; and

WHEREAS, the parties hereto wish to settle this motion on
the terms and conditions set forth herein:

NOW, THEREFORE, the parties agree as follows:

1. The Department of Health will expeditiously apply
SACs to pension costs incurred by the plaintiff in 1983 for
non-union employees, and will promulgate, subject to the
approval of the Director of the Budget of the State of New York
as required by New York Public Health Law § 2807(2)(a), revised
1983 provisional Medicaid rates if warranted.
2. The pension costs reportedly incurred by plaintiff for 1983 is $53,702. Subject to audit, these costs will be used by the Department in applying SACs and issuing revised provisional Medicaid rates in accordance with paragraph 1 hereof.

3. The motion for contempt is hereby withdrawn with prejudice and without attorneys fees or costs by any party against any other party.

Dated: New York, New York
March 15, 1984

MARVIN NEIMAN, ESQ.
Attorney for Plaintiff
39 Broadway, Suite 2510
New York, New York 10006
(212) 269-2225

Dated: New York, New York
March 15, 1984

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendants
By:

BARRIE L. COHEN
Assistant Attorney General
Two World Trade Center
New York, New York 10047
(212) 488-4940
June 13, 1986

Dear Mr. Schmertz:

Enclosed please find the duly executed "Concurrence" of Frank McKinney with regard to the above captioned matter which was executed by him and delivered to me on June 3, 1986. I also enclose the executed "Dissent" of the undersigned which was signed by me on June 3, 1986.

In view of the highly improper "after-the-fact" alleged "Concurring Opinion" of Frank McKinney I enclose herewith a Dissenting Opinion.

Very truly yours,

HERBERT A. ROTHMAN

Enc.

cc: Mr. Frank McKinney
    Mr. Irwin Bluestein
    John Sulds, Esq.
In the Matter of the Arbitration:
between
International Chemical Workers
Union, Local 560
and
Davis & Geck
(American Cyanamid Company)

The stipulated issue is:
Was there just cause for the discharge of
Jane Abbruscato? If not what shall be the
remedy?

A hearing was held at the Company plant in Danbury,
Connecticut on March 26, 1986 at which time Ms. Abbruscato,
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 Union and Company filed post-hearing
briefs.

The grievant was discharged for "insubordination" due to
her refusal or failure to follow the instructions of a guard re-
garding where to park her car in the plant parking lot, and for
"instigating, leading and condoning" a work stoppage on December

While I do not find her blameless, and though I find her
responsible for a measure of condonation during the period of
unauthorized cessation of work by 25 - 30 employees, I do not
find a sufficient quantity of evidence to support the balance
of the charges against her or to support a conclusion that her
activities rose to the level of insubordination or responsibility
for instigating or leading a work stoppage which would justify
the penalty of discharge.
On the day in question, the grievant was the highest Union officer in the plant, serving as Acting President. In the parking lot she was told by the guard that her car was wrongly parked. He asked her to move it elsewhere. She did not do so, stating that she was late and would move it later. In that respect she was unresponsive to the guard's request and uncooperative with the Company's then newly implemented parking rules. But the guard did not order or direct her to relocate her car and he did not warn her of the disciplinary consequences of a refusal or failure to comply.

Insubordination requires a direct order by supervision, an overt refusal to comply or a refusal by inaction in the face of the direct order. And generally, insubordination is the proper conclusion when the supervisor accompanies his order with a clear warning that refusal or failure to comply will result in disciplinary action. None of these requisite conditions, separately or jointly took place in the instant case. I fault the grievant for her cavalier attitude, but I cannot find that she was defiant, disrespectful or contemptuous of the guard's supervisory authority, or that she refused to follow his orders.

The Company also has the burden of showing that the grievant instigated, led and/or condoned the actions of the 25 to 30 employees when they left their work places and congregated in the personnel office to protest the Company's new parking rules.

Setting aside speculation, conjecture and circumstantial suspicion, the probative evidence adduced falls short of meeting the burden. There is no question that the grievant planned
to protest the new parking rules; that she announced that she was going to the personnel office to protest and that she asked two employees if they wished to accompany her there, without seeking permission of their supervisor. But I do not find an adequate evidentiary basis to link her to or hold her causally responsible for instigating or leading the rest of the group to stop work and to go to the personnel office.

In the absence of evidence of statements or direction by her to the balance of the employees, I find it plausible to conclude that the group of employees, also unquestionably angry with the Company's new parking rules, and seeing or hearing the grievant's plan to go to the office to protest, decided as a group or by encouragement from others in the group, to go along too. Of course it is possible that they did so at the grievant's urging or direction, but the evidentiary link establishing that is missing and a separate decision by the employees to stop work and demonstrate in the personnel office cannot be ruled out, especially with the burden on the Company, in a discharge case, to prove otherwise by clear and convincing evidence.

However, I do find that a point came where and when the grievant failed to meet her special duty as a Union officer to take steps to end the "self help" involved.

When the grievant first saw or realized that a group of employees had left their work stations during working hours to congregate in the personnel office, she should have taken strong and decisive measures to direct them to return to work and to let the regular grievance procedure deal with the problem. She failed to do so. I find she knew that the group had ceased work as they followed her to the office, or at the latest when they entered the office shortly after she arrived there. In that
respect she was wrong and defaulted on her responsibility to the integrity of the contract and the grievance procedure. And she was wrong when she told management that the group of employees "had a right to be there." Additionally, she acted wrongly when earlier, she invited two other employees to accompany her to the office, apparently without the permission of or notice to their supervisor.

That she characterized the position of the employees as "an insurrection" is ambiguous. It could have meant, as the Company argues, that she was leading a work stoppage or concerted demonstration. It could have meant also that the other employees were angry at the new parking rules and that their anger had reached the level of a figurative "insurrection." Either interpretation is colloquially logical and acceptable. I find no reason, in this colloquial setting, to rely on a precise dictionary meaning of the word "insurrection." Again, with the burden on the Company and in the absence of other clear and convincing evidence linking the grievant to a leadership role in the work stoppage, I am not persuaded that her use of the word "insurrection" was an "admission against interest" that establishes with requisite conclusiveness the grievant's responsibility for instigating and/or leading the stoppage.

For the foregoing reasons I do not find that the Company had just cause to discharge the grievant. But there are grounds, as indicated, for some discipline. The duty of a union official to uphold the orderly processes of the contract is of the highest, and because, in the respects indicated the grievant fell short of full compliance with that duty, the discipline may be substantial, though short of discharge.
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 discharge of Jane Abbruscato is reduced to a suspension for the period of time involved. She shall be reinstated but without back pay.

Eric J. Schmertz
Arbitrator

DATED: May 20, 1986
STATE OF New York )
COUNTY OF New York )ss.: 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:

Was there just cause for the ten working days suspension of Lawrence Silver? If not, what shall be the remedy?

A hearing was held on September 29, 1986 at which time Mr. Silver, 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 charge against the grievant and for which he was suspended is that he "filed a false accident report in order to have a previously diagnosed condition corrected under our Workers Compensation Insurance Program."

This is a disciplinary case with the burden on the Employer to prove the charge by clear and convincing evidence. The Employer has not met that burden.

There is no evidence that the grievant did not have an accident at work on September 14, 1985. There is no evidence that his report that he missed a step on a ladder, causing him to come down heavily on one leg was untrue. There is no evidence that he planned or "orchestrated" the accident. The medical evidence shows that upon examination by an Employer Physician, the grievant was found to be suffering from a groin strain.
He had reported that a pain in his lower left side resulted from the accident off the ladder. There is no evidence that the groin pain or groin strain was not the proximate result of the misstep off the ladder, as the grievant had stated in his accident report.

It is undisputed that on February 12, two days before the accident the grievant had been told by his own physician that he had a hernia. The hernia was discovered by the grievant's physician as a result of an examination for a prostate condition.

It is the Employer's contention that the "groin strain" that the grievant claims he suffered in the ladder accident was really the pre-existing hernia condition; that it was therefore not work related; that the grievant falsely told the Employer physician that he had no prior hernia problems in order to transform the pre-existing hernia condition into a work-related injury for Workers Compensation coverage, and that the grievant's motive was to get any lost time changed to compensation and to save all the accumulated sick time he had for payment at retirement.

While the Employer may have suspicions about the grievant's behavior and motives, suspicions and speculation are not enough to sustain a disciplinary action.

The critical medical evidence does not support the Employer's case. The grievant's pre-existing hernia was diagnosed as "asymptomatic," meaning that the grievant had no hernia symptoms. So, there is no evidence that prior to the accident on the ladder, the grievant experienced any prior swelling or discomfort resulting from the hernia. Yet, again based on the medical evidence, following the accident he did experience pain and was
diagnosed by the Employer physician as suffering from a "groin strain." Absent any evidence to the contrary and there is none in this record, the only probative conclusion that can be reached is that the symptomatic groin strain resulted from the accident and that it was either a new injury, different from the re-existing hernia; or was an aggravation of what had been an asymptomatic hernia.

Either way, the grievant's accident report was not false. He did not claim that he suffered a hernia from the ladder accident. He reported only that he suffered pain in his side. Again, absent contrary evidence, I must conclude that he believed that he had injured his groin in the misstep from the ladder or that the groin pain was an aggravation of the pre-existing hernia.

The Employer has conceded that a work related accident that aggravates a pre-existing non-work-related condition is compensatory under Workers Compensation. And it is undisputed that a new or different injury to the groin from a work-related accident would also be compensatory. So, again, either way the grievant's accident report which generated a Workers Compensation file and case was not false.

Indeed under the Employer's procedures, an injured employee does not make a claim for Workers Compensation. Rather he fills out an accident report which the Employer sends to its carrier for Compensation processing. Here the grievant filled out the accident report as required, and, based on the credible evidence in the record, I cannot find that the report was false or fraudulent.

That in response to a question by the Employer's physician
as to whether he ever had a hernia, the grievant answered "no" untruthfully, is disturbing, of course. But unless there is evidence that he did so to hide a groin strain that did not result from the accident on the ladder, that untruth, though reprehensible if willful, is immaterial to the validity of the accident report and the Workers Compensation case.

Also, that the grievant was later denied compensation and had the hernia (and the prostate condition) corrected under his Blue Cross-Blue Shield coverage, does not mean that he did not have a legitimate reason to fill out an accident report, noting "pain in the lower left side" when the accident occurred. It is the truth or falsity of that report that is in issue here, not the subsequent Workers Compensation determination, from which an appeal was not taken.

With the failure of the Employer's case to show that the grievant did not suffer a groin injury from a misstep off a ladder while at work, the grievant's interest in or concern over preserving his accumulated sick days are of no probative consequence.

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 ten working days suspension of Lawrence Silver. The suspension shall be expunged from his record, and he shall be made whole for the time lost.

DATED: October 6, 1986
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:

Was there just cause for the discharge of Mary Dixon? If not, what shall be the remedy?

A hearing was held in Liverpool, New York on November 12, 1985 at which time Ms. Dixon, 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 Union and Company filed post-hearing briefs.

The dispute is even narrower than the stipulated issue. It is whether the fourth warning notice given the grievant for excessive absenteeism and lateness (including "early outs") was proper. The Union does not contest the grievant's three active, prior warnings (including a disciplinary suspension following the third), nor does the Union contest the Company's policy of imposing the penalty of discharge for a fourth warning notice within a relevant period of time. The Union confines its case to a challenge of the fourth warning notice, conceding that if that notice was justified, the grievant's discharge was proper.

Indeed, the dispute is further narrowed to whether the absences, latenesses and "early outs" for which the grievant was charged; which make up 14% of her scheduled time, and for which
she received the fourth warning notice, were properly charged against her. It is not disputed that a 14% absence/lateness record over a period of fifty working days is excessive. What is disputed by the Union is the inclusion of certain absences, and latenesses in that 14% for which, the Union claims the grievant was or should have been excused.

The Company's Code of Conduct or absentee policy lists the absences, etc. which are excused. Included is "excused illness." The others are not relevant to this case.

In the instant case, the Union asserts that the Company unfairly and arbitrarily refused to excuse the grievant from absences and tardiness which were "beyond her control", including illness. (And also including public transportation delays and car breakdowns). It argues that because the Company's policy of issuing warnings is "corrective" in its intent, and that corrective action is inoperative in circumstances beyond the grievant's control, those circumstances may not be included in the cumulative attendance record and should have been excused.

I cannot agree with these arguments because they run counter to certain well settled industrial relations principles, and because I find nothing in the contract, the Code of Conduct, or practice which varies those principles.

First it is well settled that when an employee has accumulated an excessive record of absenteeism and latenesses, it is proper for an employer to require that subsequent claims for illness be substantiated by a doctor's statement. Here, following the grievant's three warning notices, I cannot find fault with the Company's requirement that she produce medical documentation of further illnesses in order to excuse these illnesses from her
record. So, as to that contention, I conclude that the grievant's subsequent absences or tardiness due to "illness" which were not medically documented, were properly included by the Company in the 14% calculation.

It is also, in my opinion, universally well settled that "corrective" action, in the form of progressive discipline, may be applied to absences/latenesses, etc. that are both within or beyond the employee's control. This is based on the equally well accepted proposition that an employer has the right to expect and require regular and reliable attendance from its employees; that a pattern of excessive absenteeism/lateness, for whatever reasons, is inconsistent with that rightful expectation; and is actionable by corrective or progressive discipline, including the ultimate penalty of discharge. Indeed, such a corrective and progressive discipline policy must be applied regardless of the reasons for that unsatisfactory attendance record, if an ultimate discharge is to be upheld. The mere use of the phrase "corrective action" in the Code of Conduct does not transform or limit the application of the Code or disciplinary action to those instances of irregular attendance which the employee could have controlled. To do that, in my judgment, more explicit contract language or Code language is required, for it would be a significant change in what is broadly and traditionally accepted in the industrial relations community as the meaning and scope of "corrective action." In short, "corrective action" is traditionally recognized as synonymous with "progressive discipline," and I find nothing in this setting to change that recognition. Therefore, I find no contractual basis on which the grievant's un-
substantiated illnesses or other absences or latenesses "beyond her fault or control" should have been excused.

Against the back-drop of three prior, active warning notices for an unsatisfactory attendance record, including a disciplinary suspension, the grievant had a duty to make an extra and prudent effort to obtain medical documentation of claimed illnesses, to travel early enough to get to work on time; to arrange for alternative transportation if her car was unreliable, and to avoid leaving work early except in the most compelling and also adequately documented circumstances. (That she told her foreman that she had to leave early "for personal reasons," and he permitted her to do so, does not mean that she was "excused," within the meaning of the Code of Conduct.) She did not meet this duty.

Therefore, considering her chronic record of excessive absenteeism and lateness, as evidenced by her three prior warnings and disciplinary suspension, her subsequent unsubstantiated illnesses and other circumstances "beyond her control" which caused absences and other attendance problems, were and are prejudicial to her in the proper application of discipline. Hence, I must reject the Union's argument that certain absences and latenesses should have been excused. The excessive 14% record therefore stands, and as the Company had followed the progressive discipline formula, a fourth warning notice was proper, and the grievant's discharge 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:
There was just cause for the discharge
Mary Dixon.

DATED: January 29, 1986
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 ex-
cuted this instrument, which is my AWARD.

Eric J. Schmertz
Arbitrator
The stipulated issue is:

Was there just cause for the discharges of Steven Vu and Felix Miller? If not, what shall be the remedy?

A hearing was held in New Orleans, Louisiana on May 22, 1986 at which time Messrs. Vu and Miller, hereinafter referred to as the "grievants" 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, and both sides filed post-hearing briefs.

The charge against the grievants for which they were discharged, is that they falsified their expense accounts for the purpose of obtaining lodging expenses they did not incur.

As in all discharge cases, and especially where the charges involve financial dishonesty, the burden is on the employer to prove the charges by clear and convincing evidence.

Though the facts in the instant case raise legitimate suspicions and involve questionable circumstances, I find that the Company's case falls short of this requisite standard.

There is no doubt that the expense accounts submitted by the grievants were inaccurate with regard to a third night of lodging; that the expense accounts claimed reimbursement for a
third night in a motel when the grievants did not stay the third night and did not incur a third night's expense; that the expense accounts were so filed by the grievants with the Company after an originally scheduled third night had been cancelled with the grievant's knowledge and after the motel gave them back their third night's deposits.

However, I find the grievants' explanations to be plausible, believable and probable. A contrary conclusion, namely that they wilfully falsified their expense accounts to gain monies to which they were not entitled is of course a possible finding, but, based on the entire record too inconclusive to meet the test of "clear and convincing."

The grievants were on a work assignment which required their stay in a motel. Their original schedule called for three overnight stays. On checking in they paid for one night in advance and after that night paid for the remaining two in advance. Before the third night the work unexpectedly finished or was discontinued, and a third night's stay was unnecessary. On short notice the grievants left the motel before the third night, at which time the motel returned to them their third night's advance payment.

The grievants explain that after the first night, or before the scheduled third night had been cancelled they had prepared their lodging expense account in advance, and that this had always been their practice. When the third night was abruptly cancelled they returned to the Company headquarters, arriving in the early morning hours, and left the prepared expense accounts, still showing a third nights lodging, forgetting or neglecting to make the appropriate changes.

I am not prepared to conclude that the grievants falsified
this testimony. Clearly the grievants did not hide the fact that they spent only two nights in the motel. They attached the motel bills to their expense accounts. Those bills showed only two nights of motel expense. By their own action the grievants had disclosed to the Company that their lodging expense was limited to two days, regardless of what their expense account claimed. In other words, any plan of the grievants to deceive could be readily uncovered by the very documents they filed. Hence, I do not believe that they set out to deceive or defraud.

Also, because the original schedule called for three nights, the expense account reference to a third night in the motel did not have a fictitious origin. Originally, but anticipatorily, it was correct. So, in the absence of any evidence in refutation, I accept their testimony that they made out the expense account in advance, anticipating three night's stay and, considering the short notice of the cancellation of the work before the third night, their arrival back at Company headquarters in the early hours of the morning, and their fatigue at the time, I accept their testimony that they forgot or neglected to correct their expense accounts before filing them at that hour.

Additionally, I do not think it unreasonable, under the particular circumstances of this case, for the grievants to await an expected, routine audit of their expense account to make the needed corrections.

The evidence on the regular audit procedure is basically undisputed. Routinely, an auditor calls employees into the office and with the affected employee, makes changes in the expense accounts, including disallowances. Errors have not resulted in discipline. Though previous audits may not have dealt with such a large inaccuracy as an additional nights lodging, I cannot conclude that the grievants falsified their reliance on an expected
audit to correct their accounts. Especially so when as previously noted, the documents they filed with their expense accounts disclosed the discrepancy and inaccuracy and certainly would have prompted such an audit. In short, I believe the grievants did not act dishonestly because, by their own simultaneous acts, any such dishonesty would have been easily discovered.

The Company makes much of what is considers as an untruthful answer by grievant Vu, when, in response to an investigatory question "how many nights (he) stayed in the motel," he replied "three." I do not consider this fatal. Vu is Chinese, and English is not his native language. I consider it an acceptable possibility that he did not understand the question precisely; that he confused the number of days in the motel (correctly three) with the number of nights; or that he confused the original plan to stay three nights with what actually happened. Again, his answer could be interpreted as prejudicial to him, but a non-prejudicial explanation is also logical and reasonable under all the circumstances of this case. These divergent, albeit logical interpretations mean that a prejudicial interpretation has not been clearly and convincingly established.

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 discharge of Steven Vu and Felix Miller. They shall be reinstated with full benefits and back pay less their earnings from gainful employment, if any, during the period of their discharges.

DATED: July 27, 1986

Eric J. Schmertz
Arbitrator
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:

Did the Employer violate Article VI Paragraph 4 by its failure to start Robert Doherty at a pay rate of $450.25 a week at his date of hire, March 3, 1985. If so what shall be the remedy?

A hearing was held in Boston, Massachusetts on February 20, 1986 at which time Mr. Doherty, 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. A stenographic record was taken and both sides filed post-hearing briefs.

Article VI Paragraph 4 reads:

Length of Service Steps

The word "year" or "years" as used in this article in relation to step raises shall mean year or years of experience in comparable work. "Comparable work" shall not be limited to the Newspaper and/or Communications Industry. Experience, as used in this Agreement, means employment by any daily newspaper of general circulation, in a comparable job classification, or by any recognized news or photo syndicate or press association, or comparable experience on any recognized periodical of general circulation, or for commercial positions, in a comparable position for a comparable organization or newspaper.

The grievant is a custodian. When he began work full time he was paid the starting rate for that classification of $275.51 a week. It is the Union's contention that because of the grievant's prior experience as a custodian in previous jobs elsewhere
he was entitled to the top of the custodian rate, namely $450.25 a week, under the foregoing contract provision. There is no dispute that the grievant had no experience in the various newspaper job classifications and/or in the communications industry or in comparable jobs with any recognized news, photo syndicate or press association or periodical within the meaning of Article VI Paragraph 4 of the contract. The only question is whether as a custodian, he occupies a "commercial position" within the meaning of that section of the contract, and at the the time of his hire, possessed prior experience in a "comparable position" with a "comparable organization."

By its terms Article VI Paragraph 4 does not cover all persons employed by the Employer. Clearly it covers only those with prior newspaper, communications, news and/or photo experience with other newspapers or periodicals, and it covers other employees falling within "commercial" classifications. Had it been intended to cover all bargaining unit employees, I am satisfied it would have said so. Instead of setting forth delineations among employees with prior newspaper and photo experience and those in commercial positions, it would have provided for length of service pay steps for "all employees." Indeed, in other sections of the contract, the parties, have demonstrated a knowledge of and ability to express coverage for all the bargaining unit employees.

The remaining question is therefore whether the custodian position is a "commercial position" within the meaning and intent of Article VI Paragraph 4. I must conclude it is not. The traditional meaning of a "commercial position" includes business, clerical and other recognized administrative jobs with a newspaper. It is well recognized that commonly used terms should be
given their traditional meaning, unless a specific different definition or other evidence of a different meaning is shown. That exception has not been demonstrated in this case.

The Employer has presented persuasive reasons for and explanations of why Article VI Paragraph 4 does not and was not intended to cover custodians. It points out that length of service pay steps have been necessary to attract journalists, editorial staff, and clerical and administrative personnel to jobs with this newspaper. Competition for those types of employees warrant pay recognition for comparable experience gained elsewhere. This explanation is unrefuted. Also unrefuted is evidence adduced by the Employer that no such competition exists for custodians, and that there is and has been a ready and available supply of employees for custodian positions without any need to grant pay levels based on prior experience as a custodian.

However, even if it is assumed that the language "commercial positions" is ambiguous and may lend itself to an unusual interpretation which would include custodians, the evidence before me still supports the Employer's contention. Where a contract phrase is ambiguous; where its meaning is unclear; and where it may be subject to different interpretations, the arbitrator looks to past practice for clarification and for an evidentiary indication, by the practice of the parties, of what the language was intended to mean. There is clear evidence of past practice in this case which probatively negates the Union's interpretation. The undisputed fact is that for all the many years of this collective bargaining relationship, no custodian has ever received a pay rate based on prior custodian experience elsewhere under Article VI Paragraph 4 of the contract. I hold that this lengthy and un-
varied past practice supports the interpretation that the phrase "commercial positions" in Article VI Paragraph 4 does not include the custodian classification.

With that holding, it is unnecessary to decide whether the grievant's prior experience as a custodian meets the experience qualifications of Article VI Paragraph 4.

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

The Employer did not violate Article VI Paragraph 4 by its failure to start Robert Doherty at a pay rate of $450.25 a week at his date of hire, March 3, 1985.

DATED: May 12, 1986
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:

Did the Company violate the Basic Agreement by refusing to allow James A. Dugard to bump Arthur Headley out of the Tool Crib Store Keeper position? If so, what ought the remedy be?

Did the Company violate the Basic Agreement by not awarding the Cl. 6 Truck Driver job to either Odie Hunt, Marion Jeffries or John Schneider? If so, what ought the remedy be?

A hearing was held in Louisville, Kentucky on September 17, 1986 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 and each side filed a post hearing brief.

Both issues in this case involve the ability of the grievants to perform the job sought, by a lateral bump (in the first issue) or by a bid (in the second issue).

Under the first issue, the relevant contract provision is Article 4.6d(2)(b) which reads:

An employee in a sharing unit in which a reduction in force is taking place, or who is otherwise displaced, will have the opportunity to avail himself to a job in the order listed below:

(b) The job of the least senior employee on any shift in the plant in a higher classification on which the employee has been permanently assigned with satisfactory performance for a period of twenty (20) work days, or the same classification, or a lower classification through classification 5, on which the employee has been permanently assigned with satisfactory performance for a period exceeding twenty
(20) work days or is otherwise qualified by his prior work experience, provided the displaced employee has greater seniority than the employee he would displace.

The grievant, James A. Dugard, laid off from the classification 8 Tool Grinder "B", sought to bump the less senior employee, Arthur Headley, in the job Tool Crib Store Keeper, classification 8. As such it was an attempted lateral bump. It is undisputed that the grievant had not been previously and permanently assigned to the Tool Crib Store Keeper job for "a period exceeding twenty (20) working days." The dispute therefore is narrowed to whether the grievant was "otherwise qualified by his prior work experience."

The record before me establishes that the phrase "otherwise qualified by ... prior work experience" means an ability to step into the disputed job and perform it satisfactorily without training or an on the job "break in" period of other than a minor period. Indeed, this practice is supported by Article 4.6d(3) of the contract which provides for on the job training only where the classification involved is at Grade 4 or less. Here we are concerned with classification 8.

The Union has offered considerable evidence concerning the grievant's other work positions including that of Tool Crib Dispenser which the Union claims has given him the requisite experience and training to perform the Tool Crib Store Keeper job satisfactorily. The Company's evidence and testimony sharply dispute this conclusion. Frankly, I find the respective positions to be offsetting and hence inconclusive. As such, the Union, with the burden of proving its case, has fallen short of establishing the grievant's "qualifications" by other work assignments within the meaning of the critical language.

What is relevant, is the period of time that the grievant was temporarily assigned to the Tool Crib Store Keeper job. His
temporary assignments, cumulatively, amounted to about 44 hours. This is a period of experience relevant to his ability to perform the job if assigned it permanently. However, I am not prepared to substitute my judgment for that of the Company that 44 hours is not enough to either equal "more than 20 work days" of a permanent assignment, or enough to establish a "qualification" within the meaning of the contract, especially when, based on practice, no employee with as few hours of temporary assignment has been permitted to bump.

This is not to say that the grievant does not know some important things about the Tool Crib or even about the Tool Crib Store Keeper job. Rather it is to say that the Company's determination that his other work experience and his period of temporary assignment were not enough to qualify him to assume the full responsibilities of the job, cannot be faulted as arbitrary, capricious or even evidentially unreasonable. As the grievant acquires more experience in the job by temporary assignments or comparable experience, he will be accumulating the requisite experience that should qualify him in the future for a chance as a Tool Crib Store Keeper.

On the second issue, I find no fault with the Company's rejection of grievant Marion Jeffries. Jeffries had an official, medical work restriction, limiting the amount of walking and climbing he should undertake or be required to perform. Walking was not to exceed 200 yards, and climbing or "scaffolding" was prohibited.

Again the evidence and testimony on how much walking was required of the truck driver operator was contradictory. Yet, on balance, I am persuaded that the job does and would require amounts of walking in excess of the 200 yard limitation, and hence if awarded to Jeffries would be in express violation of that
official limitation. Accordingly, the rejection of Jeffries’ bid was not improper or violative of the contract. That the Company may have known that Jeffries has been walking in excess of 200 yards on other jobs may be a violation of the limitation as to those jobs, but cannot constitute an elimination of that restriction or create a different medical condition, when bids for a different job (here as Truck Driver), are considered. In short, I cannot find that an official, physical and medical work restriction has been eliminated by the theory of estoppel. The grievant’s remedy is to require the Company to reduce the amount of walking in his incumbent jobs, so that the restriction is properly respected.

However, the most senior of the bidders was Odie Hunt, and I do not find that the Company had reasonable grounds to bypass or disqualify him. With that determination, the other less senior bidders need not be considered. The relevant contract provision is Article 4.5g which reads:

When there are two or more eligible, qualified bidders as evaluated by Management in accordance with Article 4.2a and 4.2b, for a posted job opening, the eligible, qualified bidders shall then be considered in order of seniority.

Management may then determine by interview or review of records of the senior, eligible, qualified bidder if he can read required blueprints, or has any physical, mental or any other disqualifying deficiency which would prevent satisfactory performance on the job. If a deficiency is noted in the interview or records review, the bidder will be disqualified and Management will proceed to the next senior, eligible, qualified bidder.

When the Company selects the senior, eligible, qualified bidder without a disqualifying deficiency, that employee will be given a trial period (not training period) not to exceed 20 work days on the specific job opening. If the employee is awarded a Trainee job posting, he will be given a 20 work day trial period. In either case of "trial periods" the employee may be revoked from that job and returned to his former job, if within the trial period his
aptitude, capability, or performance is unsatisfactory. Any employee returned to his former job will not be eligible to bid on any subsequent posting for 26 weeks.

Hunt had regularly filled in on the job, covering for vacations and illnesses. He drove both the large and small truck. He had work experience as a helper on the trucks. That he was disqualified because he was "not as proficient as a qualified operator" when he filled in is not a disqualifying factor. The contract does not require an immediate proficiency in bidding situations. Indeed, the provision in Article 4.5g for a "trial period not to exceed 20 work days on the specified job opening" shows that full proficiency is not expected immediately. Also, an employee who has filled in from time to time, as in the case of the grievant cannot be expected to immediately know the locations of all the stops and points of pickup and delivery. The trial period is accorded for that as well as other reasons, including a determination of "aptitude, capability and performance."

That the grievant was disqualified because he failed to make a pickup where a business had moved from one location to another, and for one traffic violation arising out of either "ignoring" a traffic sign (as alleged by the Company) or his "confusion" over the sign (as alleged by the Union) mean that the Company requires errorless performance with no margin for mistakes. I think that is unreasonable and that the grievant's extensive work experience on the trucks involved qualified him for at least the contractual trial period.

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

[1] The Company did not violate the Basic Agreement by refusing to allow James A. Dugard to bump Arthur Headley out of the Tool Crib Store Keeper position.
[2] The Company violated the Basic Agreement by not awarding the Cl. 6 Truck Driver job to Odie Hunt. He shall be given the contractual trial period on the job and made whole for wages lost.

Eric J. Schmertz
Arbitrator

DATED: December 13, 1986
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.