In the matter
of
Local 144, S.E.I.U., A.F.L.-C.I.O.
and
Manhattanville Nursing Care Center, Inc.

I, the undersigned Arbitrator, appointed by mutual consent of the parties, conducted a card count on October 6, 1989. The Card Count was conducted pursuant to two (2) Recognition Agreements, dated September 25, 1989, entered into by Local 144, Hotel, Hospital, Nursing Home and Allied Services Union and Manhattanville Nursing Care Center, Inc. Said Recognition Agreements were submitted to the Arbitrator as Exhibit 1 (2 pages) and Exhibit 1A (2 pages) which are attached hereto. Exhibit 1 concerns a Service and Maintenance unit; and Exhibit 1A concerns a Licensed Practical Nurse (LPN) unit. The terms and conditions of the two (2) Recognition Agreements are hereby incorporated by reference as if fully set forth herein and are an integral hereof.

The Card Count was for recognition of the following two (2) units based on a list of eligible employees (Exhibit #2-three (3) pages-attached hereto).

1. Service and Maintenance Unit:

Including: All full-time and regular part-time nurses aides, nurses assistants, dietary aides,
cooks, maintenance employees, orderlies, recreation assistants, switchboard operators and ward clerks employed at the 311 West 231st Street, Bronx, New York facility.

Excluding: All other employees, guards and supervisors as defined in the National Labor Relations Act.

2. Licensed Practical Nurse (LPN) Unit:

Including: All full-time and regular part-time Licensed Practical Nurses (LPNs) employed at the 311 West 231st Street, Bronx, New York facility.

Excluding: All other employees, guards and supervisors as defined in the National Labor Relations Act.

The parties stipulated to the authenticity of the signatures on the cards produced by Local 144.

I hereby certify that the results were as follows:

Local 144 produced eighty-seven (87) cards for the proposed Service and Maintenance Unit. Of these cards, seventeen (17) cards were invalid, and seventy (70) cards were valid, compared to the list of eighty-four (84) eligible employees, thereby resulting in cards from a majority of the eligible employees. Local 144 produced ten (10) cards for the proposed L.P.N. unit. Of these cards, two (2) cards were invalid and eight (8) cards were valid, compared to a list of twelve (12) eligible employees, thereby resulting in cards from a majority of the employees.
THEREFORE, Local 144 is designated as the exclusive bargaining representative of the above-described bargaining units at Manhattanville Nursing Care Center, Inc.

ERIC J. SCHMERTZ
ARBITRATOR

Before me this date, October 25, 1959, came Eric J. Schmertz to me personally known and to whose signature (above) I attest:

[Signature]
RECOGNITION AGREEMENT

IT IS AGREED, by and between Local 144, Hotel, Hospital, Nursing Home and Allied Employees Union, Service Employees International Union, AFL-CIO (hereinafter referred to as the "Union") and Manhattanville Nursing Care Center Inc. (hereinafter referred to as the "Employer"), that:

WHEREAS, the Union has requested recognition from the Employer as the exclusive collective bargaining representative of employees employed in the following bargaining unit:

Included: All full and regular part-time nurses aides, nurses assistants, dietary aides, cooks, maintenance employees, orderlies, recreation assistants, and ward clerks employed at the 311 West 231st Street, Bronx, New York Facility.

Excluded: All other employees, guards and supervisors as defined in the National Labor Relations Act.

AND, WHEREAS, the Employer has agreed to voluntarily so recognize the Union, provided that the Union establishes by a card count that it represents a majority of the employees in the above bargaining unit, IT IS THEREFORE AGREED THAT:

1. The Union will establish, by a card count, that it represents a majority of the employees in the above-
described unit. Said card count will be conducted by Eric J. Schmertz, and payment for these services shall be shared equally by the parties.

2. Upon the Union establishing that it represents a majority of the employees in the above-described bargaining unit, the Employer shall recognize the Union as the exclusive collective bargaining representative of the employees in the bargaining unit and agrees to negotiate in good faith with the Union for a reasonable period of time over terms and conditions of employment to be embodied in a collective bargaining agreement.

3. It is further agreed that the above-described unit does not include any individual employed by any company with which the employer has contracted to perform housekeeping services at the facility.

Dated: Sept 25, 1989

Ernest Dicker, Executive Director
Manhattanville Nursing Care Center Inc.

Dated: Sept 25, 1989

Frank McKinney
Secretary Treasurer, Local 144, SEIU, AFL-CIO

Vice Pres
RECOGNITION AGREEMENT

IT IS AGREED, by and between Local 144, Hotel, Hospital, Nursing Home and Allied Employees Union, Service Employees International Union, AFL-CIO (hereinafter referred to as the "Union") and Manhattanville Nursing Care Center Inc. (hereinafter referred to as the "Employer"), that:

WHEREAS, the Union has requested recognition from the Employer as the exclusive collective bargaining representative of employees employed in the following bargaining unit:

Included: All full-time and regular part-time Licensed Practical Nurses (LPNs) employed at the 311 West 231st Street, Bronx, New York facility.

Excluded: All other employees, guards and supervisors as defined in the National Labor Relations Act.

AND, WHEREAS, the Employer has agreed to voluntarily so recognize the Union, provided that the Union establishes by a card count that it represents a majority of the employees in the above bargaining unit, IT IS THEREFORE AGREED THAT:

1. The Union will establish, by a card count, that it represents a majority of the employees in the above-described unit. Said card count will be conducted by Eric J. Schmertz, and payment for these services shall be
shared equally by the parties.

2. Upon the Union establishing that it represents a majority of the employees in the above-described bargaining unit, the Employer shall recognize the Union as the exclusive collective bargaining representative of the employees in the bargaining unit and agrees to negotiate in good faith with the Union for a reasonable period of time over terms and conditions of employment to be embodied in a collective bargaining agreement.

Dated: July 25, 1989

[Signature]
Ernest Dicker, Executive Director
Manhattanville Nursing Care Center Inc.

Dated: Sept. 25, 1989

[Signature]
Frank McKinney
Secretary-Treasurer, Local 144, SEIU, AFL-CIO
The stipulated issues are:

[1] Was there just cause for the three-day suspension of Ray Miller from December 21? If not what shall be the remedy?

[2] Was there just cause for the discharge of Ray Miller? If not what shall be the remedy?

A hearing was held on February 24, 1989 at which time Mr. Miller, 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.

There is no dispute that on December 21, 1987 the grievant was several miles off his route; and that as a result he was ten minutes late arriving at the location of his assignment. Additionally, the Company charges that in an apparent effort to get from the location off his route (the northern Bronx) to his assignment (at the lower Bronx) he drove at an excessive speed on the I-95 highway and recklessly at the Bruckner Boulevard exit.

The Company has clearly established and notified its drivers that being off route is a serious violation.

The grievant offered no reason or explanation for being so far off route and away from his assignment. That being so,
it is not unreasonable to conclude that the grievant was using the bus for some personal or otherwise improper purpose. That is also a well established rule violation. Additionally, I find no reason to disbelieve the Company representative who testified that he saw the grievant driving the bus at an excessive speed and hazardously. That the grievant was late to his assignment makes logical and probable that he was driving fast and without precautions to try to make up his lateness. Speeding, and carelessness, are of course, serious rule violations, well publicized to and known by the employees.

The grievant's prior disciplinary record discloses some earlier problems. He was involved in two "chargeable" accidents, and was reinstated on the appeal of the Union after being discharged for "insubordination." These reports and records were not challenged, and therefore stand as part of his personnel record.

Under the foregoing circumstances, I cannot find fault with the imposition of a suspension for the "off route", and speeding and careless driving offenses. And I do not find a three day suspension to be unreasonable.

However, though the grievant committed at least one subsequent offense, I am not convinced that it or they were so serious as to warrant discharge. But an additional disciplinary suspension and final warning are warranted.

Following the foregoing three day suspension, the grievant violated a Company rule, which he acknowledged he was aware of, by parking his bus near a bank so that he could cash his check. It is undisputed that the bank had objected to this; that the Company had so advised its drivers, including the grievant, and that the
grievant disregarded the notice.

However, the additional charge upon which his discharge was based, namely insubordination for "walking out of" or "refusing to participate" in a disciplinary hearing is not sustained. I do not think it unreasonable for the grievant to have requested that a particular steward or union representative be present at and represent him at the hearing. Particularly so, when as the record shows, it would only have been a day or so later when that Union representative was available. Of course, the grievant should not have walked out of the hearing, but I think he was merely angry and frustrated, and did not intend to be defiant or disrespectful to the level of insubordination.

So, one of the discharge offenses has been proved; the other has not. Also, of significance to me is that following the three day suspension of December 21, 1987, he was warned on February 17, 1988 that "any more problems may result in suspension" (emphasis added). The next "problems" were the parking at the bank, and walking out of the hearing. Under the facts and circumstances as found, I think the Company is bound at this point to the penalty it warned would be imposed for further problems. And that penalty is a suspension. I consider it proper and appropriate that the grievant be denied back pay.

Accordingly, the Undersigned, Impartial Chairman under the collective bargaining agreement between the above-named parties, and having duly heard the proofs and allegations of said parties, makes the following AWARD:

There was just cause for the three day suspension of Ray Miller.

There was not just cause for the discharge of Ray Miller. There is cause for a sus-
pension without back pay. Accordingly he shall be reinstated, but without back pay.

He is expressly warned that further rule violations would warrant his discharge.

Eric J. Schmertz
Impartial Chairman

DATED: March 28, 1989
STATE OF New York ) ss.
COUNTY OF New York )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
In the Matter of the Arbitration:
between:
Local 100 Transport Workers
Union of America
and:
New York Bus Service

OPINION and
AWARD

The stipulated issue is:

[1] What shall be the disposition of the Union's grievance dated November 30, 1988?

[2] Did the Company have just cause to suspend Ronald Arnold for five days? If not, what shall be the remedy?

A hearing was held on April 11, 1989 at which time representatives of the above-named Union and Employer appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

Grievance of November 30, 1988

The grievance reads:
On November 23rd the attached notice was posted early in the P.M. The Trippers that were cancelled are regularly scheduled Trippers that were picked during the August '88 pick. Because these Trippers were cancelled without the drivers consent, the affected drivers are entitled to their tripper pay.

At the hearing the Union also sought as a remedy affirmation of the right of the affected drivers to a "new pick" under the Pick Period clause of the contract.

The Union also asserts that its grievance is not limited to November 23rd, but that the same cancellations took place on December 23 and 30th, 1988.
The Company has shown that what it did on November 23, and December 23 and 30th (each, the day before a holiday) has been regularly done as a practice when, because of a holiday, a "get-away day" or other circumstance, the ridership (usually returning at the end of the work day) is significantly reduced.

The Company has shown by testimony that it has also done so in instances of heavy snowfalls, causing a drop in ridership on regularly scheduled trips, and that the practice has been followed since 1970 without payment to the drivers affected and without triggering a new pick.

Even if the foregoing contract section is applicable, the conditions for a "new pick" have not been met. The contract section "require(s) a new pick if mutually agreed upon by the Union Committee and the Employer." (emphasis added) Here, there has not been any such mutual agreement.

In point, I believe is the language in my Opinion and Award of December 9, 1986, in connection with the grievance of Robert Warburton. Though I held therein that the Employer assigned a "surviving trip" to the wrong employee, I stated inter alia:

"When ridership fell off, the Employer decided that only one of these trips was needed.... Clearly the Employer has the right to discontinue runs and trippers, to change their schedules, and to make run and tripper combinations for operational needs. In the instant case it had the right to discontinue one of the two trips involved."

I also stated in that decision:

"However, the grievant does not and did not have the remedy of a new pick. The contract requires mutual agreement of the parties for a new pick to be offered, and there was no mutual agreement in this case."

Accordingly, the Union's grievance of November 30, 1988 is denied.
Suspension of Ronald Arnold

Mr. Arnold is charged with reckless and careless driving which endangered two complaining pedestrians.

I am not prepared to sustain a disciplinary penalty on the sole basis of letters of complaint from pedestrians or the public without direct supporting testimony subject to cross-examination.

This is not to say that the complaining letters regarding the grievant's recklessness towards the pedestrians are untrue, but rather that the letters alone do not constitute the type of probative evidence required to meet the requisite standard of "clear and convincing" evidence. Their truth cannot be tested, as it should be, in the adversary setting of live testimony and cross-examination.

Also, the Employer has not explained why the complainants were not called to testify in person, nor is there any explanation as to why, if at all, it was not possible to get them to testify.

In other matters before me under this impartial chairmanship, members of the riding public and/or pedestrians have appeared and have testified. I find no practice or mutual agreement of the parties to dispense with that process. Therefore, I see no reason why that procedure should not be required here, or if not possible, why there should not be an appropriate explanation.

Accordingly, the Employer's case falls short of the standard of proof required, and the grievance on behalf of Mr. Arnold is sustained.

The Undersigned, Impartial Chairman under the collective bargaining agreement between the above-named parties, and having duly heard the proofs and allegations of said parties, makes the following AWARD:
1. The Union's grievance dated November 30, 1988 is denied.

2. The suspension of Ronald Arnold was not for just cause. It is reversed and he shall be made whole for the time lost.

Eric J. Schmertz
Impartial Chairman

DATED: May 8, 1989
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.
In the Matter of the Arbitration:

between

Local 100 Transport Workers
Union of America

and

New York Bus Service

OPINION AND AWARD

The stipulated issue is:

Did the Company have just cause to terminate
Albert Spivey? If not what should the remedy
be?

Hearings were held on February 17, May 2 and June 26, 1989
at which time Mr. Spivey, 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 Arbitra-
tor's Oath was waived. The parties filed post-hearing briefs.

Although there are other charges against the grievant relat-
ing to use of offensive language and disciplinary threats to stud-
ents on his bus; to a rule violation regarding taking students
"up the hill" to let them off upon return from school rather than
at the prescribed final stop location; to his favoring of female
students and his discouragement of male students from riding his
bus; to his calling out suggestive remarks to a female pedes-
trian; to impairment of the safety of a student to whom he gave
money to go to a delicatessen across two streets to buy candy;
these are not the principal allegations against him and, in my
view, are not the ones that caused his discharge.

I am persuaded that he was discharged because the Company
concluded that he acted toward some of the female student passen-
gers in a manner that was intimate and sexual. It is charged that
he kissed some on the lips, or forehead, or cheeks, or hands; that
he placed or pulled one or more onto his lap; that he patted their
"butts;" that he touched or caressed their hands or arms; that he
photographed the breast area (clothed) of one and the "backside" area of another; and that he suggested a date "to go dancing."

This Arbitrator is familiar with the psychological phenomenon of children, when testifying or complaining about intimacies or sexually suggestive matters and conduct, to exaggerate the facts; misconceive the actions and motives and to fantasize what took place. However, based on the entire record before me, including the grievant's testimony in which he made limited admissions to some less serious parts of the charges (after denying them entirely when first confronted by the Company), I do not think that the students testified either falsified or fantasized what took place.

Let me make clear that that is not to say that I conclude that the grievant had sexual or other willfully improper and intimate motives by his actions, but rather that what he did (and I accept the testimony of the students as the accurate and credible evidence of what he did) created a perception of possible impropriety that because of the obvious sensitive nature of the responsibilities of a school bus driver carrying students of intermediate school age (11 to 14), has fatally undermined his acceptability, reliability and usefulness as that type of bus driver. In this sensitive situation, that kind of perception, of the grievant's making (regardless of the true motive), creates a risk that need not be further tolerated and therefore constituted grounds for removing the grievant from that type of work arrangement.

Put another way, it is possible that the Company and the students read more improprieties into the circumstances than were true. Indeed, based on the entire record, I would not conclude that the grievant had a sexual motive or sought or was acting out sexual intimacies with the students. Only the grievant knows for sure. The record falls short of any such persuasive conclusion. It is possible, as he states, that the grievant had a "grandfatherly" interest in and affection for the female students, and, considering his age of 55 and that he had a family of his own, his
actions were nothing more than a manifestation of those grandfatherly impulses. But I am not prepared to conclude that either, and I cannot fault the Company for not so concluding.

Therefore, as the truth of his motives are not absolutely established one way or the other, we are left with the perception, known to the students, to their parents, to the school authorities and to the Company. And by at least inappropriate and suspicious actions the grievant is responsible for that perception. That perception under the circumstances of this case is enough to constitute cause for the disqualification of the grievant from a school bus driving assignment.

However, considering his approximately 20 years of employment with the Company and his apparently unblemished record before the instant charges, I am not convinced that he should lose his employment entirely. As there is room to question his motives and intentions, including room for a conclusion of innocence of any intended sexual impropriety on his part, his long and good prior record and service should weigh in his favor in mitigation.

Accordingly, for his inappropriate and unjustifiable behavior, I shall reduce his discharge to a suspension and direct his re-employment in and to a different capacity.

The Undersigned, Impartial Chairman under the collective bargaining agreement between the above-named parties, and having duly heard the proofs and allegations of said parties, makes the following AWARD:

The discharge of Albert Spivey is reduced to a suspension for the period of time he has been out. He shall be reinstated without back pay but not as a driver of a school bus for which he is now disqualified. He shall be given any other bus driving assignment.

DATE: September 19, 1989
STATE OF New York ss.:  Eric J. Schmertz
COUNTY OF New York ss.:  Impartial Chairman
I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
In the Matter of the Arbitration:

between

TWU Local 100

and

New York Bus Service

OPINION AND AWARD

The stipulated issue is:

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

Hearings were duly held, at which time the grievant and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Three sets of medical opinions were submitted for my review.

FACTS

Seymour Schleider is a bus operator for New York Bus Service who, in approximately June of 1987 suffered what doctors have referred to as a cerebrovascular accident while shopping with his wife. Mr. Schleider had a similar incident in December of 1987 albeit, in the doctors opinion, of a less serious nature.

Based on these two incidents, the Company decided to discharge Mr. Schleider from his bus drivers position as, in their opinion, he constituted a threat to the safety of their passengers. The Union brought this grievance to challenge that determination.

There is conflicting medical testimony. Dr. Michael Swerdlow of Montefiore Medical Center is of the opinion that Schleider can return to work. Dr. Stephen Kass of the Neurological Associates of Westchester is of the opinion that Schleider not be allowed to return to work. At the request of the parties the Undersigned appointed Dr. Fletcher H. McDowell of the Burke
Rehabilitation Center to examine Mr. Schleider and to render a neutral medical opinion as to the fitness of Mr. Schleider. Dr. McDowell is of the opinion that Mr. Schleider's obesity and hypertension increase his risk of having another cerebrovascular accident to the point that the doctor would not recommend his return to work.

OPINION

Based upon all of the above I find that the Company had just cause to discharge Seymour Schleider. From my review of the medical evidence it appears that Mr. Schleider's weight problem is a significant factor in the recommendation of Doctor Fletcher J. McDowell that he not return to work. Accordingly, in the interest of all parties it is my determination that should Mr. Schleider lose 60 pounds, he be afforded the opportunity to be re-examined by Dr. McDowell and be considered for re-employment based upon the results of such examination.

Eric J. Schmertz
Impartial Chairman

DATED: February 17, 1989
STATE OF New York ) ss.:
COUNTY OF New York )
IMPARTIAL CHAIRMAN, LOCAL 100 TRANSPORT WORKERS
UNION of AMERICA -and- NEW YORK BUS SERVICE

In the Matter of the Arbitration:

between

Local 100, Transport Workers
Union of America

and

New York Bus Service


OPINION AND AWARD

The stipulated issue is:

Did the Company have just cause to suspend
Harry Brown for three days? If not what
shall be the remedy?

A hearing was held on August 3, 1989 at which time Mr. Brown, hereinafter referred to as the "grievant" and representatives of
the above-named Union and Company appeared and were afforded full
opportunity to offer evidence and argument and to examine and cross-

examine witnesses. The Arbitrator's Oath was waived.

The grievant was suspended three days for a cumulative record
of excessive absenteeism.

Up to and including a disciplinary warning on February 7, 1989, the grievant's attendance record is not challenged. Over
several years he received several warnings for an unsatisfactory
attendance record, which the Company asserts exceeded the average
of other employees. Those warnings were not contested and therefore stand as valid and indisputable in these proceedings. And,
as those warnings were for poor attendance, that characterization
of his record for that period of time is also not now contestable.

The sole question is whether, subsequent to the warning of
February 7, 1989, the grievant's absences are to be treated as a
continuation of a poor attendance record, justifying, under tradi-
tional progressive discipline, the three day suspension and final
warning that are at issue in this case.
The Union points out that the grievant's absences after February 7, 1989 were due to illness - pneumonia and bronchitis (extending and accounting for two weeks) and a one day hospitalization for "chest pains" that came on him while driving his bus causing him to be taken from his bus to the hospital by ambulance. It also notes that two absences were only for half days each and that they came about because he had to help his ill wife.

Standing alone, the reasons for the grievant's absences after February 7, 1989 would not be grounds for a disciplinary suspension. Indeed, if his prior record had been satisfactory, those absences might even be excusable as emergencies and illness exceptions to an otherwise good record. But they do not stand alone. They follow an incontestable period of several years during which the grievant accumulated several disciplinary warnings for a record of poor attendance. There comes a point, which I have repeatedly stated, and which is universally recognized by arbitrators, when an absentee record is chronic and when an employer need not tolerate it further, even if the absences are beyond the employee's fault or control. Where, as here, the employer operates a service that is founded and relies on the regular and timely attendance of its employees delivering that service, chronic absenteeism or an inability to report to work promptly and regularly, are recognized grounds for discipline, regardless of the reasons or seemingly good explanations for that poor attendance. In fact, the contract contemplates this circumstance. It authorizes discipline not just for "unexcused" absences but also for "excessive" absenteeism.

Unfortunately, the grievant's record reached that point. Against the backdrop of his several warnings, and the further warning of February 7, 1989, the grievant's subsequent absences, even though due to illness or other understandable reasons, were nonetheless, a continuation of his unacceptable attendance record, and properly interpreted by the Company as an inability on his part to comply with and maintain the type of attendance required
of his job.

Had this been a discharge case, I would have given the grievant one final chance to bring his attendance record to a satisfactory level, by reducing any such discharge to a suspension.

But he has not been discharged. The suspension of three days and the final warning imposed by the Company are proper, and what is required at this point in the application of progressive discipline. The grievant has the chance to save his job by a diligent and successful effort to make his attendance record satisfactory. In part that is the purpose of the suspension and final warning, and it is hoped that he will respond constructively so that the ultimate step of discharge for this employee of ten years service, will be obviated.

The Undersigned, Impartial Chairman under the collective bargaining agreement between the above-named parties, and having duly heard the proofs and allegations of said parties, makes the following AWARD:

There was just cause for the three day suspension and final warning of Harry Brown.

Eric J. Schmertz
Impartial Chairman

DATED: August 14, 1989
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 B.3(a) of the collective bargaining agreement when it denied Donald Pierce's application for extended sick leave? If so, what should be the remedy?

Hearings were held on April 28 and May 15, 1989 at which time Mr. Pierce, hereinafter referred to as the "grievant" and representatives of the above-named Association and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Certain facts are undisputed. The grievant suffers from chronic obstructive pulmonary disease and pulmonary impairment. At the time that he applied for the extended sick leave that is the subject of this case, he had exhausted his regular sick leave benefits.

Article VI B.3(a) reads in pertinent part:

Effective September 1, 1984, extended sick leave shall accumulate to a maximum of two years (to be paid at full salary), in the case of a serious illness or disability which prevents the employee from performing his/her professional responsibilities. This leave shall be granted only after the employee has exhausted all of his/her previously accumulated sick leave credits. The applicant for such a leave must submit prior to the granting of such leave, a report from his/her physician, or a medical facility, stating the prognosis with regard to the possibility of returning to work and the approximate date of such return.

I find the foregoing language clear and unambiguous. It not
only requires that an employee first exhaust his previously accumulated sick leave benefits (which the grievant did) but also that the illness or disability for which the extended sick leave is requested,

"prevents the employee from performing his/her professional responsibilities." (emphasis added)

Based on the latter eligibility requirement, the grievant's application for extended sick leave was premature. He suffers from a serious and chronic illness. Obviously it has made the performance of his duties difficult. Yet he has been performing his professional responsibilities. I believe he has done so for economic reasons. Apparently he is not financially able to retire, and is not yet eligible for the contractual disability benefit.

That he may be or has been out on given days from time to time because of his illness, does not yet meet the mandated contractual requirement that his illness or disability has "prevented him from performing his professional responsibilities." "Prevent is an absolute term. It means "to keep from occurring," "preclude," "obviate," "thwart." "To prevent is to stop something...and rendering it impossible." (The Random House Dictionary of The English Language).

In short, it means an illness or disability of a continuing, not sporadic, characteristic and effect. By his own actions, and by the reports of the physicians, the grievant's condition has not yet reached that evidentiary point. Neither he nor the physicians have said that his illness prevents him from working.

The fact seems to be that he should not be working but is not yet prevented from doing so. His chronic condition apparently will not improve. It will remain stable or deteriorate. To work as a Union representative, with the pressures, tensions and long and irregular hours involved is probably injurious to his health.
Yet his physician, Dr. Harlan B. Weinberg did not order him to stop work or certify that his illness prevented him from working. Rather Dr. Weinberg only suggested that:

"...since his current level of occupation involves significant physical activity, that he be allowed to apply for either full-time disability or part-time employment with your firm."

The Employer's physician, following an examination of the grievant:

"...recommended to Mr. Pierce that it would be in his best interest to go into retirement since both his symptoms and physiologic assessment lead me to predict that putting in a regular work day, especially under stressful conditions will predictably be poorly tolerated over time."

In short, neither physician has taken the position that the grievant's condition prevents working. Both make clear that for him to work would be counterproductive to his health and that his ability to work will decrease with time.

I am most sympathetic to the grievant's problem. He should not be working, but is financially unable to stop. But the arbitrator is bound to the contract language and conditions negotiated and written by the parties. By limiting extended sick leave to illness and disabilities that prevent the employee from working, I conclude that the parties intended that benefit to apply only when and at the point the employee is incapacitated and unquestionably unable to work. That being so, based on the evidence in this case, the grievant has not yet qualified. I regret very much the consequences of this holding - namely that his condition must worsen to the point where it prevents him working, or that it be so certified medically, before he is eligible, but that is what the contract requires.

Under this circumstance I need not deal with the question of whether an adequate prognosis of the grievant's condition has
been provided by his physician; whether such prognosis must include an estimated date of return to work; and whether an anticipated ability to return to work is also a condition of eligibility. Those questions would have to be dealt with only at the time that the grievant states, and his physician certifies that his illness prevents him from working, and he stops work for that reason.

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 B.3(a) of the collective bargaining agreement when it denied Donald Pierce's application for extended sick leave.

DATED: June 14, 1989
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.

Eric J. Schmertz
Arbitrator
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration:

between

Local 153 O.P.E.I.U.  
and  
The New York Stock Exchange

RULING  
Case #1330 0817 88

The Employer asserts that for the Arbitrator to allow testimony by the Union relating to the negotiation of Article II(f) of the collective bargaining agreement would be violative of the parol evidence rule, and moves that such testimony be barred on that ground.

Article II(f) reads:

"(f) Amend dental coverage to provide for a maximum benefit at current Metropolitan New York 'usual, customary and reasonable fees' for the following procedures: orthodontia, periodontia, caps and crowns, bridgework, partial and full dentures."

The Employer argues that the foregoing written contract language is clear and unambiguous and hence cannot be changed by evidence of oral discussions that took place prior to or contemporaneous with the execution of the written agreement.

The Union contends not only and simply that the words "Metropolitan New York 'usual, customary and reasonable fees'..." are ambiguous, but more specifically that those words should be interpreted to mean and the arbitrator should find that they mean that the procedures and benefits under the predecessor contract remain effective. Those prior benefits and procedures accorded dental benefits based on the usual, customary and reasonable fees of the geographical "zip-code, nationwide," where the dental treatment was rendered.

There can be no doubt, irrespective of the meaning of the
two foregoing arrangements for the payment of dental benefits, that they are manifestly different on their face.

My study of the record thus far before me, and the memorandum of law I requested from the parties, have led me to conclude that this matter can and should be determined without technical resort to or reliance on the parol evidence rule.

I so conclude because of the nature of the testimony which the Union stated it would introduce if permitted to do so. That testimony would not be of discussions between or among the negotiators on the meaning, intent or specifics of the language ultimately written into Article II(f). That testimony would not be designed to clarify any jointly agreed to interpretations of "Metropolitan...New York fees."

Rather, even assuming no Employer case to the contrary, the Union's testimony would be that on that point there were no discussions, no negotiations whatsoever between the parties about that critical language in Article II(f). (The Union states that its testimony would show that all that was discussed was a cap on the fees and the question of a deductible).

Without resort to the technical provisions of the parol evidence rule, I fail to see how evidence of no discussions on or references to language that found its way into an executed contract, can support a conclusion that "Metropolitan...New York fees" should mean and be read as "zip code by zip code nationally." To so conclude would be a major change in or reformation of the present written contract which both sides signed, whether or not that present language is unclear or ambiguous. And I fail to see how an arbitrator can effectuate such a change or reformation in the absence of joint discussions on the point. So, even if "Metropolitan...New York fees" is unclear, the Union's testimony cannot, in my judgment, provide or potentially provide the
clarification that forms the basis of one of the exceptions to the parol evidence rule. Nor does the Union claim that there was no contract, which is another exception to the parol evidence rule.

Even more in point, in my view, is that the Union's testimony, if allowed, would show that the Union made a unilateral mistake as to what it thought the dental benefit would be. A unilateral mistake is not grounds for rescission, reformation or change in a written agreement, unless that mistake was misleadingly or fraudulently induced by the other side. Here, in asserting that its testimony would be to the effect that no discussions on the critical language took place, the Union did not claim, and I am convinced that it would not and could not claim, that the Employer misled or defrauded it into signing a contract containing the present language. So, whether its unilateral mistake was due to a failure to carefully read the written contract and notice the new language, or because it had some unilateral idea that the reimbursement arrangement for dental benefits had not changed, or whatever, it cannot now avoid the written agreement it signed because of its own mistake.

For the foregoing reasons, the Employer's motion is granted.

Dated: January 16, 1989
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.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration
between

Local 153 O.P.E.I.U. ...
and...
The New York Stock Exchange

AWARD
Case #1330 0817 88

The stipulated issue is:

Did the Employer violate Article II of the collective bargaining agreement in the payment of the dental benefit? If so what shall be the remedy?

In view of my recent ruling in this matter granting the Employer's Motion to bar the Union from presenting testimony and evidence designed to change the present wording of Article II(f), the Union is unable to make out a case proving its claim that dental benefits are and have been wrongly paid and/or that Article II has been violated.

Accordingly, 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 II of the collective bargaining agreement in the payment of dental benefits.

DATED: January 26, 1989
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 issue in dispute is the Union's grievance of July 21, 1988 which reads:

The Union has been advised from Facility Operations Agents at the Staten Island Bridge that they are being forced to do Police related work (which has been performed on overtime ONLY) during the course of their tour. As you know this issue has surface in the past. It was then and is now the understanding that these details would be permitted to continue so long as they are performed on overtime.

The following work has been assigned to Facility Operations Agents on overtime for at least the past two years. A. Police diary detail. B. Ordering advance checks for Police. C. Monthly summons reports, and other work which has been performed on overtime only.

A hearing was held on January 19, 1989 at which time representatives of the above-named Union and Authority 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 a stenographic record taken. Each side filed a post-hearing brief.

The issue turns simply on whether there was a bilaterally negotiated agreement between the Authority and the Union for the Facility Operations Agents to perform the work involved on an overtime basis. If so, that arrangement became a condition of employment for the FAOs, and cannot be unilaterally changed by the Authority regardless of its present operational ability to have
the work done during regular hours at straight-time.

If not, the Authority retained its managerial authority to decide whether the work is to be done on straight time or overtime, and because under that circumstance, it is not required under the contract to provide overtime opportunities, it may reverse and discontinue any practice of scheduling the work on overtime and reschedule it instead during regular hours.

It is the Union's position that the agreement was reached approximately eight years ago, in settlement of a grievance then filed by the Union protesting that the work was not within the FAO classification.

In short, claims the Union, the FAOs would continue to do the work, provided that it was done on overtime. And that the practice over the last eight years has been in implementation of that express agreement.

The Authority disputes the occurrence or existence and any such agreement, and asserts that it has not been proved in this proceeding.

The Union's evidence about the alleged bilateral agreement is limited to the testimony of Frank Liuzzi who was Chairman of the FOAs at the time and who states that the arrangement was negotiated with a captain whom he could not now identify, and that it was in settlement of the Union's complaint that the work then assigned to FAOs was "outside the unit - not our job." The claimed agreement was not reduced to writing, and apparently no other persons were present when the claimed agreement and grievance settlement was reached. Also, there is no evidence of a written grievance at the time or a written Authority answer thereto or a written resolution thereon. That imprecise testimony, and the
absence of confirming documents standing alone cast doubt on whether in fact, an enforceable agreement was reached that remains bilaterally binding.

Yet, subsequent mutual conduct and practice of parties is evidence of and can serve to confirm an oral agreement. Here, for about eight years the FAOs consistently and uniformly handled the work only on an overtime basis. The Authority assigned the work on overtime, and the FAOs performed it on overtime. The rhetorical question "from where did the mutual practice come?", can only be logically answered: "from an agreement or understanding..." Indeed, work done on overtime is expensive to the Authority. I cannot believe that the Authority participated in a course of conduct of assigning the work on overtime for some eight years, if there had not been some agreement to do so. Certainly before now, if the Authority had reserved its right to reschedule it at straight time (another assertion not testified to or reduced to writing), it would have found ways to do so, on the same basis as now, namely with operational changes to eliminate overtime costs.

Without the subsequent unvaried practice for eight years, the agreement would not be proved. But with it, the agreement gives a rational, and indeed, only basis for what otherwise would be an unexplained and expensive practice.

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

If the FOAs are to perform the work referred to in the Union's grievance of July 21, 1988, the work is to be assigned to them on an overtime basis. Because the record is unclear on who would have done the work on overtime, when and for how long since it has been assigned on a straight time basis, any claim for money damages or back pay is denied.

Eric J. Schmertz
Arbitrator
DATED: March 28, 1989  
STATE OF New York ) ss.:  
COUNTY OF New York )

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

between

Transport Workers Union of America Local 1400

and

The Port Authority of New York and New Jersey

OPINION AND AWARD

Grievance No. 2T-88

The stipulated issue is:

Did the Authority violate Specification 2013 (pg . 212 of the contract) when it assigned AOA personnel at the heliport to snow removal? If so, what shall be the remedy?

A hearing was held on August 19, 1988 at which time representatives of the above-named Union and Authority appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

It is undisputed that historically AOA's at the heliport have performed snow removal work. It is stipulated that Item 7, paragraph C of the job specification 2013 of AOA's which read inter alia:

"Coordinates...snow removal periods with outside contractors...Under direction of an Operations Supervisor, leads and directs Port Authority and contractor snow removal teams in specific areas,"

is not the direct snow removal work or assignment about which the Union complains in this proceeding. Additionally, it is further stipulated and obvious from a reading of the Specification, that snow removal by AOA's at the heliport is not specifically mentioned as a "Specific Function."

It is the Union's claim that the job or assignment of direct removal of snow by AOA's at the heliport was based on the
following provision in the prior job specification (Item 10 of the "Major Functions"):

"Performs other comparable related aircraft operation duties as assigned."

But that the current Specification (i.e. 2013, pg 212 of the contract), no longer contains the aforesaid item, having been deleted by mutual agreement of the parties in the recent contract negotiations. It is the Union's position that when that "catch-all" phrase was dropped, and the job specification was included in the contract as a result of joint negotiations, the Authority lost its right to continue to assign snow removal work to the AOA's at heliports.

In support of this position, the Union points to a statement by Supervisor Vince Ignizio to AOA Paul Esposito, when the latter questioned the assignment of snow removal work, that it was included in "related duties as assigned, such as snow removal from helicopter operating area and roadway approaches to the Port Authority Heliports" as set forth in a unilaterally promulgated Authority training manual entitled "Duties and Responsibilities of the Heliport Operations Agent..." Therefore argues the Union, when the "related duties" clause was subsequently and bilaterally removed from the contractual job specifications, the job function of snow removal, founded on that clause, was per force eliminated as a required duty.

The Union's case has a legal logic to it, even if, as I do, agree with the Authority that the job specification sets forth only the principal or major duties and is not all inclusive as to what AOA's may be required to do. Indeed, had Supervisor Ignizio stated that snow removal by AOA's at the heliport had been a related duty based on long standing practice, without reference to
the "related duties" clause of the Manual the Authority's position that the specifics of the job specifications are not all inclusive would be correct. But when a job assignment is justified on certain specific language of the Specification, it limits the propriety of the assignment to that supportive language, not to the otherwise legitimate assertion that the assignment is based on practice and/or the non-inclusive nature of the Specification.

If this was all there was to this case, as the Union contends, I would have concluded that the Authority cannot have it both ways. It cannot base the propriety of the snow removal work on the "catch-all" language of the prior Specification and the Manual and at the same time continue to make that work assignment after that sole basis has been removed from the Specification by joint negotiations.

But that is not all there is to this case. Unrefuted and determinative to my mind is the Authority's testimony that at the contract negotiations when the Specification was changed, there was no discussion of snow removal by AOA's at heliports, but that the "related" clause was deleted for a sole and specific reason. And that reason was in response to the Union's concern that unless deleted it could be used by the Authority to enlarge the AOA's duties under a general umbrella of "related duties" language.

I conclude therefore that it was not within the contemplation of the parties, and not part of the Union's concern in seeking deletion of that language that there be a reduction in the duties of AOA's performed at heliports, including the duty of snow removal.

Put another way, the purpose and effect of the job specification change was not intended to and had nothing to do with snow removal work by AOA's at heliports and was not intended to
eliminate or reduce any work previously assigned and performed. Hence all the duties regularly performed were retained and preserved, the dropping of the "catch-all" language notwithstanding.

That being so, Supervisor Ignizio's statement in defense of the assignment of snow removal was and is correct, whether or not the "related" clause was in the Specification. Snow removal by AOA's at the heliport remains a duty unaffected by the job specification change, simply because that change was for a jointly agreed to different purpose and different effect.

For the foregoing reasons, the Undersigned, Impartial Chairman under the collective bargaining agreement between the above-named parties and having duly heard the proofs and allegations of said parties, makes the following AWARD:

The Authority did not violate Specification 2013 (pg 212 of the contract) when it assigned AOA personnel at the Heliports to snow removal.

Eric J. Schmertz
Impartial Chairman
DATED: February 6, 1989
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.
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration:

between

Local 153, OPEIU

and

Public Service Electric

and Gas Company

AWARD

Case #1330 1402 88

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

The Union's grievance set forth in a letter dated February 1, 1988 is granted. Ann Marie Smith shall be upgraded to Office Assistant and made whole for the difference in pay between that classification and the classification of Clerk, retroactive to the date in December 1987 when the overhead group in West Orange subheadquarters was relocated to Irvington.

DATED: August 14, 1989
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.

Kenneth Brandt
Concurring

DATED: August 1989
STATE OF
COUNTY OF

I, Kenneth Brandt 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: August 1989
STATE OF
COUNTY OF

I, Robert N. Turken 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 the arbitration provisions of the collective bargaining agreement between the above-named Union and Company, the Undersigned was selected as the Chairman of a Tripartite Board of Arbitration to hear and decide, with the Union and Company designees to said Board, a dispute relating to the staffing of a subheadquarters.

The stipulated issue is:

What shall be the disposition of the Union's grievance set forth in a letter dated February 1, 1988 from Linda Port Vliet to Mr. J. McAlpine?

A hearing was held on June 27, 1989, at which time representatives of the Union and Company appeared, and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Messrs. Kenneth Brandt and Robert N. Turken served respectively as the Union and Company members of the Board of Arbitration. The Arbitrator's Oath was waived. A stenographic record of the hearing was taken. The Board of Arbitration met in executive session on August 2, 1989.

The aforementioned letter of February 1, 1988 reads:

Mr. J. McAlpine  
Division Manager  
Metropolitan Division

VIOLATION OF OA JOB SPEC - DUTY 5 & THE LETTER OF AGREEMENT FOR STAFFING THE TWO SUBHEADQUARTERS - METRO DIVISION
Dear Mr. McAlpine.

The union met with the company on 1/25/88 to initiate a first step grievance involving a violation of Office Assistant job spec - Duty 5.

Specifically, the union is grieving the fact that Ann Marie Smith, a clerk, has full responsibility of the clerical routine of the overhead line department office in building #1, located at 938 Clinton Avenue, Irvington. The union maintains that this responsibility falls under duty #5 of the Office Assistant job specs. The union also has an agreement with the company to staff the subheadquarters with an Office Assistant, and while the closing of the West Orange subheadquarters resulted in the overhead and underground line departments being located in Irvington, the fact remains that they are housed in two totally separate buildings and are two totally separate offices.

Since the issue was not resolved, we are requesting a second step meeting at our earliest mutual convenience.

Very truly yours,

Linda Port Vliet
Division Steward
Metro Division

Whether Ms. Ann Marie Smith should have been classified as an Office Assistant rather than as a clerk on and following the operational move referred to in the February 1st, 1988 letter depends on resolution of some or all of the following questions:

1] Was there a bilateral agreement between the Union and the Company that each subheadquarters would be staffed with an Office Assistant to perform the administrative/clerical duties involved in this case?

2] Whether, following the move, the result was a combination of former West Orange departments with the line department(s) then and previously located at Irvington, making a single subheadquarters of what was formerly two, and requiring thereby only one Office
Assistant, a position already occupied at the Irvington location by a Mr. Charles Dyke?

3) Whether the work performed by Mr. Dyke as an Office Assistant and Ms. Smith as a clerk were the same, thereby creating or perpetuating unfair and disparate treatment of Ms. Smith in violation of the implicit equal treatment requirements of the contract.

4) Whether the work performed by Dyke and Smith at the Irvington location was actually within the Clerk job description or the Office Assistant description.

The first question was answered by Arbitrator Maurice Benewitz in the Award and Opinion in Case #1330 0915 86, dated July 5, 1988. Though I am not bound by the decision of a prior arbitrator, such decisions should not be overturned unless "palpably wrong." Mr. Benewitz was not palpably wrong. He held that the memorandum of October 7, 1980 (which the Union relies on in the instant case) was not a negotiated staffing agreement, but rather informational from the Company to the Union on how it intended to staff subheadquarters. Based on the record in the instant case, I cannot find enough contrary evidence to warrant a different finding. As with Benewitz, I find that the memorandum is the minutes of a meeting of the parties at which the Company informed the Union of its staffing decisions, but that those decisions were not arrived at by negotiations and therefore it did not constitute a binding bilateral agreement. Indeed, in the instant hearing, this view was confirmed by the testimony of a Company witness who was present at that meeting. No Union witness who testified was present at the meeting, and the Union's conclusions on the import of the minutes is based only on what was found in the Union's files and other hearsay information and conclusions. That the meeting was informational and not a negotiation is further supported by the undisputed fact that following October 7, 1980, the Company made a unilateral change in the staffing of clerks, changing it from what was set forth in the minutes, and so informed the Union, with no negotiations and with no Union objection.
Therefore, on that matter, the Company's managerial rights to decide staffing, remain intact and the Union's claim on this point is rejected.

On question 2, the Company does argue that the move produced a single subheadquarters, and that therefore two Office Assistants were not needed or warranted, irrespective of any staffing agreement. The Company has not proved that a single entity was created. The evidence shows otherwise.

The incumbent subheadquarters and the one moved from West Orange remained separate at the Irvington location. They perform different services and there is no evidence of any significant overlap or synonymousness in their activities. They occupy different buildings. The only interchange of work between the two appears to be the arrangement between Smith and Dyke to "cover for each other" during meal periods and other short periods when one is away. The latter is not enough to create a consolidation or single entity. So the Company's claim on this point is rejected. However, in view of my finding on question #1, the failure of the Company's argument on question #2 obviously does not result in the granting of the Union's grievance.

In my judgment, this case is decided by the answers to questions 3 and 4. And I shall deal with them together.

It is stipulated that Dyke and Smith do the same work. The Union argues that the duties of both are in the Office Assistant classification, and that for that reason as well as the fact that Dyke is so classified, Smith should enjoy the same classification.

The Company asserts that the duties of both fall within the Clerk classification; that neither perform the supervisory functions or judgmental work required of an Office Assistant. The Dyke classification came about, explains the Company, by a "past practice" which the Company terminated by express notice to the Union in the contract negotiations for a successor contract to the agreement that expired on April 30, 1987. That notice was set forth in Item #17 of the Company's contract proposals in a letter of January 30, 1987 from Mr. R. N. Turken, the Company's Industrial
Relations Manager to Mr. Paul Greenspan, the Union's Business Representative. Item #17 reads:

"Informational item. Discontinue staffing subheadquarters solely with Office Assistants."

Assuming arguendo that staffing of subheadquarters with Office Assistants was a result of past practice, irrespective of whether or not the duties fell within that classification or the lower Clerk classification the critical question is whether the Company ended that practice effectively so as to nullify any precedent for or impact on the instant grievance on behalf of Smith. I conclude that it did not. If a practice is terminated, not only must notice be given, but, prospectively, all examples or conditions of the practice must end or be eliminated. Its retroactive effect cannot be undone, but its prospective presence cannot be perpetuated. And that is the problem and fault with the Company's position in this case. It cannot end the practice, and still maintain substance and evidence of it with the continuation of Dyke as an Office Assistant. A practice cannot be ended and at the same time have its effect and application continue under circumstances where, as here, two employees performing the same work, remain differently paid. The unfairness to Smith remains. The favoring of Dyke remains. That is not an effective and persuasive termination of the past practice which created the disparity. And so long as that disparity or unevenhandedness exists, it is violative of the universally recognized rule that under collective bargaining agreements employees similarly situated must be equally or similarly treated. More specifically, the remaining disparity is also violative of the job specification provisions of the contract, whether the same work that Dyke and Smith perform are within the Clerk or the Office Assistant classification.

For the foregoing reasons I need not answer question #4. For as long as Dyke is classified and paid as an Office Assistant,
Smith is entitled to the same treatment, regardless of the actual level of the same duties they both perform.

Eric J. Schmertz
Chairman

DATED: August 14, 1989
In the Matter of the Arbitration:

between

Rockland Community College
Federation of Teachers
Local 1871

and

Rockland Community College

The Undersigned, duly designated as the Board of Arbitration in the above matter, and having duly heard the proofs and allegations of said parties, make the following AWARD:

Sarah Schmidt is covered by Article 15.051 of the collective bargaining agreement.

The College violated the procedural requirements of the Agreement with respect to its October 29, 1987 action regarding Sarah Schmidt.

Sarah Schmidt was entitled to complete her period of employment to and through August 31, 1988. Here, notice of dismissal on October 29, 1989, followed by a letter making the dismissal effective October 31, 1987 was not effective for her dismissal at that time. It complied with the requirement under Article 15 of notice by December 1st of a decision not to reappoint for another term, and hence was effective to terminate her employment on August 31, 1988.

The College shall pay Sarah Schmidt her salary for the period of October 23, 1987 to and through August 31, 1988. Offset against that amount shall be the $2333.33 she received as vacation pay, and the $4666.67 she received as severance pay.

DATED: October 25, 1989
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.
I, John Beers do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.

I, Joseph Suarez 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

Rockland Community College
Federation of Teachers

and

Rockland Community College

The stipulated issues are:

Is Sarah Schmidt covered by Article 15.051 of the collective bargaining agreement, and if so, what then is the remedy?

Has the College violated the procedural requirements of the Agreement with respect to its October 29, 1987 action regarding Sarah Schmidt, and if so, what shall be the remedy?

Hearings were held on May 22 and May 26, 1989 at which time Ms. Schmidt, hereinafter referred to as the "grievant" and representatives of the above-named Federation and College appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Mr. John Beers and Joseph Suarez, Esq., served respectively as the Federation and College members of the tripartite Board of Arbitration. The Undersigned was selected and served as the Chairman of said Board. The Oath of the Board was waived; the parties filed post-hearing briefs; and the Board met in executive session on October 18, 1989.

The grievant was hired as Director of the Israel Office commencing May 1, 1985, following an interview in Israel by College officials on April 24, 1985. She was terminated from that position, by verbal notice on October 29, 1987 and then by letter effective October 31, 1987.

The central question in this case is whether, while employed, she was a "temporary" or "term" employee within the meaning of Article 15 of the contract. If the former, she served at the "will" of the President of the College, and her termination with
only two days notice cannot be disputed. If a "term" employee with service beyond one full year, she would have been entitled to notice by no later than December 1 that she would not be re-appointed for a succeeding term, and, in this case, would be entitled to pay for the balance of the then academic year 1987-1988, or through August 31, 1988.

The pertinent sections of Article 15 are 15.01, 15.02 and 15.021. They read respectively:

**ARTICLE 15 - Termination of Services**

15.01 Temporary Appointments

The service of members of the faculty having temporary appointments may be terminated at will by the President of the College, notwithstanding any other provision of this article.

15.02 Term Appointments

15.021 The decision of the Board to reappoint or not to reappoint persons with term appointments, when such reappointment would not confer tenure, shall be communicated in writing to the person affected not later than March 15 preceding the expiration of the first full year of service and not later than December 1 of each succeeding year. In the event that persons covered by this provision are not advised of their renewal status on the dates indicated above, or are not provided with reasons as to why such notice is being delayed for a reasonable period, their services shall be presumed to have been retained. Nothing herein, however, is to be construed as precluding reasonable delays or even changes in such determinations due to budget uncertainties, unforeseen budget cancellations and impairment.

The College asserts that the grievant was a "temporary" employee because she was so told in the April 24th interview; that the Israel program was a "pilot" undertaking with an uncertain future (because its original and apparently successful program had defected to another educational institution); that the grievant was told that its continuation depended on adequate enrollment; and that term appointments are made only by the
College Board of Trustees on recommendation of the President, and that was never done in this case.

The real issue, as I see it, is not whether the grievant was technically appointed or hired as a "term" employee, but rather whether she had reasonable and acceptable grounds to believe she was so hired, and whether the status of "temporary" was effectively and enforceably communicated to her.

Based on the record, I conclude that the quantity of credible evidence supports a conclusion that she had reasonable and acceptable grounds to believe that she was appointed as a "term" employee, and that irrespective of the "legalities" of the appointment process, the College is now estopped from showing that she was "temporary."

In any employment setting, the burden of defining the employee's status, is on the employer. If the employee is to be "part-time" or "temporary" or "permanent" or "tenure tracked" it is traditional and necessary that he or she be expressly notified of the status in some clear and unequivocal way, preferably, at least in the academic world, by letters of appointment or other written communication. In my view, and in my experience, so that the employee knows his or her status from the source of the employment (i.e. the employer) that applies for equally good reasons, whether the appointment is "temporary" or "term."

Here, the College did not meet that fundamental responsibility. It knew how to give such notice, because there is no dispute that there was mutual agreement that the grievant would work "part-time" on an hourly basis from May 1 to July 1, 1985, and would begin full time work on that latter date.

It is for the period of July 1, 1985 until her termination that the College failed to give her the requisite adequate and decisive notice of her status.

There is a sharp dispute over what she was told when interviewed for and offered the job. The College says that she was expressly informed that the job was "temporary" or "at the will of
the President" because of the uncertainty of enrollment and success. The grievant denies that she was so told. I credit her testimony as accurate for several reasons. First, the College acknowledges that at that time, it did not believe that the job was within the bargaining unit covered by the collective bargaining agreement. With that view, Article 15 would not be applicable at all and it would be unnecessary for the College to have told her that it was a "temporary" position. Under those facts, she had no contractual guarantees, and could have been dismissed at any time without protection by the Federation or the Agreement.

Next, that the enrollment or future of the program was uncertain, are not logical grounds to state the "temporary" nature of the job. Clearly, if there is not enough enrollment or if for economic or academic reasons, the program had to be discontinued, the grievant could have been laid off or her job discontinued for those legitimate and well recognized reasons, whether the job was or was not identified as "temporary," and any such threshold condition of employment was not needed.

Also, the nature and content of the discussion between the grievant and Drs. Dodge and Weitzman from the College during the job interview in Israel, are supportive of the grievant's understanding. The grievant testified in this arbitration that she told Dodge and Weitzman that she was "interested in a permanent full-time position with some future in it." In her testimony Weitzman did deny or rebut this statement by the grievant. Dodge, who has retired from the College did not testify. So we do not have his support of Weitzman's version of the interview or his rebuttal to what the grievant said she told them both. The College did not show that Dodge was unavailable and could not testify. When versions of a conversation are in dispute, absence of testimony by one of the principal participants, when that testimony could be obtained, leaves resolution of the dispute to other circumstances, which as here, add up more favorably and probatively, to the grievant's advantage.
If the grievant had been told that the job was "temporary," why did she ask the College repeatedly for a letter of appointment. If she didn't know that letters of appointment were not sent to "temporary" employees, the College had ample opportunity to tell her that each and any time she asked for an appointment letter, over several months during the period of her employment. If she had been told when interviewed, and/or hired that the job was "temporary" the College should have and indeed would have told her in response to her request for an appointment letter, that it would not be forthcoming because she was told the job was temporary. But the College did not do that.

Dr. Weitzman testified that she told the grievant "she would get a letter of appointment if the President recommended her appointment to the Board of Trustees, and the letter of appointment comes from the President." Apparently that response, in substance at least, was what the College told the grievant each of the several times she asked about an appointment letter. Though the grievant testified that she was told that the "letter has been prepared and was on the President's desk for signature" I need not resolve that conflict of testimony, because the College's version left the grievant's status at least unclear and equivocal, and certainly was inconsistent with the College's claim that she had been told at the outset that the job was "temporary."

Also, when hired, the grievant was given benefits that are accorded to term employees and not to temporary employees. She was placed in the pension plan. The College's Faculty Manual expressly excludes "temporary" appointments from the Retirement System. The College has not shown a pattern or practice of granting pension coverage or rights to other temporary employees. Hence, I must conclude that the grant of that benefit, if not intended as a condition of employment for a term or permanent employee, must be construed as leading the grievant to believe that she was not temporary, and that she was not told, or that it was not made clear to her when interviewed and hired, that she was "temporary."
Additionally, the grievant was given vacation benefits when hired. Yet, the Agreement excludes "temporary" employees from vacation rights (Article 10.051). The reference to "faculty" in that Section is defined in Article 24.04 to include "Administrators." I am satisfied that the denial of pension and vacation rights extends by contract and by the Manual to the administrative position of Director of the Israel Office, if that job was temporary. But again, because of the grant of vacation entitlement as with the pension benefits, the grievant had sound and legitimate grounds to believe and conclude that the Israel job was of a status other than "temporary."

There is more that estops the College or adds evidence to a conclusion of waiver of any claim that the job was "temporary." The grievant's successor was hired (actually promoted from the Associate Directorship) under conditions which undisputedly were not "temporary." Unlike the College's position regarding the grievant's employment, her successor started in the job right away under a term appointment or contract. While it may be argued that that was done because the program was then successfully ongoing in contrast to the uncertainties when the grievant was hired, the record does not show definitively or conclusively that even the grievant's predecessor in the job occupied it as a "temporary" employee. The College makes that bare claim, but it did not, when only it has the employment records, show to my satisfaction by probative evidence, that he was not a "term" or permanent employee. Again that may be explained by the then ongoing success of the program, which became uncertain when he and the program (and students) switched to the auspices of another educational institution.

But the point is that under all those circumstances it was most important if not compelling that the College make clear to the grievant that her status, at the time the College was attempting to salvage and rebuild the program, was as a "temporary" employee. Not only did it not do so, but it took steps inconsistent with and therefore prejudicial to its present position.
That the Board of Trustees never appointed or approved the grievant as a term employee is immaterial under the foregoing circumstances. The College gave the grievant reasonable and substantial grounds to believe that she was not a temporary employee, and the lack of action by the Trustees cannot be imputed to or be binding on her, and is not enough to overturn the various authoritative actions or inactions of the College constituting estoppel or waiver.

For the foregoing reasons, the grievant's termination effective October 31, 1987 was improper. Notice of her termination satisfies the December 1, 1987 notice requirement of Article 15.02 of the contract, and constitutes notice that she would not be reappointed for another term. Accordingly she was entitled to complete the term ending August 31, 1988, and shall be paid for the last week of her employment which she did not receive plus the balance of her salary thereafter until August 31, 1988. Offset against that sum of money shall be the vacation pay in the amount of $2333.33 and severance pay in the amount of $4,666.67, she has received as a result of a lawsuit and/or otherwise.

DATED: October 25, 1989

Eric J. Schmertz
Chairman
In the Matter of the Arbitration between
Local 144 S.E.I.U. and
Sea Crest Health Care Center

The stipulated issue is:

Was there just cause for the discharge of Ananias St. Clair? If not, what shall be the remedy?

Hearings were held on July 28, September 26, 1988 and April 17, 1989, at which time Mr. St. Clair, hereinafter referred to as the "grievant" and representatives of the above-named Union and Home 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 charge against the grievant is that he initiated a confrontation with Senior Supervisor Eunice Gatling in which he threatened her in a manner that caused her to believe that he would harm her physically. The Home asserts that he abused her verbally, refused to comply with her instructions, acted disrespectfully and insubordinately and concluded with a threat of physical retaliation.

To come right to the point, I conclude that Gatling's testimony is an accurate and credible account of what took place, and that the grievant's version is contrived, inconsistent with the facts, and therefore not believable.

Gatling's and the Home's contentions are that on the day in question, the grievant was using the floor phone for a personal call, in violation of repeated instructions not to do so. That Gatling could not get through by phone to that floor, and upon going to the floor saw the grievant on the phone. That she instructed
him to get off the phone because she needed to use it; that he did not do so until he completed using it. That he thereafter went to her office and in a loud and angry voice demanded to talk to her and told her that she "had to speak to him as a man." That when she said she didn't want to talk to him then, he went into her office uninvited. And that when she instructed him to leave, he said, in a loud, and angry voice, and in very close physical proximity to her, "I'll take care of you tomorrow."

Thereafter, based on Catling's testimony and the testimony of other Home witnesses, Catling was so frightened that, after going home, she told the Home that she was going to resign because she was afraid of the grievant and could not work with him present.

An analysis of the grievant's version discloses points inconsistent with the facts and logic, and further reveals his hostility to and disrespect of Catling, as his supervisor. He denies he was using the phone for an improper purpose. He says that he was attempting to reach Catling to get some cleaning equipment. Yet, he concedes that he continued on the phone when he saw Catling get out of the elevator and walk toward him. He says she tried to shut off the phone while he was using it and told her not to do that. Obviously, if the grievant was using the phone to find Catling, upon seeing her the natural thing for him to do would be to put the phone down immediately because he no longer needed to call or page her. That he did not, but rather continued on the phone, persuades me that he was using it for another purpose, especially when, as he claims, he told Catling not to cut off its use. So I find his testimony on this point is not believable. His version of the events at and in Catling's office are also prejudicial to his defense. It is undisputed that he sought out Catling
by going to her office. It is undisputed that he insisted that he talk to her about the telephone incident. He admits that she told him that she didn't want to talk with him then. He admits that he thereafter entered her office while she was still outside of it. That act, I find to be in defiance of her expressed wish not to talk with him then, and contemptuous of her managerial authority as the grievant's supervisor.

He denies that he said "I'll take care of you tomorrow." But he admits he said "If you don't talk to me today, you'll talk to me tomorrow." The grievant's version itself is defiant, disrespectful and confrontational. His own version discloses an arrogance and anger that supports the more threatening version asserted by Catling. Indeed, it is the grievant who testified that Catling responded by asking "if that was a threat," and that he replied "if you want to call it a threat, that's your option."

Considering the foregoing, I am persuaded that the grievant said "I'll take care of you tomorrow;" that on its face and in the confrontational setting it was not only insubordinate but threatening, and Catling had reasonable grounds to believe that she was in physical danger and was legitimately frightened to return to an employment setting in which the grievant remained.

The events leading up to the threat may have been disciplinarily actionable for progressive discipline. But the threat, and its insubordinate and frightening content is grounds for summary discharge, regardless of the grievant's seniority and prior record.

In regard to the latter, the grievant was not an exemplary employee. He had received many warnings and counselings regarding attendance, poor work performance, disputes over work duties, and for other "confrontational" situations.
That being so, I cannot find the Homes penalty of discharge to be unfair or unreasonable.

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 of Ananias St. Clair.

Eric J. Schmertz
Arbitrator

DATED: May 8, 1989
STATE OF New York ) ss.
COUNTY OF New York )

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

between

Local 144, Hotel, Hospital
Nursing Home and Allied
Services Union, SEIU. AFL-CIO:

and

Sea Crest Health Center

This is a third Interim Award with reference to the continuing arbitration proceedings between the above parties with respect to all matters in issue for the period January 1, 1985, through the new contract period ending September 30, 1991, and with respect to all issues described in the Interim Awards of May 3, 1986, and July 20, 1987.

Pursuant to my request, the parties are in the process of submitting final briefs and memoranda concerning all issues in this matter.

Pending the issuance of a final Award in this matter, and without prejudice to any final determination that may be made thereunder, I hereby direct that Sea Crest Health Care Center shall pay the sum of $500.00 (Five Hundred Dollars) to all full-time covered employees, and a pro rata amount to part-time employees, who are currently employed at Sea Crest Health Care Center to the extent that same may be due as per the wage increases agreed to between the Union and other signatory Southern New York Association Facility members for the contract period April 1, 1987, through September 30, 1991. Said payment shall be on account of any and all indebtedness that may be due by Sea Crest Health Care Center in accordance with the final Award that will be issued here-
under and all prior Interim Awards that may relate thereto.

This sum shall be paid within 10 (ten) days from the date hereof.

Dated: September 5, 1989
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.
August 21, 1989

Mr. Frank McKinney
President
Local 144, S.E.I.U.
233 West 49th Street
New York, New York 10019

Mr. Jack Friedman
c/o Fort Tryon Nursing Home
801 West 190th Street
New York, New York 10040

Friedwald Home
Attn: Mr. Nat Sherman
475 New Hempstead Road
New City, New York 10956

RE: Local 144 –and– Friedwald

Gentlemen:

I enclose my Award in the above matter.

Very truly yours,

Eric J. Schmertz
Arbitrator

EJS:hl
Encl.
In the Matter of the Arbitration
between
Friedwald House HRF
and
LOCAL 144 S.E.I.U.

In accordance with a jointly signed letter dated November 30, 1984 (the "Friedwald side letter") and the Local 144 - Southern NY RHCF Association collective bargaining agreement dated November 30, 1984 (the "Southern Contract"), Friedwald House HRF (a member of the Southern New York RHCF Association, Inc.) and Local 144 have submitted various issues to me for binding arbitration.

The Friedwald side letter provides in pertinent part as follows:

"Friedwald House is a non-parity facility. As a non-parity facility all issues relating to wages and liability for contributions to the funds shall be submitted to immediate binding arbitration before the Honorable Eric J. Schmertz subject to paragraph J, Reimbursement Clause, contained in the collective bargaining agreement."

Both parties have appeared before me on numerous occasions with respective counsel, accountants and witnesses, and have presented evidence and their respective positions regarding Friedwald's affordability to implement the lump sum payments and
wage increases due under the Southern Contract for the years 1984 and 1985.

Based on the record before me, I conclude that Friedwald is affordable only to the extent of paying the 6 1/2% wage increase, effective July 15, 1984, through and including December 31, 1985. I find that Friedwald is not affordable to the extent of paying the 1984 lump sum payments due under paragraph II(A)(1) of the Southern Contract or paying the 1985 portion of the 7% wage increase effective July 15, 1985. I also find that Friedwald is affordable to the extent of making the fund contributions provided for in the Southern Contract.

This Award is based on the particular circumstances and facts of this case and this Home (which is a "non-parity" home), and establishes no precedent for any other Home or facility or for any other proceeding.

Eric J. Schmertz
Arbitrator

Dated: August 21, 1989
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 Final Award.

ERIC J. SCHMERTZ
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration:

between

Somers Faculty Association

and

Somers Central School District

AWARD

Case #1939 0042 88

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 Board of Education misinterpreted and misapplied Article XIII Section A of the contract between the Board of Education and Somers Faculty Association covering the period 1987-1990 by selecting the POMCO Health Insurance Plan instead of the Empire Plan under the New York State Health Insurance program.

As remedies, the Board is directed to comply with the "So Ordered" stipulation between the parties, introduced into evidence in this arbitration as Board Exhibit CC.

DATED: December 18, 1989
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.

Eric J. Schmertz
Arbitrator
The stipulated issue is:

Did the Board of Education misinterpret or misapply Article XIII Section A of the contract between the Board of Education and Somers Faculty Association covering the period 1987-1990 by selecting the POMCO Health Insurance Plan instead of the Empire Plan under the New York State Health Insurance program? If so, what shall be the remedy?

Nine hearings were held at the offices of the American Arbitration Association in White Plains, New York over the period from April 18, 1988 through May 19, 1989.

The above-named Association and School District were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The parties filed post-hearing briefs and reply briefs.

Most of the hearings were devoted to extensive testimony and to the introduction of voluminous exhibits relating to the substantive provisions, employee eligibility, benefits and entitlements under the two respective health plans (or programs) referred to in the stipulated issue, and to whether the comparisons thereof meant that the plans (or programs) were "equal" or "not equal" within the meaning of Article XIII Section A of the contract.

However, fully litigated at the hearings and briefed is a critical threshold issue. That issue is the fundamental disagreement between the parties over the interpretation of Article XIII
Section A, and more particularly the meaning of the word "equal" therein.

Article XIII Section A (Insurance) reads:

"The district's health insurance plan will consist of the Empire Plan (Blue Cross, and major medical insurance) under the New York State health insurance program or some other health insurance plan selected by the district that will provide health benefits equal to the benefits under the New York State program."

On December 16, 1987 the Board of Education informed the Association that it was transferring its health insurance coverage from the Empire Plan to the POMCO Health Insurance Consortium. The transfer was thereafter implemented.

The differing positions of the parties on the meaning and intent of Article XIII Section A are clear-cut and uncomplicated. The Association contends that various coverages, benefits and entitlements under the POMCO plan are inferior to the same but prior coverage under the Empire Plan; that the contract language

"...will provide health benefits equal to the benefits under the New York State program"

means the same substantive benefit for each covered illness or medical condition as was provided under Empire; and that the variations and lesser benefits under POMCO make the transfer to and the implementation of that plan a violation of Article XIII Section A. In short, the Association says that "equal" means just that - that each POMCO coverage, benefit, allowance and eligibility condition must be equal to what had been provided under the Empire program. That "equal" means at least the "same," not a lesser variation, and that that is what was expressly negotiated in the contract negotiation leading to agreement on Article XIII Section A.

Attached hereto as Exhibit #1 is the Association's Summary of Services in which Empire Plan is Superior to POMCO Plan.
The District's interpretation of Article XIII Section A and the negotiations leading to it, are different. It contends that "equal" does not and was never intended to mean "identical"; that the Association recognized and accepted that distinction and understood, as a result of the negotiations, that if the District changed health plans, the successor plan "would be different" from Empire, yet "equal" within the contract requirement. Conceding that some of the POMCO benefits are less than under Empire, the District argues that because the other benefits, especially for illnesses or medical problems more frequently encountered by the covered employees, are at least as good and for some, better than under Empire, the POMCO plan, "on balance" and on a composite basis is "equal" to Empire within the intention and understanding of the parties when Article XIII Section A was negotiated.

Attached hereto as Exhibit #2 is the District's Benefits Comparison 1989 Empire Plan Plus Enhancements vs. 1989 Putnam-Northern Westchester Plan (POMCO).

The testimony and evidence adduced by both sides on what took place in the contract negotiations leading to agreement on Article XIII Section A are not only conflicting, but ambiguous and hence inconclusive one way or the other on what was intended by the requirement that benefits of a successor health plan be "equal to the benefits under the New York State program." (emphasis added)

The District points out that it proposed the word "equal," that the Association countered with the language "identical and equal"; and that when the Association dropped the word "identical" and settled for "equal" it knew and recognized that those two words were not synonymous, and that the surviving word "equal" allowed for some differences and even lesser coverage in infrequently utilized areas in any successor plan as compared to Empire. That is a logical interpretation.

On the other hand, however, the Association's position is equally logical. It is that because the two words do mean the
same, the word "identical" was unnecessary; its withdrawal created no prejudice; and in fact was first proposed and then withdrawn not only because they meant the same and because "equal" was acceptable to the Association in the face of what it thought was an effort by the District to change its "equal" proposal to "equivalent," but also in order to get the District to drop its attendant demand that employees contribute to the cost of the health insurance.

These two logical but diametrically divergent conclusions are not resolved favorably to either by any other evidence of the contract negotiations at that time.

It should be clear that a substantive analysis of the comparable benefits of both plans is necessary only if the District's interpretation of Article XIII Section A is upheld. But, in view of the undisputed fact that some POMCO benefits are less than coverage for the same conditions or circumstance under Empire (for example psychiatric treatment and the maximum for major medical coverage), if the Association's interpretation of Article XIII Section A is accepted as correct, the POMCO plan would not be "equal"; the requirements of Article XIII Section A would not have been met, and an analysis of the provisions of both plans, benefit by benefit, or by overall coverage (with greater benefits possibly offsetting lesser benefits and with consideration of frequency of need or use) would be immaterial.

As has the District in its brief, and in any case because of the inconclusiveness and remaining ambiguity of the negotiations of Article XIII Section A, I shall resort to the dictionary and to the Thesaurus for definitions of "equal." I observe, as is well settled, that absent specific contract definitions, ordinary or customary language in a contract should be accorded its ordinary and customary meaning and definition.

Before that however, and at this point, an evidentiary ruling
is in order. The question of whether the plans are "equal" does not include consideration of the sharply increased premium costs of the Empire plan which the District was confronted with before it switched to POMCO, and which, obviously prompted the switch. I am persuaded, and on this point there is no ambiguity, that when "equal" was negotiated it applied only to the substantive benefits, coverage and eligibility under the plan including the availability and location of providers. Also "equality" is limited to the plans as they existed at the time the change was made. Subsequent benefit changes are irrelevant as they were not in place or among the reasons for the change when the change was made. Not subsumed within "equal" was a possible (and by then apparent) "inequality" in cost. Of course it was clear to both sides that the District was seeking a right to change plans because the Empire plan had become or was expected to become too expensive. But, nonetheless a change in plans could not be contractually justified on economic grounds, if the successor plan did not have benefits or coverage that were substantively equal to Empire irrespective of the relative costs. In short, the District obtained the right to change plans for economic reasons, but the requirement of "equal" benefits was wholly separate from costs and had to be met as a condition of the change regardless of cost comparisons. Also, if the Association prevails in this proceeding, the cost of reenrolling the covered employees in the presently existing Empire plan is also, and for the same reasons, immaterial and beyond consideration by this arbitrator. If, under that circumstance there are unreasonable costs involved, and if the Empire plan presently existing is substantively different from the Empire plan in 1987 or early 1988, those matters are also beyond the arbitrator's jurisdiction. Any consideration of those possible factors and any adjustments therein, would be matters for direct negotiation between the parties and not for consideration in this proceeding.

My reading of the dictionary and a thesaurus has produced a different result than what the District found and argued in its
brief. In short, I find a set of consistent and majority interpretations and definitions which make "equal," "identical" and the "same" as synonyms of each other.

The Random House Dictionary of the English Language (The Unabridged Edition) has the following definition for "equal":

"As great as; the same as; like or alike in quantity, degree value; "Equal" indicates a correspondence in all respects unless a particular respect is stated or implied. "Equal" is distinguished from "equivalent." "Equivalent" indicates a correspondence in one or more respects, but not in all. (emphasis added)

Based on these definitions, it is clear to me that the District's argument that the POMCO plan "on balance" is equal to Empire is to confuse the meaning of "equal" with the different meaning of "equivalent."

Indeed, in the absence of any contractual language comparing the plans of an overall package, or "on balance" basis, the definition of "equal" as "corresponding in all respects" (emphasis added) must apply. To argue, as apparently the District does, that the same or even better benefits for some coverage, including for illnesses and conditions more frequently experienced by the employees, offsets those that are less favorable, is to argue "equivalency," not "equality."

The same dictionary lists as synonyms to "identical":
"congruous, congruent, equal, matching (emphasis added)

Roget's International Thesaurus (Fourth Edition) lists as synonyms to "equal"
"match, mate, twin, like; keep pace with; measure up to."

and to "identically"
"equally, coequally, on all fours with, just the same." (emphasis added)
This is not to say that there are not to be found some definitions that support an "equivalency" argument. Rather it is to say that the overwhelming quantity of the definitions and synonyms show "equal" and "identical" to be interchangeable in meaning. And, in the absence of any special contract definitions, or other evidence of a different intent, the majority dictionary definitions must prevail.

Based on the foregoing, I am persuaded that "equal" meant and means the same substantive benefit on a benefit by benefit basis, and not as an overview or "on balance" assessment of the plans as a whole. Had the District intended the latter, and because it would have been a variation from standard and customary application of the word "equal" it should have negotiated and included some language in Article XIII Section A making that interpretation and variation clear and applicable. Not only did it not do so, but instead agreed to language that, by any fair interpretation, supports the Association. The language says:

"...or some other health insurance plan selected by the District, that will provide health benefits equal to the benefits under the New York State program." (emphasis added)

By speaking of "health benefits" in the plural as equal to the New York State program's "health benefits" in the plural, the only fair interpretation to my mind is that all the benefits of the POMCO plan had to be equal to all the benefits of the New York State program, on a benefit by benefit basis.

That the POMCO plan does not meet this test is essentially undisputed. This is not to say that some POMCO benefits are not better than Empire's, or that many, if not most are as good. They are. But in my view the contract language does not allow for consideration of the quantity of users or the infrequency of use of the less favorable benefits under POMCO as compared to equal or even better benefits for more subscribers. In the face of some
inequalities of benefits, the experience impact and its predictability are not contractual considerations, and even if, on balance, are salutory, do not cure the fact that some POMCO benefits are less and hence not equal.

Exhibits 1 and 2 attached hereto show the difference and similarities in benefits. I do not think that the foregoing ruling is either narrow or overly technical, and I find no need to go through them one by one. Rather, let me deal with just two examples. The Empire benefits for psychiatric treatment and for the maximum or major medical are better than POMCO. The Empire psychiatric benefit for inpatient care has an annual maximum of $120,000. POMCO's annual maximum is $25,000. And under major medical Empire accords a lifetime maximum of $1 million, whereas POMCO's maximum is $250,000.

For a psychiatric outpatient, the Empire plan has no annual or lifetime cap on the number of visits; POMCO has specific dollar limits for annual and for lifetime visits.

I do not think that one can dispute the following philosophical (if not legal) view of medical insurance. Certainly, as here it is a group plan, covering a defined group of employees. But it is more than that. It is protection for individuals and for families. What is of fundamental interest to those individuals and their families, is not the cumulative or in toto scope of the plan, but what their particular protection is for each and every illness or medical condition listed. It is hardly much solace to an employee in need of psychiatric care to be told that he should not be concerned with and accept reduced caps under POMCO because other employees (or he under other circumstances) under POMCO can get prescription drugs less expensively, or can gain admission to a hospital with no pre-admission certification. For that psychiatric patient, the POMCO coverage and benefits is simply not equal to the Empire coverage, and in that situation I fail to see how it can be successfully argued that the plans are "equal."
The same is true in my view in connection with the major medical maximum, $1 million under Empire and $250,000 under POMCO. The District may be correct in its assertion that to date, no subscriber has needed more than the $250,000 maximum under POMCO. But that does not mean that a case may not arise needing greater coverage. I am not persuaded that $1 million major medical coverage is fanciful, fictitious or unneeded, and I do not think it is for the District to make that judgment. That used major medical in excess of $250,000 is unlikely or not yet experienced is not the point. A single future case requiring greater coverage is enough, as to that subscriber, to make the benefit, and hence the plans, manifestly unequal.

The District, after switching to POMCO offered to buy additional major medical coverage up to the $1 million level. That was commendable, and perhaps should have been accepted by the Association, if such acceptance would have been without prejudice to its position on the balance of the POMCO plan, but it is now irrelevant. It's what the two plans provided at the time the switch was made that is material. Subsequent offers, apparently to gain acceptance of POMCO and to settle the grievance, are not probative.

Lest the District assert that this ruling is wrong because it makes Article XIII Section A meaningless and non-invokable by the District, let me hasten to observe that I have had several experiences where the same benefits have been replicated by a successor health plan and purchased at a lesser cost than the plan replaced. I believe that Article XIII Section A was intended and designed for that realistic purpose.

Accordingly, I find that the District violated Article XIII Section A of the contract. It is directed to comply with the remedies set forth in the "So Ordered" stipulation between the parties in a law suit related to this proceeding and introduced into evidence in this arbitration as Board Exhibit CC. Other
remedies sought by the Association are denied.

Dated: December 18, 1989

Eric J. Schmertz
Arbitrator
## EXHIBIT #1

### Summary of Services

#### In Which Empire Plan Is Superior to POMPCO Plan

<table>
<thead>
<tr>
<th>Service</th>
<th>Empire Plan</th>
<th>POMPCO Plan</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Annual Major Medical Maximum</td>
<td>$1,000,000</td>
<td>$100,000.00</td>
</tr>
<tr>
<td>2. Routine Pediatric Care (Exams)</td>
<td>Paid in Full Through Participating Providers</td>
<td>Not Covered</td>
</tr>
<tr>
<td>3. Routine Nursery Care</td>
<td>Paid in Full Through Participating Providers</td>
<td>No Full Coverage</td>
</tr>
<tr>
<td></td>
<td>Covered Under Major Medical up to a Maximum of $100</td>
<td>Covered Under Major Medical up to a maximum of $75</td>
</tr>
<tr>
<td>4. Annual Physical Exam</td>
<td>Paid in Full Through Participating Providers</td>
<td>No Full Coverage</td>
</tr>
<tr>
<td></td>
<td>Benefits Under Medical Plan for Employee and Spouse Age 50 and over.</td>
<td>Benefits Under Medical Plan for Employee Age 50 and over.</td>
</tr>
<tr>
<td></td>
<td>Employee - $ 100</td>
<td>Employee - $50</td>
</tr>
<tr>
<td></td>
<td>Spouse - $ 50</td>
<td>Spouse - $ 0</td>
</tr>
<tr>
<td>5. Psychiatric Care</td>
<td>Under Major Medical</td>
<td>Under Major Medical</td>
</tr>
<tr>
<td>(1) Inpatient</td>
<td>Annual Maximum $1,000.000; Annual Maximum (effective 1/1/89) 450 daily Maximum $120,000 annual limit)</td>
<td>$25,000</td>
</tr>
<tr>
<td></td>
<td>Lifetime Maximum</td>
<td>Lifetime Maximum</td>
</tr>
<tr>
<td></td>
<td>$1,000,000</td>
<td>$250,000</td>
</tr>
<tr>
<td>(2) Outpatient</td>
<td>Maximum per visit</td>
<td>Maximum per visit</td>
</tr>
<tr>
<td></td>
<td>1-10 visits $48.00*</td>
<td>$40.00</td>
</tr>
<tr>
<td></td>
<td>11-30 visits $40.00</td>
<td></td>
</tr>
<tr>
<td></td>
<td>over 30 visits $30.00</td>
<td></td>
</tr>
<tr>
<td></td>
<td>*other than crisis intervention</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Annual Limit - None</td>
<td>Annual Limit - $1500</td>
</tr>
<tr>
<td></td>
<td>Lifetime Limit - None</td>
<td>Lifetime Limit - $3000</td>
</tr>
<tr>
<td>Service</td>
<td>Empire Plan</td>
<td>POMPCO Plan</td>
</tr>
<tr>
<td>----------------------------------------------</td>
<td>------------------------------------------------------------------------------</td>
<td>---------------------</td>
</tr>
<tr>
<td>6. Hearing Aid</td>
<td>Exam and/or purchase $150 every 3 years</td>
<td>Not covered</td>
</tr>
<tr>
<td>7. Hospital Emergency Care (non-accident)</td>
<td>Pain in full if treatment rendered within 24 hours of onset of medical emergency</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Voluntary over 50 miles - $75 under 50 miles - $50</td>
<td>(Dated 12 hours)</td>
</tr>
<tr>
<td>8. Ambulance</td>
<td>Paid in Full in lieu of hospitalization in an approved facility. 365 benefit days Each day - 1/2 day benefit care (i.e. 730 total SNF days per spell of illness)</td>
<td>Voluntary over 50 miles - $25 under 50 miles - $25 Paid in accordance with Medicare Limitations. 100 day maximum 1-20 days full benefits 21-100 days Medicare co-payment</td>
</tr>
</tbody>
</table>
## SERVICES

### HOSPITALIZATION - BLUE CROSS

<table>
<thead>
<tr>
<th>Service</th>
<th>1989 EMPIRE CORE PLUS ENHANCEMENTS</th>
<th>1989 PUTNAM/NO. WESTCHESTER PLAN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hospitalization</td>
<td>Pre-Admission Certification required. Paid in full 365 days per spell of illness for medical or surgical care, 30 days per spell of illness for psychiatric care in general care in general or public hospital. Additional days available through major medical. 5 days alcohol/drug detoxification.</td>
<td>Same as Empire with no Pre-Admission Certification and 120 days of care for psychiatric admission</td>
</tr>
<tr>
<td>(Room, Board, etc.)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Semi-Private</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hospital Outpatient Care</td>
<td>Paid in full; accident 72 hrs. Illness - within 24 hrs. $8.00 copayment per visit (no copayment for chemotherapy, radiation therapy, physical therapy, hemodialysis or for emergency room services).</td>
<td>Same as Empire except that Emergency care for an illness must be sought in 12 hours and there is no copayment for any services.</td>
</tr>
<tr>
<td>Accident &amp; Emergency Illness</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Surgery &amp; Radiation Therapy</td>
<td>Paid in full.</td>
<td>Same as Empire.</td>
</tr>
<tr>
<td>Diagnostic X-ray &amp; Lab Test</td>
<td>Paid in full.</td>
<td>Same as Empire.</td>
</tr>
<tr>
<td>Preadmission Testing</td>
<td>Paid in full.</td>
<td>Same as Empire.</td>
</tr>
<tr>
<td>Physical Therapy</td>
<td>Paid in full in connection with hospitalization or surgery for up to one year.</td>
<td>Same as Empire.</td>
</tr>
<tr>
<td>Alcoholism Treatment</td>
<td>60 outpatient visits per year.</td>
<td>Same as Empire.</td>
</tr>
<tr>
<td>Hemodialysis</td>
<td>Paid in full.</td>
<td>Same as Empire.</td>
</tr>
</tbody>
</table>
**MEDICAL/SURGICAL/MAJOR MEDICAL**

**METROPOLITAN LIFE**

- In-Hospital Medical Care
- Surgery
- Assistant Surgeon
- Anesthesia
- Maternity
- X-ray & Lab Tests
- Doctor's Office
- Voluntary Sterilization

**EMPIRE CORE PLUS ENHANCEMENTS**

 Paid in full through Empire Plan Participating Providers.

- There is an $8.00 copayment per visit, except for chemotherapy, radiation therapy, hemodialysis and well child care.

- Major medical coverage for non-participating providers:
  - Annual deductible—$150/Ind.
  - $75/Spouse
  - $150/All children

- 80% reimbursement of Reasonable & Customary charges for the first $3,750.00 of covered expenses
  (Maximum copayment of $750 per family per year.)

- Annual and lifetime maximums of $1,000,000.

- Routine Pediatric Care
  (Immunizations, Exams)

- Private Duty Nursing

- Crutches, Wheelchairs, Prosthetic Appliances, etc.

**PUTNAM/NO. WESTCHESTER PLAN**

 Paid in full through POMCO participating providers.

- No copayment.

- Same as Empire except for $75 annual deductible per person and $225 per family.

- 80% of Reasonable and Customary charges after annual deductible has been met for the first $2000 of covered expenses. Reduces maximum copayment to $400 per individual policy or family policy.

- $100,000 Annually per covered person.
- $1,000,000 Lifetime per covered person.

- Routine care is not covered. Only if child has a diagnosed condition.

- Same as Empire.
<table>
<thead>
<tr>
<th>Service</th>
<th>Metropolitan Life</th>
<th>Empire Core Plus Enhancements</th>
<th>Putnam/No. Westchester Plan</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ambulance</td>
<td>Provided by admitting hospital: paid in full. Professional: $50 (Blue Cross) plus major medical coverage. Voluntary: $75 over 50 miles $50 under 50 miles.</td>
<td>Covered under major medical up to seven weeks per year in an approved facility; 30 outpatient visits per year.</td>
<td>Same as Empire except voluntary payment limited to $25.</td>
</tr>
<tr>
<td>Treatment of Alcoholism</td>
<td>Covered under major medical up to seven weeks per year in an approved facility; 30 outpatient visits per year.</td>
<td>Same as Empire.</td>
<td>Same as Empire.</td>
</tr>
<tr>
<td>Treatment of Substance Abuse</td>
<td>Covered under major medical up to seven weeks per year in an approved facility; 30 outpatient visits per year.</td>
<td>Same as Empire.</td>
<td>Same as Empire.</td>
</tr>
<tr>
<td>Chiropractic Care</td>
<td>Covered services paid in full through participating provider with $8.00 copayment. Covered under major medical if non-participating provider utilized. All fees and services subject to review.</td>
<td>Same as Empire without any copayment.</td>
<td>Same as Empire without any copayment.</td>
</tr>
<tr>
<td>Annual Physical</td>
<td>Paid in full through participating provider. Employees age 50 &amp; over up to $100. Covered spouse age 50 &amp; over up to $50. These benefits not subject to deductible or copayment.</td>
<td>Same as Empire except limited to $50 for employees only.</td>
<td>Same as Empire without any copayment.</td>
</tr>
<tr>
<td>Physical Therapy</td>
<td>Paid in full through participating provider with $8 copayment. Major Medical if non-participating provider utilized.</td>
<td>Same as Empire without any copayment.</td>
<td>Same as Empire without any copayment.</td>
</tr>
<tr>
<td>Hearing Aids</td>
<td>Services for exam and/or purchase of hearing aids covered up to maximum of $150 every three (3) years.</td>
<td>Not covered.</td>
<td>Voluntary Program.</td>
</tr>
<tr>
<td>Second Surgical Consultation Program</td>
<td>Required for certain operations.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Metropolitan Life

**Prescription Drug Coverage**
- Brand Name Prescription Drug: $4.00 copayment
- Generic Prescription Drug: $1.00 copayment
- Mail Order: No copayment

**Psychiatric Care**
- Inpatient - Private Hospital: Covered under major medical with maximum daily covered charge of $450 per day.
- Outpatient:
  - Crisis Intervention: 3 visits per occurrence; $60 per visit; not subject to deductible or copayment.
  - Visits thereafter, or not related to crisis, subject to deductible and copayment (copayment does not apply to annual out-of-pocket maximum).
  - Maximum payments at 80% of Reasonable and Customary charges are as follows:
    - $48 for visits 1-10
    - $40 for visits 11-30
    - $30 for later visits

### Empire Core Plus Enhancements

1989

### Putnam/No. Westchester Plan

1989

**Prescription Drug Coverage**
- Brand Names: $3.00
- Generic: No copayment

**Psychiatric Care**
- Covered under major medical with $25,000 annual and $250,000 lifetime caps.

**Outpatient**
- Covered up to $40 per visit payment with $1500 annual and $3000 lifetime caps.
In the Matter of the Arbitration between Amalgamated Transit Union, Local 627 and Southwest Ohio Regional Transit Authority

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

1] There was not sufficient cause for the discharge of Maurice Patmon. Mr. Patmon shall be reinstated.

2] Mr. Patmon’s reinstatement shall be without back pay.

DATED: May 15, 1989
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.

DATED: May 1989
STATE OF
COUNTY OF

I, Rebecca H. White 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: May 1989
STATE OF
COUNTY OF

I, Douglas Taylor 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:

Whether Maurice Patmon was discharged for sufficient cause, and if not what shall be the remedy?

A hearing was held on January 20, 1989 in Cincinnati, Ohio, at which time Mr. Patmon, hereinafter referred to as the "grievant" and representatives of the above-named Union and Authority appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Rebecca H. White, Esq. served as the Authority's designee on the Board of Arbitration, and Douglas Taylor, Esq. served as the Union's designee on said Board. The Undersigned was selected and served as the Chairman. The Oath of the Arbitrators was waived; a stenographic record of the hearing was taken; and each side filed a post-hearing brief.

The issue puts into question the propriety of the Authority's absentee rule (Performance Policy) and its disciplinary action under that rule and policy as applied to the grievant.

I have no quarrel with the Authority's rule than an employee who has been out of work must report his availability and readiness to work by 2 PM on the day before his return. And I have no quarrel with the denial of a right to work the subsequent day, if such
report of readiness and availability has not been made known by 2 PM.

By its operational practices and the need to call in replacements or substitutes by 3 PM on the day before to maintain the next day's schedule, the Authority has shown a bona fide business need to require word by 2 PM the day before from the regular employee.

Also, I have no quarrel with that part of the rule which charges an employee with an unexcused absence on such subsequent day if no report is made by 2 PM the day before, provided the affected employee should have been able to so report or has no acceptable excuse for not doing so. And I have no quarrel with the use of any such unexcused absences, in that circumstance, in the application of the progressive discipline policy for absenteeism.

What I quarrel with is the particular circumstance where the affected employee is not only barred from working the next day but also is charged with an unexcused absence for disciplinary purposes, where compliance with the 2 PM rule is literally impossible in all respects. That is the circumstance in the instant case.

The grievant was scheduled to begin work on March 21, 1988 at 6:35 AM. He reported late for work at 1:53 PM. (His lateness is carried as a "miss" and is not involved in the discipline imposed in this case). Claiming illness he marked off sick a few minutes later, at 2:03 PM.

Though the Authority expresses suspicions regarding the validity of his claimed illness (a "headache"), it does not officially challenge the bona fides of that claim in this proceeding, and indeed accepted as valid, a medical statement from the grievant's doctor covering March 21st.

Having left work at 2:03 PM, it became impossible in all respects for the grievant to report on or before 2 PM that he was ready and available to work the next day. He was not only barred
from working on March 22nd, though he called in later on the 21st to report he felt better after seeing his doctor and could work on the 22nd, but also was penalized with an unexcused absence for March 22nd. That absence triggered his discharge, as he was at the final point and on final warning in the progressive discipline sequence for absenteeism.

It is completely well settled that to be enforceable, work and discipline rules (including here, the Authority's Performance Code), must be reasonable and capable of performance. Here, as applied to the particular facts of this case, the grievant was incapable of complying, and for him, under those facts, compliance was literally impossible as a matter of fact and time.

In short, if he left work at 2:03 PM, because of unchallenged illness, it was obviously impossible for him to report at least 3 minutes earlier that he was ready to work the next day. That he lost employment that subsequent day is acceptable and proper because the Authority had to obtain and schedule a substitute by 3 PM, to be sure the next day was staffed. But I find no administrative justification for or fairness in charging him with the unexcused absence, which, consequently triggered his discharge.

The way the Authority applied the Policy or rule in this case was reasonable up to the point of charging the grievant with an unexcused absence, but as applied to that final point, namely to impose an unexcused absence, was, in my view, manifestly unreasonable, because compliance was literally impossible and that impossibility was not due to any misconduct by the grievant or to circumstances for which he was actionably responsible.

Accordingly, on this technical, but controlling ground, I shall reverse the discharge and order the grievant's reinstatement.
Based on the stipulated issue, the parties have given the Board power to fashion the remedy. I choose to deny him back pay. I do so because I am not satisfied that though ill on March 21st, as a matter of evidence, he was so ill that he had to disrupt the work schedule by first reporting for work very late, and then, within minutes thereafter, left claiming a headache. Frankly, I believe he could have continued at work, and his credibility on this point is belied by his prior record.

Considering his undisputedly poor attendance record, which placed him on final warning, I am not persuaded that he yet understands the precariousness of his position and his job obligations to the Authority and to the riding public. I believe he has been and remains cavalier and irresponsible about his duty to achieve and maintain a good and prompt attendance record. To grant him back pay and make him whole is to disregard those facts and might be counterproductive to the notice and rehabilitative purposes of progressive discipline that has been applied to him up to this point. In short, the circumstances warrant a further severe warning in the form of loss of pay for the period he has been out.

Eric J. Schmertz
Chairman

DATED: May 15, 1989