IN THE MATTER OF THE ARBITRATION

between

UNITED STEELWORKERS OF AMERICA, LOCAL NO. 12003, AFL-CIO

and

BOSTON GAS COMPANY

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, make the following AWARD:

The grievance of Cathy Gately, filed by the Union on August 24, 1994 is upheld as follows:

1. The Company violated the Collective Bargaining Agreement by transferring the work of cleaning trailers at Everett from a Local 12003 Attendant to a Local 12007 Attendant. The work so transferred shall be returned to the Local 12003 classification.

2. As it has not been shown that Cathy Gately or any other Local 12003 Attendant has suffered any monetary damages in regular pay, the request for a monetary remedy is denied.

Eric J. Schmertz, Chairman

DATED: April 10, 1996
STATE OF NEW YORK )
COUNTY OF NEW YORK )

I, Eric J. Schmertz do hereby affirm upon my Oath as Chairman that I am the individual described in and who executed this instrument, which is my AWARD.
Edward J. Maloney
Concurring in #1
Dissenting from #2

DATED: April , 1996

STATE OF MASSACHUSETTS) ss: COUNTY OF )

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

Thomas J. Ryan, III
Dissenting from #1
Concurring in #2

DATED: April , 1996

STATE OF MASSACHUSETTS) ss: COUNTY OF )

I, Thomas J. Ryan, III do hereby affirm upon my Oath that I am the individual described in and who executed this instrument, which is my AWARD.
IN THE MATTER OF THE ARBITRATION

between

UNITED STEELWORKERS OF AMERICA,
LOCAL NO. 12003, AFL-CIO

and

BOSTON GAS COMPANY

-------X-------

OPINION OF CHAIRMAN

The stipulated issue is the grievance of Cathy Gately, filed by the above-named Union on August 24, 1994. In substance, the grievance charges the above-named Company with violations of "Article II, Section 1, Article I, Section 3" of the Collective Bargaining Agreement by "work transferred from Local 12003 to Local 12007." The remedy sought is "return work to Local 12003 and make whole for all lost wages."

A hearing was held on October 30, 1995 at Braintree, Massachusetts, at which time representatives of the Union and Company appeared.

The Board of Arbitration consisted of Edward J. Maloney, Union designee; Thomas J. Ryan, III, Company designee; and the Undersigned as Chairman. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Oath of the Arbitrator was waived; a stenographic record of the hearing was taken, and the parties filed post-hearing briefs.

By agreement, the Board of Arbitration deliberated by correspondence.
I conclude that under Article II, Section I of the contract, implemented by a long-standing past practice of some 23 years, the work of cleaning trailers at Everett was established and recognized as within the jurisdiction of the Local 12003 bargaining unit, and more particularly a job duty of a Local 12003 Building, Grounds and Security Attendant.

In any unilateral change by the Company in the duties of a Local 12003 Attendant, including the elimination or diversion of some cleaning duties, a contractual distinction must be made between changes within the 12003 bargaining unit (i.e. "intra-unit changes") and those which transfer the work outside the Local 12003 Unit (i.e. "inter-unit" changes such as here to a different bargaining unit).

It is my view, as expressed in my paycheck decision that the Company may make changes in working conditions, including changes in the duties of a job classification, under Article XIII, Section 3 of the contract. But, it is my interpretation of that Article and Section that it contemplates and applies to changes within the Local 12003 bargaining unit (i.e. intra-unit changes). Those changes, if insubstantial may be made by the Company unilaterally. If substantial, the notice and discussion provisions of that Section must be followed.

As an integral part of the Local 12003 contract, I conclude that Article XIII, Section 3 is per force limited in its application to work within that Union’s recognition (i.e. "intra-union changes") and was not intended and does not extend to the divestiture of Local 12003 jurisdiction by its transfer to a different bargaining unit or to some other outside source. Any other interpretation would give the Company a
license to erode the Local 12003 work jurisdiction unilaterally by "insubstantial" changes and after notice and discussion, by "substantial" changes. I am not persuaded that Article III, Section 3 was negotiated with that reach intended; nor, therefore, should it be so interpreted.

The "change" that the Company effectuated and which is the subject of this case was not a change within the meaning and intent of Article III, Section 3. Rather it was an "inter-unit" change -- the transfer of work historically performed by Local 12003 Attendants to an Attendant(s) in Local 12007, a different bargaining unit. Clearly, an inter-unit transfer of this type encroaches on and constitutes an erosion (no matter how small) of the certified jurisdictional rights of Local 12003, mutually recognized for so long by an unvaried practice.

The Union's brief quotes from a 1984 decision between the parties by Arbitrator Abraham Siegel. I agree with that quotation.

Arbitrator Siegel said inter alia:

"The Preamble and recognition clause language only assures that the job duties incorporated in the listed classification shall not be exported from the bargaining unit. If they no longer exist, given changes in need (for whatever legitimate business reason) or if they are transferred from one place in the bargaining unit to another or if they are changed, all this is permissible..." (Emphasis added)

Applied to this case, the Company retained a managerial right to move the duties of the affected Local 12003 Attendant to other Attendants or even to other classifications within the Local 12003 bargaining unit, pursuant to the provisions of Article XIII, Section 3. Or it could have discontinued those duties or merged them with other duties of classifications within the Local 12003 bargaining unit. But what it may
not do, against the backdrop of the Recognition Clause, the 23 years of practice and the foregoing contractual interpretation of Article XIII, Section 3, is to remove work from Local 12003 entirely, by transferring it to another bargaining unit -- Local 12007. In my view that is not significantly different from transferring bargaining unit work to managerial or supervisory employees or improperly subcontracting it -- circumstances proscribed by prior, cited arbitration Awards.

The justifications for the transfer argued by the Company, namely legitimate business needs, greater efficiency, on-site supervision, less required travel time, equalization of the work loads of Attendants of both bargaining units and the de minimis quantity of the work transferred, all apply to changes within the unit, but are not circumstances which allow the permanent removal from the bargaining unit of work contractually and historically recognized as belonging to the jurisdiction of that unit. In short, the contractual prohibition on a permanent loss of work jurisdiction belonging to Local 12003 cannot be ignored by an Arbitrator bound to uphold the contract merely because the quantity of the work transferred is 1 1/2 hours a week (i.e. less than 1/2 of 1% of the Attendant's work load) or is more equitable to the Local 12007 jurisdiction or more efficient and productive. A contract breach -- here the divesting of some Local 12003 work to another unit -- cannot be cured in arbitration by those justifications.
Finally, in the absence of any challenge from Local 12007 or a full exposition of the facts, I cannot deem as precedential the examples cited by the Company of transfers of work or personnel from Local 12007 to Local 12003. Indeed, I do not have jurisdiction over actions under the Local 12007 contract.

Accordingly, the grievance of Cathy Gately, filed by the Union on August 24, 1994, is sustained to the extent set forth in the AWARD.

Eric J. Schmertz, Chairman

DATED: April 10, 1996
March 26, 1996

Mr. Edward J. Maloney
Vice-President
United Steelworkers of America
Local 12003
48 Thomas Road
South Weymouth, Massachusetts 02190

Mr. Thomas J. Ryan, III
Director, Industrial Relations
Boston Gas Company
One Beacon Street
Boston, Massachusetts 02108

Re: United Steelworkers of America, Local 12003
-and- Boston Gas Company
(Building and Grounds Attendant Work Transfer)

Gentlemen:

I enclose to both of you a copy of the proposed Award and my Opinion in the above matter.

May I have your views within the next few days as the Award is due on or before April 17th.

Very truly yours,

[Signature]

Eric J. Schmertz
Chairman

EJS/ps
Enclosure
IN THE MATTER OF THE ARBITRATION

between

UNITED STEELWORKERS OF AMERICA,
LOCAL NO. 12003, AFL-CIO

and

BOSTON GAS COMPANY

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 just cause for the six-day suspension of John Houlihan.

2. There was just cause for the three-day suspensions of Paul Carey and Joseph Ahl.

3. The demotion of John Houlihan to the classification equipment operator from May 9, 1994 to the date of this Award, is upheld.

4. The "permanence" of Houlihan's demotion is lifted. Effective immediately, and under the terms of the contract, he shall have the right to exercise his seniority for restoration to the job of crew leader or for any other job for which he would be eligible under the contract.
Eric J. Schmertz, Chairman

DATED: February 2, 1996

STATE OF NEW YORK )
COUNTY OF NEW YORK )

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

Mark Smith
Concurring in #1, #2, and #3
(Concurring in #4)
(Dissenting from #4)

DATED: February 2, 1996

STATE OF MASSACHUSETTS)
COUNTY OF

I, Mark Smith do hereby affirm upon my Oath that I am the individual described in and who executed this instrument, which is my AWARD.

Stephen Finnigan
Dissenting from #1, #2, #3
Concurring in #4

DATED: February 2, 1996

STATE OF MASSACHUSETTS)
COUNTY OF

I, Stephen Finnigan do hereby affirm upon my Oath that I am the individual described in and who executed this instrument, which is my AWARD.
The stipulated issue is:
Was the discipline of John Houlihan, Paul Carey and
Joseph Ahl for just cause? If not what shall be the
remedy?

Hearings were held before a Board of Arbitration of the
Undersigned as Chairman and Messrs. Stephen Finnigan and Mark Smith,
respectively the Union and Company designees. Representatives of the
above-named Union and Company appeared, as did Messrs. Houlihan, Carey and
Ahl, hereinafter referred to collectively as the "grievants," and
individually as "Houlihan," "Carey" and "Ahl." All concerned were
afforded full opportunity to offer evidence and argument and to examine
and cross-examine witnesses.

The Oath of the Arbitrators was waived; a stenographic record of
the hearings was taken and the parties filed post-hearing briefs. By
agreement, the Board of Arbitration deliberated by telephone and
correspondence, and met together in executive session on February 1, 1996.

Let me come right to the essential point, as I see it. I do not
think that this matter would have come to arbitration if the charges
against the grievants did not include, primarily, the allegation that they
were asleep in their truck when assigned to and when they should have been actively working to locate and repair a Grade I gas leak during the early morning hours of April 27, 1994.

Though the grievants are also charged with poor work performance, particularly the assertion that they did little if any work on the assignment, and that what work they did, if any, was not in accordance with prescribed methods and procedures, I am satisfied that the penalties imposed would be appropriate, with some modification, if the "sleeping" allegation is proved, irrespective of the other charges. Only if that "threshold" charge is not established need I make determinations on the others and judge the appropriateness of the discipline imposed as to them.

I accept as accurate and credible the testimony of Paul McGrath the Company's District Supervisor. Based on that testimony and the evidence of the circumstances surrounding what McGrath saw, I conclude that the grievants were asleep in their truck; that Houlihan was asleep with his boots off and not just resting from a toothache or drying his socks; and that Carey and Ahl were not "cleaning up the truck" but rather awakened and exited from the back of the truck over the front seats when McGrath awakened Houlihan, in an apparent attempt to avoid being discovered asleep. I accept McGrath's testimony that he awoke Houlihan after observing him asleep for several minutes and that the rear of the truck (where Carey and Ahl were located) was quiet and dark. In short, I find no credible reason why McGrath would falsify this testimony. 2

1It is undisputed that a Grade I gas leak is the most serious type and dangerous to the area where it is present.

2The Union's reliance on an incident during the 1993 lockout when McGrath was hit with a tomato is not evidence of bias because McGrath knew that another employee, not Houlihan, threw the tomato.
I must reject also the Union's claim, on behalf of the grievants, that they were in their truck, after aerating the location of the leak, simply awaiting the outcome of the aeration. The Company has persuasively shown that when aerating, the repair crew is to actively monitor the effects of the aeration on the affected buildings and geographical area. They are not to relax their efforts at that time. In any event, sleeping during any such period is manifestly improper.

Houlihan who was the crew leader was suspended for six days and permanently demoted to his former classification. Carey and Ahl, the crew members, each received three-day suspensions.

Considering the dangerous nature of a Grade I leak and the grievants' misconduct of sleeping or "cooping" when they should have been at work, I cannot find the respective suspensions of six days and three days to be too harsh, inappropriate or without just cause.

Additionally, I cannot fault the removal of Houlihan from his crew leadership, nor do I find contractual fault with the Company's imposition of a demotion. Despite his long service with the Company, it is clear that he defaulted on his leadership responsibilities as a crew leader. He permitted conduct by himself and his crew, which not only ignored the dangerous conditions present due to the Grade I leak, but abdicated his fundamental duty to direct his crew in containing and eliminating that danger. Contractually, he was still in a probationary status in that particular job as crew leader. The contract gives the Company the right to "demote" as well as discipline employees "for just cause." Article III Section I makes clear that "demotion" may be resorted to for disciplinary reasons. Inability or unwillingness to carry out the responsibilities of a crew leader, particularly under the dangerous circumstances of this case, constitute cause for "demotion." I conclude
that the Company demoted Houlihan as a disciplinary penalty, not because he was still in his probationary period, though the Company asserted this latter point as well.

The Union argues that the demotion should be reversed on the grounds of "disparate" treatment. The parties submitted a stipulation listing cases in which employees were disciplined for work infractions but not demoted. And other cases in which the affected employee was demoted. So the bare practice has been both ways and mixed. I do not have enough information about the former cases of discipline to determine if any of those employees were similarly situated to Houlihan. It appears that only one was a crew leader, and the nature of his two suspensions were not disclosed. I cannot tell if his misconduct or work failures were as serious as Houlihan's inattention to a Grade I gas leak. Therefore, there is insufficient evidence to establish that Houlihan's demotion was "disparate" treatment.

The Union's argument that the job Houlihan should have been returned to under Article XI of the contract was as a "crew leader" and not as an equipment operator is neither logical nor persuasive. It would nullify not only the effectiveness of the demotion, but in this case, its express purpose and justification.

Finally, however, I find no support in the contract or in practice for a "permanent" demotion. I believe in rehabilitation and redemption. Houlihan has been in demoted status since May of 1994. As a disciplinary penalty that is long enough for the offense committed.

Accordingly, the "permanence" of Houlihan's demotion is lifted. Effective immediately, and under the terms of the contract he shall have the right to exercise his seniority for restoration to the job of crew
leader or for any other job for which he would be eligible under the contract.

Eric J. Schmertz, Chairman

DATED: February 2, 1996
The stipulated issue is:

Was TIMOTHY KIRKPATRICK, entitled to a negotiated
disability benefit increase? If so, what remedy is
proper?

A hearing was held in Indianapolis, Indiana on May 17, 1996 at
which time Mr. Kirkpatrick (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 Arbitrators Oath was
waived; a stenographic record of the hearing was taken; and the parties
filed post-hearing briefs.

More precisely, the question posed is whether, while still on
disability, the grievant was entitled to a change in the disability
benefit which was negotiated and made "effective" during his period of
disability, and which if applicable to him would have increased his
disability entitlement?

The grievant became disabled on March 23, 1995 and began to
receive disability benefits on March 30, 1995. At that point, under the
then applicable 1993-1995 Collective Bargaining Agreement, his disability
benefit was 75 percent of his base hourly rate, with a maximum "cap" of $425 a week. He received the $425 a week maximum and that entitlement, applicable at that time, is not disputed. The grievant's disability ended on September 25, 1995, and he returned to work on that date.

During the grievant's period of disability the parties negotiated the current 1995-1999 Collective Bargaining Agreement. Addendum "A" thereof reads:

**DISABILITY:**

First six months - 72% Base Rate - no cap
Second six months - 65% Base Rate - no cap
Effective date is June 12, 1995

If applicable to the grievant, the removal of the "cap" and the application of the 72% would result in an increase in his disability benefit from the "capped" $425 a week to an "uncapped" $518.11.

It is the position of the Union that because the foregoing Addendum "A" made the benefit change "effective June 12, 1995," the grievant was entitled to an increase to $518.11 from that effective date. In support of its position, the Union points out that the improved disability benefit was "paid for" by the grievant and all bargaining unit employees in lieu of an additional wage increase in the amount of .5 cents per hour. And that therefore, because the newly negotiated disability benefit has a "cost factor" and diminished the potential wage increase by .5 cents an hour, the grievant's entitlement to an improved disability benefit was not only justified by the contractual effective date of June 12, 1995 but, significantly, supported by a monetary consideration.

The Company does not deny the .5 cents an hour cost value of the improved disability benefit.
In citing the adjustments made under the new contract in the Thrift Plan, Pensions, Life Insurance, and Health Care Coverage, the Union points out that the effective date of each (except the Thrift Plan which required IRS approval) was June 12, 1995, and that for each there was a cost factor that otherwise could have gone into wages.

Finally, the Union rejects any reliance by the Company on "past practice." Because of the Union’s policy not to "seek out" grievances, but to wait until an employee formally complains, the Union asserts that it could not and did not know of any prior cases where an improved disability benefit was not made applicable to an employee who was on disability when the improved benefit was made contractually effective.

The Company’s case is essentially based on past practice. It placed into the record evidence of a substantial number of examples where a new disability benefit was not made applicable to those on disability, but rather applicable only prospectively to those who became disabled on or after the effective date of the newly negotiated benefit. The Company argues that it is "incredulous" to believe that the Union and its members did not know of this long-standing and unvaried practice. And that at no time during the most recent or prior contract negotiations did the Union seek to change the way Addendum "A" was and had been applied. The Company concludes that the Union and the employees thereby knew of and accepted Addendum "A" as implemented by the Company, historically and in the instant case.

I conclude that Addendum "A" in the current contract, and particularly the reference to an effective date of June 12, 1995 is
ambiguous. I find that there are no provisions in prior contracts, including prior Addendum "A's" which clarify or resolve that ambiguity. With equal validity, the improved benefit could be interpreted two ways. It could apply to all disabled employees, those on disability before June 12, 1995 and those who became disabled thereafter. Contrariwise, it could have been intended to apply prospectively, namely to those employees who became disabled on an after June 12, 1995.

I do not find the precedents cited by the Union with regard to the Thrift Plan, Pensions, Life Insurance and Health Care coverage helpful in resolving the ambiguity. Aside from the argument that these changed benefits were "effective June 12, 1995" there is no evidence in the record as to how they were implemented and whether any of them have relevance to employees similarly situated to those on disability. I do not see how an effective date of June 12, 1995 for a new Thrift Plan or for Life Insurance or for Health Care premiums, all obviously applicable to active employees, and all effective prospectively, represent circumstances similar to the application of a new disability benefit to employees already on disability. Pensions may have a precedential relevance. But the record does not contain probative evidence on how the new Pension entitlement was implemented -- whether applicable only to employees retiring after June 12, 1995 or applicable also to those already retired.

Nor do I find dispositive the fact that the employees gave up .5 cents an hour in potential wages to gain the improved disability benefit. The Union's contention in that regard begs the question. The real question is what did the .5 cents an hour buy? Did it buy an improved benefit for all those disabled or was it calculated, actuarial, on what it
would cost prospectively for those who became disabled on or after the effective date? The record is devoid of any evidence of the former, so the cost of .5 cents cannot be definitively determined as a cost attendant to those, like the grievant, already on disability.

That leaves the question of how to resolve the continuing ambiguity. Traditionally, arbitrators look to the negotiation history and/or to past practice for answers.

Here, the negotiation history is unavailing. It is acknowledged by both sides that there were no discussions or understandings at negotiations regarding to which class of disabled employees any changed disability benefits would apply on its effective date.

However, there is considerable evidence of past practice. And it is well-settled that an unvaried and extensive practice is probative evidence of how the parties understood the meaning and intent of contract language which, on its face, is ambiguous.

Here the extensive past practice supports the Company's interpretation and implementation of Addendum "A" and particularly its effective date. Without exception, no employee on disability before a negotiated change in the benefit, and still on disability thereafter, received the improved rate. Rather, employees so situated continued to receive the amount they received when they began their disability, regardless of any negotiated increase thereafter. Indeed, supportive of this practice, is evidence of one case where the negotiated benefit decreased, but on employee already on disability did not have his benefit reduced on the effective date of the changed benefit, but retained the higher amount he received when his disability began.
That this practice was open, unvaried and of considerable duration leads to only one logical conclusion. And that is that the employees and the Union knew of it actually or at least constructively, and are hence bound. Therefore, the practice constitutes probative evidence of what the parties believed the proper application of Addendum "A" to be and accepted that application as their mutual interpretation and meaning.

Accordingly, I find no contractual basis to reverse the Company's denial of an improved disability benefit to Timothy Kirkpatrick.

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

TIMOTHY KIRKPATRICK was not entitled to a negotiated disability benefit increase.

Eric J. Schmertz, Arbitrator

DATED: August 21, 1996

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.
AMERICAN ARBITRATION ASSOCIATION,
ADMINISTRATOR

IN THE MATTER OF THE ARBITRATION

between

LOCAL 701, INTERNATIONAL UNION OF
ELECTRONIC, ELECTRICAL, SALARIED
MACHINE AND FURNITURE WORKERS,
AFL-CIO

and

GENERAL ELECTRIC COMPANY

OPINION AND AWARD
CASE # 11 E 3000173195

The stipulated issue is:
Was there just cause for the discharge of JOSEPH R.
KANE? If not, what shall be the remedy?

A hearing was held on January 24, 1996 in Madisonville,
Kentucky, at which time Mr. Kane, 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, and the parties filed post-hearing briefs.

The grievant was discharged for committing an assault on a
fellow employee (Tim Moore), in violation of the Company's Code of Plant
Conduct -- specifically a prohibition on "Fighting, otherwise assaulting,
or willfully attempting to injure anyone on Company property..."This
prohibition is listed among the offenses for which "discharge may be
imposed."

The propriety of such a rule is not seriously disputed.
Manifestly, orderliness and discipline in the work place and the safety
and morale of employees justifies the proscription against fighting and assaults. And unless an assault or a fight is in unavoidable self defense or excused because of pronounced provocation, or subject to other significant mitigating circumstances, the penalty of discharge is warranted.

In the instant case the facts and evidence as adduced in the record show that the grievant's attack and assault on Moore was violent, physically extreme and dangerous. The weight of the credible testimony reveals that with both hands and from behind the grievant grabbed Moore around the neck, pulled him forcefully from a chair dragged him across the plant's Electronic Maintenance Repair Room to a wall or a desk by the wall, and held him by the neck until the verbal intervention of one or more fellow employees caused the grievant to release him.

The testimony of other employees who witnessed the event and the evident redness observed by a witness on Moore's neck support the foregoing facts about the assault and its magnitude.

The charge against the grievant also includes the allegation that later, after Moore told him that he'd report the incident to management or that he "could have (the grievant's) job" for what the grievant did, the grievant "threatened to kill" Moore, by stating that he "knew where (Moore) lived" and "it wouldn't bother me to kill you."

It is obvious that under these facts and circumstances, the grievant violated the aforesaid work rule. The Company's burden of proof in that regard has been met. The burden of proving that the assault was justified or should be excused or that the penalty of discharge should be mitigated, shifts to the grievant and the Union on his behalf.
To meet that burden, the grievant and the Union assert that the grievant was provoked by Moore not only at the time of the assault but over the years of their employment together. Specifically, the grievant and the Union contend that Moore regularly "harassed" the grievant on the job; removed the grievant's work from the computer; removed and tore up the grievant's photographs of his wife and grandchildren and/or punched out the eyes of those photographs, and continuously acted toward the grievant in a "nasty, condescending, 'better than you' and provocative" manner. It is also asserted that the grievant complained about Moore's attitude towards him and the adversarial relationship between them to supervision, and that supervision did nothing about it. At the time of the assault the grievant and the Union claim that a sarcastic and contemptuous response by Moore to a question from the grievant, triggered the assault. The claim is that upon entering the Electronic Repair room the grievant asked Moore if he "was still meddling with things not of your concern," (referring to the removal of programs on the computer) and that Moore replied "might be." It is explained that this confirmed the grievant's belief that Moore had willfully and maliciously removed from the computer programs on which the grievant had been working, and that, against a backdrop of months, if not years of harassment, provoked the grievant's anger and the assault.

There is substantial evidence in the record which leads to a belief that there was a long-standing personality conflict between the grievant and Moore. Indeed, there is evidence supportive of the
assertions that the grievant was "a bully" and that Moore was "arrogant, condescending and difficult to work with." No doubt their personalities were at odds with each other and that they disliked each other.

But the evidence falls short of establishing that Moore committed any of the specific acts which the grievant claims provoked his anger and the assault. The grievant testified that he believed Moore removed his programs from the computer; that he believed that Moore was responsible for tearing up or defacing the grievant's photographs of his wife and grandchildren. Not only does Moore deny these allegations but there is no direct evidence either by the grievant or by any other witness that Moore did these things. Moore admitted that he removed certain personal "games" from the computer, which were placed there by the grievant (and others) because they "filled up" the computer with non-work related material. But that is not the removal of work programs on which the grievant was working, and as such, even if it angered the grievant, was not a provocative justification for the assault.

So, while the record supports suspicions about Moore activities and an arguable theory that the grievant's beliefs were not wholly fanciful, the evidence does not meet the clear and convincing standard to support a conclusion that Moore did the provocative acts charged. So, the defense of provocation falls short of the requisite proof to rebut the established proof of the assault and its violation of the Code of Conduct.

However, there is a factor in this case which does not justify the assault or otherwise excuse the grievant but which imputes some relevant responsibility to management. I deem it to be a mitigating factor in consideration of the penalty of discharge.
Despite the denials of supervisor Ortt that the grievant complained about Moore, I am persuaded by the testimony of others and by the obvious extended and notorious adversariness between the grievant and Moore, that supervision and management could not have been ignorant of the negative relationship between them; that the "personality conflict" was made known to supervision (and hence management) even if the grievant did not register specific complaints and that the Company had a managerial duty in maintaining efficient operations, employee morale and the safety of the work place to take steps to defuse what I believe they knew or should have known was a potentially explosive relationship between the two. Indeed, where there is notice or knowledge of such a situation, the Company cannot ignore it, relying only on its disciplinary rule against fighting or committing an assault. It has a duty, in support of that proper rule, to warn employees who are in conflict with each other that a physical "flare-up" will not be tolerated, and to take other steps, including, if practicable, separating the work areas of the conflicting employees to reduce the chance of direct confrontation. In short, because I believe and conclude that supervision knew of the "bad blood" between the grievant and Moore, and did nothing to ease or defuse the tensions, the Company was, in some measure, "contributorily negligent." This is not to say that the Company could have prevented the assault. Rather it is to say that the Company should have taken some reasonable steps to try to head it off.

This does not mean that the grievant was justified in attacking Moore. He should have complained further to supervision and also, and probably especially, to his Union, and not engage in "self help." It does
not mean that he is excused from the consequences of the assault. It means only that the penalty for the assault (and the verbal and obviously reprehensible threat that followed subsequently)\(^1\) should be mitigated to something less than discharge. This mitigation is supported by the fact that the official record does not show the grievant to be a future threat to co-workers. That in a phone call following a written psychological evaluation a counselor characterized the grievant as "a big bully" is self-serving and gratuitous because that was not the written diagnosis. Rather, the psychological report states that"...it is felt that Mr. Kane would not present a direct danger to anyone in his place of employment." (emphasis added) Consistent with my view that the Company should have taken steps to avoid the "conflict" the psychological report goes on to state:

"If he should retain his job, then it would be important to have him document any conflicts that he might have with fellow co-workers and undergo some type of mediation process." (Emphasis added)

In short, an authoritative psychological report did not conclude that the assault, albeit violent and inexcusable, meant that the grievant was a violent personality and a danger if re-employed.

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

The discharge of Joseph R. Kane is reduced to a disciplinary suspension. He shall be reinstated without back pay.

\(^1\)I deem the verbal threat to be part of the grievant’s emotional outburst. There is no evidence of an intent to carry it out.
The period of time from his discharge on October 17, 1994 until his reinstatement shall be deemed a disciplinary suspension for the offense charged. He is warned that any future acts of violence or threats of violence on his part would be grounds for immediate discharge.

Eric J. Schmertz, Arbitrator

DATED: March 18, 1996
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.
The stipulated issue is:

1. Did the grievant, MAURICE LAVIGNE have the minimum qualifications required under the provisions of Section 1 of Article XXVIII of the National Agreement or the Local Job Posting and Upgrading Understanding to be upgraded to the Craft Leader/Planner position in October 1994?

2. If the Arbitrator determines that the grievant did have the minimum qualifications required for such upgrading, did the Company violate Article XXVIII of the National Agreement or the Local Job Posting and Upgrading Understanding when it upgraded Lawrence Williams, Donald Blakeslee, James Rebhun and Patrick McCauley rather than the grievant? If so what shall the remedy be?

A hearing was held in Albany, New York on October 11, 1995 at which time representatives of the above-named Union and Company appeared. The grievant was also present. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived, a stenographic record of the hearing was taken and the parties filed post-hearing briefs.

To come right to the point, the issue centers on whether a written test administered by the Company as a method of determining qualifications under the aforesaid contract provision, and which the
grievant failed under the scoring standards set by the Company, was fair, reasonable, relevant to the job in question and non-discriminatory, and whether it should have been determinative in disqualifying the grievant, from further consideration?

In September 1994, the Company established as a bargaining unit job the position Craft Leader/Planner,¹ and posted ten such positions for bids. Sixty-six bargaining unit employees bid on the openings, including the grievant.

The Company inaugurated and implemented a multi-step process in determining the minimum qualifications of the bidders. In order, the steps were a self-screening evaluation, an aptitude test, a written skills test and interviews. The grievant survived the first three steps. By the time of the written test, the original sixty-six applicants had been reduced to twenty-nine candidates, including the grievant. Those twenty-nine took the written test. Seven failed, including the grievant. His participation in the selection process ended at that point. Ultimately the ten openings were filled by other bidders who passed the written test and the interviews, and some were junior in seniority to the grievant.

The Union does not challenge the multi-step process. It acknowledges the right of the Company to administer a written test as part of that process in determining minimum qualifications. Its objection and its challenge in this case is to the fairness, reasonableness and objectivity of the test as applied to the grievant and to the conclusiveness the Company attached to it in disqualifying the grievant from further consideration for the job opening.

It is the Union's position that the test was "slanted" in favor of bidders who had previously performed the job on a temporary basis; that

¹Earlier it was a managerial classification.
the passing grade of 75% was too high; that more than two questions should have been disregarded in scoring the test and if done so, the grievant’s score would have reached 75%. And the foregoing notwithstanding the grievant’s unblemished work record of 22 years, his computer skills, his excellent recordkeeping skills, his demonstrated aptitude (having passed the aptitude test) and his good health should have been but were not considered by the Company in assessing his minimum qualifications.

All considered, the Union contends that the Company’s actions and determinations were not only unfair, unreasonable and discriminatory, but arbitrary and capricious.

There is no dispute over the equal and uniformed administration of the test to the bidders, nor is there any allegation that each test was not equally and uniformly scored.

It is apparent to me that the test was relevant to the duties of the job, Craft Leader/Planner. The duties of the job, and the job posting included requirements of a knowledge and understanding of plant engineering standards, OSHA regulations, ISO guidelines, standard maintenance operating procedures and the modification review process. The test questions were geared to these subjects.

Though as a practical matter, bidders who previously worked in the job may have had experiences which aided them in answering questions about the job’s duties and required knowledge, I cannot conclude that the Company "slanted" the test in their favor, or that the consequences of the test scores evidenced any such "slant." The fact is that 11 of the 22 candidates who passed the exam had no prior experience in the job. The other 11 did; so the pass rate for both group was equal. Also, the statistics showed that the failure rate among those with and without prior experience was reasonable close (21 1/2% to 26 1/2%). Additionally the
record indicates not only that the grievant was informed of the substantive nature of the test and the subject matter to be expected, but that study and research material on those subjects were made available for preparation.

I cannot conclude that the 75% passing grade was too high. I fail to see how a lesser grade would demonstrate the requisite knowledge of the job functions. How far below 75% could the break point go? To speculate on or indulge in that would be for the arbitrator to substitute his judgement on the passing score for that of the Company. And he should not do that unless the passing score set by the Company was unreasonable or unjustified. I do not find 75% to be either.

The Union argues that 75% is too high because a "trial run" of the test among qualified exempt employees who had experience on the job when it was a managerial position, resulted in an average score of only 66%. Again the difference of 11% is a judgmental matter. But for a test with 60 questions, it is not an insignificant differential. In short, to fix the passing grade at 75% for the bidder, when experienced personnel scored 86%, is not arbitrary or lacking in acceptable rationale.

Because all the candidates missed two particular questions — questions 7 and 57, the Company eliminated those questions from the scoring of all the exams. Obviously had they been included, the grievant's score would have been lower. So he and the other candidates were treated equally and fairly in that regard. The grievant missed 20 of the 60 questions for a score of 66.66%. Given credit for questions 7 and 57 raised his score to 70%.
The Union points out that 25 of the testers missed questions 2 and 54 and 24 missed question 39, and argues that had the grievant (and presumably the others), been given credit for those the grievant’s score would have exceeded the threshold 75%.

Unless questions 2, 54 and 39 are shown to be unreasonable, ambiguous, unfair, irrelevant or discriminatory, the Arbitrator has no authority to ignore them or to re-score the exam. None of these fatal characteristics were shown by the Union in this record. Therefore, those questions must remain as part of the exam and included in the scoring.

For all the foregoing reasons, I find no basis or authority to invalidate the test as it was applied to the grievant.

The remaining question is whether his failure of the test should have disqualified him from further consideration in the selection process. The answer to that question is found in the well-settled application of the "Wirtz formula." That "formula" is precedential in the interpretation and application of Section I of Article XXVIII of the contract. In my prior decision of January 23, 1984 (cited by the Company herein) I discussed the "Wirtz formula." My application to the facts therein are relevant to the facts in the instant case. Therein I stated:

As I see it, the Wirtz formula is not inconsistent with my often expressed view, shared I believe by the large majority of arbitrators, that in matters of ability and qualifications, the employer’s judgement enjoys a presumption of validity unless shown to be arbitrary, capricious, discriminatory or unreasonable.

In the instant case, applying the Wirtz formula and the foregoing view, I conclude that the Company’s determination that the grievant did not possess the threshold qualifications for Control Operator MCS-2, should be affirmed.

Assuming that in the first step of his two step formula, Arbitrator Wirtz interpreted "minimally qualified" to mean "an ability to perform the job passably," I do not find that the grievant’s
disqualification on that basis was arbitrary, capricious, discriminatory or unreasonable.

The Union has not clearly and convincingly shown that the grievant's good work record in other jobs gave him the type of knowledge and experience that was transferable to the Control Operator position to reasonably insure his ability to perform it "passably." On the other hand, I cannot find the methods employed by the Company in judging the grievant's qualifications to be wrong. The questions which supervision posed to the grievant in considering his bid were fully related to the job and its duties and responsibilities as listed in the posting. It is undisputed that the grievant could not answer those questions or answer them correctly. As the questions asked related reasonably to the minimum qualifications enumerated in the posting, I cannot fault the Company for deciding that the grievant's inability to respond correctly meant that he lacked the minimum qualifications for the job.

This is not to say that the grievant could not perform the job satisfactorily or that he could not learn and adjust to its requirements and responsibilities in due time. Indeed, the grievant struck me as highly intelligent, poised, stable and well motivated. His good work record is stipulated. Rather it is to say that the Company's process of deciding on his qualifications; the implementation of that process, and the consideration of his other work experience, were not irrelevant, unfair or unreasonable, and that the conclusions reached were not arbitrary, capricious or discriminatory, albeit arguably subject to different interpretations.

In short, under the instant circumstances; under the Wirtz formula; and under the presumptions previously mentioned, this arbitrator finds no legitimate basis to substitute his judgement for that of the Company.

The coincidence of the foregoing to the facts of the instant case are manifest. The grievant has a good work record. Clearly he could learn the job. But, under the "Wirtz formula" it is not his potential that equates to "minimum qualifications," but whether he can perform the job passably upon assuming it. Here, as in the 1984 decision, a fair, reasonable and relevant test was utilized to measure that. Here, as in the 1984 decision, the employee failed the test. Here, as in the 1984 decision, the Company's reliance on that test, as determinative in judging
a lack of minimum qualifications, irrespective of work record and aptitude, was not arbitrary, capricious or discriminatory, and was therefore in accord with the well-settled principle and precedent of the "Wirtz formula." In short, the application of the "Wirtz formula" to the facts in this case, compelled the end of the grievant's pursuit of the job opening with his failure of the written test.

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

The grievant, MAURICE LAVIGNE did not have the minimum qualifications required under the provisions of Section 1 of Article XXVIII of the National Agreement or the Local Job Posting and Upgrading Understanding to be upgraded to the Craft Leader/Planner position in October 1994.

Eric J. Schmertz, Arbitrator

DATED: January 4, 1996

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

INTERNATIONAL UNION OF ELECTRONIC,
ELECTRICAL, SALARIED, MACHINE AND
FURNITURE WORKERS, AFL-CIO
LOCAL 161

and

GENERAL ELECTRIC COMPANY
ROANOKE, VIRGINIA

The stipulated issue is:

Was the termination of JAMES CRAIGHEAD on March 3, 1995 appropriate under the circumstances? If not, what shall be the remedy?

A hearing was held in Roanoke, Virginia on March 14, 1996 at which time Mr. Craighead, hereinafter referred to as the "grievant" and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived; a stenographic record of the hearing was taken; and the parties filed post-hearing briefs.

The grievant was terminated under the provisions of Article VIII Section 2(a)(2) of the National Agreement. It reads:

Service credits previously accumulated and continuity of service, if any, will be lost whenever the employee....

Is absent from work for more than two (2) consecutive weeks without satisfactory explanation.
The Company contends that following the taking of vacation time, some sick leave time and a personal leave day in the month of January 1995, and after exhausting those allowed periods of absence, the grievant didn't come to work during the month of February; did not contact the Company during that period; and gave no "satisfactory explanation" for his continued absence. Also, he was unreachable. Though the Company tried to contact him, it could not do so. His phone was disconnected and mail to his last known address was returned. Only after the grievant called a fellow employee at the end of February, following which he talked to his supervisor, did the grievant make contact. At that point he was advised by the Company's Human Resources Manager that he was suspended pending review of his status. Subsequently he was terminated.

The grievant's explanation for his absence during February was that he was abusing drugs and was depressed.

The Company asserts that this explanation is not a "satisfactory explanation" (emphasis added) within the meaning of Article VIII Section 2(a)(2) of the contract, and not a "satisfactory explanation" as that contract language has been interpreted by arbitrators in prior arbitration cases. Hence, argues the Company, the grievant was "absent from work for more than two (2) consecutive weeks" and, without a satisfactory explanation, his termination was administratively mandated and proper under the contract.

The Union argues that "drug addiction" is a recognized illness; that the Company had according it that recognition by the establishment of an Employee Assistance Program for treatment of drug and alcohol abuse; that the grievant's long standing addiction to drugs was known to the Company; that the Company had paid medical benefits for his treatment; and
that therefore his continued addiction and abuse in February should have been recognized and accepted by the Company as a "satisfactory explanation" for his absence that month within the meaning and intent of the foregoing contract provision.

Additionally the Union argues in its brief, but not on an evidentiary basis at the hearing, that the Company "miscalculated" the grievant's vacation entitlement. It reasons that if he had been accorded the full vacation to which he was entitled for his 25 years of service, it would have carried him through January and into a substantial part of February, leaving less than two (2) weeks in February during which he was otherwise "absent." And that, therefore, he was not "absent without satisfactory explanation" for more than two (2) consecutive weeks.

The Union's latter argument must be rejected on procedural grounds. Simply put, it was not raised or litigated at the hearing. It is a new theory, advanced for the first time in the Union's brief and therefore not examined in or as part of the necessary adjudicatory process of the arbitration. It was not put to the essential evidentiary test. As such, the Company had no chance to consider it and no opportunity to offer rebuttal evidence and argument. Though rejected by me for these procedural and due process reasons, I observe, nonetheless, that the argument is clearly speculative and contrary to the evidentiary record of what, in fact, the grievant requested and was granted in vacation time.

Accordingly, and factually, I must find that the grievant was absent in February without permission for more than two (2) weeks; and that he was not then on vacation or any other approved leave of absence. The question then is whether he had a "satisfactory explanation" for that absence.
Article VIII Section 2(a)(2) of the contract has been interpreted and applied by arbitrators serving on the contract panel.

It is well-settled that, though not technically res adjudicata, prior Awards between the same contractual parties under or covered by the same collective bargaining agreement, which interpret the same contract language under substantially similar facts, should be accorded credit and persuasiveness by a subsequent arbitrator unless deemed by that arbitrator to be "palpably wrong." Especially so here, in my view, where prior arbitration decisions were rendered by members of a permanent contract panel and where one of the purposes of that panel is to make more probable decisional predictability, consistency and hence stability in the application and interpretation of the contract provision in dispute.

In Case #16 300 00283 94 (1995) Arbitrator Joseph P. Sirefman held that an employee of 27 years was properly terminated under Article VIII Section 2(a)(2), where the reason for his absence was that he was on a "drug binge." Citing a prior Award by Arbitrator Tim Bornstein, where a woman claimed that her absence was due to headaches and depression, Sirefman held, as did Bornstein that the employee had the burden of showing not just that he was ill or abusing drugs, but that he was so disabled as to be unable to come to work. Sirefman held that there is a distinction between "being ill" and "being unable to work or unable to notify the employer"; and that a "satisfactory explanation" required proof of the latter as well as the former. "General assertions of being under the influence of drugs," stated Sirefman, "do not put...to rest," questions of inability to come to work or inability to contact the Company.

Substantively, and factually the Sirefman decision is in point to the instant case before me. Here the grievant only claims to have been
under the influence of drugs, but admits he received no medical attention. So, not only is the credibility of his claim in question, but he has not provided proof or even probative evidence that he was "unable to work or unable to make contact with the Company." Indeed, by his own testimony he admits he did some work during the period to get money to buy drugs. So, though I can assume that a "drug binge" can impede one's ability to work, more than an assumption is needed under the Sirefman and Bornstein decisions to satisfy the contractual requirement of "satisfactory explanation" for the absence.

In Case# 11 300 01957 89 Arbitrator Theodore J. St. Antoine sustained the termination of a sixteen-year employee under Article VIII Section 2 of the contract who absented himself, in part at least, because of a "cocaine addiction." He stated "...the evidence in this record would not support the notion that the grievant's cocaine addiction or illness so incapacitated him...that it was 'impossible' for him to communicate...with the Company about his disability." So, implicit in Section 2(a)(2) and explicit in Section 2(a)(3) is the requirement that the absent employee "notify the Company," with the burden on the employee to show he was unable to do so. Again, speculatively I can understand an argument that a cocaine binge could foreclose an ability to notify the Company, but the prior Awards require proof of that, not speculation. In the instant case, the grievant has not met that requirement.

In the previously mentioned decision by Arbitrator Bornstein (Case #1130-1709-83) he cites the decision of Arbitrator Howard W. Kleeb (Case #1130-0178-70). Kleeb upheld a termination under Article VIII Section 2(a)(2) when the affected employee claimed the absence was due to "hypertension." Kleeb found the explanation unsatisfactory because there was "no evidence that the grievant's doctor told him not to work" or that
he "was bedridden or homebound or otherwise unable to perform normal duties." So again, the prior decisions place a burden on the affected employee to prove "inability to work," not just an illness or an affliction, or as in the instant case, a "drug addiction." The grievant in the instant case has not met that test.

The case cited by the Union, Case #11 E 300 01576 95, decided by Arbitrator St. Antoine, reversed a discharge which was imposed not under Article VIII Section 2, but rather under the "four-warnings" disciplinary policy of the Company. Also, the discharge was reduced to a suspension, in part at least, because the affected employee with 16 years service had a prior unblemished record.

Contrariwise in the instant case, the termination was based on a different contract provision and on a different contractual theory. And the grievant before me had an extensive prior disciplinary record for "absenteeism." In short, the case cited by the Union in support of its position is inapposite.

As I have said, I do not find these prior decisions that are similar to the facts and contract provisions before me, to be "palpably wrong." Notwithstanding any contrary views that I may have, I find that I am persuaded to accept them as precedential. With that ruling the Union's argument regarding the "illness nature" of drug addiction, the Company's recognition of that by its establishment of Employee Assistance Programs, the Company's knowledge of the grievant's addiction and the grievant's long service are insufficiently material to overcome the line of cases upholding the Company's application of Article VIII Section 2(a)(2).

In other words, the Company's obligations and practices regarding treatment of an employee for drug addiction do not constitute a
waiver of its contractual right to terminate an employee for an absence proscribed by Article VIII Section 2, even if that absence is due to drug abuse. Any other rule would grant an unlimited immunity to drug use and to absences due to drug use, and prevent action in cases of where the employee has failed at rehabilitation.

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

The termination of JAMES CRAIGHEAD was appropriate under the circumstances, and is upheld.

Eric J. Schmertz, Arbitrator

DATED: JUNE 6, 1996

STATE OF NEW YORK )  ss:
COUNTY OF NEW YORK )

I, Eric J. Schmertz do hereby affirm upon my Oath as Impartial Chairman that I am the individual described in and who executed this instrument, which is my AWARD.
The stipulated issue is:
Is the grievance of MICHAEL GALINDEZ arbitrable? If so, was there just cause for his discharge, and if not, what shall be the remedy?

A hearing was held on May 16, 1996 at which time Mr. Galindez, hereinafter referred to as the "grievant" and representatives of the above-named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator’s Oath was waived.

Arbitrability

The grievant was discharged on February 28, 1996. The Employer contends that he was still in his probationary period at that time and that under Article VII Section 1 of the collective bargaining agreement his discharge may not be protested as a grievance or in arbitration. Said contract Section reads:

All employees hired to work at the Agency will serve a probationary period of ninety (90) continuous calendar days from the date of hire.
The Agency shall have the right, after consultation with a Union representative, to extend the probationary period for an additional ninety (90) days. A probationary employee's service may be terminated by the Agency at any time, with or without cause, and the Union will not have recourse to the grievance and arbitration procedure over such termination. An employee who successfully serves the probationary period of employment will become a full-time or regular part-time employee with seniority computed from the date of hire. (Emphasis added)

The grievant was hired as a new employee into the Project Reach Program on August 28, 1995. (He served a previous term in a different program of the Employer and, undisputedly satisfactorily completed the probationary period in that program).

The Employer asserts that the grievant's ninety (90) day probationary status was extended on November 21, 1995 to February 28, 1996, and that he was terminated on the last day of that extended probationary period.

The Union contends that the extension of the probationary period for a second ninety (90) days was improper and ineffective because it was not done "after consultation with a Union representative"; that, therefore, the grievant became a full-time regular employee on or about November 28, 1995 and his grievance over his discharge is grievable and arbitrable.
The Employer acknowledges that the extension was effectuated without discussions with a Union representative but asserts that that requirement is directory and not mandatory in view of the last sentence of the foregoing contract provision.

"An employee who **successfully** serves the probationary period...will become a full-time employee..."(Emphasis added)

The Employer argues that because the grievant was determined by the Employer not to have successfully completed his probationary period, the failure to consult with the Union when it extended the probationary period was unnecessary.

The Employer's argument is not persuasive. The contract explicitly conditions the extension of a probationary period on and after consultation with the Union. That condition was not negotiated for a meaningless reason, and its presence must be given recognition and enforcement by the Arbitrator.

Moreover, if as a matter of contract law, the grievant's probationary period ended ninety (90) days after he was hired, namely on or about November 28, 1995, and he was not terminated then or before then, it must be contractually deemed that he "successfully completed" his probationary period. The Employer's failure to extend the probationary period as prescribed by the contract (i.e. after consultation with the Union) cannot turn or transform a contractually "successful completion" of the first ninety (90) day probationary period into an unsuccessful subsequent period. Indeed, the Employer acknowledged at the hearing that no particular notice is given an employee, nor any particular action taken when an employee successfully completes his probationary period. If, as
here, the extension of the grievant’s probationary period was contractually improper, the Employer’s argument that he continued as a probationary employee and that his work performance during that extended period was not yet satisfactory, cannot be sustained.

Accordingly, I find that by operation of contract law, the grievant completed his probationary period successfully and the grievance over his discharge is arbitrable.

On the merits, however, the Employer’s position is upheld.

The grievant was discharged for two (2) reasons. The primary reason was that his physical presence at work was so offensive and disturbing to other employees and to management that his continued employment could no longer be tolerated. The other reason was that he had not demonstrated the requisite skills to effectively work in the Project Reach Out Program.

The first reason is enough to sustain the discharge. The grievant’s clothing and body give off an intense, toxic and most unpleasant disinfectant odor. The fumes emanating from him irritate the eyes of other employees. Not only did other employees and management complain about this situation; not only was it repeatedly called to the grievant’s attention; but the fact of the condition was affirmed at the arbitration hearing. The Arbitrator experienced the odor emanating from the grievant, experienced its intensity and unpleasantness and experienced burning of his eyes.

The grievant admits the use of a strong, toxic disinfectant with the trade name of "Creolin." He explains that he trains dogs; that he uses this solution to clean the kennels; and that the solution is also
used on the dogs' coats. He claims that he has tried to eliminate the odor in his body and clothes by cleaning and buying new clothes and by taking other hygienic steps. Most significantly for this case, the grievant asserts that he stopped using the disinfectant in November 1995.

I am not satisfied that the grievant took the steps he could have taken to eliminate the odor. By not doing so, he disregarded the counselling and pleas of management, and remained insensitive to and disrespectful of the legitimate objections of his fellow employees. I cannot believe that if he stopped using the solution some six (6) months prior to the arbitration hearing, the odor from him would still be present, and certainly not at the current intensity. Moreover, the bottle of Creolin he produced at the hearing he admits he bought only a day before the hearing. If in fact he discontinued its use in November, why did he buy more of it so recently. I must conclude that despite expressed concern to him by management and more explicit warnings, he did not discontinue the use of the disinfectant and did not take steps to eliminate or reduce to acceptable levels the odors resulting therefrom. His failure to do so means to me that he has been more interested in his dog training business than his job with the Employer, and has remained indifferent to the way he is unreasonably disturbing the work environment of the other employees.

It is well-settled that a condition of this type, which makes the physical presence of an employee intolerable to others and which, as here, is intensively disturbing to the work environment, is grounds for termination of the offending employee, especially where, as here, he has failed to take steps to eliminate the offense.
The Undersigned duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above-named parties, makes the following AWARD:

The grievance of MICHAEL GALINDEZ is arbitrable.
The discharge of MICHAEL GALINDEZ was for just cause.

Eric J. Schmertz, Arbitrator

DATED: May 29, 1996

STATE OF NEW YORK )
COUNTY OF NEW YORK ) ss:

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

1. Is the grievance arbitrable?

2. If so, was the Employer's termination of steward DENNIS MORA in violation of the Collective Bargaining Agreement? If so, what shall be the remedy?

Hearings were held at the Hofstra Law School on June 26 and August 7, 1996 at which time Mr. Mora, hereinafter referred to as the "grievant" and representatives of the above-named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs.

Arbitrability

The Employer contends that the grievance is not arbitrable because neither the grievant nor the Union followed or complied with the various procedural steps of the grievance procedure and failed to submit the grievance to arbitration within the mandatorily prescribed time limits thereof. Accordingly, the Employer asserts that the "matter," namely the Union's protest of the discharge of the grievant, "shall be dropped."
In pertinent part Article XXI, Grievance and/or Arbitration Procedures, reads:

(a) Any grievance, complaint, or dispute between the Union and the Employer arising out of this Agreement, or as to the meaning, interpretation, application or alleged violation of any provision or provisions of this Agreement shall be handled in the first instance by an officer of the Union designated by the Union and a representative of the Employer involved who is a member of the Association.

(b) If the representatives of the Union and the Employer fail to reach an agreement within five (5) work days, the grievance, complaint, or dispute shall be handled by a designee or designees of the Union and the Association. The designee of Allied shall be a member of the Association or a permanent employee of the Association. The aggrieved party shall file a statement of the grievance, complaint, or dispute with the Association or the Union, as the case may be. The designees shall meet within (2) work days after the receipt of written notification.

(c) If the designees of the Union and the Association fail to reach agreement within three (3) work days after they meet, as provided above, the grievance, complaint, or dispute shall be submitted for final and binding determination to... the Impartial Arbitrator. If for any reason the Impartial Arbitrator is incapacitated or for any other reason is unable to act expeditiously, he shall designate
a substitute Arbitrator. If the Impartial Arbitrator is unable to make such designation, the Union and the Allied Association shall promptly make such designation. Should they fail to agree on a substitute Arbitrator, the procedures of the American Arbitration Association, shall be utilized to resolve these disputes on a case by case basis until the Union and the Allied Association agree on a permanent Arbitrator.

The Impartial Arbitrator shall have all the powers granted to arbitrators pursuant to the Civil Practice Law and Rules of Procedure of the State of New York and shall be authorized to compel the production of books and records of any kind or type which may be involved in a dispute. The decision of the Impartial Arbitrator shall be final and binding on the Employer and the Union.

(d) If the party initiating the grievance, complaint or dispute fails to submit the matter to the Impartial Arbitrator within ten (10) work days after the designee of the Union and the Employer are unable to reach agreement, the matter shall be dropped.

The Union does not dispute the Employer's assertion that it did not invoke the foregoing steps of the grievance procedure. Nor does it contend that the grievance was submitted to arbitration within the "ten (10) work days" prescribed in (d) above.

Rather, it is the Union's position that it was not required to initiate the grievance procedure because those steps should have been
taken first by the Employer. Specifically in this regard, the Union relies on Section XIV of the Contract which, in pertinent part states:

(a) A steward shall be appointed by the Union. Such steward shall not be laid off or discharged or discriminated against for performing his duties as a steward, unless such layoff or discharge is sanctioned in accordance with the grievance and arbitration procedure hereinafter provided for in Section XXL.

It argues that because the grievant was a steward, his discharge was procedurally defective at the threshold because it was not first "sanctioned" by the grievance and arbitration provisions of the Contract. And hence, it was the Employer's obligation, not that of the grievant or the Union, to initiate the grievance procedure and arbitration to "sanction" its action.

The Union also relies on the "20 day notice" provision of Article 7503, Civil Practice Law and Rules. The Union served that notice on the Employer along with its demand for arbitration to the Impartial Arbitrator. It cites the statutory language that precludes the Employer "from objecting that a valid agreement was not made or has not been complied with..."upon the failure of the Employer to move to stay the arbitration after service of the 20 day notice, and argues that the Employer is therefore foreclosed from claiming in this arbitration that the Union did not comply with the steps of the grievance procedure or any time limit thereof. Also, the Union contends that for the Employer not to raise the issue of non-arbitrability until the arbitration hearing constituted a waiver of that defense.
On the issue of arbitrability, the facts are not in dispute. The grievant was the Union's steward. He was discharged on November 3, 1995. The Union's first formal protest of the discharge was a letter to the Undersigned from Union counsel dated December 7, 1995, demanding arbitration. The first formal notice to the Employer of the Union's demand for arbitration was a subsequent letter to the parties from the Undersigned scheduling a hearing.

It is also undisputed that the parties are in disagreement over the reasons for the grievant's discharge. The Union claims that he was fired because and as a consequence of his engagement in statutorily "protected" union activity. The Employer contends that the discharge was solely because of the grievant's poor productivity on his bargaining unit job, his unauthorized absence from his work locations, and his failure to carry out the duties of his job classification.

I conclude that the grievance must be deemed as "dropped" within the meaning of Paragraph (d) above and that it is not arbitrable on the merits.

Article XIV does not foreclose the discharge of an employee who also happens to be a Union steward before "sanctioned" by the contractual grievance and arbitration provisions. It prohibits the discharge of a steward for performing his duties as a steward, until and unless so sanctioned. Here the parties are in critical dispute over whether the grievant was discharged for performing his duties as a steward or because his work as an employee was unsatisfactory. That threshold dispute is in and of itself a factual disagreement that takes the issue out of the restrictions of Article XIV and makes it, along with the issue of cause for the grievant's discharge, subject to review in and under the regular grievance and arbitration provision of the Contract. In short, with the
presence of that threshold dispute, I do not find that Section XIV barred
the Employer from discharging the grievant as an employee, subject of
course to review subsequently of all the reasons for the discharge in the
grievance and arbitration provisions of the Contract. As the Employer's
reasons for the discharge and its theory of the case are not based on the
grievant's status or duties as a steward, the Employer was not obligated
to initiate the grievance and arbitration provisions as conditions
precedent to effectuating the discharge. Rather, if at that point, the
Union believed that Article XIV was violated because the discharge was for
"protected activity" that belief constituted a grievable issue. And the
Union had the right and the duty at that point, to grieve its objection
and its interpretation of Article XIV. It did not do so. Indeed, if the
Employer's reason for the discharge were other than because of his
activities as a Steward, how could the Employer initiate an Article XIV
proceeding, which by its terms relates to a discharge for performance of
steward duties?

As is uncontested, the Union did not invoke any of the
sequential steps of the grievance procedure. It filed for arbitration not
within ten (10) work days of what would have been the point that the
designees of the parties (under (d)) were "unable to reach an agreement,"
but not until December 7, 1995, some 34 days later.

As a discharge case, with a disputed issue over whether the
grievant was discharged as an employee or for performing his duties as a
steward, the burden was on the Union to initiate and process its grievance
over the discharge through the grievance steps and thereafter to
arbitration within the ten (10) work days prescribed. That the contract
provides that the grievance "shall be dropped" (emphasis added) if the ten
10) work day time limit is not followed, means, of course, that that time limit is mandatory and a "statute of limitation."

The Arbitrator need not remind the parties that they, not he, negotiated the grievance and arbitration provisions of the contract, with its mandatory time limit. And it is to the contract and to its enforcement that the Arbitrator is bound. That the Union unilaterally thought that resort to the grievance procedure would be "futile" is not an excuse to by-pass it without mutual agreement to do so.

The Employer's "participation" in the selection of the Arbitrator and in the arbitration proceeding, does not constitute a waiver of its non-arbitrability defense. "Participation" constitutes a waiver of that defense only in a court proceeding for a stay or for a motion in court to vacate an Award.

The Union's argument that the Employer waived the non-arbitrability defense because it did not raise it until the arbitration hearing also is not good law. It is well-settled that the defense of non-arbitrability need not be advanced in the grievance procedure or earlier than at the arbitration forum, but can be raised effectively for the first time in the forum in which it is applicable, namely in the arbitration forum. Also, in this case, as the Employer did not know of the grievance until it was filed for arbitration, it had no opportunity or forum any earlier to assert the defense of non-arbitrability.

Finally, the Union's reliance on the statutory "20 day notice" is unavailing as a matter of law.
It is settled law that the "20 day notice" under Article 7503 of the Civil Practice Laws and Rules does not have the same effect in labor arbitration as it does in commercial arbitration. In fact, the "20 day notice" in a labor case does not oust the arbitrator from considering and ruling on procedural arbitrability issues even if the Employer (or respondent) does not stay the arbitration. Indeed, whether or not the Employer seeks a stay, the issue of procedural arbitrability remains within the jurisdiction and responsibility of the arbitrator and will be referred to him by the court even if a stay of arbitration is sought. In short, unlike a commercial arbitration, the service of a 20 day notice neither prevents the Employer from claiming procedural non-arbitrability in the arbitration, nor does it divest or release the arbitrator from the authority or duty to decide that issue.

The Commentary on Article 7503 in McKinney’s Consolidated Laws of New York reads:

While most of the rules governing labor arbitration are the same as those in commercial arbitration, there is one salient difference. Because of the national public policy which applies to collective bargaining agreements, there is a presumption of arbitrability in labor disputes. That presumption extends even to the root issue as to who must decide whether there is an arbitrable question. So long as there is some question, whether that question be substantive or procedural, it is for the arbitrators to decide whether the issues should be submitted to arbitration or left for common-law litigation. The court’s function is limited to finding that a dispute of some kind does in fact exist. If the parties to a collective bargaining agreement desire to escape this presumption, then express
language should be carefully drafted providing that questions as to whether a matter is arbitrable are for the courts. Matter of the Arbitration between Long Island Lumber Co., Inc. and Martin, 1965, 15 N.Y. 2d 380, 259 N.Y.S. 2d 142, 207 N.E.2d 190.

Here the parties have not included express language in their contract giving the courts the authority to decide procedural arbitrability. So, under 7503, even in the face of a 20 day notice and the failure of the Employer to seek a stay of the arbitration, the court will not decide procedural arbitrability, but leave that to the arbitrator. So, it is not the effect or consequence of the 20 day notice to foreclose the Employer from asserting non-arbitrability (i.e. the Union’s failure to comply with the contract) as a defense, and it remains the original duty of the arbitrator to decide that issue.

Consider the landmark case of Vincent J. Smith Inc. v. Truck Drivers and Helpers Local Union No. 640 1965, 23 A.D. 2d 944, 259 N.Y.S. 2d 888:

Under contract, between employer and labor union, for arbitration of grievances including "any controversy, complaint, misunderstanding, or dispute * * *": employer’s objections, urged as grounds for stay of arbitration proceedings, that labor union had not complied with provision requiring initial settlement discussion or with provisions considered by employer to be time limitations, and certain other objections were for arbitrator’s determination, and stay was properly refused. Vincent J. Smith, Inc. v. Truck Drivers and Helpers Local Union No. 649, 1965, 23 A.D. 2d 944, 259 N.Y.S. 2d 888.
The facts in that case are the same as the instant matter. The holding makes clear that even if the Employer here sought a stay of the arbitration after being served with a 20 day notice, the court would not determine the procedural arbitrability dispute but rather would deny the stay and refer the arbitrability issue(s) to the Arbitrator. That being so, it cannot be persuasively argued by the Union in this case that the Employer's failure to move to stay this arbitration foreclosed him from asserting his procedural non-arbitrability defense before the Arbitrator. If, as held, procedural arbitrability issues are for the Arbitrator, and so recognized by the courts, the service of a 20 day notice is essentially ineffective in depriving the Employer of that defense in arbitration. (Though it may deprive him of that defense in a court proceeding on the merits).

Moreover, the foregoing notwithstanding, I fail to see how the mere service of a 20 day notice after total non-compliance with the grievance procedures and its time limits to go to arbitration can or should serve to cure that defect. At least, if the 20 day notice is to have any effectiveness, the Union should be able to assert and show a prima facie compliance with the procedural steps its notice seeks to foreclose the Employer from contesting. The Union cannot show that here.

Considering all the foregoing and especially the duty of the Arbitrator to uphold and enforce the contract which the parties negotiated, I find that the grievant and the Union did not comply with the grievance steps of the contract, did not comply with the mandatory time limits thereof, and had a contractual obligation to do so on their initiative in order to protest the Employer's action and to gain arbitration of the instant grievance on the merits.
Accordingly, the Undersigned, Impartial Arbitrator under the Collective Bargaining Agreement between the above-named parties, and having duly heard the proofs and allegations of said parties make the following AWARD:

The grievance of DENNIS MORA is not arbitrable.

Eric J. Schmertz, Impartial Arbitrator

DATED: September 20, 1996

STATE OF NEW YORK  )
COUNTY OF NEW YORK  ) ss:

I, Eric J. Schmertz do hereby affirm upon my Oath as Impartial 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 9 Section 3 of the Collective Bargaining Agreement by failing to pay night differential Bonus to the Driver/Check-in employees, namely RALPH RAMOS, OMAR QUIROZ, JEFF GILROY and one other, within the period of time June 1994 to the present? If so, what shall be the remedy?

A hearing was held on September 20, 1996 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.

The pertinent contract provision, Article 9 Section 3 reads:
The practice of continuing a 10% night differential "Bonus" for straight time hours only, (worked between 6:00 P.M. and 4:00 A.M.) will continue for the duration of the Collective Bargaining Agreement.
It is the Union’s contention that the employees classified as Drivers/Check-in whose regular work schedule since June 1994 has been from 10:30 A.M. to 8:30 P.M. (except for grievant Quiroz, whose regular schedule is from 12 Noon to 10:00 P.M. on Monday and Tuesday, and 11:00 A.M. to 9:00 P.M. on Wednesdays and Thursdays) should have received the 10% night differential "Bonus" for the hours worked after 6:00 P.M.

The question of timeliness of the grievance and its arbitrability notwithstanding, the evidence conclusively establishes that the Employer and officials of the prior administration of the Union agreed at contract negotiations in 1994 that the foregoing contract provision would apply only to a shift then in existence which began at 6:00 P.M. (and has since been discontinued) and to the night loaders. Of course, what was agreed to by prior Union officials, remains binding on the Union today.

The Employer’s unrefuted testimony regarding what was discussed when Article 9 Section 3 was negotiated was that the Union understood and agreed that that provision would not apply to any employee who did not begin his work shift on or after 6:00 P.M. And that hence, it was understood that the Drivers/Check-in were excluded.

Also unrefuted is the Employer’s testimony that at the urging of the present Union leadership, an exception was made subsequently for about four to six weeks for employees classified as Scanners who were shifted from the day shift to night hours during the installation of automated systems. But that agreement to accommodate the Scanners was expressly without prejudice to the Company’s position that Article 9 Section 3 did not apply to Drivers/Check-in, and that if Drivers/Check-in sought the night differential during that four to six week period, they would not receive it. The Employer asserts that the Union representative gave
assurances that that was understood and "would be so explained to the Drivers/Check-in." Additionally, and also unrefuted is testimony and evidence that since 1994, Article 9 Section 3 has been applied and implemented consistent with the Employer's view of its meaning. With the exception of the four to six week period of accommodation for Scanners, whose work schedules were markedly disrupted by temporary transfers to night work, no employee who began work before 6:00 P.M. and worked thereafter received the night differential. And at no time since 1994 when Article 9 Section 3 was negotiated did any Drivers/Check-in receive the Bonus for hours he worked after 6:00 P.M. This unvaried practice affirms the Employer's interpretation of the contract.

Based on the foregoing, I am compelled to conclude that by mutual agreement and practice, Drivers/Check-in were not and are not entitled to the night differential "Bonus" set forth in Article 9 Section 3 of the contract.

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

The Employer did not violate Article 9 Section 3 of the Collective Bargaining Agreement by not paying Drivers/Check-in employees a night differential "Bonus" for any period from June 1994 to the present.
DATED: September 24, 1996

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.
The stipulated issue is:

Has the Company violated Article 33 of the Collective Bargaining Agreement by requiring bus operator, SALVATORE FUSCO to submit to a drug and alcohol test, complete a DMV 104 form and/or return to work prior to the test results, as the result of an incident which occurred on his school bus route on October 3, 1996?

If not, what shall be the remedy?

A hearing was held at the Hofstra University School of Law on December 5, 1996 at which time Mr. Fusco, hereinafter referred to as the "grievant" and representatives of the above-named Union and Company appeared.

All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.
The facts surrounding the incident which gave rise to the Company’s requirement that the grievant take a drug and alcohol test and fill out a DMV 104 form, are not in dispute. Significantly, also not in dispute is the Company’s acknowledgement that in no respect was the grievant at fault and in no regard did the grievant act wrongly or negligently in connection with that incident.

The grievant, a school bus operator, operated his bus properly on October 3, 1996, the day of the incident. He properly stopped his bus to discharge student passengers. He properly activated the yellow flashing lights on the bus signifying his approaching stop, and then activated the flashing red lights upon and during the stop. The students descended from the bus in an orderly and correct manner. One, the student that was ultimately injured, left the bus and got on to the sidewalk. But instead of turning right, as was his procedure to go to an after school activity, he turned left, and went to the crosswalk ahead of the bus. Then, as witnessed by the crossing guard who testified, he started across the street against a red light. As he crossed, he was struck by an automobile that passed the stopped bus from behind on the outside lane. The automobile failed to stop behind the bus, apparently disregarding the flashing lights. The student who was struck was injured and was taken by ambulance to the hospital.

Again, undisputedly, there was nothing that the grievant did or failed to do that had any proximate or causal connection to what happened to the injured student. The grievant was, as an attending police officer stated, only a witness to the accident.
Yet the Company required the grievant to undergo a drug and alcohol test by testing his breath with a breathometer and by taking and thereafter testing his urine. Both tests were negative for drug or alcohol use. He was also required to fill out a DMV 104 form describing the accident, and he did so under protest.

The Union protests both. It asserts that in view of the acknowledgement that the grievant was blameless, there were no reasonable grounds to require either; that both should be fully expunged from the grievant’s personnel record and removed from any source to which they were reported (e.g. the Board of Education, the Department of Motor Vehicle, the Department of Transportation). And that because the test for drugs and alcohol was without reasonable cause and did not follow the procedural requirements of Article 33 of the contract, the grievant should be granted extra compensation for the period of time from taking the test to the issuance of its official results, in addition to the regular pay he received for that period.

The Company responds that this is not an Article 33 case; that the administration of a drug and alcohol test and the filling out of a DMV 104 form are mandated by certain regulations of the Board of Education and the Motor Vehicle law and that the Company is legally and contractually bound to both.

Additionally, the Company asserts that both requirements were reasonable exercises of its managerial authority under the contractual management rights clause and that both were required not just to comply with the law and Board of Education regulations but were protective of the grievant as well as the Company in any subsequent lawsuit against either or both.
I conclude that the Company, operating the bus in question under contract with the Board of Education and transporting students, is bound to both the rules and regulations of the Department of Transportation and Federal Highway Administration and Title 17 Chapter 6 of the Administrative Code of New York City and to relevant provisions of the Motor Vehicle law. But I also conclude that those rules and regulations and the law must be interpreted and invoked under "a rule of reason" reflective of the particular circumstances of the incident or accident involved.

Both sides introduced into evidence written statements from officials of the Board of Education and the Department of Motor Vehicles purporting to authoritatively inform the Arbitrator whether or not, under the facts of this case, a test of the bus operator for alcohol or drugs and the requirement that he fill out a DMV 104 form were proper and mandated. However, those documents were unsupported by direct testimony and were not subject to the credibility test of cross-examination. Also they are inconsistent. As such, I must deem them non-determinative and probatively inconclusive.

However, I accept and take arbitral notice as applicable and relevant, Title 17 Chapter 6 of the Administrative Code of the City of New York and certain provision of the New York State Motor Vehicle law.

The latter requires that a DMV 104 form be filled out by the operator of the bus and filed with the DMV, SEP, DOT and with the office of Pupil Transportation of the Board of Education "within ten (10) days of an accident." (emphasis added)
The former requires a "post accident" drug test to any bus driver who during the course of his/her employment:

1. "is involved in a serious accident while operating a bus or other motor vehicle. (A serious accident is defined as an accident associated with the operation of a bus or motor vehicle used to transport school children in which an individual...must be taken to a medical treatment facility...)" (emphasis added).

The obvious questions in this case are whether the incident was "an accident" within the meaning of the Motor Vehicle law and/or "an accident associated with the operation of a bus...."(emphasis added).

Let me deal with the drug and alcohol test first. A rule of reason, in my judgement, would affirm any such test if the physical and mental condition of the bus operator had any reasonable, proximate or causal connection to the accident involved. In other words, a drug and alcohol test would be appropriate, indeed mandated, if the operator’s physical condition or impairment due to drug or alcohol use was in any way "associated" with the accident or in anyway "associated" with the operation of the bus where there is causal relationship between the operation of the bus and the accident. In my judgement that is what the foregoing law intends and means.

But, here, the grievant’s condition was in no way related to or "associated" either with the incident or with the operation of the bus.
Put another way, assuming arguendo that the test for alcohol and drugs was positive, that condition still would have had no causal or proximate connection to the incident. The student would have been struck by the oncoming car and injured regardless of the bus operator’s condition and whether or not the operator was impaired by alcohol or drugs. The grievant’s condition and his operation of the bus had nothing to do with the injury to the student, and hence both are irrelevant to what happened.

So, in short, I find no reasonable grounds to have required the grievant to undergo an alcohol and drug test. While I appreciate the Company’s argument that the drug or alcohol test was, in part, a protection for the grievant, I must conclude that is was not proper and cannot be upheld if it was not required by the meaning and intent of the foregoing Administrative Code. Nor I might add and for the same reason, namely irrelevance, I find no basis to sustain the test under the Management Rights Clause.

Accordingly, I shall direct the test, its results and any reference to it be annulled and expunged for the grievant’s personnel records. The Company shall inform the Board of Education and any other agency which received reports of it that it has been deemed by arbitration to be a nullity.

With the annulment of the drug and alcohol test and with the attendant legal effect that it never took place, I find it unnecessary to rule on the Union’s claim that it did not follow the prescriptions of Article 33. Nor need I deal with or rule on the Union’s requested remedy that the grievant receive additional compensation of any period of time he worked between taking the test and the issuance of its results.
However, applying the same "rule of reason" results in a different conclusion regarding the DMV 104 form. Irrespective of the Motor Vehicle law and without the need to decide whether the incident was an "accident" within its meaning, I conclude that the requirement that the grievant fill out a DMV 104 form was a proper exercise of the Company’s managerial authority. I accept and agree with the Company’s assertion that the DMV 104 was required and designed to provide information about the incident virtually contemporaneous with its occurrence, and that as such, it was needed for factual information and as a protection for the Company and the grievant against any liability suit. But I deem the DMV 104 form, filled out by the grievant and filed with the Board of Education and other agencies to be a statement from a witness to the incident and not a statement from a participant in the incident or accident or as one involved in the accident. The records of the Company and those of the agencies with which the DMV 104 form was filed should reflect that limited role by the grievant. This Award may be deemed to serve that purpose.

Also, a word to distinguish my ruling on the alcohol and drug test from the DMV 104 form. The alcohol and drug test I deemed irrelevant to the incident or accident. But the report and recollections of the grievant as a witness to the incident or accident are relevant to a full understanding of what happened. Hence, my rejection of the former and my affirmation of the latter.
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 drug and alcohol test administered to bus operator SALVATORE FUSCO is voided and nullified. As annulled, it shall be expunged from his records and notification of its annulment and expungement shall be given by the Company to the Board of Education and other agencies with which the drug and alcohol test and report was filed.

2. The requirement that Mr. Fusco fill out an DMV 104 form is upheld. But his role in doing so is and was as a witness to the incident or accident and not as a participant in or as involved in the incident or accident.

DATED: December 31, 1996

STATE OF NEW YORK )
COUNTY OF NEW YORK ) ss:

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

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

A hearing was held on May 8, 1996 at which time Ms. Gomez, 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.

Against the back drop of her involvement in several chargeable accidents for which she was progressively disciplined, the grievant is charged with responsibility for another "chargeable" accident on March 8, 1996 when the bus she was operating hit a tree located just outside the curb of the road. No passengers were on the bus at the time. The bus suffered some damage to the upper right side of its chassis. This last accident triggered the grievant’s discharge as the final step in the progressive discipline process.

Whether the grievant’s involvement in accidents before the accident of March 8 constituted grounds for her dismissal, is not the issue. The Company did not discharge her for those prior accidents on at the time of their accumulation, so that question is not before me.
Rather, in this case it is acknowledged that but for the March 8 accident the grievant would not have been discharged. The final accident was the event that triggered the discharge because, in the judgement of the Company, it was "chargeable" or in other words due to the grievant's negligence or unsafe driving.

It follows that based on that theory of this case, if the "chargeability" of that last accident has not been established, it would fail as the trigger for the discharge penalty and the grievant's discharge should be reversed even if her prior accident record justified dismissal. The burden of that proof is on the Company, I find that it has not been met.

It is undisputed that at the time of the accident the road was snow covered and icy. The grievant testified that because of the poor driving conditions she had slowed to about 15 miles per hour. She stated that when she attempted to make a normal stop behind a car ahead, which had stopped for a red light, the bus skidded, slid into the curb and made contact with the tree. There were no other witnesses at the accident. There is no evidence that the grievant's testimony about how fast she was travelling was false. There is no evidence that the road conditions were not as she testified. And most significantly, there is no evidence that such a skid, on snow and ice, would not have occurred unless the grievant was driving faster than 15 miles per hour or travelling too close to the car ahead.

In the absence of any contravailing evidence I do not consider it unreasonable or unrealistic to conclude that such a skid was possible
even at the slow speed the grievant asserts she was driving, even if she
was following the car ahead by an adequately safe distance and even if she
applied the brakes normally at a proper distance behind the car ahead in
anticipation or in response to the red light at the intersection.

Of course, it is equally possible that the grievant was
travelling too fast and had not maintained a sufficient distance behind
the car ahead. But the evidence presented by the Company, limited to the
fact that her bus hit a tree, is not enough to prove those assertions.

Her statement at her hearing that the "light caught the car
ahead by surprise" can be interpreted two ways. It could mean that she
had to stop more quickly than expected and had not properly anticipated
the need to do so. But, it could also be simply an observation of why she
stopped when she did. Considering the burden of proof in this matter I am
not persuaded that her statement is enough to prove that she was at fault
either because of the speed of the bus or the distance between it and the
car ahead, or otherwise. In short, the accident may have been because of
the snow and ice and for no other reason.

That many of the Company's buses travelled the same route that
day and about at the same general time without accidents is not convincing
evidence that the grievant's accident had to be her fault. There is no
evidence that the other buses applied their brakes at the point the
grievant did and I deem it speculative to reason that the location at
which the grievant applied the brakes was not different as to the quantity
or texture of the snow and ice than at any other location on that road.

Absent more direct or probative evidence about the accident I
cannot conclude that the conditions at the accident location were the same
for the other Company buses travelling that day on that road or that the
conditions confronting the grievant add up, probatively, to negligence or fault on her part within the meaning of "chargeability."

This is not to say that the grievant did not drive unsafely but rather that the requisite evidence does not prove it. Based on the record before me, it is too much of an evidentiary stretch to reach any such conclusion.

With this finding that the accident was not proved as chargeable the "trigger" reason for the grievant's discharge has failed and the discharge must be reversed.

However, companion to my several prior decisions in which I have repeatedly held that the Company has a fiduciary duty to the public to operate safely; that its drivers have a similar duty to drive prudently and safely; that the Company need not await a major accident before it can discharge a driver who incurs more than a reasonable number of accidents (rulings which I reiterated herein), I also recognize the condition of "accident proneness."

I have held and reiterate herein that a driver whose accumulation of accidents, regardless of severity and chargeability, may be disciplined and discharged as proper preventative steps in compliance with the Company's fiduciary duty on the ground of "accident proneness."

The grievant is just about at that point. Because she was discharged for a final chargeable accident, I will not, at this time, sustain the discharge on the different ground of accident proneness. But, she is expressly warned that she is at or virtually at the point of being so identified and could be so judged in the future in the event of a further accident, regardless of chargeability. For that reason, I shall deny her request for back pay. Instead, though I shall direct her reinstatement, the period from her discharge to her reinstatement shall be
deemed a disciplinary suspension for her quantity of accidents and to impress on her the precariousness of her tenure. In short, I shall give her one final chance to drive safely and accident free.

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 ELIZABETH GOMEZ is reduced to a suspension. She shall be reinstated but without back pay. She is expressly warned that her involvement in future accident(s), regardless of chargeability, will result in the judgement that she is accident prone and make her subject to discharge.

Eric J. Schmertz
Impartial Chairman

DATED: May 23, 1996

STATE OF NEW YORK )
COUNTY OF NEW YORK )

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

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

A hearing was held on November 20, 1995 at which time Mr. Navarro, hereinafter referred to as the "grievant" and representatives of the above-named Union and Hospital appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived and the parties filed post-hearing briefs.

Prior to his discharge the grievant was a Transporter whose primary duty was to transport patients among the facilities and treatment centers of the Hospital.

He was discharged for what the Hospital asserts were four incidents of "insubordination" and "inappropriate behavior" during the week of April 10, 1995. Those incidents separately or in combination, are viewed by the Hospital as cause for discharge, especially when considered against the backdrop of the grievant's prior disciplinary record. That record is made up of a number of verbal and written warnings and two suspensions, all for acts of "insubordination and inappropriate conduct."
The Hospital asserts that on April 10, 1995 the grievant objected to, resisted and delayed in reporting for clerical "cross-training" and engaged his supervisor, Raji Mathai in an argument over the assignment.

It asserts that on April 11th grievant "exploded" angrily when instructed to report to transport patients, and argued loudly with supervision over the assignment, at a time that the grievant believed he was on his lunch break. It says that the grievant was so loud and confrontational that it disturbed the Hospital's registrar and a patient and the patient's family with whom the registrar was dealing.

It asserts that shortly thereafter on April 11th, the grievant refused to comply with his supervisor's request for details regarding an "infectious exposure incident," when the grievant asked for an infectious report form that he wanted to fill out; telling his supervisor instead that he "did not want to discuss it with him."

And it asserts that on April 13th when told to report to the Cat-Scan Department at 4:00 P.M., as the only Transporter scheduled to work between 4:00 P.M. and 5:00 P.M., the grievant shouted at his supervisor when asked about his whereabouts, "you don't ask me where I've been or what I've been doing."

These four incidents the Hospital contends show that the grievant "continued a practice of not following direct orders, arguing (over) what he did not like, and showed blatant disrespect for his superiors." His conduct, claims the Hospital, was argumentative, challenging to supervisory authority, disruptive to the Hospital's operation, seen and viewed as unprofessional by patients and their families -- all intolerable in a hospital environment.
The grievant and the Union on his behalf contend that the grievant had the right to question the assignments, especially the "cross-training" which no other Transporter was required to undertake, and the work orders issued and to be carried out during his meal breaks. He claims that he gave supervision what details he knew about the "infectious incident"; that if he was loud or argumentative it was only in response to arguments started by Supervisor Mathai; that he never used threatening or profane language; that at no time did he refuse or fail to carry out the work orders given him; and that generally, the charges against him of the week of April 10th were in retaliation because he could not comply with his supervisor's request that he come in an hour early on April 10th.

For reasons set forth later, the grievant's prior disciplinary record is relevant to disposition of the instant issue. Though the Union attempted in this proceeding to dispute some of the prior disciplinary actions, those actions were either not grieved or not protested to any terminal step at and after the time imposed. Hence, they stand unrefuted and are no longer challengeable de novo in this proceeding. One or two of them, the Union contends, were to be withdrawn from the grievant's record by agreement with the Hospital. But the Hospital denies any such understanding. No hard evidence was offered of any such agreement. That being so, I find no basis upon which I could expunge these disputed disciplinary actions from the grievant's record or disregard them.

The Union did concede and stipulated that the grievant received ten verbal warnings for "insubordination" between February 1992 and August 1993 and that none of them were grieved.

In addition, the grievant received a written warning on June 10, 1992 for "disconnecting a patient's I.V. line despite being previously advised and in serviced not to handle I.V..."
He was suspended for one day on September 27, 1993 for "neglect of duty and insubordination by failing to carry out an order to go to Cat-Scan to take a patient back to (his) floor."

He was suspended for three days in February 1994 for yelling at a Ultrasound Technologist, for using profanity to her and shoving office chairs around, in response to her inquiry about the whereabouts of the patient the grievant was to transport. And for delay in carrying out the assignment thereafter.

In July 1994 the grievant received a "Final Notice" for "gross misconduct." He refused to carry out a direct order of supervision to transport a patient requiring oxygen after being instructed where to obtain the oxygen tanks.

In the latter notice, the grievant was told that that was his "final warning notice"... and that "any refusal to perform assignments within the Department will result in his discharge." The notice stated expressly that "there will be no discussions about nor repeated instructions to perform assignments"...and that "if Mr. Navarro has a problem with an assignment, he is reminded to strictly follow the Union and Hospital established policies on grievances." (Emphasis added)

In the notice of his first suspension, a copy of which he received, the grievant was told:

"This action will be followed by further monitoring of (his) behavior and counselling to take place when necessary but any further occurrence of this nature will result in disciplinary actions up to and including termination."
In the notice of his second suspension (a copy of which he also received) he was told:

"This action will be followed by further monitoring of (his) conduct. If there are any further occurrences of this nature...it will result in immediate termination."

On the facts of the four incidents during the week of April 10th, I find no reason in the record to disbelieve the testimony and versions of the events adduced by Hospital witnesses. I find that testimony credible and accurate. The grievant's contention that he was being punished for not coming in early on April 10th, is just not persuasive. On the other hand, because his job is at stake, the grievant had reasons to deny or "tone down" the allegations of argumentativeness, disrespect and objections to work assignments. I see no credible evidence that supports the grievant's explanation that he was provoked or that supervision initiated the arguments.

Standing alone, the events of the week of April 10th may fall short of traditional insubordination. Though obviously argumentative, and disrespectful of supervisory authority, the grievant apparently did perform the work ordered, albeit delayed at times and grudgingly. There is insufficient evidence that he used profanity to supervision.

But the events of the week of April 10th do not and cannot stand alone. When viewed appropriately against the backdrop of prior disciplinary action, and especially the admonitions referred to above, the grievant's conduct during the week of April 10th takes on a much more serious and prejudicial nature.
Despite warnings not to do so (particularly and expressly set forth in the Final Warning notice), the grievant continued to object to or question the propriety of work orders. He argued about the "cross-training." He argued about a work assignment during what he thought was his lunch break. He wrongly refused to give details of an "infectious incident" when expressly asked for these details by supervision, and he challenged supervision's authority by disrespectfully and angrily telling supervisor Mathai not "to ask where (we'd) been and what (he'd) been doing."

All of these acts by the grievant constituted a continuation of an altitude and conduct for which he was previously disciplined and which he was expressly warned would result in his discharge if continued. The grievant offers explanations for his conduct. For example, I understand his frustration over the confusion about his lunch break on April 11th. And I can understand his momentary anger at being told to work when he thought he was at lunch. But he was on notice not to engage in arguments or disputes with supervision. He was told expressly to pursue problems with his Union and through the grievance procedure. That is what he was told repeatedly to do and that is what he failed to do or refused to do during the week of April 10th. None of the events that week justified his confrontational and argumental conduct and altitude. All of these circumstances, if he thought them improper, were properly subject to and could be remedied by and through the grievance procedure, and not by "self-help" tactics of argument, delay and disrespect. In short, he continued to violate one of the best settled rules of industrial relations. He engaged in oppositional conduct and attitude when he should have forthwith complied with the work orders and resorted exclusively to the grievance procedure and his union representation for redress.
Finally, I agree with the Hospital that this type of conduct is especially inappropriate in a hospital setting. Patients and treatment procedures have top priority. Professionalism must be maintained. Loud arguments between staff and supervision; delays in transporting patients; and challenges to work orders are incompatible with professionalism and the carrying out of the Hospital's mission.

Under all the foregoing circumstances, I deem the grievant's overall record, culminating in the four incidents of the week of April 10th, to constitute continued behavior that is inappropriate for a staff employee of the Hospital and contrary to the orderly rules of an employee-employer relationship.

Prior to his discharge, he was not only progressively disciplined but expressly warned about any continuation of his unacceptable conduct. His failure to heed these proper warnings and admonitions not only justifies his termination, but makes him wilfully responsible for his own dismissal.

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

The discharge of EMILIO NAVARRO was for just cause.

Eric J. Schmertz, Arbitrator

DATED: February 13, 1996
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 6 CLUB and BARTENDERS UNION

and

THE PENN CLUB

--------------------------------------------------

OPINION AND AWARD

Case # 13 300 00082 96

In accordance with the arbitration provisions of the collective bargaining agreement between the above-named Union and Employer, the Undersigned was selected as the arbitrator to hear and decide a dispute relating to the Union's claim that "wages for all food servers be adjusted to the higher rate of pay as of January 12, 1996."

A hearing was held on May 13, 1996 at which time representatives of the above-named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Arbitrator's Oath was waived.

At the threshold the parties are in dispute over the scope of the issue before the Arbitrator. Hence they were unable to agree on a stipulated issue.

The Union claims that food service employees ("waiters"), in addition to their regular duties, are being required to perform duties of other higher paid classifications -- namely duties of a bar tender, utility worker ("steward") and bus person ("bus boy").

On behalf of the waiters the Union seeks a higher regular hourly rate of pay in compensation for those extra duties (i.e. either the bar tender rate, the utility worker rate or the bus person's rate).
The Employer asserts that the issue grieved is limited to a claim for bus person’s pay; that the grievance arose and was generated by the elimination of the bus person classification and the layoff of those so classified. It rejects as part of the issue, on the grounds that it was not grieved or part of the grievance meetings, any complaint regarding the assignment of duties attendant to the bar tender classification or the claim for the bar tender rate of pay. And it takes the same position regarding the allegations concerning the duties of and the claim for the rate of pay of utility workers.

The Union’s Demand for Arbitration reads:

THE NAME OF THE GRIEVANT: All waiters in Main Dining Room and the Grill

THE NATURE OF THE DISPUTE: Management has chosen to eliminate the position of busboy. Busboys are being laid off while food servers are asked to perform work outside their regular position. Management is requiring waiters to work in more than one position and is not paying the higher rate of pay in accordance with the contract.

THE CLAIM OR RELIEF SOUGHT (the Amount, if Any): Wages for all food servers be adjusted to the higher rate of pay as of January 12, 1996.

There was no written grievance. The grievance meetings were verbal.
It would appear that the grievance is protesting the consequences of the layoff of bus persons namely the assignment thereafter of bus person duties to the waiters. As such, that would confine the scope of the issue to that protest with a remedial claim for the bus person rate of pay.

However, absent a written grievance, the scope of the issue is not necessarily confined to the "short-hand" wording of the Demand for Arbitration. Inquiry may be made about the discussions of the parties during grievance meetings, especially where as here, arguably, the Demand for Arbitration is ambiguous. Though it protests the consequences of the layoff of the bus persons, it also protests the assignment of "work outside their regular position" (emphasis added). This can be reasonably interpreted to include and encompass duties of the restaurant bar tender and/or the work of stewards.

Based on the evidence, I am persuaded that during the grievance meetings the Union did call attention to work the waiters were doing that previously was performed by the restaurant bar tender and the stewards, as well as work of the bus person classification.

However, the foregoing notwithstanding, I find that the scope of the issue is limited to the Union's claim that the waiters are required to perform bus person duties and are entitled to bus person compensation.

I conclude that but for the layoff of the bus persons and the undisputed assignment of their duties to the waiters, there would not have been the instant grievance.

The facts show that the elimination of one bar tender (in the restaurant) took place before the Union was certified as the bargaining
agent; that for many months the waiters were assigned to perform bar tender duties (in the restaurant but not in the grill) and did it without objection. I conclude that they called attention to those extra duties during the grievance meetings not to protest that work standing alone or to seek bar tender pay, but rather to show the Employer all the "extra" duties the waiters were assigned at the time the work of the laid off bus persons was added.

In short, the addition of bus person’s duties triggered the grievance, and it is that additional set of duties about which the Union grieves and for which the Union seeks additional pay for the waiters. Otherwise the work of bar tendering would have continued without objection. Again, its reference in the grievance meetings was, I conclude, to show the Employer that the waiters had assumed enough extra work and that to take on the work of the bus persons as well was too much.

So I find that the Union was not claiming bar tender pay as part of its grievance.

Also, as the disputed bar tender work was assigned to the waiters before the Union’s recognition, was performed without objection and was not an issue in the negotiations of the contract, I must conclude also that the Union and the waiters had accepted that bar tendering work as part of their then regular duties, encompassed by practice in the waiter classification and the waiter rate of pay negotiated in the contract.
As I understand the record some stewards work was first assigned to bus persons when some stewards were laid off and thereafter, apparently, to waiters when the bus person’s classification was eliminated. Again, I find that this work, which originated with the stewards, was cited by the Union and the waiters at the grievance meetings. But it was cited, I find, not as independent work required of the waiters for which they should be paid the steward’s rate of pay, but as work inherited by the waiters from the duties previously performed by the bus persons and as part of the grievance protesting the assignment of bus person duties to the waiters. So, again with the elimination of bus persons the Union’s protest ran to the assignment to the waiters of whatever duties had been performed by the bus persons, with the remedial claim limited to bus person’s rate of pay.

Therefore, I deem the issue before me to be:

"Whether, because of the assignment of bus person duties to the waiters, the waiters are entitled to the bus person rate of pay or bus person compensation."

Unlike my ruling on the work of bar tendering by the waiters, which I found not to be encompassed in the issue grieved and as an integral part of the waiters job when the pay for the waiters was negotiated in the contract, I do not find or rule, by framing the foregoing issue, that steward work is properly part of the waiters classification, or that waiters were properly assigned those duties. Rather, I find only that a claim for the stewards rate of pay was not part of the grievance. It is unclear in the record whether, when the pay rate of the waiter classification was negotiated, or more significantly, when the parties negotiated the side letter of
December 18, 1995 (Joint Exhibit 1a) dealing with the elimination of the bus person classification and the assumption of bus person duties by the waiters, the parties knew or contemplated that the bus persons were performing some steward work or understood or contemplated that the assignment of bus person work by the waiters and the rate of pay negotiated then, would include a take over by the waiters of whatever steward duties had been assumed by the bus persons. Those questions are not before me and are not disposed of by my Award on the issue I have framed. The rights of the parties on these questions are therefore expressly reserved. Put another way, an objection by the Union to the assignment of steward work to the waiters and/or a claim for steward pay remains grievable and arbitrable. It was just not part of the grievance in this case.

However, a negative answer to the issue I have framed is mandated by express negotiated agreements between the Union and the Employer.

Schedule A (Employer’s Exhibit 3) of the collective bargaining agreement sets forth the rates of pay for the waiters. The Employer’s testimony that the rates of pay for the waiters and the increases therein took into consideration the addition of bus person’s duties was unrefuted. Schedule A must be read in conjunction with the side letter of December 18, 1995 (Joint Exhibit 1a). Both Schedule A and the side letter were negotiated or agreed to at the time the contract was consummated. The side letter expressly provides for the assumption of bus person duties by the waiters. I find that it is silent on the matter of pay for that assumption because the pay question, with
cognizance of the added duties, was dealt with and agreed to in Schedule A. In short, the side letter provided for the take over by the waiters of the bus person duties and Schedule A provided the wage rates and wage increases for waiters, with contemplation of those additional duties.

On that basis, the Union's claim for bus person's pay for the waiters for the performance of work previously done by bus persons, is denied without prejudice to the question of whether those additional duties and the rate of pay properly include work previously or regularly performed by stewards.

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

The Union's grievance on behalf of the waiters, as set forth in the Demand for Arbitration dated January 19, 1996, and limited to the claim for the bus person's rate of pay, is denied.

Eric J. Schmertz, Arbitrator

DATED: May 30, 1996

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 is:
What shall be the disposition of the grievance of OLGA GERENA?

A hearing was held on September 16, 1996 at which time Ms. Gerena, hereinafter referred to as the "grievant" and representatives of Local 153, hereinafter referred to as the "Union," and Professional Staff Congress, hereinafter referred to as the "Employer" appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

I deem the "grievance" to be set forth in a letter dated March 26, 1996 from Charles L. Smith, the Union's Business Representative to Dr. Frank R. Armuziato, the Employer's Executive Director. In pertinent part it reads:

Since we have been unable to reach an agreement on the reinstatement of OLGA WERBETSKI (GERENA, [e.s.]) to her former position at PSC, the Union has decided to pursue the matter in arbitration.
Based on the evidence and undisputed facts, I conclude, as a matter of law, that there is one agreement that controls this matter and that it is manifested in two forms — verbally and by an unsigned writing.

If the former, namely the verbal agreement, is proved, it is the enforceable agreement and the written recitation thereof is merely ministerial.

On the other hand, if the verbal agreement is not proved and/or if barred by the Statute of Frauds, then the written document must be resorted to as the controlling document. And because in this case that document is unsigned and contains express language making it unenforceable unless signed, an enforceable agreement cannot be proved, and no agreement between the Employer and the grievant would exist.

However, I am fully satisfied that the parties reached a complete verbal agreement; that it was supported by consideration; that it was properly relied on by the Employer; that it’s substantive terms were clear and undisputed and that the Employer could be held to those terms and to its performance. With these factual findings, the verbal agreement is removed from the Statute of Frauds.

The written document, reciting the terms of the agreement, need not therefore be proved or resorted to prove the agreement and its provision of unenforceability unless signed, simply does not come into play.

The essential facts are not in dispute. Following a one-week disciplinary suspension the grievant, on November 1, 1995 went on "disability" leave because of pregnancy. She and/or the Union on her
behalf shortly thereafter notified the Employer that she decided not to return to her job as legal assistant to the Employer’s general counsel; that she wanted to stay at home to take care of her baby after its birth; and that she wanted to negotiate a severance package. On her behalf and so authorized, Charles L. Smith, the Union’s Business Representative opened negotiations with Sheri Skolnick, the Employer’s office manager on the terms of a severance package for the grievant’s severance from the Employer’s employ. The negotiations went on for several weeks.

On or about December 21st, Smith notified Skolnick that a severance proposal offered by the Employer and similar to or the same as an earlier plan for another employee, Robin Caines, was acceptable to the grievant and that all issues were resolved. Smith then went on vacation until January 8, 1996.

Ms. Skolnick wrote the following memo to her file, dated December 20, 1995:

I spoke with Charles Smith today, and he said that OLGA WERBETSKI agreed to the following:

- 4 weeks salary;
- 5 weeks severance;
- 1 week vacation; and
- Letter of employment.

Charles said that we should put together an agreement dated 1/1/96 and effective on that day. He said we should use the agreement that was written for Robin Caines, and use similar language. Charles is on vacation until 1/8/96.
In anticipation of and then in reliance on the grievant’s intention and decision not to return to work and the aforesaid severance terms, the Employer, beginning in December (but earlier than December 21) posted and thereafter advertised for a replacement for the grievant.

There were no internal bids but were several responses to the ads. Interviews of applicants were held and one was offered and accepted the position on January 4th. She gave notice to her then employer and began work with the Employer January 22nd, replacing the grievant.

The Employer reduced the terms of the severance package to a formal written document in traditional contract form and faxed it to Smith on January 11th. The written document was never signed, because by then the grievant had suffered a miscarriage and, as Smith said "had changed her mind" about leaving. Smith notified the Employer that the grievant wanted to return to work and to her job. He claimed she had a right to do so because of "changed circumstances"; because the formal document was not signed as required by its terms to be effective;¹ and because she was "returning" from disability.

The grievant admits the foregoing events. She admits that she originally notified the Employer of her decision not to return to work. She admits that the severance package was originally acceptable to her and that she agreed to it in consideration for the termination of her employment. She acknowledges that she changed her mind when she lost her baby.

¹That language reads:

"This settlement agreement shall be effective and binding only when signed by all of the parties...."
The Union asserts that the grievant had the right to change her mind because the severance agreement was not finalized in writing and signed; that a signed document was necessary because the Union had told the Employer to give the grievant the same package as was given Caines and that an essential part of that earlier deal was that it was put in writing and signed. Also, the Union argues that the grievant had the general right to return to work following a "disability," and that the Employer "jumped the gun" by recruiting a replacement before the agreement was final. It asserts that the grievant should not be held responsible for any harsh results to the replacement employee if removed from the job by the grievant's reinstatement.

It is manifestly apparent to me that the parties reached a verbal agreement. The grievant was severing her employment. Her notice and that of the Union on her behalf was unequivocal on that point. The severance was supported by economic considerations and a letter of recommendation. The consideration was acceptable to the grievant and so communicated to the Employer. It was unconditional and without reservations. Substantively it was the same economic package and reference as was given Caines. And the Employer relied on its finality and completeness.

On those bases I find that the Employer had reasonable and proper grounds to so rely especially when the job involved was an important one and the general counsel needed it filled expeditiously. That it began recruiting for a replacement even before the December 21st date of "agreement" on the severance terms, is therefore understandable. And because ultimately an unconditional severance plan was agreed to, albeit verbal, any "premature" action was ratified by that agreement.
Did the grievant have the right to "change her mind" because of changed circumstances; because of the lack of signature on the formal written document which by its terms was not enforceable unless signed; and/or because the "deal" was not the same as was offered Caines in that it was not formally consummated by a signed writing?

My answers are in the negative. At no time was the grievant's notice of her decision to sever her employment conditioned on the birth of her baby. That was an implied if not express reason for her decision, but the decision itself was unconditional. Put another way, I find no controlling reason why the Employer had to await the birth or anticipate that she would want to return to work if the child was not born, before it made irrevocable arrangements to seek and obtain a replacement for the undisputedly important job of legal secretary (or assistant) to the general counsel. So, the "changed circumstances," though unfortunate and for which I have a personal sympathy, was not a reservation of any right to revoke a decision to sever her employment or to revoke a bilateral agreement to do so. Her decision not to return to work and that bilateral agreement to do so ended or extinguished any re-employment rights she may have had arising from her status on disability leave.

Because the full written agreement is pre-empted by the prior verbal understanding and need not therefore be proved to prove the agreed-to arrangement, the fact that it was unsigned and contained conditional language, is not controlling. In short, there are equitable factors that favor the grievant, but not the controlling contract law. In that circumstance the latter prevails, and the Arbitrator is so bound.

The "difference" from the Caines settlement is not persuasively probative. I am not satisfied that the Union's request that the instant
settlement follow the Caine "formula" included, as an essential or material term, the requirement that it be in writing and signed. I am satisfied that the request that it follow the Caine settlement meant that it be substantively the same, specifically in economic terms and the letter of recommendation. In that essential respect the verbal agreement with the grievant and the signed written agreement with Caines were the same.

Frankly, I believe that the Union's request for a signed, written document was, in both cases, a traditional precaution to be able to prove the "deal" and to remove any verbal agreement from later disputes and other impediments under the Statute of Frauds. In short, it is easier to prove a contract that is in writing and signed. Admittedly, a verbal contract is more difficult to prove. But if proved, as here, it is just as enforceable. This burden of proof, I believe, is what prompted the conditional language in the Caines case and, by happenstance and by simple copying, it found its way into the unsigned document in the grievant's case. As such, I do not find that it was a material or essential condition to what otherwise was a full, completed and enforceable agreement, albeit verbal.

Also, there is no evidence in this record that the Caine agreement could not have been proved and made effective if only verbal. That was never an issue or tested, because in that case there was a written, signed document, that would prove the severance plan, if proof in that case was necessary.
The Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above-named parties, makes the following AWARD:

The grievance of OLGA GERENA is denied. The parties are directed to implement the severance package agreed to.

Eric J. Schmertz

DATED: September 30, 1996

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.