The stipulated issues are:

1. Is the grievance of HAZEL LYNN MALKES arbitrable?

2. If so, did the District violate Article XIX 2 of the collective bargaining agreement when effective July 1, 2001 it terminated health insurance benefits of Ms. Malkes?

If so, what shall be the remedy?

A hearing was held at the offices of the School District on September 13, 2001 at which time Ms. Malkes, hereinafter referred to as the “grievant” and representatives of the above-named Association and School District 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.
Arbitrability

The District contends that the grievance is not arbitrable because the District did not receive proper notice of the Demand for arbitration in accordance with Rule 7 of the Labor Arbitration Rules of the American Arbitration Association.

That Rule reads:

"Arbitration under an arbitration clause in a collective bargaining agreement under these rules may be initiated by either party in the following manner:

(A) by giving written notice to the other party of its initiation to arbitrate (demand)."

I accept as credible the testimony of the Association that its Demand for arbitration was mailed both to the District and the American Arbitration Association. The Rules unlike the CPLR, do not require that service of the arbitration Demand be by Certified or Registered mail or by personal service. Rather ordinary mail is adequate. And this case, per the collective bargaining agreement is under the Rules.

Moreover, even if the District did not receive the Demand from the Association, it soon thereafter received correspondence from the Arbitration Association acknowledging the Association’s Demand with a list of arbitrators sent to the District and the Association for the selection of the arbitrator.

I take arbitral notice of that communication from this Arbitration Association, notifying the District of the filing of
this grievance for arbitration. So, I see no prejudice to the District or to its case herein by a failure of delivery of an original Demand for arbitration, if such failure occurred. The District received timely and adequate notice of the filing for arbitration, which avoided any prejudice to its case.

Accordingly, the grievance is arbitrable.

The Merits

Pertinent to this case is Article XIX 2(a) of the contract, which reads:

The current group health insurance program or its equivalent will be made available to employees whose workweek is not less than 20 hours subject to regulations and conditions established by the insurance carrier. All health benefits for this unit are on a twelve-month basis. (emphasis added)

The grievant was an employee who met the no less than 20 hours work week requirement, and received health insurance benefits each year from the date of her hire as a full-time pool substitute in March 1999 until July 1, 2001.

Prior to the termination of her benefits on July 1, 2001, she received the health insurance benefits on a continuing twelve-month basis, which included the summer months of July and August in 1999 and 2000.

It is the Association’s contention that the contract provision, underscored above, requires the continuation of health benefits for twelve months each school year. And that that
twelve-month period runs from the commencement of a teacher's teaching schedule in September, through the next August.

Accordingly, contends the Association, irrespective of the grievant's status in July and August 2001, her contractual benefit of health insurance must continue through July and August 2001.

The District interprets the controlling contract provision differently. It asserts that the health insurance benefit is for "employees," and therefore, ceases when employment with the District ends.

Here, the District points out that the grievant was terminated at the end of June 2001, and that therefore, her entitlement to benefits ended at that point. It explains that she continued to receive benefits during July and August of the prior years because she remained an "employee" then by virtue of her teaching assignments beginning again in the subsequent Septembers.

Moreover, the District asserts that the "school year" runs not from September through August but from July 1st through June 30th. And that therefore, the grievant received twelve months of health insurance benefits over that period of time, terminating, with her severance from employment, on July 1, 2001.

Based on the facts peculiar to this case, I find I need not define the "school year," nor decide whether the
grievant’s benefits ended on July 1st, 2001; nor whether the contractual reference to benefits on a twelve-month basis carries over after an employee’s termination.

I need not decide those questions, which otherwise would be critical to this case, because I am not satisfied that the grievant was, in fact, terminated effective July 1, 2001. The letter of “termination” is equivocal, leaving open, in my judgment the possibility of her reappointment for September 2001.

The letter purporting to notify the grievant of the end of her employment with the District is a letter dated June 4, 2001 from the Principal, Mark Kavarsky.

In significant part it read:

...I...informed you that I was withholding my recommendation for you as a pool sub for 2001-02 so that I may review the staff organization needs for the Middle School. (emphasis added)

I do not read that to be a final termination decision. Though the letter went on to cite a “replacement” position for which the grievant was not qualified, it did not unconditionally terminate her employment. Indeed, I interpret the foregoing language not to rule out the possibility of an opening and reappointment after, as the Principal stated, he “review(ed) the staff organization’s needs for the Middle School.”
The dictionary definition of "withholding" is "to hold back" or "to keep from actions." It leaves things in suspension, pending a later final decision. It did not, in my view, unequivocally notify the grievant that there was no possibility of reassignment for September 2001.

It can be argued that the final sentence of the letter:

"I wish you the best in the future and thank you for all your efforts on behalf of the children of Lawrence Middle School."

is notice that her services had come to an end. But that statement is boilerplate cordiality and, in my view, where contract rights are involved, is not enough to constitute absolute notice of termination.

Under that particular circumstance it cannot be said that for health insurance purposes, the grievant was effectively terminated until September when she was replaced and/or not re-appointed.

So, from July 2001 through August 2001, her status was contractually similar to that of Stephen Clements. Mr. Clements, a teacher was "excessed" in June 1974, "excessed" in June 1975, and again "excessed" in June 1985. To be "excessed" is synonymous with an industrial "layoff." It is notice to an employee that his active services in the future are not needed, but he retains a right of "recall" if conditions change. The grievant's status (i.e. "withholding recommendation" on
re-appointment) is equivalent to Clements' status as "excessed." Yet, Clements continued to receive his health insurance benefits for the months of July and August, 1974, 1975 and 1985.

The District justifies this on the fact that Clements was ultimately re-appointed for the Septembers of those years, and that therefore, he was not terminated. Clearly, however, had he not been re-appointed, and had he remained "excessed" he would have received the health insurance benefits for July and August nonetheless. The grievant is similarly situated. Under the particular facts of this case, I need not, therefore, decide whether the grievant would have been entitled to health insurance benefits for July and August 2001 if she had been terminated unconditionally on July 1st, 2001. Though perhaps disappointing to the parties, I leave that to a later dispute.

AWARD

The grievant, HAZEL LYNN MALKES was entitled to continuation of the health insurance benefits for the months of July and August 2001.

The District shall make her whole for any expenses incurred by its wrongful termination of those benefits on July 1st, 2001.

Eric J. Schmertz, Arbitrator

DATED: November 9, 2001

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

BUW LOCAL 329

-and-

NATIONAL GRID USA SERVICE COMPANY, INC.

The issue is:

Did the Company violate the collective bargaining agreement by its rejection of the grievant, SEAN MURPHY for the position of Material Handler at the Franklin CDC in April 2001? If so, what shall be the remedy?

In the course of the proceedings the above-named parties reached the following Stipulated Agreement:

Without prejudice or precedent for any further matters, and without prejudice to the Company's contract rights regarding the filling of vacancies, SEAN MURPHY shall be accorded a total of three additional hours of instruction, practice and testing to qualify on the forklift trucks. A Union representative (the shop steward) may observe.

The Company's determination regarding the outcome after the three additional hours shall be final and binding.

Eric J. Schmertz, Chairman

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.

Sworn to before me on this 22nd day of October, 2001

PATRICIA A. SIMMONS
Notary Public
Qualified in New York County
Commission Expires July 31, 2005
Thomas M. Hession, Company Arbitrator

DATED: OCTOBER , 2001

STATE OF )

COUNTY OF ) ss:

I, Thomas M. Hession, do hereby affirm upon my Oath as Company Arbitrator that I am the individual described in and who executed this instrument.

Sworn to before me on this ___ day of October, 2001

____________________________
Notary Public

George Fogarty, Union Arbitrator

DATED: OCTOBER , 2001

STATE OF )

COUNTY OF ) ss:

I, George Fogarty, do hereby affirm upon my Oath as Union Arbitrator that I am the individual described in and who executed this instrument.

Sworn to before me on this ___ day of October, 2001

____________________________
Notary Public
IN THE MATTER OF THE ARBITRATION

between

BUW LOCAL 329

-and-

NATIONAL GRID USA SERVICE COMPANY, INC.

The issue is:

Did the Company violate the collective bargaining agreement by its rejection of the grievant, SEAN MURPHY for the position of Material Handler at the Franklin CDC in April 2001? If so, what shall be the remedy?

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The Company's determination regarding the outcome after the three additional hours shall be final and binding.

Eric J. Schmertz, Chairman

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.

Sworn to before me on this 22nd day of October, 2001

Notary Public

PATRICIA A. SIMMONS
Notary Public, State of New York
No. 31-4953942
Qualified in New York County
Commission Expires July 31, 2023
I, Thomas M. Hession, do hereby affirm upon my Oath as Company Arbitrator that I am the individual described in and who executed this instrument.

Sworn to before me on this ___ day of October, 2001

Notary Public

George Fogarty, Union Arbitrator

I, George Fogarty, do hereby affirm upon my Oath as Union Arbitrator that I am the individual described in and who executed this instrument.

Sworn to before me on this ___ day of October, 2001

Notary Public
The stipulated issue is:

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

A hearing was held at the offices of the Undersigned on February 21, 2001, at which time Mr. Butler, 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 memoranda.

The grievant was discharged on January 12, 2001 "for a chargeable rear-end accident and previous record."

The outcome of the instant case was cast on July 6, 1999 when the grievant was suspended four days, and warned that future (accidents) "will result in his being terminated." The four-day suspension was negotiated by the Union and the Employer, after the

1 "stationary objects"
Employer's initial decision to discharge the grievant for the accidents then involved.²

Prior to July 6, 1999, the grievant's driving record shows some nine chargeable accidents during his eleven years of employment as a bus driver. These driving accidents included hitting parked cars (four times), hitting such objects as a sign post, a fire hydrant, a tree branch and the side of a bridge.

These prior accidents for which the grievant was subjected to disciplinary hearings were, in my view, considered by the Employer in the initial decision to discharge the grievant on July 6, 1999, following the accident of June 29, 1999, and were duly considered by both the Union and the Employer in reaching an agreement to reduce the discharge at that time to the four-day suspension.

Accordingly, I accept as accurate, and no longer contestable, the facts of those accidents and the July 6, 1999 agreement between the parties related thereto. So, the suspension and final warning are binding and constitute not only a progressive discipline step, but joint recognition that the grievant's accident record was excessive and unsatisfactory.

Against that backdrop is the instant charge against the grievant. It is undisputed that on January 8, 2001, while driving a school bus (without passengers) the grievant rear-ended a jeep striking a "concrete divider and parked car"
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 RUDOLPH BUTLER was for just cause.

Eric J. Schmertz
Impartial Chairman

DATED: March 23, 2001

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:

Did the Company violate Section 25 of the collective bargaining agreement which it failed to pay certain employees holiday pay for July 4th, 2000? If so, what shall be the remedy?

A hearing was held on December 8, 2000 at which time 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 parties filed post-hearing memoranda.

This decision is limited to the particular facts in this case and shall not be construed as precedential for any other issue involving holiday pay. The facts in this case are limited to a claim for holiday pay for July 4th, 2000 by certain employees who ended picks on June 28, 2000 and then commenced new picks on July 5, 2000. The holiday of July 4th, 2000 fell between the end of one pick and the beginning of the next pick.
It is the contention of the Union that the foregoing particular facts fall within the specific provisions of Section 25 of the contract, entitled the grievants to the July 4th, 2000 holiday pay.

In addition to listing July 4th as a paid holiday, the contract requires that:

"All employees must report to work and complete their assignment in their last scheduled day before, first scheduled day after, and the holiday, if scheduled to be eligible for any holiday pay whatsoever."

(emphasis added)

The Union argues that the grievants completed their last scheduled assignment on June 28th, 2000, when their picks ended, and completed their first scheduled assignment on July 5, 2000, with the beginning of their next picks. None were scheduled to work on the July 4th holiday. The Union asserts that the grievants complied with the conditions for holiday pay under clear contract language.

The Company asserts that historically and as a matter of unvaried past practice, it has never granted holiday pay to employees who did not work the holiday, when the holiday fell between the end of one pick and the beginning of the next pick. The Company points to other holidays over the years, such as Labor Day and Union Membership Day for which the Company did not grant pay when those holidays fell within a hiatus between picks and that the Union did not object to or grieve those circumstances.
This practice, and the Union’s failure to object, should be interpreted, the Company argues, as a mutual recognition that there is no eligibility for holiday pay when the holiday falls between the end of one pick and the beginning of another.

The Company points out that to accept the Union’s interpretation of Section 25 would lead to the grant of pay for holidays that occurred while an employee was on a lengthy layoff, on the erroneous theory that the last and first days such an employee would have worked were the day before his layoff and the first day following his recall.

I do not consider this last example as relevant to this case. First, as I have stated, I am not deciding the eligibility or non-eligibility of employees on layoff. This case involved grievants between picks and the holiday of July 4th, 2000. Secondly, the status of the grievants and on employee on layoff is different. The latter (on layoff) are inactive and not considered regularly employed. The grievants, I conclude, remain as active employees during the hiatus of a few days between one pick and the next. (As here, between June 28th, 2000, and July 5th, 2000). Similarly, the status of employees not working or working differently during the summer months may be different from the grievants in this case. Again, I make no determination regarding holiday pay during summer months.

As the parties well know, if the contract is clear, past practice that may be different from that contract language is
prospectively immaterial. When challenged, the clear contract language prevails.

For the instant case, and limited to the facts of this case, namely a pick "hiatus" of a few days, the holiday of July 4th, 2000 within that hiatus and grievants who worked a last assignment at the end of one pick, and the first assignment of the next pick, I find the contract language clear and supportive of the Union's position. Particularly significant to my mind is that the parties did contemplate "Exceptions" to the "last and first day" assignment condition, in the event of "substantiated just cause, i.e. verified sickness, death." And, though those are exceptions to the last and first day work requirement, the parties were aware of "exceptions" generally and had the contemplated opportunity to include contractual exceptions to eligibility. The most obvious would have been to exclude holiday pay for a holiday that fell within a hiatus between picks. But that was not done.

Frankly, where the negotiated contract accords employees specified paid holiday, including July 4th, and where the contract language does not exclude that pay when the holiday falls within a hiatus between picks, I think it unreasonable and contrary to the explicit contractual holiday pay benefit, to deny holiday pay for July 4th, 2000 when only a few days elapsed between picks during which July 4th, 2000 fell, when the employees worked the last scheduled assignment of the prior pick and the first scheduled assignment of the successor pick. The "luck of the draw" or,
here, the "luck of the pick" and the calendar for July 4th, 2000, should not work to deny holiday pay for what otherwise is an unrestricted contract benefit.

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 Company violated Section 25 of the collective bargaining agreement when it failed to pay certain employees holiday pay for July 4th, 2000. The Company is directed to make that payment.

Eric J. Schmertz
Impartial Chairman

DATED: January 17, 2001

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 CLIFORD GUERRIER? If not, what shall be the remedy?

A hearing was held on February 6, 2002, at which time Mr. Guerrier, 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.

Considering the seriousness of the accident, which the grievant acknowledges was his fault and due to his negligence (apparently he activated the bus accelerator rather than the brake as he moved forward, causing a severe rear-end collision with a bus that was parked and loading passengers ahead); the injury to four passengers and its driver and the grievant, requiring hospital attention for all six; the relative short-term employment
of the grievant with the Company (16 months); the probable compensation and tort liability of the Company arising from the accident; and the cost of repairs to both buses, totally about $10,000, the grievant's discharge is not surprising.

The "just cause" question, however, is how the facts and circumstances of this case fit, if at all, into my many prior decisions on penalties for accidents.

As I hope the parties know, I have not been tolerant of accidents. I have enumerated certain principles in that regard. I have held that the Company has a fiduciary duty to provide safe transportation for the public, and that its bus drivers have a high duty of care in the furtherance of that objective.

I have held that a series of accidents, even if minor, is cause for progression discipline and discharge in my recognition of "accident proneness." And that the Company, faced with an accident-prone driver or one with more than an ordinary number of minor accidents, need not wait a major accident before it may terminate such a driver.

In short, I have repeatedly ruled in favor of preventative action, all in recognition of the Company's and the drivers' duties to the riding public.
But, I have not held that a driver is an absolute guarantor of no accidents (except, of course, in the case of willful misconduct) or that a first accident even one that is severe is automatically or *per se* grounds for dismissal. In that circumstance I believe that the Impartial Chairman should look to see if mitigating factors are present and if so whether a disciplinary penalty less than dismissal is adequate for any such first offense.

I am not saying that a first but severe accident may not be grounds for discharge, but rather that if there are mitigating factors a rule of absolute liability should not necessarily obtain.

Here, I find factors in mitigation, which support a ruling that a lengthy disciplinary suspension rather than summary dismissal, is adequate and proper.

The grievant displayed honesty and contrition. He did not try to deny his fault. He offered no excuses but admitted, his negligence. He did not try to justify or explain away what he did or his mistakes in operating the bus. He is not charged with
any misconduct. There is no evidence nor even an allegation of drug or alcohol use. He has had no prior disciplines nor chargeable accidents, and, though self-serving, I believe that his earlier service with Varsity Bus Lines was accident free.

He expressed what I accept as an honest apology for what happened, for the injuries he caused and the damage to the Company's property. I sensed that except for this accident the Company considered him a cooperative and satisfactory employee who took on extra assignments (on holidays, etc.) and with a likeable personality.

His plea for another chance was, in my view, sincere and meaningfully remorseful.

Under the foregoing mitigating circumstances, and confined to this case alone, I think the grievant can serve without further trouble. I have decided to take the chance of restoring him to duty without any back pay, with the admonition to him that he must now drive free of accidents. At the Company's discretion he may be required to undergo re-training before being restored to regular duty.
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:

On a last chance basis, the discharge of CLIFORD GUERRIER is reduced to a disciplinary suspension. He shall be restored to duty without back pay. At the Company's option he shall be required to undergo re-training before returning to duty.

Eric J. Schmertz
Impartial Chairman
The stipulated issue is:

What shall be the disposition of the claims of CHARLES BEMBRY?

A hearing was held on February 23, 2001 at which time Mr. Bembry, hereinafter referred to as "Bembry," and representatives of "Bembry" and the above-named Credit Union appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The parties filed post-hearing memoranda.

Bembry claims that because he was discharged from the post of Assistant Manager/CFO of the Credit Union, "for reason other than 'cause'" he is entitled to severance pay under Section 18 of his employment contract for the "remainder of the contract" (a period greater than "eighteen months"), plus "retirement pension contributions," "401K contributions," "life insurance," and "medical health insurance," in the total amount of $217,739.99.
Based on the record before me I make the following Findings of Fact:

1. The position of Assistant Manager/CFO, held by Bembry was an officership of the Credit Union;

2. Bembry's appointment to that post effective June 1, 2000 was procedurally violative of the Credit Union's by-laws and the Federal Credit Union Act in that it was effectuated prior to the annual meeting of the Credit Union membership; and

3. The appointment prior to the annual membership meeting was not authorized or justified by instructions or orders from the Federal Examiner of the National Credit Union Administration ("NCUA") that would constitute an exception to the by-laws and NCUA regulations.

I find that the Assistant Manager/CFO was an officer within Article VIII of the Credit Union's by-laws.

Article VIII states, *inter alia* that the "officers of this Credit Union shall be a president, a vice-president, a treasurer, and a clerk..." (emphasis added).

Though the Assistant Manager/CFO is not listed in Article VIII, it is clear to me that his duties may include the duties of the treasurer and that he shall assume those duties "during the absence of the treasurer." I conclude that with the partial title CFO (i.e., "Chief Financial Officer") (emphasis
Bembry's job was synonymous with that of the "assistant treasurer" under Section 6 of Article VIII of the by-laws. In pertinent part that Section provides that the assistant treasurer may:

"perform any of the duties devolving on the treasurer (and)...may also act as the treasurer during the absence of the treasurer..."

Bembry's contract of employment also supports his officership. It provides, inter alia that he "will report directly to the Chief Executive Officer of the Credit Union" and "in the absence of the Chief Executive Officer of the Credit Union, Mr. Charles Bembry will perform the functions of the Chief Executive Officer's position" (emphasis added).

Clearly the Chief Executive Officer is an officer of the Credit Union. So, a person authorized to perform Chief Executive Officer’s functions (here Bembry) is a fortiori, an officer also.

Also, Article VIII Section 5 of the by-laws states inter alia that the treasurer shall be the General Manager of this Credit Union. So, as the titles of treasurer and manager are synonymous, the manager, per force is an officer, the absence of that title from the by-laws notwithstanding. Additionally, as it appears that the Manager is also synonymous with the Chief
Executive Officer, Bembry’s authority by contract to assume the duties of the Chief Executive Officer, further supports the conclusion that his position as Assistant Manager/CFO is an officership of the Credit Union.

Bembry was appointed by action of the then Board of Directors of the Credit Union and signed a three-year contract dated May 25, 2000. The contract was to be effective “on or about June 1, 2000.” The annual membership meeting of the Credit Union was held in the afternoon of May 26, 2000. At the membership meeting certain new directors of the Credit Union were elected (reflecting the earlier change in leadership of the Local Union). The newly constituted Board of Directors (with new directors Bermudez, Steinberg and Zachman) met on May 30, 2000 and also elected William Smith (the new president of the Local Union) to fill an additional Board vacancy created by the resignation of Seymour Goltz. Among its actions on May 3rd, was a 4-2 vote to “dissolve” the contracts of the Chief Executive Officer and Chief Financial Officer. I find it significant that leading up to that vote, Board member Caniano stated “it is the Board of Director’s responsibility to vote for officers of the Credit Union” (emphasis added). I interpret that to mean the Chief Executive Officer and Chief Financial Officer. No Board member disputed that statement or characterization.
It is that termination of Bembry's contract as Assistant Manager/CFO that gave rise to the instant dispute and arbitration.

The dispute centers on the following part of Section 18 of that contract. It reads:

In the event that Mr. Charles Bembry is terminated due for reasons other than "cause" he will be paid eighteen (18) months severance compensation or the remainder of the contract, whichever is greater..."

Article VIII, Section 2 of the by-laws (entitled Officers and Their Duties) provides that:

"officers elected at the first meeting of the Board of Directors following the annual meeting shall hold office for a term of one year and until the election and qualification of their respective successors..."

Not before me and not needed for a decision in this case is whether Bembry's three-year contract was inconsistent with the foregoing reference to a one-year term. Here, Bembry's employment contract preceded the membership annual meeting, not by vote of the Board of Directors following the annual membership.

Impliedly, the National Credit Union Act (12 USC §1758) and the regulations of the National Credit Union Administration speak to this issue.
Section 1761(a) of the Act provides *inter alia* that:

"At their first meeting after the annual meeting of the members, the directors shall elect from their members, the board officers..."

It is undisputed that the foregoing Standard Form for Credit Union by-laws was adopted by this Credit Union.

Though the foregoing applies to officers of the Board, not to officers of the Credit Union, its obvious purpose, in my view, relates to both. It recognizes that at an annual membership meeting new Credit Union Board Members may be selected and that following the annual membership meeting, a newly constituted and possibly changed Board of Directors would take office. Clearly, the purpose of the Standard Form is to preclude the election of officers of the Board by a Board (or a part thereof) that is subject to change or rejection by the membership. Or, in short, the newly constituted Board, by action of the membership at its annual meeting, is the Board that should elect its officers for the future.

That being so, the same purpose and logic should apply to the election of officers of the Credit Union. Those officers should be chosen by a Board fully and newly constituted and elected by the membership at the annual meeting, and not by a Board or a part thereof that may be "lame duck" or potentially "lame duck."
And as I see it, that is the fair and logical application of both the by-laws and the NCUA Standard Form, and best reflective of the current will of the Credit Union membership in this particular case.

Remaining for determination is whether the action of the then Board on May 25, 2000, prior to the annual meeting, was compelled or sustainable, irrespective of the by-laws and NCUA regulations. Bembry asserts that it was.

He contends that the NCUA, through its Examiner-in-Charge, Heather Murphy, directed the Board to have a Chief Executive Officer replacement in place when the then incumbent Chief Executive Officer, Stanley Myers, resigned as of June 1, 2000. And that to meet this directive, the Board had to name a replacement for Myers, in advance of the annual membership meeting. What Murphy said is critical. Frankly, I do not find it so definite or precise to supercede the by-laws and the NCUA regulations.

The NCUA Examination Report stated:

**Management Conduct**

For the past year, the board of directors has experienced many changes and personal issues stemming from the change in sponsor management. This has left vacancies in the board and credit committee. According to your by-laws, you must have 7 board of directors. Currently there are 6 and Mr. Myers submitted his letter of resignation effective June 1, 2000. It is imperative that you have a full board of directors.
elected at your annual meeting at the end of May, 2000. You must also develop a succession plan to be sure the Credit Union operations continue to run smoothly when Mr. Myers leaves (emphasis added).

The foregoing, read as an entirety means to me that the timing of two events are, if not, simultaneous, closely related. They are the election of Board Members at the annual membership meeting and the "develop(ment)" of a "plan" to replace Myers. As it is the directors who elect or appoint a replacement for Myers, it is more logical and consistent with the reference to the by-laws, that Myers' replacement be named by the Board elected at the annual meeting, or reconstituted by action of that meeting.

Moreover, the requirement that a "plan" to replace Myers be "develop(ed)" to insure that the Credit Union operations run smoothly when Myers leaves, does not, in my judgement mandate that a replacement be named and in place on June 1, 2000. Had that been the Examination's purpose and intent the wording easily could have been and should have been more precise. Instead of asking that a "plan be developed" it would and should have insisted that a replacement for Myers be named, appointed and in office on June 1, 2000. Indeed, I think that if the NCUA intended to issue a report and a directive which was inconsistent or arguably inconsistent with the Credit Union's by-laws and the NCUA regulations, the Examination report had to be absolutely
clear and unequivocal about when Myers' replacement had to be on the job.

So a different interpretation is a better reflection of what the NCUA wanted.

It should be noted that the NCUA Examination and Report referred to a replacement for Myers -- who was the Chief Executive Officer. If there was an urgency to the Examination it was for the filling of that job, not the job of Assistant Manager/CFO. The latter became involved only because the Board promoted Darlene Green from Chief Financial Officer to Chief Executive Officer (as Myers' replacement) creating the Assistant Manager/CFO vacancy. Whether the promotion of Green was timely or premature is not before me. But the NCUA Report, even if interpreted urgently, (which I do not) did not relate to the Chief Financial Officer vacancy, and hence cannot be used to justify the Board's action regarding that job before the annual meeting. And again, the Examination's admonition that the Credit Union's operations continue to run smoothly" applied to the Chief Executive Officer's job held by Myers and not the Chief Financial Officer's job. So, I cannot find that the NCUA thought or even considered whether a short vacancy in the Chief Financial Officer's job would impede the smooth operations of the Credit Union. There is no evidence that the NCUA knew of or contemplated the promotion of Green to Chief Executive Officer.
So, I cannot find that it's admonition to develop a successor plan related to both the Chief Executive Officer and Chief Financial Officer's job.

For the foregoing reasons, the election and appointment of Bembry as Assistant Manager/CFO prior to the annual membership committee was violative of the letter and intent of the Credit Union by-laws and NCUA regulations. His contract was, therefore, void and he has no cause of action for severance pay or damages thereunder.

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

The claims of CHARLES BEMBRY are denied.

Ernest J. Schmertz, Arbitrator

DATED: April 10, 2001

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 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Union,

- and -

NEW YORK RACING ASSOCIATION, INC.,

Employer.

Before: Eric J. Schmertz

Appearances: For the Union:

Norman Rothfeld, Esq.
276 Fifth Avenue
Suite 806
New York, NY 10001

For the Employer:

Certilman Balin Adler & Hyman, LLP
90 Merrick Avenue
East Meadow, NY 11554
By: Michael C. Axelrod, Esq. and
Robert Connolly, Esq.

John L. Russo, Esq.
Counsel for NYRA
P.O. Box 90
Jamaica, NY 11417
PRELIMINARY STATEMENT

By separate letters, each dated June 16, 2000, James Mehrtens and Diane Mehrtens were notified by the Employer that they were “suspended without pay or benefits pending the completion of an on-going investigation by NYRA” about allegations that they had “filed fraudulent documents and engaged in an act of fraud and dishonesty…in connection with obtaining health benefits for…Dena McAleavey under the health benefits plan provided to [them] by NYRA.” James and Diane Mehrtens were married in May 1995. Dena McAleavey is Diane Mehrtens’ daughter and James Mehrtens’ step-daughter.

By separate letters, each dated June 23, 2000, the Mehrtens were notified that their employment had been terminated for their “participation in the act of fraud and dishonesty directed against NYRA in connection with obtaining dependent health benefits under the health benefits plan provided to you by NYRA.”

Thereafter, the Union filed a demand for joint arbitration under the parties’ 2000-2003 collective bargaining agreement regarding the “discharges of Diane Mehrtens and James Mehrtens without just cause.” The remedy sought is reinstatement with back pay.

Although the Employer initially objected to a joint arbitration, and tried unsuccessfully to obtain a judicial stay, combined hearings on the discharges of the employees were held on December 11, 2000\(^1\) and January 6 and 30, April 5 and 12, 2001.

Without precedent or prejudice, counsel for the parties stipulated at the first day of hearing that the disciplinary charges against each employee would be treated as separate

\(^1\) The parties’ opening statements were not transcribed.
proceedings, notwithstanding the submission of evidence under a single record. One discussion and opinion is provided simply to avoid an unnecessary repetition of facts common to each proceeding, but separate awards have been issued for each employee pursuant to the parties' stipulation.

Counsel for the parties waived the arbitrator's oath and there were no objections to the conduct of the hearing. The Union gave its closing statement orally at the hearing on April 12, 2001. The Employer has filed a written memorandum.

**ISSUE**

The parties stipulated the following issue during the first day of hearing:

Was the discharge of James Mehrtens and/or Diane Mehrtens for just cause? If not, what shall be the remedy?

**POSITIONS OF THE PARTIES**

**Union**

The just cause issue submitted to the Arbitrator allows and requires an assessment of only that evidence which the Employer had in its possession at the date it discharged the employees. Information acquired thereafter is not admissible or competent to prove whether the discharge of either employee was for just cause.

As the employees have been charged with the crime of insurance fraud, the burden of proof the Employer must satisfy is very high. It did not meet that burden as to either employee. Indeed, the Employer's case is frivolous no matter what standard of proof is

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2 Designated by the case number followed by the letter "(A)" for James Mehrtens and the letter "(B)" for Diane Mehrtens.
used. There is no persuasive evidence that either employee individually or in conspiracy with one another and/or other persons intended to or attempted to defraud the Employer or its insurance carrier. Although Dena did not testify, no adverse inference can be drawn against the Mehrtens because of her nonappearance because, among other reasons, it claims a subpoena was served, if at all, not on Dena, but on a person having much different physical characteristics. The Employer failed to establish the existence of any company policy known to the employees pursuant to which they were required to notify their Employer once they learned that their daughter was not, in fact, enrolled or attending college. Moreover, Diane Mehrtens was not the health benefits policy holder and, therefore, she had no obligation to notify the Employer of changes in her daughter’s status.

**Employer**

There is clear and convincing evidence that each employee committed fraud by knowingly and intentionally submitting forged and altered documents containing false information known to them to be false for the purpose of obtaining health care benefits for the daughter, Dena McAleavey, which she was otherwise ineligible to receive. Indeed, the only reasonable conclusion to be drawn from the record is that the Mehrtens’ culpability has been proven beyond a reasonable doubt. The employees both participated in the forgery and the alteration of those documents and accepted health benefits for their daughter for at least four months after they admitted they knew Dena was not attending college. The grievants’ claims of innocence are not credible.
An inference adverse to the grievants should be drawn from the daughter’s failure to testify and any testimony by the employees regarding statements allegedly made to them by the daughter are hearsay which should not be considered. Evidence discovered by the Employer after the employees were discharged is admissible because it is relevant to the grounds relied upon by the Employer for the discharge.

As fraud, theft and falsification of company records are universally recognized to be just cause for discharge, and as the Employer has proven acts which breach the employees’ duty of trust and loyalty, the discharge of each grievant must be sustained and the grievances must be denied.

**FACTS**

The New York Racing Association, Inc. is a non-profit racing association incorporated under §202 of the New York State Racing Pari-Mutual Wagering and Breeding Law (Racing Law). The Employer owns and operates the three major thoroughbred racetracks in New York pursuant to a franchise conferred upon it by the State of New York under which excess revenues are returned to the State for the support of government (Racing Law §208).

The Union represents, among others, the pari-mutual clerks who work at the racetracks operated by the Employer. Pari-mutual clerks conduct the wagering that takes place at the tracks and they have responsibility for the substantial monies they receive and pay out to patrons during wagering.³

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³ Diane Mehrtens’ last assignment prior to discharge did not require her to handle money on a regular basis.
James and Diane Mehrtens were employed as pari-mutual clerks at the date of their discharge on June 23, 2000 and both had been employed in that capacity for a number of years.

At the relevant dates, James had a family health insurance plan under a Blue Cross/Blue Shield HMO offered him by the Employer by virtue of his employment. NYRA also offers individual and husband/wife health insurance plans to its employees. NYRA’s costs for the family health insurance plan are higher, by approximately $220 per month, than they are for a husband/wife plan, which would have been the Mehrtens’ option but for Dena’s continued coverage. Family dental and vision coverages also cost the Employer more than the husband/wife coverage.

In mid-November 1999, the Employer sent James Mehrtens an inter-office memorandum re Dena’s health benefit status. James is informed in that memorandum that the Employer’s records showed that Dena was born in 1980. He is then informed that Dena’s health insurance coverage would end December 31, 1999 unless she is unmarried, dependent upon the employee for support, and is attending an accredited institution of higher education. The employee is then asked to check one of two paragraphs, one continuing coverage; one ending coverage. On that document, a check mark appears next to the following pre-printed statement:

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4 The husband/wife coverage was obtained by NYRA in negotiations as a result of a grievance filed by the Mehrtens which resulted in an arbitration award that permitted married couples to maintain separate, individual health insurance coverage. The collective bargaining agreement was changed such that a husband and wife cannot have individual plans.
My child is unmarried, dependent upon me for support and attending the following institution of higher education on a full time basis: 

In the blank space is printed by hand the word “Briarcliff” (sic). By checking that space on the form, health benefits of an employee’s dependent, which would otherwise be discontinued after December 31 of the year in which the child attains the age of 19, are continued. James’ signature as it appears on that document dated “11/30/99” was made by his wife Diane at his request and with his authorization.

Sometime after the inter-office memorandum was submitted, James Mehrtens was told by James Alexander, NYRA’s Human Resources Officer, that the Employer would need something bearing a college letterhead if Dena’s health coverage was to be continued. In response to that request, two additional documents were faxed to the Employer in January 2000 by Diane Mehrtens.

One of those documents is a “Student Coverage Questionnaire” which is signed “James Mehrtens” and dated “1/18/00.” The questionnaire is not a NYRA form nor is it one Briarcliffe uses. On that form appears James’ identification (Social Security) number and responses to inquiries stating that “Dependent” “Dena McAleavey,” born “4/4/80” is the employee’s “Daughter” who is “single,” employed “part-time,” without other health coverage and is a “full-time” student at “Briarcliff College” (sic) with an expected date of “course completion of “4/01.”

Above the signature line appears the following:

I herby certify that the above is correct to the best of my knowledge.
Beneath the employee's signature line is a space for a "SCHOOL CERTIFICATION" with instructions as follows:

NOTE: After completing the above information, forward this form to the school for their certification of questions 6-10.\(^5\)

Beneath that appears a signature of the School "registrar" dated "1/18/00," the same as was the date of James' signature, and a copy of the Briarcliffe seal.

At the top of the student questionnaire form is the following handwritten instruction: "Change Dena McAleavey Child Status to Student Status." This instruction was written on the form by Diane Mehrtens. James' signature on this form was again made by Diane Mehrtens who faxed the completed questionnaire form to James Alexander from her home.

The second document faxed to the Employer by Diane Mehrtens is a "Spring 2000 Registration Form" for Dena McAleavey dated "12/18/99," which bears a signature of Dena's "advisor," which is the same in appearance as the registrar's signature on the student questionnaire form. The registration shows certain course work within "section" for six credits each in sessions 1 and 2. The courses listed are in or related to the field of graphic design. The form also shows Dena to be a "returning student" with an entry date of "S99" and that she was not "planning on graduating at the end of this semester." At the top of the form is type showing the address and telephone number of Briarcliffe College and a copy of the College's seal.

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\(^5\) Those questions concern the student's status.
On the basis of these documents the Employer continued Dena's coverage.

On January 13, 2000, Diane Mehrtens faxed to the insurance carrier a document requesting that Dena's status be changed from child to student. That cover document is signed "Diane McAleavey." Diane testified that this was her signature, but it was her maiden name. She testified that she has not signed "Diane McAleavey" since her marriage to James in 1995. Attached to this cover sheet is a copy of a schedule for Dena for the Fall 1999 semester at Briarcliffe in a program of "Graphic Design/AAS" and the Spring 2000 Briarcliffe registration form that was faxed to the Employer on January 18, 2000.

In or around March 2000, John Russo, Counsel for NYRA, received an anonymous telephone call from within Aqueduct Park during which an unknown male stated that Dena was not in college. The caller indicated that the Mehrtens had fraudulently claimed health insurance benefits for Dena.

Russo called NYRA's health benefits office and ascertained that Dena was being covered. Russo then contacted Northern Intelligence Agency, a private investigation agency, which was retained to conduct an investigation into whether Dena was working and if she was a student at Briarcliffe College.

The investigation agency made its first report to Russo in April 2000. The investigator, Michael Quartaro, had ascertained that Dena was then working approximately 35 hours per week at a hair salon. It was also reported to Russo that Dena's Spring 2000 College registration form appeared to have been "doctored."
Quartaro testified that he went to Briarcliffe College after he was contacted by Russo. Quartaro met with Francine Byrnes, the Briarcliffe Registrar. After Byrnes checked the College’s records, she told Quartaro there was no record of Dena having been enrolled or attending Briarcliffe at any date. Quartaro showed Byrnes the student coverage questionnaire and Dena’s Spring 2000 registration form. Byrnes did not recognize the College official’s signature on the questionnaire as being anyone from the Registrar’s office and told him that no one else could sign as Registrar. Byrnes also told Quartaro that the student questionnaire form is not one issued by the College. Byrnes also told Quartaro that the spring registration form was not a true college form because the real form, which Byrnes gave to Quartaro, and which was in use during Spring 2000, does not contain the College’s address or its insignia. Quartaro reported this information to Russo.

Byrnes sent Quartaro a letter dated April 12, 2000 confirming that there was no registration on file for “Dena McLeavey” (sic) for the Spring 2000 semester and another confirmation of that finding for “Dena McAleavey” on November 22, 2000. Both documents contain the same social security number for Dena.

Quartaro’s findings were reported to Russo over the telephone and in writing as they were discovered. The agency’s final report issued June 10, 2000.

James Mehrtens was called as a witness by the Employer. He testified that he authorized his wife to sign the November 1999 inter-office memorandum attesting to Dena’s attendance at Briarcliffe and the student questionnaire form dated “1/18/00.” He
could not recall where he had obtained the student questionnaire form, but he believed that Dena had given him the Spring 2000 registration form.

As James testified, Dena told him that she was going to go to Briarcliffe and he thought she had enrolled. It was not until late January 2000 or early February 2000 that he learned that she was not in fact enrolled or attending Briarcliffe or any other college. Although he knew she had to be going to college to be covered under his insurance, he did not inform NYRA that she was not a student until after he was suspended. He testified that he did not make this disclosure because he did not know that her insurance coverage would cost NYRA more money, that it was not “foremost in his mind” because of medical problems affecting his wife and family, and because Dena told him that she was going to go to college in September 2000 although, in fact, she did not.

Diane Mehrtens was also called as a witness by NYRA. She testified that her memory was permanently faulty due to chemotherapy treatments she had received that ended in 1993, but neither she nor the Union offered any evidence in support of that statement.

Diane testified that she faxed the Spring 2000 registration form to James Alexander. Other than perhaps filling in Dena’s phone number and her social security number, she testified that she did not otherwise fill in any other information on that form and did not know where her husband had obtained the form which he gave to her. She testified that she did not sign Dena’s name on the registration form and that the address of “Elmont NY” was not her handwriting.
On the student questionnaire, Diane wrote in the direction at the top to change
Dena’s status from child to student and included information on that form pertaining to
Dena’s birthdate, her relationship ("Daughter"), the college name and address, but she
testified she did not date the form "1/18."

Diane testified that at the time she faxed the forms, she did not know whether
Dena was enrolled in college. She, too, learned that Dena was not attending college by
the end of January 2000 or early February 2000, but did not notify NYRA of that fact.
Although she knew Dena could not be covered, she testified that she had no obligation to
notify NYRA because the insurance plan was her husband’s, not hers.

According to Patricia Cerda, a NYRA employee, in March 2001, Diane attempted
to obtain an ID badge from her. When Cerda asked if she was working, Diane told Cerda
"Yes, I went to arbitration." As Diane was not on the eligible list, Cerda said she would
have to check with a supervisor. Diane told her not to do so because she did not want the
Employer to know she was on the grounds. After Diane said she would "try another
time," she left the facility.

The Employer also called as a witness Robert W. Lesnevich, a forensic document
examiner, who was qualified as an expert in that field. Lesnevich examined certain of the
documents in issue and offered certain opinions and conclusions with respect to them.

Lesnevich opined that the signature of the school official on the student
questionnaire form and the spring 2000 registration form were the same and were not
authentic.
Lesnevich testified that the school insignia at the top of the spring registration form, and the College’s name, address and phone number were added to the registration form. In addition, the student signature on that form was “in all probability not the signature of Dena McAleavey.” Moreover, he opined that the “D” in “Dena” as it appears on the registration form is similar in formation to the “D” in “Diane Mehrtens” signature as it appears on documents bearing Diane Mehrtens’ authentic signature. In Lesnevich’s opinion, certain letters in Dena’s signature on the registration form had no similarity to letters in her signature on documents bearing her true signature.

The Employer subpoenaed Dena McAleavey to appear and testify at the arbitration hearing, but despite a judicial order for her to appear, she did not.

**OPINION**

These are cases of alleged fraud to which attach certain accepted principles.

First, the quantum of proof is clear and convincing evidence. That standard reflects the majority view of arbitrators, including mine as expressed during the hearing. The Employer concedes that this is the applicable standard. Some arbitrators apply a simple preponderance of the evidence standard in cases of this type and others require proof beyond a reasonable doubt. As I indicated during the hearing, I do not regard either to be the correct or majority view. Therefore, I will apply a “clear and convincing” standard which for me, as I have repeatedly stated in numerous decisions, requires proof that convinces me that the offense charged has been committed. In other words, this standard is not satisfied unless there is a high probability that the facts alleged are true.
Second, upon proof of fraud by clear and convincing evidence, summary discharge is appropriate. An employer has the right to the receipt of honest and accurate records from employees which have a direct financial impact upon the employer. An intentional falsification of those records for private gain is theft warranting discharge for a first offense no matter the employee’s work record.

Third, the elements of fraud, as correctly summarized by the Employer, are as follows:

1. False representation by affirmative act or omission;
2. Employer reliance on the representation;
3. Scienter i.e. employee knowledge of falsity with intent to deceive; and
4. Damages

As the Employer also correctly argues, all but the scienter element are established beyond any reasonable doubt upon this record and the facts underlying those three elements were actually known to the Employer at the date the Mehrtens were terminated.

The documents filed by the Mehrtens were in fact false as of the date those documents were completed and filed. Dena had never attended Briarcliffe or any other college and had not enrolled for the Spring 2000 semester or thereafter. I reject as unfounded the Union’s suggestion that the College’s record system was faulty. There is no reasonable likelihood that the searches conducted by the College would have failed to produce evidence of Dena’s application, enrollment or attendance had any of those acts taken place. The Employer relied upon the information supplied by the Mehrtens to continue Dena’s health care coverage which would otherwise have been ended as of
December 31, 1999. The continuation of that coverage on and after January 1, 2000 both burdened the Employer financially and benefited the employees.

The Employer asks that the scienter element be evaluated under a negative inference drawn against both James and Diane Mehrtens because Dena refused to appear despite subpoena and judicial order.

A party’s failure to call as a witness an available person who is under that party’s control who can testify about material facts creates an inference adverse to that party. If these conditions are satisfied, the trier of fact is permitted to draw the strongest inference against that party which the record evidence permits. There are, however, questions as to whether the conditions for drawing an adverse inference against either or both employees have been satisfied in this case.

Given the nature of the allegations made by the Employer, Dena McAleavey faced the possibility of a criminal prosecution for insurance fraud. That being so, Dena likely would have been able to invoke a constitutional right against giving testimony which could incriminate her. It is at least arguable in these circumstances that Dena was not a witness available to either of the Mehrtens.

Second, the witness must be under the party’s control before an adverse inference is permissible. In that regard, a relative of a party is presumptively within the control of that party. In this case, however, Dena at the time of these hearings was an emancipated adult who was not residing with the Mehrtens. Whether in these circumstances Dena can

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7 Id.
8 Id.
be fairly regarded as under either or both of the Mehrtens' control is again at least open to reasonable debate.

Ultimately, however, it becomes unnecessary for me to decide whether an adverse inference could be properly drawn on the facts. Even were an inference adverse to both Mehrtens drawn, the record read most favorably to the Employer does not clearly and convincingly establish that either employee forged any documents in an effort to defraud the Employer or conspired for that purpose and to that end.

A disposition of these charges must begin with an identification of the basis upon which the Mehrtens were discharged, and a discussion of what evidence may be properly considered in evaluating whether either discharge was for just cause.

The Mehrtens were discharged upon the same ground. The Employer concluded after investigation that each separately and together had acted dishonestly and had defrauded the company by obtaining health insurance benefits for Dena. Whether this accusation is characterized as theft, dishonesty or fraud is largely immaterial. No matter how the misconduct is characterized, the misconduct alleged centers on intent. The Employer alleges that the Mehrtens knew Dena was not eligible for health insurance benefits but fabricated documents to misrepresent her student status so they could secure those benefits. Therefore, guilt necessitates proof that the Mehrtens either individually, or together in conspiracy, acted deliberately to defraud the Employer by obtaining benefits they knew they were not entitled to receive.

9 It is, therefore, unnecessary for me to consider the Union's allegation that Dena was never served.
The next issue is what evidence may properly be considered in assessing whether the Employer has satisfied its burden of proof. Is all of the record evidence competent or only that part of the record which is coextensive with the evidence the Employer actually had in its possession at the date it discharged the Mehrtens? The Union argues that the issue as stipulated allows for a consideration of only the latter. According to the Union, “after acquired” evidence is immaterial to the issue of whether the discharges were for just cause. Were the Union’s argument to be accepted, the testimony of the Mehrtens, for example, would be immaterial to the issue of their guilt or innocence because the Mehrtens were not interviewed by the Employer before they were discharged. Similarly, the expert’s testimony would be immaterial because there is no evidence in the record that he had been consulted and had reported to the Employer the findings to which he testified before the date the employees were discharged. The Employer argues that the “post discharge” or “after acquired” evidence is admissible because it is relevant to the acts or grounds for the discharge.

The Union’s argument raises substantial issues, but they need not be resolved in this case. Even when the entirety of the record evidence is considered, I must conclude that the Employer has not clearly and convincingly established that either employee intentionally defrauded the Employer or acted dishonestly in filing the documents pursuant to which Dena’s health insurance coverage was continued.

In evaluating the entire record, I have not disregarded the Mehrtens’ testimony about the few statements they claim were made to them by Dena. The Employer argues that I should not consider them because the statements are hearsay and because it would
be unfair to the Employer were Dena's statements to be considered because she refused to appear and the Mehrtens did nothing to try to have the daughter testify.

As to the first ground, the statements are admissible even if hearsay, which they at least arguably are not, because they are not offered for the truth of their content, but to evidence the employees' state of mind. As to the claimed unfairness, it was the Employer which called the Mehrtens as witnesses over the objection of counsel for the Union. The Employer cannot, in that circumstance, have me consider the Mehrtens' testimony to the extent it tends to evidence their guilt but exclude that testimony to the extent it is exculpatory.

When all of the record evidence and all of the Employer's arguments are considered, what is established is that the information on the forms which led to Dena's continued coverage was false. She was not attending college. Falsity, forgery and alteration of documents is established, but without sufficient evidence that either James or Diane Mehrtens fabricated those documents or filed those forms with knowledge that the information contained therein was false when they were filed. Upon this record, it is entirely possible that Dena was the one who "doctored" the forms and forged the college official's signatures on those documents. Dena could well have duped her parents for a while even though she was then living with them. It appears from this record that Dena had an interest in graphic design and likely possessed enough skill to "cut and paste" documents together. Moreover, the information on the forms is of a type that could have come only from a person who had some familiarity with college courses or possessed
copies of Briarcliffe’s course catalog. This is much more probably Dena than her parents.

The Employer argues that the unexplained absence of the originals of the two documents that were faxed to it by Diane Mehrtens greatly evidences the employees’ guilt. It claims that the reason there are only the faxed transmissions is because the originals were “cut and paste” jobs that would have shown unquestionably that the employees either doctored the forms themselves or knew they were doctored. But what was faxed, however, could well have been a copy of the original “cut and paste job” given them by Dena. Again, no matter how much one might suspect some misconduct by one or the other of the employees, that suspicion cannot substitute for the clear and convincing evidence required in a case such as this.

The only clear linkage of either employee to an act of forgery is the expert’s testimony that “Dena’s” signature on the school registration form was not hers and that the letter “D” in that signature was “similar” in formation to the letter “D” appearing in two examples of Diane Mehrtens’ known signatures.

The expert did not opine, however, that Diane Mehrtens had actually signed Dena’s name on the college registration form. His testimony stops short of that conclusion. Although there is some reason to believe from the expert’s testimony that Diane Mehrtens did sign her daughter’s name on that document, the evidence falls short of the clear and convincing evidence needed in a case of this type. Moreover, even if it were found that Diane Mehrtens did make Dena’s signature on that form, that would not
establish that Diane Mehrtens was also the one who placed the information on that form regarding Dena’s alleged, but false, enrollment at Briarcliffe.

It is unquestionably true and most troubling, however, that although the submission of the forms may have been innocent when they were filed, both Mehrtens subsequently learned that Dena was not enrolled and was not attending college. They knew this to a certainty by early February 2000 at the latest, but did not disclose this information to the Employer such that their daughter’s coverage was continued.

This failure to disclose known information was not specifically included in the charges which led to the terminations. The failure to include that specification owes substantially, if not entirely, to the fact that neither Mehrtens was interviewed by the Employer before they were discharged. Thus, the Employer did not know what the Mehrtens knew and when they knew it until the Mehrtens were called as witnesses by the Employer at an unemployment insurance hearing and during these hearings. It found out about the failure to disclose known information after the employees were discharged.

Although the Employer was under no obligation to interview the employees, it bears the consequences for having chosen not to do so. Although the charges are framed broadly to include unspecified acts of “dishonesty and fraud” those terms can only have the meaning they had to the Employer at the time the charges were levied. At that time, the dishonesty and fraud were based upon the filing of what the Employer regarded to be “faked” forms. It knew only that the information on the forms regarding Dena’s student status was false. She was not in school. It then concluded that the Mehrtens had lied about the information that was supplied and that they were the ones who altered the
forms and forged various signatures. The Employer's subsequent discovery of the fact that the Mehrtens failed to disclose that Dena was not enrolled after they knew that she was not attending school could not possibly have been within the scope of the acts of "dishonesty or fraud" alleged in the charges upon which the employees were dismissed because the Employer simply did not have the information nor did it make that particular allegation of misconduct at the date of discharge.

The Employer also alleges that after the employees were discharged, illegitimate insurance claims for Diane, Dena and James' married daughter, Jennifer Mehrtens Moskowitz, were submitted under James' policy. Those allegations, of course, are not part of the charges before me. Thus, I express no opinion as to whether either or both of the employees can be disciplined upon those grounds. However, the Employer apparently relies upon this particular post-discharge activity to attack the Mehrtens' credibility and/or to evidence their willingness or predisposition to engage in fraudulent acts regarding health insurance coverage. For either purpose, the evidence is relevant, but not dispositive, as to the allegations involving Dena's coverage. That evidence, like the balance of the record, is ultimately unpersuasive of a conclusion that either Mehrtens forged documents for the purpose of continuing Dena's health insurance coverage or knew that they had been "doctored" to reflect information they knew to be false when those documents were filed. The evidence as to these other insurance claims on this record does not establish that either James or Diane submitted those claims or knew that they had been submitted by the service providers on their behalf or on behalf of the children.
No different or greater weight is afforded Diane's efforts to obtain an ID badge. As the Union was appealing the discharge, she might well have believed it was appropriate to request an employee identification. That she did not want the employer's agents to know about her inquiry reflects little more than a desire to avoid a confrontation. Neither the inquiry nor the statements can supply the clear and convincing evidence of insurance fraud, whether considered individually or in the context of the entire record.

When all examinations of the record are concluded, even in the light most favorable to the Employer, what is established is that information filed was in fact false, certain forms were “doctored,” and certain signatures were forged. What is not established within the applicable clear and convincing standard is that either Mehrtens knew the information was false when it was submitted to the Employer or that either of them doctored the forms or forged signatures or knew of those acts or assisted in and with those acts. Dena and/or another person or persons unknown could well have done everything which the Employer alleges to be fraudulent and dishonest. Without clear and convincing evidence establishing either Mehrtens’ involvement either directly, or in conspiracy with others, I am constrained to dismiss the charges against each for failure of proof.

**REMEDY**

Having found that the record does not prove either employee’s guilt under the charges lodged against them leaves the issue of remedy.
Considering of all relevant circumstances, both James and Diane Mehrtens are conditionally reinstated to their former positions, but without back pay.

The reinstatement of both James Mehrtens and Diane Mehrtens shall not be effective until the date both the Employer and the insurance carrier are reimbursed any monies paid by either as a consequence of Dena McAleavey’s continued health care coverage on and after February 1, 2000, the date by which both employees’ acknowledged they knew Dena was not eligible for coverage.

In deciding whether back pay is appropriate, the issue as framed by counsel for the parties affords me the power, notwithstanding any limitations which might otherwise exist, to grant or withhold that relief, or any other, in light of all relevant circumstances. A back pay remedy is, at least in part, equitable in nature. Therefore, in considering whether to grant or deny back pay in whole or in part, I am allowed to consider the equities and those equities do not favor back pay for either employee.

Although the employees’ guilt or innocence cannot be based upon their failure to disclose the fact that Dena was not in school because the grounds for discharge could not have encompassed that allegation, I am not obliged to ignore that admission in shaping the appropriate remedy. Without unnecessary elaboration, I find the employees’ several explanations for this failure of notification to be entirely unsupported, wholly unpersuasive and partially inconsistent. As both employees all but admit, they knew they should have disclosed that information but did not and thereby continued to receive benefits they knew they were not entitled to receive.
AWARD

The discharge of James Mehrtens was not for just cause. James Mehrtens is reinstated to his former position without back pay or lost benefits, such reinstatement to be effective upon the date at which both the Employer is repaid any monies paid by it as a consequence of Dena McAleavey’s continued health insurance coverage on and after February 1, 2000, and the date the health insurance carrier is repaid any monies it paid service providers under insurance claims submitted by or on behalf of Dena McAleafey on or after February 1, 2000.

The discharge of Diane Mehrtens was not for just cause. Diane Mehrtens is reinstated to her former position without back pay or lost benefits, such reinstatement to be effective upon the date at which both the Employer is repaid any monies paid by the Employer as a consequence of Dena McAleafey’s continued health insurance coverage on and after February 1, 2000, and the date the health insurance carrier is repaid any monies it paid service providers under insurance claims submitted by or on behalf of Dena McAleafey on or after February 1, 2000.

The Employer is to specify the amounts to be repaid to it and its insurance carrier promptly.

I will retain jurisdiction as to remedy should there be allegation that the Employer unreasonably delayed notification of the monies owed or there is disagreement as to the amounts actually owed by the employees.
I hereby affirm pursuant to CPLR 7507 that I am the individual described herein and who executed this instrument which is my Award.
A hearing was held on November 5, 2001 on the following question:

Whether my Award of July 7, 2001 was complied with and/or whether I had any continuing retained jurisdiction.

Representatives of the above-named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator’s Oath was waived and a stenographic record of the hearing was taken.

The Union asks that I rule that JAMES MEHRTENS was not reinstated; that the Employer’s act to do so was “sham,” and that therefore my Award of July 7, 2001, ordering his reinstatement was not complied with.

Whether Mr. Mehrtens was or was not reinstated; whether his suspension on July 19th was a continuation of his earlier discharge; whether the charges on which the suspension was based are new and different from what I ruled on in the July 7th Award,
or pretextual to camouflage the Employer's intent to prevent his reinstatement, are matters not within my retained jurisdiction.

In my Award of July 7th, I retained jurisdiction only as to monies Mehrtens was to repay to the Employer and to the insurance carriers for certain health insurance coverage. Specifically I stated:

"I shall retain jurisdiction as to remedy should there be allegations that the Employer unreasonably delayed notification of the monies owed or there is disagreement as to the amounts actually owed by (Mehrtens).

It is not disputed that the Employer and/or the insurance carrier supplied the amounts due and that Mehrtens made payment thereof. So that part of my Award was satisfied, and that is all to which my retained and continued jurisdiction applied.

The Union argues that I have implied authority to review compliance with my Award that ordered Mehrtens' reinstatement. I conclude that I have no such implied, retained authority. Except for the foregoing explicit reservation of jurisdiction I am functus officio.

Therefore any dispute over Mehrtens' reinstatement or non-reinstatement must be determined either in an action to enforce my Award judicially or by referral of that issue jointly
by the parties either to me or to another arbitrator, or by a court order remanding the issue to me.

Also, disputes over the present charges against Mehrtens, on which his present "suspension" is based, as well as the propriety of his "suspended" status, are matters which may also be referred to me or another arbitrator by joint agreement of the parties. Or, those matters may be the subject of a new grievance by the Union, which may be processed under the grievance and arbitration provisions of the collective bargaining agreement.

In connection with the foregoing procedure, the substantive rights of the parties are expressly reserved.

Eric J. Schmertz, Arbitrator

DATED: November 15, 2001

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 Undersigned has been named arbitrator of the above-captioned matter pursuant to a collective bargaining agreement ("the contract" or "the Agreement") between UNITED FOOD AND COMMERCIAL WORKERS LOCAL 342-50 ("LOCAL 342-50" or "the Union") and OSSIE’S OF BORO PARK ("OSSIE’S" or "the Employer").

On or about May 10, 2001, LOCAL 342-50 filed a demand for arbitration pursuant to its collective bargaining agreement with OSSIE’S; said demand was docketed by the American Arbitration Association as AAA Case No. 13 300 0058801. The issues, as agreed to by the parties at the arbitration, are:

1. Whether the Employer violated Article XXII of the contract by denying the Union access
to its premises and bargaining unit employees and to records requested by the Union?

2. Whether the Employer violated Article III of the contract by failing to pay employees at the proper rate?

3. Whether the Employer violated Articles I, II, and XXII of the contract by interfering with employees becoming union members in good standing?

4. Whether the Employer violated Article II of the contract by failing to notify the Union of the need for new help and failing to permit the Union an opportunity to refer individuals for employment prior to the Employer hiring new employees?

5. With respect to issues 1-4, if the Employer violated the contract, what shall be the remedy?

LOCAL 342-50 and OSSIE'S have now agreed and consented to issuance of the following Award:

AWARD

1. On November 27, 2001, LOCAL 342-50 representatives shall be permitted access to OSSIE'S for the purpose of assisting
employees who are not presently union members to become union members. It is anticipated that, at that time, the following full-time employees shall execute union membership applications and dues checkoff authorizations:

- Guadalupe Gil
- Alejandro Garcia
- Luis Martin Rivas
- Alejandro Miguel Martinez
- Walter
- Victor Serrano Coriver

Should these employees fail to execute cards on November 27, 2001, they shall be dismissed from employment by OSSIE’S and not rehired unless they execute a card within seven days thereafter or are referred for employment through the LOCAL 342-50 hiring hall.

2. The Undersigned shall be present at OSSIE’S November 27, 2001 to ensure that union representatives are provided the full access to OSSIE’S required by the Agreement and that there is no undue disruption to OSSIE’S operations.

3. OSSIE’S agrees to waive the probationary period with respect to the employees identified in paragraph 1 and to apply the Agreement with respect to these employees retroactively to October 1, 2001. Without waiving any claim by
any employee to additional wages, benefits, or seniority, the parties agree as follows:

a. The employees who execute membership cards shall be assigned a seniority date of October 1, 2001.

b. OSSIE’S shall make benefits contributions, or payments in lieu thereof in accordance with the Agreement, on behalf of the employees identified in paragraph 1 retroactive to October 1, 2001.

c. OSSIE’S shall make back wage payments on behalf of all employees, including the employees identified in paragraph 1 and existing union members, of $280 per employee, with a copy of the payments to LOCAL 342-50. OSSIE’S shall make 8 monthly payments in equal amounts commencing on November 30, 2001 to satisfy the obligation.

4. On or before January 1, 2002, LOCAL 342-50 representatives shall be permitted access to OSSIE’S for the purpose of discussing with employees the benefits provided by the Local 342 Seafood Division Welfare Fund, and each employee’s option to execute a waiver of welfare benefits and instead
receive cash payments as set forth in the Agreement. LOCAL 342-50 and LOCAL 342-50 representatives shall be provided an opportunity to meet with any employee who indicates an intent to execute a waiver prior to the execution of the waiver.

5. OSSIE'S shall not subcontract bargaining unit work.

6. OSSIE'S agrees to comply with all of the terms of the Agreement, including but not limited to seeking referrals for new help from LOCAL 342-50 in accordance with Article II, payment of wages in accordance with Article III, payment of overtime in accordance with Article IV, and permitting LOCAL 342-50 representatives to visit OSSIE'S places of business and inspect books and records and meet with employees for the purpose of ascertaining whether the Agreement is being properly observed in accordance with Article XXII.

7. OSSIE'S shall keep and preserve time records of hours worked by bargaining unit employees utilizing an objective time recording mechanism. OSSIE'S shall make such records available upon request for inspection by LOCAL 342-50 representatives.

8. Any layoffs shall be in accordance with the collective bargaining agreement, including but not limited to Article VI. It is, however, acknowledged that the seasonal nature of OSSIE'' manpower needs (as it is a Kosher vendor,
catering to an orthodox and conservative Jewish clientele) may require bulk layoffs during non-holiday preparation periods. Provided, this paragraph does not create any right to employ seasonal or temporary employees.

9. Nothing herein shall be construed as a finding or admission by OSSIE’S of any violation of the Agreement.

10. OSSIE’S shall indemnify LOCAL 342-50 for any costs (including damages and reasonable attorneys’ fees) incurred resulting from any employee(s) of OSSIE’S pursuing a claim(s) against LOCAL 342-50 for breach of its duty of fair representation concerning back wages, benefits, or seniority, or other failure to enforce contractual rights for any time period from March 1, 2000 to the date of this Consent Award, whether or not designated as claim for breach of the duty of fair representation.

11. This Consent Award shall become final and LOCAL 342-50’S grievance shall be deemed resolved four months after the execution of this Consent Award, provided that OSSIE’S complies with its obligation to permit LOCAL 342-50 representatives to visit OSSIE’S places of business and inspect books and records and meet with employees for the purpose of ascertaining whether the Agreement is being properly observed during that period. Upon any denial of access within that period, LOCAL 342-50 may reopen the arbitration and seek all
relief as well as payment by OSSIE'S of the arbitrator's full fee for any additional proceedings. The Undersigned shall retain jurisdiction during the aforementioned four-month period to resolve any dispute arising under the terms of this Consent Award or any claim of non-compliance with this Consent Award.

12. This Consent Award is non-precedential and shall not be cited in any other proceeding, except a proceeding to enforce its terms.

ERIC J. SCHMERTZ, ARBITRATOR

DATED: NOVEMBER 30, 2001

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.

ERIC J. SCHMERTZ
The undersigned has been named arbitrator of the above-captioned matter pursuant to a collective bargaining agreement ("the contract" or "the Agreement") between United Food and Commercial Workers Local 342-50 ("Local 342-50" or "the Union") and Ossie's of Boro Park ("Ossie's" or "the Employer").

On or about May 10, 2001, Local 342-50 filed a demand for arbitration pursuant to its collective bargaining agreement with Ossie's; said demand was docketed by the American Arbitration Association as AAA Case No. 13 300 00588 1. The issues, as agreed to by the parties at the arbitration, are:

1. Whether the Employer violated Article XXII of the contract by denying the Union access to its premises and bargaining unit employees and to records requested by the Union?
2. Whether the Employer violated Article III of the contract by failing to pay employees at the proper rate?

3. Whether the Employer violated Articles I, II, and XXII of the contract by interfering with employees becoming union members in good standing?

4. Whether the Employer violated Article II of the contract by failing to notify the Union of the need for new help and failing to permit the Union an opportunity to refer individuals for employment prior to the Employer hiring new employees?

5. With respect to issues 1-4, if the Employer violated the contract, what shall be the remedy?

Local 342-50 and Ossie’s have now agreed and consented to issuance of the following Award.

AWARD

1. On November 27, 2001, Local 342-50 representatives shall be permitted access to Ossie’s for the purpose of assisting employees who are not presently union members to become union members. It is anticipated that, at that time, the following full-time employees shall execute union membership applications and dues checkoff authorizations:

   Guadalupe Gil
   Alejandro Garcia
   Luis Martinez
   Alejandro Rivas
   Miguel Martinez

___

Walter
Victor Serrano (Rivera)
Should these employees fail to execute cards on November 27, 2001, they shall be dismissed from employment by Ossie’s and not rehired unless they execute a card within seven days thereafter or are referred for employment through the Local 342-50 hiring hall.

2. The undersigned shall be present at Ossie’s on November 27, 2001 to ensure that union representatives are provided the full access to Ossie’s required by the Agreement and that there is no undue disruption to Ossie’s operations.

3. Ossie’s agrees to waive the probationary period with respect to the employees identified in paragraph 1 and to apply the Agreement with respect to these employees retroactively to October 1, 2001. Without waiving any claim by any employee to additional wages, benefits, or seniority, the parties agree as follows:

a. The employees who execute membership cards shall be assigned a seniority date of October 1, 2001.

b. Ossie’s shall make benefits contributions, or payments in lieu thereof in accordance with the Agreement, on behalf of the employees identified in paragraph 1 retroactive to October 1, 2001.

c. Ossie’s shall make back wage payments on behalf of all employees, including the employees identified in paragraph 1 and existing union members, of $850.

-3-
per employee, with a copy of the payments to Local 342-50. Ossie's shall make 8 monthly payments in equal amounts, commencing on January 1, 2002, November 30, 2001 to satisfy this obligation.

4. On or before _, Local 342-50 representatives shall be permitted access to Ossie's for the purpose of discussing with employees the benefits provided by the Local 342 Seafood Division Welfare Fund, and each employee's option to execute a waiver of welfare benefits and instead receive cash payments as set forth in the Agreement. Local 342-50 shall provide waiver forms acceptable to Local 342-50 and Local 342-50 representatives shall be provided an opportunity to meet with any employee who indicates an intent to execute a waiver prior to the execution of the waiver.

5. Ossie's shall not subcontract bargaining unit work.

6. Ossie's agrees to comply with all of the terms of the Agreement, including but not limited to seeking referrals for new help from Local 342-50 in accordance with Article II, payment of wages in accordance with Article III, payment of overtime in accordance with Article IV, and permitting Local 342-50 representatives to visit Ossie's places of business and inspect books and records and meet with employees for the purpose of ascertaining whether the Agreement is being properly observed in accordance with Article XXII.
7. Ossie's shall keep and preserve time records of hours worked by bargaining unit employees utilizing an objective time recording mechanism. Ossie's shall make such records available upon request for inspection by Local 342-50 representatives.

8. Any layoffs shall be in accordance with the collective bargaining agreement, including but not limited to Article VI. It is, however, acknowledged that the seasonal nature of Ossie's manpower needs (as it is a Kosher vendor, catering to an orthodox and conservative Jewish clientele) may require bulk layoffs during non-holiday preparation periods. Provided, this paragraph does not create any right to employ seasonal or temporary employees.

9. Nothing herein shall be construed as a finding or admission by Ossie's of any violation of the Agreement.

10. Ossie's shall indemnify Local 342-50 for any costs (including damages and reasonable attorneys' fees) incurred resulting from any employee(s) of Ossie's pursuing a claim(s) against Local 342-50 for breach of its duty of fair representation concerning back wages, benefits, or seniority, or other failure to enforce contractual rights for any time period from March 1, 2000 to the date of this Consent Award, whether or not designated as a claim for breach of the duty of fair representation.
11. This Consent Award shall become final and Local 342-50's grievance shall be deemed resolved four months after the execution of this Consent Award, provided that Ossie's complies with its obligation to permit Local 342-50 representatives to visit Ossie's places of business and inspect books and records and meet with employees for the purpose of ascertaining whether the Agreement is being properly observed during that period. Upon any denial of access within that period, Local 342-50 may reopen the arbitration and seek all relief as well as payment by Ossie's of the arbitrator's full fee for any additional proceedings. The undersigned shall retain jurisdiction during the aforementioned four month period to resolve any dispute arising under the terms of this Consent Award or any claim of non-compliance with this Consent Award.

12. This Consent Award is non-precedential and shall not be cited in any other proceeding, except a proceeding to enforce its terms.

LOCAL 342-50

By: [Signature]

OSSIE'S OF BORO PARK

By: [Signature]

Eric Schmertz
Arbitrator

Sworn to before me this ___ day of November, 2001

Notary Public
At the duly scheduled hearing on August 9, 2001, the above-named Employer failed to appear despite due notice.

The above-named Union’s motion to proceed with the hearing was granted and the proofs and allegations of the Union were heard.

The issue is:

May the Employer deduct the parking tickets of other employees from the vacation pay owed to the grievant, PETER BALZANO?

The Arbitrator’s Oath was waived as was the contractual tripartite Board of Arbitration. The case was heard by the Undersigned as sole arbitrator, duly selected by and under the Rules of the American Arbitration Association, as provided by the collective bargaining agreement between the parties.

By its own document, which I deem authentic and which I admitted into evidence as Union Exhibit #1, the Employer admits that it owes the grievant vacation pay in the gross amount of $1,043.10. From that amount the Employer made two gross
deductions -- $360.50, for FICA and taxes, and $811.00 for parking tickets. The latter were incurred by the truck from which the grievant made emergency elevator repairs on behalf of the Employer, but driven not by the grievant (who doesn't possess a driver's license) but by a helper assigned to the grievant for the driving and to assist in the repairs. The two deductions exceeded the gross vacation pay by $128.40.

The Union asserts that the deductions for parking tickets are unlawful under Section 193 of the New York State Labor Law and otherwise not the responsibility or liability of the grievant because his helper, not he, drove and parked the truck and that each ticket was the result of performing the work assigned by the Employer, namely elevator repairs, almost invariably on an emergency basis.

It is enough for me to rule, as I do, that vacation pay is "wages" within the meaning of Section 193 of the Labor Law and that parking ticket fines are not among the items for which deductions from wages or vacation pay may be made.

Whether the helper(s), the Employer or the grievant are liable for payment of those fines in any other forum is not before me and I make no determinations thereof. Indeed, in the absence of the Employer at the hearing, it has not even been established by sufficient evidence the quantity of the parking tickets or that the fines amounted to $811.
However, the Union does not dispute nor do I doubt the
certainty of the deductions for FICA and taxes leaving a net
vacation payment due of $682.60. Accordingly, the Undersigned,
duly designated as the Arbitrator, and having duly heard the
proofs and allegation of the Union, the Employer having failed to
appear after due notice, makes the following AWARD:

P.S. MARCATO ELEVATOR CO. INC. owes and is
directed to forthwith pay vacation pay to
PETER BALZANO in the net sum of $682.00.

Eric J. Schmertz, Arbitrator

DATED: August 16, 2001

STATE OF NEW YORK  
COUNTY OF NEW YORK  

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

between

LOCAL 282 I.B.T.

-and-

SOLOMON OLIVER MECHANICAL

The stipulated issue is:

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

A hearing was held at the offices of the Undersigned on February 16, 2001 at which time Mr. Boodoo, 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.

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

Mr. Boodoo shall be reinstated as a truck driver, but without back pay.

However, his reinstatement is conditioned on the following:

1) That he possess a valid truck driver's license;
2) That he possess the required paper's and/or authorization from the Immigration Service to lawfully be in the United States and to be lawfully employed; and

3) That his reinstatement and assignment to drive a truck do not prevent the Employer's insurance carrier from insuring the truck(s) he drives.

Eric J. Schmertz, Arbitrator

DATED: February 27, 2001

STATE OF NEW YORK )
COUNTY OF NEW YORK )

ss:

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

Was there just cause for the suspension and discharge of BENJAMIN MARTINEZ? If not, what shall be the remedy?

Hearings were held December 13th, 2000, January 5th, February 8th and February 15th, 2001; at which time, Mr. Martinez, 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 grievant, while a preceptor/clinical coordinator (and lead radiology technician) at the Hospital, is accused of engaging, on his initiative and virtually one-sidedly, in a sexually explicit and graphic conversation with two women radiology technician students over lunch in the Hospital cafeteria on January 31, 2000.
The Hospital contends that his sexually explicit remarks, with attendant physical gestures, were so unwelcome, so coarse and obscene and so irrelevant to the students' course of training that they shocked the students, and caused them emotional distress.

Additionally, because the students were assigned to the grievant for training, because he supervised their work and evaluated their progress and because he could have become one of their instructors in the near future, his conduct was not only unprofessional but constituted sexual harassment. And that his conduct was especially egregious because one of the women students was only 18 years of age.

The principal Hospital witnesses were the two women students and Hospital officials to whom the events were reported and/or those who conducted the investigation.

The grievant places a different cast and interpretation on what he did. He asserts that his remarks and descriptions were "clinical" or societal in nature, relating to an academic study of a woman's anatomy, including some medical methods of falsifying virginity; to the sexual experience of his son, at 21 years of age, only to explain how undisciplined youths can later mature to responsible adults (in response to the older student's expressed concerns about her children). He contends that his "clinical" remarks about the frequency of sexual activity were willingly responded to by the older woman student who
volunteered examples of sexual experiences with a former boyfriend.

He denies making specific references to the sexual preferences of younger women and older women and rejects the students’ assertion that his conduct was unwelcome, claiming that they laughed with him at his statements and examples.

The grievant attributes the charges against him to an organized campaign by the technicians under him in his department (whom he characterizes as “thugs”) to get him fired. They, he contends, exaggerated and miscast his lunch conversation with the students, encouraged the students to formally complain for the purpose of getting him fired because they disliked him, and circulated an unsigned letter demanding his termination to the Hospital authorities and to the training program accreditation agencies.

I find no reason in the record to disbelieve the two students. They testified forthrightly and unequivocally, though it was obvious to me that such testimony, in which they recited and demonstrated the grievant’s graphic and explicit sexual remarks and gestures, caused them distress and discomfort. I find no reason why they would falsify or distort what happened.

Indeed, I consider it significant that they had declined to file a formal complaint (after reporting the incident verbally to Hospital management) and as witnesses expressed their reluctance to have to testify. I accept as truthful and
accurate not only their testimony of the event, but their expressed statements that they didn’t want to file a formal complaint and had preferred not to testify because as students they feared the consequences of a formal complaint on their studies and careers, and only wanted “to complete their training at the Hospital and leave.”

To my mind, their complete and detailed testimony, together with their expressed reluctance to do so, rebuts the Union’s assertion that the women were instrumentalities of the technicians or part of a scheme to get the grievant fired. In short, the truthfulness of their testimony supporting the specific allegations stands unimpeached, the motives of the technicians notwithstanding. Also, I deem it inconsequential that the students may have “laughed” at what the grievant said. It was the grievant who asked the students if he could join them at lunch. Obviously, as their supervisor or preceptor, they could not say “no” to him. And, I conclude that if they laughed at what he said, it could well have been from nervousness and embarrassment, and to camouflage their discomfort -- not as evidence of willing participation.

Let me state unconditionally that I find the grievant’s behavior at that lunch to be reprehensible. What he said and what he demonstrated was obscene, unjustified and unwelcome. It caused the students emotional distress, manifest embarrassment generally, and confusion in the “teacher-student” relationship,
particularly. In short, the charge against the grievant of unprofessionalism is clearly proven.

But the grievant’s discharge is not limited to his unprofessionalism. His conduct is also defined by the Hospital as “sexual harassment” and as the latest episode in a “pattern of behavior.”

The Hospital's letter of discharge addressed to the grievant on March 22, 2000 states inter alia:

"...you engaged in a sexually explicit conversation in the St. John’s Queens Hospital Cafeteria with two students who were assigned to you. This sexual conversation entailed a reference that the students would take classes with you as a faculty member in their next calendar year of study (emphasis added).

This assertion, as developed in the Hospital’s case in this arbitration, relates to the specific additional charge of "sexual harassment."

The letter goes on to state inter alia:

"Interviews of X-ray staff and a review of your personnel file indicate a pattern of behavior that is indication of unprofessional conduct" (emphasis added).

This statement, again as developed by the Hospital in this arbitration, is the additional charge of a "pattern of behavior."

In short, the Hospital relied on three circumstances in effectuating the grievant’s discharge. Unprofessionalism,
sexual harassment and a "pattern of behavior" as evidence of both.

Though the charge of unprofessionalism has been clearly and convincingly established, the latter two charges fall short of the requisite standard of proof. This is not to say that the grievant would not have been suspended and discharged for the first offense -- unprofessionalism. I do not know. Rather it is to say that three charges were presented as the grounds for his termination, both in the discharge letter and in the Hospital's case in this arbitration. And that with that choice and circumstance the burden is on the Hospital to prove, clearly and convincingly, the causes for the grievant's discharge. The stipulated issue is whether there was "just cause" for the grievant's suspension and discharge. As the Hospital relies on three reasons as meeting the test of "just cause," adequate proof of only one, considering other relevant circumstances, may be grounds for mitigation of the discharge penalty to something less.

The Hospital has not proven a "pattern of behavior." It claims that the grievant engaged in incidents of "sexual harassment" in 1993 and 1996. However, neither of these allegations were substantiated when they happened and neither were proven in this arbitration. The Hospital conceded that the 1993 allegation was "unsubstantiated" and I ruled therefore that it was not a probative matter in this case. No evidence was
offered by the Hospital in support of the 1996 allegation. The grievant testified about that incident on cross-examination. His explanation of that event in no way constituted factual sexual harassment. And that testimony was un-rebutted. So, the 1996 allegation is wholly without probative value. Rejecting as I do, the allegations of 1993 and 1996, it is manifestly obvious that no “pattern” of behavior or misbehavior, either of unprofessionalism or sexual harassment has been proved. So, that charge is dismissed. And that leaves the grievant’s prior disciplinary record over his 27 years of service, unblemished.

The charge of sexual harassment, arising from the grievant’s conduct over lunch, is based on the Hospital’s assertion that the grievant was the students’ supervisor, evaluator and potential instructor. And that by his superior rank and power and control over their studies he created a “hostile environment” that was so sexually frightening and intimidating as to equate to “sexual harassment,” then, for the balance of their training program, and especially for the next academic session when he could be their instructor.

My study of the law of sexual harassment persuades me that no matter how coarse, obscene or reprehensible was the grievant’s behavior over a lunch of about ½ hour duration, it did not rise to the level of sexual harassment as defined and recognized in statutory or case law.
Circumstances constituting sexual harassment generally fall into two categories — the "quid pro quo" and the "hostile environment." The former, of course, is the demand, exchange or offer of benefits for sexual favors, or reprisals or threat of reprisals for rejection of such demands or offers. There is no credible evidence of a "quid pro quo" circumstance in this case.

A "hostile environment" as defined by the statutory Title VII and lead cases thereunder requires evidence that the workplace is permeated with discrimination, intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" Oncale v. Sundowner Offshore Service Inc., 523 U.S. 75, __, 118 S. Ct. 998, 1001 (1998) citing Harris v. Forklift Systems, Inc.; 510 U.S. 17, 21, 114 S. Ct. 367, 370 (1993) Oncale makes clear that Title VII is strictly limited to actual harassment based on sex (gender) and that it may not be construed to enact a federal code of civility. Here, in my judgement, the grievant's behavior was manifestly uncivil, but fell short of creating the pervasive or severe hostility or the discriminatory intimidation required for sexual harassment.

Assuming, as I do, that the students' status is legally comparable to an "employment," it is speculative, at best, that the grievant's conduct, limited to the lunch period, had a nexus to their tenure as students, to their assignments, to the grading of their work or to their ultimate success as
students. Certainly the students were shocked, insulted and emotionally distressed. But I do not think they felt a pervasive hostility or threat; nor did their testimony so indicate. Nor do I find evidence that the grievant intended his remarks to be a prelude to later intimidation, coercion or irregular influence. Rather, I see it as a stupid and perverted act of misplaced bravado confined to the lunch period.

Clearly, severe discipline is appropriate for the grievant’s misconduct and unprofessionalism. But with two of the three charges against him unproved, and without a claim by the Hospital that the remaining charge would be “just cause” for dismissal, I consider it appropriate and consistent with due process that the arbitrator consider mitigation of the discharge penalty.

Consideration involves a look at the grievant’s overall employment record and longevity. He has been a long service employee of 27 years. There is no evidence that his work has been anything but satisfactory. He has risen in rank to that of lead technician, and supervises a group of technicians. As previously held, his prior disciplinary record is unblemished. These consideration lead me to conclude that a lengthy disciplinary suspension from the date of his discharge on March 22, 2000, to one year later, March 22, 2001 is the proper penalty. At the Hospital’s option his reinstatement may be at his previous location or at any of the Hospital’s facilities.
Also, at the Hospital's option and sponsorship, he may be required to undertake sensitivity training and/or psychological counseling.

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

The discharge of BENJAMIN MARTINEZ is reduced to a disciplinary suspension of one year.

He shall be reinstated without back pay on March 22, 2001, one year from the date of his discharge.

At the Hospital's option and sponsorship, he shall undergo sensitivity training or psychological counseling.

Also, at the Hospital's option, his reinstatement may be at his prior facility or, if feasible, at any other location, within the Hospital's facilities.

Eric J. Schmertz, Arbitrator

DATED: March 9, 2001
STATE OF NEW YORK )
COUNTY OF NEW YORK )

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

Did the Employer violate the collective bargaining agreement by assigning bargaining unit duties of the lead Engineer to non-bargaining unit employees? If so, what shall be the remedy?

Hearings were held on September 20th; and December 6th, 2000; January 23rd, and March 16, 2001 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. The parties filed post-hearing briefs.

There is no dispute that beginning in March 1998 and thereafter in 1999 various duties performed by the bargaining unit lead Engineer over a twenty-five-year period were re-assigned to managerial or supervisory personnel, namely the Director and Assistant Director of the Employer's energy plant.
And that from the end of December 1999, when the incumbent Lead Engineer was removed from that job because he failed to obtain a required license the Lead Engineer job became and has remained vacant, with the duties thereof assumed by the Director and Assistant Director.

What is in dispute is whether the assumption of the Lead Engineer duties by the Director and Assistant Director and the refusal of the Employer to fill the Lead Engineer position with a bargaining unit employee violated the collective bargaining agreement.

There is no significant dispute over what the duties of the Lead Engineer are or were.

The Job Description reads:

LEAD ENGINEER

Person in charge in absence of Director and Assistant Director. Responsible for all maintenance in Power Plant, garages and community center, etc. Lays out work, assigning all persons to work duties. Orders all supplies for mechanical operation of Plant. Must be familiar with all phases of Plant operation and maintenance.

The Employer describes the principal duties as:

"...to day out the work, assign all persons to work duties, order all supplies and be in charge in the absence of the Director and Assistant Director. In addition, the Lead Engineer provides technical advice to the employees."
The Union describes the basic duties as:

"...to determine what work needs to be done, lay out the work, assign persons to work duties, order all supplies for mechanical operation of the plant, assist employees in trouble shooting problems, oversee the work performed, answer technical questions, assist in complex maintenance and repairs and check the work of the employees one completed."

I deem the two foregoing descriptions substantially similar, at least for purposes of this case.

By a jointly negotiated memorandum of June 20, 1998, the parties agreed that the Lead Engineer (then Anthony Montelione) was required to possess an operating Engineer's license, (which Montelione failed to obtain by December 31, 1999, and which caused his removal). However, the first transfer of duties from the Lead Engineer to the Director or Assistant Director took place in March 1998.

A memo dated March 3, 1998 read:

From: Vernon Douglas

Subject: Power Plant

Date: March 3, 1998

After a number of meetings regarding the operation of the power plant, the following is a list of processes that should facilitate cooperative operation of the plant:

1. There will be a daily afternoon meeting between the director of the plant, the assistant director and the lead engineer. The purpose of the meeting will be to review ongoing projects, prioritize and assign new projects, and create work orders as needed. The director or assistant director will write
out the work orders to be distributed by the lead engineer. If during the workday the lead engineer deems it necessary to reassign employees as it relates to the operation of the plant, he would be allowed to do so based on the following conditions:

a. Non availability of either the director or the assistant director.

b. An emergency situation that requires immediate attention.

The lead engineer will notify the director or the assistant director within a reasonable amount of time about the change in assignments. The lead engineer will make written comments on the work order, indicating what changes took place.

The lead engineer will also keep the director and the assistant director updated during the day as needed regarding the status of the projects. The director, the assistant director, and the lead engineer will meet every morning to readjust work orders based on any changes that took place overnight.

2. There will be a weekly meeting between the director, assistant director, lead engineer, and the lead electrician to review long-term projects, prioritize overall operation of the plant. The director will have the final say on all assignments, work orders, etc., and the overall operation of the plant. In lieu of the director's absence, the assistant director would have similar responsibilities.

3. To help create a positive working atmosphere and to resolve issues as they relate to labor and management, there will be a monthly meeting between the director and/or assistant director, the shop stewards from Local 3 and Local 30, and the director of human resources to discuss and, hopefully, resolve any problems that may arise.
With the implementation of this Memo, the Director and Assistant Director assumed the threshold duties of determining the work to be performed, generated the work orders and authorized changes in the work assignments. The Lead Engineer’s role in these functions was apparently changed from one of exclusive or primary responsibility to shared responsibility or subordinate responsibility to the Director and Assistant Director.

The Employer makes the point that these changes resulted from discussions with the Union and were not grieved by Montelione or the Union.

Thereafter, in February 1999, a further change occurred. On instructions from management, a new Director took over the handing out of work orders to the employees, based on computer generated Work Orders. Soon thereafter the paper Work Orders were discontinued and the employees received their work assignments verbally from the Director or the Assistant Director.

What remained for the Lead Engineer was to provide “technical assistance” to the employees and to order supplies and prepare requisition forms.

However, the Employer asserts that even those functions were not the Lead Engineer’s exclusively, but that all three, the Director, the Assistant Director and Montelione, ordered supplies, and gave assistance.
The final shift of Lead Engineer duties occurred on and after December 31, 1999 when Montelione was removed from the job (and demoted pursuant to an arbitration award) for failure to obtain an operating engineer’s license. The Employer asserts that at that point the work that had remained for Montelione (about 50% of his original assignments) was not needed in a full-time capacity. Accordingly, what duties remained were taken over by the Director or Assistant Director, and the Lead Engineer job was not filled.

The Employer argues that the reassignment of the Lead Engineer duties to the Director and Assistant Director was the product not only of discussions with the Union, but was with the Union’s agreement. I am not so persuaded. Clearly the changes of February 1999 and December 31, 1999 were unilaterally effectuated by the Employer. The only possible bilateral agreement was the initial or basic shift in March 1998, as memorialized in the Memo of that date. Though clearly there were discussions between the parties leading to that Memo, I find no evidence that, in fact, it constituted bilateral negotiations. Rather, I conclude that the Employer notified the Union of the new and pre-eminent role of the Director and Assistant Director, but neither sought nor obtained the Union’s agreement. I conclude also that the Union did not then grieve because the Lead Engineer job remained, was still occupied by a bargaining unit employee who was paid his full rate, regardless of any
diminution in his duties or responsibilities. So, I reject the Employer's claim of Union agreement to the shift of duties. At most, the Union acquiesced, but did not, at that point, feel a threat to the bargaining unit.

The Employer contends that its actions were consistent with its managerial rights and, more specifically, its right to sub-contract.

The contractual management rights clause reads in pertinent part:

e. The Employer retains the usual and customary management rights as the number and distribution of employees consistent with efficient operations subject to the terms of the agreement.

The sub-contracting clause reads:

a. Sub-contracting

In the event that the employer desires to sub-contract for work that previously had been performed by members of this union or falls within jurisdiction of this union, the employer will notify the union at least one (1) week prior to the effective date of its contracting for such services and set forth the name and address of the contractor provided; that in the event of an emergency in regards to the operation of the Power Plant or related facility, the employer shall not be required to provide such notice.

In substance, the Employer argues that the shift in the work from the Lead Engineer to the Director and Assistant Director is not prohibited by the contract, remains a managerial
right under (e) above and/or is in nature of sub-contracting within the meaning of (a) above.

Additionally, the Employer asserts that all the duties of the Lead Engineer especially the principal or basic duties, were performed regularly by the Director and Assistant Director historically on a joint jurisdiction basis with the Lead Engineer. And that therefore in the absence of exclusive jurisdiction of the Lead Engineer, the transfer of duties from the bargaining unit to the Director and Assistant Director did not deprive the bargaining unit of any jurisdictional right to the work.

I do not see what happened here as sub-contracting within the meaning of (a) above. No sub-contract was involved and obviously no sub-contractor was named. Sub-contracting traditionally means contracting bargaining unit work to a different independent employer, usually out of the plant. That was not the case here. The work remained in the plant and was performed, not by an independent contractor, but by employees of the Employer namely the Director and Assistant Director. In short, the facts are much closer to the performance of bargaining unit work by supervisory or managerial employees.

Nor, in my view, is this the proper exercise of a managerial right under (e) above. Though the contract contains no specific ban on the performance of bargaining unit work by non-bargaining unit personnel, it is well settled that an
unrestricted transfer of bargaining unit work out of the unit carries with it the power to damage or even destroy the certified unit by wholesale removal of its jurisdictional work. The well-settled rule is that any such managerial power is restricted by contractually implied but logical and reasonable conditions.

I agree with the esteemed, late Saul Wallen who in deciding a case similar to this stated:

"job security is an inherent element of the labor contract, a part of its very being if wages is the heart of the labor agreement, job security may be considered its soul. Those eligible to share in the degree of job security the contract affords, are those to whom the contract applies.

The transfer of work customarily performed by employees in the bargaining unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore on one of the contract’s basic purposes."

(See Ekkouri & Elkourie: How Arbitration Works - Fourth Edition pg. 549)

Hence, even in the absence of explicit restrictions on sub-contracting or non-bargaining unit assignments of bargaining unit work, arbitrators limit management’s rights to circumstances of bonafide business need, lack of skills of the unit employees or lack of equipment, emergencies, short-time constraints, adequate conditions of employment of the sub-contractor.
Transcending all these conditions is the rule that subcontracting or transfer of work to non-bargaining unit employees not be in derogation of or do damage to the bargaining unit.

Here, these exceptions were not present, at least based on the record before me. The Employer made the changes for purposes of managerial control and efficiency. That is not enough to deprive the bargaining unit of one of its more important and senior jobs. The unit was damaged by that loss. And it was not until that damage presented itself that the Union needed to or was required to grieve.

In short, except for the exceptions noted, bargaining unit work, so identified by contractually negotiated bargaining unit job titles and descriptions belong with the unit so long as the work is to be performed.

The remaining question is whether the duties of the Lead Engineer have been exclusively bargaining unit work, subject to the above rule. For if, as a matter of practice, those duties were performed jointly with managerial employees, bargaining unit exclusively is lost and the work may be properly shifted back and forth between the unit and non-unit employees.

In this case, the Employer argues joint jurisdiction. I do not find it as a practice. The Lead Engineer, with the full original duties, had been in place for almost twenty-five years. There is not persuasive evidence that performance of those duties by the Director and Assistant Director pre-dated the March
1998 reorganization. The Employer has failed to show a practice of managerial or supervisory activity in determining the work, its priority, laying out the work, or assigning it over the 24 years prior to March 1998. Rather, I deem its testimony as evidence of what the Director and Assistant Director did from March 1998 on. That the Director and Assistant Director may have "ordered supplies" and provided some "technical assistance" prior to March 1998 is not enough to establish joint jurisdiction over all or most of the work, as a practice. Accordingly, I find that until March 1998, the primary if not all the duties of the Lead Engineer were performed exclusively by him and that therefore, those duties fell within the exclusive contractual jurisdiction of the Union. And so long as those duties are to be performed, they belong to the bargaining unit, subject to the exceptions noted. There is insufficient evidence of whether a particular employee is entitled to the re-established job of Lead Engineer, so no employee is so identified and no back pay is awarded.

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

The Employer violated the collective bargaining agreement by assigning Lead Engineer bargaining unit duties to non-bargaining unit employees.
The Employer is directed to return those duties to the bargaining unit and to the Lead Engineer job.

Eric J. Schmertz, Arbitrator

DATED: May 29, 2001

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.