IN THE MATTER OF THE ARBITRATION

between

LOCAL 62, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES AFL-CIO

Union,

-and-

DEFENSE SUPPLY CENTER, PHILADELPHIA

Employer.

The issue in dispute involves the propriety of the Job
Opportunity Announcement, and its implementation for the position
Community Technical Specialist, GS-301-12.

A hearing was held at its Employer's facility in
Philadelphia, Pennsylvania, on April 28, 2004, at which time
representatives of the Union and the Employer appeared and were
afforded full opportunity, to offer evidence and argument and to
examine and cross-examine witnesses. The Arbitrator's Oath was
waived. Summation briefs were filed by both sides.

The Union contends that the process used by the Employer to
fill 14 vacancies in the stated job classification from the 68
applicants declared eligible and referred for interviews was
violative of Article 13, other sections of the collective
bargaining agreement and other regulations and rules. And hence
fatally flawed.
Specifically, the Union asserts that:

1. The Employer accepted additional qualifying information after the Job Opportunity Announcement was closed.

2. The Employer improperly re-rated and re-ranked the referred qualified candidates.

3. The Employer disregarded established past practice by using direct supervisory input in the selection process.

4. The Employer made decisions regarding credit for education outside of the Job Opportunity Application.

5. The Selection Panel's responsibilities and duties were illegally intertwined with the selecting officials.

6. The selection violated established tie-breaking procedures.

7. The criteria of "merit" was not properly evaluated.

8. The Employer committed a violation when it made additional selections despite the Union's grievance in this case.

9. The Employer discriminated against protected under-represented minorities.

After full study of all the rules and regulations relied on by the Union, I find that what is relevant and controlling is Article 13 (Merit Promotion) of the collective bargaining agreement. And that the Union's allegations, to be sustained, must show a violation or violations of that Article, inasmuch as that is what the parties bi-laterally negotiated as the process
and procedure for filing promotional opportunities in the bargaining unit.

Pertinent to these cases are the following Sections of Article 13:

SECTION 1 - PURPOSE AND SCOPE

This Article is applicable to all promotions to Agency positions within the bargaining units represented by the DLA Council.

The Agency has the right to select or not to select from among a group of highly qualified promotion candidates, including the right to non-select all candidates.

SECTION 5C

3. Cooperate in the resolution of questions concerning their qualifications and eligibility for a specific job vacancy or job category by providing pertinent information as may be requested or required.

SECTION 9

B. Candidates must be evaluated on the basis of their knowledge, skills, and abilities (KSA) relevant to the position being filled. For each position (or group of positions) which will be filled through competitive promotion procedures, a written rating plan must be developed. This plan will describe:

1. The knowledge, skills, and abilities identified through job analysis as necessary for successful job performance and the degree to which each is needed.

2. The measurement methods to be used.

3. How the highly qualified group will be determined.
E. All rating plans must evaluate promotion candidates on the basis of experience, education, training and self-development, awards and performance ratings.

F. Evaluation procedures to be followed and measuring information to be used will be based solely on job related criteria. Unless otherwise negotiated locally, all ranking plans will use a maximum point score of 100. As a minimum, the factors which must be considered in the development of ranking plans are: (a) Quality of Experience, (b) Performance Rating, (c) Education, Training, and Self-Development, and (d) Awards. Additional factors considered relevant and essential to the ranking process such as required test or group interviews, etc., may be used. Promotion candidates with no performance rating, no relevant critical elements, or whose rating does not match the DLA scoring process, will be given a score equal to "Fully Acceptable."

H. Only education, training, and self-development completed by the closing date of the JOA may be credited if it is indicative of likely possession of one or more of the knowledge, skills, or abilities of the vacancy.

I. Each candidate's score for the rating elements will be determined by a review of the Supplemental Qualifications Statement (SQS) and/or the SF-171 or locally developed substitute form submitted. OPFs will be used only to corroborate information provided by the candidate.

SECTION 10 - USE OF PANELS IN THE PROMOTION PROCESS

A. Rating and ranking panels may be used to evaluate and rank candidates for promotion consideration. If management elects to convene a rating and ranking panel, it will notify the Union and will ensure that Union nominees are fully considered in its selection of panel members.

B. Panels used to rank candidates for positions at GS-12 and above must include a subject matter expert.
C. Panel members will be provided sufficient guidance concerning the methods and procedures for evaluation and ranking candidates so as to enable them to thoroughly understand and uniformly apply the evaluation process.

D. Panels will not function in any way which preempts the selecting official’s authority.

SECTION 11 - REFERRAL OF CANDIDATES FOR SELECTION

A. A list of the highly qualified candidates, as determined by the Civilian Personnel Office or a rating panel, as applicable, will be referred to the selecting official for consideration. The number to be referred will be determined locally.

SECTION 12 - CANDIDATE INTERVIEWS

A. Generally, all candidates will be interviewed. Candidates who are not readily available need not be interviewed or may be interviewed by phone. To expedite staffing, additional candidates who need not be interviewed may be determined locally based on whether the position(s), interviewer(s), and the organization(s) are similar and how much time has elapsed since the last interview.

With regard to Section 9H. above it is agreed that after the closing date of the JOA, no new or additional information may be submitted by the applicant.

I choose to deal first with the Union’s objections 2 through 9. Each is determinable by one or more of the foregoing Sections of Article 13.

Objection #1 states that the process of reducing the number of applicants for further consideration by judging eleven of the 68 as only “good” or “average,” from the threshold listing as “highly qualified” is a violation.
The Union appears to confuse the initial "highly qualified" rating of all 68 candidates with the second step of the selection process, namely the evaluation of each for legitimate reduction to 14, as there were only 14 vacancies to fill. The second step resulted from the Employer's evaluation of each candidates credentials and an interview. This narrowing process is precisely authorized by Sections 1D, 9B, E, F above.

Objection #3, namely the Employer's use of supervisory input in the evaluation process, is contradicted by the universal right of management to seek and consider a supervisor's view of a candidate for promotion, with the exception that such input may not be arbitrary, capricious or discriminatory. Here there is no evidentiary showing of any such motives to supervisory input. "Vagueness" of the input is not a disqualifying factor, provided it is not used as a critical or determinative element. And that has not been shown in this case.

Objection #4 represents the Union's view of how the educational factors and experience were utilized and credited. I agree with the Union that a "trade school" certificate is not equivalent to a BS/BA college degree. But the question is whether for this particular job, that trade-school course, with the skills, experience and aptitude required of that job, may be equivalent or even superior to a Bachelor's degree. That is a judgment call, and an exercise of managerial authority in determining qualifications for particular job. Put another
way, the burden is on the Union to show that the Panel's recommendations regarding education and experience were unrelated to the job requirements, and that any such evaluation was irregularly made for the purpose of favoritism or discrimination. That burden has not been met here. Additionally, management's rights in this regard, again absent proof of arbitrariness, is sanctioned by Section 10D above and in accordance with the Employer's authority to develop and apply a "plan" applicable to the job in question. Finally, the Employer's decisions, as part of its "plan" to accord extra weight to certain factors is again, job related presumptively. Only if found to be arbitrary or improperly preferential, may it be successfully challenged. The arbitrator cannot determine if "experience with threaded or non-threaded products" is relevant. I cannot say it is irrelevant.

Objection #5 has not been proved to my satisfaction. The Employer has the express right under Section 10 above to established a Panel to assist in the selection process. The evidence shows that the Panel obtained information and made evaluations which it reported to the selecting officer. I find nothing in the evidence that the Panel or its members usurped the selecting officer's authority to make the ultimate decisions. Indeed, the probative evidence shows that the Panel, as authorized by Section 10, acted substantively in acquiring information and making judgments on qualifications among the candidates, but that they acted under the guidance of the
selecting officer, and in an advisory, albeit important, delegated role, as is contemplated by Section 10. In short, there is no evidence of a "conflict of interest" between the role of the Panel and the selecting officer.

Objections #6 and #7 involve the contention that weighted credit for certain factors and the use of factors only for "tie-breaking" purposes, are violations. Again, both methods are part of the Employer's plan, which unless shown to be unrelated to the job duties in question or otherwise arbitrary, must be credited as a proper managerial function under Section 9 above. The contract does not specify how the factors of experience, education, training, self-development, awards and performance ratings are to be to judged. "Due consideration" of each and all allows for different credit and emphasis, based on the Employer's determinations of the skills, and experience needed. So, again, unless arbitrariness is shown, the Arbitrator cannot substitute his judgment for that of the Employer in assessing the qualitative requirements of a particular job. Extra weight for some more relevant factors is permissible and to use "awards" and "education" as "tie-breakers" meets "due consideration" or "due weight" requirements. In short, "due weight" is subjective, with the presumption in favor of a legitimate exercise of a management right.
Objection #8 is procedurally erroneous. Merely because the Union has grieved the process in this case does not mean that the Employer must stop processing appointments thereunder. The Employer may do so, at the risk that their appointments may be vacated or otherwise changed if the process is ultimately deemed flawed. Any other rule, unless specified in the contract (which it is not) would enjoin the Employer from carrying out its duties and responsibilities. A grievance does not suspend the Employer’s authority. It only puts the legitimacy of that authority in question for arbitral or legal determination. Like any alleged violation of civil law, the right of the parties involved to continue the disputed practice continues, unless legally enjoined. There is no such contractual or arbitral injunction in this case.

With regard to objection #9, the Union’s claim is mere assertion. It has not shown probatively that minorities are under represented in this job classification. The Employer contends otherwise. At best the evidence is unclear. And with the burden on the Union to prove that allegation, the absence of clear and convincing evidence negates the allegation.

What remains is Objection #1. Here I am troubled by what the Employer did and I find merit in the Union’s assertion that Article 13 Section 9H was violated by adding new or additional
substantive information to the applications of some of the applicants after the JOA was closed.

The Employer denies that it did so, but rather only exercised its right to “clarify” or “get explanations” of information on the submitted application. But I still deem it irregular and potentially prejudicial to other applicants who relied only on the information submitted. For it cannot be said that the additional information provided did not have an effect on the subsequent evaluations of the Panel or the rankings the Panel recommended, to the disadvantage of those eleven applicants who were not promoted. This is so notwithstanding the fact that all 68 applicants were initially found qualified.

Article 9H, means, and as mutually stipulated, that each applicant stands or falls on the credentials he submits with his application.

That the applicant may not add new information; does not mean, as the Employer erroneously argues, that a Panel or a selecting officer may obtain that additional information. That would be an obvious circumvention of the restrictions of Section 9H and a violation, albeit indirectly, nonetheless. In short, to do something by indirection that cannot be done directly is a well-settled legal prohibition.

What the Employer did here went beyond seeking bare clarifications and/or explanations, but prompted some applicants
to add, expand or supplement the credentials they originally supplied.

Specifically, I accept as accurate the Union's claim (and as the testimony reveals) that:

(a) Employee Gene Boss was told to supply an official transcript.

(b) Employee Anthony M. Carenia was told to submit a transcript or grade card for a course in "Human Resources" at Penn State, to raise his academic credits from 22 (on the original application) to 25.

(c) Employee James F. Heimen, Jr. was told to submit certain transcripts and "original application and questionnaire."¹

I cannot tell from the record how severe or prejudicial this violation may have been. It may have been of de minimus effect, with no change in the ranking of those who succeeded, or alternatively prejudicial to other candidates. Therefore the Union's request for a remedy for violation(s), namely that the eleven unsuccessful candidate be promoted to the job in question, is inappropriate and excessive.

What is appropriate, in my view, and the customary remedy in cases where a process has been flawed, is to order a re-play of the process, eliminating therefrom the points of violation. I shall direct that that be done, and I expect it will be done by the Employer in good faith, with a de novo result that may or may

¹ The nature of the "application and questionnaire" is unclear. But it is additional information, not submitted originally, and beyond a clarification or explanation.
not change the order and rankings of those applicants selected and those rejected.

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

All the Union's objection to the process and methods of promoting applicants to the job classification of Community Technical Specialist GS-301-12 under a Job Opportunity Announcement are rejected, except for one objection.

The Union's claim of violation of Article 13 Section 9H is upheld. Because the evidence does not show how prejudicial that violation was, the Union's request for a remedy, namely the promotion of eleven applicants who were rejected, is denied.

The appropriate remedy is for the selection to be redone ab initio, omitting the information that violated Section 9H.

I direct that the repeating of the process without the offending factor be done in good faith, so that the ultimate ranking of the candidates reflect a flawless procedure.

Pending that renewed process, the present status quo, with the promotions made, shall be maintained.

Eric J. Schmertz, Arbitrator

DATED: November 5, 2004

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 NEW YORK PLAN FOR THE SETTLEMENT
OF JURISDICTIONAL DISPUTE

IN THE MATTER OF THE ARBITRATION

between

OPERATING ENGINEERS LOCAL 14-14B

-and-

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 3

OPINION AND AWARD

The jurisdictional dispute between the above-named Unions involves the question of which union has jurisdiction over the operation of two overhead, Type B cranes at the Peletti Powerhouse, in Astoria Queens, New York.

A hearing was held before an Arbitration Panel on May 5, 2004, at which time representatives of both unions appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The operation of the two cranes is presently split between the two unions - one is operated by the Operating Engineers, the other by the I.B.E.W. Both cranes are performing identical work. The "50-50" sharing was on order of the contractor, and apparently pursuant to a decision of the Executive Council of the American Federation of Labor, dated August 4, 1926.

Local 3, I.B.E.W. is satisfied with the split work arrangement, arguing that it is in accord with that decision and
seeks affirmation of that arrangement from this Arbitration Panel.

Local 14-14B of the Operating Engineers claims jurisdiction over both cranes, asserting that the 1926 decision is inapplicable. Rather, it argues that by consistent practice in the Greater New York geographical area, such cranes have always been operated by members of the Operating Engineers, and that that prevailing practice is determinative.

As the parties were expressly advised at the outset of the hearing, the authority of the Arbitration Panel under the New York Plan for the Settlement Jurisdictional Disputes, is as follows, inter alia and in pertinent part:

"The arbitration panel shall be bound by Green Book decisions...or where there are none, International Agreements of record between the trades. If none of these apply for any reason...the arbitration panel shall consider the established trade practice and prevailing practice in the Greater New York geographical area."

The parties agreed that there are no applicable Green Book decisions. The Panel finds that the cited decision of 1926 is not an International Agreement, within the meaning of the Panel's authority. An International Agreement
must be signed by the presidents of the respective unions involved. Standing alone, as a "decision" it was obviously not a negotiated Agreement between the parties, nor signed by their presidents. Moreover, and significantly, the 1926 decision, by its express terms was confined to and applicable to thirteen western states, not including New York. Additionally, the cited Memorandum of Understanding of July 21, 1965, which affirms the 1926 decision fails the test of an applicable International Agreement on two grounds. First, though it incorporates and affirms the 1926 decision, it makes no change in the limits thereof, namely limiting it still to the thirteen western states of Colorado, Idaho, Montana, Utah, Wyoming, Alaska, Hawaii, California, Nevada, Oregon and Washington. Again, New York is not included or covered. Secondly, that Memorandum was signed (or purported to have been signed) by the I.B.E.W. Vice Presidents of the eighth and ninth Districts and the Regional Director, tenth Region of the Operating Engineers. It was not signed by the respective presidents of the unions, and hence does not rise to the level of an International Agreement.

Accordingly as Local 3 I.B.E.W. relies entirely on the 1926 decision, it has failed to meet its burden of proof in this case.

Conversely, Local 14-14B of the Operating Engineers, relying on established and prevailing trade practice, has met its
burden of proof. By evidence and testimony it has shown that over the years, with the only exception being the instant Poletti power plant, overhead cranes of this type have been operated by members of the Operating Engineers Union. Indeed, Local 3 I.B.E.W. concedes that its claim for jurisdiction in this case is because there are two cranes at work, and that it seeks the right to operate one of them, not both. It acknowledges that if there was a single crane, it would concede jurisdiction to the Operating Engineers, and would not have joined in this arbitration. With our rejection of the 1926 decision, the Panel views that concession and acknowledgement as determinative of the Operating Engineer's jurisdiction over both cranes.

The prevailing trade practice, which is controlling in this case, has been shown clearly and convincingly by the Operating Engineers. Eleven affidavits and supporting testimony were submitted into evidence showing the unvaried trade practice in the New York geographical area of assignment of operating cranes of this type to the Operating Engineers. And the record is devoid of any examples (except the one in dispute) of an assignment to Local 3 I.B.E.W.
For the foregoing reasons, the Panel makes the following AWARD:

The operation of the two Type B overhead cranes at the Poletti Powerhouse, in Astoria Queens, New York is work that belongs to Local 14-14B of the International Union of Operating Engineers.

Eric J. Schmertz, Chairman

DATED: May 11, 2004

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

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

Whether the termination of BERNEST WATFORD was for just cause and if not, what shall the remedy be.

A hearing was held on March 10, 2004 at the offices of the American Arbitration Association in Boston, Massachusetts, at which time Mr. Watford, hereinafter referred to as the "grievant" and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator’s Oath was waived, a stenographic record of the hearing taken, and both sides filed post-hearing briefs.

It is clear that the grievant engaged in vouchering irregularities by deferring to a later date some of his production made on a prior day. As a result, on the subsequent day the added production from an earlier day produced a "vouchered" record for the subsequent day that exceeded the actual quantity of work done that day. Conversely, his "vouchering" of work done on the earlier day was less than actually produced, leaving the excess for vouchering later.

The record is unclear why the grievant did so, except for his explanation that he held reporting production from an earlier day until a later day "to even out bad production days with good production days," thereby consistently meeting expected production standards.

The Company suggests that he did so to permit loafing or other non-productive activity on the subsequent day, on his shift to which no supervisor was assigned. But there is no probative evidence supporting the Company’s suspicious. Rather, the record shows that the productivity flow (where work on a particular part is sequential, requiring the completion of certain steps before the part can be moved for further work) was not impeded or delayed by the grievant’s later vouchering because the parts so “under claimed” on a given day, were nonetheless worked on in the prescribed sequence and moved on schedule to the next step of productivity.

It is also a fact that the grievant did not profit monetarily by what he did. He is paid on an hourly basis, not on a piece work basis. Moreover, as the work was in fact done, albeit vouchedered or accounted for at some subsequent point, what the grievant did, although irregular and probably skewed the Company’s vouchering system, did not involve a fraudulent claim for work not done or for payment for work not done. Also his total productivity did not fall below standard.

The Company claims that the grievant’s methodology (which occurred some 71 times) distorted the unit cost calculations which it uses to structure bills for its customers. But, based on the record, I am not satisfied that the Company has proved that assertion (upon which it relied at least in part, in imposing the discharge penalty) by the clear and convincing standard required in discharge cases. Importantly, the Company did not show that customers were wrongly or inaccurately billed as a consequence. So I see no negative economic or even public relations detriment to the Company’s dealings with its customers.
In defending its discharge penalty, the Company relies on its Code of Conduct (which it unilaterally promulgated). In doing so, it is so bound and constrained. It charges that the grievant's conduct falls within the terminal step of the Vouchering disciplinary sequence. That step calls for the penalty of discharge for:

"Vouchering irregularities of a more serious nature such as a claim
for payment or claim for work not performed."

In short, discharge is the penalty for fraud or theft where an employee seeks payment or a credit for work not and never performed. And that, in my view is what is meant by "a more serious nature." Here, within the context and content of vouchering misconduct, the justification of the penalty of discharge is so delineated and defined. Therefore, unless a false claim for payment or credit can be shown, the penalty of discharge is not appropriate, other potential consequences, especially if unproved, not withstanding.

But, clearly, the grievant is not blameless. He had no right to "level out" his production by the method he employed. It violated the vouchering instructions given him. Indeed he knew he was doing something wrong, by admitting his practice during the Company's investigation, and by promising "it would not happen again." His offense is clearly recognized and defined under the "suspension" penalty section of vouchering. The Code of Conduct provides for a disciplinary suspension for:

"Vouchering irregularities that involve such things as overstatements
or understatements with respect to the recording of time on a particular voucher."

The foregoing is precisely what the grievant did. He underestimated his actual production on day one and overstated it on day two. And by nonetheless arranging for the deferred part(s) to flow to the next production point, even though not yet vouchered, his vouchering reports were erroneous "with respect to the recording of time...."

The Company argues that because the foregoing statement refers in the singular to "a particular voucher" (emphasis added) it applies only to a single violation and not to the multiple (71) acts of the grievant. I do not read it that way. I conclude that that language only identifies the offense, but is not a limitation on the number of times the offense may occur for that Code Section to apply. I doubt that this particular provision of the Code of Conduct was legislated for a single offense. That the grievant acted some 71 times in violation has a bearing on the measure of the penalty imposed under that section of the Code. Here, because of the grievant's multiple violations, I shall impose a disciplinary penalty of the entire period he has been out. But it is still that section of the Code that is applicable.

Accordingly, the appropriate penalty compelled by the Company's own Code of Conduct is a suspension, not discharge. And as stated, a suspension from the date of his discharge to his reinstatement, as ordered below, is appropriate.
The Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above-named parties, makes the following AWARD:

There was not just cause of the discharge of BERNEST WATFORD. There was just cause for a suspension. He shall be reinstated but without back pay. The period of time between his discharge and his reinstatement shall be deemed a proper disciplinary penalty.

Eric J. Schmertz, Arbitrator

DATED: May 13, 2004
STATE OF NEW YORK )
COUNTY OF NEW YORK ) ss:
I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
IN THE MATTER OF THE ARBITRATION

between

LOCAL UNION NO. 322, B.U.W. COUNCIL

-and-

MASSACHUSETTS ELECTRIC COMPANY

The stipulated issue is:

Did the Company violate the collective bargaining agreement by not assigning an overhead line crew from the Spencer Platform to perform work in New York for the Niagra Mohawk Company on Friday, April 4, 2003? If not, what shall be the remedy, if any?

A hearing was held in Worcester, Massachusetts on November 17, 2003 at which time representatives of the above-named Union and Company appeared. The contractual tri-partite board of arbitration was waived and the parties proceeded before the Undersigned as sole arbitrator. The Arbitrator’s Oath was waived. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The Company filed a post-hearing brief. The Union waived its right to do so.
The Union relies on Article III, Section 3 of the collective agreement. It reads:

**Section 3.** Mutually agreed upon working conditions now existing, established past practices, or any working conditions will not be changed during the term of this contract. In order for the Company or the Union to show that a claimed past practice is binding, it must establish the following:

a. The past practice has been consistently followed by the parties for a reasonable time period, and

b. The past practice is a result of a formal or informal agreement between the Union and the Company over any working condition.

The Union asserts that it has been a "past practice" within the definition and requirements of Article III Section 3, for the Company to assign a crew from the Spencer Platform (located east of Worcester, Massachusetts) whenever another utility company requires and requests assistance in handling outages or other power emergencies.

In the instant case, the Niagara Mohawk Company in New York State encountered such problems and requested crew assistance from Massachusetts Electric. In response the Company sent crews from the Worcester and Leominster platform on April 4th, 2003; and a
The Union contends that a crew from Spencer should have been sent on April 4th, also.

The Company denies the applicability of Article III, Section 3 on two grounds. First it argues that that Section is modified and conditioned by that part of Article III, Section 1 which reads:

"The Union and the Local recognize the right and power of the Company to...to assign...or direct all working forces...and generally to control and supervise the Company's operations and to exercise the other customary function of Management....

If the Local claims that the Company has exercised any of the foregoing rights in a capricious or arbitrary manner, such claim shall be subject to the Grievance Procedure in Article XVI.." (emphasis added),

and that there has been no "past practice (that) has been consistently followed by the parties for a reasonable time period" nor is any past practice "the result of a formal or informal agreement..."

I need not resolve the interplay between Sections 1 and 3 of Article III because at the threshold the Union has failed to establish the existence of a "past practice" within the meaning and conditions of Section 3.
Company Exhibit #1, which stands unrefuted by the Union shows that for the period January 1998 to April 2003, (and excluding the instant circumstance), the out-of-town assignments of crews did not consistently include a crew from the Spencer Platform. Specifically, on July 2, 2002 and August 3, 2001 at (Merrimock Valley), a crew from Leominster was sent, but not one from Spencer. Similarly, on August 10, 2001 (North Shore) only a crew from Leominster was assigned. So, on three occasions out of a total of eight assignments from the Central District between 1998 and March 2003, Spencer crews were not deployed to the out-of-town locations.

Also, unrefuted is the Company's testimony that as a policy it has apportioned out-of-town overtime separately as well as conjunctively among the three platforms at Worcester, Leominster and Spencer and that Spencer has received the fewest because of its size, relative to the other two. There is no testimony that there was a "formal or informal agreement" to the contrary.

So, I do not find the establishment of a "past practice" that has been "consistently followed...for a reasonable period of time" or "a formal or informal agreement" supporting any such practice.
Hence, I do not find an evidentiary basis in this case to hold Section 3 pre-eminent over the general managerial rights set forth in Article III.

Accordingly, the grievance is denied.

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

The Company did not violate the collective bargaining agreement by not assigning an overhead line crew from the Spencer Platform to work at Niagra Mohawk Company on Friday, April 4, 2003.

Eric J. Schmertz
Arbitrator

DATED: March 11, 2004
STATE OF NEW YORK ss:
COUNTY OF NEW YORK ss:

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

IN THE MATTER OF THE ARBITRATION

between

LOCAL 30 I.U.O.E., AFL-CIO

-and-

MERIDIAN MANAGEMENT CORP.

OPINION AND AWARD

Case #133000190403

The Undersigned was selected as the Arbitrator to decide a dispute between the above-named Union and Employer involving the job classifications of HENRY MALDONADO and DARRYL JOHNSON.

A hearing was held on December 5, 2003 at which time Messrs. Maldonado and Johnson, hereinafter referred to as the "grievants" or individually as "Maldonado" and "Johnson," appeared, together with representatives of the Union and Employer. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Post-hearing briefs were filed.
The parties could not agree on a stipulated issue, leaving the determination of the issue to the Arbitrator. As is usual in such circumstance, I deem the issue to be:

"What shall be the deposition of the Union’s grievance on behalf of Maldonado and Johnson, numbered 2/2003 and dated February 7, 2003, and the Union’s Notice of Intention to arbitrate, dated August 5, 2003.

The grievance reads:

"Violation of Schedule A (of the contract) Darryl and Henry are working out of title. They are doing Inspectors work and are being paid as Clerks.

Settlement Desired. To have titles and rate adjusted retro to 1 October...."

The Notice of Intention to arbitrate reads:

"The improper working out of title of HENRY MALDONADO and DARRYL JOHNSON as Quality Control Inspectors or similar titles without paying them the appropriate rate of pay for said work in violation of the Agreement between the parties at the Fort Hamilton Army Base, Brooklyn, New York location.

In short, based on the duties they perform, the Union seeks an upgrading of the grievants from their present titles of Shipping/Receiving Clerk (Maldonado) and Lead Shipping/Receiving Clerk (Johnson) to the classification of Quality Control Inspector or similar titles with retroactive pay increases."
In the course of the hearing, the Union asserted alternatively that the grievants were entitled to the classification of General Clerks.

Controlling in this case are Schedule A of the contract, which enumerates the bi-laterally negotiated job classifications, Article XXI-Management Rights, Section 1 and Section 4 of Article VII-Grievance Procedure.

Article XXI Section 1 and reads:

ARTICLE XXI - MANAGEMENT RIGHTS

Section 1. The Union agrees that the management of the Employer and the direction of the working force shall be in the discretion of the Employer, and agrees that all management rights (except as specifically limited by any of the express provisions of this Agreement) are reserved to the Employer, including the right to hire new Employees to promote, to transfer, to discipline, suspend or discharge for just cause, to assign work, to schedule employees work week and the working hours including overtime, to classify employees, to introduce new or improved methods or facilities, and to require employees to observe reasonable rules and regulations. (emphasis added)

Section 4 of Article VII reads:

"The Arbitrator shall have no power to add to, subtract from or modify in any way any of the term of this Agreement."

Under the Employer's rights in Article XXI and the restrictions on the authority of the Arbitrator in Article VII it is obvious that the Arbitrator does not have the authority to
reclassify the grievants as Quality Control Inspectors. That classification or title is not included in Schedule A of the contract. To grant that requested classification would be to add a job title to Schedule A and would constitute an addition to the contract expressly prohibited by Section 4 of Article VII. That express restriction is binding on the Arbitrator regardless of the nature of the duties the grievants are performing.

As to the Union’s alternate argument that the Schedule A classification of General Office Clerk is proper and appropriate for the grievants, the Employer asserts that its managerial right to “classify employees” is restricted only if the exercise of that right is “limited by any of the express provisions of (the) Agreement.” And that the Union cannot point to any express provision violated.

The Union is correct in arguing that the Employer’s right to classify employers may be challenged and changed if the exercise of the right is an abuse of its managerial authority, as arbitrary, capricious or unreasonable.

Here, again irrespective of the nature of the work performed by the grievants, I do not find their classification as Shipping/Receiving Clerk or Lead Shipping/Receiving Clerk to be arbitrary, capricious or unreasonable.
Even if inaccurate, they were so classified by the Employer based on a U.S. Department of Labor classification of similarly employed personnel at another army base (Fort Drum). Also, when the grievants were transferred into the Employer's bargaining unit from their early employment with a sub-contractor, they carried with them the classifications they then had, namely Shipping/Receiving Clerk and Lead Shipping/Receiving Clerk. And they were slotted into classifications the parties negotiated in Schedule A. The Union did not at that time try to or succeed in negotiating a new classification for them or get them included in the general office clerk title. Recognizing the Employer's managerial right to "classify employees," the Union's argument that the instant classifications should be overturned as arbitrary, capricious or unreasonable cannot be sustained. For under the foregoing circumstances an inaccuracy between the classification and the duties performed is not enough to prove arbitrariness, capriciousness or unreasonableness.

Nor am I able to conclude within my limited authority, that the instant classifications violated Schedule A, as asserted in the grievance. Assuming that the classifications listed in Schedule A are "express provisions of the Agreement" within the meaning of the Management Rights clause, the burden is in the Union to show that the grievants' entitlement to the
classification of General Office Clerk, is violated by their classifications as Shipping/Receiving Clerks.

Confined to the issue as defined by the grievance and Notice of Intent to Arbitrate, the Union must prove that the job of General Office Clerks is "similar" to Quality Control Inspector. It has not done so.

Also, even if a substantive comparison of the work performed and the classification General Clerk is within the Arbitrator's authority, the Union has not shown that the particular and seemingly unique work performed by the grievants (in administering the movement, storage and inventory of property belonging to army personnel going from one duty station or location to another) fits adequately or persuasively into the General Office Clerk classification. My examination of the job description of General Office Clerk does not satisfy me that it reflects the type of work the grievants perform.

Indeed, Maldonado testified frankly that the title "that best fits his job was that of Inspector/Quality Control." Not General Office Clerk.

Accordingly, if the grievants are now mis-classified and if they are performing work of a higher responsibility and are entitled to a classifications and wage rate that accurately reflects their work, it is obviously a matter for collective
bargaining and negotiations between the parties but not within the authority of the arbitration forum.

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 Union's grievance on behalf of HENRY MALDONADO and DARRYL JOHNSON dated February 7, 2003, is denied.

Eric J. Schmertz, Arbitrator

DATED: February 5, 2004
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

UNITED STATES POSTAL SERVICE

-and-

AMERICAN POSTAL WORKERS UNION, AFL-CIO

-and-

NATIONAL POSTAL MAIL HANDLERS UNION


Before: Eric J. Schmertz, Arbitrator

Appearances:

For the U.S. Postal Services

Mr. Anthony Salzo, Jr.

For the APWU:

Mr. Michael E. LaPoint

For the NPMHU:

Mr. David E. Wilkin

Place of Hearing: Buffalo P&D Facility

Date of Hearing: September 8, 2004

The stipulated issues are:

(1) Did the Postal Service violate the Memorandum of Understanding of April 16, 1992 under the Dispute Resolution Procedures?

(2) Did the Postal Service violate RI 399 by assigning clerks to manual operation 121-48. If so, what shall be the remedy, except monetary?
A hearing was held in Buffalo, New York on September 8, 2004, at which time representatives of the above-named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Post hearing briefs were filed which reached the Arbitrator on October 19, 2004.

At the threshold, I conclude that the establishment of the manual operation 121-48, staffed solely by clerks, was an operational change within the meaning of that part of the Dispute Resolution Procedures which requires that the Service “present and discuss such change(s) with the Local Dispute Resolution Committee thirty (30) days prior to the effective date of the operational change.”

The change was from or in addition to a machine function staffed by both mail handlers and clerks performing dedicated work assignments, to a “bull pen” manual operation staffed only by clerks. Clearly, it was a methodological change that resulted in changing a mixed jurisdiction of clerks and mail handlers, to one of exclusivity for clerks. And that, in my view, is a “reassignment of function from one craft to another” (i.e. from a mixed assignment of two crafts to one craft).
This procedural requirement is a contractual condition precedent to establishing the changed operation. The parties are bound to it, and the Arbitrator must enforce it.

Here, though it would appear that the Service constructively or substantially complied with that requirement, I conclude that it did not comply with its essential spirit and intent. Indeed, it is well-settled law that an act may be within the letter of the law but not within its spirit and intent. And if not compliant with its spirit and intent, it is avoidable.

The Service's purported thirty-day notice to the affected Union took the form of a letter dated January 14, 2004 to the Mail Handlers, advising that "a permanent change" would be made effective February 16, 2000" and that there would be a trial period or experimental period from January 16, 2004 to February 16, 2004. It went on to invite the Mail Handlers to contact the Service if it had any "input" regarding the change. The trial period or experimental period was implemented, and staffed with clerks.

I find that the purpose and intent of the thirty-day notice was not satisfied by that letter, and that the rights of the affected Union (the Mail Handlers) were prejudiced by the trial or experimental period put in place by the Service within the 30-day period - indeed within two days following the date of the letter.
As in FibreBoard\footnote{FibreBoard Paper Products Corp. v. NLRB 379 U.S. 2003.} and the recent notice requirements for plant closings in the private sector, the thirty-day notice, in my view, was intended not just to give a Union notice of a change that affected its jurisdiction, but of equal importance to afford the affected Union the chance to discuss the proposed or projected change with the Service in an effort to resolve disputes over the change; to attempt to modify the change or its impact; to make concessions that might obviate or lessen the change and to fully explore and understand the business and operational needs underlying the change.

These opportunities, as contemplated by the thirty-day notice provisions, were not realistically afforded the Mail Handlers in this case. By implementing the change on a trial or experimental basis, the Mail Handlers were confronted with a constructive fait accompli, before any discussions could take place. The Service thereby created an apparent presumption that the change would be made regardless of later possible discussions, thus rendering less meaningful later discussions and its invitation for “input.”
In short, whether a trial or experimental period, a change was made on January 16, 2004, with an exclusive craft assignment to the clerks. And that was done without any discussions with the Mail Handlers.

Significantly I find nothing in the thirty-day notice provision, nor has any contract or other applicable provision been cited which permits the Service to implement a changed operation during the thirty-day notice period, whether a trial or experimental, or otherwise. For whether de facto (trial or experimental) or de jure (permanent) the effect is the same. Work has been shifted from a mixed jurisdictional operation to an operation staffed by one craft.

Put simply, I believe that the thirty-day notice/discussion requirement was intended to maintain the status quo for that period of time, and for the purposes stated, and that implementation two days into the thirty-day period was a prejudicial breach of the status quo, and inconsistent with what the parties intended by negotiating that status quo requirement.

As a remedy, I shall direct that the correct procedure be followed. Indeed, it may produce a resolution of this dispute, as is one of the reasons for the thirty-day notice and discussions, without further arbitration on the merits. I direct the affected parties to engage in discussions about this
operational change for 30 days, thereby satisfying and exhausting their respective rights and obligations. If there is no resolution of this dispute it may be referred back to me for a decision on Issue #2 above. For that purpose and in that event I shall retain my authority over this case.

Pending compliance with the foregoing ruling and its outcome, the manual operation 121-48 as presently constituted may continue.

DATED: November 12, 2004

Eric J. Schmertz
Arbitrator

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.
RI-399 JURISDICTIONAL DISPUTE
ARBITRATION PANEL

IN THE MATTER OF THE ARBITRATION

between

UNITED STATES POSTAL SERVICE

-and-

NATIONAL POSTAL MAIL HANDLERS UNION

-and-

AMERICAN POSTAL WORKERS UNION, AFL-CIO

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

OPINION AND AWARD

Case#BOOM-1B-503091150
Local #03027

Before: Eric J. Schmertz, Arbitrator

Appearances:

For the U.S. Postal Services

Francis E. McNamara

For the National Postal Mail Handlers Union:

Robert J. Broxton

For the American Postal Workers Union:

Michael E. LaPoint

Place of Hearing: Hampden, Maine

Date of Hearing: November 10, 2004
AWARD

During the scheduled hearing on November 10, 2004, the above-named parties settled the dispute involved. At their request I make their settlement my Consent Award as follows:

PRIORITY SOP

EQUIPMENT WITH ONLY PRIORITY

Handled on the platform by mailhandlers—operation 210 A breakdown of shape sort and Maine mail will be done. Maine mail will go inside to clerks for finalization.

EQUIPMENT WITH MIXED CLASSES

Handled in 010 by mailhandlers.
In the 010 breakdown, one container will be used for Priority.
The Priority container will go to the clerk breakdown—operation 050, 055 for finalization including SCF and outgoing Priority by shape sort.

Joint Service talks will be given by management, the APWU and the NPMHU to both Tours 3 and 1.

Any violations of this SOP that are grieved by either Union will be addressed in the Article 15 process as a violation of Article 7.

This resolves all issues raised by the NPMHU and the APWU regarding Priority mail breakdown in case #BOOM-1B-J 03091150, Local #03027.

DATED: November 22, 2004

Eric J. Schmertz
Arbitrator
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.

[Signature]

3
RI-399 JURISDICTIONAL DISPUTE
ARBITRATION PANEL

IN THE MATTER OF THE ARBITRATION

between

UNITED STATES POSTAL SERVICE

-and-

AMERICAN POSTAL WORKERS UNION, AFL-CIO

-and-

NATIONAL POSTAL MAIL HANDLERS UNION

RULING ON ARBITRABILITY

Before: ERIC J. SCHMERTZ, ARBITRATOR

Appearances: For the U.S. Postal Services

James J. Kirk

For the APWA:

Michael E. LaPoint

For the NPMHU:

Lawrence Hill

Place of Hearing: MidHudson P&DC, Newburg, New York

Date of Hearing: July 28, 2004
AWARD

I find that the elimination of the Act Tag function related the Outgoing Primary on Low Cost Tray Sorter was an operational charge within the meaning of the last paragraph of RI-399 Dispute Resolution MOU dated May 1, 1992 (Joint Exhibit #4 in the record). As such, Management was required "to present and discuss such change(s) with the Local Dispute Resolution Committee thirty (30) days prior to the effective date of the operational charge" I find that that presentment and discussion was not done by Management. Hence, the provision "within fourteen (14) days from the effective date of the operational change the adversely impacted union may appeal the operational change to arbitration" was not triggered, because the thirty (30) day notice was a condition precedent thereto. Hence, the complaint to arbitration of the Mail Handlers Union in dispute #A00M-1AJ04116249 was not untimely.

The argument of Management and the Postal Workers Union that the dispute is barred from arbitration by Article II B. of Postal Operations 1085-PO-204 is unpersuasive. That Section is ambiguous. It is not clear whether the "four (4) or more hours of continuous work" applies to each individual employee assigned or is cumulative to and among all the employees so assigned. Here, though individually, an assigned clerk may not work four or more hours on Tour 3, it is acknowledged that three to five clerks are
so assigned two hours each, making a total of from six to ten hours.

With the well-settled presumption in favor of arbitration, that ambiguity lacks sufficient precision to quantitatively bar the dispute from arbitration.

Accordingly, the complaint of the Mail Handlers in dispute A-00M-1A-J04116249 is arbitrable.

The merits of that case will be heard at the next hearing scheduled for either September 17th or September 21, 2004 (the parties are to advise which).

Eric J. Schmertz
Arbitrator

DATED: August 19, 2004

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

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

Craft designation, AFSM 100 Operation 035.

A hearing was scheduled for September 16, 2004, at the Mid Island P&DC in Melville, New York. Representatives of the above-named parties appeared.

During the time of the scheduled hearing the parties directly negotiated a settlement of that part of case A98M-1A-5002 45921 as referred to in the stipulated issue.
At the request of all parties, I make that settlement my Consent Award, as follows:

The parties hereby mutually agree to delete the language written in the letter, dated August 11, 2000, authored by Henry Johnson, Manager Inplant Support.

The language to be deleted is:

"During machine or console downtime, Mail Processors assigned to the AFSM 100, may be used in the prep area".

Furthermore, it is agreed that this language is stricken and will not be placed into the facility RI 399 Inventory.

DATED: September 21, 2004

Eric J. Schmertz
Arbitrator

STATE OF NEW YORK )

COUNTY OF NEW YORK )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The Undersigned, Impartial Chairman under the collective bargaining agreement between the above-named parties and having duly heard the proofs and allegations of said parties regarding the discharges of MICHAEL SANCHEZ and RODNEY PRIMUS at a hearing on June 24, 2004, makes the following AWARD:

The discharges of MICHAEL SANCHEZ and RODNEY PRIMUS are reduced to a disciplinary suspension.

They shall be reinstated without back pay effective June 20, 2004.

Said reinstatements are made with the provision that neither will drive New York City Board of Education work until they are recertified by the New York City Board of Education.

Mr. Primus’ suspension by the New York City Board of Education shall continue through July 18, 2004.
Mr. Sanchez's suspension by the New York City Board of Education will continue through July 26, 2004.

This AWARD is based on the particular facts of these two cases, and shall not be precedential.

ERIC J. SCHMERTZ
Impartial Chairman

DATED: June 29, 2004

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 BARRINGTON COPELAND? If not, what shall be the remedy?

A hearing was held on June 9, 2004, at which time Mr. Copeland, 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. Post-hearing briefs were filed.

The grievant was discharged for an overall unsatisfactory driving record, which included "multiple accidents, traffic violations, and reckless driving."

The unsatisfactory nature of his record as a driver is documented in the record by warnings, retraining efforts and a five-day suspension in January 2004. The latter suspension, also
included the admonition that if "violations continue, he would be terminated." That suspension and final warning was not challenged or grieved by the grievant or the Union. Hence the basis and justification for the suspension and final warning is no longer challengeable.

Subsequent thereto, the grievant's erratic and dangerous driving continued. I accept as accurate the testimony of Joseph A. Pereira a 19-A Examiner employed by GVC Ltd, that he saw the grievant driving an Employer bus on March 17, 2004; that the bus first stopped, and then backing up in traffic on the South-bound lane of highway I-95, requiring the witness' car and other vehicles to take evasive action to avoid hitting the bus or others. Manifestly this was a dangerous and prohibited driving maneuver by the grievant.

Also, the next day, on March 18, 2004, in a call and then a letter from a member of the public, it was reported that the grievant was seen driving erratically, changing lanes without signaling and moving at an excessively high speed on the Bruckner Expressway. Considering the grievant's driving record, I have no reason to disbelieve that report.

Accordingly, those two latter driving offenses, trigger the discharge the grievant was expressly warned would occur if his driving continued unsatisfactorily.
The Undersigned, duly designated as the 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 BARRINGTON COPELAND was for just cause.

Eric J. Schmertz
Impartial Chairman

DATED: August 2, 2004

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

I, Eric J. Schmeitz 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.
IN THE MATTER OF THE ARBITRATION

between

LOCAL 153 OPEIU

-and-

UNITE

The stipulated issue is:

Whether UNITE violated Article 4.3 of the parties' collective bargaining agreement in connection with the documentation it required from laid-off employees in the month of January 2004 who wished to be eligible for severance? If so, what shall be the remedy?

A hearing was held on September 15, 2004 at which time representatives of Local 153 OPEIU ("Union") and UNITE ("Employer") appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

Article 4.3, in pertinent part reads:

"...to be eligible for severance, an employee must execute a General Release provided by the Employer...."

It is the content of the General Release required and executed by employees laid off in January 2004, that is in dispute in this proceeding.
The Union argues that the General Release required of the laid-off employees in this case, and entitled Memorandum of Agreement and General Release, exceeded the traditional legal substance of any such Release, and contained provisions that were mandatory subjects of collective bargaining and hence precluded from the Employer's unilateral inclusion. But the Union does not assert that the provisions of the Release are violative of other specific provisions of the collective bargaining agreement.

Article 4.3 was bilaterally bargained. As such, it gave authority to the Employer to "provide" the General Release. I interpreted that to mean that the substance of the Release was also within the Employer's authority, provided that substance was legitimately relevant to the job(s) in question, reasonable in what is required, and not contrary to any lawful prohibition. I conclude, therefore, that subject to these restrictions, the bilateral negotiation of Article 4.3 satisfied any mandatory bargaining aspects of the content of the Release.

Union Exhibit #4 is the full content of the Release used in January 2004, and is incorporated by reference herein.

I am not persuaded that the proper General Release is confined to the General Release Form found in the General
Obligation Law, as the Union argues. That Form is for commercial transactions.

A Union-management relationship is sufficiently different from a traditional commercial transaction to warrant and justify an enlarged or substantively different Release, especially as sanctioned by the unlimited language of Article 4.3 of the contract. If the parties intended to use the traditional business form, Article 4.3 could and should have so provided.

Specifically the Union objects to paragraphs 1, 2, 3, 4, 6 and 9.

I find nothing wrong with paragraph 1. It merely recites the basis for the Release, namely the "lay-off" and the name of the employee affected.

I find nothing wrong with paragraph 2. It sets forth the amount of severance pay and other benefits which the employee is to receive.

I find nothing wrong with paragraph 3. It sets forth the extent of Health Insurance and COBRA election.

Paragraph 4 is not objectionable, provided it is implemented reasonably and without imposing financial expense or other undue burden on the employee. If the Union contends that its application is unreasonable, unduly burdensome to the
affected employee or imposes a financial expense to the employee, those contentions are grievable and arbitrable under the grievance and arbitration provisions of the contract.

Paragraph 6 is not objectionable if it relates to a job on which the employee had access to confidential and/or sensitive information. Under that fact and circumstance, it is a customary and therefore proper restriction. Again, if the Employer attempts to apply it to an employee who did not have a job with access to such information, the Union’s objection would be grievable and arbitrable.

Paragraph 9 is not objectionable. It is a traditional consideration (i.e. a waiver of future employment with this Employer) for the severance pay and other stipulated benefits.

However, I do find one objection that is a matter of form, rather than substance. Article 4.3, specifically provides for a General Release. It does not authorize a document titled “Memorandum of Agreement and General Release.” Accordingly, though I have found the content of Union Exhibit #4 to be proper quid pro quos for termination of employment and payment of severance pay and other benefits, I find that the document used should have been entitled General Release.
Therefore, I direct a modification by deleting from the title, preamble and body of the document all references to a Memorandum of Agreement.

In short, subject to relevant and reasonable application, to the grievability and arbitrability as stated above, and to the foregoing modification the text of Union Exhibit #4 is proper and upheld.

Finally, if there be an ambiguity in the meaning of "General Release" in Article 4.3, resolution is found in past practice. The evidence discloses that for prior lay offs, the text of the General Releases used at those times was virtually the same as the instant Union Exhibit #4, with variations, if any, reasonably related to the job, duties and status of the employee(s) laid off.

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

Based on the "modification" directed, the grievable/arbitrable references and reasonableness of implementation as stated in the foregoing Opinion, UNITE did not violate Article 4.3 of the contract by the documen-
Forfeitation it required of employees laid off in the month of January 2004.

[Signature]
Eric J. Schmertz, Arbitrator

DATED: September 29, 2004

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.

[Signature]
The stipulated issue is:

Was there just cause for the 30-day suspensions of
CHRISTOPHER WILLIAMS and STUART HIRSH? If not, what
shall be the remedy?

A hearing was held on February 24, 2004 at which time
Messrs. Williams and Hirsh (hereinafter referred to as the
"grievants") and representatives of the Nurses Association
(hereinafter referred to as the "Union") and the Westchester
County Healthcare Corporation (hereinafter referred to as the
"Employer"), appeared. All concerned were afforded full
opportunity to offer evidence and argument and to examine and
cross-examine witnesses. The Arbitrator’s Oath was waived; the
Union and Employer filed post-hearing briefs.

The grievants are charged with and were suspended 30 days
each for what the Employer characterizes as “insubordination.”
The grievants are employed as Star Flight Nurses on the Employer's helicopters, providing emergency medical treatment and transporting patients by air to the Westchester Medical Center in the Westchester and Ulster County geographical area. They are based, with a helicopter, at the Ulster County Air Base or at the Westchester Medical Center Base. It is undisputed that depending on operational requirements, weather, aircraft problems and staffing, their Base may be changed from time to time from one of those locations to the other.

The Employer asserts that on February 11, 2003 after reporting to the Ulster County Base they were advised of a site change and directed to report to the Westchester Medical Center Base. And that they repeatedly refused to do so.

Based on the entire record before me I am persuaded that the grievants delayed too long in responding to the site change directive, and understood that by doing so that they would be subject to disciplinary action. However, I find that certain unique circumstances were present at the time which legitimately account for some of the grievants' delay and which to an extent, but not fully, mitigates part of the penalty imposed. Also, while generally an insubordinate refusal to comply with a legitimate work order (and there is no doubt here that the site change order was operationally legitimate) warrants serve
discipline, including summary dismissal regardless of the offending employee's prior record. But here I find a contractual limitation on the magnitude of the penalty imposed.

The unique circumstances are viewed against the backdrop of the facts of the charges.

I have no reason to disbelieve the testimony of Chief Flight Nurse Anne Wargo. She explained the operational needs for the site change; testified that she spoke to or made adequate communications with both grievants; and instructed them to change their locations from Ulster to Westchester. She testified that not only did the grievants refuse to comply, but directly answered "yes" when she asked them pointedly whether "they were refusing." She testified that she continued to direct them to change their Base despite their request that an alternative arrangement be made, and despite their questions regarding the use of their own cars to change locations. I accept as accurate her testimony that she rejected any such alternatives or questions and I also accept her testimony that she did not offer or grant the grievants' "sick time" (which would allow them to avoid the new assignment). Credibly and consistent with the universally well-settled rule that an employee must comply with a work order and grieve later, I accept her testimony that she told the grievants that she would not "negotiate" with them, but
directed them to comply. Finally, while it is generally required that an employee who refuses to comply with a work order be expressly warned that failure to do so would result in disciplinary action, I am satisfied that when Ms. Wargo told the grievants that their refusals would be reported to the Deputy Director of Nursing, that was clear notice to the grievants that their conduct would be reviewed for disciplinary penalties.

What was unique? It is that this was a "first impression" for the grievants and also for Wargo. Though the Base had been changed before, it was always before the grievants reported for duty at a Base originally assigned. Here, unlike prior site changes, they had properly reported to Ulster before being instructed to report to Westchester. Factually I find that though the Employer tried to notify them earlier, the efforts to do so failed.

Neither grievant was reached directly and if messages were left on answering machines or cell phones, I accept as accurate the grievants' testimony that they did not get them before they reported to Ulster. So, confronted for the first time with a Base change after reporting for duty, I am not surprised nor do I fault their initial efforts to work out an alternative arrangement (like relocation of the aircraft). Similarly, if they raised the possibility of taking "sick time," because it
appears that there may have been some such prior practice for that. And while it is unclear to me when the question of use of their own cars and mileage reimbursement came up, I would not find that fatal if part of the initial discussions. But the grievants pressed those points too long and frankly, too defiantly once Margo rejected them and repeatedly ordered them to Westchester. At the point that she said she would "not negotiate" the site change, the grievants should have known that their responsibility was to comply forthwith leaving to a later grievance any challenge to the propriety of the site change or the conditions of traveling form Ulster to Westchester and even any entitlement to "sick time." From that point forward, though they may have thought they had some rights to continue to resist, based I think on their prior unblemished records and apparent dedication to their medical duties, they were wrong and hence technically insubordinate and subject to disciplinary action. That one or both were ultimately prepared to go to Westchester, after they were told to go home and that the matter would be so referred to the Deputy Director of Nursing was immaterial, it was then too late. That later conclusion is not changed in my mind by the hearsay and ambiguous E-mail from "Bobby" that purports to send a message to the grievants from Margo stating "...she thanks you but you can go home."
The final question is whether a 30-day suspension under the facts and unique circumstances of this case is appropriate or excessive. Normally, because insubordination is a serious offense, an Arbitrator should not substitute his judgment for that of the employer on the magnitude of the penalty imposed. Here, however, the Employer has promulgated certain rules and procedures regarding the offense of insubordination which constrain the measure of penalty by requiring consideration of certain factors in determining the appropriate penalty. Having promulgated those factors in its Human Resources Policy and Procedure, the Employer is so bound and constrained. Section 111-D ¶ V, Section 5 of said Policy and Procedures, the subject of which is:

"Employee Behavior
Employee Discipline"

reads inter alia:

"Insubordination includes... a refusal to obey management directives."

"... With regard to a refusal to obey a directive the following factors must be considered (emphasis on "must" added).

A) What is the magnitude of the offense and has the employee engaged in similar behavior in the past.

B) Was the order or directive clearly expressed by the management official.

C) Has the discipline been applied in a non-discriminatory and progressive manner. (emphasis added)
D) Was the employee made aware that his or her refusal to carry out the directive would result in disciplinary action.

E) Is it self-evident that the employee’s refusal to carry out a directive constitutes insubordination and, therefore no warning is necessary.

It is reasonable to conclude that the phrase “the following factors must be considered” means that all the factors must be satisfied to justify severe discipline.

A) Above, has not been fully satisfied. Though the offense was of sufficient magnitude, the grievants had not engaged in similar behavior in the past. And fortunately, no patients were endangered.

B) Above, was adequately satisfied.

C) Above, has been partially satisfied and partially not satisfied albeit ambiguously. The discipline was applied non-discriminatorily, but not progressively. “Progressive discipline” as defined by the Policy is:
   a. Oral warning(s)
   b. Written warning(s)
   c. Formal Discipline

The Policy goes on to provide for “formal discipline” (i.e. suspension and/or discharge) for such misconduct as “theft, immediate threat to the safety of himself/herself or others etc. And while it is not totally so limited, application of the legal principle of ejusdum generis, makes formal discipline applicable
to offenses that constitute crimes, moral turpitude and endangerment.

I do not think the grievants’ misconduct in this case equates to those type of offenses.

D) Above was satisfied by notifying the grievants that their conduct would be reported to the Deputy Director.

E) Above was satisfied by compliance with D.

This is not to say that the Employer was required in this case to discipline the grievants by a warning, oral or in writing. Rather it is to say that under the definitions and conditions of the Policy as applied to insubordination, and particularly because all of the factors that “must” be considered were not fully satisfied, a rule of reason, calling for an equitable remedy, should be applied to this case.

On balance, considering all the foregoing and based on the facts of this case alone, I am convinced that the grievants “overstepped the bounds” in response to a legitimate directive and that discipline is justified. But, clearly though a simple warning is not enough, a 30-day suspension under the factors of Section 5 (Insubordination) is excessive.

A suspension of 10 working days is both reasonable, equitable and appropriate in this case.
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 30-day suspensions of CHRISTOPHER WILLIAMS and STUART HIRSH are reduced to disciplinary suspensions for each of 10 working days. They shall be made whole for the difference.

Eric J. Schmertz, Arbitrator

DATED: April 20, 2004

STATE OF NEW YORK )
COUNTY OF NEW YORK )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
In accordance with the Expedited Submission Agreement dated February 28, 2003 between the above-named Union and Employer, which is a mutually agreed to forum for arbitration of discharges of school bus drivers and monitors charged with “having been responsible for unattended children,” said parties have submitted to me the questions of whether there was just cause for the discharges of drivers Percy Henry and Monet Oglesbee.

By agreement of the parties and in accordance with said expedited Submission Agreement, the issues were presented to me by written documents without a formal evidentiary hearing.

I find that the facts are that Percy Henry failed to pick up five children assigned to his bus at the end of the school day on January 7, 2004, leaving them unattended at school. He realized this at a drop-off stop and apparently only after inquiry from a parent awaiting his child there. Henry then returned to the school to retrieve the children left. It appears that during the time they were left, they were unattended.
Oglesbee left a child on his van when and after he returned to the yard, apparently not checking the van as required, at the end of the run. The child was discovered on the van by a supervisor.

The facts of these two incidents fit squarely within the express prohibitions of the Employer’s published Memorandum of February 1, 1997 and are violative of the Employer’s promulgated rules requiring a procedure to ensure that children are not left unattended when they should be in the Employer’s care. That rule and the procedures to be followed to insure compliance have been upheld uniformly as reasonable and relevant to the job duties of a driver by several prior arbitration Awards. Similarly, the penalty of discharge for those offenses has been also upheld as proper and for just cause.

I find nothing in the instant cases that distinguish them from the several Awards the Impartial Chairman has rendered for those offenses (See Matter of Frank Benedetto June 25, 1997; Matter of Etta Daniels, July 1, 1999 and Matter of Patsy DeSanto, April 2, 2003).

The grievants’ explanations in the instant case are not excusable defenses.
Accordingly, the discharges of Percy Henry and Monet Oglesbee were for just cause and are upheld.

As in the earlier, aforesaid cited cases, I see sufficient similarities to make a similar recommendation herein.

Therefore, without prejudice to the validity and continued enforceability of the Employer's rule, without any precedent for any future matters, and solely for the Employer to consider in its sole discretion and because of the grievants' apparent satisfactory prior record, I recommend the following:

That the grievants be re-employed without back pay to available work on a different route and for a different school district from those they were working at the time of the incidents.

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

The discharges of Percy Henry and Monet Oglesbee were for just cause.

Eric J/ Schmertz
Impartial Chairman
DATED: February 9, 2004

STATE OF NEW YORK } ss:
COUNTY OF NEW YORK }

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

[Signature]

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In accordance with the Expedited Submission Agreement dated February 28, 2003 between the above-named Union and Employer, which is a mutually agreed to forum for arbitration of discharges of school bus drivers and monitors charged with "having been responsible for unattended children," said parties have submitted to me the questions of whether there was just cause for the discharges of drivers Percy Henry and Monet Oglesbee.

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

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Eric J. Schmertz
Impartial Chairman
DATED: February 9, 2004

STATE OF NEW YORK  
ss:
COUNTY OF NEW YORK  

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

Was there just cause for the discharge of DONOVAN HALL. If not, what shall be the remedy?

A hearing was held on February 20, 2004, at which time Mr. Hall, 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 Employer cites and relies on my Decision in the Matter of Maria Ciapetta (December 8, 1998).

The facts in the instant case are distinguishable from that matter. That case dealt with a series of accidents or a cumulative record of accidents which I concluded showed a propensity or accident proneness that predicted probable further driving errors, with attendant danger to the riding public and Employer liability. I ruled that for that reason the Employer
need not tolerate that future prospect and therefore had the right to severe said employee from its employ.

The instant accident, though severe, was the grievant's first. This is not to say that a severe first accident may not be grounds for summary dismissal. Rather it is to say, in this particular case, that the unique circumstances that caused the accident lead me to conclude that it was aberrant and not yet evidence of propensity or accident proneness or of chronic driving deficiencies. I believe that though preventable and chargeable because of the grievant's negligence, it does not represent what his future driving record would be. Specifically I do not think he would have such an accident again.

Simply put, he placed an unopened beverage can precariously on top of his personal belongings bag in the console next to the driver's seat. As he made a left turn on to Mamaroneck Avenue the can fell to the floor and apparently lodged itself under the brake and accelerator pedal. He then, negligently, took his eyes off the road while attempting to dislodge the can with his feet or by bending down. The bus continued to veer left, crossed from the driving lane into the left lane and struck and rode on top of a Mercedes in the left on coming lane, and pushed the Mercedes
backward into a Ford passenger car. The Mercedes was totaled, its driver injured and the Ford damaged. But for the unsafe location of the can and his negligence in taking his eyes off the road in attempting to retrieve it or dislodge it, the accident would not have occurred. These most particular events, albeit very serious and negligently based, lead me to believe that the accident was a one-time event.

This hopeful conclusion is buttressed by the grievant's good prior record. In the one year of his employment he has had no prior problems. Indeed, his good record led the Employer to make him a trainer of new drivers. I believe that but for this unfortunate accident, and the unique circumstances that caused it, the grievant was on his way to a good employment record with the Employer. Indeed, no less a person that the Employer's CEO, characterized his record prior to the accident as "exemplary," I believe that given another chance, the grievant will not commit accidents and will develop into a valued if not superior employee.

I reiterate and affirm all the principles I set forth in the Ciapetta case and other decisions of mine spelling out the special fiduciary duties of the Employer and its drivers. But in this
case, under its particular facts and circumstances, and on a "last chance" basis, I will give the grievant the opportunity to redeem himself and show a resumption of his otherwise "exemplary" status.

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 DONOVAN HALL is reduced to a disciplinary suspension. He shall be reinstated without back pay on a "last chance" basis. He shall be required to undertake any additional training the Employer deems necessary. The period between his discharge and his reinstatement shall be deemed a disciplinary suspension for the accident of November 10, 2003.

Eric J. Schmertz  
Impartial Chairman

DATED: March 5, 2004

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

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

Was there just cause for the discharge of DONOVAN HALL. If not, what shall be the remedy?

A hearing was held on February 20, 2004, at which time Mr. Hall, 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.

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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 DONOVAN HALL is reduced to a disciplinary suspension. He shall be reinstated without back pay on a "last chance" basis. He shall be required to undertake any additional training the Employer deems necessary. The period between his discharge and his reinstatement shall be deemed a disciplinary suspension for the accident of November 10, 2003.

Eric J. Schmertz
Impartial Chairman

DATED: March 5, 2004

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

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