The stipulated issue is:

Did the Port Authority breach Article XXIV, Paragraph 28 of the Memorandum of Agreement, by refusing to comply with OSHA standards in regard to fire-retardant work clothes? If so what shall be the remedy?

A hearing was held on January 13, 2005 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.

Article XXIV paragraph 28 of the Memorandum of Agreement reads:

28. Safety and Health Standards.

If it is established that the Post Authority does not basically conform with OSHA standards, the Port Authority will make every good faith effort to come into conformance.

The Employer issues certain work clothing to the electricians in the bargaining unit involved in this case. The
The clothing in question are work shirts, work trousers, a work coverall and an outerwear jacket.

The Union contends that their items of clothing do not comply with OSHA 1910.269(1)(6)(iii) which reads:

OSHA 1919.269(1)(6)(iii) states: "The employer shall ensure that each employee who is exposed to the hazards of flames or electric arcs does not wear clothing that, when exposed to flames or electric arcs, could increase the extent of injury that would be sustained by the employee."

Note: Clothing made from the following types of fabrics, either alone or in blends, is prohibited by this paragraph, unless the employer can demonstrate that the fabric has been treated to withstand the conditions that may be encountered or that the clothing is worn in such a manner as to eliminate the hazard involved; acetate, nylon, polyester, rayon."

And OSHA 1910.335(a)(1)(i) states: "Employees working in areas where there are potential electrical hazards shall be provided with, and shall use, electrical protective equipment that is appropriate for the specific parts of the body to be protected and for the work to be performed."

The Employer asserts that the foregoing OSHA provisions do not apply to the work performed by the Port Authority electricians, but to:

"the operations and maintenance of electric power generation, control, transformation, transmission and distribution lines and equipment...at electric power generation stations including fuel and ash handling, water and steam installation and test sites..."
involving temporary measures associated with electric power generation, transmission, etc. as well as level-clearance, tree trimming operations.” And that the Port Authority electricians do not do that work.

The precise nature of the work performed by or required of the bargaining unit electricians at the Port Authority is not part of the record in this case. So I cannot tell whether any of the work cited by the Employer as not within any work assignment of an electrician may or may not, in fact be performed by them.

But I need not decide that question, because, in as much as Article XXIV Section 8 is part of the Memorandum of Agreement between the parties, it must have some applicability to the electricians in this case.

The applicability, I judge, is simply whether the clothing issued by the Employer is not “clothing that, when exposed to flames or electric arcs, could increase the extent of injury that would be sustained by the employee” I conclude that that is applicable because it is reasonable to assume that the electricians, performing their regular duties are “exposed to hazards of flames or electric arcs...” Otherwise there would be no reason for the inclusion of paragraph 28 in the Memorandum of Agreement.
More specifically, OSHA has issued interpretations that define the clothing material that comply with its regulation. It has ruled that:

"Fire-retardant treated 100% cotton clothing when meet the American Society for testing and materials standards, F1506-1994 is acceptable under Section 910.269(1)(6)(iii)."

(emphasis added)

The Employer's assertion and testimony that the shirts, trousers and coveralls, made of 100% cotton are fire-retardant treated, is not refuted by the Union.

So, as to the shirts, trousers, and coveralls, the Union has not shown that they fail to comply with the OSHA standard on which the Union relies.

The outerwear jacket is different. It is made of polyester, and is not or has not been treated for fire-resistance. OSHA 1910.269(1)(6)(iii), which I have found is applicable in the contractual context stated, prohibits "acetate, nylon, polyester, rayon" (emphasis added), unless the Employer can demonstrate that it was treated for fire-retardation. The record before me does not show that the Employer here has met that burden of showing that the outerwear jackets were so treated. So, unless there is some other outerwear clothing that covers the issued jacket, that the jacket is worn by electricians on work that exposes them to flames or electric arcs, there is non-compliance with Section 28.
The Memorandum of Agreement; Article XXIV provides for the remedy in that event. It requires the Employer to "make every good faith effort to come into compliance." And that is the extent of the Arbitrator's remedial power.

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 shirts, trousers, and coveralls issued to the electricians comply with OSHA standards and Article XXIV paragraph 28 of the Memorandum of Agreement.

The outerwear jacket, unless treated for fire-retardation does not so comply.

The Port Authority is directed to make every good faith effort to come into conformance with OSHA regulations and Article XXIV of the Memorandum of Agreement, with regard to the issued outerwear jacket.

Eric J. Schmertz, Arbitrator

DATED: May 10, 2005

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 discipline of Frantz Seraphin? If not, what shall be the remedy?

A hearing was held on June 14, 2006 at which time Mr. Seraphin, 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 grievant was "written up" and suspended for about three and one-half hours from 1:10pm to 3:45pm (with the loss of double time pay for that period of time) on the Presidents Day holiday of February 20, 2006 for "being off-post."

The grievant is a Security Officer who was assigned that day to the taxicab stand and location at Grand Central Station and 42nd Street. His responsibility
was to maintain order and organization of the line-up for cabs, prevent line “jumping” or
“crashing,” prevent “hustling” of passengers and luggage by
unauthorized personnel and generally to insure the orderly and fair procurement of
taxicabs at that location. The assignment comes with certain special condi-
tions. Because the Employer (and presumably the City) want the taxi stand covered by
a Security Guard continuously, to insure the foregoing, the assigned Security Officer
may not leave that post unless physically relieved “face-to-face”
by another officer. This applies to meal breaks, personal needs, the end of a shift and
other circumstances when and where the officer is scheduled to leave or needs to
leave the post. This condition and rule have been promulgated because of the
potential for confrontations, disputes, and disorder between and among persons
seeking cabs and because of the illegal practices of “hustlers.”
An exception, relevant to the instant case is that on days of severe weather
conditions (cold, heat or other severe inclement conditions) a Security Officer, assigned
to the taxi stand may go into an inside location (a store, hallway or other shelter) to “get
warm” (or cool), provided there are no persons on the taxi line seeking cabs, provided
that from the shelter location the officer can unobstructedly and continuously see and
maintain observation of the taxi stand and provided he remains in the sheltered
location for a short period of time. (The Employer contends that the time limit is five
minutes).
In this case, the grievant and the Union on his behalf do not deny those conditions (except the five minute time limit) but rather assert that the grievant complied with those rules. Undisputedly, he went into the hallway of the Grand Central Terminal entrance at 42nd Street. He contends it was "very cold that day" and that he went inside "to warm up". He claims that he stood just inside the entrance doors, continuously observed the taxi stand, and that there were no persons on the taxi line seeking cabs. And that therefore he was not off post improperly or in violation of patrol rules, and his suspension and discipline were unjustified and should be reversed.

The Employer's view of the facts is critically different and was set forth in the testimony of Supervisor Harvey Rivers. The issue turns on the credibility of the grievant and the credibility of Rivers.

It is well settled that between an employee who has been disciplined and whose defense, as here, is based on that employee's testimony, and the contrary testimony of a supervisor, the supervisor's testimony is viewed more objective and accurate, unless there is a showing of animosity, retaliation or arbitrariness by the supervisor toward the employee. And that because the employee has a personal, partisan interest in his own defense, his testimony, in that circumstance, enjoys less credibility. (See Elkouri & Elkouri : Arbitrator Saul Wallen.)
I find that is the circumstance here. I accept as accurate and credible the testimony of Rivers and find that this testimony meets the Employer's burden of proving the charge against the grievant by the requisite "clear and convincing" standard. I find no reason whatsoever in the record, or even suggested, why Rivers would testify falsely, nor is there any evidence supporting a claim of discrimination or retaliation against the grievant. Indeed, if Rivers "bore false witness" it would be nothing short of a "frame-up." And there is no evidence whatsoever, or even an argument to support that.

Rivers testified that following a phone call from a person who told him that no security officer was at the taxi stand location, Rivers went to the location and observed it for 10-15 minutes, during which he looked for but did not see the grievant. He stated that he looked in the general area, into the doorway of adjacent stores (i.e. The Banana Republic) but didn't see the grievant. He stated that there was a line of travelers on the taxi line seeking and waiting for cabs and indeed, intervened in and resolved a dispute over a cab between a man and a woman on the line. Thereafter, he testified he saw the grievant in the Grand Central Terminal entrance, about 10-15 feet from the entrance doors, down the ramp leading to the station, talking to another security officer (Perez). He stated that from the grievant's location (i.e. 10-15 feet down the ramp) the grievant was not observing the taxi line or stand, nor could he do so from that distant
location. When Rivers confronted the grievant, in the terminal and at that location on the ramp, and asked him what he was doing, the grievant replied "warming up."

From that credible testimony I conclude that the grievant was off post, inside the Grand Central Terminal ramp for at least 15 minutes, and considering the period of time from the initial phone call to Rivers, his period of observation, and his intervention in the taxi line dispute the grievant was off post for about one-half an hour.

Therefore I reject the grievant's assertion that he was located just inside the entrance door, leaning on the glass, and at a location that he could maintain a view of the taxi stand. Rather, I accept Rivers testimony that the grievant and Perez were located at the second glassed display window of the Kenneth Cole store (on the Grand Central ramp) and I reject the grievant's testimony that he saw Rivers approaching from Park Avenue across the street, and went outside the Grand Central entrance to meet him there.

Also rejected is the grievant's testimony that there were no taxi passengers in the line, or that for the entire period of time, from Rivers' initial observation through the time that Rivers saw and spoke to the grievant and Perez, no passengers were on or formed on the taxi line. February 20th was part of a holiday weekend. I deem it unlikely in the extreme that no passengers exiting Grand Central during that time
sought a taxicab. Indeed, Rivers testimony to the contrary, and especially his unrefuted testimony of settling a dispute on the taxi line, is the credible and believable evidence.

Under the foregoing circumstances, I find that the grievant did not meet or comply with the work conditions that attach to the assignment of a post at the taxi stand. With that conclusion, I find it unnecessary in this proceeding to consider or deal with the question of whether there is the additional condition of limiting a "warm-up" or "cooling" period to five minutes.

That there were taxi passengers on the taxi line and that the grievant was at a location from which he could not observe the taxi stand, are enough violations of the otherwise undisputed limited conditions when an officer can leave the taxi stand post; to justify the grievant's suspension for the balance of his shift that day.¹

The Union raises the defense of "disparate treatment." It asserts that Officer Perez who was talking to the grievant and was admonished for doing so by Rivers, only received a warning, but not a suspension.

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¹ After Rivers confronted the grievant and Perez, the grievant was ordered to "clock out" and was subsequently officially suspended for the balance of his shift.
And that an officer Smith who, the Union claims was tardy in returning to his patrol post that day after his meal break, and hence "off post" was not penalized at all.

These situations are substantively distinguishable from the grievant. Perez was on his meal break when he was talking to the grievant. Though Rivers told Perez that that "was more serious," it is not clear whether that applied to Perez or was a further violation by the grievant who was on duty. In any event I do not think it disparate to treat "talking while on duty" comparable to being "off post." So I do not find that Perez should have been suspended as well. As to Smith, the evidence is unclear whether he was actually off post, and if so, for how long. He was on his way back to his patrol post, and if tardy at all, it was de minimus, not comparable to the grievant's period of time off post. And hence not a "disparate" comparison. Moreover, the Employer makes a distinction between patrol posts and the taxi stand assignment, according some time leeway to the former because of reasonable differences between those different assignments.

Finally, the magnitude of discipline often depends on an employee's prior disciplinary record. Here, the grievant was previously suspended for six hours for an "off post" violation. Neither Perez nor Smith had prior disciplines (or at least none were introduced in this record). I recognize that the Union had not been recognized as the
bargaining agent when the grievant was previously disciplined, and that discipline could not then be challenged by impartial judgment. But it nonetheless is part of the grievant's work record, and in that respect can and does distinguish the grievant from Perez and Smith for disciplinary purposes.

Officially, the grievant was charged initially with violating Rules 8 and 1 of the Employer's Work Rules. Thereafter, following the grievance procedure, the Employer charged the grievant with violations of Rules 8 and "2."

I need not make a determination or consider if there is an inconsistency in the charges of either #1 or #2, because all the foregoing supports a violation of Rule 8, which reads

"Employees must be present on their assigned routes or post assignments during work-hours unless authorized to leave;"

and which, therefore is enough to sustain the discipline imposed.

The Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above-named parties, makes the following AWARD:
There was just cause for the discipline of Frantz Seraphin.

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.

STATE OF New York)  
COUNTY OF New York) ss:  
DATE JUNE 20, 2006)
The Undersigned duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above-named parties at a hearing on December 4, 2006, makes the following AWARD

The layoff of Kevin Owens is sustained on the following basis:

1. Nationwide Management as agent for Kaygreen Realty Corp. shall pay to Kevin Owens the sum of $5000 in full settlement of all claims.

2. Maintenance of all equipment at 89-41 164th Street, with the exception of the new air conditioning and heating equipment, if necessary, shall be done by a local 30 contractor.

3. In the event that such services are necessary, management shall request a list of contractors from Local 30 and shall provide service through such contractor.
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.

STATE OF NEW YORK)
COUNTY OF NEW YORK)
DATE DECEMBER 4, 2006
American Arbitration Association,
Administrator

In the Matter of the Arbitration Between

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1381,

Union,

- and -

KEYSPAN ENERGY,

Employer.

AAA Case No.
13-300-E-02776-04
(Discharge: Andrea Macaluso)

Appearances:

For the Union:

Edward J. Cohen, Esq.
Cohen, Leder, Montalbano & Grossman, LLC
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Kenilworth, NJ 07033

For the Employer:

Patrick M. Collins, Esq.
Greenberg Traurig, LLP
200 Park Avenue
New York, NY 10166
PRELIMINARY STATEMENT

The Undersigned was selected by Keyspan Energy (Company) and IBEW, Local 1381 (Union) to hear and decide a dispute arising from the Company’s discharge of Andrea Macaluso from employment in October 2004.

Hearings were held at the New York City offices of the American Arbitration Association on August 10, 2005, November 17, 2005, January 13, 2006 and March 9, 2006, at which the parties were represented by counsel who were afforded a full opportunity to examine and cross-examine witnesses and to submit other evidence in support of their positions. A stenographic transcript of each day’s proceedings was taken that serves as the record for this opinion and award. Counsel elected to make oral arguments in closing on March 9, 2006, thereby waiving submission of written memoranda.

ISSUE

The parties stipulated the issue at the first day of hearing to be whether there was just cause for Andrea Macaluso’s discharge and, if not, what is the appropriate remedy.

SUMMARY OF PARTIES’ CONTENTIONS

Company

Macaluso was properly discharged for a willful violation of the Company’s ethics policy because she knowingly assisted at least two other employees, both since
discharged,¹ who were working in direct competition with the Company by installing gas meters and doing other work related thereto. Macaluso knew that the employees, who are her personal friends, were engaged in side work that the Company does not permit and she nonetheless assisted them by taking job information from them, falsifying Company records, facilitating the completion of the side work, and securing a waiver of charges ordinarily imposed by the Company. There is, moreover, evidence of her willingness to accept a cash payment in return for the help she gave these two other employees. The work done by the other two employees presented a potential safety problem for the customers and general public and it exposed the Company to potential liability.

Macaluso’s intentional misconduct was egregious and warrants discharge, particularly because she had earlier accepted a suspension for a violation of the ethics policy centering on a disclosure of confidential Company information.

**Union**

The grievant in performing her job as a dispatcher did nothing improper. She is a long-term employee with an excellent record of service. The Company wants to impose guilt by association due to its suspicion that any close friend of the two other employees the Company fired must also be guilty and it seeks to punish the grievant because she had filed a sexual harassment complaint against a Company supervisor on May 11, 2004, shortly before the Company’s investigation into her job performance began. Grievant’s recorded conversations with the other employees reveal nothing wrong nor could she

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¹ One employee who is represented by a different union is contesting his discharge under a separate arbitration proceeding that is pending.
know that whatever side work those employees may have been doing was in violation of Company policy. Grievant dealt with those former employees in the same way she dealt with any other contractors or plumbers and she performed her job duties in the normal manner and as instructed by Company supervisors. She is not guilty of any wrongdoing and should be reinstated with backpay and benefits.

**FACTS**

**A. Grievant’s Employment Record**

Macaluso was hired by the Company in 1987 and worked as a dispatcher for approximately fourteen years before she was placed in charge of meter sets for about three years before returning to dispatch in January 2004. During her employment, she received several commendations and notes of appreciation from Company supervisors and co-workers for the quality of her work, dedication and teamwork. After having been disciplined in March 2004 for an unrelated violation of the Company’s ethics policy, by letter dated October 18, 2004, issued after an interview with her earlier in October, the Company discharged Macaluso from employment effective October 5, 2004 without a statement of reasons being set forth in that letter.

**B. The Company’s Ethics Policy**

The Company’s ethics policy, as here relevant, prohibits certain types of conduct by its employees.

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2 This discipline, based on disclosure of Company information, and consisting of an eighteen-day suspension, was grieved and reduced to five days by agreement reached in July 2005 before a different arbitrator.
The “no compete” policy is carried as a conflict of interest and displayed on the
Company’s intranet system as follows:

No employee shall provide services (managerial, consulting
or otherwise) on behalf of his or her self, or on behalf of any
organization other than the Company, to any outside concern
which does business with, or is a competitor of the Company,
unless such activity has received prior written approval from
the Ethics Office.

No employee shall be obligated, in fact or appearance, to
anyone by accepting any gifts, payments, fees, services (other
than services generally available to the public), vacations,
pleasure trips, loans (other than conventional loans from
conventional lending institutions), or other
favors from any person or business organization that does or
seeks to do business with, or is a competitor of, the Company.

No employee shall conduct any activities or business related
to an after hours job, second job or outside business, during
the hours that the employee works at the Company.

The ethics policy in other places prohibits gifts or bribes as evidenced by the
following excerpts:

The Company’s policy further prohibits the receipt of bribes
or kickbacks by employees.

Should you become involved in a situation where a request
has been made for a bribe, kickback or any other prohibited
kickback, it is your responsibility to report the situation to
your immediate supervisor and the Ethics Office.

The giving or receiving of common courtesies such as sale
promotion items, occasional meals or reasonable
entertainment, which is appropriate to the business
relationship, is permissible. However, the giving or receiving
of cash or cash equivalents (e.g., gift certificates) is
prohibited under all circumstances. If you have any questions
as to whether a gift or favor is permissible, you should either
reject the gift or favor, or see your immediate supervisor for
guidance before accepting the gift or favor.
Employees are prohibited from (a) taking for themselves personally opportunities that are discovered through the use of corporate property, information or position; (b) using corporate property, information or position for personal gain; and (c) competing with the Company. Employees owe a duty to the Company to advance its legitimate interests when the opportunity to do so arises.

The ethics policy closes with a notice to employees that whenever an employee "has reason to believe [a situation] may represent a violation of these policies," the employee is required to notify supervision or the Company's Ethics Officer. Those situations include those involving "other Company employees," in which cases the employee "should request management's advice."

Macaluso has attended ethics training both in December 2003 in the ordinary course of employment along with others and in conjunction with her prior discipline for a violation of the ethics policy. That training included notice of misconduct that could result in immediate dismissal, cited examples of which included "competing with the Company, soliciting or receiving gratuities...from customers or vendors, violation of Corporate policies which call for immediate discharge and falsification of records." Macaluso also reviewed the ethics policy before she filed her sexual harassment complaint on May 11, 2004.

C. The Telephone Conversations

The investigation that ultimately led to Macaluso's discharge began, according to Raymond Guckenberger, a Senior Supervisor in Dispatch where the Grievant works, with
what he described was a routine quality assurance check in July 2004 of the land-line telephone calls in the department, all of which are recorded pursuant to governmental regulation.

At that time, Guckenberger became “suspicious” because he heard Jack LaGrassa, an electrical technician, tell Macaluso that he needed “a favor.” That comment, however, was made in an August 12, 2004 conversation with Macaluso, a point the Union alleges establishes that Guckenberger lied and that the true motive for the investigation was retaliation against Macaluso whose sexual harassment complaint was against Guckenberger’s manager, Edward Van Gaulden.

Guckenberger then checked into other of Macaluso’s phone calls, found others that he believed were suspicious, and forwarded the information to Van Gaulden. Guckenberger testified that a May 27, 2004 conversation between LaGrassa and Macaluso aroused his suspicions because he concluded that LaGrassa was “changing gas meters” which Guckenberger believed LaGrassa should not be doing because LaGrassa’s job with the Company had nothing to do with gas meters.

The transcript of the May 27, 2004 conversation relative to a job at an address on Santa Barbara Road West in Lindenhurst has LaGrassa stating “I have a little, uh, meter upgrade.” Macaluso says “OK,” and she asks LaGrassa for the meter and index numbers of the old and new meters. After LaGrassa mentions that the index of the old meter had
been “removed,” Macaluso asks “Oh, you already did it?” to which LaGrassa responds “Yeah.”

There is then a conversation about a blue envelope that LaGrassa states will be coming to her “after the holidays” that she should “look for.”

The May 27 conversation then turns to what LaGrassa described as “a little service thing in Dix Hills.” Guckenberger was concerned about this conversation because he felt that that type of inquiry should have been made to the Company’s marketing division, not dispatch, and it sounded to him, again, that LaGrassa was doing “side work” that he was “not supposed to do.”

LaGrassa explained to Macaluso during the conversation that there was a customer who had a gas line to a pool heater that had been cut and capped and the meter removed by the Company after the pool collapsed. After the homeowner relocated the pool, he wanted a new service that required a few feet of additional line and a “riser,” but had been unsuccessful in getting the work done by the date of LaGrassa’s and Macaluso’s conversation. LaGrassa asked Macaluso how to get the Company to do that work. Macaluso took LaGrassa’s cell phone number and promised to call him right back.

Macaluso then called Katie Pugliese in the Company’s Marketing Department who told Macaluso the customer would be charged for the work. Macaluso asked Pugliese why there was a charge because this was a previous customer, to which Pugliese states that she would have to “run it by” Sue Mannarino, Manager of Residential
Sales and Support. Macaluso then told Pugliese that she would call Mannarino and she did.

In the conversation between Macaluso and Mannarino, Macaluso begins by stating that she has a “friend” who is a “plumber” working with a customer in Dix Hills who needs an additional gas line. Mannarino states initially that there is a charge for the work and asks Macaluso if the plumber “does...a lot of gas work” to which Macaluso responds, “Oh, yeah. They do a lot.” Mannarino then says that the charges could be waived and she asks Macaluso to try to “talk him into converting his house,” to which Macaluso says, “okay, that I can do.”

Macaluso then calls LaGrassa, informs him the charges were waived because she “made the call,” and she asks LaGrassa about converting the house to gas, to which LaGrassa states “I may...afterwards,” referring to him waiting until he can “put the service near the house.” LaGrassa then reminds Macaluso to “look for next week’s blue envelope” to which Macaluso responds “okay.”

Macaluso then calls Pugliese to determine what is needed to get the work done, and after Pugliese tells her what is needed, Macaluso then telephones LaGrassa with that information.

According to Guckenberger, he felt that “certain procedures were being circumvented” with respect to the Dix Hills pool job. Upon instructions from his superiors, Guckenberger continued to monitor the Dix Hills job. Conversations between
Macaluso and LaGrassa and Macaluso and Company personnel regarding Dix Hills during June through August 2004 were monitored and transcripts of those calls were also introduced into evidence.

On June 22, 2004, LaGrassa, expressing frustration over having to deal with certain other Company employees, asks Macaluso if the service was being put in because he had not heard anything. Macaluso volunteers to help and eventually reaches Nancy Cristiano in Gas Sales who tells her the work was not yet done but she would check on it.

On June 24, Macaluso calls Cristiano to ask about the Dix Hills work and Cristiano tells her that the charges for the work were waived and service would be restored in four to six weeks. Macaluso then calls LaGrassa and gives him that information.

On July 28, 2004, Macaluso follows up with Cristiano about the status of the Dix Hills order and Cristiano tells her she will inquire and advise.

On August 12, 2004, LaGrassa calls Macaluso and tells her he needs a favor. Macaluso asks if it is personal and she then has him call her on her personal "Nextel" line that is not recorded.

Another of Macaluso’s recorded phone conversations was one which took place on July 8, 2004 between Macaluso and Tim Braddick, then a utility mechanic with the Company. Guckenberger testified that that conversation also concerned him because he
suspected that Braddick was doing side work in violation of Company policy and that Macaluso was helping him.

Braddick tells Macaluso that a “guy” has fuel oil to sell at a cut rate and asks if she is interested. It is from this that Guckenberger concluded that Braddick was converting a home heated with oil to gas heat.

The conversation then turns to “Smithtown” and Braddick asks Macaluso “how soon could you get a meter set there,” to which she replies it could be done “right away.”

Guckenberger testified that he concluded from the July 8 conversation that Braddick was asking Macaluso to find a serviceman in the field to set the meter without following the proper procedures and that if that were arranged, Macaluso would somehow be compensated because at that point in the conversation Macaluso told Braddick to call her on the unrecorded “Nextel” line.

D. Job Records

Without unnecessary factual detail, the accounting records created by Macaluso consist of information given to her by LaGrassa, and perhaps others, or information that she entered by herself to complete the records. That information is inaccurate as to type of pressure (all recorded as low when they were high), lock up and run numbers, dispatch, response and completion times and dates of service readings. In addition, omitted from certain accounts are the pressure tests that are required by many municipalities and otherwise by the Company. Except as to the information reported by LaGrassa, or as inserted by Macaluso by her admission, the evidence does not reveal
who, if anyone, may have reported the information to Macaluso that is recorded and it
does not reveal who actually performed the work that is the subject of the several
accounts in evidence.

E. The "Blue Envelope"

A blue envelope, sent by Company inter-office mail, was intercepted by Company
personnel who were alerted from the telephone recordings to the possibility that such an
envelope would be coming to Macaluso.

The envelope, pre-printed "CONFIDENTIAL" and "TO BE OPENED BY
ADDRESSEE OR AUTHORIZED SUBSTITUTE," was addressed to Macaluso and
inside the envelope was a hand-written note and $50.00. The note, on Key Span
letterhead, purported to be from Braddick, and read "Andrea, thank you!!" and was
signed "Timmy".

The one conversation of record between Macaluso and Braddick does not mention
an "envelope." Rather, that reference was made by LaGrassa in his May 27, 2004
conversation with Macaluso.

Macaluso was questioned by Company personnel, including Richard Romano, the
Company’s Lead Human Resources Representative, about the envelope. According to
Romano, Macaluso did not know why Braddick had sent her the $50.00. Macaluso, who
never received the envelope, testified that she thought that the envelope mentioned by
LaGrassa had something to do with an upcoming pig roast /beach party hosted by
LaGrassa. She reiterated during her testimony that she did not know why Braddick sent her $50.00.

**OPINION**

The grounds upon which Macaluso was discharged amount to an alleged conspiracy by a senior employee to evade the Company’s ethics policy that was driven by personal friendships and economic gain with overtones of fraud/dishonesty and cover-up that imperiled the public safety and harmed the Company financially both actually and potentially. Conviction upon such charges would warrant discharge and likely end the Grievant’s chances for future employment in any position of trust. In discipline cases of this type carrying the employment consequences they do for the employee, I have long held, consistent with the majority view among labor arbitrators, that such accusations must be proven under a clear and convincing evidentiary burden of proof. As discussed shortly, I find that burden of proof not satisfied upon this record. Before turning to that discussion, two points need to be clear.

First, I do not make any findings as to whether any of the Company’s actions from initial investigation to conclusion were motivated in whole or in part by Macaluso’s filing of a complaint with the State Division of Human Rights in May 2004. Having concluded that there was not clearly proven just cause for discharge, the Company’s motive is not relevant. The merit of the Union’s allegation concerning retaliatory motive is for others to determine if that claim is pursued.
Second, nothing in this opinion is intended to constitute any finding regarding any former employees’ activities. At least one of those former employees is contesting his discharge in a separate arbitration proceeding and his guilt or innocence upon such charges and penalty, if any, is properly the subject of determination in that proceeding.

With those disclaimers, I return to the charges against Macaluso. After very careful and repeated review of this record, I am left where the Company first began: suspicious of what happened. But suspicion falls short of the clear and convincing evidence necessary to sustain a conviction and a finding of just cause in a case such as this.

There is substantial question upon this record, frankly, as to the credibility of both primary witnesses, i.e. Guckenberger and Macaluso. Their answers at times, and in different respects, were less than forthright and less than candid. But the particulars need not be laid bare here because, in the final analysis, and despite Macaluso’s evasiveness, the record does not prove clearly what must at base be proven by the Company. In simple terms, there is not clear proof that Macaluso knew that co-workers or others were breaking Company ethics policy or that she intentionally deviated from Company protocols regarding account processing for the purpose of defrauding the Company or to cover-up known wrongdoing by herself or others.

The recorded telephone conversations are at best ambiguous. Several of them, moreover, reveal no wrongdoing by Macaluso at all. But even those parts of
conversations that are suspect are subject to different conclusions. One might infer from certain of them that Macaluso had to have known that co-workers were installing or changing meters which she admitted is work that can only be done by gas servicers employed as such by the Company. But other reasonable inferences are equally possible. The telephone conversations show clearly only that LaGrassa and Braddick were at one or more points in time at work sites where meter work or related work was done or planned. Those telephone conversations, however, fall short of establishing clearly that the Grievant knew that LaGrassa and/or Braddick were personally engaged in proscribed activity. Indeed, under the high burden of proof required of the Company in this type of case, it is not unreasonable to infer that the Grievant knew or assumed that LaGrassa and Braddick, working as independent contractors, may have arranged the meter installation under proper conditions and by qualified personnel.

Another different but reasonable inference relates to the acknowledged right of Company employees to “moonlight” as plumbers, electricians, etc. on their own time, provided what they do is not in conflict with the Company’s “no compete” policy. LaGrassa and Braddick, despite their Company classifications, apparently were skilled plumbers and/or electricians. With the Company’s acknowledgement that “moonlighting” is not prohibited, if non-competitive and not engaged in on Company time, I think it a reasonable view, or another reasonable inference, that the Grievant thought only that LaGrassa and Braddick were employed privately by residential customers and were performing work in that capacity and under those restrictions.
In short, considering these different inferences, I conclude that the hard evidence falls short of both imputing to the Grievant knowledge of wrongdoing by LaGrassa and Braddick or of a willful participation in the scheme for which she was charged.

The Company asserts that the Grievant knew that what LaGrassa and Braddick did, even as independent contractors, was work that was in conflict with the Company’s services and those of its subsidiaries (like piping work) and, hence, improper and an ethical violation. The evidence, however, does not clearly support that assertion. The ethics policy is generalized. There is no evidence that the Grievant was trained specifically to the point of understanding which type of work was “in conflict” with policy, what was in conflict with a Company subsidiary or even that the Grievant knew the identity of all the Company’s relevant subsidiaries. I am not persuaded that the “conflict” policy set forth what members of other bargaining units could or could not do independently nor that the Grievant was responsible to know either way.

Also speculative is the question of the source for and the legitimacy of the particular meter(s) (and other equipment) involved. The Company does not know (but suggests improprieties). The record does not give an answer. But clearly, based on the record, any knowledge that one or more persons improperly acquired a meter(s) cannot and is not imputed to the Grievant.

I do not find that Macaluso’s efforts to facilitate the completion of any of the work at issue and, in one instance securing a waiver of charges for work done by the Company,
to have been proven to be improper. Without unnecessary elaboration, there is nothing, by the Company's own admission, improper per se in what she did and I cannot conclude that the procedure she followed on the work with which LaGrassa and Braddick were associated was anything different than she would have done for any other plumber, contractor, customer or other person having business dealings with the Company.

As to the account records, the record establishes that Macaluso entered information as relayed to her by LaGrassa. When she did not have information, she entered data that was admittedly incorrect in several respects. The latter, Macaluso claims, was pursuant to long-standing supervisory instructions to "fudge" the numbers as necessary to create or close an account or work order. She also reactivated one vacant account that the Company alleges should have been established as a new account. In the final analysis, it is not necessary to decide whether Macaluso's entry of incorrect data was pursuant to supervisory direction because Macaluso was not discharged for having incorrect records or not following appropriate procedures. Rather, it is the motive underlying the record keeping that the Company urges as the basis for her discharge. The records, according to the Company, were "falsified" for the purpose of covering up a conspiracy among Macaluso, Braddick, LaGrassa and perhaps other persons, to violate the Company's "no compete" ethics policy. Inaccuracy in record keeping and not following protocol were not the basis for this discipline and whether Macaluso could have been disciplined on these grounds is an issue that is not before me.
In net effect, and as with the “blue envelope” next discussed, the alleged falsification of records is offered by the Company as a major piece of evidence, along with the phone conversations, to establish Macaluso’s knowing and willing cooperation in a scheme to defraud the Company. For the reasons previously discussed, it cannot be clearly and convincingly concluded that Macaluso was a knowing member of a conspiracy. Indeed, that the information she entered on the computer records was so glaringly incorrect suggests less that it was an effort to conceal wrongdoing than it was an effort, albeit seriously misguided, to get the accounting work done. As is apparent from this case, any dispatch supervisor looking at those records would quickly see errors as Guckenberger and others obviously did. Maybe Macaluso thought no one would check the records, and maybe she thought, as she claims, that she did nothing inappropriate. The point is that these conclusions are speculative and do not satisfy the applicable evidentiary standard. That said, the inaccuracy in her records, to the extent that inaccuracy exists, cannot be the sole basis on which to determine there was just cause for her discharge.

The Company argues also that the $50.00 sent by Braddick was for work she did for him in conjunction with the July 8, 2004 telephone call which she inexplicably switched to her private cell phone. However, it is not possible to conclude clearly that the $50.00 was paid as a “thanks” or in return for her doing something for Braddick that was even work related, let alone that it was a payment for doing something Macaluso knew was prohibited. In that July 8 telephone call, Braddick only asked how long it
would take to get a meter set. Macaluso’s answer to that question is not improper. The Company believes that Braddick himself was setting a meter and that Macaluso knew that, but this record does not prove either assertion by the required standard proof.

The record, moreover, does not establish that Macaluso solicited any money, and it is also speculation that she would have kept the money if she had received the envelope. Indeed, that the envelope was sent through Company inter-office mail undercuts to a degree the reasonableness of a conclusion that she was expecting a bribe or a gift for services rendered in conjunction with her job. If money in return for prohibited favors on the job was what was planned, surely Macaluso would have been smart enough to have the transaction take place differently. As with the other parts of this case, one may well be suspicious about the reasons for Braddick sending Macaluso $50.00, but again, suspicion cannot substitute for clear evidence of guilt required in a disciplinary action of this type.

Having determined that the record does not clearly and convincingly prove just cause for Macaluso’s discharge, I turn to the question of remedy.

As mentioned previously, I am disturbed by several aspects of Macaluso’s testimony. In the simplest of terms, I find her testimony in different respects to have been less than candid and forthcoming and, at points, evasive and antagonistic. The circumstances of this case leave me suspicious of her activities. In short, she did not enter this proceeding, and does not leave it, entirely with clean hands. Although I cannot
conclude to the fair certainty required in this type of case that she knew that then current or former employees were engaged in prohibited activities and that she knowingly aided them, there was enough in the recorded telephone conversations to have alerted Macaluso that such activities may have been taking place. As I and the Company were suspicious of LaGrassa’s and Braddick’s activities, so should Macaluso have been suspicious.

Macaluso had the ethical duty to report those suspicions to the Company as required by the Company’s ethics policy. Frankly, had she met that ethical duty she would have and should have at least questioned LaGrassa and Braddick more clearly about the details of their activities, their capacities and the precise work they were doing to satisfy herself of its legitimacy. Though I have found as a matter of evidence that she was not complicit in wrongdoing, I think she preferred not to know what was being done and she decided not to ask about such details.

So, for all those reasons, I shall reverse her discharge and direct her reinstatement, but I shall deny her back pay.

**AWARD**

There was not just cause for the discharge of Andrea Macaluso who is to be reinstated to the position she held immediately prior to her discharge in October 2004 without loss of seniority, but without back pay.

Dated: May 4, 2006

Eric J. Schmertz
Arbitrator
State of New York )

County of New York )

I hereby affirm pursuant to CPLR 7507 that I am the individual described herein and who executed this instrument which is my Award.

Dated: May 9, 2016

Eric J. Schmertz
NY PLAN FOR THE SETTLEMENT OF JURISDICTIONAL DISPUTES

IN THE MATTER OF THE ARBITRATION

between

IBEW Local 3

and

LABORERS LOCAL 78
MASON TENDERS DISTRICT COUNCIL

On October 14, 2005 a New York Plan Arbitration Panel rendered an Award which stated:

1. The drilling of holes for the installation of electrical work that contains asbestos is the work of the Laborers Local 78.

2. The drilling of holes that do not contain asbestos for the installation of electrical work is the work of IBEW Local 3.

Thereafter, an appeal to the National Plan, Arbitrator Greenberg overturned the aforesaid NY Plan Award and ruled:

The decision of the New York Plan is reversed. The disputed work of core drilling holes through asbestos containing material (or suspected asbestos containing material) when the holes will be used to install electrical conduit shall be performed by electricians, so long as the electricians possess the appropriate level of license or certification required by federal, state or local governments to perform the work.

In accordance with the required procedures of the NY Plan, its policies and practices, a National Award pre-empts a NY Plan Award. Therefore the Greenberg Award supercedes and replaces the aforesaid NY Plan decision, which is accordingly nullified and revoked.
Also, in accordance with the consent agreement in the lawsuit by Local 78 in U.S. District Court, the NY Plan panel was reconvened for the purpose of adopting the Greenberg Award area-wide. The panel did so at its reconvened meeting on November 16, 2006. That procedure of area-wide adoption is and was mandated by the policy and provisions of the NY Plan.

As a consequence of the foregoing, Green Book decision 100-K supercedes Green Book decision 100-J.

Finally, any question or challenge to the legality of the Greenberg decision, are not before this Panel; but are matters for judicial review. In that regard the rights of the parties are expressly reserved.

December 26, 2006

[Signature]

Eric J. Schmertz
Chairman
In the Matter of the Arbitration Between

NARRAGANSETT ELECTRIC COMPANY,
- and -

LOCAL UNION NO. 310, BUW COUNCIL,
UWUA, AFL-CIO,

Union.

Before: Eric J. Schmertz, Esq., Arbitrator

Appearances: For the Employer:

Glenn E. Dawson, Esq.
Wilson, Dawson & Bret
21 Custom House Street
Boston, MA 02110

For the Union:

Burton E. Rosenthal, Esq.
Segal, Roitman & Coleman
11 Beacon Street, Suite 500
Boston, MA 02108
This completes the Opinion and Award in this matter following one issued in February 2006. In the latter, which is incorporated herein and made a part hereof, I remanded the dispute to the parties for further negotiations, including negotiations on the intended meaning of “high” contractor volume and the Company’s obligation to “endeavor” to provide “overtime opportunities” when contractor volume is “high”. I stated that if the parties could not resolve the dispute or agree on the meaning of those words and phrases, the matter could be returned to me for decision. I observed in the first Opinion that I felt that the grievance represented more of an “interest” dispute than a “rights” dispute and that I doubted I had the jurisdiction or the authority to legislate an intent for those words and phrases when, in my view, the parties had not done so in the bargaining that led to their collective bargaining agreement.

The parties met three times pursuant to the remand, on April 13, May 18 and June 13, 2006. At the end of those sessions, and despite the parties’ determined efforts that saw different settlement packages rejected, the parties agreed that the dispute was not resolved, that no mutual agreements were reached in those sessions, and that the dispute was appropriately returned to me for final disposition on supplemental briefs that have been filed by both parties.

The Union submits that this dispute can and should be decided in its favor if natural, common sense meaning is given to the words and phrases in issue under notions
of basis fairness. The Employer counters that because the parties did not ascribe meaning to those terms that are susceptible to many different interpretations, the arbitrator may not do that work for them without exceeding his authority as a grievance arbitrator.

Initially, resort to a dictionary gives the following definitions to "high" and "endeavor"

"High": elevated; culmination; greater degree; greater than average; elevated level
"Endeavor": try; attempt; serious effort; to make an effort to do something

It is clear to me for the reasons next discussed that using those dictionary definitions does not give me the arbitral authority to sustain the Union’s grievance with the remedy the Union seeks.

I start with a self-serving, but truthful statement. I spent considerable time both studying the original record, the subsequent transcript of the remanded negotiations, the briefs and thinking about the differing ways I might approach the disposition of the issues in dispute in this case. As the parties know, I spent more time before rendering the Opinion and Award in this matter than any of the more than 10,000 cases I have decided over the last 50 years. I have concluded that nothing in the parties’ meetings subsequent to my original Opinion and Award changes my mind regarding my arbitral authority. I do not see how I can sustain this grievance and consider the remedy the Union seeks without writing contract provisions which the parties failed to produce or define in their
original contract negotiations or in the subsequent negotiations pursuant to the remand.

To do so, as I stated in my first Opinion, would have me function *ultra vires* as an interest arbitrator rather than grievance arbitrator. In neither set of negotiations have the parties defined the controlling words or had any meeting of the minds, or even a near meeting of the minds, on the meaning of “high” contractor volume and the Company’s obligation to “endeavor” to provide “overtime opportunities.”

For me to define those terms would require, initially, that I decide what particular quantity of contractor work meets a “high” volume (e.g., should it be an increase of 5%, 10% or 100%, and from what level at what time?) and to decide which types of work the parties intended are to be included in or excluded from that calculation. To do either or all is to write terms into the contract which were not at all defined by the parties and, at best, only inadequately addressed by them even conceptually.

These are major issues, but more serious, and the real impediment to my giving an answer to the questions posed in this grievance arbitration proceeding, is the inability to give meaning and application to the statement that the Company would “endeavor” to provide overtime opportunities. The word “endeavor” has been left so subjective and so devoid of a meaning shaped by the parties’ bilateral agreement as to defy a *contractual* application or interpretation of that word by a third party neutral, unless the neutral were to write into the contract a definition of his choosing. Assume arguendo that there is or has been a “high” volume of contractors used by the Company during any relevant time.
period. As I said in the first Opinion, that is not a contract violation per se. Standing alone, high contractor volume neither warrants an injunction or damages or any other remedial action. Rather, what such a conclusion does is to trigger a duty by the Company to "endeavor" to provide "overtime opportunities" for the bargaining unit employees. "Endeavor," as the dictionary definition makes clear, is not a guarantee. It is not a binding promise to provide any particular amount or level of overtime "opportunities." At best, it is a representation by the Company that it will consider adding overtime work in good faith, but I judge, and significantly, unilaterally. In short, it is my view, in this particular case, that "endeavor" is synonymous with "good faith."

Indeed, one piece of disputed testimony supports the foregoing analysis in my view. The Union asserts that the Company told it after the contract language had been drafted to "trust us" when Company officials were asked how the "endeavor" language would be implemented. I have little doubt that the Union thought the Company meant that it would increase the overtime work made available to unit employees in some proportion to the contracted work. (Another failure of meeting of the minds). But it also meant, I conclude, that no bilateral guarantees were made or exchanged, and that the contract did not require an increase in overtime calculated by any formula or metric which the Company consistently and clearly rejected during negotiations. Were there such a guarantee, the Union would not have asked that question and received that reply. Significantly, I find that implicit in the question was a recognition that the Company
retained its unilateral right to schedule overtime for unit employees, provided it did so or did not, in good faith.

Therefore, all the arbitrator can do within his grievance authority is to decide, based on clear evidence, whether the Company abused its retained right to "endeavor" to schedule additional overtime for employees. I conclude that to sustain the grievance I would have to find evidence or conduct by the Company which shows a willful disregard of facts evidencing some entitlement to overtime, or a distortion of otherwise true facts designed to frustrate additional overtime opportunities, some arbitrariness, or manifest unreasonableness in decision making, or anti-union animus. There is no evidence in this case which would accord me a basis to find that the Company abused that right. Based on the record before me I would have to probe the mental processes of the Company on whether it did or did not act in good faith. I would have to engage in a detailed analysis of the Company's operational and business judgments, and would have to do so for each and every outsourcing decision. To do any of this calls not only for me to write new provisions or definitions into the contract, but requires action by the arbitrator far beyond the grievance presented and certainly far beyond the record evidence in this case.
The Union’s arguments may well have an equitable color, but notwithstanding such, I can find no probative or evidentiary basis in this record to conclude that the Company acted in bad faith or defaulted on its efforts to “endeavor” to provide overtime opportunities. If there is evidence of such default or failure of good faith, it is not in this record. And, I say again, for it to be gleaned constructively or hypothetically is beyond the arbitrator’s authority.

Although I stated in my original Opinion that I would provide an award, even if it meant engaging in “interest arbitration,” I said that, frankly, because I felt strongly that this issue was for bargaining, not arbitration, and that the prospect (or threat) of an interest award might encourage or facilitate the bargaining I directed. If this Award is to be regarded as a change of mind, so be it. But after very careful study and attention, I have concluded that what I have said herein is the full extent of my statutory and contractual authority.

I still believe that the issues in this case are for resolution in collective bargaining, not arbitration. I note that the current contract expires within about 6 months. Hence, the opportunity to deal with the dispute, both contractually and equitably is near. And, of course, the respective rights of the parties are reserved for those negotiations.

**AWARD**

The Union’s grievance regarding “high contractor volume” and the Company’s obligation to “endeavor” to provide “overtime opportunities” is denied.
Dated: ________________________ Eric J. Schmertz
Arbitrator

State of New York )
) ss:
County of New York )

I hereby affirm pursuant to CPLR 7507 that I am the individual described herein
and who executed this instrument which is my Award.

Dated: ________________________ Eric J. Schmertz
The jurisdictional dispute between the above-named Unions involves:

The Vertical Transportation of Materials used for the Construction of Elevators on a Rack and Pinion Outside Hoist The Gramercy Park Hotel.

A hearing was held on January 10, 2006 at which time representatives of both Unions appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witness.

The Members of the Arbitration Panel were:

Kenneth Buettner
David Gund
Sal Russo
Joseph E. Van Etten
and the Undersigned, as Chairman

During the course of the hearing, the two Unions stipulated that the disputed work was now completed and that at the time of the dispute the Unions met and reached an agreement that resolved the dispute to their mutual satisfaction. The settlement agreement included arrangement for the vertical hoisting of the materials up the elevator hoistway by Local 1 Elevator Constructors.
It was further stipulated that no further work of this disputed nature was to be done, as the work was fully completed. They agreed that based on the mutually satisfactory settlement, the instant jurisdictional case has been mooted and need not be decided on the merits.

Eric J. Schmertz, Chairman

DATED: January 31, 2006

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 jurisdictional dispute between the above-named Unions involves:

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Eric J. Schmertz, Chairman

DATED: January 31, 2006

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 DISPUTES

IN THE MATTER OF THE ARBITRATION

between

ELEVATOR CONSTRUCTORS LOCAL 1

and

OPERATING ENGINEERS LOCAL 14-14B

OPINION AND AWARD

In accordance with the New York Plan for the Settlement of Jurisdictional Disputes, an Arbitration Panel was appointed to hear and decide a jurisdiction dispute between the above-named Unions, involving the operation of Hoist for Personnel and Materials (also known as a Joint Venture Car) at the construction locations of 310 West 51st Street and 1880 Broadway (contractors respectively Tishman Construction and Bovis Lend Lease).

The members of the Panel of Arbitrators were Daniel Grund, Sal DiLorenzo, Angelo Lopes, Sal Russo, and the Undersigned as Chairman.

A hearing was held on March 4, 2006 at which time representatives of the above Unions appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.
There are five "joint venture" hoists involved at the two locations. A "joint venture" car transports both personnel and construction material, together and separately. Hence the terminology "joint venture hoist."

The contractors assigned the operation of those hoists to operators from Local 14-14B. (A sixth hoist, not involved in this dispute, and used exclusively to transport personnel has been assigned to Local 1, and there is no dispute that that hoist belongs in the jurisdiction of Local 1).

Local 1 claims that whenever a joint venture transports personnel (with or without construction material) its operation belongs to Local 1 and that therefore the exclusive assignment to Local 14-14B is improper.

Local 14-14B argues contrariwise, asserting that the instant assignment is properly within its jurisdiction and it has accepted that assignment from the contractors.

The authority and purpose of this Arbitration Panel is precisely defined by the New York Plan. It is not for the Panel to legislate a solution it deems appropriate, nor may the Panel ignore the standards set forth in the Plan and substitute its own judgment for what it thinks the parties should agree to or order other arrangements it may deem equitable.

Rather, the Plan specifically sets forth the Panel's limited
authority and the evidentiary standards upon which its decision must be based. The Plan reads 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 those apply for any reason...the Arbitration Panel shall consider the established trade practice in the Greater New York geographical area."

It is undisputed that there are no International (or National) agreements of record applicable to this case.

Though Green Book decisions are cited, the Panel has determined that they are not applicable either. Local 1 cites and relies on Green Book Decision 101 3b, and more specifically the Arbitration Award of Arbitrator Greenberg which generated that Decision, Greenberg ruled:

"...in the event the employer generates a mixed-use car, the Elevator Constructors shall operate the car during those portions of the day when the principal use of the car is for transporting personnel. The Operating Engineers shall operate the car during those portions of the day when the principal use of the car is for transporting construction materials..."

Recognizing what Greenberg termed a "turf battle," he opined that it was "of the parties own making" and urged them to resolve it by direct negotiations and collective bargaining."
The Panel deems the Greenberg decision inappropriate to the facts in this case. Unlike the facts before Greenberg, the instant case does not present facts that separate the transporting of personnel and material. Whereas under the facts before Greenberg, it was possible and logical for him to apportion the work separately to each Union. But here, the work on the hoists is and has not been separated, but rather both personnel and material are hoisted together - hence the joint venture hoist.

In short, the Greenberg decision which provided for the use of hoists at different times and respectively for either material or personnel (but not together) is simply not what is happening in the matter before us. And indeed, though Local 1 cites the Greenberg decision, we do not find that Local 1 seeks an Award in this case which would so separate the use of the hoists. Rather, Local 1 claims jurisdiction of a mixed-use car, when and if personnel are transported as they are now, along with construction material.

So, for those reasons, the Greenberg Green Book decision is not precedential here.

1. The record discloses that a subsequent effort to do so proved unavailing.
Local 14-14B also cites various Green Book decisions, but the Panel is not persuaded that they apply to "Joint Venture" hoists, but rather to other types of hoisting equipment.

In the absence of Green Book decisions the Panel is mandated to next consider established or prevailing practice in the Greater New York geographical area.

Based on the record before us we find three sets of "practices," one of which in our judgment meets the test of a "practice in the New York geographical area," within the meaning and intent of the Plan.

The first is or has been what we choose to refer to as an "accommodation practice." To maintain uninterrupted productivity and to avoid jurisdictional disruptions, employers and the two Unions have shared the hoist work. They have done so in various ways, including double or multi-manning of a hoist by a Local 1 operator and a local 14-14B operator, respectively one hour on and one hour off for each, during a regular shift. This has meant employment of two operators when only one is needed, and frankly is viewed by the employers as "featherbedding."
Another arrangement has been to designate one hoist exclusively for personnel and another for material, with no mixing of the two, and to assign them respectively to Local 1 and 14-14B. This does not double or multiply on employers' manning costs, but it restricts the managerial use of each hoist for either material or personnel. Another arrangement is or has been to make all the hoists joint venture cars, but assign them respectively and alternatively to Local 1 and Local 14-14B and require each to transport both personnel and material.

From the record before us, the Panel is not persuaded that any of these arrangements constitute a valid resolution to this jurisdictional problem within the intent and meaning of the Plan. Indeed, neither Union seeks any of these arrangements from our decision, and it is clear from the testimony of witnesses associated with the employers that the employers object to these arrangements as unjustifiably costly, inefficient and restrictive on managerial rights. The Panel agrees that arrangements should not be perpetuated nor do we think the Plan intended them as “practices” to be codified into Green Book decisions.

The next “practice” we see is whether and where an operator from Local 1 or an operator from Local 14-14B are or have been operating “joint venture” hoists, carrying both material and
personnel, and are or have been doing so without participation of or the sharing in any form by an operator from the other Union. There is evidence in the record of that type of work by both Unions. However, the evidence by Local 1 is virtually exclusively in the State of New Jersey. But the evidence adduced by Local 14-14B cites 25 instances (hoists) in New York City when joint venture hoists, carrying material and personnel are and have been operated by a Local 14-14B member without the presence or participation of a Local 1 operator and without evidence of objections or grievances by Local 1. However, the reference in the Plan to the New York Metropolitan geographic area, does not include New Jersey, where the New York Plan is not operative because parties in that state are not covered by the New York Plan. In sum, it is the practice in New York City, engaged in by Local 14-14B, that is probatively determinative in this case.

Finally, the Panel wishes to make clear that it does not have the authority to determine whether the use of “joint venture” cars, carrying both material and personnel is in compliance with applicable construction rules and regulations. We must assume that all parties to the work and the work methods are in compliance leaving any question thereof to the proper regulatory agencies.
AWARD

The operation of joint venture hoists that transport both personnel and construction material is the work of Operating Engineers Local 14-14B.

The operation of a hoist exclusively used to transport personnel remains the work of the Elevator Constructors, Local 1.

DATED: APRIL 7, 2006

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, Chairman
The jurisdictional dispute in this case involves the "unloading, handling and setting of stone" at Columbus Circle, New York City.

A hearing was held on June 2, 2005 at which time representatives of DERRICKMEN and RIGGERS L.U. 197 appeared. Though served with due notice of the scheduled hearing no representative of PAVERS and ROAD BUILDERS LOCAL 1010 appeared.

By ruling of the Arbitration Panel, the hearing went forward and the proofs and allegations of Local 197 were heard. The Arbitration Panel consisted of the Undersigned as Chairman and Messrs. John Cavanagh, Al Gerosa, and Patrick Barrett.

Under the New York Plan for the Settlement of jurisdictional Disputes, the decision of the Panel is to be based on Green Book Decisions or International Agreements, or if there be none, on prevailing practice in the Greater New York geographical area.
In this case, L.U. 197 has cited a Green Book Decision which the Panel finds is relevant and has offered persuasive testimony of a prevailing practice in the New York geographical area establishing that the work involved has been consistently assigned to and performed by L.U. 197.

Specifically the work in question involves stone curbings, flagstone settings and pavings, granite railings and stone trimming, around and in the vicinity of the monument of Christopher Columbus at Columbus Circle.

Cited by L.U. 197 is Green Book Decision 269-9C (February 26, 1996) which reads in pertinent part:

"The Executive Committee finds that the tending of stone setters/masons, including the unloading handling and installation of cut stone...is the (work) of the DERRICKMEN and RIGGERS, Local Union No. 197."

The Panel finds that the work at Columbus Circle is of the same type and nature referred to in the foregoing Decision.

Also, Local 197 offered the testimony of two contractors who have performed the type of work in disputes in this case. Those contractors stated unconditionally that at many sites and projects in New York geographical area in which this type of work was required and performed, they always used Local 197 and its members, and never employed members of Local 1010. And they specifically identified several of those projects.
Accordingly, by Green Book Decision and by prevailing practice the work at Columbus Circle that is the subject of this dispute belongs to and should be performed by L.U. 197.

[Signature]
Eric J. Schmertz, Chairman

DATED: June 6, 2005

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

I, Eric J. Schmertz do hereby affirm upon my Oath as Chairman that I am the individual described in and who executed this instrument, which is my AWARD.
In accordance with the arbitration provisions of the collective bargaining agreement between the above-named parties, the Undersigned was selected as the Chairman of a tripartite board of arbitration to hear and decide the following issue:

Whether the Authority violated Section 307 of the collective bargaining agreement when it did not permit the grievant, Dawn Crewl, to work the second half of her run on December 10th, 17th, 18th, 19th, 20th, 21st, 2002? If so what shall be the remedy?1

Messrs. Stephen M. Palonis and W. Thomas Clark were named, respectively as the Union and Authority members of the arbitration board.

1. In addition to denying any contract violation the Authority disputes the accuracy of the dates set forth in said issue.

2. Procedurally, it was agreed that the Decision would be made initially
A hearing was held in Pittsburgh, Pennsylvania on December 15, 2005 at which time the grievant and representative of both parties appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Oath of the Arbitrators was waived, and the parties filed post-hearing briefs.

For one particular reason, and under the particular circumstances of this grievance, I find a contract violation.

The particular reason is that the grievant exercised a statutory right to a legitimate absence from work under the provisions of the Family and Medical Leave Act ("FMLA"), for a period of time that coincided with the first half of her "split run," and did so with the approval of the Authority. As such, the terms and entitlements of that statutory benefit became an acknowledged part of the employment relationship and an accepted condition of employment within and under the application of the collective bargaining agreement.

by the Chairman with the right of the partisan designees to request a Board meeting hereafter for further deliberations if they wished.
From that fact I conclude that it is contractually improper for the result or consequence of the legitimate and approved use of a statutory right under the FMLA to be a deprivation or negation of a contract right. Specifically, I find, under the particular facts of this case, that to deny the grievant the right and opportunity to work the second part of the “split run” that she had properly picked based on her seniority, when she was ready and able to do so, and where as here, the period of time she was absent was precisely fixed, constitutes a constructive “penalty.” And that the imposition or consequence of a penalty for the exercise of a statutory right to a leave of absence is simply incompatible with fundamental legality and hence, here, incompatible with a right under the collective bargaining agreement.

Also, clearly to my mind, an absence under the FMLA is not “sharking” within the meaning of Section 310 of the contract. The “sharking” provision is both regulatory and disciplinary. To my mind it was negotiated and designed to prevent or discourage excessive and/or unexcused absenteeism. And it sets forth “Penalties for Sharking.” I do not believe that the parties intended an authorized and approved absence
under FMLA to be the type of absence from work that fits that contract definition; to wit:

"An operator is sharked when he/she does not report in person to the Dispatcher on or before scheduled pay time on any part of a day's work."

In my Judgment, an approved absence under the statutory entitlement of the FMLA takes that particular absence out of the provisions or application of Section 310. Moreover, it would be further incongruous for an FMLA absence to be subject to a disciplinary penalty under Section 310.

Finally, I am not persuaded by the Authority's argument that it had a contractual duty to assign the grievant's full run to an employee on the Extra Board, once the grievant took the first half of her run off. As the representative of the bargaining unit the Union did not and has not made any such claim on behalf of any employee on the Extra Board, and in its brief expressly denies any claim thereof.3

3. Indeed, it is not unusual for a union to assert the rights of one bargaining unit member (such as in "seniority and ability" cases), over the presumed contrary right of a different member of the bargaining unit.
Hence, the Authority's interpretation not withstanding, and without prejudice to any other proceeding, I do not find that argument probatively applicable in this case.

Again, it should be clear that this decision is not a declaratory judgment for any other circumstance where an employee marks off or absences himself for a part of a run. Rather it is fact based. Specifically, those facts are that the grievant's absence was statutory mandated under the FMLA; her absence was legitimate (for the special medical treatment of her son), her pick was for a "split run" and the time involved was fixed and determinable, making it operationally practicable for the Authority to seamlessly and prospectively schedule both parts of her split run, including according her her seniority right to work the second part thereof.

The record before me does not include the details of each of the days she was absent, nor whether all the foregoing conditions were present each time. Also some of the asserted days referred to in the "issue" are disputed in the record by the Authority.

Yet, the Authority does not dispute all the dates. Therefore, I
take arbitral notice that some of the dates are accurate and meet the foregoing conditions, warranting a partial financial remedy for the grievant. Hence on an equitable and constructive evidentiary basis, I shall award an amount of pay equivalent to half of her runs for three days.

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

Under the particular facts and circumstances set forth in the above Opinion, the Authority violated Section 307 of the collective bargaining agreement when it did not permit the grievant, Dawn Crewl, to work the second half of her run.

She shall be paid an amount of money equivalent to half her runs for three days.

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

DATED: MARCH 18, 2006

STATE OF NEW YORK )
COUNTY OF NEW YORK )

Date

Stephen M. Palonis
(concurring)
(dissenting)

Date

W. Thomas Clark
(concurring)
(dissenting)
American Arbitration Association,
Administrator

In the Matter of the Arbitration Between

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Union,

- and -

VERIZON INFORMATION SERVICES.

Employer.

Before: Eric J. Schmertz, Esq., Arbitrator

Appearances: For the Employer:

Arthur G. Telegen, Esq.
Alicia Alonso Matos, Esq.
Foley Hoag LLP
155 Seaport Boulevard
Boston, MA 02210

For the Union:

Patricia M. Telesco, CWA Staff Representative
Communications Workers of America
193 State Stree, 2nd Floor
North Haven, CT 06473

Gabrielle Semel, Esq. and
Lauren Cumbia, Law Clerk
Semel, Young & Norum
275 Seventh Avenue, Suite 2300
New York, NY 10001
PRELIMINARY STATEMENT

The Undersigned was appointed under the administration of the American Arbitration Association to hear and decide a dispute between the Communications Workers of America, AFL-CIO (CWA or Union) and Verizon Information Services (Company or Employer) centering on CWA’s allegation under a grievance that the Company demoted Nancy Purcell (Grievant) in violation of the parties’ collective bargaining agreement (CBA or Agreement).

Hearings were held on March 6, 2006, April 24 and April 25, 2006 at which the parties were represented and afforded the opportunity to examine witnesses and to submit other evidence in support of their contentions. There were no objections to the conduct of the hearings. The parties’ representatives have filed post-hearing memoranda with reply which, together with the hearing transcripts and exhibits, form the record for disposition of the questions presented in this proceeding.

RELEVANT CONTRACT PROVISIONS

Article 5 Management Rights

5.1 The Union recognizes the Company’s traditional right to manage its business except as specifically limited by this Agreement.

Article 16 Grievance Procedures

16.1 A grievance is a complaint involving the interpretation or application of any of the provisions of this Agreement or a complaint that an employee or group of employees in the bargaining unit has been unfairly treated.
Article 17    Arbitration

17.1 In the event a grievance involving the interpretation or application of any of the provisions of this Agreement is not satisfactorily resolved following the grievance procedure, the Union must request that the matter proceed to arbitration within thirty (30) calendar days following the company’s final written reply. Selection of the arbitrator and conduct of the arbitration shall be under the existing labor arbitration rules of the American Arbitration Association unless mutually waived by the parties.

17.2 The decision of the arbitrator shall be final and binding upon both parties, and shall not be subject to other legal challenge. The arbitrator shall have no authority to add to, subtract from, or modify any provision of this Agreement, nor to rule on any question except whether the Agreement has been violated and if so to provide a remedy.

17.3 Each party shall bear the expense of preparing and presenting its own case. The compensation and expenses of the arbitrator and the incidental expenses of the arbitration proceeding shall be borne equally by the Company and the Union.

17.4 Cases involving discipline or discharge of employees may not be submitted to arbitration or other legal challenge as follows: (a) sales representatives with less than eighteen (18) months in their current position following initial sales training and on-boarding or (b) employees other than sales representatives with less than twelve (12) months of service.

17.5 If the case involves the suspension or discharge of a bargaining unit employee, and if the arbitrator determines to award back pay, the total back pay award shall be limited to a “make whole” concept. Therefore, any back pay award is to be reduced by: all interim earned income; unemployment compensation; termination pay; and Company pension payments; Social Security Disability payments and other similar payments.
17.6 Any arbitration case which has not been submitted to the American Arbitration Association within twelve (12) months of the date of initial receipt by the Company of the demand for arbitration will be considered to have been finally disposed of under the provisions of this Article, unless the Company and the Union mutually agree in writing to extend the time period.

Memo of Understanding

Verizon Information Services ("VIS") and Communications Workers of America ("CWA") agree as follows:

1. Appended to this Memorandum is VIS's current policy regarding Performance Improvement Plans ("PIP").

2. VIS will not, for the term of the contract, change the PIP policy, as it relates to performance by Sales Representatives who have been in a position 18 months or longer, VIS may change the PIP policy as it relates to performance by Sales Representatives who have been in a position less than 18 months after providing the CWA with notice and a reasonable opportunity to comment.

3. Employees who commence PIPs while in their probationary periods will not be allowed to challenge discharge, demotion or other discipline at arbitration or in any other legal forum. For the purpose of the PIP policy, probationary employees are those who are in their current position for less than 18 months following initial sales training and on-boarding.

4. As to employees who have completed their probationary periods and are placed in a PIP, the application of “cause” referenced in Article 5.1 shall only be interpreted to mean that management applied the proper process as set forth in the PIP policy. The Company retains the sole responsibility to set standards of performance unless specified in the PIP policy.

5. The parties acknowledge that there may be circumstances when the Company may determine to demote rather than to terminate employees who fail PIPs. Therefore, in any arbitration in which the Union challenges the type of discipline received by an employee for not meeting performance standards, the Union shall not make any
"disparate treatment" claim based on VIS’s treatment of other employees.

This Memorandum of Understanding is effective February 9, 2003 and shall expire on October 8, 2005. The parties specifically agree that the terms and conditions set forth in this Memorandum of Understanding shall not survive the expiration of this Memorandum of Understanding unless agreed to by the parties in writing.

PARTIES’ CONTENTIONS

Company

The Company acted reasonably and fairly by removing the Grievant from a job that she could not perform to reasonable Company standards. This action was not discipline, rather it was a legitimate exercise of a management right to protect the Company’s business, its customers and employees, including the Grievant because her behavior placed the high dollar-value accounts she was handling at risk of cancellation due to customer dissatisfaction. By giving the Grievant a lower-level, less stressful job, the Company hoped that the Grievant could once again become the star performer she had been for the Company before her promotion to the P3 position from which she was removed. The Grievant was suffering from certain physical and personal problems that likely contributed to her performance deficiencies, but the Company is not obligated to keep an employee in a job that the employee cannot perform to expected and reasonable standards. The Company could have disciplined Grievant for her incompetency and her behavior with customers, supervisors and employees, but instead it chose to retain her and help her cope with her personal crises by giving her a sales representative job of the type she had excelled with in the past.
Even if the Grievant's transfer to the lower level P1 job could be deemed a disciplinary demotion, the action taken does not violate the collective bargaining agreement because Grievant's poor job performance and abysmal work behavior merited discipline, including termination. The Arbitrator should defer to the Company's decision to demote the Grievant because it was not in any reasonable sense an unfair treatment of the Grievant. Notwithstanding the excuses and justifications offered by the Grievant for her actions, which have little, if any, evidentiary support, the record establishes that the Grievant was unable to handle the job the Company needed her to handle and she jeopardized the Company's relationships with its most valuable accounts and most important customers.

The grievance should be denied.

Union

The Company demoted the Grievant without just cause, an act that constitutes unfair treatment giving rise to an arbitrable grievance. Certain traditional benchmarks of just cause discipline were not afforded the Grievant. She was not given advance warning or notice that a demotion would be a consequence of the alleged deficiencies in her performance so as to permit her an opportunity to improve nor did the Company conduct a fair investigation into those job deficiencies on which it based its decision to demote. Moreover, a two pay level demotion is unfair and disproportionate to the misconduct and incompetency alleged by the Company.
The alleged performance deficiencies were the product of Company's decisions to downsize staffing, to deny the Grievant assistance, and to increase her workloads to an unreasonable level which eventually caused Grievant to suffer a nervous breakdown in February 2004 for which she was treated and released. Only upon her return from approved leave in April 2004 was she unfairly demoted. The imposition and continuation of the demotion after she returned from a leave of absence taken pursuant to the Family Medical Leave Act (FMLA) violates the FMLA.

The Grievant is an experienced employee who has received many awards and praise from her customers. She has been unfairly singled out for demotion by her supervisors, who do not appreciate her zeal, her assertiveness, and her drive to service and protect the interests of her customers.

The grievance should be sustained and the Company should be ordered to reinstate the Grievant to her P3 position and to make her whole for lost salary and commissions.

ISSUE

The parties did not stipulate an issue. For the reasons discussed fully hereafter, the following issue statement captures the nature of the dispute submitted for determination and is one consistent with the terms of the CBA.

Did the Company's demotion of Grievant from a P3 to a P1 position violate the parties' collective bargaining agreement? If so, what is the appropriate remedy?
Although there does not appear to be any disagreement between the parties that the present controversy is grievable and arbitrable, it is appropriate and helpful to discuss the grievance and arbitration provisions of the parties’ Agreement because they provide a context for the discussion and disposition of the merits of this dispute.

Under §16.1 of the Agreement, a grievance includes disputes over the interpretation or application of the terms of the Agreement, and complaints that an employee has been “unfairly treated.”

The arbitration provisions in Article 17.1, however, apply to “a grievance involving the interpretation or application of any of the provisions of this Agreement…” seemingly excluding complaints of unfair treatment from arbitration. Those provisions go on in §17.4 to make arbitration available in cases “involving discipline…of employees” who have specified months of service. There is no dispute that the Grievant has more than the minimum service levels referenced in §17.4 of the CBA.

Therefore, if the Grievant’s demotion is characterized as “discipline”, as CWA alleges, the dispute would be arbitrable under the clear terms of §17.4. The Company contends, however, that its action does not constitute discipline. But, even if the Company’s demotion of the Grievant was not intended to be disciplinary, and should not be viewed as such, arbitration is still available for the following reasons.
The contractual grievance procedure is a source of both procedural and substantive rights to employees. In relevant respect, it gives employees a right to be free from unfair treatment by the Company. Thus, a claim that an employee has been treated unfairly involves the interpretation and/or application of the terms of Article 16 that becomes arbitrable pursuant to Article 17.1.

Although the question of whether the Company's action is disciplinary in nature does not affect any arbitrability issue, whether the Company's action constitutes discipline is relevant to how the merits of the case should be analyzed. The Union argues that the Company's action was discipline, review of which should be judged against a "just cause" standard and the several "tests" of just cause that are traditionally applied in discipline cases. But, if the Company's action is not properly viewed as an act of discipline, then there is at least an argument that its action should not be judged against a traditional "just cause" standard which the Agreement, in any event, does not provide expressly, but which, so the Union argues, arises by reasonable implication from the CBA.

In analyzing the nature of the Company's action, it is first necessary to characterize the action itself. CWA argues that Grievant was demoted while the Company claims that Grievant was reassigned or transferred.

It is fair to characterize what happened to the Grievant as a demotion. Her duties were changed, the expectations and responsibilities placed upon her were lowered, her method of compensation was changed, and her pay, in fact, was lower as a PI than it was
as a P3. The Company itself concedes these changes that flowed from Grievant’s reassignment to a P1 position. Indeed, certain of the changes were made by the Company for the admitted purpose of decreasing the stress associated with the higher level job of a P3. Those are the touchstones of a demotion.

Having characterized the action taken by the Company as a demotion, however, it does not necessarily follow that demotions generally, or this one in issue, constitute “discipline.”

The Elkouris in their treatise How Arbitration Works\(^1\) detail the many awards in which a distinction has been drawn between a disciplinary demotion and a nondisciplinary demotion, the latter being marked generally by an employee’s lack of qualifications for the job from which the employee has been demoted as opposed to a qualified employee who becomes guilty of misconduct or incompetency.

These parties’ CBA does not expressly recognize the Company’s right to demote employees, except in the memorandum accompanying the Performance Improvement Plan (PIP), discussed hereafter, that had been suspended during the relevant time frame. But neither does the CBA expressly restrict the Company’s right to demote. The right to demote, moreover, has been recognized to exist both as an aspect of a general contractual management rights provision and as a residual, inherent managerial power. Except as the right to demote is restricted by agreement, arbitrators generally uphold an employer’s decision to demote an employee provided there is some reasonable basis for the action.\(^2\)

\(^1\) Elkouri and Elkouri, How Arbitration Works (6\(^{th}\) ed. 2003) at 799-805 (hereafter Elkouri).
\(^2\) Elkouri at 799-800.
The clear majority view among arbitrators, if not “the rule,” is that management has a continuing right, except as restricted by the collective bargaining agreement, to assess the performance of its employees and to demote those whose performance falls below standard, even if the employee has occupied the position for a considerable period of time. That view has been expressed as follows:

We may assume further that the obligation to perform satisfactorily is a continuous condition of the maintenance of the better job and that an employee’s performance, though once adequate, may fall below standard and merit demotion, either because his own performance has deteriorated or, though it has not deteriorated, because the standard in his occupation has been raised by the greater ability of those around him. Such a demotion would be an instance of the Company’s continuing interest in the satisfactory performance of each of its jobs.3

Under this prevailing view, demotions are upheld if an employee is found to lack the qualifications for a position under the performance standards set by the employer.

Although discipline, including termination of an unqualified employee is permitted, there is arbitral authority for the proposition that demotion is actually the fairer, and, therefore, the preferred option that preserves the legitimate interests of all parties.4

A lack of qualifications for a given job can stem from a variety of reasons, either singly or in combination, including a physical or psychological inability to perform to

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3 Ford Motor Co., Opinions of the Umpire, #A-30 at 1 (1943).
4 Elkouri at 803, n. 907 (citing awards).
expectation, which themselves will form a legitimate and reasonable basis for demotion under a collective bargaining agreement.\(^5\)

The discussion to this point distills to this. It does not matter whether this demotion is characterized as disciplinary in nature because the ultimate question remains the same: was the Company’s demotion objectively fair or unfair. In that regard, the just cause standards relied upon by the Union are not controlling if for no other reason than the CBA does not establish a strict “just cause” standard, even for actions that clearly constitute discipline so long as the employee is treated fairly. These “just cause” standards are, however, relevant to the extent they bear upon the fairness of the demotion, and I have considered them in the evaluation of the fairness of the Company’s action.

Another preliminary issue is whether I should decide if the Company’s action violated the Family and Medical Leave Act of 1993 (FMLA).\(^6\) The separate questions of whether labor arbitrators can or should consider external law in deciding disputes arising under collective bargaining agreements have been the subject of considerable and longstanding debate and differences of opinion among arbitrators. *Elkouri* devotes an entire chapter to the use of substantive law in arbitration.\(^7\)

One point is entirely free from debate. Unless the collective bargaining agreement itself, or the parties’ submission of the issue mandates the consideration of state or federal law, private arbitrators are not required to consider external law.

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\(^5\) Id. at 804

\(^6\) 29 U.S.C. §2601 et seq.

\(^7\) *Elkouri*, ch. 10 at 486-566.
In this case, I am asked by the Union to consider whether the Company’s demotion of the Grievant violates the FMLA.

Although it is certainly arguable that treatment of an employee in violation of federal law constitutes “unfair” treatment within the meaning of the parties’ agreement, I decline to exercise any jurisdiction over such claim, even if possessed, for the following reasons.

First, the parties’ CBA says nothing about the arbitration of any statutory claims. In such circumstances, I believe it at least improvident to conclude that the parties intended to have private arbitrators interpret and apply public law and it is, of course, the parties’ intent that is the source of my jurisdiction and authority.

Second, the FMLA is a complex and highly integrated statutory and regulatory scheme. The rights and obligations arising from that law and administrative regulations are often unclear and interested parties and persons can have defensible differences of opinion about what the FMLA means. And so it is here with the Union claiming that the Company’s refusal to reinstate the Grievant to an equivalent position after her return from leave violates the FMLA and the Company claiming, for different reasons, that nothing it did violates any part of the FMLA. It is simply the better choice, in my opinion, to leave issues of federal law in such circumstances to the public tribunals that Congress vested with the specific jurisdiction to hear and decide such statutory issues and remedy any violations, as appropriate.
Nothing in my opinion and award should be construed as reflecting any finding or judgment about any claim, factual or legal, asserted by either party as to any FMLA issues. My declination to consider such claims leaves all parties free to pursue such claims in the appropriate forum.

Turning to the merits of the grievance, the following summary of facts is intended only as a backdrop for the discussion that follows. As the material facts are not in dispute, not everything of record has been recited here in the interest of brevity, but the entire record has been repeatedly and thoroughly reviewed in conjunction with my opinion and award.

Grievant applied for and was promoted to a P3, major account executive, in the Spring of 2002, upon the recommendation and encouragement of supervisors, after excelling as a sales representative and account executive (P2) for several years earlier despite an admitted twenty-year alcohol dependency. As a P3, Grievant reported to District Sales Manager Lisa Miller, who in turn reported to Douglas Baumgarten, General Sales Manager. In mid-November 2003, Miller was replaced by Pat Manzella.

In the Summer of 2002, Grievant was injured in a boating accident, and following that, she and her boyfriend of many years ended their relationship. Grievant took FMLA leave in March 2003 for alcohol rehabilitation for which she was treated and released on April 3, 2003 and returned to work. According to the Company, it was after the accident
that its supervisors first began to notice problems with Grievant’s work and her relationships with other employees, customers and supervisors.

On February 6, 2004, Grievant had what she described as a nervous breakdown and was again on FMLA leave from February 9, 2004 to April 23, 2004. Upon her return to work on April 26, 2004, Grievant was demoted to a P1 sales representative position.

The Union argues that if Grievant failed in any way as a P3, it was because the Company gave her too many accounts, too complex and complicated a mix of accounts, denied her the clerical assistance given the P3 whom the Grievant replaced, a situation made all the more intolerable because the Company was short-staffed due to employees leaving under a separation incentive offered by the Company in early November 2003. It is also argued that Grievant’s supervisors, particularly Baumgarten, were intent on punishing Grievant because of her aggressiveness in questioning the Company’s treatment of accounts and her persistence in protecting her personal interests.

The Union appears to actually advance two arguments which are in the alternative because to fair degree they are inconsistent with one another.

The Union argues that the Grievant was, in fact, performing her job well until the date of her physical/mental breakdown in 2004 and after her return from leave she was ready, willing and able to pick up where she left off.

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8 Cited is an alleged over billing, never refunded, of one account and a change in policy regarding placement of lawyer advertising that resulted in lawyer referral services affiliated with the New York State Bar Association being placed many pages after listings for individual attorneys.

9 Cited is Grievant’s persistence regarding her standing among candidates for a Company trip to Hawaii awarded to top salespersons.
Alternatively, any deficiencies in her job performance as a P3 that may exist were caused by the Company who gave her too much work to do with too little, if any, assistance.

Having carefully considered the record, I cannot agree with either of the Union’s arguments and find, rather, that the Company took a reasonable action intended to protect its business interests and the interests of its employees and the Grievant notwithstanding that the Grievant considers that she was mistreated. A P3 position is at the pinnacle of the Company’s sales hierarchy. It is a position that requires attention to detail, an ability to quickly handle a large volume of often complex accounts on a repetitive basis, discretion, tact, and judgment when dealing with the Company’s largest advertisers who can be difficult and demanding. The record persuades me that there were sufficient examples of Grievant’s inattention to customers, untimely account closings, and behaviors with supervisors, employees and customers, ranging from the curious and unexpected to the disrespectful and bizarre. This is not to say that this marked the totality of the Grievant’s performance as a P3 because the record also evidences some success. Rather, the Grievant’s performance problems as a P3 were of a number, nature and duration sufficient to preclude a finding that the Company’s decision to remove her from the position as a major account executive was unfair.

Without unnecessary elaboration, I do not find that any Company representative was “out to get” the Grievant for any reason. Indeed, Grievant’s success on the job would have directly benefited her supervisors. This is not to say that her supervisors were not concerned about what they considered to have been Grievant’s erratic and
unprofessional behavior or, at times at least, were not personally offended by the Grievant’s actions. Rather, I simply am not persuaded that the demotion was meted out in retaliation for the Grievant standing up for her customers, herself, or for what Grievant believed were the Company’s best interests. There is more than sufficient evidence that Grievant was not meeting the Company’s expectations of a P3 which in no sense can be considered “unfair” under a competitive business model. A business must be permitted to take reasonable action to protect its business interests so long as those actions violate neither law nor collective bargaining agreement. Grievant’s demotion, put simply, was a legitimate exercise of recognized managerial authority and not “unfair” within the meaning of the CBA.

The work the Grievant took on as a P3 was inherently difficult and time consuming, but the accounts for which she was responsible were the same as those of the P3 she replaced. If the mix and complexity of Grievant’s work was different from that of the other P3, that was simply the result of where the P3s were assigned, with Grievant upstate and the other P3 more downstate. Although the Grievant accepted some additional assignments due staff shortages, other employees did so as well. Therefore, that does not constitute discrimination or unfair treatment of the Grievant within the meaning of the CBA. As Grievant struggled to keep up, despite her denial that she was lagging, other employees and supervisors helped with her accounts. The Company did not abandon her as alleged by CWA.

The record does reflect that the prior P3 in Albany had some unspecified type and level of clerical help with the amount of paperwork that is generated by the accounts in
the Albany area. It is alleged by the Union that the Grievant was not given clerical assistance. Even if the clerical support given the Grievant in this respect was not the same, the Company made efforts to reduce the amount of paperwork and streamline the process by having others key the hospital accounts on a trial basis. It is alleged by the Union that this “trial test” failed and that the initiative actually produced more work for the Grievant. But it is the effort and intent to help, not hurt, that is the more relevant to the question of “fairness” than is the alleged failure to achieve the objective. Moreover, it appears that Grievant herself was able to secure some clerical assistance which on the Union’s own allegations was not available to her on only one day when Baumgarten also needed clerical assistance.

But most consequential, I conclude, is that the fundamental and principal reason for the Grievant’s difficulties was the timing of her promotion. She took the P3 job and worked at it during a time of extreme personal, psychological and emotional turmoil in her life. Those troubling factors, I believe, were significantly responsible for her failure.

With that as a general summary, I turn to the more specific of CWA’s allegations of “unfair” treatment.

There was a meeting held on November 14, 2003, at Grievant’s request. Grievant wanted to meet with her supervisors, including Baumgarten, to discuss what the Grievant considered to have been Baumgarten’s unprofessional and rude interruption of a conversation that Grievant had at a Company meeting with a Company Vice-President.
At the November 14, 2003 meeting, Baumgarten, Manzella and the Grievant were present. During this meeting Baumgarten told Grievant that he was dissatisfied with her job performance.

The Union argues, however, that this meeting was not intended to be a disciplinary meeting and that Baumgarten’s comments should not be considered a warning of possible disciplinary action if her performance did not improve. The Union argues that disciplinary warnings are documented formally by the Company, as happened once before when the Grievant was warned in September 2003 for remarks the Grievant made that the Company considered to have been in violation of its code of conduct. Thus, her demotion was, for this reason alone, not for just cause according to CWA.

As discussed earlier, this case is not properly analyzed as a just cause disciplinary proceeding. Thus, any “tests” of just cause used in such proceedings are not strictly applicable. Rather, those so-called “tests” are relevant only to the extent they bear upon the question of whether the Company treated Grievant unfairly. In this respect, the November 2003 meeting clearly placed Grievant on reasonable notice that it had substantial and serious questions as to her job performance as a P3. That the notice might not rise to the level of a documented warning in the disciplinary sense is not controlling. As discussed, the issue here, at bottom, is fairness and notice of performance deficiency actually received and understood is sufficient when assessing the objective reasonableness of the Company’s action. The record also establishes that Grievant had been otherwise made aware of her performance problems in meetings or conversations with supervisors. Indeed, even CWA representatives were concerned about the Grievant
and worried that she could be facing some type of adverse action stemming from her performance as a P3.

That Grievant, by at least mid-November 2003 and thereafter, was reasonably placed on notice of the Company’s dissatisfaction with her performance as a P3 remains true despite the Company’s suspension on November 4, 2003 of its Performance Improvement Plan (PIP). Employees can be placed under a PIP if their performance is substandard and remain on the PIP for six months. The PIP appears to have been reinstated, coincidentally, on or about the same day Grievant was demoted. Nothing, however, establishes that a PIP placement was or is the exclusive method of notifying employees of performance deficiency nor is there anything suggesting that the Company suspended the PIP in response to anything having to do with the Grievant. The suspension of the PIP was a business decision and as the PIP program was not then in effect, the meeting on November 14, 2003, at which Grievant was told of the Company’s concerns about her performance, becomes all the more fair and reasonable.

CWA also argues that Grievant was denied union representation in April 2004 when Baumgarten and Manzella announced that she was being demoted to a P1 position. However, as this meeting was not a disciplinary interview, but was simply a meeting to report action already decided upon, there would not be any right of union representation under the NLRA nor does the parties’ collective bargaining agreement provide for such representation.
The Company's alleged failure to conduct a full and impartial investigation prior to Grievant's demotion is again, and for the same reasons, not dispositive of whether the Company treated Grievant unfairly. Indeed, even in the context of a true "just cause" disciplinary proceeding, I have not slavishly applied this prior investigation "test" of just cause because an employer's failure to investigate prior to the imposition of discipline should and does redound to the employer's detriment if the full facts revealed at the just cause hearing are materially different from the employer's assumed facts that formed the grounds for the disciplinary action. Therefore, the Company's alleged failure to conduct an impartial investigation of the totality of the circumstances prior to the Grievant's demotion does not relate to the fairness of the Company's demotion of the Grievant. As in a disciplinary context where the question of whether there exists just cause is a conclusion to be reached by an arbitrator upon the record as developed by the parties at the hearing, so it is here upon the question of whether the Company treated the Grievant unfairly. The record as developed is the measure of objective fairness or unfairness.

Nor do I agree with the CWA's assertion that the demotion from a P3 to a P1 was draconian or disproportionate to any job failures, should any be found. To the contrary, the record reflects a considered effort by the Company to place the Grievant in a position of a type she had previously held and one in which she had admitted and proven success in lieu of termination.

Supervision discussed terminating the Grievant, but rejected discharge because the Grievant had been an exemplary employee and there was hope that a position less stressful than a P3 would help Grievant recover and again become an asset to the
Company. A telephone sales job, that Grievant once held, was rejected because the
Company felt the job and the opportunities were too small for Grievant given her record
and that Grievant might quit if that was the job offered her. Making her a P2 would have
required Grievant to handle what were once P3 accounts because the P2 account
threshold had been raised and, thus, supervision decided that a P2 position would
continue to expose Grievant to the stresses and responsibilities management determined
she could not handle.

These deliberations evidence focused efforts by the Company to retain a valued
employee and to fit her into a job that she would likely be able to perform well to the
mutual advantage of the Company and the Grievant.

Although the grievance must be denied, I conclude with a general observation and
a recommendation. It is apparent that the Grievant accepted the P3 promotion somewhat
reluctantly and at a troubled time in her life personally and at a time when the Company
was undergoing change and downsizing. It is true also that Grievant had enjoyed a clear
measure of success in her positions prior to her acceptance of the promotion to a P3.
Whether the Grievant could have succeeded as a P3 in different circumstances cannot be
known to any degree of certainty. But neither can it be known whether, but for these
circumstances, that the Grievant would not have been capable of meeting the job
expectations of a P3. I trust, therefore, that both the Company and the Grievant will
retain an open mind as to reassignment as a P3 in the future should circumstances then
warrant.
AWARD

The Company did not violate the CBA by demoting the Grievant from a P3 to a P1 position. The grievance is denied.

Dated: ____________________________

_____________________________________
Eric J. Schmertz
Arbitrator

State of New York )
) ss:
County of New York )

I hereby affirm pursuant to CPLR 7507 that I am the individual described herein and who executed this instrument which is my Award.

Dated: ____________________________

_____________________________________
Eric J. Schmertz