Communications Workers of America, Local 1180, 15 OCB 1 (BCB 1975) **[Decision No. B-1-75 (Arb)],** ***rev'd in part, Burnell v. Anderson*****, N.Y.L.J., Nov. 26, 1975, at 8 (Sup. Ct. N.Y.Co.)(Reversal rendered moot by amendment to CSL § 100(1)(d);** ***see Rockland County v. Rockland County Unit, CSEA*****,74 A.D.2d 812 (2d Dep't 1980,** ***aff'd*****, 53 N.Y.2d 741 (1981)).**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK,
Petitioner,
-and

DECISION NO. B-1-75

ALLIED BUILDING INSPECTORS, LOCAL 211, IUOE, AFL-CIO,
Respondent,

-and-

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1180, AFL-CIO
Respondent.

DOCKET NOS. BCB-190-74
BCB-191-74
BCB-192-74
A-401-74
A-402-74
A-405-74

DECISION AND ORDER

On August 29, 1974, Allied Building Inspectors, Local 211 (ABI), filed its requests for arbitration in cases BCB-190-74 and BCB-191-74. On August 28, 1974, Local 1180, Communications Workers of America, AFL-CIO,(CWA), filed its request for arbitration in case BCB-192-74. With minor variations, the three cases seek arbitral awards of payment for performance, by the respective grievants, of duties and functions of titles higher than those they held during the periods covered in each case and prior to their formal. appointments to such higher titles. Since the pleadings and other supportive material filed by the parties in both the ABI and the CWA cases raise the same issues for decision by this Board, we issue the decision heroin as a determination in the three docketed matters.

In BCB-190-74, ABI alleges that the Department of Buildings has made it a regular practice to assign construction inspectors to duties substantially different from those stated in their job specifications and identical with those of higher-titles in the construction inspector series of titles. In this case, which is in the nature of a group grievance, ABI seeks an award either directing the Department of Buildings to terminate the above-described alleged practice or, in the alternative, directing payment of higher wages to any unit employee to whom the alleged practice is applied.

In BCB-191-74, ABI alleges that the grievant, a Construction Inspector, was assigned by the Department of Buildings, on November 27, 1973, to perform the duties of a Senior Construction Inspector. However, the department allegedly did not begin paying grievant as a Senior Construction Inspector until April 29, 1974, when he was appointed, in accordance with Civil Service Law and procedure. The union seeks payment to him of the difference between his wages as a Construction Inspector and those of a Senior Construction Inspector for the five month period November 27, 1973 to April 29, 1974, during which time he was allegedly assigned to perform and did perform the duties of the latter title.

In BCB-192-74, CWA alleges that the Department o f Social Services, on September 17, 1973, assigned the grievant, an Administrative Assistant, to perform the duties of an Administrative Associate but did not commence payment to her of the wages of the higher title until she was formally promoted provisionally to the title on March 18, 1974. The union requests payment to grievant of the difference between her wages as an Administrative Assistant and those of an Administrative Associate for the six-month period September 17, 1973, to March 18, 1974.

In each of these three cases, the union represents not only the titles occupied by the affected employees but the higher titles in which unit employees have allegedly been directed to serve on an out-of-title basis.

The City commenced the instant proceedings by filing its petitions herein questioning arbitrability in BCB-190-74 on September 16, 1974; in BCB-191-74 on September 19, 1974; and in BCB-192-74 on September 20, 1974. The City also filed Motions for Summary Judgment in BCB-190-74 and BCB-191-74 on the identical grounds in each case. For the reasons which form the basis of this Decision, we dismiss the said motions.

The Contractual Provisions

In cases BCB-190-74 and BCB-191-74, ABI alleges that its claimed grievances fall within the definition of the term "grievance," in Article VI, Section 1. of its contract, which reads as follows:

> "Definition: The term 'grievance' shall mean
> (A) A dispute concerning the application or interpretation of the terms of this collective bargaining agreement;
>
> (B) A claimed violation, misinterpretation or misapplication of the rules or regulations, existing policy or orders of the agency which employs the grievant affecting the terms and conditions of employment; provided, disputes involving the rules and regulations of the New York City Civil Service Commission shall not be subject to the grievance procedure or arbitration;

(C) A claimed assignment of employees to duties substantially different from those stated in their job specifications;

(D) A claimed improper holding of an open-competitive rather than a promotional examination; and

(E) A claimed wrongful disciplinary action against an employee.

In Case BCB-192, CWA alleges that its claimed grievance falls within the definition of the term "grievance," in Article VI, Section 1 (A), (B) of its contract, which reads as follows:

"Definition: The term 'grievance' shall mean
(A) A dispute concerning the application or interpretation of the terms of this collective bargaining agreement;
(B) A claimed violation, misinterpretation or misapplication of the rules or regulations, existing policy or orders applicable to t:,e agency which employs the grievant affecting the terms and conditions of employment; provided, disputes involving the rules and regulations of the New York City Civil Service Commission shall not be subject to the grievance procedure or arbitration;"

CWA alleges that the City violated Article III of its contract which in seven pages of text describes the wages and other benefits of employment due employees.

Position of the City

The City maintains that these grievances must be read as demands for arbitral awards of retroactive promotion and alleges that any such award would be in violation of Civil Service law.[1]

The City argues, further, that the unions' demands for payment for duties allegedly performed on an out-of-

[1] The City cites Civil Service Law 561: "No person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed and, except upon assignment by proper authority during the continuance of a temporary emergency situation, no person shall be assigned to perform the duties of any position unless he has been duly appointed, promoted, transferred or reinstated to such position in accordance with the provisions of this chapter and the rules prescribed thereunder. No credit shall be granted in a promotion examination for out of title work."

title basis is not within the power of the arbitrator since it would involve a direction to a public official to perform an act in violation of Civil Service Law, Sections 101, 956, and 1006.[2]

In this connection, the City argues that this Board should either set aside or so amend its Decision No. B-5-74 as to preclude the possibility of any arbitrator issuing an award directing the performance by a public official of any of the acts dealt with in the cited Civil Service Law provisions.

The Positions cf the Unions

ABI relies upon our decision in Matter of CWA and Civil Service Bar Association -and- City of New York, Decision No. B-5-74, in which we found arbitrable a grievance almost identical with those involved here. We specifically rejected City contentions as to the alleged illegality of the remedy sought, and held that the question of remedy was for the arbitrator and not for a tribunal considering the substantive arbitrability of a grievance. CWA maintains that the City's alleged actions are in violation not only of the salary schedules set forth in Article III of the collective agreement between the parties but also in violation of Sections 115, 131 (2) (a)[3] and other

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[2] Civil Service Law §101

"Any officer who shall wilfully pay or authorize the payment of salary or compensation to any person in the classified service with knowledge that the state civil service commission has refused to certify the payroll, estimate or account of such person, or after due notice from such department or commission that such person has been appointed, employed, transferred, assigned to perform duties or reinstated in violation of any of the provisions of this chapter or the rules established thereunder, shall be guilty of a misdemeanor.

Civil Service Law §956:

". . . Any person employed or appointed contrary to the provisions of this chapter or of the rules and regulations established thereunder shall be paid by the officer or officers so employing or appointing, or attempting to employ or appoint him, the compensation agreed upon for any services performed under such appointment or employment or, in case no compensation is agreed upon, the actual value of such services and any necessary expenses incurred in connection therewith, and shall have a cause of action against such officer or officers for such sum and for the costs of the action. No public officer shall be reimbursed by the state or any of its civil division for-any sums so paid or recovered in any such action.

Civil Service Law §1006:

". . . If the department or municipal commission finds that any person has been promoted, transferred, assigned, reinstated or otherwise employed in violation of this chapter or rules made pursuant thereto, it shall so notify the appropriate disbursing and auditing officers who thereafter shall not pay or approve the payment of any salary or compensation to such person; and nothing contained in this section shall be construed to authorize any officer to approve or pay salary or compensation to any person contrary to such a notice . . ."

[3] Section 115. Policy of the State:

"In order to attract unusual merit and ability to the ser
vice of the state of New York, to stimulate higher efficiency among the personnel, to provide skilled leadership

sections of Civil Service

Law, of the "Regulations Establishing Alternative Career Salary Plan . . . Applicable to Certain Classes of Position Covered by Collective Bargaining Agreement,"[4] and of applicable case law and policy. CWA also alleges that the City's failure to pay the wages of the higher title during all of the time that grievant performed the duties of that title is inequitable, arbitrary, capricious and discriminatory, and that it has unjustly enriched the City.

(Contd) in administrative departments, to reward merit and to insure to the people and the taxpayers o-ff the state of New York the highest. return in service for the necessary costs of government, it is hereby declared to be the policy of 1.:he state to provide equal pay for equal work, and regular increases in pay in proper proportion to increase of ability, increase of output and increase of quality of work demonstrated in service.

§131 (2) (a)
"Appointments and promotions to higher grade positions. If such employee is appointed or promoted to a position in a higher grade, he shall receive an increase in salary, upon such appointment or promotion, which is equivalent to the full increment payable in the position to which he is appointed or promoted, or he shall be paid the minimum salary of the grade of the position to which he is appointed or promoted, whichever results in a higher annual salary."

[4] A body of rules and regulations governing certain under the Career to the original conditions of employment for all employees and Salary Plan who are not paid according thirty-two salary grades of that plan.

Discussion

In order fully to clarify the City's characterization of the unions' pleadings herein, it is necessary to follow the underlying reasoning of the City's position. It may be summarized as follows:

> 1. Civil Service Law requires that certain steps and procedures be followed in order to bring about a legally valid appointment to a civil service title.
>
> 2. Unless an incumbent has been appointed to a civil service title in accordance with the prescribed steps and procedures he may not be paid for the 'performance' of the duties of that title out of public monies but must seek such payment from the official who appointed him improperly.
>
> 3. Since no person may be paid out of public funds for performance of the duties of a civil service title to which he has not been properly appointed, any demand for payment for the performance of such duties can and must be interpreted as a demand for a sort of retroactive appointment so as to justify payment for performance of duties during the retroactive period.

The City's essential opposition to the arbitration of grievances such as those involved here has already been stated in the prior proceeding before us in which we issued our Decision No. B-5- 74, supra. The significance of the instant matters is thus not in the novelty of the issue presented but in the fact that it is still being raised and elaborated upon as an issue. This is perhaps due, in part, to our reluctance to deal with what may be considered the merits of the underlying a grievances now and heretofore before us. In order that our prior decisions as well as our decision herein may be more comprehensible, this reluctance must be overcome. We will, therefore; set forth our reasons for rejecting the City's recommendation that we set aside our Decision No. B-5-74 and for finding that, aside from the intrinsic defect of circularity, the City's contentions with regard to Civil Service Law are without merit.

It is significant that the City does not argue that the practice complained of is unusual or

exceptional. We believe ourselves justified, therefore, and in light of the number of such cases submitted before us for arbitration, in assuming that the City, in order to carry on its many-faceted functions finds it necessary in various circumstances to proceed as it is said to have done with each of the grievants herein; that is, to direct an employee to, assume the duties of a higher title prior to formal appointment to the higher title. We also find basis for the inference that if it is not official affirmative policy of the City to make use of this device, it is at least the established practice of the City to condone its regular and repeated use by duly constituted City officials and supervisory employees. Thus, the City, with its contentions about the illegality of appointments not in accordance with Civil Service law and rules and of the illegality of payments to persons so appointed, engages, in sophistry which we cannot indulge.

We are not alone in our rejection of such reasoning. The Court in Campbell v. Lindsay, 358 NYS 2d 533 [6/19/74], commented on an almost identical City practice, as follows:

> ". . . In plain fact, this reasoning by the City appears to be tortuous and self-serving. It boils down simply to this - that no matter what personnel may have been assigned to perform, no matter what responsibilities are entailed, no matter what the appearance may be -that they have been 'designated' as commanders and supervisors, they will riot receive the scheduled salary for that position until someone in the City decides to qualify them-for it by issuing an 'effective personnel order.' In other words, among all those occupying similar positions, and serving similar functions, higher pay will be accorded only to those selected few who are among the chosen upon whom the title is conferred. The law, however, does not blink away realities and engage in an elaborate minuet with chosen partners. The very meaning of the law. The uniformity and equality which make it a system and a science, and which bars whimsical and haphazard applications, require comparable treatment for all persons in comparable positions and situations. It is not a clerical tapping on one's shoulder for budgetary purposes which is determinative, but rather the realities of whether in fact a person has been designated and serves in the position and functions denominated by law."

In Gotbaum v. Sugarman, 358 NYS 2d 635 [7/31/74], a program in which welfare recipients are assigned, on a salaried basis, to perform duties ordinarily assigned to competitive civil service employees, was alleged to be in violation-of the Civil Service Law and the New York State constitutional provisions relating to Civil Service, the court said in pertinent part:

> "Some of the most difficult problems which are presented for judicial resolution involve a head-on collision of two socially desirable but conflicting objectives. In this case such a problem is presented by the conflict between constitutional provisions for a merit system of civil service employment and the desire to set up a humane and enlightened welfare and relief system to provide employment for recipients..."

The Court then held that since the conceitedly worthwhile provisions of Civil Service Law were not directly contravened, they were not a bar to the equally worthwhile provisions of the law providing a work program for relief recipients. While recognizing that certain conflicts existed and that, for example, the work program provided for assignment of program participants to titles "which are comparable so far as job specifications and qualifications are concerned, with a number of positions in the competitive class ice, the Court held, nonetheless, of civil service that the program should be permitted to continue since "the . . . program does not appear to be a subterfuge device to evade competitive civil service examinations merely by setting up differing job titles for the same civil service work. . . . There . . . appears to be no danger that an extra-legal and cognate system of government employment will be set up to evade the principle of merit and to create a new spoils system."

We understand the decision in Gotbaum v. Sugarman to follow the well-settled rule that where laws for the furtherance of differing public policies conflict, they should, if possible, be harmonized. In the instant case, we deal not with a conflict between different laws but between different articles of the same Civil Service Law. We are not persuaded by the City's contentions regarding the preemptive effect of the particular provisions of Civil Service Law upon which it relies on the issues presented here. We understand it to be the purpose and intent of the Civil Service Law provisions and of the related constitutional provisions to prevent abuses in the appointment and employment cf public employees. It is the purpose and intent of the Taylor Law, itself a .part of the Civil Service Law, and of the NYCCBL, enacted by the New York City Council pursuant to and consistent with the Taylor Law further to regularize the status of public employees. We do not believe that these several areas of Civil Service Law are mutually exclusive nor do we find any difficulty in harmonizing them.

Under the civil service provisions urged by the City, it is mandated that appointment to civil service titles must be made on the basis of merit and fitness. None of the grievants in this or in any prior case decided by us has claimed a right under a collective bargaining agreement to be appointed to a civil service title. In each instance, the grievant has claimed that his supervisor designated him to perform duties ordinarily performed by a higher title; in each instance, the employee was formally appointed to the higher title at a later date; in each instance, having been paid during the hiatus at a rate lower than that payable for the services rendered, the grievant has sought redress by way of arbitration; in each instance, it has been alleged that the City's failure and refusal to make such payment was in direct violation of specific provisions of its agreement with its employees. It is the purpose of those sections of the Civil Service Law mandating collective bargaining to promote the use of all of the processes, including arbitration of grievances, generally associated with any system of labor-management relations.[5]

[5] NYCCBL §1173-2.0 Statement of Policy.

It is our opinion that this area of Civil Service Law mandates that if the City either as a matter of affirmative policy or of indulgence of the regular practice of its duly appointed officers and agents utilizes and benefits from the assignment of employees to out-of-title duties, and if any such action is alleged to be in violation of a collective bargaining agreement to which the City is a party, the matter should be submitted to an arbitrator for adjudication and, if appropriate, for remedy. The City resists conformance with this purpose of the Civil Service Law by making allegations which tend to demonstrate that the City, itself does not comply fully either with the labor relations purposes or the merit system purposes of the Civil Service Law.

The City's argument that the existence of a statutory right preempts a contractual right has been dealt with previously by this Board and the courts of this state.

The Court of Appeals in Board of Education - and - Associated Teachers of Huntington, Inc., 30 NY 2d 122, 331 NYS 2d 17, recognized the existence of alternate methods of challenging an administrative decision. In that case the Board of Education-maintained that the statutory right to appeal within the Board of Education to the commissioner, or to go to court, precluded the Board from concluding a collective bargaining contract which grants the right to present grievances and to go to arbitration. The Court ruled:

> ". . . We also find without substance the Board's claim that the grievance provision violates section 3020-a of the Education Law, generally known as the Tenure Law. That statute provides that, prior to any disciplinary action being taken against a teacher the latter must be afforded a hearing before an impartial panel, which then submits recommendations to the school board (Education Law, §3020-a, subds. 2, 3, 4). The Board is not bound by these recommen-dations and may disregard them in making its decisions. Since a decision by the Board itself to impose discipline is a pre-requisite to arbitration, the grievance provision in no way supplants this aspect of the Tenure Law. In addition, section 3020-2 (subd. 5) declares that any employee 'feeling himself aggrieved' may either appeal to the Commissioner of Education or commence an article 78 proceeding. The

> procedure thus set up is not mandatory, its implementation resting entirely in the teacher's discretion. Thus, the Legislature has given a tenure teacher a choice of two methods of statutory appeal if he desires to challenge an adverse decision of the school board. But it does not follow from this that the teacher may choose arbitration as a third method of reviewing its determination."

In Local 1180, CWA, Decision No. B-24-72, the grievant was a Clerk Grade 5, a Rule X title which survived from a previous system of job classifications and which had a wide ranging job description susceptible to a variety of assignments. The City's .Department of Personnel and Budget "equated" the duties being performed by the grievant to a comparable job description in the present Rule XI System of Classification for pay purposes. The union sought back pay for grievant claiming that he had performed work of a higher level position than the one to which he had been thus equated. The City asserted that grievant's attempt to obtain review of his job classification should have been addressed to the Classification Appeals Board of the Civil Service Commission and could not be submitted to an arbitrator. The Board found that:

> ". . .the grievance is arbitrable as 'a claimed assignment of employees to duties substantially different from those stated in their job classification' under Article 9, §1(B) of the parties' contract. The grievant clearly asserts that he performed a job for eleven months in an out of title*capacity. Therefore, he has a contractual right- to arbitrate that claim and seek a remedy.
>
> "The fact there may be another forum available to grant a different the of relief does not bar arbitration. The grievant has filed the waivers required by §1173-8.0d of the NYCCBL thereby choosing arbitration and relinquishing his right to proceed in any other fashion. This is the result contemplated by the statute."

In CWA and Civil Service Bar Association, Decision No. B-5-74, two unions sought arbitration of their grievances that certain unit employees had not been compensated for the performance of higher titled duties to which they had been assigned. The City maintained in those cases, as it does here, that the unions' demands for back pay amounted to demands that the employees be appointed to, or promoted to, higher Civil Service titles, a remedy in excess of an arbitrator's authority, since only the Civil Service Commission can appoint or promote. We held, in pertinent part, as follows:

> "We neither adopt nor reject the City'' interpretation of the union's demands [that the union is actually requesting that grievants be appointed or promoted to particular Civil Service titles) for we believe that an even more fundamental error is intrinsic to the City's arguments with regard to the nature and quality of the remedy sought by the unions. The error lies in the City's failure to make a distinction between the alleged impermissibility of the remedy sought and the arbitrability of the underlying alleged contract breach; for it is the general rule that arguments addressed to questions of remedy are not a bar to the arbitrability of the grievance and the property of the remedy sought is to be considered by the arbitrator.
>
> (emphasis added)

As has been stated above, the City urges herein that our Decision No. B-5-74 be set aside or amended. We reject this suggestion and adhere, in the instant matter, to the rationale set forth in B-5-74. We reiterate the statement in that decision that "an arbitrator's award may not violate the law." We note, however, that §1173-8.0.b specifically provides for the arbitration of out-of-title grievances; we believe that this provision does not contemplate a meaningless exercise. It is thus our opinion that in an appropriate case an arbitrator would have authority to make an award of money.

We find that neither the grievance and arbitration procedures set forth in the collective bargaining contracts nor the remedy sought by the unions are preempted by Civil Service Law. Accordingly, we find and conclude that the three grievances are arbitrable..

In connection with the dissent of Alternate City Member Herlihy, infra, we note that it relies heavily upon the decision in Cassella v. City of Schenectady, 281, App. Div. 428, a 1953 decision. We do not agree with him that our "assertion that 'in an appropriate case an arbitrator would have authority to make an award of money' is plainly contrary to the view of the New York Courts" as expressed in that decision. The Cassella decision has nothing to do with arbitration or the authority of arbitrators. It deals with a suit to recover in quantum meruit for services rendered by a physician who performed the duties of a fire surgeon during the period of a final illness of the duly appointed incumbent of the position. The plaintiff, not a public employee, was never certified, never appointed to the position and never appeared on the payroll of the Department in any capacity.

Moreover, the Court held in that decision:

> " . . . recovery may be allowed against a municipality in quasi-contract for benefits received under an unenforceable contract where the invalidity was due to a mere irregularity or a technical violation . . . but where the making of the contract flouted a firm public policy or violated a fundamental statutory restriction upon the powers of the municipality or its officers, recovery in quasi-contract is uniformly denied."

We believe that a case in which it was proven to an arbitrator that a civil service employer, eligible for promotion to a higher title under civil service law and rules was assigned to perform the duties of the higher title by his superiors in a City agency pending completion of ministerial formalities of appointment, an award of money by the arbitrator to bring payments to the employee up to levels prescribed 'by a written and duly executed collective bargaining agreement would find justification in that portion of the Cassella decision approving recoveries against a municipality where the only impediments thereto consisted of "mere irregularity or technical violation: rather than to the flouting of "firm public policy" or the violation of "a fundamental statutory restriction upon the powers of the municipality or its officers."

We shall grant the requests for arbitration and dismiss the three petitions herein.

O R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the motions for Summary of the City in BCB-190-74 and BCB-191-74 herein be, and the same hereby are, denied; and it is further

ORDERED, that the petitions of the City in BCB-190-74, BCB-191-74 and BCB -192-74 herein be, and the same hereby are, denied; and it is further

ORDERED, that Respondents requests for arbitration in BCB-190-74, BCB-191-74 and BCB-192-74 be, and the same hereby are, granted.

DATED New York, New York
January 6, 1975

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

ERIC J. SCHMERTZ
M e m b e r

EDWARD F. GRAY
M e m. e r

I dissent TIMOTHY J. HERLIHY
M e m, b e r

DISSENT OF THOMAS J. HERLIHY IN CASES NOS. BCB-190-74, BCB-191-74 AND BCB-192-74

I respectfully dissent in all of the instant cases. It is clear that the Civil Service Law prohibits payment of municipal monies to anyone for performance of out-of-title work and, accordingly, the City and unions could not, as a matter of law, have agreed to make payment to an employee for performance of out-of-title work.[1] It follows that no collective agreement between the City and any municipal labor union may implicitly or explicitly contain a provision that an arbitrator can do by indirection what the parties cannot do directly, which is to provide a pay differential between the contractually agreed upon salary for an employee's title and that payable to a higher title for duties not within the class specification of the affected employee.

This Board's assertion that "in an appropriate case an arbitrator would have authority to make an award of money," is plainly contrary to the view of the

[1] Any more than could the City and municipal labor unions have agreed to either a union shop or a closed shop provision. These matters, like payment for out-of-title work, are prohibited subjects of bargaining (see-our Decision No. B-11-68) because they are prohibited by law, and like payment for out-of-title work, cannot be agreed upon in collective bargaining.

New York Courts as expressed in Cassella v. City Of Schenectady, 281 App. Div. 428 (3rd Dept., 1953) As a career civil servant, I must agree that the logic of the Court's interpretation of the Civil Service Law comports with my understanding of the sound operation of the merit system. The Board's decision today does not. Under the logic of the Board's decision, a Director of a social services center can tell a Supervisor I, whom he wishes to receive the benefits of a promotion without competitive examination, to do the work of a Supervisor III, even though she is prevented by law from doing so, and he can assure her that she will receive the money for work in a higher title simply by filing a grievance and obtaining it from an arbitrator. That all the Supervisors II awaiting the promotion are illegally prevented from the opportunity for promotion becomes irrelevant under the logic of today's decision.

Two of the cases at hand provide excellent examples of why the law was designed to prevent the grievants from receiving exactly what the Union is asking for. If the grievants in BCB-191-74 and BCB-192-74 were inappropriately performing duties in a higher title, they knew quite well that they were doing so and do not come

to this Board with "clean hands." From the circumstances set forth in BCB-192-74, it seems evident that the Administrative Assistant voluntarily assumed the duties of an Administrative Associate on the strength of a commitment on the part of a supervisor to use his "best efforts" to secure for the grievant a provisional appointment in the higher title of Administrative Associate through a recommendation to those having the power to make such appointments. The recommendation was considered, accepted, and the appointment made. Had the grievant not wished voluntarily to accept the alleged "out-of-title assignment," a timely filing of a grievance or a Protest to the Civil Service Commission would probably have remedied the situation. While not saying that it happened in this instance, it is possible that a Senior Administrative Assistant, heading a fair-sized unit of any agency, could have been the one to have asked an Administrative Assistant to perform work of an Administrative Associate, all three of which titles are in the same bargaining unit.

To "assume" that out-of-title work must be engaged in, without adhering to Civil Service Commission procedures and requirements regarding promotion or provisional assignments, "in order to carry on its many-faceted functions," is not merely an unwarranted surmise, it is directly contrary to the facts. The City seeks to stop the practice cold here today before this Board which it can do if the Board were to affirm the law and tell employees that efforts to evade the law (to the detriment of other civil service employees) will not be rewarded later by arbitration. The practice of employees engaging in out-of-title work will close very quickly once employees know they cannot- expect to be rewarded for performing duties illegally. To accuse the City of "Sophistry" in this regard, where none of the writers have any experience in working for a Mayoral agency, is ill-advised. To directly contradict the Court's interpretation and plain reading of the Civil Service Law, is an error of judgment.

A final note is in order. While, ordinarily, I would think that an arbitrator's award containing a direction for back pay for out-of-title work could be

set aside in court, Justice Spiegal, in CWA v. City of New York, decided that when the City did not appeal from this Board's order in Decision No. B-5-74, or move to stay arbitration, it must have been "deemed to have waived its contention that the arbitration [sic] did not have the power to award monetary damages." Moreover, a CWA representative upbraided the City in the same matter for having proceeded to arbitration and then appealed the result rather than challenging this Board's decision. Accordingly, as a matter of law and sound labor relations, I believe it is incumbent on the Board to stop these requests from proceeding to arbitration.

I would hold that the Requests for arbitration in BCB-191-74 and BCB-192-74 are moot because the Union affirmatively alleges that no out-of-title work was being performed by the grievants at the time the Request for Arbitration was made and the only issue for the arbitrator was the specific remedy of back pay. I would further hold that the request in BCB-190-74 should be dismissed as it is not a true

group grievance and certainly to the extent that defect might be cured in a subsequent Request for Arbitration by the filing of waivers of each affected employee, the request should be limited by this Board noting that the arbitrator has no authority, as a matter o law, to grant payment for out-of-title work which may have been performed by the affected grievants.