Communications Workers of America, 65 OCB 13 (BCB 2000) [Decision No. B-13-2000 (Arb)], aff'd, City of New York v. DeCosta, No. 403336/00 (Sup. Ct. N.Y. Co. Jan. 12, 2001).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration - between - CITY OF NEW YORK, Petitioner, - and - COMMUNICATIONS WORKERS OF AMERICA, Respondent.	Decision No. B-13-2000 Docket No. BCB-1700-94 (A-5582-94)

DECISION AND ORDER

On November 21, 1994, the Human Resources Administration ("HRA") filed a petition challenging the arbitrability of a grievance filed by Local 1180 of the Communications Workers of America ("Union"). The grievance alleged that "grievants appealed the Step II decision to [the City's Office of Labor Relations] more than nine months ago, [the Office of Labor Relations] has not responded; grievants' workload continues to grow; grievants are not being compensated for the increases in their workloads; grievants continue to perform duties substantially different from those stated in their job specifications." As a remedy, the Union asked that the grievants be paid appropriately, retroactive to the date that the Step I grievances were filed, and that they be placed in the appropriate titles.

Between November, 1994 and March, 1995, the Union requested several extensions of time

in which to file its answer, which were granted. In a letter dated April 5, 1995 to the Chairman of the Office of Collective Bargaining ("OCB"), HRA stated that by agreement with the Union, it was withdrawing references in its petition to a 1986 Stipulation of Settlement between the parties, and consented to a further extension of time for the Union to file its answer.

In a letter to the City dated April 19, 1995, the Union requested information that it considered necessary to prepare its answer. In a letter dated June 14, 1995, the Union told the City that it needed the requested information to prepare its case because "[i]f the City, by its conduct, has continued to treat the settlement 'as a living and binding document' [Decision No. B-17-71] then evidence of that conduct is relevant to the Union's position that the instant matter is arbitrable."

By letters dated April 12, 1995, May 23, 1995, June 26, 1995 and July 21, 1995, the Union again requested extensions of time in which to file its answer, which were granted. In the letters of June 26 and July 21, the Union stated that these requests were occasioned by "unresolved issues involving documents requested by [the Communications Workers of America] from the City." By letter dated July 27, 1995, the City refused to provide the documents, claiming that the issue of arbitrability before the Board was whether the Stipulation of Settlement was arbitrable and that the requested information dealt with the merits of the Union's claim.

On July 27, 1995, the General Counsel of the OCB advised the parties to bring their dispute about the documents before the Board of Collective Bargaining. By letter dated August 2, 1995, the Union asked the Board to order the City to produce the information. By letters dated August 29, 1995 and October 18, 1995, the Union requested extensions of time in which to file its answer while it awaited the Board's decision.

In May, 1996, the Trial Examiner assigned to the case directed the City to respond to the Union's letter of August 2, 1995. The City did so on June 12, 1996. A subsequent exchange of letters between the City and the Union discussed time limits for filing pleadings.

In Decision No. B-45-96, issued on October 31, 1996, the Board directed the City to produce the documents requested by the Union. The City complied with the Board's order on December 17, 1996.

The Union filed an answer to the petition on September 10, 1997. By letter dated September 11, 1997, the City requested, "due to the egregious time delay in filing this Answer, in total disregard of the Office of Collective Bargaining rules, ... that [the Union's] answer be stricken from the record in its entirety." After its request was denied, and after requesting several extensions of time, the City filed its reply on January 12, 1998.

BACKGROUND

The Union represents employees in the title Principal Administrative Associate I ("PAA") who are employed by HRA at Income Support Centers. At all relevant times, the Union and the City were parties to a collective bargaining agreement that included a grievance and arbitration procedure.[1]

Each PAA is responsible for supervising employees in the title Eligibility Specialist III. Each

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[1]Article VI of the collective bargaining agreement ("Grievance Procedure") provides, in relevant part:

Section 1.

Definition: The term Grievance shall mean:

(A) A dispute concerning the application or interpretation of the terms of this Agreement;

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

Eligibility Specialist has a caseload of up to 200 cases. Because the PAA's are responsible for all cases assigned to Eligibility Specialists under their supervision, the caseloads of the PAA's depend on the number of Eligibility Specialists assigned to be supervised by each PAA.

On May 13, 1986, the City and the Union executed a stipulation of settlement in which they agreed to submit to the Board the issue of whether a practical impact existed with respect to workload and span of supervision for PAA's who worked in the Undercare Sections of Income Support Centers. The Union withdrew an improper practice petition.[2] Both parties withdrew specific bargaining demands in a pending impasse proceeding[3] and agreed to criteria to be applied regarding eligibility for merit increases.

On May 21, 1986, the parties entered into a memorandum of understanding about matters unrelated to the May 13th stipulation. The parties expressly stated that the memorandum of understanding modified the collective bargaining agreement which ran from July 1, 1982 to June 30, 1984 and that its terms, together with the Municipal Coalition Economic Agreement and the May 13, 1986 stipulation of settlement, constituted their collective bargaining agreement for the period from July 1, 1984 to June 30, 1987.

In Decision No. B-36-86, the Board ordered a hearing on the practical impact claim raised by the Union. The parties reached agreement in the practical impact dispute, set forth in a stipulation of settlement dated March 24, 1987,[4] and the Union withdrew the remainder of its request for

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[2]Docket No. BCB-838-85.

[3]Docket No. I-182-85

[4]Docket No. I-182-85. The stipulation states that it deals with Union Demand Nos. 52
(continued...)

impasse. The 1987 stipulation established, as a pilot project, new procedures for double coverage and span of supervision in Undercare Groups.[5] This stipulation was not expressly incorporated into the collective bargaining agreement.[6]

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[4](...continued)
and 53.

[5]In the 1987 stipulation of settlement, the parties agreed to the following policy regarding supervision in Undercare sections at Income Maintenance Centers:

> SECOND: The City agrees that its policy shall be that the regular span of supervision shall be five (5) Eligibility Specialists to one (1) Principal Administrative Associate - Level 1 supervisor, for all group supervisors in the Undercare Section of the Income Maintenance Centers subject to the conditions stated in this stipulation of settlement.
>
> THIRD: The City and the Union further agree that the City shall have the right to assign six (6) Eligibility Specialists to a Principal Administrative Associate - Level 1 supervisor when necessary, provided that a new group be created in an Income Maintenance Center when the number of six worker Undercare groups reaches three (3) in that Income Maintenance Center.

[6]The stipulation does not set forth a generally applicable procedure for resolving disputes arising from its terms. It does provide, in relevant part:

> FOURTH: ... If the pilot project is successful in the pilot centers, it will be progressively expanded into the other centers. The progress of the pilot project and its expansion, if successful, shall be monitored by a joint committee of the Human Resources Administration, the Office of Municipal Labor Relations and the Communications Workers of America.
>
> FIFTH: ... the City agrees to employ five (5) floating Principal Administrative Associates-Level I supervisors to assist with the supervision of the workers in the absent Principal Administrative Associate-Level I supervisor's group. If problems arise in the implementation of the floaters program, the Union may refer the issues to a Labor-Management Committee at HRA. If these issues cannot be resolved in Labor-Management, the Union may refer the issues to the Office of Municipal Labor Relations. The selection of floaters will be discussed in Labor-

(continued...)

A number of grievances were filed in 1993 by employees in the title PAA Level I who work at Income Support Centers, claiming that a practical impact existed because the grievants were "double covering" vacant Undercare Groups. In the section of each grievance form calling for "Name and Section of Contract allegedly violated," the Union wrote "Stipulation of Settlement dated 3/24/87". At the time that the grievances were filed, a collective bargaining agreement running from October 1, 1990 to December 31, 1991 was in effect.

Between August and October 1993, Step II decisions were issued denying all of the grievances, on the grounds that double coverage of PAA I supervisors at the Income Support Centers was not prohibited. The grievances were denied at Step III between August and November 1993, on the same grounds.

The Union filed a request for arbitration of all the grievances on June 14, 1994. The Request for Arbitration identifies Article VI, Section 1(C) of the collective bargaining agreement as the

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[6](...continued)
Management Committee meetings between the Human Resources Administration and the Communications Workers of America.

SIXTH: The City and the Union agree that the need to establish better training in each center will be referred to an HRA Labor-Management Committee for resolution. The Office of Municipal Labor Relations will participate in said meetings. If these training needs cannot be resolved in Labor-Management, the Union may refer them to the Office of Municipal Labor Relations for resolution.

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Entering into this Stipulation shall not be construed as an admission by the City of New York or any related public employer that it has violated any provision of the New York City Collective Bargaining Law, nor shall it constitute a precedent for the determination of any other disputes between the City of New York and the Union. In this regard, it is expressly understood that the arrangement herein is predicated exclusively upon the special circumstances of this matter and shall not be construed to represent any policy or procedure of the City of New York.

provision that was violated.

POSITIONS OF THE PARTIES

City's Position

The City maintains that the Union has not met its burden of establishing that the cited contract provision is related to the grievance to be arbitrated.[7] It claims that the Union did not allege that its members were assigned to duties substantially different from those stated in their job specifications. According to the City, the Union claims a right to relief from double coverage, but does not "base this right on the job specification for the title PAA." That job specification, it contends, neither prohibits double coverage for PAA's nor restricts their workloads at Income Support Centers. Further, it asserts, the Union's claim in its Request for Arbitration of assignments of employees to duties substantially different from those stated in their job specification was not raised at the lower steps of the grievance procedure and, thus, may not now be arbitrated.[8]

In its petition challenging arbitrability, the City asserts that the March 24, 1987 stipulation "is not referenced nor incorporated in any of the parties' successor agreements" and, therefore, the Union may not file a grievance based on the 1987 Stipulation of Settlement.[9] In its reply, the City argues that there is no grievance procedure in the Stipulation and it does not contain any reference

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[7]The City cites Decision Nos. B-41-88 and B-4-88.

[8]The City cites Decision Nos. B-40-86; B-6-80; B-20-74.

[9]The City's petition challenging arbitrability, at 7, states, "The parties, in a Memorandum of Understanding dated May 21, 1986, incorporated the Stipulation of Settlement regarding OCB Case No.I-182-85 into their July 1984-June 1987 collective bargaining agreement." For clarity, we note that OCB Case No. I-182-85 is the case in which the parties made the stipulation of settlement that is the subject of the instant dispute.

that it is part of a collective bargaining agreement. For that reason, it contends, the stipulation may not be arbitrated under the successor contract. It adds:

> If the Board was to somehow find that the March 24, 1987 Stipulation was coextensive with the 1984-87 collective bargaining agreement for Principal Administrative Associate, at most the March 24, 1987 Stipulation of Settlement existed in relation to the parties 1984-1987 collective bargaining agreement, and "must live or die with the contract." Once the 1984-87 contract expired, the Stipulation also expired. [citations omitted]

The City contends that although the Union characterizes the Stipulation of Settlement as a supplement to the contract, the stipulation was never referenced or incorporated into any of the subsequent agreements between the parties. It argues that, if the 1987 stipulation were intended to be part of the 1990-1991 contract, which was in effect when the grievances were filed, it would have been referenced or incorporated therein.[10]

Union's Position

According to the Union, the Board found in Decision No. B-17-71 that a stipulation is binding after expiration of the coextensive contract if neither party gave notice that the agreement was to expire and the parties have conducted themselves as if the agreement continued to bind them.[11] Thus, the Union claims, it has demonstrated an arguable nexus between the instant grievances and Article VI, § 1(A) of the contract because the City complied with the terms of the

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[10]The City cites *City of New York v. Social Service Employees Union, L. 371*, Decision No. B-4-72 (a grievance based on a supplemental agreement to a collective bargaining agreement was found arbitrable because the agreement survived expiration of the contract while the parties negotiated a new contract) and *NYC Health and Hospitals Corp. v. Committee of Interns and Residents,* Decision No. B-6-76 (a supplemental agreement resolving a dispute about the meaning of a contract term was fully integrated and incorporated into the contract and was the basis of an arbitrable grievance).

[11]*City of New York v. Uniformed Fire Officers Ass'n and Uniformed Firefighters Ass'n.*

1987 stipulation throughout the duration of the 1984-87 contract, the 1987-90 contract and the 1990-91 contract and neither side gave the other notice that the terms had expired. In fact, it maintains, the City treated the stipulation as part of the contemporaneous contract while the grievances were processed at the lower steps of the procedure, and until February 1993.

DISCUSSION

When the City challenges the arbitrability of a grievance, this Board must first determine whether the parties are in any way obligated to arbitrate disputes and, if they are, whether that contractual obligation encompasses the act complained of by the Union.[12] Here, the parties have included a grievance procedure in their collective bargaining agreement that culminates in binding arbitration. The dispute is whether there is an arguable nexus between the Department's alleged acts and the contract provision the Union claims has been violated.

The Union claims a right to arbitrate under Article VI, § 1(C) of the contract, which defines an out-of-title dispute as a grievance. The Union's claim of out-of-title work was first raised in its Request for Arbitration. We have consistently denied arbitration of claims that were not alleged at the lower steps of the grievance procedure. Permitting arbitration of such a claim would frustrate the purpose of a multi-level grievance procedure, which is to encourage discussion of the dispute at each step of the procedure.[13] Since the Union deprived the City of an opportunity to respond to its

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[12]*Office of Labor Relations v. Social Service Employees Union*, Decision No. B-2-69 at 2.

[13]*City of New York v. District Council 37, AFSCME, AFL-CIO*, Decision No. B-20-74 (finding that a "sound, effective, and speedy grievance procedure entails the clear formulation of the issues at the earliest possible moment, adequate opportunity for both parties to investigate and argue the grievance under discussion, and encouragement by the parties of their representatives to explore and conclude settlements at the lower steps of grievances which do not

(continued...)

theory at the appropriate time, we will not consider the argument now.

The dissenting members assert that the Article VI, § 1(A) claim was also raised in an untimely manner. The City did not object to the assertion of that provision in its pleadings in this matter; therefore, we shall not respond to our dissenting colleagues' reference to it now. In any event, the putative nexus between the Union's claim and Article VI, § 1(A) has been implicit throughout the grievance procedure: that the 1987 stipulation of settlement became, and remains, part of the contract. We have long held that the adoption of a strict pleading rule will not be used to defeat arbitrability where the City was or should have been on notice of the nature of the claim.[14]

The City asserts that the Union may not file a grievance based on the 1987 stipulation of settlement because the stipulation did not survive the contract that expired in 1987. The City members go to great lengths to distinguish some of our prior cases in their dissenting opinion. However, we note that our decisions regarding stipulations of settlement have been made on a case by case basis, with great sensitivity to the individual facts of each matter.[15] The instant matter does not differ.

There is not a rule that is uniformly applicable to dictate the result in all arbitrability cases involving stipulations of settlement. Each case turns on the facts of the particular matter. For example, we have treated differently cases where the stipulation of settlement concerns an issue that

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[13](...continued)
involve broad questions of policy or of contract interpretation. Obviously, none of these elements is achievable if easy amendment of the grievance at the ... arbitration step were permitted.")

[14]*See, e.g.*, Decision No. B-55-89.

[15]*See, e.g.,* Decision Nos. B-17-71; B-11-80; B-6-76; B-50-96; B-2-92.

is ongoing or has contractual implications for both parties, than cases where the stipulation of settlement concerns a one-time dispute with no long-term or contractual ramifications. Such a case might, for example, involve a "last-chance" agreement in a disciplinary proceeding. We also note that there are differences between cases such as the instant one and others, cited in the dissent, ~~those~~ which, although similar, are not on point for other reasons.

Several cases provide guidance to this Board in reaching a decision in this matter. In Decision No. B-17-71, the City challenged the arbitrability of grievances based on a memorandum of understanding incorporated in a collective bargaining agreement, claiming that the memorandum had expired with the contract.[16] We found that, as here, neither party had notified the other that the memorandum had terminated with the expiration of the contract. Furthermore, we said, the parties, by their conduct and the transactions performed pursuant to the agreement in the memorandum, "treated the memorandum as a living and binding document." For these reasons, we found that the parties had, in effect, consented to the continuance of the memorandum of understanding.[17]

In Decision No. B-11-80, we said that the disputed stipulation of settlement must "live or die with the contract."[18] In that case, however, the employees were covered under § 220 of the Labor Law and the collective bargaining agreement had expired. The City challenged arbitrability of a grievance based on an agreement that had settled an earlier grievance filed under the dispute resolution procedure of the expired contract. Because the parties had not filed a bargaining notice

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[16]*City of New York v. Uniformed Fire Officers Ass'n and Uniformed Firefighters Ass'n.*

[17]*Id.* at 4.

[18]*City of New York v. L. 1320, District Council 37, AFSCME.*

and were not engaged in contract negotiation, we found that the union could not avail itself of the arbitration procedure under the expired contract. The only remaining question was whether the letter agreement constituted a written rule or regulation of the agency that was arbitrable within the meaning of Executive Order 83. We answered that question in the negative.[19]

In *New York City Health and Hospitals Corp. v. Committee of Interns and Residents*, Decision No. B-6-76, employees were disciplined without notice. The Union complained that the Hospital's action constituted a violation of Article XV of the collective bargaining agreement. That complaint led to the execution of an agreement on December 30, 1975 by representatives of the Union and the City concerning conditions of employment. We found:

> the December 30, 1975 agreement dealing solely with the matter of "Disciplinary Action"-- a subject which is also covered by Article XV of the contract between the parties -- is itself a collective bargaining agreement . . . Thus, both in form and in the purpose which clearly motivated its execution, the agreement of December 30, 1975, is a quite typical example of a device commonly used in labor relations, a supplement to the contract between the parties intended and made to resolve a dispute as to the meaning and application of a term or terms of the contract arising during the effective period of the contract and in the course of its administration. Such supplements are commonplace, as we have indicated, and are regularly deemed to constitute additions or amendments to the contracts which underlie them and to be fully integrated and incorporated therein. Such is the status of the December 30, 1975 agreement; and we find that it is a supplement to and is effectively an extension and part of Article XV of the contract. It follows that allegations of violation of that agreement are allegations of violation of Article XV of the contract, and are thus subject to the grievance and arbitration provisions of Article XIV of the contract. [citations omitted]

The text of the December 30, 1975 agreement in that case does not contain an enforcement clause, nor does it incorporate the agreement into the collective bargaining agreement or evidence an intent

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[19]*Id.* at 7 (finding that the letter agreement was a "supplement to the collective bargaining agreement" that must "live or die with the contract" and did not qualify as the basis of a grievance under Executive Order 83).

by the parties that it survive the coextensive contract.

In another case, we found that a previous agreement between the parties could not be the basis of an arbitrable grievance because the City had given clear notice of its repudiation of the agreement before the grievance was filed and because the agreement had not been incorporated into the contract and its successors.[20]

In *Health and Hospitals Corp. v. L. 30, Int'l Union of Operating Engineers,* we found that a scheduling chart could not be made the basis of an arbitrable grievance because the document did not evidence the parties' intent to be bound by its terms and because successor contracts did not mention the chart.[21] We distinguished the document in that case from supplemental agreements we had found arbitrable, which were "intended to resolve disputes arising during the course of collective bargaining agreements," and noted that we had "deemed them to constitute additions or amendments to the contracts which underlie them."[22]

Through the years, we have continued to rely on our holding in Decision No. B-6-76 that supplemental agreements become part of the underlying collective bargaining agreement, and in Decision No. B-17-71 that the parties must clearly repudiate such an agreement. In the instant case,

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[20]*Dep't of Correction v. Correction Officers Benevolent Ass'n*, Decision No. B-50-96, at 15-16.

[21]Decision No. B-2-92 at 12-13. *But see, City of New York v. Dist. Council 37, AFSCME*, Decision No. B-60-91 (a stipulation of settlement of a grievance does not automatically bar future arbitrations of similar grievances, but the terms of this particular stipulation evidenced the parties' mutual expectation that it was both binding on them prospectively and conclusive of the issue decided).

[22]*Health and Hospitals Corp. v. L. 30, Int'l Union of Operating Engineers,* Decision No. B-2-92 at 13.

that is precisely the Union's argument: that the supplemental agreement became part of the 1984-1987 contract, and that it was never repudiated by the City. In fact, the Union presents evidence that the City adhered to the terms of the stipulation from 1987 until the grievances were dismissed at Step III in 1993.[23] Furthermore, the City processed these grievances at the lower steps of the grievance procedure without raising an objection, despite the fact that the 1987 stipulation of settlement had been cited as the "Name and Section of the Contract allegedly violated" on the grievance forms.

What this review of prior cases demonstrates to us is that each case must turn on its own facts. We have seen in several prior cases that a supplemental agreement may become part of the parties' contract and remain in effect unless one of the parties shows an intention to repudiate it. Here, because the City, by its actions, accepted the Union's assertion at the lower steps that the stipulation was or at least had been part of the contract, the proper conclusion under these facts and circumstances is to find the instant grievance arbitrable. The arbitrator is to decide only those grievances filed before the City repudiated the memorandum of understanding in 1993. We remind the parties under our jurisdiction that they are more likely to avoid disputes such as these if the terms of stipulations of settlement contain clear statements of the parties' intent as to the continued existence of the stipulation beyond the term of the collective bargaining agreement.

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[23]To support this contention, voluminous documentation, obtained from the City pursuant to our interim ruling in Decision No. B-45-96, was admitted into the record as an exhibit to the Union's answer.

DECISION AND ORDER

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

ORDERED, that the petition docketed as BCB-1700-94 be, and the same hereby is, dismissed, and it is further,

ORDERED, that the Request for Arbitration docketed as No. A-5582-94 be, and the same hereby is, granted.

Dated: June 27, 2000
New York, New York

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

BRUCE H. SIMON
MEMBER

CHARLES G. MOERDLER
MEMBER

I dissent* RICHARD WILSKER
MEMBER

I dissent* EUGENE MITTELMAN
MEM BER

* Please see attached dissent.

DISSENT

For the reasons set forth below, Board Members Richard Wilsker and Eugene Mittelman respectfully dissent.

The Union filed a Request for Arbitration that only claims a violation of Article IV Section 1(C) of the grievance procedure of the collective bargaining agreement ["CBA"] for the Principle Administrative Associate. Although they failed to specify a CBA, the 1990-91 CBA was attached to the Request for Arbitration. Section 1(C) of that CBA allows for out of title grievance claims only. The majority properly dismissed this claim after finding that the Union's out of title grievance was first raised in its Request for Arbitration. In denying the Union's request to arbitrate the out of title claim, the majority's reasoning was consistent with its well-established precedent to this point. As noted by the majority, if it allowed new claims to be raised for the first time at the arbitration or last step of the grievance procedure, the purpose of the multi-level grievance process would be frustrated. Yet, despite this well-developed reasoning, the majority strays from its own precedent when it failed to dismiss the Request for Arbitration outright as required by this record.

The majority permits this grievance to go to arbitration on the grounds that the Union also claimed a demonstrated nexus between its grievances and Article IV Section 1(a) of the 1990-91 CBA. The problem with this conclusion by the majority is that the Union never made a Section 1(a) claim in its Request for Arbitration, nor did it ever claim a violation of Section 1(a) of any CBA in steps 1, 2 or 3 of the grievance process.

The majority correctly dismissed the 1(c) out of title claim because of the Union's failure

to allege its violation in the lower grievance steps. The record shows that the 1(a) claim was also never raised by the Union in its grievances or its Request for Arbitration. In fact, the Union never presented the 1(a) claim until it filed its Answer to the Challenge to Arbitrability! The majority decision, however, fails to recognize its inconsistent treatment of these two claims and, consequently, fails to reconcile the inconsistency between its decision to dismiss as the 1(c) claim and its decision to permit the 1(a) claim to proceed.

The only violation alleged in the first three steps of the grievance process was a violation of the "Stipulation of Settlement dated 3/24/87" ["1987 stipulation"]. The grievances never raised a Section 1(a) claim and never referenced any document except the 1987 stipulation. In other words, like the out of title claim, the new Section 1(a) claim was raised too late in the grievance process and, therefore, must be dismissed. To permit it to proceed to arbitration is contrary to the Board's established precedent, and would have the very effect the Board sought to avoid. It would frustrate the purpose of the multi-step grievance process agreed to by the parties.

The Union never claims that the stipulation was incorporated into the 1990-91 CBA or that it was otherwise continued either by agreement of the parties or through the terms of the 1990-91 CBA. They do not claim that it was ever incorporated into any CBA between these parties. Instead, they argue that they have the right to grieve the 1987 stipulation because they believe the City abided by the stipulations up until some time in the early 1990's, when they assert the City stopped abiding by the agreement.

The Union's only defense to this Challenge is one with no basis in law. They establish without challenge that the parties engaged in bargaining efforts related to three different CBA's,

including the 1990-91 CBA, since the 1987 stipulation was executed. They admit that they never addressed the issues encompassed by the 1987 stipulation during the negotiations of these three CBA's. The union then inexplicably urges that the failure by both parties to bargain on this subject caused the stipulation to become subject to the 1990-91 grievance procedure.

The Union made this argument in a vacuum. The Union offered no theory, legal or otherwise, to explain the occurrence of such an extraordinary phenomena. The Union offered no case authority or principal of law that may explain how parties to a contract become bound to something they never mentioned in bargaining and did not include in their contract. Perhaps what is more extraordinary is that the majority is prepared to follow suit!

Naturally, the most curious aspect of the Union's agreement is the claim that the 1987 stipulation continued over the many years as part of three separate CBA's because it was not a subject of bargaining for either of the last two CBAs. This is contrary to basic contract principles. In short, the position urged by the union, and adopted by the majority, is that because the parties never spoke on the subject of the 1987 stipulation in bargaining for the 87-90 CBA and the 90-91 CBA, it was simply subsumed by these subsequent agreements.

While it is recognized that there may be some metaphysical explanation out there for how this might have occurred, we are not prepared to rely upon the metaphysical when determining important questions of arbitrability. We are limited to consideration of the record before us in the context of this Board's precedent.

The record here supports only one conclusions. The 1987 stipulation was not incorporated, referenced or otherwise intended to be subject to the 1990-91 CBA in general, or its

grievance procedure specifically. Whether the stipulation continued to exist by its own terms is a separate question that has no bearing on the determination of this challenge. Simply put, the 1987 stipulation establishes a pilot project and a proposal for its continued development, if it was successful in the early stages. The success of the pilot project is immaterial here because, whether it was successful or not, the 1987 stipulation did not provide a grievance procedure that was applicable to this project.

The clear terms of the 1987 stipulation set out the desired growth of the program and acknowledged that the pilot project may not work. The 1987 stipulation provided that if the City and the union had any differences related to the development of the pilot project, they would be addressed at the agency level first and then, if not resolved, they would be addressed in OLR-level labor management meetings. In other words, these parties exercised their prerogative to not arbitrate their differences and, instead, agreed to a less formal exchange that would allow for communication on the subject of the pilot program.

The Board almost seems troubled that equal parties would intentionally agree not to include a grievance procedure in an agreement. This Board responds to its concerns now by "rewriting" this 1987 stipulation to include a grievance procedure. To justify doing so, the majority had to reconfigure its own, long-standing case law.

It is troubling that the majority is willing to upend its own well-established precedent so this case may proceed to arbitration. It is most troubling because the parties who signed the 1987 stipulation made their agreement clear when they drafted the 1987 stipulation without a grievance procedure. The continuity of that intention is apparent in the lack of reference to or

incorporation of the 1987 stipulation into several subsequent collective bargaining agreements.

The majority's action raises a concern over whether the Board is acting within its mandated role. Its mandate does not permit this Board to impose its preference upon parties to a contract. When the parties are engaged in a contractual dispute, this Board must take care to avoid redrafting an agreement between the parties.

After all, these are equal parties who elected not to provide a grievance procedure in their 1987 stipulation. They also did not incorporate or reference the 1987 stipulation into any of the subsequent collective bargaining agreements. By the Union's own words, it did not demand that the terms of the stipulation be incorporated into a contract through two subsequent rounds of bargaining. This strongly suggests that the Union as well as the City did not see this as an appropriate or desirable item for inclusion into their CBA or under their grievance procedure.

The 1987 Stipulation was drafted by sophisticated parties. Undoubtedly, the parties were quite capable of including a grievance mechanism within the Stipulation or through a provision of the Stipulation that would link it ti the grievance mechanism of another collective bargaining agreement. The 1987 stipulation suggests they either agreed to do neither or they never saw a reason to make that discussion. The Board should not rewrite the 1987 stipulation through its decision in this case. This is particularly so when the Board's majority decision clearly misconstrues its own precedent.

In Board Decision B-50-96, the Board considered the arbitrability of a side letter agreement that did include a grievance procedure. As the Board noted there, "Where the parties have reduced an agreement to a writing . . . it is taken to be an integrated agreement . . . The

terms and obligation that the parties did not include should be deemed to be deliberately excluded." B-50-96 at 15 & 16. In the present case, the parties did not include a grievance procedure in the 1987 stipulation and they did not incorporate or reference the 1987 in any manner that would subject it to the grievance procedure in any CBA, including the 1990-91 CBA.

The majority now claims that B-50-96 is not on point because B-50-96 concerned a case where there was a separate agreement with its own arbitration procedure. We do not dispute that. What cannot be ignored here, however, is that the clear language of the 1987 stipulation establishes that the parties had not intended for it to be part of any collective bargaining agreement or for it to be subject to the grievance procedure of any collective bargaining agreement.

The majority finds that the Stipulation is part of the 1990-1991 collective bargaining agreement by relying on Board Decision B-6-76 and B-17-71, two cases easily distinguishable from the present one. In Board Decision B-6-76, the Board found a document to be a supplemental agreement because it prescribed in specific detail how sections of a collective bargaining agreement were to be applied. The claims also arose during the effective period of the collective bargaining agreement relied upon. It was apparent in that case that the supplemental agreement was intended to resolve the parties' dispute at to the meaning and application of terms of the CBA at issue.

In the instant matter, the March 24, 1987 Stipulation does not contain any clauses that describe, interpret or reference any provision in a collective bargaining agreement nor is it

resolving a dispute during the effective period of the 1990-91 collective bargaining agreement.

The issue in Board Decision B-17-71 has nothing to do with the case not before this Board. In Board Decision B-17-71, the Board held that a Memorandum of Understanding was still in effect because neither party gave notice to the other that the Memorandum of Understanding had terminated and the parties treated the Memorandum of Understanding as being in effect.

In the present case, however, the majority misses the point. It does not matter whether or not the 1987 stipulation agreement continues to exist today or it ceased to exist three years ago. The Board was not asked to determine whether this 1987 stipulation continues to exist. The Board is asked to determine whether the issue presented by this Union, i.e. an out of title claim, is arbitrable. When this Board rejected the out of title claim, we lost our way and wound up on a convoluted road that required us to determine whether the 1987 stipulation was subject to a grievance procedure.

Mo matter how much this Board may wish to change it, the 1987 stipulation still does not contain a grievance procedure. No matter how the Board's cases are read and reinterpreted, these parties have never entered any other agreement that incorporated or other wise referenced the 1987 stipulation. For these simple reasons alone, this Board must conclude that the 1987 stipulation, whether viable today or not, should never be subject to a grievance procedure because these parties never agreed to do so.

The majority does a disservice to the remarkable history of New York City collective bargaining by misapplying its own precedent so it may then rewrite the terms of a stipulation. The decision is an egregious example of how an administrative body can impose itself upon

parties to an agreement by determining that their agreement should have included a provision or protection that they did not see fit to discuss during bargaining. The only effect that should be anticipated from this decision is that the parties will approach bargaining with excessive concerns for form over substance and a hesitancy to enter agreements where they may otherwise have done so. We strongly believe that the Board's decision is arbitrary and capricious and will not pass judicial scrutiny because it strays so far from its own precedent.

Dated: October 26, 1999
New York, New York

RICHARD A. WILSKER
MEMBER

June 27, 2000
New York, New York

EUGENE MITTELMAN
MEMBER