

A MATTER IN ARBITRATION

In A Matter Between:

PACIFIC GAS AND
ELECTRIC COMPANY

(Employer)

and

LOCAL UNION NO. 1245,
INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

(Union)

Grievance: Termination

Hearing: July 30, 1988

Award: October 17, 1988

ARB CASE NO. 157

DECISION AND AWARD

GERALD R. MCKAY, ARBITRATOR

Appearances By:

Employer: **Kenneth Yang, Esq.**
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IBEW Local Union 1245
P.O. Box 4790
Walnut Creek, California 94596

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STATEMENT OF PROCEDURE

This matter arises out of the application and interpretation of a collective bargaining Agreement which exists between the above identified Union and Employer.¹ Unable to resolve the grievance between themselves, the parties selected this arbitrator, in accordance with the terms of the Contract, to hear and resolve the matter. A hearing was held in San Francisco, California on July 30, 1988. During the course of the proceedings, the parties had an opportunity to present evidence and to cross-examine the witnesses. At the conclusion of the hearing, the parties agreed to file written briefs in argument of their respective positions. The arbitrator received copies of those briefs on or before September 24, 1988. Having had an opportunity to review the record, the arbitrator is prepared to issue his decision.

1. Joint Exhibit #1

ISSUE

Was the discharge of the grievant, C , in violation of the parties' physical labor Agreement? If so, what is the appropriate remedy?²

RELEVANT CONTRACT LANGUAGE

TITLE 102. GRIEVANCE PROCEDURE

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102.2 GRIEVANCE SUBJECTS

Disputes involving the following enumerated subjects shall be determined by the grievance procedures established herein:

- (a) Interpretation or application of any of the terms of this Agreement, including exhibits thereto, letters of agreement, and formal interpretations and clarifications executed by Company and Union.
- (b) Discharge, demotion, suspension or discipline of an individual employee.
- (c) Disputes as to whether a matter is proper subject for the grievance procedure.

BACKGROUND

The grievant began working for the Employer in December, 1980 as a temporary meter reader at the Employer's Vallejo office. In early 1982, the grievant became a permanent meter reader in the Employer's Saint Helena office. In early 1984, the grievant accepted a position as helper in the gas department in the Employer's Vallejo office, performing general labor work on Employer construction projects. This position

2. Tr. Page 7

was the one the grievant occupied at the time of his termination. On September 19, 1986, the Employer made a decision to terminate the grievant because of the grievant's involvement in the sale of cocaine during working hours on Company property.³ According to the Employer's evidence, the grievant provided a small quantity of cocaine to Mr. Daniel Stewart, an undercover operative who was working with the Vallejo Police Department and the Employer's security department to uncover alleged problems of drug abuse among employees working for the Employer. The grievant denied that he provided cocaine to Mr. Stewart and asserts that Mr. Stewart fabricated the story.

Mr. Robert Lee, a sergeant working for the Vallejo Police Department, testified that in early 1986, the Vallejo Police Department contacted the Employer informing it that the police department had evidence which indicated there may be a problem with drugs among the employees working for the Employer.⁴ In response to this information, the Employer requested assistance from the Vallejo Police Department to develop an undercover operation whose purpose would be to detect and put an end to the alleged drug abuse. The police had obtained their information concerning the potential drug problem from two employees who had been arrested by the police department on drug charges. Employee B, who worked with the grievant and who the grievant acknowledges provided drugs to him, claimed that drug use among the employees was rampant.

In establishing the undercover program, Officer Lee testified, a number of potential undercover operatives were considered, including Mr. Dan Stewart. Mr. Stewart was ultimately selected based on prior work he had done with the police department

3. Employer Exhibit #13

4. Tr. Page 16

which, in Mr. Lee's opinion, had resulted in a successful undercover operation. In Mr. Lee's opinion, Mr. Stewart had a "basically clean" record. Mr. Stewart's police record includes several convictions for non-sufficient funds, for petty theft and a conviction for beating his wife for which he was placed on probation.⁵ The need to have an individual with a relatively clean criminal record, Mr. Lee stated, was important in order to assure some credibility for hearings such as the present arbitration.

Mr. Stewart was instructed with respect to how he was to engage in the undercover operation. Mr. Lee described the guidelines set down for Mr. Stewart in the following manner,

There was a whole series of guidelines that were gone over with Mr. Stewart regarding the operation. The basic guidelines were that he would be put into a position working with PGandE, he was to go out on a work crew, work with the work crews, and he was to monitor any type of illegal activity.

He was to report the illegal activity back to the police department, Kathy Cima. We were specifically looking for drug type violations, but also anything else that was illegal or against PGandE policy, he was to report.

He was told that the ideal situation was that if he was to set up a drug purchase or get involved in something going on, that he would report back to us and we would set up and try to monitor the situation. If the situation were to arise where somebody was to offer him drugs on the jobsite and there was no way around him doing it, at that time he was told that he could do it at that time and to contact us as soon as possible.

He was told that he was not to entice any employees into illegal activity, that he was just supposed to be a worker and basically see what was going on. He was told that he could ask people for drugs, which is a normal thing, it's not entrapment, and that's basically how we wanted it worked.⁶

Mr. Stewart was instructed to contact Mr. Lee or Kathy Cima, an employee in the Employer's security department on a daily basis. This was later changed to a weekly

5. Tr. Page 18

6. Tr. Pages 19 and 20

basis. In addition, Mr. Stewart was also instructed to provide written reports on what was occurring.⁷

On May 21, 1986, Mr. Lee became aware of a transaction involving the exchange of cocaine between Mr. Stewart and the grievant which had occurred on May 20 at around 12:30 p.m. Mr. Stewart filed a report on May 20 after work with Detective Allen in the Vallejo Police Department because Mr. Lee was absent that day. He gave Mr. Allen what is commonly referred to as a "paper bindle" containing a white powder which the police department had tested and which proved to be cocaine. The quantity involved was approximately a twentieth of a gram which, Officer Lee acknowledged, was a relatively small amount for a typical cocaine buy. A twentieth of a gram when laid out in a line is approximately 3/4 of an inch long and 3/16 of an inch wide.⁸ This small quantity of cocaine would be the type of sample an individual might receive who was interested in making a cocaine buy from a prospective seller.

Mr. Stewart testified that on May 19 toward the end of the day at approximately 3 p.m., he and the grievant had a conversation which Mr. Stewart initiated. During this conversation, Mr. Stewart expressed an interest in trying to find a good quality of drugs, complaining that there were no good quality drugs available on the street. In response to this observation, the grievant told Mr. Stewart that he understood. In addition, the grievant asked Mr. Stewart what drugs he was looking for and in what quantities. Around noon on the 20th of May as Mr. Stewart was getting ready to eat

7. Tr. Page 22

8. Tr. Page 62

lunch, the grievant approached him and asked Mr. Stewart if he remembered the conversation from the day before. Mr. Stewart then described what took place,

Well, he placed his left — when he walked up there, he placed his left hand on the back end of the truck. He stated his statement and then he said, if I were to find a ten spot in the coat bin I would probably pick it up, then he lifted his hand and he walked away. Where he had his hand placed, there was a small white envelope. I picked it up, I looked inside, it had what I believed to be cocaine in it. I then took it, put it into my watch pocket, placed ten dollars in the coat bin and then we went back to work after lunch.⁹

Mr. Stewart reported this transaction to the Vallejo Police and was advised to attempt to set up an additional buy. However, Mr. Stewart was unable to do so. He described the grievant after this initial purchase in the following manner, "He seemed quite paranoid about it all, didn't seem to want to talk to me at all."¹⁰

The grievant denied that he ever provided Mr. Stewart with drugs. According to the grievant, he had one conversation with Mr. Stewart about drugs which he described in the following manner,

He came to me real early in the morning, and he had his big roll of money and he says, M , something, something, do you know where I can get some drugs or something. And I said, well, what do you need drugs for, you know. And then he said, I'm going to throw a party or something, something like that.

I said, well, how much you lookin' for. He said about 300 dollars. I said, sorry, man, I don't mess with that shit. I says, I don't even drink. I didn't tell him about antibuse then, I just told him I didn't drink. I try to stay away from it, you know.¹¹

The grievant denied telling Mr. Stewart that if he found a \$10 bill in the coat bin he would be happy. The grievant described the coat bin as follows,

9. Tr. Page 80
10. Tr. Page 84
11. Tr. Page 207

No, sir. I'd like to elaborate on the coat bin. He's talking about a coat, maybe just a couple of coats. A coat bin, if you ever saw a coat bin, it would take me an hour or half an hour to look for, scrounge around — they got all kinds of equipment in there, you know, rags.¹²

Mr. D , who was the foreman of the crew to which the grievant was assigned and on which Mr. Stewart was working, testified that when Mr. Stewart first came to his crew to work that he suspected that Mr. Stewart might be an undercover agent for the Employer. Mr. D explained some of his suspicion in the following manner,

Well, the dress code for PGandE was not the way Dan Stewart came in. Short sleeved shirts, beards and all that. They made a lot of us shave all that stuff off. So he came in with beards and dark shades and he came in, you know, looking like someone that didn't need a job.¹³

On the first day Mr. Stewart worked for Mr. D , Mr. D asked Mr. Stewart if he was a "plant," or an undercover agent.¹⁴ Mr. Stewart answered, no, but according to Mr. D , he always suspected that Stewart was an undercover agent. Mr. D stated he had a conversation with the grievant concerning his suspicions of Mr. Stewart as an undercover agent. During his testimony, Mr. Stewart acknowledged that he had been asked whether he was an undercover agent but believed that after he had worked on the job for a period of time, the crew accepted him as another employee. However, Mr. D denied that the crew ever stopped thinking that Mr. Stewart was an undercover agent.¹⁵ Mr. D acknowledged on cross-examination that he was angry at Mr. Stewart and did not like him because Mr. Stewart had attempted to get Mr. D in trouble by asserting that Mr. D had a gas bypass to his house which permitted Mr. D

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12. Tr. Pages 208 and 209
 13. Tr. Page 163
 14. Tr. Page 164
 15. Tr. Page 165

to avoid having to pay for the gas he used. This assertion by Mr. Stewart turned out to be false, but as Mr. D acknowledged, it created a bitter feeling in Mr. D for Mr. Stewart.¹⁶

The grievant testified on direct that he has had problems with drugs and with alcoholism. On one occasion in 1984, the grievant participated in a 28-day alcohol treatment program in Saint Helena, California. In late 1985 or early 1986, the grievant was again suffering as an active alcoholic but declined to participate in a 28-day program again on the basis that he feared he would be terminated by the Employer if he was absent that many days. Instead, the grievant chose to participate on an out-patient basis through Kaiser Hospital.¹⁷ At the time of his termination, the grievant testified, he was not having alcohol problems and was taking Antibus to discourage him from consuming alcohol. On cross-examination, the grievant acknowledged that in addition to alcohol, he also used cocaine. According to the grievant, however, he stopped using cocaine sometime during 1985 and has not used cocaine since then. The grievant testified that he obtained his supply of cocaine from Employee B who worked with the grievant on the same crew until Employee B left sometime in 1986. The grievant acknowledged having contacts with Employee B for at least nine months after Employee B left the grievant's crew.¹⁸

16. Tr. Pages 192 and 193
17. Tr. Page 199
18. Tr. Page 220

POSITION OF THE PARTIES

EMPLOYER

The Employer argued that the evidence clearly establishes that the grievant provided drugs to Mr. Stewart during working hours on a jobsite. In the present case, the parties have stipulated that if the evidence establishes that the grievant engaged in the sale or delivery of drugs to Mr. Stewart that the appropriate penalty is discharge. In this respect, the only issue is whether the evidence available establishes that the grievant engaged in drug misconduct. The Employer's decision to credit Mr. Stewart's version of the events on May 20 involving the cocaine transaction was reasonable. In the Employer's opinion, it is clear from the record that the grievant is lying about what took place on May 20 between he and Mr. Stewart. There is nothing in the record to support finding that Mr. Stewart had a motive to frame the grievant. To the contrary, Mr. Stewart had a lot to lose if he attempted to frame the grievant. Mr. Stewart's credibility as an undercover agent for the police would be devastated by evidence which showed that he framed the grievant. In conclusion, the Employer stated, the record shows clearly that the grievant provided drugs to Mr. Stewart on May 20, 1986. Because the evidence establishes this, the only appropriate action for the arbitrator to take is to sustain the discharge.

UNION

The Union acknowledged that the grievant has a strong and direct personal interest in denying the charge against him. However, the grievant's testimony concerning

the drug-related conversation initiated by Dan Stewart is plausible and lends support to his overall credibility. The grievant's admission that he had used cocaine in the past lends support to his denial of job-related misconduct. Had the grievant been guilty of providing cocaine to Mr. Stewart, he surely would have admitted doing so. The fact that the Vallejo Police Department had no intelligence implicating the grievant in drug-related misconduct tends to support his testimony that he did not provide Mr. Stewart with cocaine. The grievant's offer to submit to a polygraph examination during the Company interrogation is probative of his innocence.

In contrast, the Union stated the circumstances of the alleged drug sale are, in all respects, highly improbable. Because Mr. Stewart was immediately identified as a likely "plant," it is unlikely that the grievant would sell him drugs. The timing of the alleged drug purchase defies common sense. The amount of cocaine allegedly purchased is suspect. The purchase price for the cocaine is suspect. Mr. Stewart's failure to follow up with the grievant is suspect. Mr. Stewart's failure to set up a controlled buy for police surveillance suggests that there was no original buy. Mr. Stewart's lack of candor with respect to circumstances of his wife-beating arrest reflects upon his credibility. The Vallejo Police Department's voucher of Mr. Stewart's reliability is entitled to no weight. The fact that Mr. Stewart was paid directly for his testimony reflects upon his overall credibility. The fact that Mr. Stewart lied to the Vallejo police about his whereabouts on May 21 casts doubts on his accusation against the grievant. The circumstances surrounding Mr. Stewart's compensation while at PG&E raise serious questions as to his credibility. The fact that Mr. Stewart does not mention the alleged drug sale in his follow-up report on the grievant suggests that it never

occurred. Mr. Stewart's track record as an undercover operative at PG&E suggests credibility problems.

Mr. Stewart's interest in this matter is substantial. Because of Mr. Stewart's unsavory background and his lack of education, it is not surprising that he became an undercover agent, selling information to the Vallejo Police Department. This undercover job was ideal for Mr. Stewart because it required no skills and no training. Up until the spring of 1986, Mr. Stewart had been living on the small amounts of money the Vallejo Police Department paid him for drug-related information. When PG&E hired him at a guaranteed \$2,000 a month without any work performance expectations normally associated with steady employment, this was a dream come true for Mr. Stewart. It is, therefore, not difficult to imagine Mr. Stewart as a man anxious to please. Mr. Stewart was under personal pressure to come up with information which would please his Employers and thereby allow him to remain in his highly paid position. Because of the grievant's background with alcohol and drugs, he became the likely target for Mr. Stewart's false accusations. The Union concluded by stating Mr. Stewart, desperately seeking to revalidate his own deservedly limited sense of self-worth and to please those upon whom he had relied for income and for favors to stay out of jail, sensed early in his employment at PG&E that his skills as a paid informant in the context of a criminal subculture might not serve him well at PG&E; thus, as insurance against the possibility that he would ultimately fail in his mission of uncovering dischargeable misconduct, he fabricated an accusation against the grievant, an easy "mark" who had earned Mr. Stewart's considerable personal dislike. The Union asked that the grievant be reinstated with full back pay and benefits.

DISCUSSION

After having reviewed the record quite carefully, it is the arbitrator's conclusion that this case is both quite simple and, at the same time, quite complex. The case is simple because it merely requires an evaluation of the credibility of two witnesses. It is complex because the assessment of credibility demands the skill of a soothsayer. If Mr. Stewart is telling the truth, the grievant must be discharged. If Mr. Stewart is lying, then the grievant has suffered a great injustice. There is no ideal method for determining when a witness tells the truth and when a witness lies. As the courts have repeatedly stated, electronic lie detecting devices do not provide much assistance in resolving this question. One is left with the need to review the facts to determine the most probable series of events based on the available stories. The more probable story is more likely to be true. In applying that test in the present case, it is the arbitrator's opinion that the story of Mr. Stewart is the most probable story.

The Union played on Mr. Stewart's background and lack of education as a contributing factor in its assertion that Mr. Stewart was a liar. The Union also played on the fact that Mr. Stewart was engaged in selling information on his fellow workers which the Union described as an unsavory occupation. All of these factors are probably true, but that does not take away from the fact that Mr. Stewart was hired to spy on employees working for the Employer. He was not hired to single out the grievant or any other particular employee. Contrary to the assertion of the Union, there is no reasonable basis to conclude that Mr. Stewart had any personal motivating factors that would have led him to single out the grievant in contrast to any other employee. To the contrary, the evidence establishes that in his role as a seller of information,

Mr. Stewart had proved to be quite reliable in the past and had gained the confidence of the Vallejo Police Department because of his reliability. The need to protect this reliability, it would seem to the arbitrator, would be a serious consideration of Mr. Stewart's.

The grievant acknowledged that he had a cocaine problem at least up through 1985. The grievant acknowledged further that the supplier of his cocaine was Employee B who had been an employee on his crew. The grievant stated further that he had access and contact with Employee B well past May, 1986. Furthermore, the grievant noted that Employee B was constantly trying to get money from him and came to his house on numerous occasions with this purpose in mind. All of these events would suggest to the arbitrator that the grievant had experience with and access to cocaine. Mr. Stewart had no prior briefing which would have given him this information unless the grievant shared it with Mr. Stewart at some point in time, which the grievant acknowledged that he probably did during a conversation with Mr. Stewart about employee assistance programs. In this respect, the evidence, in the arbitrator's opinion, is uncontradicted that the grievant and Mr. Stewart had a conversation concerning cocaine, or at least the grievant's use of cocaine, which was a conversation initiated by the grievant. It does not take much imagination to reach the conclusion that the conversation about cocaine initiated by the grievant would have led Mr. Stewart, an undercover agent, to probe that possibility to determine if he could purchase or obtain cocaine from the grievant.

The assertion of Mr. D and the grievant that they both suspected that Mr. Stewart was an undercover agent from the very first day of his employment is

not very credible. There is nothing to corroborate the assertion that Mr. D was suspicious at all times when Mr. Stewart worked on his crew, nor is there any evidence that the grievant behaved in a manner which suggested he believed that Mr. Stewart was an undercover agent. To the contrary, except for the comment during the tailgate meeting when Mr. Stewart first arrived that he was a plant, no other conversation concerning this subject occurred. Furthermore, the assertion by Mr. D on the first day Mr. Stewart showed up could be viewed as either a joke or as a warning to Mr. Stewart that he had better not be an undercover agent.

When the record as a whole is viewed, it is the arbitrator's opinion that the most probable scenario of what occurred follows along the lines related by Mr. Stewart. During the course of working together, Mr. Stewart discovered that the grievant was an alcoholic and a drug user. This information came from the grievant himself. Following up on this information, Mr. Stewart suggested that he might like to obtain some good clean cocaine. To accommodate Mr. Stewart and to be a "good guy," the grievant provided Mr. Stewart with some cocaine. However, the grievant may then have had second thoughts and did not provide any additional supplies to Mr. Stewart after the initial transaction. Based on the fact that it is the arbitrator's conclusion that the grievant did provide cocaine to Mr. Stewart, the resulting decision is clear; the Employer's decision to terminate the grievant must be upheld.


AWARD

The Employer had just cause for the termination of the grievant. The grievance is denied.

October 17, 1988



Gerald R. McKay, Arbitrator



RICK R. DOERING, Company Member

Concur/~~Dissent~~

10/25/88

(Date)




DONALD E. KASSO, Company Member

Concur/~~Dissent~~

10/27/88

(Date)



ROGER W. STALCUP, Union Member

~~Concur~~/Dissent

11/3/88

(Date)



DOROTHY FORTIER, Union Member

~~Concur~~/Dissent

11-3-88

(Date)