In the Matter of an Arbitration between **INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245,** Complainant and **PACIFIC GAS & ELECTRIC COMPANY,** Respondent Re: Discharge Arbitration Case No. 171.	**Opinion & Decision** **of** **Board of Arbitration** **-oOo-** San Francisco, California

BOARD OF ARBITRATION

Roger Stalcup, Union Member
Joel Ellioff, Union Member

Richard L. Bolf, Company Member
Margaret Short, Company Member

Barbara Chvany Neutral Board Member

APPEARANCES

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On Behalf of the Employer:

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INTRODUCTION

This dispute arises under the Collective Bargaining Agreement between the above-captioned Parties (JX 1). Pursuant to the Agreement, the Board of Arbitration was appointed, and an arbitration hearing was conducted on March 15, 1990 in San Francisco, California. At the hearing, the Parties had a full opportunity to examine and cross-examine witnesses, and to present relevant exhibits. A verbatim transcript of the proceedings was taken (cited herein as TR __). The Parties stipulated that the prior steps of the grievance procedure have been followed or waived and the matter is properly before the Board of Arbitration (TR 2). Post-hearing briefs were filed by the Parties, and the matter was deemed submitted for decision on June 25, 1990.

The Grievant, P , was hired in May, 1977. He was terminated effective March 31, 1988. At the time of the events at issue he was a Sub-Foreman A in the General Construction Overhead Department (TR 3-4).

ISSUE

Whether the discharge of the Grievant, P , was for just cause; and if not, what shall be the remedy? (TR 1).

REMEDY REQUESTED

The Union seeks the Grievant's reinstatement with full seniority, backpay and benefits (TR 2; UN BF 14).

The Company seeks denial of the grievance in its entirety (TR 2; CO BF 23).

PERTINENT AGREEMENT PROVISIONS

TITLE 301. EXPENSES - FIELD EMPLOYEES[1]
301.3 RESIDENCE DEFINITION
An employee's Residence and Residence Area shall be determined and used to establish eligibility for expense allowances in accordance with the following:
(a) An employee's Residence is defined as the principal place of abode in the Company system in which the employee normally resides (1) on a regular basis and from which the employee commutes daily or weekly to work locations, or (2) one which the employee has a financial responsibility to maintain and to which the employee returns to live on most weekends while on work assignments at more distant job locations. An employee establishes a Residence by filing a Residence Certificate.

* * *

(d) Change of Residence
(1) An employee may change his Residence as defined in Subsection 301.3(a) at any time; however, the employee may have only one Residence at a time. An employee who changes his Residence under this Subsection must file a new Residence Certificate immediately. The new Residence Certificate will become effective on the date of the change of Residence.
(2) Since the payment of per diem expenses is based upon the location of the employee's Residence, the employee is vouching that his Residence Certificate does, in fact, identify a Residence (as defined in Subsection 301.3(a)) and not temporary living accommodations. Any employee who knowingly falsifies or delays filing such a Residence Certificate shall be required to reimburse the Company for any overpayment of per

[1] Applicable to General Construction employees only (Section 300.1, JX 1).

diem and shall be subject to disciplinary action, including discharge. (Entire Section amended 1-1-84).

(JX 1)

RELEVANT COMPANY STANDARD PRACTICE

STATEMENT OF POLICY
1. It is the policy of this Company that employees shall at all times practice fundamental honesty. Employees shall not nor attempt to: deceive, defraud, or mislead the Company . . .; take or misuse Company property, funds, or service . . . .

* * *

4. Violation of these policies will subject any employee to disciplinary action, up to and including discharge. . . .

(JX 3)

BACKGROUND

Per Diem Allowance:

Under the above-cited Agreement provisions, a General Construction employee who meets the applicable requirements is entitled to receive a payment to help in offsetting the costs of travel and/or living expenses associated with an assignment or transfer to an area remote from his or her normal headquarters (TR 10-11, 68; JX 1). Section 301.3 et seq., above, defines the eligibility requirements. Generally, under Section 301.3(a) an employee must maintain a principal place of abode (1) in which the employee normally resides on a regular basis, and from which the employee commutes daily or weekly to work locations; or (2) a residence for which the employee has financial responsibility and to which the employee returns to live on most weekends from a distant work location (Section 301.3(a)).

An employee's residence is established by filing a Residence Certificate. An employee may have only one residence at any given time, and must immediately file a new Residence Certificate upon a change of residence (Section 301.3(d)(1)). The amount of per diem to which an eligible employee is entitled is based upon zones defined in the Agreement, in Section 301.4. That Section also sets forth eligibility standards for an employee who is establishing a new residence in the new job location (Section 301.4(d)).

In the Parties' 1984 Collective Bargaining Agreement, the provision governing entitlement to per diem expense allowance was changed (TR 13; JX 1). In order to clarify the interpretation and application of the provision, a Memorandum dated March 13, 1987 was sent to all General Construction employees setting forth the eligibility definitions, the documentation required to substantiate entitlement to per diem, the circumstances that could give rise to an audit, and the potential consequences of an audit (JX 2, X 13; TR 13-15, 64-66, 80, 133, 135).

It is undisputed that the Grievant received the above Memo (TR 133). Attached to the Memo for all employees was a new Residence Certificate to fill out (TR 80). The Grievant's copy of the Memo had such a card attached (TR 133). On April 6, 1987, the Grievant filled out the card and listed as his principal place of abode a residence on Lakeshore North in Auburn, and as his mailing address a location on La Sierra Court in Morgan Hill (JX 2, X 3; TR 134).

Grievant's Employment and Residence History:

At the time the Grievant was hired as a General Construction employee in May, 1977, he lived and worked in Auburn (TR 115). From his date of hire to his termination in March 1988, the Grievant had not received any discipline from the Company (ibid).

Prior to March 1986, the Grievant had rotated to the San Jose area four or five times for from six to ten months (TR 115). The record establishes that the Company had sought employees from the Auburn area who were willing to rotate to the San Jose area, because experienced employees were needed there (JX 2, X 2). The rotation to San Jose was advantageous to certain Auburn employees whose seniority rendered it more likely they would be able to work as Sub-Foremen in the San Jose area, and the Grievant was such an employee (TR 76-77). The Company agreed to make every effort to return these employees to Auburn at the Sub-Foreman's rate (TR 77, 83, 95-96, 116).[2]

In March 1986, the Grievant again voluntarily rotated to the San Jose area, as a Lineman (TR 77, 116). Approximately a month after the Grievant arrived in the San Jose area, a Sub-Foreman position became open. The Grievant was the most senior qualified employee for the job, and he was promoted (TR 77). The Grievant testified that he expected to stay a full year on this rotation, and he was unsure whether he would want to reside permanently in Auburn (TR 116-117).

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[2] Even according to the Grievant's testimony, there was no guarantee he would be returned to Auburn at the Sub-Foreman rate (TR 116).

In March 1986 when the Grievant rotated to San Jose, he was married and had two children, aged 12 and 14, and his family did not accompany him. Between March and September 1986, he lived in a rented trailer in San Jose, and his family remained in the Auburn residence, for which he was financially responsible and to which he returned most weekends (TR 117-118).

In September or October 1986, the Grievant's family moved from Auburn to the San Jose area (TR 119). The Grievant purchased a residence in Morgan Hill, where he and his family resided (TR 79). From that time until January 1987, the Auburn house was vacant. The Grievant was still financially responsible for it, but there is no evidence that he commuted regularly or that it was his principal abode (TR 119). Between January and June 1987, the Grievant rented the Auburn house (for less than the mortgage), and then it was vacant again from June to October 1987, when it was sold (TR 119-120). During the approximately twelve-month period he and his family were no longer occupying the Auburn house, he returned approximately nine times, for maintenance purposes (TR 120).

In October 1987, the Company received a phone call inquiring about the Grievant's receipt of per diem (TR 16).[3] As a consequence, the Grievant was sent an audit letter in November 1987

[3] The calling party identified herself as a wife of an employee who wanted to know how her husband could get the same per diem. She claimed to have been at a party at which she heard either the Grievant or his wife referring to receipt of per diem while renting their house in Auburn (TR 16).

(JX 2, X 3; TR 17, 81). The audit letter requested that he provide documentation establishing eligibility for the per diem allowance he was continuing to receive on the basis of the claimed residence in Auburn (TR 17).

After receiving the audit letter, the Grievant filed a new Residence Certificate (TR 22, 81, 124, 130, 137; JX 2, X 12). The Certificate was signed December 2, 1987 and showed a new principal place of abode, the address in Morgan Hill (JX 2, X 12). He wrote on the card that this residence was established December 2, 1987 (TR 137). It is undisputed that, between September 1986 when he moved his family to the San Jose area and December 1987 when he filed this new Residence Certificate, the Grievant collected a per diem allowance based upon the Auburn residence (TR 121).

Investigation:

In January 1988, the Grievant responded in writing to the audit letter. His January 5, 1988 response is attached hereto as Appendix "A" (JX 2, X 10). The Grievant provided documentation to establish financial responsibility for the Auburn house for a portion of the relevant period (TR 17, 18; JX 2, X 11). He did not claim to be commuting to live there most weekends.

The Company investigated the assertions in the Grievant's written response (TR 19-20, 34, 82-85). Part of the investigation focused on the Grievant's claim that he had discussed his "options" with all of his immediate supervisors including Clark, Neatherly and Marsh, and made "clear to them exactly how" he was handling the situation (Appendix "A"). Michael R. Biro, his Construction Superintendent until the Grievant's family moved to

Morgan Hill, denied that the Grievant discussed his residence circumstances with him or that he consented to the Grievant's continued receipt of per diem (TR 75, 83).

Mr. Clark was the General Foreman at the time, and Neatherly was an exempt Foreman who acted as Coordinator. March succeeded Clark as General Foreman (TR 84). All three were contacted in the course of the Company's investigation.[4] The Company's investigation indicated all three were aware the Grievant's family had moved to Morgan Hill and/or that he had bought a house there, but none were aware that he had rented or sold the house in Auburn and no longer commuted there on weekends (TR 19, 34, 84-85, 96-97).[5]

The Grievant testified he told Bill Clark, the General Foreman, that he had bought a house in Morgan Hill and moved his family there (TR 121). The Grievant testified he discussed with Clark the fact that he was still receiving per diem based upon the Auburn address; and, that Clark told him he saw no problem with it, because he continued to be financially responsible for the Auburn residence (TR 122).

Bill Marsh replaced Clark in May 1987. Marsh was a personal friend of the Grievant. The Grievant testified he told Marsh he had bought the house in Morgan Hill, and that Marsh had visited him there, including on weekends (TR 122-123). The Grievant

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[4] By that time, Clark and Neatherly had retired.

[5] None of the three supervisors testified in the arbitration hearing.

testified that Marsh was aware that he was getting per diem based upon the Auburn address; and, that Marsh said he did not see a problem with it or advise him to change his Residence Certificate (TR 123).

The Grievant also testified that he told Neatherly he bought the house in Morgan Hill and his family was living with him there, but Neatherly did not advise him to change his Residence Certificate (TR 124). However, the Grievant further testified that he did not discuss his per diem situation with Neatherly, Clark or Marsh after September 1986, but stated such discussions occurred before he brought his family down and bought the house in Morgan Hill (TR 124-125).[6] Although the Grievant asserts he discussed his situation with his immediate supervisors in order to avoid any confusion over the issue, he does not recall if he told any of them he rented or sold the Auburn residence (TR 130-131), nor did he ever discuss with them whether he was still commuting back to Auburn on weekends (TR 131-132). The LIC documentation supports a conclusion that he did not advise these supervisors of these facts (JX 2, Parag. 16, 21, 23).

The documentation of the LIC also refers to statements by the Grievant that Clark and Marsh knew he had purchased a home in Morgan Hill, and that he had spoken to Clark "many times" about that subject, and the fact that he had "moved his family to Morgan Hill and was maintaining an Auburn residence until he rotated/transferred back, or until he was to stay in Morgan Hill"

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[6] But, he also states he had ongoing discussions with Marsh (TR 125).

(JX 2, Parag. 4) (emphasis added); and that Marsh acknowledged "he was aware he [Grievant] had the home in Morgan Hill and was also maintaining the Auburn residence" (JX 2, Parag. 5) (emphasis added). The Grievant's response to the audit letter states "I have maintained my residence in Auburn all this time at considerable expense" (JX 2, X 10) (emphasis added).

March Meeting:

On March 30, 1988, Company representatives held a meeting with the Grievant and a Union Shop Steward to investigate the facts pertaining to the Grievant's receipt of per diem and to allow him to explain the situation (TR 20-21, 85). Mr. Biro was present, as was Labor Relations Supervisor Richard Bolf, and both took notes of the meeting (JX 2, X 6, X 7; TR 10, 21, 85). Detailed, typed notes of the investigating meeting were also prepared (JX 2, X 4).

At the meeting, the Grievant informed the Company he had moved his family to Morgan Hill in September 1986; that the Auburn house was vacant from September 1986 to January 1987; and that he remained financially responsible for it in case he wanted to move back. He further told the Company he was unable to sell the Auburn house in the winter because the market was dead; and he rented the property, at a loss, from January to June 1987. In May 1987 he first attempted to sell the house, and closed escrow on the sale at the end of October, 1987 (JX 2, 4, 6, 7; TR 85-86).[7]

[7] The LIC notes confirm the Grievant listed the Auburn residence for sale in May, 1987 (JX 2, Parag.13).

In the March 30 meeting, the Grievant further stated he continued to collect per diem after escrow closed, until he filed the new Residence Certificate in December 1987, because he was trying "to recoup some of [his] expenses" in being financially responsible for the two properties (JX 2, X 4, X 6, X 7; TR 21, 86); and that he filed a new Residence Certificate in December because he had received the audit letter (TR 22; JX 2, 4). The Grievant claimed he did not defraud or mislead the Company; but, the record is clear he stated in the March 30 meeting that he did not tell his Supervisors he was renting his Auburn house (JX 2, X 4, 6, 7).

At the arbitration hearing, the Grievant testified that, due to "oversight," he did not change his Residence Certificate when he sold the Auburn property in late October 1987 (TR 125). He acknowledged that he changed his Residence Certificate because he received the audit letter (TR 124). He stated he had not attempted to hide the fact that he had bought a house in Morgan Hill and moved his family there in September 1986; and, he did not attempt to provide any false documentation of commuting to Auburn when he was audited (TR 125-126).

Decision to Terminate:

In consultation with Labor Relations, Mr. Biro made the decision to terminate the Grievant (TR 57, 86). Biro decided upon discharge based upon the fact that the Grievant had knowingly received funds from the Company to which he was not entitled under the Agreement (TR 86-87).

Mr. Biro issued a termination letter dated March 31, 1988 setting forth the facts upon which the Company relied in concluding the Grievant's receipt of per diem failed to meet the eligibility requirements of the Agreement, and citing the amount of compensation he received from October 1, 1986 through December 1, 1987 at approximately $10,815.50. The termination letter charges that the Grievant's receipt of these monies on the basis of the claimed Auburn residence constituted defrauding the Company in violation of Standard Practice 735.6-1 and Sections 301.3(a) and (d)(2) of the Agreement (JX 2, 2).

Treatment of Other Employees:

Considerable evidence and testimony was presented on the subject of the discipline accorded other employees for receipt of the per diem allowance under circumstances that failed to meet the Agreement requirements. The Union contends that the Grievant's treatment as compared with certain other employees shows that he has been unfairly singled out for harsher discipline. The Company claims the discipline is consistent with that imposed on others guilty of the same offense.

Much of the focus was on the Company's treatment of Mr. L , who received a Decision Making Leave (DML) under the Positive Discipline System.[8] Internal Audit conducted an

[8] A Positive Discipline System went into effect for General Construction on April 1, 1988 just after the Grievant was terminated (TR 32-33). An issue involving Lansing's receipt of per diem allowance in 1984 is not addressed herein for several reasons. The facts on that subject are sketchy, the matter is remote in time, and it occurred around the time the Agreement language was amended and prior to the clarifying memo of March 13, 1987.

investigation of Mr. L and found there was no evidence he had violated Standard Practice 735-6.1 with regard to receiving per diem payments for his claimed residence. The audit report found that Mr. L had provided adequate evidence of financial responsibility for the residence, but had provided inadequate documentation regarding the commuting requirement, and his per diem was discontinued.

It was further found that Mr. L had violated Standard Practice 735-6.1 by providing falsified gas receipts as purported evidence of commuting and by making a misleading statement concerning his financial responsibility for the residence in question. He was issued the DML based upon these violations (JX 4-L TR 27-33, 37-38, 40-45, 48-57, 62-63, 89-94, 98-105, 112-114).

The Company established that several employees have been terminated for fraudulently claiming a residence and receiving a per diem allowance based thereon (Hill, Miller, Markiewitz - JT 4; CX 1; TR 22-26, 58, 69-74; Memo of 4-2-90).

The record shows that the disciplinary treatment of employees who provided inadequate documentation to support per diem (as opposed to those who were shown to have violated Standard Practice 735-6.1) varies depending on the circumstances. For example, in one case when adequate documentation was later provided, per diem payments were restored and no discipline was imposed (Hansen - JX 4; TR 58-59). Other employees have had per diem discontinued, without disciplinary action, due to inability to adequately substantiate per diem eligibility (Reynolds,

Morrison, Wise - JX 4; TR 59; Memo of 4-2-90). The record regarding these cases indicates that evidence was either lacking or inconclusive to show fraudulent receipt of per diem (ibid.).

The Union relies upon the case of H ·, who was given a DML when, according to the Union, the Company's investigation indicated he was not commuting to his claimed principal residence, as he alleged. A review of the documentation indicates Mr. H· provided sufficient proof of financial responsibility for the claimed residence. While he conceded he had relocated his temporary residence, he maintained that he continued to commute to the claimed principal residence almost every weekend; but, documentation of the latter assertion was found to be inappropriate and unacceptable (UX 1).

The charge supporting H 's DML was "failure to comply with Title 301.3 which resulted in falsification of his alleged Arroyo Grande residence." A review of the evidence on H fails to reflect a charge of violating Standard Practice 725-6.1 by the fraudulent receipt of per diem payments.

Another case cited by the Union involves employee Mc -, who was denied per diem and was required to repay certain amounts to the Company (UX 2). The record shows that case also involved a question about the adequacy of documentation provided to demonstrate financial responsibility and commuting. The Union disputed the Company's position that the documentation provided was inadequate. While the Company took the position that Mc : clearly failed to meet the contractual requirements for

per diem eligibility and suspected potential fraud, it gave the employee the "benefit of the doubt" based upon his assertion of a lack of notice regarding the Agreement requirements. In this regard, it is significant to note that the Mc case arose prior to the issuance of the March 13, 1987 Memo clarifying per diem eligibility requirements and the consequences for failing to meet them (X 2).

POSITIONS OF THE PARTIES

The Company:

The Grievant's receipt of in excess of $10,000 of per diem to which he was not entitled provides just cause for his discharge. The Company contends that the Grievant received these funds knowing he was not entitled to them in order to reduce the expenses he had undertaken after investing in the Morgan Hill home.

The Grievant was an experienced General Construction employee, he had received per diem allowance in the past, and he had received the Memorandum of March 13, 1987 reiterating the per diem eligibility criteria. In response to the Memo, he filed a new Residence Certificate continuing to name the Auburn home as his principal place of residence, even though he knew that home was rented to others and he was not residing or commuting there on a regular basis. By that time, he had purchased the home in Morgan Hill and moved his family there, and clearly did not maintain Auburn as his principal place of abode as defined in the Agreement. He had rented the Auburn home and then listed it for

sale in May 1987, while continuing to claim it as his principal residence. He continued to claim Auburn as his principal residence even after the sale of the house.

In the Company's view, the Grievant's knowing receipt of per diem payments under these circumstances constitutes defrauding the Company in violation of Standard Practice 735-6.1. His receipt of per diem payments after the sale of the residence, alone, is sufficient cause for discharge. The Company submits the Grievant engaged in this deceptive conduct for his personal financial advantage, and that he would have continued to do so had he not been audited. The Company should not be expected to tolerate such behavior, even by a long term employee, and the fact that he had a good past record is irrelevant in such circumstances.

The claim that the above conduct was condoned by the Grievant's supervisors is without merit, the Company contends. There is no evidence or contention that any of the Grievant's supervisors knew he had rented, listed or sold the Auburn home, or that he no longer commuted there on most weekends. The Grievant testified that any discussions he had with his supervisors on this subject occurred prior to September 1986, not later, when the significant events occurred. According to the evidence, all the supervisors knew was that the Grievant purchased a house in Morgan Hill and moved his family there. According to the Company, nothing in the per diem policy prohibits an employee from purchasing a second residence near his headquarters and having his

family there with him, as long as he maintains financial responsibility for the claimed principal place of abode and commutes there on most weekends.

Contrary to the Union's assertion, the discharge of the Grievant is consistent with practice and precedent in similar circumstances. According to the Company, the record shows that all employees who were proven to have committed the same offense as the Grievant, that is, intentionally falsifying or delaying the filing of a Residence Certificate and knowingly receiving per diem when not entitled, were similarly disciplined. The Company provided evidence of several other employees who were terminated for that offense.

The Company distinguishes those cases relied upon by the Union, in which employees were found to have provided inadequate, inappropriate or inconclusive documentation, from those in which proven fraud was involved in the receipt of per diem payments. The Company argues that the Agreement clearly differentiates between deliberate delay or falsification, on the one hand, and inadequate documentation, on the other. As clarified in the March 1987 Memo, discharge is warranted in cases of proven fraud. In the Company's view, the Grievant's discharge and those of other employees were based upon evidence of deliberate fraud, while the other cases lacked such evidence.

Further, any past discipline of other employees which occurred prior to the changes in the negotiated Agreement and/or prior to the clarifying Memo of March 13, 1987 should be disregarded as irrelevant, the Company maintains. An employer may

revitalize a rule by amending contract language or providing employees specific notice of future strict enforcement, even if past enforcement has been lax or deficient.

In conclusion, the Company contends that the Grievant knowingly and deliberately defrauded the Company in order to receive per diem benefits to which he was not entitled, and the discharge should be sustained.

The Union:

The Union's contentions are divided into two parts, the first involving the period October 1986 to October 1987. During this time, according to the Union, the Grievant continued to collect per diem with the express and informed consent of three members of management. The Union maintains the Grievant sought the advice of Clark, Neatherly and Marsh regarding his entitlement to per diem expenses after moving his family to Morgan Hill; and, none of them advised him that he was ineligible or should file a new Residence Certificate. The Union contends that, because management explicitly condoned the Grievant's receipt of per diem for his Auburn home, no discipline is appropriate for this period of time.

The second period involves the time from the sale of the Auburn house until the filing of the new Residence Certificate. As to this period, the Union acknowledges that the five-week delay in filing a new Residence Certificate was not in strict compliance with the Grievant's contractual obligations, and the Grievant recognizes this. However, the Union asserts that no discipline is appropriate for this period when the Grievant's actions are judged in the context of the Company's treatment of other employees who

have been audited concerning their eligibility for per diem. The Union relies in particular upon the Company's treatment of Mr. L .

According to the Union, other cases show a similar lenient pattern. Some employees were not disciplined at all, or were given lesser discipline than the Grievant, when they were unable to establish eligibility for per diem payments they had received. As to those cases relied upon by the Company to establish consistent treatment of the Grievant, the Union distinguishes them on the basis that none involved condonation by management, which was involved here.

The Union submits that the Grievant was straightforward and cooperative in the Company investigation, in contrast to certain other employees. The Grievant's conduct in this regard supports his claim that he acted on the advice of his superiors and believed he had nothing to hide. The Union contends that, at most, the Grievant should be treated as were other employees whose evidence of eligibility was rejected. In sum, discharge is unwarranted under the facts of this case and given the Company's light-handed treatment of other employees.

DISCUSSION

Eligibility Requirements:

An employee's entitlement to per diem is determined by the criteria set forth in the Agreement. The definition of eligibility pertinent to this case is found in Section 301.3 (a)(2), cited hereinabove. The per diem provisions were amended in 1984,

well prior to the events at issue in this case. The Grievant is entitled to receive a per diem allowance only if he falls within the applicable eligibility requirements. These requirements were clarified in the Memo of March 13, 1987.

Under the applicable criteria, from the time the Grievant moved his family to Morgan Hill in September or October 1986 and no longer commuted to Auburn on most weekends, he ceased to qualify for per diem based upon the Auburn residence. Nonetheless, he continued to collect per diem allowance based upon the Auburn residence from that time until he filed a new Residence Certificate in December, 1987.[9]

As the Union points out, the Grievant continued to have at least some financial responsibility for the Auburn property from Fall 1986 until he sold the property at the end of October 1987; but, financial responsibility is not the sole requirement to establish entitlement to per diem. It is undisputed that, commencing in Fall 1986, the Grievant no longer maintained Auburn as his principal place of abode, and did not commute there to live on most weekends. He did not simply lack documentation of the commute. Moreover, the Grievant's financial responsibility ceased upon the close of escrow on the Auburn property. Nonetheless, he continued to receive a per diem allowance throughout this entire period from Fall 1986 to December 2, 1987, during which time he clearly failed to meet the criteria for eligibility.

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[9] The Grievant may have had some entitlement to change of residence per diem expenses under Section 301.3(d) had he taken appropriate steps to qualify therefor (Section 301.3(d)(1), JX 1). He failed to do so, and that issue is not addressed herein.

Notice:

The record also supports a finding that the Grievant knowingly failed to meet the applicable requirements. He had notice through the applicable Agreement provisions that he was obligated to provide accurate, up-to-date and correct information on his Residence Certificate. Section 301.3(d)(2) provides as follows:

> Since the payment of per diem expenses is based upon the location of the employee's Residence, the employee is vouching that his Residence Certificate does, in fact, identify a Residence (as defined in Subsection 301.3(a)) and not temporary living accommodations. Any employee who knowingly falsifies or delays filing such a Residence Certificate shall be required to reimburse the Company for any overpayment of per diem and shall be subject to disciplinary action, including discharge. (Entire Section amended 1-1-84).
>
> (JX 1)

The Grievant also had notice of his obligation not to defraud, mislead or misrepresent facts to the Company by virtue of Standard Practice 735-6.1. Despite the foregoing, when his principal place of abode changed to Morgan Hill in the Fall of 1986 and he admittedly was no longer commuting to the Auburn residence on most weekends, he did not change his Residence Certificate and he continued to collect per diem.

In March 1987, the Grievant received the Memo clarifying the requirements of the per diem policy. If there was any doubt or confusion at that time as to his eligibility, certainly this Memo would have clarified it. The Grievant admits he received the Memo and that he did not meet the requirement set forth therein. Despite that acknowledged fact, he filled out a new Residence

Certificate in April 1987, claiming Auburn as his principal place of abode. He continued to collect per diem based upon that knowing misrepresentation. These facts establish the Grievant fraudulently received per diem. As recognized in Section 301.3(a)(2), such an offense warrants severe discipline. Also, the March 13, 1987 Memo includes the following:

> In certain cases of proven fraud, as opposed to simple failure to provide documentation, they [employees] may be subject to discipline up to and including discharge and recoupment of per diem payments back to the date of their Residence Certificate or the date of the fraudulent claim.
>
> (JX 2, X 3)

Alleged Condonation:

The Grievant testified he believed he was entitled to receive per diem under his circumstances as a result of alleged conversations with his supervisors, Clark, Neatherly and Marsh. The Grievant has stated that he wished to avoid any confusion on the subject and, to this end, fully apprised these supervisors of his situation; and, that they indicated his continued receipt of per diem was appropriate. However, when the Grievant's testimony is scrutinized, it is clear that he did not fully apprise these supervisors of the relevant facts about his situation. For example, he testified that these discussions (at least with respect to Neatherly and Clark) occurred before he moved his family to Morgan Hill in September 1986. Thus, these alleged discussions could not have made reference to his rental or sale of the Auburn property because those events had not occurred yet.

A review of the record, including the Grievant's testimony and prior statements, shows that these supervisors were aware he had purchased a home in Morgan Hill and his family was living with him there; but, it was not shown that members of management knew he had rented or sold the Auburn residence, or that he had ceased to maintain it as a residence to which he regularly commuted on weekends. It may not be found that the supervisors condoned or approved the Grievant's continued receipt of per diem in his particular situation, when the significant circumstances relevant to eligibility were not known to them.

The Union contends that the Employer has failed to refute the Grievant's assertions of condonation because it did not call the supervisors. Before the Company is required to rebut the Union's case on this point, the Union must show by reliable evidence that a knowing condonation or approval occurred. Such evidence was lacking in this case. The Grievant's own statements and testimony fail to show these supervisors knew the relevant facts bearing upon his entitlement to per diem.

The Union also attacks the Company's position on the condonation issue on the basis that any supervisor who knew the Grievant's family was living in Morgan Hill would necessarily know that Auburn was no longer his principal place of abode, because the Grievant certainly would not commute to Auburn regularly without his family. This assumes that the Grievant and his family could not or would not have commuted together to Auburn on most weekends, which they could have done had they so chosen.

Under the Agreement, eligibility is not determined based upon where other family members reside. It is based upon the specific criteria of financial responsibility and the employee returning to the principal place of abode on most weekends. It is possible that the Grievant could have continued to meet these requirements even after purchasing the home in Morgan Hill and moving his family there. The facts fail to demonstrate the supervisors in question necessarily were aware of the Grievant's ineligibility for per diem during this period.

Moreover, as set forth in the summary of the facts, in describing his situation to the Company, the Grievant made repeated reference to "maintaining his residence in Auburn" during this period (see, e.g., JX 2, Parag. 4; JX 2, X 10). The ordinary meaning and usage of such words conveys that he was keeping the Auburn home as his abode. This choice of words does not suggest that he and his family were no longer using the Auburn property as a residence; rather, it indicates to the contrary.

Sale and Subsequent Events:

It is undisputed that the Grievant sold the Auburn residence in late October 1987. Even at this time, he did not file a new Residence Certificate. He did not do so until he received the audit letter, whereupon he immediately registered Morgan Hill as his principal place of abode. On the new Certificate, he gave December 2, 1987 as the effective date for the change in residence, when clearly that was not the case. In fact, his principal place of abode changed to Morgan Hill in Fall 1986. The Grievant does not have satisfactory explanations for failing to

file a new Residence Certificate throughout this period, or for putting an incorrect date on the Certificate filed in December 1987. These events reinforce the conclusion that the Grievant fraudulently delayed filing a new Residence Certificate, and knowingly received per diem to which he was not entitled.

Alleged Candor:

The Union contends the Grievant has been straightforward and candid, indicating he believed he was acting properly and had nothing to hide. This contention is not accepted. The Grievant did not act candidly when he failed to file a new Residence Certificate when his principal place of abode changed in Fall 1986, or when he filed the April 1987 Residence Certificate in which he continued to claim Auburn as his residence. He was not straightforward or forthcoming with his supervisors concerning the facts pertinent to his eligibility for per diem during this period, contrary to his assertions. He misled the Company when he continued to collect per diem based upon a residence he no longer owned. Only after he received the audit letter did he file a new Residence Certificate.

The Grievant did not act as though he had nothing to hide when, on the new Residence Certificate, he entered December 2, 1987 as the effective date his residence changed. Finally, even in responding to the audit letter, the Grievant was not entirely candid. While he claims he discussed exactly how he was handling his situation with three of his supervisors, his own testimony shows this to be a misrepresentation. Although his response was

written more than two months after the sale of the Auburn property, his response makes no mention of the sale, but states, "I have maintained my residence in Auburn all this time at considerable expense . . . I put the house on the market but . . . [it] did not sell" (JX 2, X 10).

While it is correct the Grievant did not fabricate evidence of commuting or financial responsibility, his course of conduct during the relevant period certainly cannot be characterized as candid and forthright. His cooperation in the investigation does not mitigate his fraudulent receipt of per diem over an extended period.

The Grievant's statements in the course of the investigation establish that he felt justified in continuing to receive the per diem allowance during this period despite his contractual ineligibility, because of the high expenses he incurred while he owned both properties. The Company is not responsible for the level of financial commitment the Grievant elects to undertake in his personal life. The eligibility standards are those set forth in the Agreement; they are not determined by the subjective decisions of each individual employee. The fact that the Grievant did not "profit," in the sense that the per diem expense he received did not exceed the financial obligations he had undertaken, is irrelevant to this determination and does not demonstrate a lack of culpability.

Disparate Treatment:

Disparate treatment is established when the Union is able to show that the Grievant has been improperly singled out for more

harsh treatment than other employees under substantially similar circumstances. This defense is not successful where the Company is able to articulate reasonable grounds for differentiating among employees in terms of disciplinary treatment, based upon the particular facts of the case, the type of charge involved, or other legitimate factors.

As noted above, the Company has shown that other employees have been terminated for fraudulent receipt of per diem payments. Therefore, the Grievant has not been singled out for this level of disciplinary treatment. Other employees who received lesser discipline for offenses associated with receipt of per diem were unable to provide acceptable or sufficient documentation of eligibility, but evidence was lacking or inconclusive on the subject of fraudulent receipt of per diem payments.

A distinction between intentional fraud for financial gain and inability to provide sufficient documentation to show eligibility is not unreasonable or arbitrary, and this distinction is recognized in the applicable Agreement provisions and the March 13, 1987 Memo. Inconclusive evidence of fraudulent receipt of funds is a proper basis for imposing lesser discipline or no discipline, as contrasted with a case in which an employee is shown by reliable evidence to have fraudulently received per diem. A distinction is also present where fraud is involved in certain documentation, but where fraudulent receipt of per diem payments has not been shown.

A review of the cases emphasized by the Union for purposes of establishing disparate treatment shows that they are distinguishable on the above-referenced grounds. For example, even if the Union is correct that the Company erred in concluding Mr. Lansing provided adequate documentation of financial responsibility, the case still involves insufficient documentation as opposed to proven fraud. Mr. Lansing was disciplined for fraud involved in certain documentation he provided, but evidence was lacking to show that he fraudulently received per diem payments.

It has been found, above, that the Grievant intentionally misrepresented his residence status to the Company and for a period of at least several months knowingly received Company funds to which he was not entitled. He had clear notice of the eligibility requirements for per diem and the potential disciplinary consequences for proven fraud. Under the circumstances, it may not be concluded that the Grievant has been unfairly singled out for more harsh treatment than other employees under substantially similar circumstances.

Accordingly, the following Decision is rendered:

DECISION

The discharge of the Grievant, --- P , was for just cause. The grievance is denied.

Roger Statrup Union Board Member	~~Concur~~/Dissent	8/30/90 Date
Union Board Member	~~Concur~~/Dissent	9-5-90 Date
Margaret A. Hunt Company Board Member	(Concur)/Dissent	8/27/90 Date
Company Board Member	(Concur)/Dissent	8/27/90 Date
Neutral Board Member	(Concur)/~~Dissent~~	August 23, 1990 Date