A MATTER IN ARBITRATION

In a Matter Between:	Grievance: Discharge
LOCAL UNION #1245 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS	
(Union)	Hearing: September 15, 1999
and	Award: November 17, 2000
PACIFIC GAS AND ELECTRIC COMPANY	McKay Case No. 99-109
(Employer)	Arbitration Case No. 234

DECISION AND AWARD

GERALD R. McKAY, NEUTRAL ARBITRATOR
PERRY ZIMMERMAN, PANEL ARBITRATOR
LULA THEARD-WASHINGTON, PANEL ARBITRATOR
MARGARET SHORT, PANEL ARBITRATOR
KATHY PRICE, PANEL ARBITRATOR

Appearances By:

Employer:

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(Employer)	

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. Unable to resolve the dispute between themselves, the parties submitted this matter to a panel of arbitrators for final and binding arbitration. The hearing was held in San Francisco, California on September 15, 1999. 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 submitted written briefs in argument of their respective positions. The Arbitrator received copies of those briefs on or before January 25, 2000. Subsequent to the receipt of briefs, the parties entered into negotiations in an effort to resolve the dispute without the necessity for a decision from the panel. Ultimately, the efforts of the parties were not successful and the Arbitrator was notified of this lack of success in a letter dated October 3, 2000. Having had an opportunity to review the record, the Arbitrator and the panel are prepared to issue their decision.

ISSUE

Was there just cause for the termination of the grievant, meaning was there an incident that warranted discipline pursuant to the May 16, 1997, back-to-work agreement? If not, what is the appropriate remedy?[1]

RELEVANT CONTRACT LANGUAGE

TITLE 24. MANAGEMENT OF COMPANY AND MISCELLANEOUS

24.1 MANAGEMENT OF COMPANY

The management of the Company and its business and the direction of its working forces are vested exclusively in Company, and this includes, but is not limited to, the following: to direct and supervise the work of its employees, to hire, promote, demote, transfer, suspend, and discipline or discharge employees for just cause; to plan, direct, and control operations; to lay off employees because of lack of work or for other legitimate reasons; to introduce new or improved methods or facilities, provided, however, that all of the foregoing shall be subject to the provision of this Agreement, arbitration or Review Committee decision, or letters of agreement, or memorandums of understanding clarifying or interpreting this Agreement. (Relocated from 1.3 on 1-1-80)

BACKGROUND

The grievant worked for the Employer as a Utility Clerk in Oakland, California. He was terminated on April 23, 1998 for what the Employer described as "unacceptable work performance."[2] During the last several years of the grievant's career with the Employer, he was the subject of a number of items of discipline. In February 1996, the grievant was terminated for

1 Joint Exhibit #4
2 Joint Exhibit #3, page 15

allegedly taking $100.00 from a customer by crediting the customer's account for $100.00 when it fact the customer had not paid that money.[3] Ultimately, the Union and the Employer agreed that the grievant's actions in the case reflected negligence on his part in performing his duties but found there was no evidence of theft. As a result, an agreement was reached reinstating the grievant as a Utility Clerk in Oakland to handling cash receiving. In the agreement reinstating the grievant, the parties indicated, "If, after his return to work any incident occurs which warrants discipline, the grievant will be discharged with redress to the grievance procedure only to determine that the incident occurred." Subsequent to this warning, it is the position of the Employer that the grievant made errors in the performance of his work which warranted discipline. Based on the agreement, the Employer concluded that the appropriate penalty was to terminate the grievant.

The incidents which lead to the grievant's termination involved coding customer payment stubs appropriately on March 5, 1998 and April 13, 1998. The Employer asserted that it was the responsibility of the cashier to insure all collection stubs are coded properly. The grievant asserted during the investigation that no one had ever reminded him to code the stubs. The Union also pointed out during the investigation that other employees had not coded stubs and have not been terminated or even disciplined. The grievant's supervisor at the time of his discharge was Marva House. Ms. House served as Customer Services Supervisor in Oakland from 1996 to March of 1999. She described the work that the grievant was performing at that time as

[3] Joint Exhibit #3, page 16

providing service to customers who come in to make payments on their energy bills.[4] She described the responsibility of the clerks who collect the money, such as the grievant, in the following manner:

> "Basically, they're supposed to – they have a certain process that they're to follow, as far as marking whether the customer paid cash or check or money order. They stamp or process the stub in our computer system.
>
> The printer – the receipt printer would print out on the stub the actual payment amount, the account number, and the number of payment that is for that – for the day, the person's lot number – the employee's lot number and –
>
> . . .
>
> At the end of the day, they would balance their payments, all the payments that they've taken for the day"[5]

Ms. House described how the accounting at the end of the day is to be done by the clerks in the following manner:

> "Well, they would make a total of their checks, they would count their cash, and then they would verify it to the LOP system, which would tell them exactly how much cash they should have, the dollar amount of the check payments that they've taken for the day, and then balance that out.
>
> Once they balance out in the computer, they would turn in their funds to the head cashier.
>
> They would turn in the stubs, the cash, the checks, and their disk that actually writes the payments on the system."[6]

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4 Transcript page 14
5 Transcript page 16
6 Transcript page 17

At the end of the day on March 5th, the head clerk informed Ms. House that the grievant's audit for that day was short by approximately $140.00. She learned about an April shortage of approximately $84.00. When the grievant was confronted with these shortages, he could not explain them to Ms. House. One explanation he gave was as follows:

> "I believe he said that he knows the customer paid him in like – with a $20 check and $80 cash, or vice versa, and he wrote it wrong to the system.
>
> In other words, when he input it into the LOP system, he put either the check as cash and the cash as check."[7]

On cross-examination, Ms. House was asked about standards which the Employer developed for cash receivers in 1981. It was established by stipulation that in February of 1999 all 83 customer service offices of the Employer adopted identical guidelines to those which had been in existence from 1981.[8] Generally, the standard of acceptable performance was 1.5 errors per 1,000 per month. Although in a circumspect manner, Ms. House acknowledged that the grievant had not exceeded the 1.5 errors per 1,000.[9] During an eleven-month period, the grievant had four errors, including the error in March and the error in April. Ms. House acknowledged that she never calculated the number of errors on a ratio basis to determine whether or not the grievant was within or without the acceptable ratio. Ms. House acknowledged that other employees who were cash receivers had more errors in the same time frame than did the grievant.

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7 Transcript page 26
8 Transcript pages 61-62
9 Transcript page 63

When asked whether other employees have been disciplined for the over and short errors such as those made by the grievant. Ms. House recalled that she believes so but she could not recall any names. When shown an e-mail that she had sent to Margaret Short, the Employer's Director of Industrial Services, wherein she represented that she was not aware of any records documenting any disciplinary action for performance for processors in Oakland, Ms. House then recalled that she was not aware of anything specific but that there were other instances of employees being disciplined.

Ms. House testified that after the grievant was terminated and his work station was being processed, it was discovered that the grievant's petty cash fund, which should have been $100.00 was short $19.50. Ms. House testified:

> "The petty cash fund agreement for all of the employees at 1919 Webster was for $100, meaning that they would always have a $100 change fund.
>
> Wayne should have had $100 in his drawer, because he had balanced his drawer, I believe, a few days – the day before, a couple days before, the last time he had used it.
>
> Basically, once he balances at night and turns it in, you're saying, 'Okay, I've turned in everything but my $100."[10]

Money missing from the cash box is considered a serious offense by the Employer and has led to a number of terminations for theft.

[10] Transcript pages 57-58

Ms. Short testified that the standard of 1.5 errors per 1,000 transactions was not intended to preclude employees from being terminated for mishandling cash. She stated, "There have been a number of discharges where people have been discharged for failure to property safeguard company funds."[11] When the grievant's case was presented to her since he was on a decision-making leave, it was her opinion that he had failed to meet one of the standards which was expected which then subjected him to immediate discharge. Ms. Short presented a number of arbitration decisions and panel decisions in which employees were terminated for mishandling Company funds.

POSITION OF THE PARTIES

EMPLOYER

The Employer pointed out that this is the grievant's second termination. Pursuant to a decision of the review committee, the grievant was returned to work in May 1997. On his first day back from work, the grievant met with his supervisor Marva House who coached and counseled the grievant about the performance errors that led to the February 1996 termination. The grievant's job duties as a Utility Clerk assigned to the front counter was straightforward and did not vary from day-to-day. The clerks were expected to accept payment and note it properly on the appropriate documents. Despite Ms. House's sincere desire to help the grievant through the one-year DML period, the grievant did not show any interest in fulfilling his post-DML responsibility to perform his job duties in a fully satisfactory manner. In March and April 1998,

[11] Transcript page 114

the grievant's failure to safeguard Company funds once again came to Ms. House's attention. The grievant's explanation for the mistakes were not satisfactory and did not provide an accurate explanation. In addition to failing to safeguard Company funds, the grievant showed little desire to be productive or to follow employee conduct rules. Ms. House spoke to the grievant about improving his low productivity but without success. Because Ms. House was earnest in her desire to help the grievant, rather than formally disciplining the grievant each time he performed in an unsatisfactory manner or engaged in misconduct, Ms. House simply counseled the grievant to improve his behavior. Following the April shortage, however, Ms. House concluded that the grievant could not or would not improve his performance and she decided to terminate him. After the grievant was terminated it was discovered that his cash box was short $19.50.

The Employer argued that it had just cause to terminate the grievant because he was aware that if he failed to perform in a fully satisfactory manner, his employment would be terminated. The Union contended that the grievant's cash shortages were within the 1981 standard for balancing errors. However, as Ms. House and Ms. Short confirmed, at the time of the grievant's termination, there was no definite standard for missing cash. If the 1.5 errors per 1,000 standard discussed by the Union at the hearing of this matter was meant to address missing cash, it would have the absurd result of allowing clerks to have cash shortages of an indefinite amount for every 1,000 payments processed without repercussion. The Union also contends that the grievant's cash shortages were no greater than the other clerks in his office. This ignores the status of the grievant in the Employer's disciplinary process. Secondly, it ignores the significant amount which was short. The grievant was not similarly situated to his peers. The discipline imposed on the grievant was just given his active disciplinary record and his unsatisfactory work performance.

The Company's post termination discovery of yet another cash shortage demonstrates that the grievant should not be reinstated. After the grievant was terminated, it was discovered his cash box was short $19.50. The fact the grievant had another cash shortage should not go unnoticed by panel. In summary, the Employer stated it demonstrated just cause for the termination of the grievant because of his numerous mistakes and requested that the grievance be denied.

UNION

The Union argued that the Employer advanced six arguments in support of its decision to discharge the grievant:

1. The two cash handling errors of March and April warrant discipline, hence discharge is appropriate;

2. The grievant's failure to code pay stubs warrants discipline, hence discharge is appropriate;

3. The grievant's productivity warrants discipline, hence discharge is appropriate;

4. The grievant's conduct warrants discipline, hence discharge is appropriate;

5. The fact the grievant's cash drawer was $19.50 short warrants discipline; and

6. Past practice establishes that discipline was warranted, hence discharge is appropriate.

The Union noted that as a matter of policy, the Employer is willing to accept a certain level of error from its employees who handle cash. At the time of the grievant's termination, the Oakland office had for 17 years accepted 1.5 errors per 1,000 transactions. The grievant's errors were within the Employer's tolerance levels. If the Employer argues that the grievant's shortages were significant and thus warranted discipline outside the balancing error standard, it must somehow surmount the fact that significant errors were rampant in the Oakland office and that there were no disciplinary measures taken against those employees with those errors. Documentation provided by the Employer on November 3, 1999 shows significant shortages by a number of employees who otherwise met the error standard. No disciplinary action was taken against any of them. The Union cited a number of these employees indicating cash shortages from $20.00 to $160.00. The grievant's failure to code every pay stub he handled does not warrant discipline. The pay stubs processed by other employees were done in the same manner in which the grievant did them and those employees were not disciplined. Thirdly, the Employer may not properly rely on the grievant's alleged lack of productivity as warranting discipline since it did not raise that as an issue with the grievant. In a similar manner, the Employer may not rely on the grievant's attitude and conduct. There is no doubt, the Union asserted, that Ms. House had a passionate dislike for the grievant. However frivolous the grievant's conduct may have been, it did not warrant discipline either when it took place or six months later. The fact that the grievant's cash drawer was $19.50 short on the day he was fired does not warrant discipline and should not affect the remedy. Given the large number of significant shortages experienced on a weekly basis at Oakland, it is understandable why the Employer's grievance handlers did not consider the $19.50 shortage to be grounds for discipline or relevant to the remedy.

Finally, the Employer's reliance on four past instances of disciplinary action are all distinguishable from the grievant's situation. In each of the four cases, there were circumstances not found in the grievant's case. Each of the four cases relied upon by the Employer as past practice involved an element or several elements not found in the present case and therefore are not decisions upon which the panel can rely. When one reviews the record as a whole, the Union asserted, it is clear that the grievant should not have been terminated. The Union asked that the grievant be reinstated with full back pay and benefits.

DISCUSSION

This case must appropriately be divided into two parts. The first part of the case addresses the Employer's decision to terminate the grievant for making errors. The second part of the case must address the grievant's cash box shortage, which was discovered after he was terminated. While the Employer may not rely on the cash box shortage to support its termination because it was not aware of that prior to terminating the grievant, the cash box shortage is relevant for purposes of addressing the question of remedy.

Turning now to the issue of termination, there is no question in the Arbitrator's mind that Ms. House believed the grievant to be an incompetent, ineffective and an unappreciative employee who pushed all of the rules to the very edge. Ms. House spent much of her testimony telling the panel how the grievant had engaged in misconduct such as extending his breaks and otherwise misbehaving after he returned from his first discharge. Ms. House then went on to explain that she chose not to discipline the grievant for this misbehavior because she was trying to be nice to him. It is the panel's opinion that if Ms. House observed the kinds of behaviors that she claims to have observed, she was negligent in her duties as a supervisor to let those go. Ms. House had an obligation to address questions such as extended breaks and other misconduct in an appropriate manner. Under the Collective Bargaining Agreement, the appropriate manner is to issue discipline to an employee that will not conform with the rules. Since Ms. House has chosen not to use discipline, she may not at this point attempt to bootstrap this conduct into this termination case in an effort to bolster her decision to terminate the grievant. The conduct Ms. House described, other than the shortages, is totally irrelevant.

The grievant was short on several occasions. The grievant also failed to mark stubs on several occasions. The difficulty, however, is that the Employer has had a practice which has actually been formalized into an agreement to tolerate a certain level of mistake. In general terms, employees may make 1.5 transaction errors per 1,000 transactions. The grievant's transaction errors in terms of the types of error and the amount of money involved were quite similar to errors made by his colleagues in Oakland. The Employer argued that if the rule permits employees to make 1.5 errors per 1,000 without regard to the amount of money involved, employees could in essence rob the Employer blind but stay within the 1.5 error per transaction ratio at the same time. The parties should understand that employees who steal money from the

Employer will be terminated. If an employee is short significant amounts of money in circumstances that provide no logical explanation other than the employee who took the money, that employee will be terminated regardless of whether the employees was within or without the 1.5 errors per 1,000. If the Employer wishes to put a cap on the amount of money involved in the 1.5 per 1,000 ratio then it must raise that with the Union and add the cap. In the absence of doing so and in the absence of any evidence that there was intentional wrongdoing, the Employer is required to live with its 1.5 per 1,000 ratio.

The evidence before the panel demonstrates that the grievant was within the 1.5 per 1,000 ratio. The evidence demonstrates that the grievant's performance in terms of marking stubs was consistent with his colleagues. There is no evidence that any other employee in Oakland received any discipline at all during the time the grievant was making his errors and the other employees were making their errors. The grievant's conduct may not have been exemplary but the grievant's conduct was consistent with that of his fellow workers. Based on the evidence the Employer presented, the panel must conclude that the Employer did not have just cause to terminate the grievant for poor performance.

Having concluded that the Employer did not have just cause to terminate the grievant for poor performance, the panel must now address the question of remedy. After the grievant was terminated, it was determined that his cash box was short $19.50. A cash box is an amount of money kept by an employee to make change for customers who come to the counter. The cash box must be maintained at the level required by the Employer, which in the present case is $100.00. Any amount of cash missing is presumed to have been taken by the employee. In other words, the Employer gave the grievant \$100.00 to use. The Employer expected the \$100.00 to be available at all times in the cash box. When less than \$100.00 is there, it is assumed that the employee has borrowed or otherwise has dipped into the funds for the employee's own benefit. That type of behavior is considered to be theft. When an employee dips into a cash box, the employee is stealing from the Employer even if the employee intends to return the money at some future time before the employee gets caught. Unfortunately, in the present case, the grievant did not have an opportunity to return the money to cash box because he got fired.

Having concluded that the grievant's dip into the cash box to the tune of \$19.50 constitutes theft, it is not appropriate under the circumstances to reinstate the grievant to his position. However, the Employer did not raise the issue of the grievant's cash box impropriety until several months after the grievant's termination. The Arbitrator is not sure exactly the date on which it was raised for the first time with the panel, but believes it to have been three to four months after the termination. Once the Employer raised the issue of the cash box shortage, it effectively cut its liability for continued future employment and for back pay. However, since the Employer did not raise the issue of the cash box shortage for several months, the Employer is liable to the grievant for the back pay from the period of his discharge until the matter was raised as an affirmative defense by the Employer in the processing of the present grievance. The question of the appropriate date is remanded to the parties with the guidance that it is the date on which the Employer raised with the grievance panel the fact that the grievant had a cash box shortage which the Employer intended to use as a defense either to support its termination or to limit the grievant's remedy.

In summary, the Employer did not have just cause to terminate the grievant for poor performance. The poor performance demonstrated in the record does not amount to behavior which in the Oakland office would have warranted any discipline at all. Since the grievant's status on his DML required that he be terminated if discipline was warranted, the terms of the letter have not been met in the present instance. For these reasons, the discharge must be set aside. However, because of the grievant's theft of money from his cash box, he is not entitled to be reinstated. The grievant is entitled to back pay, however, from the point of his termination until the Employer raised as an issue with the grievance panel the fact the grievant had taken money from his cash box with the Employer informing the panel that it intended to use this as a defense. The Arbitrator believes that this period of time is in the neighborhood of four or five months. The exact amount of back pay due is remanded to the parties for their further deliberation in a manner consistent with this decision.

AWARD

The Employer did not have just cause to terminate the grievant. Because it was discovered after the grievant's termination that he had taken money from his cash box, the grievant is not entitled to be reinstated but is entitled to back pay in a manner consistent with the discussion above.

IT IS SO ORDERED.

Dated: November 17, 2000

Gerald R. McKay, Arbitrator

Bob Choate for Perry Zimmerman

Perry Zimmerman, Arbitrator 12/8/00

Lula Washington

Lula Theard-Washington, Arbitrator

Margaret Short 12/19/00

Margaret Short, Arbitrator

for Kathy Price

Kathy Price, Arbitrator 12/19/00