INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245,	
Complainant,	**OPINION AND DECISION**
and	**of**
PACIFIC GAS & ELECTRIC,	**Board of Arbitration**
Respondent.	
Re: Arbitration Case No. 238.	

BOARD OF ARBITRATION

Barbara Chvany:	Neutral Chairperson
Perry Zimmerman and Wayne Greer:	Union Members
Margaret Short and Doug Veader:	Employer Members

APPEARANCES

On Behalf of the Union:

Tom Dalzell, Esq.
IBEW Local 1245
P.O. Box 4790
Walnut Creek, CA 94596

On Behalf of the Employer:

Stacy Campos, Esq.
Pacific Gas & Electric
P.O. Box 7442
San Francisco, CA 94120

INTRODUCTION

This dispute arises under a Labor Agreement ("Agreement") between the above-captioned Parties (JX 1). The Board of Arbitration ("Board") was appointed pursuant to the terms of the

Agreement, and a hearing was conducted on December 8, 1999, in San Francisco, California. At the hearing, the Parties had a full opportunity to examine and cross-examine witnesses, and to present relevant evidence and argument. The Parties stipulated that the matter was pursued through the prior steps of the grievance procedure, and the matter is properly before the Board for final and binding decision (JX 2; TR 2). A verbatim transcript of the proceedings was taken.[1] The matter was submitted for decision upon receipt of post-hearing briefs on March 6, 2000.

PG&E hired Grievant F in October, 1990, and terminated his employment on February 17, 1999, for allegedly submitting a substitute for urine during a random drug test on February 4, 1999.[2] At the time of the events at issue, the Grievant held the position of Miscellaneous Equipment Operator in the General Construction Gas Department in Sacramento, California. The Union's grievance protesting the termination was not resolved at the lower steps of the grievance procedure, leading to this arbitration.

ISSUE

Was the Grievant, F , disciplined for just cause? If not, what shall be the remedy? (JX 2)

REMEDY REQUESTED

The Union requests that the Grievant be reinstated with full back pay and benefits. The Employer requests that the grievance be denied in its entirety. (TR 3)

---

[1] References to the transcript are cited herein as (TR #); references to Joint Exhibits, Employer Exhibits and Union Exhibits are cited as (JX #), (EX #) and (UX #), respectively.

[2] Unless otherwise noted, all dates hereafter refer to 1999.

RELEVANT AGREEMENT PROVISIONS

TITLE 7.1 Management of Company

> 7.1 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 hire, promote, demote, transfer, suspend and discipline or discharge employees for just cause; . . . (JX 1)

BACKGROUND

Government-Mandated Drug Testing:

The Grievant was subject to Department of Transportation (DOT) mandated drug testing by the Employer. A negotiated drug testing agreement between the Employer and the Union includes the following language: "If the employee willfully tampers with or alters the test specimen, the exempt supervisor will remove the individual from their work responsibility and the employee will be discharged" (EX 5). Employees are not subject to termination for a first positive test (EX 5).

In September, 1998, the Substance Abuse and Mental Health Services Administration (SAMSHA)[3] issued Program Directive 35 (PD 35) that sets forth mandatory guidelines for drug testing, including the following definitions of test specimens (JX 3, at page 28):

> a. *Dilute* if the creatinine is < 20 mg/dL and the specific gravity is < 1.003, unless the criteria for a *substituted specimen* are met.
>
> b. *Substituted* (i.e. the specimen does not exhibit the clinical signs or characteristics associated with normal human urine) if the creatinine concentration is ≤ 5 mg/dL and the specific gravity is ≤ 1.001 or ≥ 1.020.
> . . .

In lay terms, a finding that a specimen is "substituted" means that the test subject poured something other than urine into the specimen container. Creatinine is measured to determine if urine

[3] SAMSHA, a division of the United States Department of Health & Human Services, oversees the technical aspects of the Mandatory Guidelines for Federal Workplace Drug Testing Programs including DOT mandated drug testing (TR 21-22).

has been diluted or replaced with a substitute, because it is one of the most uniform and measurable excretions from the human body. Specific gravity also indicates whether a urine sample has been diluted because properly functioning kidneys concentrate or dilute urine to maintain hydration. A high intake of fluid causes the kidneys to dilute the urine, while a low intake of fluid causes the kidneys to concentrate the urine. (TR 11-13)

The DOT regulations and PD 35 were issued after a review of clinical and forensic toxicology literature, and after extensive hearings were conducted throughout the country, with an opportunity for public comment (TR 49, 114; JX 3, p. 28). Dr. David Smith, the Employer's Medical Review Officer (MRO),[4] described the criteria for determining if a specimen is substituted as tilting in favor of the employee (TR 49).

SAMSHA guidelines require that a "substituted" specimen be reported to an employer's Medical Review Officer as a "test not performed," with a statement that it is "not consistent with normal human urine" (JX 3, pp. 33-34). Under the guidelines, a substituted specimen constitutes a "refusal to test" (JX 3, pp. 28, 35; TR 44). Because the specimen has been substituted, the test is invalid for purposes of detecting the presence of drugs (JX 3, p. 29; TR 15, 48). The guidelines do not require the laboratory to identify the substituted material (JX 3, p. 29; TR 15).

Dr. Smith testified that commercially available products are used by some employees as substitutes for urine specimens (TR 20). The most common method for adding such liquids to a specimen is the use of a "urinator," which is a device attached to the leg of the subject to warm the substitute material to body temperature (TR 30-35).

---

[4] Dr. Smith is the founder of the Haight Ashbury Free Clinic and a recognized expert in the field of substance abuse.

An MRO receiving a lab report of a substituted specimen is required to report it to the employer. Dr. Smith testified that he does not seek an explanation from the subject when the lab reports a substituted specimen because there is no exculpatory explanation for that result (TR 15-16, 46).[5]

The Grievant's Drug Test:

At 7:00 a.m. on February 4, the Grievant's supervisor notified him that he would be required to submit to a random drug test (TR 72). Specimens are normally to be provided within two hours of notice. The Grievant gave the following testimony regarding his activities that morning leading up to and including giving a urine specimen:

During his one and one-half hour commute to work he had drunk several cups of coffee, as he usually does, and he had urinated when he arrived at work. As a result, he believed he would not be able to urinate immediately, when informed of the test. He drank three to four large cups of water so that he would be able to urinate for the test. When he felt ready to urinate, he went to the motor home where the samples were collected. He was not able to enter the motor home because a sign on the door indicated that another test was in progress. The Grievant waited, then approached the motor home again, and still was unable to enter because a test was in progress. At that point, he was getting uncomfortable and urinated to relieve himself. He eventually provided a specimen at 8:56 a.m. (TR 71-73, 80-81; JX 3, pp. 14, 23).

The Grievant gave the specimen in a bathroom in the motor home. He did not have access to water. There is a toilet in the bathroom, but it utilizes a blue liquid, not clear water. He provided a specimen to the collector, who measured the temperature and noted it was within normal range. The

[5] He does request an explanation from subjects who test positive, because prescription drugs may explain the result.

collector also noted that the specimen appeared to be a little light in color. The Grievant specifically testified that he did not tamper with or alter the specimen in any way, such as by diluting it with another liquid. He also denied using a urinator or any other such device, and testified he had not heard of a urinator before the arbitration hearing (TR 75, 78). He had never tested positive in the past for banned substances (TR 78).

Quest Diagnostics, Inc. ("Quest"), a federally certified drug testimony laboratory, analyzed two aliquots of the specimen provided by the Grievant, and achieved the same results with both: a creatinine level of 5 mg/dL and specific gravity of 1.001 (TR 58-61; JX 3, p. 23). Quest provided Dr. Smith with the results, and he advised the Employer on February 9 that the specimen fell within the definition of a substituted specimen (JX 3, p. 22; TR 16-17). The Employer terminated the Grievant effective February 17 for submitting a substituted specimen.

Disputes Regarding Reported Test Results:

Dr. Smith testified that normally functioning kidneys could not produce a specimen with a creatinine level of 5, even if the subject drank several glasses of liquid before giving the specimen. According to Dr. Smith, the only time the body would produce a specimen with a creatinine level as low as 5 "would be if somebody was in kidney failure and the kidney was not working at all and they were very sick" (TR 16-19, 21, 115; see also JX 3, p. 45). Dr. Smith is familiar with a study done in 1998 that showed that, at least in one situation, an individual had lowered his creatinine level to 4 by drinking four quarts of water within four hours, without urinating in the interim (UX 2 at page 465). Dr. Smith testified that a person would have to drink a "phenomenal amount" of water within a short period of time to obtain such a result (TR 47-48).

Pharmacologist Vina Rosetta Spiehler, called as an expert witness by the Union, testified that very low creatinine levels, even below 5, can be created by drinking large amounts of fluid (referring to the study mentioned above), and that this might explain the Grievant's specimen results (TR 90, 92-96; JX 3, p. 47). Spiehler acknowledged, however, that it would be rare for a person to have a specimen with a creatinine level of 5 and a specific gravity of 1.001 as a result of drinking water, and that there would be concerns about the medical condition of a person producing such a result (TR 108-110). Normal creatinine levels might range between 110 and 300, depending on factors such as muscle mass, diet and exercise (TR 89-92). For example, the Grievant gave specimens for random drug screens in 1995 and 1997 with creatinine levels of 114 mg/dL and 112 mg/dL, respectively (JX 3, pp. 52-53). The Grievant did not dispute that he likely followed the same morning routine prior to those tests, that is, drinking coffee on the way to work, urinating when he arrived, and consuming water prior the tests (TR 79).

In February 1999, Quest and other testing laboratories reported creatinine levels in whole numbers. For example, a 5.4 mg/DL would be reported as 5 mg/DL. (TR 27, 64, 97-98). Anthony D'Addario, the Director of Quest, and Dr. Smith both testified that such truncating of test results was not prohibited by PD 35 (TR 20, 23, 27, 41, 59, 60, and 63). In the definition for a substituted specimen contained in PD 35, which was effective at the time of the Grievant's test and termination, the creatinine level was referred to in whole numbers without a decimal place, as contrasted with the specific gravity range, which was shown to three decimal places (TR 63; JX 3, p. 28).

On July 28, 1999, (after the Grievant's termination but during the pendency of the grievance) SAMSHA issued Program Directive 37 (PD 37; TR 96-97). Although PD 37 incorporates the same

criteria as PD 35 for determining if a specimen is substituted, it contains the following comment regarding truncating of test results:

> **Comment:** Truncating a quantitative value has been acceptable with "≥", ">", and "<" decision points or cutoffs. However, truncating a quantitative value is not acceptable with "≤" decision points or cutoffs. In "≤" scenarios, truncating would change the result from acceptable to unacceptable (e.g., truncating a . . . creatinine of 5.4 mg/dL to 5 mg/dL). Values from tests for creatinine (≤5 mg/dL) . . . should contain one significant decimal place more than that specified in the stated decision point. . . . (UX 4, at page 3)

Shortly before the hearing in this matter, the Union requested and the Employer agreed to have the split of the Grievant's February 4 sample tested in accord with PD 37, without truncating the results. Pursuant to DOT regulations, the right to a split sample is withdrawn when a specimen is deemed to be substituted, but an employer may nevertheless continue to offer the right to test the split (TR 44-45). However, on December 2, 1999, Quest advised the Parties that it had discarded both the original specimen and the split (EX 7; TR 62, 68). Testing laboratories are normally required to maintain the original specimen and the split for one year (TR 32).

Although the Grievant learned of the medical opinion that only a seriously malfunctioning kidney would produce a specimen with a creatinine level as low as 5 mg/dL, he did not seek medical treatment. He explained at the hearing that he did not have medical insurance or sufficient funds to pay for an examination. The Grievant admitted, however, that he had obtained outside employment as well as medical coverage prior to the arbitration hearing. (TR 81-83)

POSITIONS OF THE PARTIES

The Employer:

» The negotiated agreement between the Parties permits the Employer to terminate employees who tamper with or alter their drug test specimens. The Grievant's specimen clearly fell within the definition of a substituted specimen. Accordingly, the Employer had just cause to terminate his employment.

» Expert testimony establishes that it is highly unlikely that the Grievant could naturally produce such a specimen unless he was in serious kidney failure. The Union did not present any medical evidence that the Grievant had a serious health condition, nor did it produce any reliable scientific evidence that the specimen was not altered.

» At the time of the Grievant's test, it was appropriate and consistent with the federal guidelines for laboratories to truncate creatinine levels. Laboratories were not required to report creatinine levels with one decimal place until July, 1999, when PD 37 was adopted. That criteria did not apply at the time of the Grievant's test and it should not be applied retroactively.

» The Grievant's claim that he did not tamper with his specimen is suspect. Nothing in his described behavior that morning, including the consumption of water, explains the results. In previous random tests his creatinine levels were within the normal range. He also admitted that, on those other occasions when he was tested, he probably followed the same routine prior to giving the specimens.

» The Grievant's failure to seek medical treatment upon learning that only a seriously malfunctioning kidney would produce a creatinine level of 5 mg/dL establishes that he knew he had tampered with the specimen.

» The scientific evidence relied on by the Union fails to establish that the Grievant's test results can be explained by his consumption of water prior to the test. The study relied upon by the Union's expert supports, rather than refutes, the conclusion that he provided a substituted specimen.

» The evidence establishes that the Employer did not violate the Agreement when it terminated the Grievant. The grievance should be denied in its entirety.

The Union:

» Termination of the Grievant's employment was appropriate if, and only if, the Employer can establish through a preponderance of the evidence that he willfully tampered with or altered his February 4th urine specimen. The Employer has failed to meet that burden.

» The Grievant had no incentive to tamper with his urine sample. He had not tested positive previously, and would not have been subject to termination for a first positive test.

» The Grievant had no opportunity to add fluid to his urine sample. Nothing unusual occurred in the collection procedure. He had no access to fluids in the testing area. His urine specimen was within the normal temperature range. The only possible method of adding a body-temperature fluid would be to store fluid and a heating element on his person. That is a highly unlikely scenario, which the Grievant plausibly denied even knowing about.

» Scientific evidence establishes that there may be alternate explanations for creatinine levels as low as 5 mg/dL.

» The laboratory results are inherently flawed because the creatinine result was truncated. As indicated in PD 37, truncating is inappropriate for a less-than-or-equal-to cutoff. Because Quest improperly discarded the original and split samples taken on February 4, the specimen could not be re-tested to obtained non-truncated results.

» The negotiated agreement permits the Employer to terminate an employee if a specimen has been altered or tampered with, not simply where a specimen is reported by a laboratory as substituted. Accepted concepts of just cause require that the Employer take into account other factors, such as those referred to above.

» The Employer has shown only that Quest's truncated reporting showed very dilute urine. In and of itself, very dilute urine is not an offense, let alone one justifying termination. Because the Employer has failed to establish that the Grievant altered or tampered with his specimen, there is no basis for any discipline. He should be reinstated with a make whole remedy.

DISCUSSION

The Employer bears the burden of proving that the Grievant engaged in the alleged misconduct and that the misconduct was sufficiently severe to constitute just cause for termination. A review of the record and the arguments of the Parties requires the conclusion that the Employer has failed to meet that burden.

The Employer's case rests on the conclusion that the Grievant's specimen was substituted, as defined in the federal mandatory guidelines. The test results were reported at the time as falling within the definition. However, all creatinine levels reported as 5 mg/dL were not necessarily equal to or less than 5 mg/dL because some results higher than 5.0 were truncated to 5. PD 37 clearly states that such truncating is "not acceptable" for a quantitative value with less than or equal to cutoffs, because it can change the result. (UX 4) This important clarification of how the DOT standard for creatinine is to be measured and reported cannot be ignored by the Board simply because it was issued after the termination.

It is significant that PD 37 does not set forth a new or different level for creatinine for purposes of determining when a specimen is substituted. Rather, PD 37 corrects a misapplication of the standard articulated in PD 35. Treating creatinine levels of 5.1 to 5.5 as less than or equal to 5 is not mathematically correct, and such truncating causes test results to be mischaracterized as substituted when they fall into the category of dilute.

This case presents an usual scenario because Quest acted in accordance with accepted reporting practices at the time, and the Employer acted to impose termination relying in good faith upon the information reported to it in the then customary manner. Nonetheless, the manner in which the Grievant's specimen was reported raises the possibility that the Grievant's result for creatinine was not a 5.0 mg/dL but exceeded that level and was truncated. If the result was truncated, it would not constitute a substituted specimen, as defined in PD 35 and clarified in PD 37.

While Quest and the Employer did not have the benefit of the information in PD 37 to guide them at the time, the Board has the benefit of that information for purposes of determining whether the Grievant's specimen has been proven in this case to be substituted under applicable federal standards. It would be illogical and artificial to act as though that guidance did not exist. If it were found during the pendency of a grievance that the laboratory's equipment was improperly calibrated, calling into question the reliability of the test results forming the grounds for termination, it would be unjust to ignore that information simply because it came to light after the termination. This situation is analogous.

The federal authorities have stated that the method used in reporting the Grievant's creatinine levels is "unacceptable." This information has come to light before a final and binding decision has been issued in a pending grievance protesting a termination. Such potentially exculpatory information

is relevant and appropriate for the Board to consider in assessing whether the Employer has proven that the Grievant, in fact, provided a substituted urine specimen as defined in the applicable federal guidelines.

As the record stands, we do not know if the Grievant did so. Quest lost the original specimen and split, so they cannot be retested and reported without truncating, in a manner consistent with PD 37. The loss of the specimen unfortunately deprives the parties of the opportunity to verify the results. Because the Employer bears the burden of proof, the Grievant must be given the benefit of the unresolved doubt concerning the status of his specimen.

A *prima facie* case of willful tampering or altering of a test specimen may be proven based upon an otherwise reliable test result meeting the definition of "substituted" under the mandatory federal guidelines. However, in this case, there is substantial question whether that definition was, in fact, met. The Grievant's specimen may have been "dilute" and improperly classified as substituted due to the practice of truncating, now deemed unacceptable by PD 37. Because the record fails to prove by a preponderance of the evidence that the Grievant's specimen met the definition of substituted urine, just cause for his termination is lacking and the Grievant is entitled to reinstatement.

The remaining question is whether the Employer is liable for backpay and benefits for the entire period he was off work. The Employer reasonably relied upon the guidance available at the time when it terminated the Grievant. It was not until the issuance of PD 37 that there was reasonable cause to question the status of the Grievant's test results. In these circumstances, the Board finds that it would be inappropriate to hold the Employer responsible for back pay and benefits prior to the issuance of that document.

For all the above reasons, the following decision is rendered:

DECISION

The Grievant, F , was not disciplined for just cause. The discharge shall be removed from his record, and Mr. F . shall forthwith be reinstated to his former position, subject to any requirements applicable to a "dilute" specimen test result. He is entitled to receive back pay from and after the issuance of PD 37 on July 29, 1999 until his return to work, or refusal of a good faith offer of reinstatement, minus outside earnings. He shall receive benefits for the same time period, payable in the amounts and manner prescribed by the Labor Agreement.

Barbara Chvany — Concur / Dissent — June 20, 2000 — Date

Margaret Short — Concur / Dissent — 8/1/00 — Date

Doug Veader — Concur / Dissent — 8/1/00 — Date

Robert Choate — Concur / ~~Dissent~~ — July 17, 2000 — Date

Wayne Greer — Concur / ~~Dissent~~ — July 21, 2000 — Date