A MATTER IN ARBITRATION

In a Matter Between:		
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1245	Grievance:	Discharge
(Union)	Hearing:	July 23, 2001
and	Award:	December 19, 2001
PACIFIC GAS AND ELECTRIC COMPANY	McKay Case No.	01-218
(Employer)	**Arb. Cases Nos. 249 and 250**	

DECISION AND AWARD

GERALD R. McKAY, NEUTRAL ARBITRATOR
SALIM TAMIMI, UNION ARBITRATOR
LULA THEARD-WASHINGTON, UNION ARBITRATOR
MARGARET SHORT, EMPLOYER ARBITRATOR
CAROL POUND, EMPLOYER ARBITRATOR

Appearances By:

Union: Tom Dalzell, Esq.
International Brotherhood of Electrical Workers, Local 1245
P.O. Box 4790
Walnut Creek, CA 94596

Employer: Stacy A. Campos, Esq.
Pacific Gas and Electric Company
Law Department
P.O. Box 7442
San Francisco, CA 94120

A MATTER IN ARBITRATION

In a Matter Between: INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1245 (Union) and PACIFIC GAS AND ELECTRIC COMPANY (Employer)	Grievance:	Discharge
	Hearing:	July 23, 2001
	Award:	December 19, 2001
	McKay Case No.	01-218

STATEMENT OF PROCEDURE

This matter arises out of the application and interpretation of a Collective Bargaining Agreement which exists between the above-identified Union and Employer.[1] Unable to resolve the dispute between themselves, the parties submitted it to a Panel of Arbitrators pursuant to the terms of the contract to hear and resolve the matter. A hearing was held in San Francisco, California on July 23, 2001. During the course of the proceedings, the parties had an opportunity to present evidence and to cross-examine the witnesses. At the conclusion of the hearing, the parties agreed to submit written briefs in argument of their respective positions. The Arbitrator received copies of those briefs on or about November 1, 2001. Having had an opportunity to review the record the Panel is prepared to issue its decision.

[1] Joint Exhibit #1

ISSUE

Were either Grievant Wi or Grievant W discharged for just cause? If not, what shall be the remedy?[2]

RELEVANT CONTRACT LANGUAGE

Letter of Agreement 90-86

"If the employee willfully tampers with the test specimen, the exempt supervisor will remove the individual from their work responsibility and the employee will be discharged."[3]

BACKGROUND

Grievant Wi began working for the Employer in August 1983 and was serving in the position of Gas Service Representative at the time of his discharge. Grievant W worked for the Employer at the time of his termination as a Field Person. Grievant Wi was terminated by the Employer on January 20, 2000 and Grievant W was terminated on February 1, 2000. Both employees had been required to submit urine samples under the Employer's Drug and Alcohol Testing Program. In both cases, the conclusion reached by the laboratory contracted to test the urine, Quest Diagnostics, was that both samples submitted by the two Grievants had been adulterated and, therefore, a test for the presence of illegal drugs could

---

[2] Joint Exhibit #2
[3] Joint Exhibit #3

not be determined. As a result of the conclusion that the two Grievants had adulterated their urine specimens, the Employer made a decision to terminate both Grievants. It is the position of the Union that the testing conducted by Quest Diagnostics violated the procedures specified by the Department of Health and Human Services (HSS) for determining the presence of adulteration. Because the testing was done improperly, according to the Union, the Grievants should be reinstated to their former positions with full back pay and benefits.

The parties introduced two advisory notices submitted to certified laboratories by the Department of Health and Human Services advising the laboratories on expected testing procedures.[4] Notice PD-35 issued by the HHS on September 28, 1998 states in relevant part relating to adulteration:

> "A laboratory may determine for each specimen (i.e., from either a single specimen collection or the primary specimen (Bottle A) from a split specimen collection) the nitrite concentration creatinine concentration, specific gravity and pH. These tests shall follow scientifically suitable methods and produce results which are accurately quantified."[5]

On July 28, 1999, HHS issued PD-37 to provide further guidance with respect to, among other things, the question of adulterating urine specimens. In this particular directive, the laboratories are given the following advice by HHS for adulterated specimens:

> "3. For adulterated specimens, concerning pH and nitrites, at a minimum, two procedures must be performed for pH and nitrites. One procedure must be quantitative and utilized the specified cut off. The second procedure may be qualitative, must be at least as sensitive as the quantitative procedure, and must be performed on a separate aliquot.
>
> 4. For adulterant analytes without a specified cut off (e.g., glutaraldehyde, bleach, surfactant), at least one procedure must be performed on two separate aliquots."

---

[4] Union Exhibit #1 and Employer Exhibit #4

[5] Union Exhibit #1

It is the position of the Union that the testing, which was performed by Quest Diagnostics on the two samples submitted by the two Grievants failed to meet the requirements specified by HHS. It is the position of the Union that the testing, which was done, involved the same test performed on two separate aliquots rather than two different tests performed on the aliquots. It is the position of the Union that because the substance nitrite was involved in the adulteration with respect to both Grievants, a screening test followed by a confirmation test different in character from the first test should have been performed. Having failed to follow the proper procedures, the Union asserts that the tests must be disregarded and that the Grievants must be reinstated.

Mr. Anthony D'Addario testified that he is a Toxicologist employed by Quest Diagnostics Laboratory located in San Diego, California. In his position as Technical Director he stated:

> "I am responsible for all technical and administrative aspects associated with the operation of a forensic drug testing laboratory, which is certified under the SAMHSA guidelines.
>
> So there are a full gamut of duties ranging from hiring and firing authority to actually certifying results, and testifying, etc., and representing the laboratory."[6]

Dr. D'Addario testified that he has a Ph.D. with a Major in Chemistry from Case Institute of Technology, part of Case Western Reserve University in Cleveland, Ohio. In addition, he is certified as a diplomate of the American Board of Forensic Toxicology, as a diplomate of the American Board of Toxicology, and also by the American Board of Bioanalysis as a high-complexity Clinical laboratory director. He is also licensed by numerous states, including New York, Florida, Connecticut, Tennessee, Oklahoma and Maryland as a Laboratory Director.

---

[6] Transcript page 15

Dr. D'Addario testified that when a specimen arrives at the laboratory, an initial test to determine adulterants is performed. The initial test he described as a colorimetric test. If the colorimetric test indicates that adulterates are present in the urine sample, Dr. D'Addario testified, a second test taken from a separate specimen of the urine samples submitted is performed to confirm the adulteration. He stated:

> "The specimen which would have tested positive on that initial test for adulterating agents would be repoured from the original specimen bottle and subjected to a second test, which uses the same analytical methodology as the first test, along with appropriate controls, to monitor the response, to ensure that your calibration, in effect, is correct."

The test performed, according Dr. D'Addario, is considered a quantitative test. He testified, "in essence, we are performing two quantitative tests on two different aliquots or portions of urine from the donor specimen."[7] According to Dr. D'Addario, the method followed by the laboratory has been used by the Environmental Protection Agency for over 20 years to determine the presence of nitrites in drinking water. In his opinion, Dr. D'Addario stated, the method his lab uses to determine the presence of adulterating nitrites "is a standard procedure used by all laboratories for the measurement -- well, when I say 'all laboratories,' I mean all laboratories that are monitoring compliance of drinking water with the EPA nitrite standards." When asked whether in his opinion the method of testing for adulterants complied with the directives in SAMHSA PD 37, he stated, "If it didn't, we would not be certified for nitrite analysis by the federal government."[8] He stated, "So we are fully in compliance with PD-37 and with the federal guidelines."[9] He went on to state, "In other words, we are using the gold standard methodology on both tests, and there's nothing in the federal guidelines that prevents that."[10]

---

[7] Transcript page 23
[8] Transcript page 24
[9] Transcript page 25
[10] Transcript page 25

The Union called as its expert Vina Spiehler who has a Ph.D. in Pharmacology and who is a board certified Forensic Toxicologist. She has testified in numerous cases as an expert witness concerning matters involving urine testing. She reviewed all of the materials submitted as its forensic package by Quest Diagnostics and concluded that the testing for adulterants done by Quest was insufficient and inadequate because it failed to "follow scientifically suitable methods and produce results which are accurately quantified."[11] Looking at the samples of both of the Grievants, it was Dr. Spiehler's opinion that the determination that the specimens had been adulterated, "was not confirmed in a forensic sense."[12] When asked why it was not confirmed in a forensic sense, Dr. Spiehler stated, "Because they repeated the test, the same test, just on a fresh aliquot, but it wasn't based on a different chemical or physical principle."[13] Dr. Spiehler went on to explain that the reason it was not appropriate to use the same test twice was "because they're not based on different chemical and physical properties. They're both the same chemical reaction. And so they'd both be subject to the same chemical problems or interferences if something came up and caused the test to go wrong. It would do the same in both of them."[14] According to Dr. Spiehler, there are tests available which are different in character and could be used to test for nitrites to establish a forensically sound result.

Dr. Spiehler testified that part of her job duties involve inspecting laboratories to certify them as SAMHSA approved laboratories. When she was asked whether she was aware of any lab which had been decertified by the federal government for using the tests which Quest used to determine adulterants, she stated, "No, I don't." She went on to state: "I think all labs use some form of the Griess reaction for the screening procedure for testing for nitrites, if they test for

---

[11] Union Exhibit #1
[12] Transcript page 95
[13] Transcript page 96
[14] Transcript page 97

nitrites."[15] When she was asked specifically, "In your view, the way that Quest tests the samples is against the federal regulations? Would they lose their federal certification?" She responded, "It's not against the regulations, but it doesn't carry them out to the degree that would be forensically sound."[16] She went on to state that in her opinion the violation of the procedures involved is SAMHSA PD-35 and not SAMHSA PD-37. The reason, Dr. Spiehler stated, that the Quest procedure for testing for adulterants violates PD-35 relates to the admonition in the cover letter "where it says it must be forensically sound." The conclusion reached by the testing done by Quest, in Dr. Spiehler's opinion, is not forensically sound. Dr. Spiehler acknowledged that the Quest corporate system operated probably 50% of the laboratories performing testing in the United States.[17]

In response to Dr. Spiehler's testimony, Dr. D'Addario stated that the dipstick used which is Uristix 4 indicates the presence of nitrite in a specimen. It does not tell how much nitrite is in the specimen. He went on to state:

> " . . . the specific items that were noted by Dr. Spiehler do not interfere in the color that we use, or the absorption maxima that we use for deterring the specific dye that we're looking at. We measure at 546 nanometers. And those other substances don't absorb at that wavelength."[18]

Dr. D'Addario continued his testimony explaining how the laboratory determines quantitatively the level of nitrites in a sample. He concluded by saying, "So once again, we look at sensitivity and specificity from the laboratorian perspective rather than from a statistical basis, and we show what our procedure can determine." He stated further, "if the methods were deficient, it would

---

[15] Transcript page 113
[16] Transcript page 114
[17] Transcript page 129
[18] Transcript page 136

be so noted in our inspection reports." The methods his laboratory uses, according to Dr. D'Addario, are scientifically accepted.

David Smith testified that he is a physician with a specialty in addiction medicine and clinical toxicology. He is the Director of the Haight-Ashbury Free Clinics in San Francisco. He is a certified Medical Review Officer and has acted in that capacity for PG&E for about 10 years. He described the problems which have arisen with individuals who adulterate their urine samples to avoid being detected positive for a particular drug. He discussed the various commercial products which are sold to the public for the purpose of adulterating urine tests. The problem is so severe that it has reached the point where for every positive drug test there is one adulterated test. The cut-off level for nitrites is 500. If the laboratory determines that a test has been adulterated, meaning that the nitrite level is above 500, the MRO has no flexibility under the federal program to provide the employee with treatment or for the MRO to conclude that there is some "alternative medical explanation" for the phenomenon. An individual suffering from a urinary tract infection might reach a nitrite level of 153. A level of 500 could not be explained by any normal process. Dr. Smith testified:

> "In other words, there is no normal process that can give you nitrites at this level.
>
> So they give a margin of two to three times the -- you know, what could happen for an alternative medical explanation, like a urinary tract infection."

Dr. Smith was then asked whether the process used by Quest as explained by Dr. D'Addario is a forensically valid process for determining adulterated sample. Dr. Smith stated, "In my opinion, it is. They're a certified lab. They're a certified scientist. Based on our training, this is a valid adulterant testing method." Dr. Smith went on to state:

> "But again, I am not a laboratory toxicologist, and I'm a certifying scientist. That would be a conflict of interest.

A certifying scientist can't be an MRO; and an MRO can't be a certifying scientist."

Both of the Grievants testified that they did not adulterate the urine samples they provided on the day they were tested. Mr. W was asked if he put nitrites or any thing else in his urine and, stated, no.[19] He acknowledged on cross-examination that when he was called for the unscheduled drug test that he was surprised by the request.[20] Grievant Wi testified that he did not put nitrites or any other adulterant in his urine.[21] The parties stipulated that on the day Mr. Wi was tested, there were other individuals tested and none of the urine provided by those individuals was determined to be adulterated.[22]

POSITION OF THE PARTIES

EMPLOYER

The Employer argued that it had just case to terminate the Grievants' employment. Pursuant to the negotiated agreement between the parties, the Employer can discharge an employee if their urine specimen is certified as adulterated. According to the Employer, the overwhelming evidence demonstrates that the Grievants independently added a substance to their urine specimen in an attempt to mask their drug use. According to the Employer, the Grievants did this in an attempt to beat their drug test. Because the Grievants' urine specimens were adulterated, the Employer chose to terminate the employees pursuant to the negotiated agreement.

---

[19] Transcript page 131
[20] Transcript page 132
[21] Transcript page 133
[22] Transcript page 134

The Employer argued that the specimens submitted by the Grievants were tested in accordance with federal guidelines. The Union has attempted to attack the scientific validity of the testing procedures for determining the presence of adulterants. The evidence produced by the Employer demonstrates that Quest's testing procedure is scientifically valid and is in accordance with federally mandated drug testing rules. The Union contends that SAMHSA's PD-37 requires federally certified laboratories to perform a qualitative test on the second aliquot to confirm the presence of adulterating agents. The Union's argument is contrary to the plain language of PD-37. Both Dr. D'Addario and Dr. Smith, experienced professionals in the field of federally mandated drug testing, confirmed that the process Quest uses to test urine specimens for the presence of adulterants is scientifically sound. Moreover, it has been repeatedly been approved by SAMHSA during the certification it performs of laboratories performing analysis of urine specimens collected pursuant to federal law. Dr. Spiehler's objections to the Quest process of testing for adulterants is based on a statistical analysis which she downloaded form the Internet. Dr. Spiehler's statistical analysis is not grounds for ignoring the test results for the Grievants' urine specimens. The testing method used by Quest is entirely consistent with PD-37 and has been repeatedly approved by SAMHSA inspectors as forensically sound. Two tests on two aliquots confirmed that the Grievants' specimens contained adulterants. For all these reasons, the Employer asked that the grievances be denied.

UNION

The Union stated that the resolution of the present grievance is not based on disputed facts. The undisputed facts are the two Grievants, who have no incentive to adulterate their urine denied that they added adulterants to their urine during the test. The laboratory reported the

samples provided by the Grievants as positive for nitrites and, in doing so, failed to follow government guidelines for nitrite testing. The laboratory that PG&E selected after it fired Quest performs the confirmation methodology required by the DOT guidelines. The application of Bayes Theorem suggests that the chances of the unconfirmed positive test results actually being positive are remote at best. The fact that Quest did not properly confirm the presence of nitrites in the Grievants' urine, coupled with the application of Bayes Theorem should lead convincingly to the conclusion that the terminations were not for just cause.

The Union argued that there is very little difference between the present case and a case recently decided by Neutral Chairperson Barbara Chvany. In that case, it was not clear what the laboratory had done, but it was clear that the laboratory had truncated the results. Here, it is clear what the laboratory did and it is clear that the laboratory's methodology does not conform with pre-existing government guidelines. Arbitrator Chvany concluded in Arbitration Case 238, "in this case, there is substantial question whether that definition was, in fact, met." Because Quest could not state whether it had in fact truncated the test results, Arbitrator Chvany concluded that there was substantial doubt and reinstated the grievant. In the present case, with the evidence in the record concerning the Bayes Theorem, there is an increase in the doubt concerning the Quest results showing adulterants. The Union noted that after losing the decision before Arbitrator Chvany, PG&E moved its drug testing to another laboratory away from Quest. The Union concluded that because the test done by Quest was done improperly, there was not just cause for the termination of the Grievants and they should be reinstated with full back pay and benefits.

DISCUSSION

The only issue before the Panel of Arbitrators is whether or not the testing of the urine samples done by Quest was done pursuant to the terms of federal regulations or did not meet the federal regulations. If the testing met federal regulations, the result is clear that the two Grievants must be terminated for adulterating their urine samples. If the testing did not meet federal guidelines, then the test may not be used and the Employer has no other evidence to establish that the Grievants adulterated their samples and the Grievants must be reinstated with full back pay. The Employer presented a prima facie case that the urine supplied by the two Grievants was adulterated through the evidence provided by Quest Diagnostic Laboratories. The burden, at this point, shifts to the Union to establish that the testing performed by Quest was done improperly and in violation of federal guidelines.

The Union's evidence to establish that the drug testing procedures used by Quest violated federal guidelines rested almost entirely on Dr. Spiehler's testimony concerning the forensically sound nature of the testing. In its argument, the Union asserted that the Quest testing violated SAMHSA PD-37. However, Dr. Spiehler's conclusion was that the testing did not violate PD-37 but violated PD-35. The reason it violated PD-35, according to Dr. Spiehler, is because in her opinion the testing was not "forensically sound."[23] The difficulty, of course, with Dr. Spiehler's conclusion is that she was not able to identify any single laboratory that had lost its federal certification for engaging in adulterate testing in the same manner used by Quest. Dr. Spiehler acknowledged that 50% of the testing market in the United States is controlled by the Quest corporate structure. Dr. Spiehler testified that she participates in the certification process of

[23] Transcript page 114 and Transcript page 120

laboratories and could not identify a single laboratory that lost its certification because of nitrite testing similar to that used by Quest.

Both Dr. Smith and Dr. D'Addario, who are also experts in drug testing, testified that in their opinion, the process for testing nitrites used by Quest was scientifically sound. The Arbitrators on the Panel, of course, are not experts in the field of forensic drug testing or laboratory procedures for drug testing. The Panel is required to rely on the expertise of the witnesses provided by the parties to answer the questions concerning drug testing requirements. At the present time, the Panel has before it the testimony of three experts. Two of the experts agree that the testing done by Quest was done properly and conforms with the federal regulations reflected in PD-35 and PD-37. One of the experts testified that it did not conform with those requirements because, in her opinion, it was not forensically sound and there was a statistical possibility that an error could have been made using the same test twice. Unfortunately, that particular witness was not able to point to any laboratory which had lost its certification for using the testing procedures which Dr. D'Addario and Dr. Smith claim to be scientifically sound. Under these circumstances, the Union simply has failed to meet its burden to establish by a preponderance of the evidenced that Quest did not use the proper testing procedure for determining adulterants in urine.

It is the Panel of Arbitrators' observations that Dr. Spiehler's testimony goes to the issue of whether a better way of testing for adulterants could be achieved by using two different tests on the adulterants. It is quite likely based on what Dr. Spiehler said that the results would be more accurate and meet the "beyond a reasonable doubt" test if two different tests were used in determining the presence of adulterants. However, the issue before the Panel is not whether better results could be achieved in testing for adulterants, but it is instead whether the test being used by Quest violated federal procedures. There is no evidence, except for the opinion of

Dr. Spiehler, that the testing procedure used by Quest violates federal procedures. Dr. Spiehler's opinion, on this matter, is about equal to the opinion of Dr. D'Addario. Because those two opinions have about the same amount of expert weight, the Union must lose since it has the burden of proof to establish that the testing violated federal guidelines.

In its brief, the Union asserted that one of the uncontested facts involved "the Grievants, who had no incentive to adulterate their urine samples, denied doing so." The fact that the Grievants denied adulterating their urine samples, of course, does not establish that they had no incentive to do so. Any employee who has a fear of testing positive for drugs during a drug test certainly has an incentive to adulterate the sample if doing so would result in a negative drug test. There is no evidence in the record, at all, that the Grievants had no incentive for adulterating their samples. The Panel would agree that adulterating urine samples under the Employer's drug testing policy is foolish. The Drug Program provides employees with many opportunities to undergo rehabilitation and retain their employment. Why an employee would risk losing one's job by adulterating urine makes little sense. However, the fact that adulterating samples makes little sense does not mean that employees will not attempt adulteration to achieve a negative drug test result. Dr. Smith indicated in his testimony that for every positive drug test, there is another employee who has adulterated his urine sample. He indicated that if the statistics apply in the case of PG&E, they would indicate that for every person who tests positive for drugs, there is another person attempting to adulterate their urine sample. This evidence, in the Panel's opinion, establishes that there are many foolish employees.

It also establishes that employees apparently believe that there is a benefit in attempting to adulterate their urine samples to assure they test negative.

It is not appropriate for the Panel of Arbitrators to conclude that because the Grievants said they did not adulterate their urine that in fact they did not do it. It is not appropriate for the Medical Review Officer, according to Dr. Smith, to make this type of conclusion. If the drug test comes back positive, according to Dr. Smith, he has no choice in the matter but to confirm that the urine was adulterated. The Panel is in a similar position in this respect to Dr. Smith. Assuming the drug test showing an adulterated urine sample is accurate, the decision to terminate the employees is for just cause according to the parties' negotiated agreement. It would be inappropriate and beyond the scope of the authority of the Panel to alter the terms of the agreement by concluding no just cause existed. The only function of the Panel, in the present dispute, is to determine whether the testing done is appropriate and meets the federal regulations. The Panel concluded that the Union failed to prove the testing does not meet federal regulations and, therefore, the Employer had just cause to terminate the Grievants for adulterating their urine samples.

AWARD

The Employer had just cause to terminate the Grievants. The two grievances are, therefore, denied.

IT IS SO ORDERED.

Dated: 12-20-01

Gerald R. McKay, Arbitrator

Dated: 1-2-02

Salim A-Tamimi Dissent

Salim Tamimi, Union Arbitrator

Dated: 1-8-02

Lula Heard-Washington "Dissent"

Lula Theard-Washington, Union Arbitrator

Dated: 1/2/02

Margaret Short Concur

Margaret Short, Employer Arbitrator

Dated: 1/3/02

Carol Pound Concur

Carol Pound, Employer Arbitrator