ARBITRATION
OPINION & AWARD

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245,

Union,

and

PACIFIC GAS AND ELECTRIC,

Employer

Re: Arbitration Case No. 258
Termination

ARBITRATION MEMBERS

Kenneth N. Silbert	Neutral Arbitrator
Lula Theard-Washington	Union Panel Member
Salim Tamimi	Union Panel Member
Margaret Short	Employer Panel Member
Jeff Wilding	Employer Panel Member

APPEARANCES

On Behalf of the Union:

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On Behalf of the Employer:

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INTRODUCTION

The Parties mutually selected the Neutral Arbitrator pursuant to the terms of a collective bargaining agreement (JX 1). The prior steps of the grievance procedure were complied with or waived and the matter is properly in arbitration. At a hearing conducted on November 20, 2002, in San Francisco, California, the Parties had a full opportunity to examine and cross-examine witnesses and to present other evidence and argument in support of their positions.[1] The matter was submitted for decision upon the receipt of post-hearing briefs.

PG&E hired Grievant M , on July 30, 1979, and terminated his employment effective April 5, 2002. The termination was based solely upon M 's alleged failure to complete a residential drug treatment program (TR 36). The Union filed a timely grievance protesting the termination.

ISSUE

Whether there was just cause for the termination of M ? If not, what is the appropriate remedy? (JX 4)

[1] The official transcript is cited as (TR __); Joint Exhibits, Employer Exhibits, and Union Exhibits are cited as (JX __), (EX __) and (UX __).

RELEVANT PROVISIONS OF THE AGREEMENT

The Collective Bargaining Agreement:

TITLE 7 Management of Company

> 7.1 The management of the Company and its business and the direction of its working forces are vested exclusively in the 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; . . .

Letter Agreement 95-31:

> CONSEQUENCES TO DRIVERS ENGAGING IN CONDUCT PROHIBITED BY THE FEDERAL HIGHWAY ADMINISTRATION'S DRUG USE AND ALCOHOL MISUSE RULES
>
> If they [employees] fail to follow the treatment as prescribed by the Medical Review Officer / Substance Abuse Professional they will be considered to have a second positive test and they will be discharged.

SUMMARY OF THE FACTS

In April, 2001, M tested positive on a random drug test. Prior to returning to work, he was required to complete a substance abuse treatment program. On July 5, 2001, M signed an "Agreement for Return to Work After A DOT Positive Drug and Alcohol Screen," that contains the following relevant provisions (JX 2, page 14):

> I agree to fully participate in and complete any and all rehabilitation and after-care programs prescribed by the MRO/SAP and promptly cooperate in the timely compliance with all his instructions.
>
> I further agree to fully comply with the terms and conditions of any prescribed rehabilitation program(s) whether or not I have executed a written contract with the provider.

* * *

I understand that failure to fully meet any of the terms set forth above with [sic] result in disciplinary action, up to and including discharge.

Substance Abuse Professional (SAP) Michael Watson was assigned to M 's case. The SAPs meet monthly with the PG&E's third party Medical Review Officer (MRO), Dr. David Smith, and Employee Assistance Program (EAP) Supervisor Vanita Kunert to review positive drug tests and treatment plans for employees who have tested positive. In prescribing treatment plans, the SAP's follow the placement criteria of the American Society of Addiction Medicine. These criteria include the employee's home life, current and past drug history, treatment and relapse history, psychiatric history, impulse control, and willingness to accept a 12 step program. Watson, Smith and Kunert agreed that, because of M 's prior drug use history[2] and inability to control his impulses, he should be placed in a Level III.5 Clinically Managed High-Intensity Residential Services program. The hallmark of such highly structured programs is their numerous rules that all residents must follow or face discharge from the program. Strict compliance with such rules is designed to keep the drug related impulses of the residents in check.

Watson directed M to enter the Henry Ohlhoff Men's Residential Program - a highly structured 30 day residential program. Ohlhoff residents are expected to take personal responsibility for their behavior, and to accept the consequences associated with failing to follow rules. They receive a 39 page "Customs and Courtesies Rulebook" with detailed expectations regarding daily life activities.

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[2] M previously had participated in two substance abuse programs under PG&E's EAP.

M commenced the Ohlhoff treatment program in early February, 2002.[3] He was required to attend relapse prevention meetings, including one on Wednesday evening, March 27. On March 26, he observed the following entry in the log book (JX 2, page 19):

> **REMINDER**: We will not have family group tomorrow night due to the fact that it is Passover. All men that are required to attend family group must attend an alon meeting. If you are mandated to go to relapse prevention Wednesday night, you can go to an ALANON mtg later in the week - just make sure it's documented (signed) & give it back to me. If you don't have to go to relapse prevention you must go to Alanon on Wednesday night!

M testified that he found the entry confusing and interpreted it to mean that the relapse prevention meeting for Wednesday night had been cancelled and that he was required to attend an Alanon meeting later in the week, instead. Beth Jaeger-Skigan, the author of the entry, was working on the log book, when M read the entry. He asked her why he had to go to an Alanon meeting. She told him that she was requiring him to go to the Alanon meeting. He told her he did not know where they were, and she told him there was a list of Alanon meetings posted in the hall (TR 79-81). Jaeger-Skigan testified at the arbitration hearing that she did not recall having any conversations with M regarding his obligations for March 27 (TR 95). However, M 's testimony regarding his conversation with her is corroborated indirectly by the testimony of Watson, who had spoken with Ohlhoff Program Director Ken Olsen about the incident. Olsen told Watson that he had witnessed a communication between M and "the counselor, where it seems that M did not want to go to the Alanon meeting" (TR 60). The reasonable inference is that the counselor referred to by Olsen was Jaeger-Skigan.

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[3] Unless otherwise noted, all dates hereafter refer to 2002.

At the arbitration hearing, Jaeger-Skigan gave the following explanation for the entry: On Wednesday, March 27, there normally would have been both a family group meeting and a relapse prevention meeting, some residents would attend both. She cancelled the family meeting because of Passover. She wanted the participants in the family meeting to attend an Alanon meeting, instead. She knew that there was an Alanon meeting off-site, on March 27, and thought that if residents attended that off-site meeting, they would not be able to return to the facility in time to attend the relapse prevention meeting. The intent of her entry was to advise residents required to attend both the family group meeting and the relapse prevention meeting that they could make up the family group meeting by attending an Alanon meeting later in the week (TR 98-100). Given this explanation, the entry was not intended for M at all, because he was not required to participate in family group meetings and the cancellation of the family group meeting had no impact on him.

Instead of going to the relapse prevention meeting, on Wednesday, March 27, M went to Oakland to sign a return to work agreement with Watson, so that he could resume working at PG&E. He returned to Ohlhoff at about 10:30 p.m., and learned that he had been terminated from the Ohlhoff program for missing the relapse meeting that evening (TR 82-83).

On April 1, Olsen advised Watson that M had been discharged from the Ohlhoff program. Olsen told Watson that M was the only resident who missed the relapse prevention meeting on March 27. After reviewing the log book entry, Watson concluded that M had failed to comply with his prescribed treatment program. According to Watson, as an experienced participant in substance abuse programs, M should have sought advice from his fellow residents or the counselor if he was confused by the entry (TR 61-66). Watson reviewed his conclusions with Smith and Kunert, both of whom agreed that M had failed to comply with the

program and should be terminated. However, at the time they made this decision, Kunert had not seen the entry in question, and it is unclear whether Smith had seen it (TR 31, 54).

M successfully re-applied for admission to the Ohlhoff residential program. By letter dated June 7, Ohlhoff informed PG&E that Ohlhoff had determined not to discharge M from the program and had instead transferred him to the re-entry program (UX 1). On October 17, M successfully completed the six-month residential treatment program (UX 2).

OPINION

PG&E bears the burden of proving that [redacted] engaged in misconduct sufficiently severe to constitute just cause for the termination. The fact that M had signed a return to work agreement specifically requiring him to complete a prescribed substance abuse program does not vitiate the just cause requirement of the CBA. However, the negotiated substance abuse program, including Letter Agreement 95-31, and the practices of the Parties with respect to employees who fail to complete required substance abuse treatment programs, must be taken into account in assessing whether there was just cause for the termination.

PG&E takes the position that it is entitled to terminate employees who fail to comply with drug treatment programs after they test positive for drugs. PG&E argues in it's post-hearing brief that the Parties never have second guessed the decisions made by SAPs or the MRO, nor have they examined the facts surrounding a decision that an employee failed to comply with a prescribed substance abuse treatment program. Strict compliance with the terms of drug treatment programs is a hallmark of those programs. The programs are heavily structured, similar to a "boot camp," and non-compliance with rules that might seem "petty" to an outsider might be the "main rules" for the treatment program. SAPs impose such rules because residents need to learn to resist acting on their

high impulses to use drugs or alcohol and to teach the residents personal responsibility (TR 25). Further, PG&E argues that M should be held to that standard because the SAPs who reviewed his case unanimously agreed that he should be required to attend a highly structured program because of his previous involvement in treatment programs and his history of inability to control his impulses regarding drugs and/or alcohol.

The Union does not dispute PG&E's general contention that strict compliance with the requirements of drug treatment programs is expected. Nor does the Union dispute PG&E's contention that, normally, the judgments of SAP's in cases such as this should not be questioned. Rather, the Union argues that, even accepting those standards, there was not just cause for the termination because the entry relied on by M was clearly ambiguous and confusing, and he took appropriate steps to clarify the ambiguity.

The Panel recognizes the generally accepted standard in drug treatment programs that residents are required to comply strictly with all rules and regulations, even those that might appear to be petty or insignificant. Strict compliance with such rules is an important part of the therapy provided by such treatment programs. Excuses that might be accepted in other circumstances are not accepted in the treatment setting, precisely because residents are expected to forego excuses for strict compliance.

PG&E has established a *prima facie* case by showing that M failed to attend the relapse prevention meeting, on March 27, and that he was discharged from the program by Ohlhoff. Where, as here, the Union asks that the judgments of the SAPs and MRO be reviewed in arbitration, it has a heavy burden. It has met that burden in this case.

There is no doubt that the log entry is ambiguous, if not outright confusing. M 's interpretation that he was required to go to an Alanon meeting later in the week, instead of the Wednesday night relapse prevention meeting, was not unreasonable. Indeed, it is a meaning naturally derived from the awkward wording of the entry. PG&E recognizes the ambiguity and the possibility of interpreting the entry as M did:

> Q: [Mr. Dalzell] If you were a member of the relapse prevention Wednesday night meeting, what would you take [the entry] to mean?
>
> A: [Ms. Kunert] I would be confused by the note.
>
> Q: And you would perhaps ask Beth what you should do?
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> A: I would ask Beth. I would ask another resident. I would ask another counselor.
>
> Q: Okay. And if you asked Beth and Beth told you, "There's the list of the Alanon meetings, just go to one of those," what would you then do?
>
> A: I'd go to the Alanon meeting. . . . Let me just clarify one thing. If we just look at this [entry], it is confusing. It is ambiguous. So, whenever there's anything – when I've worked in treatment programs, we've always said that if there's something confusing, ask a counselor for clarification verbally.
>
> Q: Okay. Let's assume that Mr. M did ask Beth, and she pointed out the list of the Alanon meetings and said, "Pick one of them." You would then go to the Alanon meeting?
>
> * * *
>
> A: I would follow the instructions.
>
> * * *
>
> Q. "If you are mandated to go to relapse prevention, you can go to an Alanon meeting later in the week." Is that ambiguous, to you?
>
> A: No. (TR 33-35, cross-examination of Ms. Kunert)

Consistent with the standards articulated above, a mere ambiguity in an instruction is not sufficient to excuse non-compliance. Rather, the resident has an affirmative duty to seek to clarify the ambiguity. Otherwise, residents would be able to avoid their obligations too easily by relying on real or perceived ambiguities in instructions. But, as the Union points out, M did seek to clarify the ambiguity by speaking directly with Jaeger-Skigan. His conversation with her confirmed his interpretation of the entry, even though his interpretation was not correct.

Thinking that the note mandated him to attend an Alanon meeting instead of the relapse prevention meeting, M asked Jaeger-Skigan why he had to attend the Alanon meeting. Jaeger-Skigan, unaware that M was no longer in her family group, told him he had to attend the Alanon meeting. This "clarified" any doubt that M had, because it constituted direct advice by the author of the entry that he had to attend an Alanon meeting. The incorrect "clarification" was further confirmed when M complained that he did not know where the Alanon meetings were, and Jaeger-Skigan told him the locations of the meetings were posted in the hall. This comment, too, indicated to M that he was required to attend an Alanon meeting instead of the relapse prevention meeting.

Missing from their conversation was any reference to the fact that M was not in the family group. If M had prefaced his question by stating that he was not in the family group, or if Jaeger-Skigan had recalled that he was not in the family group, then Jaeger-Skigan likely would have told him the entry did not apply to him, at all. Instead, their conversation was based upon differing assumptions. M assumed the entry applied to everyone, and Jaeger-Skigan assumed that M was in the family group and that the entry did apply to him. As a result, M 's effort to clarify the ambiguity instead confirmed his incorrect interpretation of the entry.

In these unique circumstances, there was not just cause for M 's termination, even though Ohlhoff initially discharged him from its program. While strict adherence to the requirements of such programs is the norm, the record establishes that M acted reasonably in view of the ambiguous log entry and appropriately by seeking clarification from Jaeger-Skigan. His failure to attend the relapse prevention was not the result of any misconduct, negligence or inattention on his part. Accordingly, the Panel issues the following award.

AWARD

There was not just cause for the termination of M . As a remedy, PG&E shall reinstate M to his former position, forthwith, and shall make him whole for all lost wages and benefits less interim earnings, if any, payable in the amounts and manner prescribed by the CBA. The Panel retains jurisdiction with respect to disputes arising out of implementation of the remedy.

Neutral Arbitrator		June 10, 2003 Date
Union Panel Member	CONCUR / ~~DISSENT~~	June-13-03 Date
Union Panel Member	CONCUR / ~~DISSENT~~	June 13, 2003 Date
Employer Panel Member	~~CONCUR~~ / DISSENT	6/23/03 Date
Employer Panel Member	~~CONCUR~~ / DISSENT	6/25/03 Date