A MATTER IN ARBITRATION

In a Matter Between:	Grievance:	Termination
PACIFIC GAS AND ELECTRIC COMPANY		
(Employer)	Hearing:	December 5, 2003
and	Award:	April 27, 2004
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 1245	McKay Case No.	02-238
	Arbitration Case No. 264	
(Union)		

DECISION AND AWARD

GERALD R. McKAY, NEUTRAL ARBITRATOR
SALIM TAMIMI, UNION BOARD MEMBER
FRANK SAXSENMEIER, UNION BOARD MEMBER
MARGARET A. SHORT, EMPLOYER BOARD MEMBER
CAROL L. POUND, EMPLOYER BOARD MEMBER

Appearances By:

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

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

A MATTER IN ARBITRATION

In a Matter Between:	Grievance:	Termination
PACIFIC GAS AND ELECTRIC COMPANY		
(Employer)	Hearing:	December 5, 2003
and	Award:	April 27, 2004
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 1245	McKay Case No.	02-238
(Union)		

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 selected this Arbitrator to serve with the Panel of Arbitrators in accordance with the terms of the contract to hear and resolve the matter. A hearing was held in San Francisco, California on December 5, 2003. 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 the briefs from the parties on or before April 7, 2004. Having had an opportunity to review the record, the Arbitrator is prepared to issue his decision.

[1] Joint Exhibit #1

ISSUE

Did the Company have just cause to terminate the Grievant, R. ? If not, what is the appropriate remedy?[2]

RELEVANT CONTRACT LANGUAGE

TITLE 7. MANAGEMENT OF THE COMPANY

7.1 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 faculties, provided, however, that all of the foregoing shall be subject to the provisions of this Agreement, arbitration or Review Committee decisions, or letters of agreement, or memorandums of understanding clarifying or interpreting this Agreement.

102.2 GRIEVANCE SUBJECTS

Disputes involving the following enumerated subjects shall be determined by the grievance procedures established herein:

• • •

(b) Discharge, demotion, suspension or discipline of an individual employee.

BACKGROUND

The Employer is a public utility providing electrical and gas service in Northern California. The Grievant has worked for the Employer for 29 years, spending the last 27 years as

[2] Joint Exhibit #2

a Gas Service Representative with responsibilities for assisting customers directly in their homes with problems they may have with gas service. The Grievant was arrested and convicted of operating a house of prostitution. Initially, the Grievant was charged with two felony counts, but through the process of plea negotiation, he pled guilty to one misdemeanor but did so in a manner that allowed the Court to consider both felony charges in future circumstances. The Grievant was not incarcerated as a result of his conviction, although he had a number of responsibilities, including hours of public service. It is the position of the Employer that the Grievant's position as a Gas Representative, which brings him into regular contact with customers in their homes is inconsistent with the Grievant's conviction of running a house of prostitution. It is the position of the Union that the Grievant's conviction was to a misdemeanor, which the County and the Court considered so minor that the Grievant served no prison time at all. There is no evidence that the Grievant poses any threat to the public or that his fellow employees are unwilling to work with him as a result of the conviction. The activity for which the Grievant was convicted was not associated with his employment and the Employer was never publicly identified in the course of the Grievant's prosecution. For these reasons, the Union asked that the Grievant be reinstated with back pay and benefits.

The District Attorney in Marin County issued a Complaint against the Grievant alleging that he maintained a house of prostitution where he derived support and maintenance from the earnings of certain named individuals who worked as prostitutes.[3] According to the Complaint, the Grievant owned and operated Sausalito Massage located in Sausalito, California. He also maintained a website using the screen name Bandit, which posted reviews and pictures of the women who worked as prostitutes at the Sausalito Massage. The website showed pictures of the women and described their attributes in a manner designed to entice and encourage male

[3] Joint Exhibit # 3V

customers to use their services. For example, his website listed an individual called Heather and stated, "Classic pin-up girl. Beautiful, natural strawberry blonde with big blue eyes. 36DD-24-26. 24." The ad provided a picture of her and a telephone number indicating she could be contacted at Sausalito Massage.[4] Another of the available women at Sausalito Massage was listed as Layla. "Exotic Eurasian. Sweet and pretty, busty (36C) Eurasian with full sensual lips (a sultry pout and naughty smile) and passionate dark eyes, 22. Not at all shy .. . ." Both Count 1 and 2 in the Complaint were charged against the Grievant as felonies. Count 1 carried a mandatory prison sentence.

As a result of negotiations with the District Attorney's office, the Grievant, through his attorney, pled guilty to Count 2 as a felony.[5] Ultimately, at sentencing the Grievant was able, through his attorney, to persuade the Judge to allow him to plead guilty to Count 2 as a misdemeanor. However, the Grievant was required to sign a Harvey Waiver, which allowed the sentencing Judge to consider the felony pimping charge in Count 1. The Grievant was sentenced to 90 days in County Jail with a 60 days stay, pending the successful completion of 3 years of supervised probation. Ultimately, the Grievant did not serve the 30 days in County Jail, but did public service, as well as undergo counseling and pay a fine of $1,127. As part of the plea, the Grievant acknowledged under oath that he owned the Sausalito Massage, that he reviewed and posted reviews of women performing acts of prostitution at his business, maintaining a client list and photographs of the women who performed acts of prostitution at his business, advertising his business on various websites, and collecting $60 per client appointment.

Count 2 was initially charged as a felony in part because of the amount of time the Grievant had operated the facility and the sophistication with which it was run. In essence, the

---

[4] Employer Exhibit #8
[5] Joint Exhibit #3VI

Grievant was an efficient and experienced operator of a house of prostitution. He was not an individual who casually became involved in an accidental way with the prostitution business, He deliberately set up a massage parlor as a front for prostitution, recruited the prostitutes, advertised their services, and collected money for their work. As stated in Court 1, the Grievant was a pimp. As part of the investigation after the Grievant was terminated, the Grievant provided a letter dated July 27, 2003 in which he took exception with some of the statements and conclusions reached by the Employer. He referenced a letter dated May 16, 2003, which asserted that he had told supervisor Cindy Whitchurch that he had been arrested in Marin County on pimping and pandering charges. According to the Grievant, that was not true, he never told Cindy Whitchurch anything. He told Brian Affleck, another supervisor, that he was being sentenced for "conspiracy to commit a misdemeanor." The Grievant went on to state:

> "At the time I spoke to Brian Affleck, the pimping/pandering charge had already been dropped because it was unfounded. The charge was based on the lies of a fired worker trying to get revenge. I'm sure I need not remind PG&E that under the laws of this country one is presumed innocent until proven guilty. Also, I was never incarcerated."

The Grievant claimed that "I was not arrested then, or at any other time."[6] The Grievant claimed that he did plead guilty to a misdemeanor, but he was not aware of any written policy from the Employer that would permit the Employer to terminate him for pleading guilty to a misdemeanor.

During the arbitration hearing, the Grievant testified about the massage parlor, indicating that he had run the parlor for about 4 years. He asserted that it was a licensed business. He stated:

---

[6] Joint Exhibit #3XI

> "It was almost four years, at a different location, but it was at -- it was the same business. And it was a licensed business. It was a licensed massage place that -- I was never there when business was going on. I was there either to make repairs or collect money, basically, but when business was happening I wasn't at the location." [7]

The Grievant asserted that his former supervisor, Billy Dayers, knew he ran a massage parlor.[8] Also Roger Alaura, another Gas Service supervisor, knew the Grievant ran a massage parlor. Neither of them, nor anyone else in management, told him it was inappropriate for him to run a massage parlor. When asked whether they knew he was running a massage parlor, which provided prostitution services, the Grievant responded, "I can't remember, to be honest with you. Billy, I think did."[9] According to the Grievant, there has never been any publicity except discussions among PG&E supervisors about his arrest. At the present time, the Grievant claimed, his business of running a massage parlor has been dissolved. Part of the dissolution included abrogating a lease, which cost him $40,000.[10]

On cross-examination, the Grievant acknowledged that when he signed the plea agreement, he realized that he was pleading guilty to a felony. When he signed the agreement, there was no understanding that he could plead the felony to a misdemeanor. The Grievant claimed that the video cameras he had at the massage parlor did not work. He used them as a deterrent to keep his employees from "ripping him off." The Grievant stated that he was not aware that his supervisor Billy Dayers was terminated for misconduct. The Grievant acknowledged that his pleading to a misdemeanor was because he was running a house of prostitution.

---

[7] Transcript page 73 and 74
[8] Transcript page 74
[9] Transcript page 75 and 76
[10] Transcript page 79

Deputy District Attorney Paul Haakenson testified that he was involved in prosecuting the Grievant for operating a house of prostitution. He acknowledged that he allowed the Grievant to dismiss Count 1 on the condition that he sign a Harvey Waiver. He stated:

> "A Harvey waiver is based on a case, 'People v. Harvey.' I don't have the citation. But what it basically means is that the court may consider all of the facts and circumstances underlying the dismissed count in deciding what sentence is appropriate for the count to which the defendant pled guilty.
>
> So, although the defendant in any particular case may plead guilty to just a small portion of the big picture, the court is going to consider the big picture in deciding what sentence within the sentencing range on the guilty plea is appropriate."[11]

When asked why he charged the Grievant with a felony, he stated:

> "I charged this case as a felony because I thought it was a serious -- a serious case, and that it was, in the spectrum of conspiracy, and in the spectrum of the type of offense that Mr. R committed, it was certainly, in my mind, a case that deserved consideration for felony punishment, including the possibility of state prison, based on the length of time that Mr. R was involved in the illegal conduct and based upon the type of conduct that he was engaged in and the sophistication thereof."[12]

Deputy Haakenson testified that the Grievant's claim that he did not go to jail is not accurate. He stated:

> "I know he did go to jail as a -- he was remanded into the jail. I don't know how much time it takes for the sheriff's department to release a person who's going to serve their time on a work program.
>
> But I was present in court, I believe, on May the 21st, when he was remanded and brought through the -- where the in-custody subjects go from the courthouse to the jail."[13]

---

[11] Transcript page 32
[12] Transcript page 33
[13] Transcript page 45

POSITION OF THE PARTIES

EMPLOYER

The Employer argued that it has just cause to terminate the Grievant's employment. The admitted facts surrounding the Grievant's criminal conviction are incompatible with being a trustworthy public representative. As a public servant, PG&E has the responsibility of generating and maintaining customer confidence by ensuing that trustworthy PG&E employees enter their home. The Employer was rightfully concerned about the Grievant's trustworthiness following his criminal conviction for marking and operating a house of prostitution. Customers, especially women, and parents with young women in their household, would likely not anticipate that PG&E would allow a convicted pimp on probation into their home, totally unsupervised, to service their gas appliances with them. The Grievant breached the public trust when he chose to break the law over a period of four years and encourage others to do the same so he could increase his profit margin. The Employer's legitimate concern about the Grievant's trustworthiness was just cause for the Grievant's termination.

The Grievant's continued employment in a public contact position would subject the Employer to customer and public scrutiny. Citing a Decision by Arbitrator Herbert Blumer, the Employer stated he recognized, "unfavorable publicity, particularly to a Company which is a public utility, may constitute a significant harm." In that particular case, a Lineman was discharged after he had been arrested and convicted of having an unlawful gambling device in a tavern where he was working as a bartender. Under these circumstances, the Arbitrator concluded that the continued employment would subject the company to public scrutiny in a

harmful manner. There is little doubt that the Employer would be significantly harmed if it became general public knowledge that the Employer was knowingly allowing a Gas Representative who is a convicted pimp on probation to enter customer homes without a supervisor. Whether the public is fully aware of the Grievant's conviction or not, the conviction is a matter of public record. The Grievant's continued employment posed an undue litigation risk to the Employer. Citing a decision written by Arbitrator Koven, the Employer noted that he stated, "because of its widespread contact with the public, the Company is particularly sensitive to litigation." He went on to state:

> "Assume for the moment that the Company retained in a public contact position a person whom it had reasonable cause to believe might engage in immoral conduct but whose guilt beyond a reasonable doubt had not been established. If in the future the person actually engaged in such conduct, the Company would obviously be vulnerable to public criticism and to private litigation that might involve serious charges of gross negligence and punitive damages."

There is little doubt that the Grievant in this case presented a serious litigation risk to the Employer. The Employer could not afford to gamble on whether or not the Grievant would decide to restart his profitable criminal enterprise by soliciting potential employees, business partners, or customers while in their home.

The Employer stated that the Grievant's off duty criminal activity is a legitimate concern of the Employer. At the hearing, the Grievant testified that his criminal conviction was "no one else's business." He appears to believe that the Employer should allow Gas Service Representatives into customer homes regardless of the Representative's criminal history as long as the criminal conduct occurred outside of normal business hours. It is well settled that the Employer has the right to "protect itself against appreciable harm to its business that might arise

from secondary employment of its employees." In the Pre Review Committee Case 12670, the parties upheld the discharge of a provisional Electric Meter Systems Technician who was convicted of a felony involving lewd acts upon a child. The Meter Systems Technician had 16 years of service and no active discipline. The decision acknowledged the liability the Employer would face in retaining the Technician and the fact that it was not obligated to accommodate an employee in another position unless the employee had a disability that prevented him or her from performing the job. In the present case, the Employer has good reason to be concerned about the nature of the Grievant's criminal conviction. The Employer had a legitimate basis for terminating the Grievant for his off duty criminal conduct. Accordingly, the grievance should be denied. The Grievant's job was dealing with the public. He knowingly placed his job in jeopardy by choosing to engage in a criminal enterprise outside of work. The incompatibility between operating and maintaining a house of prostitution and engaging in unsupervised work in private residences is so obviously unacceptable that the Grievant should have known his criminal conviction could not be tolerated by the Employer. The Grievant appears to have no sense of how others perceive the crime of pimping, especially females. The Employer requested that the grievance be denied. If the Panel determines that the Grievant should be reinstated, it should be without back pay.

UNION

The Union argued that the arbitration precedent involving these parties succinctly summarizes the law on discipline for off duty activities. Citing specifically a Decision written by Adolph Koven, identified as Arbitration Case No. 44, Mr. Koven stated:

> "It is well established in arbitration that conduct away from the plant outside of working hours justifies discipline whenever the grievant's behavior has harmed the Company's reputation or product or where such conduct renders the employee

> unable to perform his duties or leads to a reluctance on the part of other employees to work with the grievant. It is also established that such factors as the nature of the grievant's job and the crime with which he is charged becomes relevant."

The Union cited these factors listed by Arbitrator Koven and concluded that the Grievant did not do any harm to the Employer and, therefore, should be reinstated. The Union asserted that there is no claim, let alone proof, that the behavior of the Grievant has harmed the Employer's reputation or product. There is no claim, let along proof, that his conduct rendered the Grievant unable to perform his duties. There is no claim, let alone proof, that the Grievant's guilty pleas led to reluctance on the part of other employees to work with the Grievant. The only possible relevant factor is the consideration of the nature of the Grievant's job and the crime to which he entered a guilty plea. The Union suggested that the Employer's current position it took in 1959 when it terminated a Lineman who was working as a bartender and was terminated when he was arrested and convicted of having a gambling device in the tavern where he worked. In that case, the employee was reinstated with back pay. In the present case, the Grievant plead guilty to a misdemeanor, which would never had seen the light of day had it not been for a prostitute who felt that the Grievant should have paid her full attorney's fees. As Ms. Short stated, the Employer has no policy with respect to the disciplinary consequences of being convicted for a misdemeanor. In the absence of a specific policy, the Grievant's guilty plea does not raise to the level of off duty misconduct justifying termination. Marin County treated the criminal proceedings against the Grievant with the severity that one would expect in a jaywalking case. The Grievant should be reinstated with full seniority and made whole for his contractual losses.

DISCUSSION

The circumstances of the present case remind the Arbitrator of a popular musical, which reappears from time to time. Adjusted for the present circumstances, the musical would most

appropriately be titled, The Best Little Whore House in Sausalito. We would be warned, of course, by Melvin P. Thorpe that:

> Isn't this the age of telling it like it is? Sausalito has a whorehouse in it. Lord have mercy on us all. I will expose the facts although it fills me with disgust. Please excuse the filthy dark details and cardinal lust. Dancing going on inside it. Don't you see they done gone wild and no one's denied it. Bodies close together and their legs are all rearranged. And the sheriff does not close it down. That's very strange. Acting all depraved and strange only nine miles from here. Oh, there's copulation going on and it must stop.

In response to these accusations, the Grievant, based on the tenor of his testimony would in all likelihood respond:

> Its just a little old bitty piss ant country place. Nothing much to see. No drinking allowed, we get a nice quiet crowd. Plain as it can be. It's just a piddley ant country place. Nothing too high toned. Just lots of good will and maybe one small mole. But there's nothing dirty going on.

In response to the website the Grievant ran advertising the women who worked for him, he would sing:

> "I don't have no married girls. They're not on the ball. They've got homes and husbands. They're not stable at all. They don't understand a single thing about a proper business date. Now, what's the point of opening up a store if you give the goods away."

When confronted with his activities, the Grievant responded in a manner quite similar to the Governor of Texas and presumably would say when asked about his massage parlor.

> "My fellow Sausalitians, I am proudly standing here to humbly say I assure you, and I mean it. Now, who says I don't speak out as plain as day. Fellow Sausalitians, I am for progress and the flag, long may it fly. I am a poor boy come to greatness, so it follows that I cannot tell a lie."

Then he would sing:

> "Ooh, I love to dance a little sidestep and now they see me, now they don't. I come and go. Ooh, I love to sweep around the sidestep and cut a swath and lead the people on."

When asked if he was going to take steps to do something about the massage parlor, the Grievant, like the Governor of Texas would respond:

> "My good friends, it behooves me to declare, I am for goodness and profit and for living clean and saying daily prayers, and now my good friends you can sleep now. I will continue to stand tall, you can trust me for I promise I will keep a watchful eye on ya all."

Both in the Union's argument and the Grievant's testimony, the Grievant sidestepped the activity in which he was engaged in Sausalito. As the Arbitrator has described through the verses of several popular songs, the Grievant was running a whorehouse. Put in terms more palatable, the Grievant ran a house of prostitution. The Grievant did so for four years. The Grievant solicited customers using a website where he showed pictures of his girls and described their assets with the clear purpose of enticing lusty males to take advantage of their features. There is absolutely no question or any doubt that what the Grievant was doing was operating a house of prostitution for purposes of soliciting male customers to engage in illegal acts with females whom he hired and from whose earnings he made a living. No matter how the Union characterizes the criminal proceedings surrounding the Grievant's house of prostitution, those are the facts. The Grievant can dance a little sidestep, but in the end, he was a pimp. The fact that the criminal system closed the Grievant down, but did not incarcerate him, has very little relevance to the present dispute.

The Union's efforts to minimize the punishment imposed on the Grievant and Grievant's efforts to demonstrate that he was not even arrested missed the point. First, the Grievant was arrested, although it may not have occurred in a manner that he believed constituted an arrest, and secondly, the Grievant was punished and did plead guilty initially to a felony. The Grievant

got lucky with respect to his sentencing and punishment. The fact that the Grievant got lucky does not diminish, nor does it reduce, nor does it change the facts that the Grievant ran a house of prostitution and was a pimp. The question before the Arbitrator is whether an individual who engages in the business of running a house of prostitution for four years as an active pimp, is a person that the Employer should continue in its employ as a public representatives visiting customer's homes to address their gas service needs.

The case raises the issue of discipline for misconduct away from work. The decision by Arbitrator Koven referred to as Arbitration Case 44, sets forth the policy the parties have followed for a number of years.

> "It is well established in arbitration that conduct away from the plant outside of working hours justifies discipline whenever the grievant's behavior has harmed the Company's reputation or product or where such conduct renders the employee unable to perform his duties or leads to a reluctance on the part of other employees to work with the grievant. It is also established that such factors as the nature of the grievant's job and the crime with which he is charged becomes relevant."

Placing the present dispute into the criteria set forth by Arbitrator Koven, it is difficult to conclude that the Grievant's behavior in running a house of prostitution in Sausalito has harmed the Employer's reputation in the sense that there has been publicity and people have associated with Grievant with the Employer. Certainly running a house of prostitution does not interfere in any mechanical sense with the Grievant's ability to perform his duties as a Gas Service Technician. There is no evidence that other employees are reluctant to work with the Grievant because he was a pimp. However, the Grievant's job required him to maintain contact with the public on a regular basis and the nature of the Grievant's misconduct raises serious questions concerning his ability to function in a public job of that nature without causing potential harm to the Employer. In this respect, one needs to ask whether customers of PG&E would want the

proprietor of a house of a prostitution to be wandering around in their home fixing their gas service. If the customer discovered that the Grievant was the proprietor or former proprietor of a house of prostitution, what impact would that have on the Employer. Furthermore, if the Grievant chose to reestablish his business of running a house of prostitution and solicited customers to either take advantage of the services he was providing or to participate as prostitutes being offered, what impact would this have on the Employer's liability for the Grievant's misconduct. In essence, does the Employer have any responsibility to keep the Grievant employed in light of the nature of the misconduct in which the Grievant engaged.

The issue of sexual misconduct away from the workplace and the right of an employee to maintain his or her employment has been raised a number of times in recent years. For example, in the case Roe v. City of San Diego, No. 02-55164, the United States District Court for the Ninth Circuit ruled on January 29, 2004 that a police officer working for the City of San Diego may not be terminated for making videos of himself masturbating and selling them on eBay. This dispute arose in the context of the Grievant's First Amendment right to express himself. The evidence did not establish that Mr. Roe did anything illegal or that he was arrested for his conduct and convicted of any crime. The employer in that case believed that Mr. Roe's conduct was inconsistent with his obligations as a police officer and with the image the City wished to convey with respect to the officers it put on the street to assist the public. The court concluded in part that the Grievant's conduct was not illegal and that it was unlikely given the manner in which he went about creating his videos and selling them that anyone would ever discover that he was a police officer for the City of San Diego engaging in this conduct. The court concluded:

> "In sum, Roe's expressive conduct was not about private personnel matters, was directed to a segment of the general public, occurred outside the workplace and was not motivated by an employment-related grievance. Thus, he was not speaking as an employee on matters related to his personal status in the workplace. Under the public concern test, Roe's expressive conduct does not fall

> within an unprotected category of speech, so the District Court erred in dismissing his First Amendment claim without proceeding to Pickering balancing."

The Court went on to note:

> "Our holding does not render the Department powerless to act against Roe for his off-duty, non-work-related conduct. Rather, whether Roe's speech is ultimately entitled to protection will depend on the Pickering balancing phase. In that step, the free speech interests in Roe's expressive activity must be weighed against the Department's interest 'in promoting the efficiency of the public services it performs through its employees."[14]

The Pickering test comes from the Decision Pickering v. Board of Education of Township High School District 205, Will County, (1968) 391 U.S. 563. This case was a free speech case involving a teacher who made assertions concerning conduct in the school district, which were incorrect and which the Board found detrimental to the operation of the school. The Court noted in relevant part:

> "The problem in any case is to arrive at a balance between the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

The Court concluded in that case that the balance between the teacher's right to free speech and the District's right to have an efficiently run school district came out in favor of the teacher. The same process reflected in the Roe case and in the Pickering case applies in the context of off-duty misconduct. The test is one of balancing the interest of the employer versus the interest of the employee. The present case does not involve a Constitutional right, such as in the Roe case, where one is raising fundamental questions of freedom of speech. It is, instead, a commercial

---

[14] There is an extremely scathing decent in this Decision, which ridicules the position of the majority of the three Judge panel.

balancing between the right of the employer to operate its business as it chooses, and the right of an employee to maintain his or her property right in employment.

It is clear, based on the parties own experience in arbitration that if an employee engages in off-duty misconduct that has no appreciable impact on the employee's ability to perform his or her work, and does not in some way harm the Employer's interests that it is not appropriate for the Employer to discipline the employee for that off-duty misconduct. Certainly, if the Grievant had been engaging in legal off-duty conduct, such as running a house of prostitution in a county in Nevada that permitted the operation of such houses, the Employer would be hard pressed to conclude that the Grievant's conduct in some way harmed it, or interfered with the Grievant's ability to perform his duties. What we are dealing with in the present case is not some legal conduct that the Employer would find morally reprehensible. Instead, we are dealing with illegal conduct, which is prohibited and which is morally reprehensible as defined by the laws of the State of California. What is significant to the Arbitrator is that the Grievant's conduct in the present case is not casual conduct, or conduct resulting from a spur of the moment decision or a lapse of good judgment. To the contrary, it is very deliberate, calculated conduct designed to further the business and economic interest of the Grievant in an enterprise that the Grievant clearly understood was illegal and encouraged other individuals to engage in similar illegal activity.

If the Grievant had been arrested for soliciting a prostitute, which in most places is a misdemeanor, the Arbitrator would be hard-pressed to conclude that the Employer had established conduct, which truly harmed the Employer's interest, or in some other way, jeopardized the Grievant's ability to perform his job. That type of spontaneous misconduct involving the Grievant personally may be morally reprehensible, but it does not involve the Grievant engaged in some type of criminal enterprise. What the Grievant has done in Sausalito

is to set up a criminal enterprise with the intention of running a house of prostitution where he makes money off of the illegal activities of the women working in the institution for his own personal benefit. This is not casual misconduct. The Grievant and the Union attempted to minimize the Grievant's conduct and describe it as something other than what it is. The song the Arbitrator quoted titled The Sidestep is exactly what the Grievant was attempting to do. The Grievant pled guilty to the charges set out by the District Attorney, which clearly spell out what the Grievant did. The Grievant was a pimp and he ran a house of prostitution. No matter how the Grievant sidesteps those are the facts. That is a criminal enterprise. The Arbitrator is making a clear distinction, however, between the fact that the Grievant's conduct was morally reprehensible and the fact that the Grievant was engaged in a regular, organized, criminal enterprise. Certainly visiting a prostitute might be illegal, and running the house of prostitution is illegal as well, but it reflects a significantly larger illegal activity than simply a single visit to a prostitute.

In the Arbitrator's opinion, one must look carefully at the facts surrounding the off-duty misconduct to determine whether those facts have an impact on the Grievant's ability to continue working. As Arbitrator Koven noted, "such factors as the nature of the grievant's job and the crime with which he is charged becomes relevant." The Grievant was required to work with the public and the Grievant was charged factually with engaging in a criminal enterprise of running a house of prostitution. The Employer faces not only an individual who many would find morally reprehensible, but also an individual who engages in a type of organized crime. Is the Employer required to have this type of person serving as a Gas Representative visiting customers' homes? In the alternative, is the Employer obligated to find another position for the Grievant that would take him outside the public exposure, which his job requires.

Part of the analyses in which the Arbitrator believes the parties should engage in circumstances of this nature, is to look at the expectations of the affected employee with respect to the conduct in which the employee is engaged. In other words, would a person who ran a house of prostitution think that if they were caught, prosecuted and found guilty of such conduct that they could reasonably expect to continue in their job. It is the Arbitrator's opinion that the expectation for a person who wants to engage in such deliberate and calculated criminal misconduct is that if the person is caught, in all likelihood he believed his continued employment would be in serious jeopardy. It is, on the other hand, quite likely that an individual convicted of a DUI would feel that continued employment would be very likely unless the employee was required to drive in the employee's position and the employee lost his or her license for some extended period of time. There is no obligation for an employer to accommodate an employee who engages in off-duty illegal activity. If an employee engages in such activity, is arrested, and goes to jail, the Employer has no obligation to grant a leave of absence or vacation. When an employee engages in off-duty misconduct and, as a result, loses a driver's license, the employer has no obligation to accommodate that employee and find alternative employment. If an employee is engaged in serving the public, the employer has no obligation to find another job so that the employee does not have to serve the public. In short, an employee who chooses to engage in off-duty misconduct does so at his or her own risk. The nature of the misconduct and its impact on the employer are generally going to be determinative with respect to whether the employee can maintain his or her job. In the present case, the Grievant chose to engage in concerted criminal activity on a long term, on-going basis for his own financial gain using the services of women who he solicited and encouraged to engage in illegal activity as well. Is it reasonable for the Employer to conclude that such concerted organized criminal activity might have a negative impact on its business and operations particularly for an employee whose job requires him to come into contact regularly with the public. In the Arbitrator's opinion, the

Employer's conclusion is not unreasonable. For all these reasons, the Arbitrator believes that the grievance should be denied.

AWARD

The Employer had just cause to terminate the Grievant. The grievance is denied.

IT IS SO ORDERED.

Date: April 27, 2004

Gerald R. McKay, Arbitrator

F. A. Saxsenmeier

Frank Saxsenmeier
Union Panel Member

~~Concur~~/Dissent

5-6-04
Date

Salim A. Tamimi

Salim Tamimi
Union Panel Member

Concur/Dissent

5-6-04
Date

Carol L. Pound

Carol L. Pound
Company Panel Member

Concur/Dissent

5-5-04
Date

Margaret A. Short

Margaret A. Short
Company Panel Member

Concur/Dissent

5/5/04
Date