

**ARBITRATION
OPINION & AWARD**

IBEW LOCAL 1245, PG&E, Arb. Case No. 275 Re: Termination	Union, and Employer
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ARBITRATION PANEL

Kenneth N. Silbert Chairperson
Darrel Norris, Sam Tamimi Union Members
Margaret Short, Kathy Boarquero Employer Members

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 Arbitrator pursuant to the terms of a collective bargaining agreement. The prior steps of the grievance procedure were complied with or waived and the matter is properly in arbitration (JX 2). At a hearing conducted on October 17, 2006, 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.

Grievant A worked for PG&E from 1995 until June 24, 2005 when PG&E terminated his employment for allegedly testing positive for marijuana twice within 60 months after signing a return to work agreement. At the time of the termination, he was employed as a meter reader, a safety sensitive position subject to random DOT testing. 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, A terminated for just cause; and if not, what shall be the remedy? (JX 2)

RELEVANT PROVISIONS OF THE AGREEMENT

Section 7.1 of the Agreement permits PG&E to suspend, discipline or discharge employees for just cause.

To comply with DOT regulations regarding substance abuse in the workplace and testing requirements for safety sensitive positions the Parties agreed to a Drug-Free Workplace Program. To the extent relevant to this dispute, the Program provides (Letter of Agreement 04-16, Attachment 1 to the Company's brief):

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

PROHIBITED CONDUCT

Following a verified positive result, the employee will be required to complete the return-to-duty process with a Substance Abuse Professional, follow his/her instructions, and comply with the treatment/education recommendations and be subject to follow up testing. A non-compliance letter from a Substance Abuse Professional will result in discharge.

GUIDELINES FOR RETURN TO DUTY TESTING

A Return to Duty test and the SAP's evaluation of an individual's return to duty status provides some degree of assurance to the Company that the individual is presently free of alcohol and/or any prohibited drugs and is able to return to duty.

1. The SAP is the sole decision-maker of when an employee is released to return to duty.
2. Following successful compliance with the return to duty process, a negative drug and/or alcohol screen is required before an employee can return to performing safety sensitive duties.

RETURN TO DUTY AGREEMENT

I understand that if I test positive for any prohibited drugs or alcohol during the next sixty (60) month safety sensitive follow-up period, including legal drugs for which I do not have a prescription, or test positive on a breath alcohol test, I am subject to the immediate termination of my employment.

SUMMARY OF THE FACTS

Grievant's Positive Drug Tests and the Termination of His Employment:

The underlying facts are not in dispute. On April 12, 2005², the Grievant was selected for a random drug test. The results of the test were positive for THC (the active ingredient in marijuana). Pursuant to the Drug-Free Workplace Program, he was removed from duty and required to complete a drug rehabilitation program as a condition of returning to work.

² Unless otherwise noted, all dates hereafter refer to 2005.

The Grievant met with Substance Abuse Professional (SAP) Michael Watson to commence the rehabilitation process. Watson asked when he had first started smoking marijuana; and the Grievant responded that he had just started smoking marijuana a few weeks prior to the random drug test. Grievant now admits this was untrue. In fact, he had been a long-time habitual user, smoking marijuana almost daily from the time he got off of work until the time he fell asleep.

Based on the Grievant's false claim of only recent and limited use, Watson recommended that he attend an outpatient rehabilitation program for a period of two weeks. The Grievant began the outpatient program on April 25, and admittedly did not take it seriously. He gave Watson "a hard time," letting Watson know that he did not believe he belonged in the program and that he needed to return to work.

While in the program, the Grievant tested positive for THC on April 29, May 4 and May 9. All three tests were substantially above the 20ng/ml THC threshold for a positive test:

April 29	136ng/ml
May 4	99ng/ml
May 9	66ng/ml

Normally, a casual user in a two week rehabilitation program will test negative for THC on tests conducted every three to four days. Watson discussed the positive test results with Dr. David Smith, PG&E's Medical Review Officer (MRO), who opined that the Grievant's claim of only recent and limited use did not jive with the test results. Based on the Grievant's positive tests, Watson recommended that the Grievant undergo intensified treatment for an additional 24 days.

During his second rehabilitation program, the Grievant testified negative for THC on May 13, 17 and 23. After the three negative tests and the Grievant's completion of the program, Watson and Dr. Smith agreed that he could return to work. Pursuant to DOT rules and the Drug-Free

Workplace Program, the Grievant was required to have a negative drug test before returning to work. When the Grievant signed his return to work agreement, Watson warned him that it was important for the Grievant to tell Watson if he had been using marijuana because, if he tested positive on the return to work test, he would be terminated. The Grievant took the return to work test on June 2. On June 14, the test was verified as positive for THC (36/ng/ml). The test result was confirmed positive by another DOT laboratory on the split specimen. Pursuant to the Drug-Free Workplace Program, PG&E terminated the Grievant.

Notwithstanding the test results, the Grievant denies that he used marijuana after April 22.

Expert Testimony:

Dr. Vina Spiehler, a recognized expert in the field of forensic toxicology, testified on behalf of the Union. Her review of the testing data described above led her to conclude to a medical certainty that the positive drug test on June 2 represented residual THC from use prior to the rehabilitation period, as opposed to new use during the rehabilitation period. According to Dr. Spiehler, when a person ceases use of marijuana, the body does not excrete the metabolite in a purely linear manner:

In a normalized version there is a steep part and then there is the shallow elimination. So it is a two-part. But when you look at the results day to day, [some days] it [the quantity of THC] goes up and some days down. Most of that is due to the variations of the water in the content of the urine. (TR 26)

* * *

With the chronic user the initial curve takes longer to start down, days, its spread out much further in time. And the second shallow elimination has been shown to be much longer in the chronic user. (TR 27)

Because of the “sawtooth” pattern when results are examined day-to-day, it is possible for a person to fall below the testing cut-offs one day and then days later test above the cut-offs without any intervening drug use (TR 28-29). Literature shows the presence of THC up to 46 days after last use (TR 22). According to Dr. Spiehler, it is possible to normalize the effects of the sawtooth pattern by adjusting the results for the amount of water in the urine. Using that method, she concluded that the June 2 positive result showed residual THC levels from the Grievant’s April drug use, and did not establish new or continued use (TR 31). She quantified her certainty at a level of 89% (TR 42).

PG&E points out that Dr. Spiehler’s testimony is based on laboratory science described by Heutis and Cone (Union Exh 1). The authors of that article note that the normalized specimen-ratio criteria “should be tested in chronic users under controlled conditions before application to heavy marijuana users.” (UX 1, p 8-9). PG&E reads that caution to mean that the normalization analysis done by Dr. Spiehler has not been scientifically validated for heavy or chronic marijuana users.

Dr. Smith does not disagree with Dr. Spiehler’s analysis, but testified that her methodology is not permitted under DOT regulations:

Dr. Spiehler’s technical analysis of normalization is scientifically accurate, but not allowed under the DOT. This is technology that you cannot use. ... As she presented it, this is technically accurate, but not allowable. (TR 53).

Although Dr. Smith acknowledged the validity of Dr. Spiehler’s methodology, he also testified that, with habitual users, after a period of time, and particularly after a series of negative tests, the sawtooth pattern would all occur below the THC cutoff.

[The Grievant’s tests] fell below the cutoff (in intensified treatment) as predictable. He dropped under cutoff in treatment, had three spaced negatives, which is the procedure [used] by PG&E, as acceptable by the DOT, which is to have three negatives, because you don’t want him to go back to work and be positive. ... Then [on June 2] he was above the cutoff at 36 ... more than two time what he was below before. (TR 56)

Dr. Smith testified that he is 90% medically certain that the Grievant's June 2 return to work drug test demonstrated new marijuana usage (TR 57, 77). He reached this conclusion because, prior to the June 2 test, the Grievant had three negative tests. Dr. Smith characterized the June 2 results as "a significant bound up after three negatives in treatment." (TR 62) Even with heavy marijuana users, after having three negative tests in a spaced out time period, Dr. Smith would not expect to see a positive test (TR 68).

POSITIONS OF THE PARTIES

PG&E:

- » Pursuant to the negotiated agreement between the Parties, the Company may terminate an employee who tests positive twice in a period of five years. It is undisputed that the Grievant's June 2 return to work test was positive for THC, and that it was his second positive test in five years. These facts establish just cause for the termination.
- » Dr. Smith, testified that to a medical certainty the positive result of the June 2 return to work test reflected new drug use, not the residual effects of prior drug use. Although he did not dispute Dr. Spiehler's methodology, that methodology is not accepted by the DOT.
- » The Grievant's denial that he used marijuana after starting rehabilitation should not be credited. He was not truthful about his substance abuse when he first spoke to the SAP, and there is no reason to believe he is being truthful now.
- » Dr. Spiehler's opinion does not provide a defense for the Grievant.

The Union:

- » In *Arbitration Case No. 190* (April 22, 1994), Arbitrator Chvany considered the termination of an employee who was fired after a positive drug test in which the urine collector failed to split the urine sample at the collection site as required by an agreement between the Company and the Union. Even though the test could be deemed valid for purposes of DOT regulations, it did not meet the just cause standard because the failure to split the sample violated the Parties' agreement. She ordered that the employee be reinstated upon satisfying normal requirements for returning to a covered position after failing a drug test.
- » In *Arbitration Case No. 202* (February 16, 1995) Arbitrator Chvany held that "a second verified positive drug test, obtained in conformity with the requirements of the Drug-Free Pipeline Agreement, establishes a *prima facie* case for just cause discharge." The burden then shifts to the Union to establish that there is not just cause for the discharge. Arbitrator Chvany credited the employee's testimony that he had accidentally and unknowingly ingested methamphetamine by drinking a spiked Coca Cola left at his home by another person. Based on these facts, she found that there had been no "improper conduct which would constitute just cause for termination" and that the "circumstances constitute a legitimate explanation for the positive test result." The Company was ordered to reinstate the employee with full back pay.
- » In *Arbitration Case No. 238* (June 20, 2000) Arbitrator Chvany again considered discipline for alleged substance abuse. In that case, the testing laboratory determined that the employee had submitted a substitute sample, based upon the creatinine level in the sample. After the Company terminated the employee, the DOT clarified the manner in which creatinine levels

were to be reported by labs in determining whether a sample is a substitute. Based on the DOT clarification, it was not possible to determine whether the employee's sample was a substitute. Even though the finding of a substitute sample was consistent with DOT standards at the time it was reported by the laboratory and at the time of termination, Arbitrator Chvany found that there was not just cause for the termination because, based on DOT standards applicable when she decided the case, the record failed to prove by a preponderance of the evidence that the employee had submitted a substitute sample. The arbitration panel reinstated the employee without back pay because the Company had reasonably relied on the laboratory's findings in terminating the employee.

» In *Arbitration Cases Nos. 249 and 250* (December 19, 2001) Dr. Spiehler testified that the laboratory's testing of an employee's urine for adulterants was not forensically sound and that there was a statistical possibility that an error could have been made using the same testing methodology twice. Because DOT regulations and implementing guidelines specifically did not require the use of a confirming test using a different scientific principle than the screening test, Arbitrator McKay found no violation of the just cause standard and the panel upheld the discipline.

» In *Arbitration Case No. 258* (June 10, 2003) an employee was terminated after he was expelled from a rehabilitation program for missing a meeting. The facts established that the grievant had missed the meeting because of a confusing notice posted for participants. Based on those facts, the arbitration panel (chaired by the present Chairperson) found that there was not just cause for the termination because the employee was not guilty of "any misconduct, negligence or inattention."

- » The Union acknowledges that the Grievant's return to work test was a verified positive drug test, obtained in conformity with the requirements of the Parties' Drug-Free Workplace Agreement, and that the test establishes a *prima facie* case of just cause for discharge. Dr. Smith had no choice but to report the results as positive. Accordingly, the burden shifts to the Union to establish the absence of just cause.
- » The facts establish that the Grievant did not engage in any improper conduct which would constitute just cause for termination, nor was he guilty of any misconduct, negligence or inattention.
- » Dr. Smith acknowledged that Dr. Spiehler's testimony was accurate and correct. Dr. Spiehler's testimony is based upon scientific materials published by the National Institute for Drug Abuse. Based on this information, Dr. Spiehler calculated that there is an 89% probability that the positive drug test for which the Grievant was terminated was the result of residual drug excretion, not new use.
- » Dr. Smith's opposing judgement that the positive test reflected new use was not based on a physical examination of the Grievant, or upon a medical history. Rather, Dr. Smith relied solely on second hand information and the laboratory test results. His analysis does not refute the normalization methodology and ratios used by Dr. Spiehler.
- » Absent improper conduct, misconduct, negligence or inattention on the part of the Grievant, there was not just cause for termination despite the verified positive drug test.
- » The Panel should remove the discharge from the Grievant's record and order that he be reinstated to his former position with full back pay and benefits.

OPINION

As in any termination case, PG&E bears the ultimate burden of proving by a preponderance of evidence that there was just cause for the termination. In this case, that standard may be met by proof that the Grievant violated the Drug-Free Workplace Agreement by testing positive on his return to work test. The Union agrees that the return to work test was a valid positive, and that based on DOT regulations Dr. Smith was required to report the test as positive. As the Union acknowledges, these facts satisfy PG&E's burden of proof and establish a *prima facie* case supporting termination.

The Union's sole defense is based on Dr. Spiehler's testimony regarding the sawtooth pattern frequently seen in THC levels during withdrawal from marijuana use. According to Dr. Spiehler, this sawtooth effect is due primarily to differing levels of water in the urine, and the effects of those differing levels can be "normalized" by accounting for the changing water levels. Based on such an analysis, she concluded that the Grievant's positive return to work test, after three prior negative tests, did not indicate new marijuana use and was, instead, showing residual levels of THC from his prior usage.

Dr. Smith agrees that Dr. Spiehler's analysis is scientifically proper. However, that is not enough for the Union to overcome the *prima facie* case proven by the Company. The Drug-Free Workplace Program was negotiated by the Parties to meet DOT guidelines and requirements regarding drug testing for safety sensitive positions. It is undisputed that the normalization process utilized by Dr. Spiehler is prohibited by the DOT. Thus, reliance on that process is inconsistent with the Drug-Free Workplace Program.

This case differs from arbitrations decisions relied on by the Union in which arbitrators found that violations of the Drug-Free Workplace Program did not constitute just cause for termination.

In *Arbitration Case No. 190*, the arbitrator found no just cause for a discharge even though there was a valid positive drug test under DOT standards. That finding was based on the fact that the collecting site failed to split the sample, thereby depriving the employee of the ability to have an independent analysis of the urine. The failure to split the sample violated a specific requirement of the Parties' agreement. Because this deprived the employee of negotiated due process rights, the Arbitrator found no just cause for discharge. In the present case, there is no proof that the testing procedures or test results violated the Drug-Free Workplace Program or deprived the Grievant of negotiated due process rights. For that reason, the analysis in *Arbitration Case No. 190* is not controlling.

In *Arbitration Case No. 202*, the arbitrator reinstated an employee who had a valid positive test because the evidence established that the employee had accidentally and unintentionally ingested methamphetamine by drinking a spiked Coca Cola left by a third party. The arbitrator reasoned that the just cause standard required proof of improper conduct (e.g. voluntary drug use), and that the accidental ingestion of drugs was not improper conduct amounting to just cause for termination. The present case is distinguishable because the Grievant does not claim that his positive return to work test was the result of accidental or unintentional ingestion of marijuana. Indeed, he denies any use of marijuana after entering treatment, an assertion inconsistent with the positive return to work test.

In *Arbitration Case No. 238*, the arbitrator found no just cause for discharge based on a laboratory report that the employee had submitted a substitute sample. Between the date of the

termination and the date of the arbitration hearing, the DOT had revised its guidelines for determining when a sample was a substitute, and it was not possible to determine whether the employee's sample would have been characterized as a substitute under the new guidelines. This case is distinguishable because there is no evidence that DOT standards regarding the validity of the Grievant's test have changed since he was terminated. Instead, it is undisputed that the normalization analysis done by Dr. Spiehler was and is inconsistent with DOT guidelines.

In *Arbitration Case No. 258*, the arbitrator reinstated an employee who had been terminated for missing a rehabilitation meeting in violation of the rehabilitation program rules. The arbitrator found that the employee had missed the meeting because of an ambiguous meeting notice, and that his failure to attend the meeting was not due to misconduct, negligence or inattention. The present case is distinguishable because the Grievant does not claim that the positive return to work test was caused by other persons. Rather, the test establishes new use of marijuana, based on currently accepted DOT guidelines.

For the forgoing reasons, and based upon the record as a whole, the Panel makes the following award.

AWARD

Grievant : A was terminated for just cause. The grievance is denied.

Kellont
Kenneth Silbert

Concur / Dissent

Dec 21, 2007
Date

Salim A. Tamimi
Sam Tamimi

~~Concur~~ / Dissent

12-27-07
Date

Darrel Norris
Darrel Norris

~~Concur~~ / Dissent

12/28/07
Date

Margaret Short
Margaret Short

Concur / Dissent

12/28/07
Date

Kathy Barquero
Kathy Barquero

Concur / Dissent

12/28/07
Date