IN ARBITRATION PROCEEDINGS

PURSUANT TO AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy	)	
	)	
Between	)	ARBITRATION NO. 287
	)	
PACIFIC GAS & ELECTRIC CO.,	)	OPINION AND AWARD
	)	
Employer,	)	Frank Silver,
	)	Chair, Board of Arbitration
and	)	
	)	Phil Carter
INTERNATIONAL BROTHERHOOD OF	)	Darryl Norris
ELECTRICAL WORKERS, LOCAL 1245,	)	Union Board Members
	)	
Union,	)	Kathy Barquero
	)	Margaret Short
RE: Termination	)	Company Board Members
	)	

This dispute arises under the Collective Bargaining Agreement between the above-named parties. Pursuant to the terms of the Agreement, this Arbitrator was as the Chair of the Board of Arbitration to hear the evidence and to determine the issues.

A hearing was conducted on January 15, 2009 in San Francisco, California, at which time the parties had the opportunity to examine and cross-examine witnesses and to present relevant evidence. After preparation of the transcript, both counsel submitted post-hearing briefs and the matter was submitted for decision.

APPEARANCES:

On behalf of the Union:

Jenny Marston, Staff Attorney, IBEW Local 1245, Vacaville, CA

On behalf of the Employer:

Stacy A. Campos, Attorney, PG&E, San Francisco, CA

ISSUE

Was the Grievant, A , terminated for just cause? If not, what shall be the remedy?

PERTINENT PROVISIONS OF LETTER AGREEMENT NO. 04-16-PGE

Items of Understanding

* * *

20. Employees that refuse to test or refuse to cooperate in the collection process will be considered to have a verified positive test result and be subject to discipline or discharge.

Urine Collection Procedures

* * *

11. After the employee gives the specimen to the collector, the collector must check the temperature of the specimen, check the specimen volume, and inspect the specimen for adulteration or substitution. The collector should check the temperature of the specimen as soon as the employee hands over the specimen, but no later than four minutes after the employee comes out of the restroom. The acceptable temperature range is 32°-38°C/ 90°-100°F. Temperature is determined by reading the temperature strip originally affixed to or placed on the outside of the collection container. If the temperature is within the acceptable range, the "Yes" box is marked in Step 2 on the CCF and the collector proceeds with the collection procedure. (If the temperature is out of range, the collector marks the "No" box in Step 2 and initiates an observed collection.) * * *

Test Refusals - There are a number of behaviors defined in the regulation that constitute a test refusal. These are listed below.

1. Failure to appear for the test within the timeframe defined by the employer.
2. Failure to remain at the testing site until the testing process is complete.
3. Failure to attempt to provide a specimen.

* * *

5. Failure to undergo a medical examination associated with insufficient volume procedures.
6. Failure to cooperate with the collection process.

Anytime an employee exhibits any of these behaviors, the collector must immediately terminate the test, notify the DER directly, and note the test refusal on the form.

Shy Bladder - If an employee is unable to provide a sufficient amount of urine for a drug test, the employee will be encouraged to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, which occurs first. It is not a refusal to test if the employee declines to drink.

1. If the employee refuses to make the attempt to provide a new urine specimen or leaves the collection site before the collection process is complete; the collector will discontinue the collection and

immediately notify the DER. This is a refusal to test. *(Underlining in original.)*

2. The collector will inform the employee when the three-hour time limit begins. If the employee has not provided a sufficient specimen within three hours of the first unsuccessful attempt to provide the specimen, the employee will be removed from work with permission, without pay until the results of a medical evaluation are obtained. Within five days, the Company will direct the employee to attend an evaluation with a licensed physician, that is acceptable to the MRO, who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen. (The MRO may perform this evaluation if the MRO has appropriate expertise.) The Company will inform the employee of the location and date/time of the appointment.

3. Upon completion of the evaluation, the referring physician that performed the evaluation will provide the result to the MRO in a written statement.

4. The MRO will cancel the test if there is adequate basis for determining that a medical condition precluded the employee from providing a sufficient amount of urine. The employee will be reinstated with back pay.

5. The MRO will rule the test a Refusal to Test if there is not an adequate basis for determining that a medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. The employee will be referred to a SAP for an evaluation and is subject to the Verified Positive Drug Test Procedures if applicable.

FACTS

The Grievant was a meter reader with twelve years' seniority at the time of her termination in January 2007. In September 2004, she had had a verified positive result on a urine drug screen, and on November 5, 2004, she signed a Return to Duty Agreement, under which she was subject to immediate termination if she tested positive for prohibited drugs during the 60 months following her return. On January 10, 2007 she again tested positive on a DOT drug test, under the circumstances described below, and was terminated.

The January 10, 2007 drug test.

On the morning of January 10, 2007, the Grievant was instructed by her supervisor to report for a drug test. She drove to the Fremont-Rideout drug testing clinic, and at 8:20 a.m. she provided a specimen which was observed by the collector, Heidi Hibbs, to be out of temperature range, i.e. below 90 degrees. Ms. Hibbs made this determination based on a temperature strip on the specimen cup which turns bluish-green if the specimen registers between 90 and 100 degrees, but remains black if the specimen is below 90. She testified that she called Liz Cummings, the clinic supervisor, to verify the out-of-range reading, and that Ms. Cummings was nearby and responded immediately

(Tr. 42, 46-47).[1]

Ms. Cummings testified that she responded within 10-15 seconds of being called and that she felt the bottom of the cup to verify that the sample was cold (Tr. 36-37).[2] On the Clinic's Drug Screen Collection Documentation Report, an out of temperature range sample was recorded.[3] As noted on the form, after an out-of-temperature range sample has been provided, a second collection must be made by using observed collection procedures, and both samples are to be shipped for testing. In this case, however, Ms. Hibbs noted that she had inadvertently discarded the first sample, and that she had been advised to note that on the form and to proceed with the second collection observed (Jt. Ex. 2, p. 11).

The Grievant was advised that her first sample did not meet the temperature range requirements and that she would be given the opportunity to provide another sample and that the collection would be observed. She was told that she had up to three hours to provide the sample, that she could drink up to 40 ounces of water, and that she could not leave the clinic until the second sample had been produced. Thereafter, she made three unsuccessful attempts to produce a sample, at 9:35, 10:40, and 12:25. She drank 40 ounces of water during that period of time.[4]

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[1] The Grievant testified that Ms. Cummings was not in the area, and that Ms. Hibbs motioned for another employee to look for her. The Grievant testified that she waited in the lobby, and that it was at least five minutes before she was told that Ms. Cummings had made the verification (Tr. 97-98).

[2] Ms. Cummings acknowledged that it had been two years between the test in question and her arbitration testimony, and that she had difficulty recalling the specific circumstances of the test. She stated categorically that she has always responded immediately when called to observe a positive test, and that if she is not in the immediate area the protocol is for the collector to call someone else to verify.

[3] The form contains eight categories of irregular collections, and the out of temperature range box was checked. One of the other boxes is for "shy bladder," i.e. unable to provide sample. That box was not checked.

[4] The Grievant testified that she produced a small amount of urine on the first attempt, but Ms. Hibbs said it was an insufficient amount and threw it in the toilet. Ms. Hibbs testified that she would have written "QNS," for insufficient quantity, on the form if less than the required 45 ml. of urine had been produced. The Grievant (continued...)

At 12:35, Ms. Cummings advised the Grievant that she was over the three hour time limit, and she offered another chance to produce a sample. The Grievant declined, and Ms. Cummings noted, "I advised her to leave and report to her supervisor." (Jt. Ex. 2, p. 11.)

The Grievant testified that when Ms. Cummings offered the opportunity to make another attempt, she asked for more water but was told she could have no more. She testified that she also asked if they could do a blood test or use a catheter, but was told that was not an option and that she would have to leave (Tr. 102). At that point she left. She testified that she had been off work for five or six days with a flu bug which included vomiting and diarrhea, and that although she had gone back to work she still was not feeling well (Tr. 104). Ms. Hibbs testified that she had no recollection of the Grievant saying anything about being ill during the collection process (Tr. 50).

The refusal to test determination.

Dr. David Smith is the Company's Medical Review Officer (MRO), certified under DOT regulations. It was his determination, based upon the information provided on the clinic's Drug Screen Collection Documentation Report, that the Grievant's drug test results should be classified as a refusal to test, meaning that it had the same consequences as a positive test result. It was his understanding that the Grievant had provided a first specimen of at least 45 ml., but it was out of temperature range. She had then made three observed attempts over a three hour period to provide another sample while drinking 40 ounces of water, but had failed to produce a sample. He determined that the collection site had followed the appropriate protocol, and that there had been no fatal flaw in the procedure (Tr. 64). As stated in a subsequent letter responding to questions from the Review Committee, "If a donor refuses to provide a sufficient sample or leaves the collection

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[4](...continued)
acknowledged that she failed to produce any urine in the next two attempts.

site before a viable collection process has been completed, it is considered a 'Refusal to Test.'" (Jt. Ex. 2, p. 16.)

Dr. Smith testified that a specimen that is below 90 degrees is considered to be a tampered specimen, so that under the regulations the employee is required to remain at the site until he or she produces a proper 45 ml. specimen under direct observation. Because of the problem with tampering, ". . . there's no time limit. You stay there until the collection process is completed." A donor must be provided "a minimum" of three hours to provide a second sample, and if he or she leaves without completing the collection process, it is deemed a refusal to test. (Tr. 60.)

According to Dr. Smith, this is different than a "shy bladder" procedure under the regulations, in that a shy bladder means that an adequate volume of urine is not produced on the first specimen. If there is an adequate volume on the first sample, it cannot be a shy bladder and the shy bladder procedures cannot be followed. Instead, if the first sample is out of temperature range, it is considered tampered and the collection process "moves over to the tampered algorithm" in attempting to provide a proper specimen (Tr. 61). As noted above, Dr. Smith concluded that there was no fatal flaw in the clinic's procedure and determined that the Grievant's failure to provide a sample for three hours while being provided with 40 ounces of water represented a refusal to test.

POSITIONS OF THE PARTIES

The Company

The Company argues that the MRO's verification of "refusal to test" was consistent with DOT regulations and Letter Agreement 04-16-PGE. The "shy bladder" procedures did not apply, since the Grievant demonstrated she did not have a shy bladder when, at 8:20 a.m., she produced a specimen of sufficient volume. The plain language of the Agreement states that the shy bladder

procedures are triggered if the employee "is unable to provide a sufficient amount of urine for a drug test. . . ." Dr. Smith testified that the Grievant demonstrated that she was physiologically able to produce a specimen of sufficient volume, and under the regulations, the purpose of a shy bladder examination is to determine whether there is a physiological condition explaining the failure to provide an adequate specimen (49 CFR § 40.193[d]). He also ruled out the possibility that dehydration associated with flu could have prevented her from producing a specimen on the second collection.

Instead, the out of temperature range sample triggered procedures for tampering. An immediate observed collection was required, and the Grievant's failure to produce a specimen during the second collection was an issue of cooperation, not shy bladder. Under the Letter Agreement, when an employee does not produce a specimen for testing (and has not demonstrated shy bladder), the test is deemed a refusal. In particular, a test refusal includes "[f]ailure to cooperate with the collection process." The failure to produce a urine specimen without a medical excuse is a clear failure to cooperate under the terms of the Letter Agreement, as well as DOT regulations.

The Company was obligated to treat the January 10 test as a refusal to test. Once the MRO verified the test refusal, PG&E was precluded under the regulations from altering the test result. This principle is underscored by the guidance and interpretation provided by the Office of General Counsel and Office of Drug and Alcohol Policy and Compliance of the DOT, which prohibits an arbitrator exercising authority to overturn the decision of an MRO in the same manner that an employer is prohibited from doing so. PG&E had no discretion to do anything other than treat the Grievant's test as a test refusal.

Under the Letter Agreement (Items of Understanding, #20), and the Grievant's Return-To-

Duty Agreement, the Grievant's refusal to test created just cause for termination. Because the refusal to test was to be treated as a verified positive test result, she was subject to immediate termination under the Return-To-Duty Agreement.

For these reasons, the Company argues that the grievance should be denied.

The Union

The Union argues that the Company failed to prove that it followed the DOT Testing Letter of Agreement and DOT regulations in terminating the Grievant. In previous decisions, Arbitrators McKay (Arbitration Case 249, 250) and Chvany (Arbitration Case 238) have recognized that to support termination, drug tests must meet federal guidelines. Reported decisions by other arbitrators have reinstated employees based on defective testing under DOT regulations.

The Union argues there were several violations of DOT testing procedures. First, the collector discarded the first urine specimen in error before beginning the second collection, effectively cancelling the first collection so that it must be disregarded. Even if it would have been thrown out anyway at the end of the collection, the fact that it was thrown out before the second collection means it must be treated as never having happened and even under the Company's reading of the regulations, the Grievant should have been treated as a shy bladder. Also, the allegation of tampering cannot be substantiated because of the Company's error, and the collectors' errors cast doubts on the propriety of their conduct in handling the urine collection.

Next, because the collector, not the Grievant, terminated the collection process after three hours, it cannot treat the result as a refusal to test for "[f]ailure to remain at the testing site until the testing process is complete." Dr. Smith testified that since this was not a shy bladder case, the Grievant should have been allowed to remain at the collection site with no time limit until the

collection process was completed. The collectors told the Grievant that she had three hours to provide a specimen, and Ms. Cummings terminated the collection exactly three hours later. The Grievant testified that she asked for more water, a blood test, or to see a doctor – all of which indicated that she was not voluntarily ending the process.

Under the LOA and DOT regulations, the Grievant should have been referred to a doctor under the shy bladder guidelines. After her first specimen was erroneously discarded, she was given three hours to produce another specimen while drinking 40 ounces of water, and when she failed to do so, the collector terminated the collection. The Company should have then referred her to a doctor within five days, but it did not. The collectors treated her as a shy bladder, and it was six weeks later, on February 26, Dr. Smith deemed her instead a refusal to test. In his letter responding to the parties' questions, he failed to answer the question of when he had determined that the Grievant was a refusal, rather than a shy bladder (Jt. Ex. 2, pp. 16, 17).

The strained interpretation that the Grievant could not be considered a shy bladder after she produced a first sample of adequate quantity, because she was placed in a "tampering track," should not be accepted. First, the collector had already thrown out her first specimen, meaning that it had to be regarded as if it never existed. Second, under the regulations, she met the conditions for a shy bladder, and was treated as such by the collectors. The regulations do not say that an employee undergoing an observed collection is precluded from application of shy bladder. The shy bladder regulation, 49 CFR § 193 does not mention the effect of any prior specimen that is considered unusable, and the July 2008 Part 40 Questions and Answers defines the "first unsuccessful attempt" as the "very first time the employee comes out of the urination area with less than 45 mL of urine." Neither authority states that an individual who previously provided an out of temperature range

specimen is disqualified from shy bladder. Also, the regulation and Q's & A's provide that an individual who provided an insufficient sample on the first attempt, and then provides an out of range sample, is still subject to the shy bladder procedure. There is no support in the regulation for considering an individual who produced an out of range sample to be on a separate track.

For these reasons, the Union argues that the Grievant should be reinstated and made whole.

DISCUSSION

The Grievant's January 10, 2007 drug test was conducted pursuant to the terms of the parties' Letter Agreement No. 04-16-PGE and Department of Transportation Workplace Drug and Alcohol Testing regulations. The Company's Medical Review Officer, Dr. David Smith, ultimately determined that the results of the drug test should be deemed a refusal to test. Under the Letter Agreement, a refusal to test is considered to be a verified positive test, and therefore the Grievant was terminated pursuant to the terms of her November, 2004 Return to Duty Agreement.

Under these circumstances, the issue to be determined is whether the testing procedure complied with the Letter Agreement and DOT regulations. In this respect it must be recognized that Arbitration Board is not called upon to question any medical or scientific judgment by the MRO. Rather, the Board is called upon to review the procedures followed, and if they were in compliance with the Letter Agreement and the regulations, the termination must be upheld; if not, the test results cannot be relied upon to establish just cause for termination.[5]

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[5] The September 2001 Questions and Answers from the DOT Office of General Counsel and Office of Drug and Alcohol Policy and Compliance, which constitute official and authoritative guidance and interpretation concerning the drug and alcohol testing regulations, make the distinction between an arbitrator's lack of authority to change a medical determination by the MRO as opposed to the authority to cancel a test result due to a procedural defect. In explaining 49 CFR sec. 40.149, it is noted that an arbitrator cannot exercise authority to change a verified test result that the employer could not do on its own, and that the prohibition applies to substantive decisions the MRO makes about the merits of a test, for example, "with respect to whether there is a *legitimate medical explanation* for a positive, adulterated, or substituted test result or whether a *medical condition* precluded an individual from providing a sufficient (continued...)

After the Grievant reported to the drug test clinic on January 10, she provided, at 8:20 a.m., an out-of-temperature-range urine specimen. The evidence reasonably establishes that the specimen was promptly collected, and that the out-of-range reading was properly verified. Under section 11 of the Urine Collection Procedures in the Letter Agreement, the next step after an out-of-temperature- range specimen is to initiate an observed collection. The collector noted that she inadvertently discarded the first specimen, but was advised to proceed with an observed collection.[6] At some point, the Grievant was advised that she had three hours to produce a second specimen, and that she should drink 40 ounces of water. She made observed attempts at 9:35, 10:40 and 12:25, but failed to produce a specimen. At 12:35 p.m., she was advised by clinic supervisor Liz Cummings to leave and report to her supervisor.

Dr. Smith subsequently determined that the test result was a refusal to test. As he stated in his January 30, 2008 letter responding to questions posed by the Review Committee: "If a donor refuses to provide a sufficient sample or leaves the collection site before a viable collection process has been completed, it is considered a 'Refusal to Test.'" (Jt. Ex. 2, p. 16.) This analysis, however, raises procedural issues under the facts of this case. First, according to collector Heidi Hibbs, the Grievant made three observed attempts to produce a specimen between 9:35 and 12:35, and she was unsuccessful in doing so. Neither collector has stated that the Grievant "refused" to produce a specimen. Second, based upon the evidence in the record, the Grievant was directed to leave the site

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[5](...continued)
specimen." (Italics added.) However, "An arbitrator could determine that a test result should be cancelled because of a defect in the drug testing process involving the MRO (e.g., that the MRO failed to afford the employee the opportunity for a verification interview)." (See Part 40 Questions and Answers, attached to Company brief.)

[6] Had the Grievant produced a second sample, both samples would have been sent to the laboratory for testing, and the fact that the first sample had been discarded would have been a potentially significant procedural defect. Without a second sample, however, the first sample is not required, since it is only the temperature at the time that sample was produced that would be relevant.

after three hours without having produced a specimen. To meet the conditions as a refusal to test under the Letter Agreement ("Failure to remain at the testing site until the testing process is complete"), as well as the federal regulations ("if the employee refuses to make the attempt to provide a new sample or leaves the collection site before the collection process is complete. . .),[7] the language reasonably implies that the employee – not the collector – must make the decision to leave the collection site before the collection process is complete.

In this case, however, the Grievant was told by Ms. Cummings to leave.[8] This instruction by Ms. Cummings was entirely appropriate under the "shy bladder" procedure. Under the Letter Agreement, there is a "three-hour time limit" for an employee to produce a specimen after an unsuccessful attempt, and this is consistent with the federal regulations, in that an employee is given "up to three hours" to produce a specimen in these circumstances (49 CFR §40.193[b][2]). In fact, the procedure followed by the collectors when the Grievant failed to produce a second specimen – instructing her to remain in the lobby and to drink 40 ounces of water, and instructing her to leave after she failed to produce a specimen within three hours – was the shy bladder procedure as described in the Letter Agreement and the regulations.

In his testimony, however, Dr. Smith was quite specific that the shy bladder procedure did not apply to the Grievant because she had initially provided a specimen of adequate volume, although it was out-of-temperature range. He stated that the specimen was considered to be tampered, which is an entirely different category than a shy bladder. As he described it, after

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[7] 49 CFR §40.193(b)(3).

[8] The Grievant testified that Ms. Cummings was quite direct in telling her that she had no option other than to leave the clinic (Tr. 103). Ms. Cummings' recollection of what was said was vague, but her contemporaneous note strongly implies that she directed the Grievant to leave – "I advised her to leave and report to her supervisor." (Jt. Ex. 2, p. 11.)

providing a tampered specimen, the Grievant was subject to observed collections, and that "... there's no time limit; you stay there until the collection process is completed." He explained that this is considered the "donor's appeal rights," and that "if you walk out on an appeal process, then, you know, you're guilty." (Tr. 60.) Based on Dr. Smith's description of the observed collection procedure, the Grievant should not have been instructed to leave the collection site after three hours; instead, she should have allowed to stay until she produced a specimen.

It must be noted that there is no language in the Letter Agreement, and none has been cited from the DOT regulations, that states an employee who provides a tampered or out-of-temperature range specimen should be allowed to remain with no time limit to produce a second specimen. The Letter Agreement simply provides for an observed collection, and does not described how the collection is to be conducted. The regulations describe the process in more detail and state that if the employee declines to permit a "monitored collection," it is a refusal to test (49 CFR §40.69).

Therefore, although the Grievant was required to submit to an observed collection after her out-of-temperature range specimen, the Agreement and regulations are silent as to how long she should have to produce a second specimen, unless the shy bladder procedure applies because she failed to produce as specimen on the first attempt of the observed procedure, in which case there was a three-hour time limit. Notably, there is no specific language in the Letter Agreement nor in the regulations to support Dr. Smith's testimony that the shy bladder procedure should <u>not</u> be followed in these circumstances, and, in fact, as discussed above, the collectors rather diligently followed those procedures.[9]

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[9] The Letter Agreement provides: "If the employee has not provided a sufficient specimen within three hours of the *first unsuccessful attempt to provide the specimen,* the employee will be removed from work. . . ." (Italics added; see also 49 CFR §40.193[b][4]). In the Grievant's case, the first unsuccessful attempt was the first attempt in the (continued...)

Under these circumstances, it must be concluded that the shy bladder procedures did apply, and that the Grievant was appropriately directed to leave the collection site after three hours. The problem with the procedure that was followed, however, is that the Agreement and the regulations provide that after failing to provide a specimen within three hours, the Company is required to direct the employee to be evaluated by a licensed physician "who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen." (Letter Agreement, "Shy Bladder," paragraph 2; 49 CFR §40.193(c).) After such evaluation, the MRO can do one of two things: cancel the test if there is adequate basis for determining that a medical condition likely precluded the employee from producing a sufficient amount of urine, or rule the test a refusal to test if there is not an adequate basis for making such a determination.

Had the Grievant been referred for a medical examination, and had Dr. Smith ruled the test a refusal to test based on his medical opinion as to her ability to produce a sufficient specimen, the Arbitration Board would have no basis for going behind that medical determination to cancel the test. In this case, however, the required procedure was not followed: After the Grievant failed to produce a specimen within three hours and was directed to leave the clinic, she was not referred for a medical examination. Because of this procedural defect, Dr. Smith determined that it was a refusal to test without evaluating her medical condition.[10] As a result of this defect in the testing procedure,

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[9](...continued)
observed procedure. There is no language which states that the shy bladder procedure does not apply after an initial out-of-temperature-range or tampered specimen.

[10] In his January 30, 2008 letter to the Review Committee, Dr. Smith stated that he had "no knowledge of any pre-existing medical condition that would explain Ms. A. s inability to void a sufficient amount for testing." He noted that she had tested 19 times and was familiar with the testing procedures. He also testified that she was adequately hydrated after consuming 40 ounces of water (Tr. 63-64). However, these opinions were not based on a medical examination as required by the regulations.

it is concluded that the test must be canceled and given no effect.[11] It follows that the Grievant's termination was without just cause, and that she must be reinstated.

AWARD

1. The termination of the Grievant, . A , was not for just cause.

2. As a remedy, the Grievant is entitled to be reinstated to her former position, with her seniority intact, together with back pay and other economic benefits provided in the Agreement, less interim earnings, from the date of her termination until her reinstatement pursuant to this Award.

3. All time periods provided in the November 5, 2004 Return to Duty Agreement shall be considered tolled for the period between her termination and her reinstatement.

4. Calculation of the amount due the Grievant is remanded to the parties. Jurisdiction is reserved in the event of a dispute concerning implementation of the remedy.

Frank Silver, Chair, Arbitration Board		6/22/09 date
Phil Carter, Union Board Member	Concur/~~Dissent~~	7-3-09 date
Darryl Norris, Union Board Member	Concur/~~Dissent~~	6/29/09 date
Kathy Barquero, Company Board Member	Concur/Dissent	7/23/09 date
Margaret Short, Company Board Member	Concur/Dissent	7/20/09 date

[11] The Company also argues that the test should be ruled a refusal to test due to the Grievant's "[f]ailure to cooperate with the collection process" (Letter Agreement, "Test Refusals," part 6). In view of the conclusion, however, that the Company failed to refer the Grievant for a required medical examination, the general "catchall" category of refusal to cooperate cannot apply.