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IN ARBITRATION PROCEEDINGS

PURSUANT TO AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy

Between

PACIFIC GAS AND ELECTRIC COMPANY,

Employer

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1245,

Union

OPINION AND AWARD

Arbitration No. 293

This dispute involves the application and interpretation of a Collective Bargaining Agreement between the above-named Employer and Union. Pursuant to the provisions of the Agreement, the parties convened a Board of Arbitration to hear and resolve the matter. The members of the Board of Arbitration are Bob Choate and Joe Osterlund for the Union; Carol Pound and John Moffat for the Employer; and Charles A. Askin as the Neutral Arbitrator.

A hearing was held in San Francisco, California on October 5 and October 23, 2009. During the course of the hearing, the parties were given full opportunity to examine and cross-examine witnesses and to introduce relevant exhibits. The parties submitted post-hearing written briefs that were filed on February 1, 2010. The matter was deemed submitted upon the Neutral Arbitrator's receipt of the briefs on February 1, 2010.

APPEARANCES:

On Behalf of the Union:

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On Behalf of the Employer:

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ISSUE

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

RELEVANT CONTRACT PROVISIONS

POSITIVE DISCIPLINE GUIDELINES

STEP THREE - DECISION MAKING LEAVE (DML)

The DML is the third and final step of the Positive Discipline System. It consists of a discussion between the supervisor and employee about a very serious performance problem. The discussion is followed by the employee being placed on DML the following work day with pay to decide whether the employee wants and is able to continue to work for PG and E, this means following all the rules and performing in a fully satisfactory manner.

The employee's decision is reported to their supervisor the workday after the DML. It is an extremely serious step since, in all probability, the employee will be discharged if the employee does not live up to the commitment to meet all Company work rules and standards during the next twelve (12) months, the active period of the DML ...

2. Documentation

* * *

(d) A DML is active for twelve (12) months.

In the event an employee at a discipline step is placed on an approved leave leave of absence or is on the Compensation Payroll in excess of, ten consecutive workdays, the active periods referred to above will be suspended until the employee returns to the active payroll. However, if an employee is off the active payroll in excess of twelve consecutive months, any discipline will be deactivated upon their return to the active payroll. ...

III. TERMINATION -

A. Termination occurs when Positive Discipline has failed to bring about a positive change in an employee's behavior, such as another disciplinary problem occurring within the twelve (12) month active duration of a DML.

B. Notwithstanding the foregoing, if a performance problem which normally would result in formal discipline occurs during an active DML, the Company shall consider mitigating factors (such as Company service, employment record, nature and seriousness of violation, etc.) before making a decision to discharge, all of which is subject to the provisions of the appropriate grievance procedure for bargaining unit employees. . . .

FACTS

D (Grievant) was employed by Pacific Gas and Electric Company (Employer) for approximately thirty-seven years. At the time of his termination on May 29, 2008, Grievant held the position of senior meter reader at the Employer's facility in Napa, California. The Napa office is relatively small, about six hundred to seven hundred square feet. Senior meter readers are assigned cubicles and spend most of the work day in the office. They generally work the same shift and are responsible for, *inter alia*, scheduling and training approximately sixteen meter readers assigned to the Napa office. Meter readers are either regular, permanent employees of the Employer, or are dispatched from the International Brotherhood of Electrical Workers, Local 1245 (Union) hiring hall and employed at-will. Meter readers are in the office at the beginning and end of their shifts to sign in and out, but spend most of their work day outside the office on their routes. During the time period relevant herein, Derek Wilburn split his time as the Supervisor of the meter readers in the Napa office and the Employer's meter reading office in San Rafael. He began supervising Grievant in 2005, left the Napa office in 2006 until February 2007, when he resumed supervising Grievant.

By memorandum dated March 29, 2007 and signed by Wilburn, Grievant was placed on a Decision Making Leave (DML) for "inappropriate comments made by [Grievant] in the workplace towards fellow employees." The DML memorandum further states

> When you returned to work on March 29th, 2007, you told me that you wanted to continue to work for PG&E and would commit to all rules and office policies. I am glad you made the decision, and it is critically important that in the future you fulfill your commitment. You need to maintain your total job performance and conduct at a fully acceptable level in every area since any further problems that require disciplinary action may result in termination. This DML will remain active for the period of 12 months.

At the same time, Wilburn provided Grievant with a copy of the Employer's "Guidelines on a Harassment-Free Workplace" and explained to Grievant that he needed to follow the anti-harassment guidelines, and that any conduct outside of the guidelines was a violation, including any touching

or massaging of employees in the workplace. Wilburn also advised Grievant of the seriousness of the DML, and that any further policy violations could result in his termination.

In June of 2007, Wilburn observed Grievant giving a massage to a subordinate female meter reader in the workplace. He met with Grievant on June 7, 2007 and issued Grievant a Coaching and Counseling for failing to comply with the directive against touching or massaging in the workplace. Wilburn further reminded Grievant of the anti-harassment policy and that he was on a DML.

In February of 2008, Wilburn observed Grievant walking out of the office with his arm wrapped closely around the waist of meter reader W . He also observed that Grievant suddenly snatched his hand away. Wilburn believed that this conduct was inappropriate and intimate in nature. On February 22, he placed a call to Human Resources to initiate an EEO investigation of the conduct he had observed and concerns expressed by other employees. The investigation was conducted by Senior Investigator Collins Arengo, who interviewed Wilburn, Grievant, and eight other employees, including meter readers W , B, W , C , Q , R , and Bl . Interviews were conducted between March 19 and April 30, 2008. Arengo testified that it was part of her investigative procedures to advise employees that their statements would be held confidential except on a "need to know" basis.

On May 7, 2008, Arengo issued an Investigation Report. The Report did not disclose the identities of the witnesses interviewed by Arengo and relied upon in the findings and conclusions. In addition to citing the March 27, 2007 DML and the counseling conducted in June, 2007, Arengo concluded that Grievant violated Employer "policies on equal employment opportunity, anti-harassment, and employee conduct in the workplace" by engaging in four separate behaviors:

1. Grievant touched female employee W____ on more than one occasion, and his actions were unwanted and unwelcome.

2. Credible witnesses stated they observed Grievant staring at females' chests and ogling females in general.

3. Grievant gave massages to coworkers, and though not offensive to all employees, they were offensive to others observing this behavior in the workplace. His conduct was inappropriate in the workplace and he was coached and counseled by his supervisor for the same conduct in June 2007, and therefore knew he should not have engaged in this behavior.

4. Credible witnesses corroborated they observed Grievant standing too close to female employee [redacted].

Allegation No. 1: Unwanted and Unwelcome Touching of Meter Reader W

In reaching its decision to terminate Grievant, the Employer relied upon Wilburn's statement that he had observed Grievant with his arm around W ' waist as they left the office, and on the written statements of B , W and W . B testified that she observed Grievant giving W a massage after June 7, 2008 and that he put his arm around W . She further testified that W , an at-will employee, complained to her on numerous occasions about her discomfort with Grievant's touching her, but W did not report it to management because she was afraid of losing her job. B testified that she understood W ' concern because the office "turned a blind eye" to Grievant's conduct. At a funeral for a coworker in April 2008, B observed Grievant arriving with his arm "draped" around W ' shoulder. According to B , W gave her a look conveying that Grievant's conduct confirmed what W had told her about the unwanted touching.[1]

In his written statement, Wh stated that he saw Grievant rub up against W and observed Grievant at the funeral with his arm around W . He also stated that W had told him she felt uncomfortable with Grievant touching her. At the arbitration hearing, Wh testified that W had complained to him about the unwanted touching. Both Wh and B are related to Grievant on his wife's side. Grievant's wife is their aunt.

Before the hearing W was terminated for curb meter reading,[2] and did not testify. She was interviewed by Arengo in the investigation. W confirmed that Grievant had put his arms around her waist and shoulders; although she could not remember the last time it had happened, she told Arengo that she knew it was after June, 2007. W also stated that Grievant's arm had touched her butt once or twice, but she assumed it was a mistake. According to her statement, W told Arengo that she was not uncomfortable with Grievant's touching. W also confirmed,

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[1] It is undisputed that the conduct occurring at the funeral was outside the twelve-month period of the DML, which expired in late March 2008. Although such conduct may have warranted discipline, it cannot be relied upon for progressive discipline leading to Grievant's discharge, which is the issue before the Board. Accordingly, the alleged misconduct at the funeral is not properly a part of the discipline before the Board.

[2] "Curb" meter reading occurs when a meter reader dishonestly reports customer usage without actually reading the meter.

however, that she had "vented" to coworkers about Grievant, and that what she had vented were not lies. Both W and Wh stated that some of these conversations about Grievant's conduct had occurred while the coworkers were out drinking. Arengo testified that she did not credit W 's statement that she was not uncomfortable with Grievant's conduct based on her demeanor during the interview which included tearing up and looking away. Arengo further testified that she based her credibility finding on W 's statement that the comments made to Wh and B while "venting" about Grievant were not lies. Arengo also noted that W denied that Grievant showed her a photograph of his wife in a negligee, which Grievant admitted he had done.

Allegation No. 2: Staring at Female Coworkers' Chests and Ogling

Arengo relied upon investigatory statements made to her by B , Wh , and meter reader Q . Q testified that Grievant stared at female coworkers, and that if Q was in a conversation with him, it seemed like Grievant would "break his neck" deliberately turning to stare at a woman as she walked by. Q further testified that this behavior happened more than once and was not uncommon. He found Grievant's conduct in this regard to be inappropriate and offensive. Although he did not recall it at the arbitration hearing, Q stated in his written investigation statement that Grievant also stared "up and down" at female coworkers.

B used the term "ogling" to describe Grievant's conduct in staring women up and down, and further testified that he stared at the chests of female meter readers when they were standing in front of his desk. Arengo testified that it was clear from B 's demeanor and tone of voice during her interview with B that B was offended by Grievant's conduct.

In his written statement, Wh stated that he saw Grievant make "huge body movements" to look at W when she passed by, and demonstrated Grievant's conduct to Arengo during his interview. Wh testified that he did not remember showing Arengo how Grievant stared at W , but conceded that if it was in his statement the information had come from him and that his memory of the events was clearer at the time of the interview than at the hearing.

Allegation No. 3: Giving Shoulder Massages to Coworkers

Arengo relied upon the written statements obtained during investigatory interviews with employees C , H , R , Bl , W , B , and Wh in

support of her conclusions concerning this allegation.. C stated that she observed Grievant massage the neck and shoulders of H and W after June, 2007. C testified that she observed Grievant give massages to coworkers, and that she felt such conduct was inappropriate in the workplace. She further testified that she knew the massages occurred after June, 2007 because she was hired on May 31, and the massages occurred a while after she began her employment.

In her written statement provided to Arengo during the investigation, H stated that Grievant gave her shoulder massages after June, 2007.[3] R also stated to Arengo that he observed Grievant give massages to H . He testified at the arbitration that he observed the massaging, but was unable to give specific dates on which he observed Grievant's conduct.[4] Bl 's written statement indicates that he observed Grievant give massages to coworkers after June, 2007. His testimony at the hearing was consistent with his written statement in this regard. He further testified that he did not think it was right for Grievant to be giving massages, but "didn't know if [he could] say [he] was offended." Wh also stated in his written statement that he had seen Grievant give massages to several coworkers and that the conduct occurred after June, 2007. At the hearing, Wh testified that Grievant gave shoulder massages to both men and women on occasion, but that it was hard to put a time line on when this occurred.

Ball told Arengo that she saw Grievant give massages to three female coworkers, and that this conduct continued after June, 2007. At hearing, B testified that she observed the massaging of the three female coworkers after June, 2007, and that people complained about it. In her written statement provided during the investigation, W stated that Grievant gave her massages after June of 2007, and although she had not asked for them they did not make her uncomfortable.

Allegation No. 4: Standing too Close to W

Arengo testified that her finding that Grievant violated policy by standing too close to W was based on statements given to her by B , Wh and W . B tated that she observed

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[3] H did not testify at the arbitration hearing.

[4] R also testified that on one occasion when a coworker requested him to find a knot in her neck, he attempted to do so but failed.

Grievant get "way too close" to W , and that Grievant stood right behind her when she was signing in to work, even though there was plenty of room. She testified similarly at the hearing, and used a chair to demonstrate that Grievant stood close behind W , and leaned over her as she was bent over signing in. W stated that Grievant had "gotten into her personal space but not where it's uncomfortable to her." Arengo also considered W 's statement that Grievant had put his arm around her waist and shoulder as part of the allegation that Grievant had stood too close to her.

Grievant did not testify at the hearing. When interviewed by Arengo during the course of the investigation, Grievant provided a written statement. In the statement, Grievant said he might have touched W 's back as he walked by her but that it was not purposeful. He denied ogling female employees, or staring at their chests. Regarding the massaging of coworkers, Grievant stated that he stopped doing it after Wilburn told him not to give massages. He further stated that he did not recall "whether he gave anyone, W , H back, shoulder, head massages after June 2007." Grievant wrote that he had "not purposely stood too close, in someone [sic] personal space. Grievant requested that Arengo interview H who is a clerk in the office. Arengo testified that she did not interview H because, even if H said she was not offended by the conduct, other employees were offended by the conduct.

Grievant was off work for most of the month in May, 2008. On May 27, Wilburn gave him a copy of the Investigation Report and an opportunity to respond. On May 28, Grievant, with his shop steward, provided a list of items with which Grievant took issue. After reviewing these concerns with Arengo, Wilburn terminated Grievant on May 29, 2008 for violating the Company's Employee Conduct policies.

Step Two of the parties' contractual grievance procedure contemplates a "full and complete investigation" of the pertinent factors in a grievance, including a mutual narrative of pertinent facts, before the mutual Local Investigative Committee (LIC). Except for Wilburn, the identity of the witnesses who provided statements in the investigation and relied upon in the discharge decision was not disclosed at Step Two of the grievance procedure, or at Steps 3 and 4. The identity of the witnesses who provided evidence against Grievant during the investigation in support of the termination decision was disclosed at arbitration (Step 5), and many of them testified at the hearing.

CONTENTIONS OF THE PARTIES

The Employer

The Employer contends that it had just cause to terminate the Grievant. Grievant was well aware of the Employer's policies, including its EEO policies and Code of Conduct. He was placed on a DML on March 27, 2007 for making inappropriate comments to another employee. Under the terms of the DML, Grievant understood that any failure to maintain satisfactory performance over the twelve-month period would result in the termination of his employment. The parties do not dispute that Grievant's employment can be terminated if he violated Employer policies while on an active DML.

Despite being on a DML Grievant continued to engage in misconduct, and defied his supervisor's direct order not to touch or harass female employees. The Employer conducted a thorough and fair investigation into the allegations against Grievant, and provided Grievant two opportunities to respond to the allegations. The uncontroverted evidence establishes that the Employer's decision to terminate Grievant was based on the reasonable belief that the Grievant engaged in inappropriate conduct while on a DML, which had an active period from March 29, 2007 to March 29, 2008.

The record reflects that Wilburn specifically ordered Grievant not to touch or massage employees in the workplace in June, 2007. In February 20008, Wilburn saw Grievant intimately hold W as they walked out of the office. Wilburn believed this conduct was inappropriate and in defiance of his order to Grievant. Multiple witnesses saw Grievant leer at and ogle women in the workplace. Multiple witnesses saw Grievant continue to massage employees in the workplace after being specifically ordered not to do so in June, 2007. Witnesses also observed that Grievant stood too close to W and invaded her personal space.

Under the Progressive Discipline Policy, Grievant was obligated to "maintain fully satisfactory performance during the active period" of the DML. Under the Policy, failure to adhere to even one Employer policy would result in termination. The record shows that Grievant engaged in multiple policy violations while on DML. Grievant did not testify and provided no evidence to refute the eyewitness testimony presented by the Employer. Even though Grievant claims that one

of the examples given by witnesses involves conduct at a funeral occurring outside the DML period, his claim does not negate the multiple acts of misconduct at work during the active period.

Grievant's claim that the DML period had expired at the time of his termination does not excuse him from his misconduct during the DML. Under the Union's theory, the Employer would be required to be on notice of a violation, conduct an investigation, and terminate Grievant on or before March 27, 2008. There is no support for this argument. The Progressive Discipline Policy does not state that the Employer must take disciplinary action within the twelve-month period of the DML. In fact, precedential Pre-Review Committee decisions, as recently as May 2009, have upheld terminations under similar facts. In Pre-Review Committee Decision No. 18559, the grievant was on a one-year DML scheduled to expire on July 25, 2008. During the active period of the DML, the grievant engaged in a number of behaviors that violated policy. The grievant was not terminated until August 21, after a fair and thorough investigation. The grievant argued that the Employer could not terminate him because the DML expired on July 25. The Pre-Review Committee rejected the grievant's argument and upheld the termination because the misconduct occurred during the active duration of the DML.

The Union also argues that Grievant's termination should be reduced to a Coaching and Counseling because the witnesses were not made known to Grievant at the Local Investigative Committee (LIC) level. The Union relies upon Pre-Review Committee Decision No. 1468 in arguing that if the witnesses are kept confidential and not made known to a grievant at the LIC hearing, a termination must be reduced to a Coaching and Counseling. However, neither the Decision nor the record supports the Union's contentions. The Decision does not state that witness identities must be known at the LIC level. Instead, the Decision triggers only if the witness identities are withheld during the *grievance process.* The grievance process contains five steps, which includes arbitration as the last step. It is undisputed that the witnesses came forward to testify at the arbitration hearing. Moreover, Wilburn, who witnessed Grievant intimately holding W around the waist as they exited the office, appeared at the LIC.

Assuming *arguendo* that somehow Grievant is shielded from his ongoing misconduct, he is still not entitled to the remedies he seeks. Should the Board decide to sustain the grievance, the

Employer is prepared to present additional evidence showing why reinstatement and back pay is not an appropriate award in this grievance.

The Union

The Employer failed to sustain its burden of proving just cause for Grievant's discharge. According to prior arbitral precedent between the parties, the appropriate standard of proof is "clear and convincing evidence" when the Employer alleges sexual harassment. The majority of arbitrators agree that discharge for sexual harassment of a coworker must be proven by clear and convincing evidence.

The Employer did not prove by clear and convincing evidence that Grievant sexually harassed his coworkers. The Employer's investigation was driven by a supervisor and EEO investigator who had preconceived notions to terminate Grievant despite what evidence the investigation disclosed. It was inappropriate for the EEO investigator, who had no personal knowledge of the Napa office behaviors, to substitute her opinion for the firsthand information of the individuals who actually worked there. The allegations involving W (numbers 1and 4) fail because they are based exclusively on the hearsay statements made by W , who did not testify. In addition, the Employer argues that W 's written investigation statement should be disregarded, and that the Board should instead credit statements supposedly made to B and Wh , in after work drinking sessions. Even if W .made negative comments about Grievant on those occasions, the value of such statements is nil. Moreover, whether or not Grievant got in W 's personal space is inherently subjective and cannot be proven without W ' testimony.

The Employer's argument that Grievant created an offensive work environment by giving massages to coworkers (allegation number 3) falls short because the Employer failed to prove that rubbing shoulders was a violation of the Employer's sexual harassment policy. It also failed to prove that anyone was offended by the conduct. The policy defines sexual harassment as

> unwelcome sexual advances, requests for sexual favors, and/or verbal, visual, physical conduct based on sex that is sufficient to affect the terms and conditions of employment. Sexual harassment may be overt or subtle.

No evidence was presented that Grievant's shoulder massages were perceived as unwelcome sexual advances, or sexually-motivated contacts. Other meter readers have acted similarly, yet none of them

were disciplined. The Employer's claim also fails because no one actually complained that they were personally offended by observing Grievant rub another person's shoulders. Nor did the conduct amount to a violation of company policy, which the Employer must establish in order to justify the termination under the DML letter. While Grievant's conduct in giving an occasional shoulder rub may have been an exercise in poor judgment, it was not a violation of company policy that warranted his termination.

The Employer's claim that Grievant sexually harassed his coworkers by "looking" at them (allegation number 2) was also not proven. There has been no showing that any female coworker felt that Grievant looked at them in a way that made them uncomfortable or was offensive to them. The two male witnesses that now claim they thought Grievant's staring at women as they walked past was inappropriate did nothing about it, or even said anything to Grievant about it.

Even if it were determined that Grievant violated the anti-harassment policy, discharge is excessive because Grievant's DML was deactivated by the time the Employer's investigation got underway and by the time some of the misconduct is alleged to have happened. The Union concedes that RC Decision 18559 establishes that when delays occur in the Employer's investigation that are not attributed to the Employer, it has been permitted to "finish" its investigation of misconduct that occurred during the active period of the DML. The Employer may not, however, consider conduct that occurred *after* the expiration of a DML to trigger discharge based upon a DML. The instant case differs from RC Decision 18559 in two respects. First, the delays in the Employer's investigation were not caused by Grievant, or for other good cause. Second, the Employer did not determine with specificity whether all the claimed misconduct took place during the DML period. In fact, it is undisputed that evidence concerning what occurred at the funeral of a coworker in April was outside the DML period. Termination is also excessive because the Employer failed to mitigate, as required by the Positive Discipline Agreement, by taking into account Grievant's thirty-seven year tenure of employment, as well as the totality of the circumstances. These circumstances include the lack of any evidence that employees viewed the touching as unwelcome or offensive, or that any employee had complained to management about Grievant's conduct. Nor was any other employee disciplined for engaging in shoulder rubs.

In prior precedent (PRC Decision 1468), the parties acknowledged the limits of the discipline that may be imposed when the EEO maintains that confidentiality must not be breached. In that decision, the parties addressed the conflict between the right of a grievant to face his accusers and the confidentiality associated with EEO investigations. It was determined that

> when witnesses in EEO investigations do not want their identities made known, no formal disciplinary action against an employee will occur as a result of information obtained during that investigation. The employee so accused will be Coached and Counseled and notified that a problem may exist.

The parties noted that this procedure would be followed in future similar cases. The Employer's argument that the decision only applies to cases in which the witnesses do not wish to have their identities known is a red herring. Whether confidentiality is insisted upon by the witnesses or by the Employer, it has the same effect upon a grievant's right to confront his accusers.

The Employer's claim that it met its obligation by identifying the witnesses at arbitration is not persuasive. To allow the Employer to withhold witness identities until arbitration contradicts the policy concerns underlying PRC 1468. Disclosing witness identities is necessary for thorough consideration of the merits of a discipline at *every* step of the grievance procedure. To conclude otherwise would seriously burden the grievance process; the Union would be forced to arbitrate every case where the Employer relies upon anonymous accusers and reports. Under PRC 1468, the Employer was only permitted to Coach and Counsel Grievant.

The grievance should be sustained. The Board should order that Grievant be reinstated and made whole for the losses he incurred as a consequence of this unjust termination.

OPINION

In determining whether an employer has just cause to impose discipline upon an employee, it is necessary to consider two separate issues. An employer must first establish that the employee committed a disciplinary offense, i.e. a violation of a valid work rule. In this regard, in addition to the facts of an employee's conduct, arbitrators normally consider such factors as whether there is an existing rule which the employee is accused of violating, whether such rule is clear and understandable, whether it was published or disseminated to the employees, and whether the rule has a reasonable relationship to legitimate employer interests.

Assuming that a violation of a valid rule has been established, an employer must then persuade that the discipline selected is reasonably related to the seriousness of the proven offense in all of the circumstances of the case. Generally, the concept of just cause contemplates an adequate and fair investigation of the facts prior to imposing discipline and recognition of any mitigating facts disclosed by that investigation. Other appropriate considerations include whether the employer's rule has been enforced in a uniform and non-discriminatory manner, and whether, absent proof of a summary discharge offense, the discipline selected is consistent with accepted standards of progressive discipline.

The PRC 1468 Defense

As an initial matter, it is necessary to address the Union's argument that the Employer was limited to Coaching and Counseling Grievant for any alleged misconduct pursuant to the ruling adopted by the parties in PRC Decision 1468 because it chose to withhold the identities of the witnesses whose statements the Employer relied upon in determining to discharge Grievant. A review of the Grievance Procedure in the parties' contract reveals an unusually detailed and extensive grievance procedure, consisting of five steps ending in arbitration. Step Two of the grievance procedure provides for the establishment of a Local Investigating Committee charged with making a *"full and complete investigation of all of the factors pertinent to the grievance,"* including holding investigatory interviews if *"necessary to gain all of the information required to resolve the grievance."* The grievance procedure further provides for the LIC to prepare a report of its findings, including a mutually agreed upon narration of *"all the events and factors involved in the dispute"* and *"findings with respect thereto."* Step Three of the grievance procedure provides for the creation of a Fact Finding Committee which is empowered to *"hold hearings or meet at such places and times as it deems necessary to resolve the grievance."* If the grievance is not resolved at that step, it is moved to Step Four in which Pre-Review Committee and Review Committee procedures are followed in a further effort to resolve the grievance before its referral to Step Five Arbitration.

These extensive grievance procedures clearly reflect the parties' intention that grievances will be thoroughly investigated and every effort made to expeditiously resolve them before referring them to arbitration. They contemplate that the parties will develop the facts pertaining to a grievance by

conducting a live, fact-finding proceeding at which witnesses will be called upon to disclose relevant information and questions can be asked and answered. To the extent that either party withholds pertinent information or percipient witnesses, upon which its view of the grievance relies, such conduct fails to comport with the requirements of the contractual procedures and their underlying intent. In fact, the parties' agreement, as reflected in PRC Decision 1468, is that the Employer is limited to a specific, minimal penalty – a Coaching and Counseling – if it chooses to withhold the identity of witnesses in EEO investigations underscores the importance the parties themselves have placed upon the full and thorough investigation of all pertinent facts in an effort to resolve grievances as early as possible in the grievance procedure. PRC Decision 1468 reflects a mutual understanding and recognition that withholding witnesses at the initial steps of the grievance procedure constitutes a patent violation of the Agreement. As the Union points out, if the Employer were allowed to withhold the identities of its witnesses, the Union would have no way of assessing the validity or strength of either party's position to determine whether to settle, pursue, or drop a grievance. Under these circumstances, the Union would be constrained to arbitrate all cases of discipline where the Employer relied upon anonymous witnesses. Such a result is inconsistent with the language of the contractual grievance procedure, and particularly as interpreted in PRC Decision 1468.

In addition, this conclusion is required by the due process considerations underlying the principles of just cause. As noted above, the concept of just cause includes an adequate and fair investigation of the facts. A fair investigation must include a meaningful opportunity for a grievant to confront his accusers and challenge their statements as to accuracy and credibility, and to present exculpatory information. If this opportunity is not provided until the day of an arbitration hearing that might not take place for many months or over a year later (as occurred in the instant case), the Union and the grievant can be seriously hampered in attempting to provide pertinent information with respect to dates, times, and other witnesses who may have relevant, and/or differing perceptions of critical events because of the passage of time undermines the ability to mount an effective defense.

In sum, it is concluded that the Agreement's grievance provisions specifically required the Employer to provide the identities of witnesses before imposing any formal disciplinary action

against Grievant. Well-established principles of just cause mandate the same result. Accordingly, it is not appropriate for the Board to consider the evidence of alleged misconduct provided by witnesses whose identities were not disclosed until the day of the arbitration, the last step of the five-step grievance procedure. Since the Employer was limited to a Coaching and Counseling under the parties' precedent, such counseling also cannot be used to build on a DML to justify termination.

Was there Just Cause for the Termination?

Apart from the initially-anonymous information which is limited to the Coaching and Counseling as described above, there is independent evidence of two other incidents during the active period of the DML issued to Grievant that were considered in support of the termination decision which are properly before the Board in assessing the propriety of the termination decision. First, there is undisputed evidence that Wilburn observed that Grievant gave a massage to an employee in June, 2007. Second, there is undisputed evidence that Wilburn observed Grievant leaving the office in February, 2008 with his arm wrapped closely around the waist of W Wilburn's identity and the substance of his accusations were disclosed to the Union and Grievant before and at the LIC meeting, and thus known by both parties through each step of the grievance procedure. In view of the undisputed nature of that evidence, the record supports a finding that the Employer proved that Grievant gave a massage to a coworker in June, 2007 and later also touched a female worker by wrapping his arm around her waist while exiting the office several months later, both of which occurred during the active period of the March 29, 2007 DML.

Having concluded that the Employer proved that Grievant committed the separate acts of giving an employee a massage and touching an employee's waist in a familiar, if not intimate, manner, it must next be determined whether the penalty of termination for those proven actions was reasonable in all of the circumstances of this case. It is clear that the Employer considered these incidents, not as summary discharge offenses, but rather as further misconduct in the context of prior progressive discipline. The analysis of the reasonableness of the termination penalty necessarily starts with a review and consideration of the progressive discipline in effect at the time the latter misconduct occurred. Here, it is undisputed that Grievant was subject to a DML for 12 months commencing on March 29, 2007.

The parties' Positive Discipline Guidelines addresses the significance and seriousness of this level of discipline. It is noted therein that a DML is the third "and final step" of the Positive Discipline System and that it constitutes "an *extremely serious step* since, in all probability, the employee will be discharged *if the employee does not* live up to the commitment to *meet all Company work rules and standards for the next twelve (12) months...*" (emphasis added). Finally, the policy states that termination is warranted and "occurs" when Positive Discipline fails to change the employee's behavior, "*such as another problem occurring within the twelve (12) month period*" (emphasis added). Thus, based on the clear content of the Positive Discipline Guidelines, it is contemplated that a single ("another") problem, or an infraction of *any* work rule during the active life of a DML subjects an employee to discharge. In this case, the record shows that Grievant received similar warnings when he received his DML on March 29, 2007:

> You need to maintain you total job performance and conduct *at a fully acceptable level in every area* since *any further problems that require discipline may result in termination.* This DML will remain active for the period of 12 months.

In addition to these clear general expectations and warnings about following "all" rules and avoiding "any" further problems, and Employer also provided Grievant with more specific guidelines and expectations of his specific conduct issues by giving him a copy of the written policy entitled "Guidelines on a Harassment-Free Workplace" and a verbal warning that any conduct outside the guidelines – including any touching or massaging of employees in the workplace – was a violation that could result in termination.

In the context of both the general written policies concerning "further" violations while on a DML, and in the particular context of the specific warnings given to Grievant, the proven incident in June, 2007 when Grievant gave a massage to an employee in the workplace was a serious violation that *could* have resulted in termination at that time. Thus, not only was Grievant's conduct a "further problem" in light of his past violations of the harassment policy, the evidence shows that Grievant's conduct was directly contrary to the very specific warning – and instruction – of his supervisor that he was *not* to give any massages to coworkers. While the Employer could have imposed discharge pursuant to the Positive Discipline Guidelines and the terms of his own DML when Grievant disregarded that instruction in June, 2007, management elected to give Grievant yet

another chance to abide by "all" rules and expectations by giving him a Coaching and Counseling instead. In the Board's view, this action in lieu of termination for the June, 2007 incident was consistent with the Employer's obligation under the Positive Discipline Guidelines to consider mitigating factors, including Grievant's service time and the seriousness of the performance "problem" – before imposing the ultimate penalty of discharge. Thus, Grievant was given another opportunity to demonstrate that he could change his behavior and comply with "all" rules and standards during the remaining active period of the DML, with a specific reminder of the directive against "touching" or massaging employees in the workplace.

Unfortunately, the evidence shows that Grievant was still unable to meet his commitment under the DML of meeting all work rules and standards during the remaining active period of the DML. His proven conduct of closely wrapping his arm around the waist of a female employee as they exited the office was inappropriate, and was more intimate than giving a massage. Moreover, like the June 2007 incident, it was conduct in direct violation of the specific supervisory instruction that Grievant was not to "touch" a coworker in the office. The facts also show that Grievant engaged in the rather unusual conduct of suddenly removing his arm from W waist as they exited together, an action suggesting either that W requested that he stop what he was doing or that Grievant himself recognized that his conduct was improper and/or about to be discovered, which he knew could result in serious discipline. Notwithstanding his furtive conduct, Grievant's touching of coworker W was indeed discovered, and it constituted yet another violation of the instruction he had been given by Wilburn *after* (and in addition to) the terms of his DML. This "further problem" appears to indicate that Grievant was unable, or unwilling, to comply with the specified expectations and instructions prohibiting any "touching" of coworkers in the workplace. Since the prior serious discipline of a DML, plus the "extra" chance opportunity afforded by the last Coaching and Counseling in June, 2007, failed to achieve the intended purpose of correcting Grievant's behavior, the Employer's decision to terminate Grievant was consistent both with accepted principles of progressive discipline and in accordance with the general and specific warnings he had received pursuant to the Positive Discipline System and the terms of his own DML and accompanying verbal warnings from his supervisor.

To summarize, the Employer was permitted to rely upon Wilburn's statements which were provided to Grievant and the Union at the onset of the grievance procedure. This uncontroverted evidence establishes that Grievant engaged in two instances of misconduct during the twelve-month period of his DML. Grievant's conduct demonstrated that he was either unable or unwilling to change his behavior after being accorded all the benefits of the parties' Positive Discipline agreement. Based on all the circumstances of the case, it is concluded that the Employer had just cause to terminate Grievant.[5]

AWARD

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

DATED: March 19, 2010

Charles A. Askin, Neutral Arbitrator — Date 4/15/10

Bob Choate, Union Panel Member — CONCUR/DISSENT — Date 4/7/10

Joe Osterlund, Union Panel Member — CONCUR/DISSENT — Date 4/7/10

Carol Pound, Employer Panel Member — CONCUR/DISSENT — Date 4-5-10

John Moffat, Employer Panel Member — CONCUR/DISSENT — Date 3/31/2010

[5] The Union also raised a procedural issue concerning its claim that the discharge was improper because the prior DML discipline had expired before the investigation was conducted, and that the delay was not caused by Grievant or for other good cause. It is undisputed that Grievant's misconduct in February, 2008 occurred within the twelve-month period of the DML. Obviously, if an employee on a DML allegedly engaged in misconduct on the last day of a DML, the Employer is permitted to investigate the alleged misconduct within a reasonable period of time and reach a determination on the matter because the conduct occurred within the active period of the DML. In this case, there was some delay between the conduct that occurred in early February and that formal start of the investigation on or around March 19, 2008, which was still within the DML period. The Investigative Report issued on May 7, and Grievant was terminated on May 29; however, the parties' Chronology (Jt. Ex. 2-4) indicates that Grievant was off work for most of the month of May. It is concluded that the delay in initiating the investigation and in reaching the termination decision was not unreasonable in all of the circumstances of this case.