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MATTHEW GOLDBERG
Arbitrator ◆ Mediator ◆ Attorney at Law
130 Capricorn Avenue
Oakland, California 94611

IN ARBITRATION PROCEEDINGS PURSUANT TO

AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy between: INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245, Union, and PACIFIC GAS & ELECTRIC COMPANY, Employer. Re: S[redacted]ermination	OPINION AND AWARD OF THE ARBITRATION BOARD

This arbitration arises pursuant to a Collective Bargaining Agreement between **INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245**, (referred to below as "Union"), and **PACIFIC GAS & ELECTRIC COMPANY**, (referred to below as "Employer" or "Company"). Under its terms, Arbitrator Terri Tucker was originally selected to serve as neutral Chairperson of the Arbitration Board; **F.E. DWYER** and **MIKE GRILL** served as Union Board Members; and **ROBIN WIX** and **CHRIS ZENNER** served Company Board Members. At some point after the close of the hearing, Ms. Tucker became incapacitated and unable to submit a written Award in this matter. Subsequently, on August 31, 2017, **MATTHEW GOLDBERG** was selected to review the entire record and to prepare and file the Award.

Hearings were conducted on August 19, 2015, and February 8 and 9, 2016 in Vacaville,

California. A written transcript indicates that all parties had full opportunity to examine and cross-examine witnesses, and to submit evidence and argument. Posthearing briefs were received by this Arbitrator on or about October 12, 2017.

APPEARANCES:

On behalf of the Union:

ALEX PACHECO, Staff Attorney, **INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245**, 30 Orange Tree Circle, Vacaville, California 95678

On behalf of the Employer:

KYLE MATARRESE, Esq. of **LITTLER MENDELSON,** 650 California Street, 20th Floor, San Francisco, California 94108

THE ISSUE

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

RELEVANT CONTRACT SECTIONS

TITLE 24. MANAGEMENT OF COMPANY AND MISCELLANEOUS

TITLE 24.1 – MANAGEMENT OF COMPANY

The management of the Company and its business and the direction of its working forces are vested exclusively in the Company, and this includes, but is not limited to, the following: to. . . . discipline or discharge employees for just cause. . . .

POSITIVE DISCIPLINE GUIDELINES[1]

* * *

In order to ensure that customers are served effectively and Company business is conducted properly and efficiently, employees must meet certain standards of performance and perform their jobs in a safe and effective manner. Supervision is responsible for establishing employee awareness of their job requirements, and employees, in turn, are responsible for meeting these

[1]The Guidelines were the subject of a September, 1987 Letter of Agreement between the Company and the Union.

standards and expectations. Positive Discipline is a system that emphasizes an individual's responsibility for managing their performance and behavior. It focuses on communicating an expectation of change and improvement in a personal, adult, non-threatening way; while at the same time maintaining concern for the seriousness of the situation. Key aspects of this system include recognizing and encouraging good performance, correcting performance problems through coaching and counseling, and building commitment to effective work standards and safe work practices.

. . . . Positive Discipline is designed to provide the opportunity to correct deficient performance in a manner that is fair and equitable to all employees. Each step is a reminder of expected performance, stressing decision-making and individual responsibility, not punishment.

THE POSITIVE DISCIPLINE SYSTEM

A. Coaching and Counseling

Coaching/counseling is the expected method for the supervisor to inform an employee about a problem in the areas of work performance, conduct or attendance. The objective of performance coaching/counseling is to help the employee recognize that a problem exists and to develop effective solutions to it. . . .

B. Positive Discipline Steps

When an employee fails to respond to counseling and coaching or a single incident occurs which is serious enough to warrant a formal step of discipline, the supervisor will have several options, depending on the seriousness of the performance problem. . . .

STEP ONE – ORAL REMINDER

1. Application

The supervisor discusses the conduct, attendance or work performance problem with the employee in a private meeting. The supervisor reminds the employee of the importance of commitment to follow work rules and Company standards. In this problem-solving discussion, the supervisor informs the employee that this is the first step of the discipline process and restates the employee's need to live up to her commitment. . . .

STEP TWO – WRITTEN REMINDER

A written reminder is a formal conversation between a supervisor and employee about a continued or serious performance problem. The conversation is followed by the supervisor's written letter to the employee summarizing the conversation and the employee's commitment to change his/her behavior. It is the second step of the Positive Discipline System

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1. Application

The step is applied when:

- An employee's commitment to improve is not met within the six(6) month active time period for an oral reminder; or
- An employee commits a serious offense whether or not any previous disciplinary action has been taken.

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 the employee about a very serious performance problem. The discussion is followed by the employee being placed on DML the following workday with pay to decide whether the employee wants and is able to continue to work for PG&E by following all the rules and performing in a fully satisfactory manner.

The employee's decision is reported to his/her 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 twelve (12) months, the active period of the DML, except as provided in Section III.B.

Because the DML is a total performance decision by the employee, there is only one active DML allowed.

1. Application

The step is applied when:

- An employee's commitment to improve is not met within the twelve(12) month active time period for a written reminder; or
- An employee commits a serious offense whether or not any previous disciplinary action has been taken.

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. Termination may also occur in those few instances when a single offense of such major consequence is committed that the employee forfeits his/her right to the Positive Discipline process. . . .

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. . . .

IV. ADMINISTRATIVE GUIDELINES

A. Rule infractions are generally divided into three categories. These are (1) work performance (2) conduct and (3) attendance. The maximum number of oral reminders that may be active at one time is three (3) and these must be in different categories. Should another performance problem occur in a category where there is already an active oral reminder, the discipline step must escalate to a higher level of seriousness, usually a written reminder. The maximum number of written reminders that may be active at one time is two (2) and these must be in different categories. Should another performance problem occur in a category where there is already an active written reminder, the discipline step must escalate to a DML

* * *

Placement of a bargaining unit employee at a Positive Discipline step or termination of a bargaining unit employee may be grieved by that employee's Union on the ground that such action was without "just cause," the degree of discipline was too severe or there was disparity of treatment, pursuant to the provisions of the appropriate grievance procedure.

Because the Decision Making Leave is a total performance decision on the employee's part, there is only one DML. Additionally, while the DML is active, no other formal steps of Positive Discipline may be administered, except as provided for in Section III.B.

B. The following list, which is not intended to be all-inclusive, gives examples of rule violations and general categories they fall into:

Work Performance

Unsatisfactory Work Performance (Quality/Quantity, Effort and/or Negligence)

* * *

C. Offenses in each of the three categories are normally assigned a level of severity. Their level of severity can be minor, serious or major in nature. As a general rule, the seriousness of the offense dictates which step of the Positive Discipline process would apply.

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EXCERPTS FROM EMPLOYEE CODE OF CONDUCT

Employee Conduct Standards[2]

Safety

We must create an environment at PG&E where employees feel free to raise all safety-related issues without peer pressure or fear of reprisal. . . .

Harassment and Discrimination

At PG&E, we are committed to maintaining a work environment that respects individual differences. Conduct yourself in a professional manner and treat others with respect, fairness, and dignity. PG&E does not tolerate harassment or discrimination, including behavior, comments, . . ., or other conduct that contributes to an intimidating or offensive environment. . . .

Harassment and discrimination also can occur in the form of bullying, initiation activities, or workplace hazing, which can be humiliating, degrading, or cause emotional or physical harm. No forms of harassment or discrimination are tolerated, regardless of the employee's willingness to participate; such conduct can result in termination.

Discipline

Failure to comply with this Code or company guidance documents may result in disciplinary action or termination. . . .

How To Raise Concerns

If you encounter questionable activities at work, immediately bring them to PG&E's attention. . . .

PG&E prohibits retaliation against anyone who raises good faith concerns or is involved in an investigation. PG&E will investigate any all reports of retaliation and take the appropriate action.

VIOLATION OF A CONDUCT STANDARD [3]

Violation of a conduct standard or company value may subject an employee to disciplinary action or termination of employment. . . .

SPECIFIC CONDUCT PROHIBITIONS

Harassment, Discrimination, and Other Inappropriate Conduct

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[2]Revised August 2013. There have been subsequent revisions beyond the dates of these events.

[3]Revised August 2008.

- Engage in any form of workplace violence, including . . . extreme behavior intended to frighten, intimidate or injure another person. . .

- Engage in any form of workplace hazing or bullying, including activity expected of someone in a particular workgroup that humiliates, degrades, or risks emotional and/or physical harm, regardless of the employee's willingness to participate.

CUSTOMER CONTACT & CREDIT OPERATIONS
EMPLOYEE CONDUCT SUMMARY SUPPLEMENT

STATEMENT OF CC & CO POLICY:

It is the policy of the CC & CO that employees at all times provide comprehensive and quality service to PG&E customers. CC & CO employees shall utilize their best efforts to perform their work in a manner that reflects positively upon PG&E. CC & CO employees are also expected to be familiar with, and adhere to the policies outlined in the CC and CO guidelines.

FAILURE TO ABIDE BY CC AND CO POLICY WILL SUBJECT ANY CC AND CO EMPLOYEE TO DISCIPLINARY ACTION, UP TO AND INCLUDING DISCHARGE

Examples of misconduct that may subject an employee to disciplinary action, up to and including discharge include, but are not limited to the following:

- Using language or responding to a customer in a manner that is disrespectful, rude or demonstrates an unwillingness to assist the customer in resolving a problem.

FACTS
Background

Grievant was first hired by the Employer as a Customer Service Representative ("CSR") on January 24, 2002. Her job consisted primarily of providing in-person assistance to around 70-80 customers each day. Grievant was terminated September 17, 2013 following an allegedly retaliatory statement to a co-worker on July 23 and a customer complaint lodged on July 24. Her termination notice recites that she "violated the Employee Code of Conduct" as a result of these acts and "continuing customer complaints." The Notice additionally states that when these incidents took place, grievant was on an active DML, and "a subsequent Coaching and Counseling."

Prior to her discharge, grievant was working at the Employer's Merced customer contact

center. O[redacted] G[redacted] was her direct supervisor at the time.[4] She found that grievant's performance was generally inconsistent, with great days when she was a "stellar employee" mixed with bad ones where she struggled to get along with customers and co-workers. Grievant first worked under G[redacted]' supervision in Fresno in December of 2007. She maintained that she got along well with all of her prior supervisors, but after 10-11 months under G[redacted]' supervision, transferred to Merced because she felt G[redacted] was "harassing" her. As evidence of that harassment, grievant point to several Oral Reminders and a Written Reminder which she claimed were issued in the absence of prior Coaching and Counseling.

Grievant was supervised by S[redacted] C[redacted] in Merced for four years.[5] During those years, she received one coaching and counseling, and no formal discipline, while her performance evaluations were consistently excellent. G[redacted] transferred to Merced around April, 2012,where she resumed supervising grievant the following year. Grievant claimed she got "warning messages" from CSRs in Fresno, advising her "to get out of there" because G[redacted] was going to be her supervisor. Grievant immediately put in transfer bids which she later nevertheless declined. She maintained that G[redacted]' harassment began anew shortly after her arrival, issuing her a Coaching and Counseling for a political remark she denied making.

In early January, grievant was issued an Oral Reminder based on a customer complaint, discussed in greater detail below. Toward the end of the month, grievant received a Written Reminder for working unauthorized overtime, as well as having 3 "over/shorts" (till out of balance) within 2 weeks the previous November. Grievant maintained she was looking for an unaccounted $100, which the Reminder also encompassed as an over/short violation, along with two others for $0.01 and $0.02, respectively. This Written Reminder was reduced to an

[4]G[redacted] has been employed by the Company for 12 years. Currently a Dispatch Supervisor, G[redacted]z was then a Customer Service Supervisor.

[5]C[redacted] retired in February of 2013.

Oral Reminder after she filed a grievance. The following March, G[redacted]s sent an email to all CSRs in the office which cited a high volume of notifications that employees were working beyond 5:15.

In January, 2013, grievant complained anonymously against G[redacted] for harassment, via the Employer's ethics and compliance hotline. She was notified several months later that no evidence of discrimination or harassment had been found. Grievant filed another complaint with the Department of Fair Housing and Employment in February or March. She was later informed that this complaint was likewise unfounded. Grievant testified that G[redacted] continued to "harass" her during this period, harassment which she felt included speaking to her for taking time off of work.

CSR K[redacted]G[redacted] testified that on two separate occasions after G[redacted] was transferred to Merced from Fresno, she "bragged" about being known as "the write-up queen in the Fresno contact center."[6] In her brief experience working with the supervisor, G[redacted] found she was not warm and "attacked at lot," "just kind of stop us or write us up or get rid of us was the mood that she set." G[redacted] did not recall whether G[redacted] issued her any discipline during the three months she was her supervisor. G[redacted] was also critical of G[redacted] for not disciplining a co-worker whom G[redacted] felt was rude to customers.

Although G[redacted] noted that grievant's personnel records reflected positive customer feedback on seven occasions in 2013, she disciplined grievant more than other employees because no others received multiple customer complaints. At first, she refrained from issuing any discipline despite receiving several of them. A number mentioned that grievant was

[6]G[redacted]s denied ever referring to herself as the "writeup queen." Labor Relations Manager Margaret Franklin thought G[redacted]s issued more discipline than some supervisors and less than others. She added that G[redacted]s did not issue the discipline beyond Coaching and Counseling as she consulted with J[redacted]s about it who consulted with Franklin.

impatient and short with them; one reported that she closed the window on her as she was coming up to her workstation.

The Written Reminder

Two separate customer complaints, one from an individual, C[redacted] M[redacted], and the other from a married couple, the Z[redacted], resulted in a Written Reminder February 21, 2013. M[redacted] reported that she went to the Merced office on January 15 to pay her bill. She was on her phone as she came to the window. Grievant "pointed at her and said 'I'm not going to help you until you get off the phone.'" She had the bill and payment in her hand and did not need to speak with anyone. No one else in line at the time. M[redacted] found grievant's tone "rude." Immediately thereafter, M[redacted] asked to speak with a supervisor.

B[redacted] reported the incident to G[redacted], stating that grievant told M[redacted] "I will help you when you are through with your phone call." After making the payment, she asked grievant for her name and walked to B[redacted] window, asked for the manager, and gave B[redacted] her name and telephone number. G[redacted] contacted M[redacted] and wrote the following notes of their conversation:

> Lady was very rude, had a rude tone when she asked me to get off the phone. "I can help you when you are done with your call!" Bad attitude, lobby was empty. I didn't need to talk to her. Just wanted to make my payment. I had my stub and payment ready for her. She should not address customers so rudely.

Grievant had been told in 2011 by a previous supervisor who had gotten complaints about such a problem from a number of CSR's that CSR's could politely ask customers to put their calls on holds. Grievant maintained that she was "cordial," telling M[redacted] "Ma'am, I'll be able to help you when you're done with your call." M[redacted] put her bill and check on the counter, without saying anything. Grievant processed the payment, gave her a receipt, and said "Thank you," denying she was rude to M[redacted] in any way. She stated at the LIC that she felt that

conducting business while customers were on the phone was "inappropriate, and testified at the arbitration that it was "rude" for M[redacted] to be on the phone while she was at her counter.

The Z[redacted]s arrived at grievant's window on January 28 to obtain a copy of their bill. Following their interaction with grievant, they flagged down an employee in the parking lot[7] to report that grievant was rude and disrespectful, and they were "very shaken up by the interaction." In an email to the Employer they reported

> During this process, we felt that we were mistreated. It is not because. . . the front desk lady refused to serve us, rather it is her attitude toward us. It is her reluctance to serve us, her impatient attitude and her somehow animosity expressions (sic) that made us very upset."

Grievant testified that when the couple came in requesting their bill, she printed out the most recent after seeing the husband's identification. The wife looked at the bill and remarked "That's not my address." Grievant updated the address in the system and printed out a confirmation letter, telling them that she could not re-print the bills with the new address. She thanked them and they left. Grievant maintained that she made every effort to assist them throughout, even expressing a willingness to do so, and did not make any rude remarks or behave impatiently. Nor was she frustrated by anything the customers did.

G[redacted] spoke to M[redacted] and the Z[redacted] and found that these customers were all "very upset." M[redacted] described grievant's behavior as rude and disrespectful, while the Z[redacted] added "dismissive" to those observations. M[redacted] thought grievant displayed hostility, and was so angry that she was "screaming" when, an hour after leaving the service center, G[redacted]

[7]The employee, K[redacted] O[redacted], sent G[redacted] an email several hours later describing his encounter with the Z[redacted]. As he wrote, the couple

> were (*sic*) very upset at how they were treated at the front counter, with the wife actually shaking. . . . They came into our front office since we had been sending their bill to an incorrect address and wanted to get this fixed. . . . They felt [the representative who assisted them] was very rude and dismissive to them. . . . I . . . sat them in my office . . . and apologized if we did not treat them with courtesy. I then called you . . . . While we waited they repeatedd several times how poorly they felt they were treated and disrespectful our clerk was.

talked with her on the phone. The Z[redacted], whom G[redacted]s spoke to in person felt like she acted as if she did not want to wait on them. She did not maintain eye contact, instead looking repeatedly at the next person in line. However, they had no issues with anything grievant said, or with the disposition of their business.

G[redacted] handwritten notes of her conversation with the Z[redacted]s recite

> Said CSR was trying to get them to leave her window, didn't want to take time to help them. Very impatient and very angry facial expressions. No reason, they were very respectful with her.

In her interview with the supervisor, grievant denied being rude to the customers. As indicated, grievant told G[redacted]s that she asked M[redacted]s to put her call on hold. G[redacted]s felt that this was not the issue. Rather, it was the way that she spoke to the customer. She asked G[redacted]s to review the surveillance videos of both encounters, but they were never produced for the Union. The videos do not include sound. G[redacted]s did review video of the M[redacted] incident to confirm that there were no other customers in line.

G[redacted] also asked grievant about her facial expression when talking with the Z[redacted], as Mr. Z[redacted] felt that she was conveying animosity when she spoke with them. Soon after G[redacted]s started working with grievant, in May or June 2012, the two had discussed facial expressions when assisting customers, as grievant had been the subject of three customer complaints, "one right after another."[8] Grievant mentioned she was aware from a young age that she had had "a problem with frowning." In her testimony, grievant acknowledged that others often regarded her facial expression as a frown. While she kept a mirror at her workstation to monitor that appearance, she claimed that frowning was for the most part unintentional, and there was nothing she could do to fix it.

G[redacted]'s manager, G[redacted] V[redacted], recommended that the incidents be treated as two

[8]No discipline resulted from them, however. G[redacted]s declared that her intent during these discussions was not discipline, but to coach her "to ensure that there were no other complaints in the future."

separate disciplinary infractions. G[redacted] proposed that they be consolidated as she "really wanted to give her an opportunity to work on changing her behavior and improving her performance." The Written Reminder was based on a violation of the Employer's Customer Contact policy, which provides that "[u]sing language or responding to a customer in a manner that is disrespectful, rude or demonstrates an unwillingness to assist the customer" is misconduct that can lead to disciplinary action, up to and including termination. Nothing in the policy relates to body language or facial expressions. The Employer's Code of Conduct recites that employees should "deal with people and issues openly, directly and respectfully," "demonstrate a passion for understanding and meeting the needs of our customers and shareholders," and "treat fellow employees and customers with respect."

Grievant had reached the Written Reminder level of discipline because she had been issued an Oral Reminder that January resulting from a customer complaint. In that incident which occurred the previous October, a customer complained that as she came up to grievant's window, grievant pointed a fan at her and told her, "You're wearing too much perfume.'" When the customer told her she was cold, grievant turned the fan around. Grievant denied pointing the fan in the customer's face, asserting that the customer was lying. She is allergic to cigarette smoke and certain other scents, and routinely pointed a fan outwards at her window to keep scents away.

G[redacted] stated that grievant told her on several occasions that she was unhappy in her current job because she disliked working with customers.[9] G[redacted] attempted to help her pursue other opportunities within the Company. She also offered her a software program designed to assist her in improving her customer interactions, but grievant rejected it. G[redacted] maintained that she "did more... to try to help [grievant] and coach her and help her improve her

[9]Grievant denied ever telling this to G[redacted].

performance than I did for any other employee that I've ever supervised."

Grievant did not find the customer service skills software program helpful, as it simply conveyed information she already knew. She felt that all the discipline G[redacted] issued to her, except for that based on working unauthorized overtime, was unjustified and constituted harassment. After grievant filed a complaint against her alleging she was racist, G[redacted] asked grievant about it. She responded that "she knew I wasn't a racist but that she was trying to save her job."

Two more additional customer complaints alleging rudeness resulted in two separate instances of Coaching and Counseling in May. In the first incident, a customer's mother complained that grievant had laughed at her son. CSR C[redacted] B[redacted], who was present at the time, informed G[redacted] via email that the customer was mistaken, and grievant had not in fact laughed at her. B[redacted] asserted that G[redacted] "brushed her off." Grievant likewise denied laughing when the customer accused her and said "What the F are you laughing at?"

DML

Human Resources Director W[redacted] P[redacted] was responsible for oversight of EEO investigations. His department received a May 2013 complaint alleging that grievant had engaged in harassment and retaliation against a co-worker, Senior Representative B[redacted] L[redacted]. L[redacted] thought her relationship with grievant was positive, as least initially. The two worked in adjacent work stations at the front counter, and interacted with one another daily. However, after a co-worker, M[redacted] K[redacted], filed a harassment complaint against grievant, and she was called in as a witness, grievant began giving her as well as K[redacted] the silent treatment.[11] On two or three other occasions, grievant remarked to L[redacted] that "She doesn't get mad, she gets

[11]Grievant denied acting in this manner. K[redacted] filed a complaint against grievant for this reason which was ultimately dismissed.

even." Grievant denied that she said this. After L[redacted]'s daughter was not hired by the Employer, grievant commented it was "karma." Although L[redacted] complained to C[redacted] about grievant's behavior on two separate occasions, no action was taken.

At some point, L[redacted] was called in to a supervisor's office who inquired whether she witnessed anything which might cause one of grievant's customers to complain.[12] On May 20, L[redacted] was working when grievant was similarly asked to speak with a supervisory. When she returned, L[redacted] was helping a customer. L[redacted] testified that grievant pointed at her, saying

> I know who the snitch is, some people just can't keep their mouths shut. . . . No wonder her daughter can't get a job here; it's because of karma. What comes around goes around.

L[redacted] stated that grievant was directing her remarks to another employee, C[redacted] B[redacted]. L[redacted] further alleged that grievant said something to the effect that the office was "just like a high school, L[redacted] needs to grow up." Some minutes later, a customer asked grievant how her day was going, to which grievant replied "It would be pretty good if you could trust your coworkers" as she looked at L[redacted].[13] L[redacted] believed the retaliation was due to her role in a customer complaint matter which she witnessed.

L[redacted] became, in her words, "very upset." She was "getting a migraine," stressed out. She left her work station and called G[redacted] to see if she could go home. L[redacted] filed her EEO complaint the following day. Though she initially submitted the complaint anonymously, she put her name on it after her co-workers expressed the fear that grievant would blame them for the resulting investigation.

Grievant also felt she had a positive relationship with L[redacted]. When she was called into

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[12]L[redacted] initially conflated this incident with the one in July which led to grievant's termination, discussed below.

[13]The allegation that grievant made this particular remark, which grievant denied, was not included in the Local Investigating Committee's ("LIC") report.

G[redacted]'s office May 20 she was directed not to discuss any investigative interviews with co-workers. Both the meeting and the admonition were not connected to any particular ongoing investigation.[14] L[redacted] was not mentioned during the meeting. Grievant claimed she had no reason to suspect that L[redacted] had made a complaint or statement against her. She did not learn L[redacted] had made any investigative statements involving her until the LIC for the DML, in August.

Grievant testified that as she left G[redacted]s' office, she whispered to B[redacted] "I think I know who said something." She was referring to her earlier complaint to the EEOC, which she had been talking about with B[redacted] Grievant claimed she was not referring to L[redacted], nor could she believe that L[redacted] could have even heard what she whispered to B[redacted]. She denied making any other statements, and specifically denied those using the words "snitch" or "karma,"[15] as well as pointing at Lee. Nonetheless, G[redacted]s substantiated that L[redacted] reported to her that grievant had called her a snitch less than an hour after the supervisor warned grievant not to discuss the customer complaint investigation with co-workers, and that she was "extremely upset" and "couldn't finish the day out."

EEO investigator B[redacted] B[redacted] interviewed B[redacted] who told her that grievant "whispered" to B[redacted] that "I think I know who said something." B[redacted] further expressed surprise that L[redacted] was able to hear the remark. However, B[redacted]'s notes of her interview with B[redacted][16] reflect that B[redacted] "did hear [grievant] say out loud" that she knew who said something. She did not recall any name mentioned nor hearing grievant say the word snitch. The notes further recite that grievant "crouched down below the partition and pointed in B[redacted]'s direction, which is the only other work station in the area." While B[redacted] did not

[14]Grievant was the subject of a number of investigations at the time.

[15]Grievant admitted mentioning karma "now and again," but not in this instance.

[16]B[redacted] did not testify.

recall hearing anything about L[redacted]'s daughter, grievant "may have said something about karma," which she "often talks about." The notes continue:

> According to C[redacted] she wasn't paying close attention because she was focused on her customer. C[redacted] said S[redacted] could have been rambling on (because S[redacted] does talk a lot) but C[redacted] wasn't focused 100% on what S[redacted] was saying.
>
> C[redacted] confirmed after B[redacted] was finished helping her customer she immediately got up and left the front counter area. . . . Before B[redacted] left she told C[redacted] she felt like S[redacted] was attacking her and C[redacted] could tell B[redacted] was upset.

While in her interview with B[redacted], grievant denied calling L[redacted] a "snitch" or making "reference to any employee," she admitted saying the comment which B[redacted] attributed to her. B[redacted] concluded that grievant violated the Employer's policy prohibiting "retaliation against anyone who raises good faith concerns or is involved in an investigation."[17] The Code of Conduct also provides that "adversely changing an employee's condition of employment for a non-business reason (i.e., 'retaliating') is not acceptable";[18] and that the Company "prohibits retaliation against anyone who raises concerns or is involved in an investigation."

B[redacted] only found support for the allegation based on the statement to B[redacted]. She determined that there were discrepancies in grievant's responses which were a cause for concern about her credibility, adding that while "[a]ll of the allegations attributed to [grievant] could not be substantiated by witness statements. . . I have a reasonable belief. . . that [L[redacted]s] account of the events that took place on May 20, 2013 did occur as reported." In the Conclusion to her investigation report, B[redacted] writes:

> Ms. B[redacted] actions of stating publicly "I know who said something" and pointing at her co-worker in front of another co-worker and customers constitute retaliation against a witness, (who had participated in a protected activity), giving

[17]The policy does not provide a definition of "retaliation."

[18]The Employer does not allege that grievant violated this provision.

> a statement in an investigation. Her actions can reasonably be seen as an attempt to intimidate the complainant and an attempt to have a chilling effect on other employees choosing to participate as witnesses in Company investigations into employee conduct. [Grievant's] actions violate the Company's Standards.

When the May 20 incident arose, grievant's disciplinary record included two Coaching and Counseling actions and one Written Reminder within the "Conduct" category, and a Written Reminder regarding "Work Performance." After a finding of retaliation was sustained, she was put on a DML June 27, 2013. The letter which notified her of the DML further stated that she was required to maintain acceptable performance in every category during the term of the DML.[19] K[redacted] J[redacted], the Customer Service Offices Southern Regional Manager for the Employer, determined that the DML for retaliation was appropriate because it is an egregious offense, particularly when viewed in light of the remaining active discipline on her record.[20]

Labor Relations Manager Margaret Franklin[21] consulted on the investigations and disciplinary decisions, including the termination, for the grievant. She testified that her department consults with the "line of business"[22] within the Company after there is an investigation into conduct which may result in discipline and determines whether there should be discipline and if so, what level of discipline to impose. Labor relations specialists, which in this case was Sean Marjala, report to her to review the investigation. In the event of a termination, the review is conducted at the upper levels of Labor Relations, including Franklin's director, the senior director, and the vice president of labor relations.

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[19]The initial levels of Positive Discipline are imposed for behavior which falls into on the categories labeled "Conduct," "Work Performance," and "Attendance." However, once an employee is on a DML, the employee must maintain fully acceptable performance in all categories.

[20]Grievant also received a Written Reminder for violating money management procedures in May of 2013. The grievance filed contesting any discipline for this alleged violation is being held in abeyance pending the outcome of this grievance.

[21]Franklin has worked for the Company for 32 years. She began as a CSR, becoming a labor relations specialist in 2006. She was promoted to manager in 2013.

[22]A "line of business is a division within the Company such as Customer Relations, where the grievant worked.

There are three categories of behavior on which discipline may be based: conduct, work performance and attendance. The escalation of discipline to a DML occurs after three oral reminders in every category or two Written Reminders in two separate categories, or could be advanced to that point based on conduct of sufficient severity. Oral Reminders are active for six months, Written Reminders and the DML are active for twelve. Once on a DML, "total performance" is considered in determining subsequent discipline, meaning that fully acceptable performance must be demonstrated in all performance categories.

Following the two separate customer complaints, Franklin consulted with Marjala and G[redacted]. They agreed that as grievant was on an active Oral Reminder in the conduct category at the time, a Written Reminder would be appropriate. Because the two complaints arose within weeks of one another, it was determined that any disciplinary action would be based on both.

Franklin was also consulted on the DML, who involved her labor relations director as well. She affirmed there was an EEO policy which addresses retaliation, as noted above. As concerns the DML, she reviewed the EEO report with her director and the discipline record which as noted, contained on active Written Reminder followed by two Coach and Counsels based on customer complaints. Franklin understood that grievant had been given a sufficient opportunity to improve. Given this record and the seriousness of the retaliation violation, it was determined that a DML was warranted.

At the LIC, L[redacted] essentially repeated the remarks she attributed to grievant when interviewed by B[redacted]. She noted she was seated next to B[redacted] who was between her and the grievant. After the comments made by grievant, as indicated in the LIC Report, "when she finished with the customer she got up and tried to calm down." The Report continues: "B[redacted] had come in and that B[redacted] said she was sorry that this happened to L[redacted] and

that she did not know why the grievant says things like that." L stated to the committee that while the comments were made to L, they were "'loud enough that anyone in the lobby could hear them.'"

B's testimony at the LIC was contradicted somewhat by her statement to B as reflected in those notes. B told the committee that grievant's stament "was not loud it was whispering." Explaining why she spoke with L after the incident, B stated that she was "a little floored by her reaction," but recognized that L was so upset that she left for the day. Asked whether she made the comment about being sorry this happened and not knowing why grievant "says things like this to people," B said "I'm sure I said that, that is totally believable." B also confirmed that she thought the reference to karma was about L. Clarifying the volume of grievant's voice when the comments were made, B told the committee "it was clearly meant to be a whisper, she put her hand up so customers couldn't even see."

Grievant told the committee that she whispered her remarks to B and did not recall if she pointed, but admitted saying "I think I know who said something." She later said to the committee that she did not recall whether the statement was made in reference to L, claiming "I wouldn't do that after being given a direct order not to." Grievant then told the committee "I never came out of the office and pointed and singled L out. I never said anything about her daughter. I said what I told you that I said to K B and that was that."

The Termination

Following the imposition of the DML, grievant was the subject of another customer complaint from one A S. This incident took place on July 24, 2013. S provided telephonic testimony at the LIC. As reflected in the Committee's Findings,

> S[redacted] [said] . . . she had come into the Merced office . . . to pay her bill with her husband, and stood in line for a pretty long time. . . . [W]hen she got to the window she was greeted by the grievant, . . . [who] asked her for her I/D/ and statement, and the grievant started typing a bunch of numbers. I said I only came in to pay this amount. The grievant said I have to do my part first. . . . I said I have a payment arrangement from the 1-800 number. The grievant started calculating numbers on a calculator. I said you don't have to be sarcastic, and my husband said you don't have to be rude to her, and the grievant said excuse me I am helping her. My husband said why are you being so rude. The grievant said I'm not going to take that amount, and I said can I talk to a Supervisor. The grievant was talking and other customers could hear her say that I can't afford to pay this. The grievant got a Supervisor and another employee came to help me. She was nice and soft spoken. . . . The lady took my payment and apologized. My husband was mad and she said if you want to complain here is a number. . . .

As L[redacted] described what took place that day, a couple was talking to grievant about a payment arrangement they made with the Company. The discussion took about 20 minutes and became "very heated."[23] The couple came down to L[redacted]'s window to speak with her about it. She pulled up their records and confirmed that they were granted an "extension." L[redacted] testified

> All they were trying to do is pay the amount what they promised to pay and they said that [grievant] was refusing to and that by making that payment she would not guarantee their service would not be interrupted.
>
> So I apologized. I told them I would go ahead and accept their payment plan. They were still very upset. And they wanted to talk to a supervisor so it got escalated to a supervisor.

During the investigation, L[redacted] mentioned that she pointed out to grievant the note authorizing the lower payment while the customer was in line. Grievant answered "Well, it's not right, they need to pay more." To L[redacted], "It sounded like [grievant] was not happy with the payment plan that was worked out. . . so she was not honoring it." L[redacted] ultimately completed the transaction. She maintained she was able to find the note on the account without any

[21]Surveillance video depicts eight minutes of the transaction. S[redacted] is shown standing at the counter and for the most part remaining silent while grievant examines her screen monitor, uses her calculator, and eventually. After L[redacted] appears, she points to something on the screen, after which S[redacted] and her husband move out of view.

trouble, and grievant should have been able to do so.

When G[redacted] interviewed grievant about the incident, grievant said that while she did not recall the encounter, she had probably not seen the note on the account authorizing a payment plan. G[redacted] asserted that grievant should have reviewed the account to see if a payment arrangement had been agreed to, and do everything she could to accommodate and assist the customer.

Grievant noted that S[redacted] was a "credit blue" customer, meaning they had agreed to a number of payment plans which were not honored. She used a calculator consistent with her normal practice to determine how much the customer owed.[24] Grievant stated that account notes are not always visible on the main customer account screen and/or not immediately accessible, and that she did not see any notes for S[redacted]'s account. Grievant further maintained that she missed such notes on three or four other occasions during her tenure, and had never been disciplined. Former Union Business Representative and Arbitration Board Member Ed Dwyer also testified that notes on customers' accounts frequently do not come up on the main computer screen, and CSRs need to find them in a different area of the system.

Grievant denied being advised of a payment plan made with another Company employee: S[redacted] simply told her that she needed to make a payment. Grievant ultimately called L[redacted] over because grievant did not want to misinform the customer about what she owed. She explained her calculations to L[redacted] and that she did not see a payment plan or note on the account. Had she allowed S[redacted] to pay a lower amount than was authorized, S[redacted] might be at risk of having her service cut off. Grievant further claimed that L[redacted] did not point out the note to her, and that if she had, she would have processed the payment immediately.

On July 23, 2013, L[redacted] submitted a second complaint to the EEO office. L[redacted] reported that

[21]S[redacted] testified at the LIC by telephone. She mentioned that after she told grievant she had a payment arrangement and only had to pay a certain amount, grievant "started calculating numbers on a calculator."

she was training a K[redacted] C[redacted], a new CSR. C[redacted] acknowledged to L[redacted] that as she was assisting a customer, she forgot to staple the receipt to the invoice and return the invoice to the customer, adding "I don't want to do it wrong and get into trouble."[25] Grievant remarked "Yeah, you don't want B[redacted] to tell on you," and laughed. L[redacted] testified that grievant's statement made her look bad in front of customers and the trainee, making her worried that "it was all starting again." She told the LIC that "everyone heard" it, and that following the remark "everyone got quiet and I think it made everyone uncomfortable." Given their past history, this caused L[redacted] stress and made her not want to come to work. L[redacted] reported to G[redacted] that grievant was continuing to retaliate for her earlier witness statements.

Grievant acknowledged that she made the remark, claiming she was only joking, and that everyone had laughed. She maintained that the she did not make it out of any animosity and did not intend on offending anyone. Grievant insisted that she was not referring to any of the investigations against her or the retaliation charge when she made the remark, and had no spiteful intent. Nor was she trying to intimidate L[redacted] or anyone else. She nonetheless conceded that she was thinking of "a few occasions" when L[redacted] had reported her to G[redacted].

Nonetheless, as reflected in the LIC Report, C[redacted] was surprised and offended. She did not think the comment was a joke or "done in kidding," and felt that it was unnecessary. M[redacted] G[redacted], a part-time Service Rep who was also working that day. M[redacted] G[redacted] also did not feel the grievant was joking.

The EEO department concluded that grievant's conduct violated the retaliation policy, and determined that her remark could have a chilling effect on future reports to management. Dwyer was not aware of any discipline since 2001 issued for retaliation involving two subordinate employees.

[25]In C[redacted]'s testimony to the LIC, she told the committee that she made the statement "jokingly."

J[redacted] made the decision to terminate grievant after the two July incidents, in consultation with G[redacted], Franklin, and Customer Services Director C[redacted] Z[redacted] They concluded that the second act of substantiated retaliation, coming shortly after the DML based on a like offense, warranted termination. In making the decision, the group reviewed the customer complaint and the EEO investigation report. Franklin testified that either of the incidents on its own would have warranted termination, as grievant was within the twelve month DML period. She stated further that grievant was allowed the opportunity to change her behavior. The conduct violations continued, including another for retaliation, behavior which she had been warned about previously, and one for a customer complaint. Termination was therefore the only appropriate step.

POSITION OF THE EMPLOYER

The grievances should be dismissed because the Company's actions do not violate the Contract nor were they arbitrary and capricious. Despite numerous warnings and a suspension, grievant engaged in misconduct which she failed to cease or remedy. Three different customers filed formal complaints with the Company within a seven-month period for her rude and offensive behavior. She refuses to acknowledge any misconduct.

Grievant showed similar disregard for co-workers. She accused L[redacted] of being a snitch in front of customers and co-workers because L[redacted] provided evidence which concerned grievant's mistreatment of customers. Grievant admitted making each of two retaliatory statements, making the second after a suspension and final warning and ignoring warnings not to engage in retaliatory conduct and follow all policies. After receiving discipline for customer abuse and retaliation, she mistreated another customer and engaged in further retaliation.

Settled authority holds that discharges which are consistent with the Contract and not arbitrary or capricious should be upheld. The parties have agreed through the Positive

Discipline Guidelines that employers have a fundamental interest in maintaining customer relations. Grievant's repeated and unremediated abuse of customers and retaliation against co-workers plainly constitutes just cause for discipline.

Company policies prohibited the conduct grievant engaged in. She was aware that these violations would result in discipline. The allegations of misconduct were thoroughly investigated, and grievant was given the opportunity to respond to them. The Company reasonably determined that grievant committed the misconduct alleged. Progressive discipline was applied. The Company's actions were therefore not arbitrary or capricious.

The Employer was left with no choice but to terminate grievant for these offenses. She was given ample opportunity, throughout all of the steps of Positive Discipline, to correct her performance, but was unable or unwilling to do so.

The Employer prohibits customer abuse and retaliation against co-workers. Multiple policies require that CSRs treat customers with courtesy and respect. The Employer's policies also prohibit harassment and retaliation against co-workers. Grievant had notice of these policies, and was repeatedly counseled by her supervisors on their importance. She cannot reasonably deny being aware of them. She admitted being trained in them, and was explicitly reminded about the policy prohibiting retaliation in a letter she received following the first act of retaliation.

The evidence reflects that grievant violated these policies in all of the alleged incidents. Her self-serving denials are outweighed by the unbiased and credible testimony of numerous witnesses. The weight of the evidence supports that grievant repeatedly communicated with customers in a way which violated Employee Conduct policies. She spoke to M[redacted]s in a rude and disrespectful tone, pointing at her and telling her that she would not help her until she got off the phone, despite the fact that no one else was in line. M[redacted] was so upset by her

transaction with grievant that she immediately asked to speak with a manager to lodge a complaint, and called G[redacted]s the same day. She also appeared at the LIC. Grievant admitted that she made the statement that triggered the complaint.

She likewise treated the Z[redacted] rudely and disrespectfully. The Z[redacted] were so upset that they flagged down another employee in the parking lot to make a complaint, and sent an email reiterating their complaint even after speaking to G[redacted]. Grievant was also "rude and sarcastic" in her interaction with S[redacted], and subjected Solmis to significant embarrassment. She refused to accept the payment S[redacted]s had already reached an agreement on because it was "not right." L[redacted] was easily able to find the note on the account when she eventually came over to assist. Grievant engaged in a clear pattern of customer abuse that she was unable or unwilling to cease, despite numerous warnings.

Grievant admitted to making the statements that resulted in the sustained retaliation and harassment allegations. She admitted saying "I know who said something" after being told not to discuss the content of the investigations against her with co-workers, and later told a trainee that L[redacted] might "tell on her" even after being placed on a DML for the earlier act of retaliation. She mentioned L[redacted] reporting to management on two separate occasions, in L[redacted]'s presence, and in the presence of customers. The EEO reasonably concluded that her conduct on both occasions could chill employee participation in misconduct investigations.

The retaliation complaints were investigated by professional EEO investigators. All of the investigations were thorough, and afforded grievant adequate due process. Grievant was given an opportunity to tell her side of the story in each instance. A group of four to six individuals with experience in discipline and EEO investigations, labor relations and grievant's work all chose to accept the EEO report.

Grievant's testimony was not credible and is outweighed by the record evidence. Her

self-serving denials were contradicted by every other witness in the case. The Arbitrator should instead credit the overwhelming and consistent testimony of the employees and customers who were the victims of grievant's abuse and who had no personal stake in the outcome. The customers and employees had no reason to lie about what occurred. It is well settled that the testimony of accused employees should be treated with a strong measure of skepticism, given that their jobs are at stake. *See United Parcel Service,* 66-2 Lab. Arb. Awards 8703 (Dolson, 1966). Here, the complaining parties came forward of their own accord, and invested significant time and energy to ensure that their complaints were heard. Grievant has no credible explanation for why so many employees and customers might misconstrue or misrepresent her behavior in a series of unrelated events. Her position, that all of them are attacking her without basis and in some cases conspiring against her, must be rejected.

The discipline imposed was neither arbitrary nor capricious. Where the Employer has established the alleged misconduct, management has significant discretion to determine the appropriate penalty. The choice of penalty should not be disturbed absent compelling evidence of abuse of discretion. *Kroger Co.*, 113 LA 1033 (BNA)(Sergeant, 1999). Here, the Employer conducted good faith investigations of every complaint and determined that she had violated the Employer's policies and standards of conduct in each instance. Management proceeded to follow all of the progressive Positive Discipline steps prior to termination. Her refusal comply with the policies prohibiting customer abuse and retaliation against co-workers is especially significant because CSRs are highly visible primary points of contact between the Employer and the public. Her misconduct reflected negatively on the Employer to the public, and negatively affected the morale of her co-workers.

Finally, there is no credible evidence of disparate treatment or harassment of grievant by G[redacted]. Grievant was not shown to have been singled out or punished for conduct that

other employees were allowed to get away with. The Union submitted no evidence that any other CSR repeatedly abused customers or retaliated against co-workers with no consequences. Any claim that the grievant was subject to disparate treatment must fail because the Union, consistent with its burden of proof, was unable to adduce any evidence that any other CSR abused four customers on three separate occasions and retaliated against a co-worker twice. Grievant's history of misconduct is incomparable.

The Union's attempt to paint G[redacted] as the "write-up queen" ignores the fact that she did not conduct either of the retaliation investigations or choose to issue any of the disciplinary actions at issue. The disciplinary decisions were made by a variety of managers who had no animus against grievant. If G[redacted] had truly wanted to get rid of grievant as soon as possible, she would not have noted her positive customer contacts, nor sought to combine the separate complaints made by M[redacted] and the Z[redacted] into a single disciplinary action. She also decided to resolve a number of customer complaint issues with grievant informally. Her patience with these issues was extraordinary. There is simply no evidence of disparate treatment or bias by G[redacted].

The Employer therefore respectfully requests that the grievance be denied in its entirety.

POSITION OF THE UNION

Grievant was terminated from a job she held for more than a decade as the result of the combined effort of two employees, G[redacted] and L[redacted], who both shared a deep, personal dislike for grievant. G[redacted], known as the "write-up queen," started running grievant through the Positive Discipline Program by issuing formal discipline for minor incidents that should have been resolved informally. Grievant transferred to Merced to escape the supervisor, fearing that the end result of this harassment would be the loss of her job. She thrived for a number of years under subsequent supervisors. However, when G[redacted]s came to Merced she picked

up where she left off and immediately started issuing unwarranted formal discipline. Grievant's disciplinary record shows that G[redacted] was the only supervisor to formally discipline her .

The first disciplinary action at issue involved two customer complaints which are dubious for the same reasons. While each alleged that grievant was "rude," their complaints did not identify the behavior they claimed was a problem. Grievant was the only witness to testify at the hearing about these incidents and thus the only one subject to cross-examination. Her version of events was dismissed outright by G[redacted] and the Company, revealing an intertwined bias.

The problem with the second basis for discipline, a claim of retaliation, is that the Employer does not have a policy regarding retaliation which would apply. It is thus impossible for her to be guilty of the offense. Even if there were such a policy, L[redacted]'s hostility toward grievant poisoned her entire testimony. The number of discrepancies in that testimony are too numerous to list. The accusations should have been thoroughly examined due to credibility issues. But the Company took her word at face value, despite the fact that the only other witness, B[redacted], directly contradicted nearly every facet of L[redacted]s account.

The final disciplinary action concerned yet another claim of retaliation, which should not have been accepted for the same reasons as the second, and a final customer complaint that is discredited by the video. Significantly, L[redacted] played a central role in this complaint despite the video which reveals many embellishments.

The Company failed to establish most, if not all, the essential elements of just cause, and as a consequence, has not met its burden of proof. In every instance, the Company either failed to perform an investigation or conducted one which was so procedurally deficient as to render it invalid. The Employer did little to nothing to verify any of the customer complaints in this case. There is no dispute that grievant had a long and troublesome history with G[redacted],

who referred to herself as the "write-up queen" and was known as such by many employees. She consistently targeted grievant during both of her stints as her supervisor, issuing discipline that would move grievant closer to termination rather than resolve minor issues through coaching and counseling. For the entirety of grievant's decade-plus career, G[redacted] is the only supervisor to issue her formal discipline of any kind.

Given this history, the fact that G[redacted] was in charge of investigating all three customer complaints is inherently suspicious. She was willing to overlook and ignore key facts that corroborated grievant's defenses. Her investigations of the complaints were perfunctory. Although she returned to the office to speak with the Z[redacted], the only other witness she spoke to was the grievant. She did not even attempt to obtain security footage of the incident with the Z[redacted] when their entire complaint concerned alleged non-verbal mannerisms and body language. Given the ambiguous nature of their complaint, G[redacted]s should have dropped the matter entirely or, at most, coached and counseled her. Her choice to issue formal discipline only serves to underscore her bias. Finally, the fact that the Z[redacted] were not called to testify further diminishes the credibility of their complaint.

As with the Z[redacted], M[redacted]s was not complaining about the quality of the service she received. G[redacted]s found no evidence to corroborate M[redacted]'s claim that grievant's reasonable request that she end her phone call was made rudely or impolitely. G[redacted]s instead chose to credit both complaints at face value. The evidence at the hearing supports grievant's testimony that she phrased her request in the affirmative. The fact that the Company failed to have M[redacted]s testify undermines its position. The Employer fell well short of meeting its burden of proving that grievant engaged in conduct worthy of discipline in both instances.

G[redacted]s did next to nothing to examine the complaint lodged by S[redacted] beyond discussing the incident with L[redacted], who shared her personal dislike of grievant. L[redacted] claimed that

grievant refused to abide by the agreed terms of payment and that grievant and S[redacted] engaged in a twenty-minute "heated argument." However, the video evidence shows that S[redacted] was standing silently while grievant performed calculations, as she was supposed to do for credit blue customers. She then called L[redacted] over when she was unable to process the transaction to S[redacted]'s satisfaction. In short, she acted according to protocol, yet the Employer ignored clear evidence in her favor to prop up a false story that incriminated grievant.

L[redacted]s initial claim of retaliation was not substantiated by anyone else, yet it was the story that the Employer ultimately accepted. Her original complaint alleged that grievant called her a snitch while pointing at her and telling her to keep her mouth shut, that grievant said something about her daughter's ability to get a job at PG&E, that she made a remark about karma, and that she told L[redacted] to grow up. The evidence contradicts L[redacted]'s account. Her entire complaint is premised on the idea that grievant must have figured out that she had participated in an earlier investigation. However, grievant had no idea of L[redacted]'s involvement, and had no reason to suspect it. B[redacted], the only neutral eyewitness to the encounter, could not corroborate any of berating statements alleged by L[redacted]. Nor did she substantiate two additional allegations raised by L[redacted] for the first time at the hearing, that grievant said something to the effect of "it's her, right there," and "It would be nice if I could trust my co-workers."

The gaping holes in L[redacted]'s story should have been obvious to B[redacted] and indeed to all of the manager who reviewed the incident. However, instead of questioning L[redacted]'s account, B[redacted] instead concluded that it was grievant's credibility that was suspect. She further stated that she "believed" L[redacted]'s account despite the fact that it was not rooted in any verifiable facts reported to her during the investigation. The investigation was clearly not conducted in an objective and fair manner.

Grievant never engaged in any form of retaliation, nor did she harass L[redacted]. The

Employer's policy regarding retaliation does not apply to grievant, and, even if it did, the investigators of the separate charges used ill-defined and inconsistent standards to evaluate her conduct. The retaliation policy comes closest to defining retaliation when it states that "adversely changing an employee's condition of employment for a non-business reason (i.e., 'retaliating') is not acceptable." In other words, only those who wield supervisory authority can engage in retaliation. This definition necessarily excludes grievant from being able to retaliate against L[redacted], who in fact had superior authority as a senior service representative. This explains why there have been no other cases where retaliation was alleged by one subordinate employee against another. The Employer only chose to pursue the retaliation charges due to the cringe-inducing connotations attached. Ultimately, however, the definition does not fit.

Even if the Employer did prohibit retaliation between subordinate employees, the Employer was unable to provide a single, consistent framework to evaluate whether grievant's conduct actually fit the bill. For example, in the first claim, B[redacted] concluded that grievant's actions were an attempt to intimidate and an attempt to cause a chilling effect on L[redacted] and other employees. Grievant's intent was therefore central. However, in the second case, grievant's intent was not considered at all, as it was determined that her behavior (a joke) created a chilling affect. Grievant's conduct does not fit any known form of retaliation. The EEOC standards provide that retaliation does not include slights, annoyances, or "snubs," and that retaliation requires an actual adverse employment action.

Here, grievant's statement that she knew "who said something" is the only statement that can be verified with any degree of certainty. Such a statement clearly does not constitute an "adverse employment action" under the EEOC or any other reasonable definition. Further, the fact that she whispered the comment shows that she did not intend for L[redacted] to hear it. There is no evidence that she was attempting to intimidate or threaten her. The comment in the second

charge was simply a joke to put a new employee at ease. Moreover, it was not in reference to any ongoing investigation. The Employer has therefore failed to meet its burden of proving that grievant engaged in retaliation.

Grievant's conduct also cannot be considered harassment. The Employer did not charge grievant with harassment, and therefore cannot rely on any such allegation. "It is axiomatic that an employer's defense in a discipline case must rise or fall on the initial reasons provided the employee. Other reasons cannot be added later when the case reaches arbitration merely in an attempt to strengthen the employer's defense." *Chevron-Phillips Chem. Co.*, 120 LA 1065, 1073 (Neas, 2005). The discipline reflects that grievant was charged with retaliation, not harassment.

In any event, the evidence does not support any findings of harassment. A single statement, which was taken completely out of context and likely not even overheard by L[redacted], cannot constitute harassment. The closest it could come would be workplace bullying or hazing, but considering that grievant did not direct the remark at L[redacted] but instead whispered it to B[redacted], even this characterization falls flat. Since the two claims of retaliation do not hold any water, grievant must be reinstated regardless of whether the customer complaints are determined to have any merit.

If any one of the disciplinary actions is determined to have lacked just cause, termination is no longer justifiable under the Positive Discipline guidelines. As demonstrated, none of them were issued for just cause. Accordingly, the Union respectfully requests that grievant be reinstated and made whole.

DISCUSSION

The Union initially argues that the discharge was inconsistent with just cause principles because, in every instance, the Company either failed to investigate the allegations of

wrongdoing which led to the discharge, or conducted an investigation that was neither neutral nor objective. It first cites the issues that grievant had with her supervisor as the reasons for these shortcomings and why the complaints which involved grievant were not verified or fairly examined. As the Union sees it, grievant was singled out by an overzealous supervisor who imposed formal discipline for minor infractions rather than resorting to Coaching and Counseling per the Positive Discipline guidelines. G[redacted]s' predisposition to punish grievant unduly escalated prior discipline and accelerated grievant's progression on the discipline ladder to a point where an alleged offense placed her on the threshold of discharge without justification.

The record fails to establish that G[redacted]s was actively pursuing some sort of vendetta for reasons unknown so that she might get rid of the grievant. When grievant received positive customer feedback, it was duly noted by the supervisor. Grievant worked under G[redacted]s' supervision for a number of months without formal discipline, despite demonstrating issues with customer interactions as well as other aspects of her performance. Instead, G[redacted]z counseled grievant and recommended training. She also helped grievant consider whether she might be better suited to another position. When grievant was the subject of two separate customer complaints in January, 2013, it was G[redacted]s who persuaded HR that the two should be combined into one discipline-causing event.

G[redacted]s' efforts to modify grievant's conduct so that it would not run counter to policy proved unsuccessful. Customer complaints as well as other performance problems persisted. Even after grievant had received the Written Reminder for the two January complaints and still had an active Oral Reminder in her file, Coaching and Counseling was issued for two additional customer complaints which arose three months later. G[redacted]s refrained from imposing or recommending anything more severe, indicating that she was still willing to utilize more lenient measures to correct grievant's behavior. Moreover, the evidence demonstrated that HR would

oversee any investigation into conduct which might result in discipline more serious than an Oral Reminder. It was HR, rather than G[redacted]s, who would also make the ultimate decision on the level of discipline to be imposed.

The Union maintains there was inadequate support for the February 2013 Written Reminder which was issued following two customer complaints. For the Union, G[redacted]s' involvement in the investigation of the customer complaints in this case and her tendency to ignore evidence that grievant offered in her own defense renders the findings in regard to them "inherently suspicious." Nonetheless, the Z[redacted]s were so disturbed by the way they were treated by grievant that they flagged down another supervisor and went back into the Service Center where they waited for G[redacted]s to return so that they might lodge a formal complaint. When they were interviewed by her, notwithstanding the Union's characterization that their interpretation of grievant's tone and expression were highly subjective, they were visibly upset. Their complaint was anything but ambiguous.

The parties stipulated that when M[redacted] presented herself at grievant's window, grievant pointed at her and said "I am not going to help you until you get off the phone." As she was was there merely to drop off a payment, M[redacted] did not need to speak with grievant to accomplish her purpose. When M[redacted]s was finished, she reported the matter to B[redacted], who in turn relayed the complaint to G[redacted]s. What grievant said to M[redacted] was essentially corroborated by B[redacted]. M[redacted] followed up by leaving her name and phone number. When contacted by G[redacted]s, she gave a statement in which she reported that grievant had been rude and disrespectful to her, and that what really upset her was the grievant's attitude and the way grievant spoke to her. Contrary to grievant's description of her own behavior as "cordial," her pointing at M[redacted] displays a certain level of impatience or at minimum, annoyance. G[redacted]s noted that M[redacted] was so angry when she spoke to her she was

"screaming" about grievant's behavior.

The failure of either M[redacted] or the Z[redacted] to testify, or that they ultimately may have received service on their accounts from grievant, is irrelevant. That grievant has the most at stake in these proceedings is not reason in and of itself for dismissing her testimony as unreliable. Yet grievant's self-serving denials that there was anything objectionable about the way she treated these customers cannot be credited in the face of evidence from these wholly unbiased witnesses, witnesses who were disturbed enough by their encounters with grievant to expend the time and energy to pursue formal complaints and give statements. Grievant had no explanation for why these individuals would be so upset. It was altogether reasonable for G[redacted] and HR to conclude on the basis of this evidence and the demeanor of these customers as they gave their statements that the allegation that grievant was rude and dismissive to them was factually accurate.

Grievant's response to these allegations not only has a negative impact on her overall credibility. It is also noteworthy that grievant failed to modify her conduct in response to these complaints, thus indicating her resistance to corrective discipline. Her own subjective belief that she was not offending or being rude to anyone is directly undermined by the number and regularity of the complaints concerning her behavior. Grievant refused to recognize, that there even was a problem in this area which was of vital importance to the job she was performing, much less take responsibility for it. In her view, correction was "harassment." As a consequence, this attitude becomes a factor in weighing the appropriateness of the penalty which the Employer ultimately proposed.

Rather than acting out of hostility toward grievant, G[redacted] possessed discretion, subject of course to just cause considerations, to determine whether conduct warranted lesser discipline such as counseling or to refer it to other parties for more serious measures. As

discussed above, there are no indications that this discretion was abused. Franklin established without contradiction that discipline of greater severity than coaching and counseling was subject to HR investigation and review. The record as a whole simply does not support the notion that grievant was the victim of an incomplete and biased series of investigations and altogether blameless in each of the incidents under examination. The level of discipline imposed for these incidents was within the "zone of reasonableness" given grievant's conduct and the guidelines under the Positive Discipline Policy.

Similar to its challenge to the sufficiency of the evidence with regard to the M[redacted]s and Z[redacted] complaints, the Union argues that the investigation into the S[redacted] incident was tainted by bias, principally because it finds L[redacted]s characterization of this couple's encounter with the grievant considerably exaggerated and tempered by her personal dislike of the grievant. It asserts that the video of the interaction contradicts L[redacted]s testimony that there was a 20-minute "heated argument." The video, however, does not begin just as S[redacted] is approaching grievant's window. It starts with Ms. S[redacted] already standing there, despite the fact that in her account to the LIC she states that she waited in line a long time. Thus it is unclear what may have transpired prior to the beginning of the clip. There is no sound recording, so it is impossible to determine the tone of the exchanges between grievant and these customers. Additionally, the Union's contention that the video evidence shows that S[redacted] "does not speak once during the entire interaction" is similarly unsupportable given the incompleteness of the recording.

The Union's claim that grievant was unaware that the S[redacted]' had negotiated a payment plan with another Company employee was plainly refuted by Ms. S[redacted] statement to the LIC specifically mentioning that she told grievant that she had "a payment arrangement from the 1-800 number." Ignoring her, grievant started to enter numbers in a calculator rather than accept

and investigate what S[redacted]s had just said, no doubt causing S[redacted]s some consternation and providing a logical basis for her to conclude that grievant was being rude. The Union's assertion that S[redacted]s "made no mention" of the payment arrangement is plainly refuted by the record evidence.

The video also shows that after L[redacted] was called to assist, she pointed to grievant's screen, arguably corroborating that she demonstrated to grievant that the customer had been granted an extension, and contradicting grievant's claim that L[redacted] did not show her the note that a payment arrangement had been made. While grievant stated that she did not refuse to accept any payment from the S[redacted]', the video does not depict them furnishing any check or money to her. Rather, it shows them leaving her window before handing her anything.

The Union asserts that G[redacted]s did nothing to investigate this incident other than to discuss it with L[redacted]. However, as with M[redacted]s and the Z[redacted]s, the fact that S[redacted]s, an otherwise disinterested individual, took the time and trouble to not only file a formal complaint, but also to provide testimony at the LIC, lends credence to her version of events. That L[redacted] was able to process the transaction also indicates that the note on the account could have been discovered with reasonable diligence, and that grievant's purported concern that accepting a payment less than the amount authorized was unfounded and an after-the-fact rationalization for failing to process the transaction in ordinary course. Not unlike her response to all of the other matters cited as reasons for discipline, grievant refused to recognize that her behavior may have run counter to Company policy and provide cause for concern. The Company could reasonably conclude on the basis of this evidence that the S[redacted] complaint was legitimate and provided cause for discipline.

The Union applies the same rationale concerning the inadequacy of the Company's investigation to the finding that grievant engaged in "retaliation." In its view, that finding cannot

be sustained because of inconsistencies in the testimony of the key witness to the alleged retaliatory acts, a lack of corroboration for that testimony, and the witness' bias against the grievant. Despite this, the Union argues, the Employer chose to accept her version of events.

The Union emphasizes that L[redacted] was the only witness to claim that grievant called her a snitch, referred to her daughter, and told L[redacted] she had to grow up. Closer examination of the record, including statements made to investigators and to the LIC, reveals support for rather than contradiction of L[redacted]'s account. The Union asserts that the only neutral witness to the encounter, B[redacted], did not corroborate any of the objectionable statements attributed to grievant by L[redacted]. B[redacted] did not testify. However, she did tell B[redacted] that she heard grievant say "out loud" that she knew who said something. The statement was obviously loud enough for L[redacted] to hear it, as clearly shown by her reaction to it. B[redacted] herself substantiated that L[redacted] heard the remark, otherwise her concern that L[redacted] was upset would make no sense and be without context.

Moreover, while B[redacted] said she did not recall whether grievant used the word snitch or mentioned L[redacted]'s daughter, she told B[redacted] that she wasn't paying close attention to what grievant was saying, that she "could have been rambling on (because S[redacted] does talk a lot)," and that she "may have said" something about karma. These statements tend to confirm rather than rebut L[redacted]'s account. Consistent with what L[redacted] told the LIC, B[redacted] also stated to the committee that she mentioned to L[redacted] she was sorry that this happened to her and that she did not know why the grievant says things "like that." Grievant plainly said something to B[redacted] critical of and demeaning L[redacted] which upset her co-worker. Even assuming that she did not use the exact word "snitch," grievant's words and gestures were plainly intended to convey that idea.

In the face of this testimony, grievant's denials and her attempts to minimize the impact

of her statements to B[redacted]n cannot be credited. She admitted making the comment that she knew who said something. If she was not referring to anyone in particular, there would be no reason for her to proclaim that knowledge. Her denial that she pointed at L[redacted] when saying this, or that she was referring to L[redacted] when she said it, are simply not believable. B[redacted]n affirmed that grievant pointed to L[redacted] at that moment. There would have been no reason for the gesture at L[redacted] if she were not referring to her or to anyone identifiable. Grievant also contradicted herself on this particular at the LIC, first stating "I don't recall if I pointed," then "I know I did not come right out and point at her," then altogether denying it: "I never came out of the office and pointed and singled L[redacted] out."

As noted, grievant had a tendency to sanitize each and every aspect of her conduct and repeatedly present herself as entirely without fault. She routinely tailored her version of events to suit her self-interest, even in the face of contrary testimony from neutral witnesses. This necessarily had a negative impact on the believability of her entire account. It is accordingly found that grievant retaliated against L[redacted] for providing information in an investigation into grievant's conduct, and that the Employer's determination on this issue was reasonable and neither arbitrary nor capricious.

Despite this conclusion, the Union maintains that the Employer's policy with regard to retaliation was vague and uncertain, and at all events did not apply to grievant. The Union reads the policy as applicable only to those who exercise supervisorial authority and who are capable of "adversely changing an employee's condition of employment." The Conduct Standards state however, that employees are required to "treat others with respect," and that the Company "does not tolerate harassment . . . including behavior, comments, . . ., or other conduct that contributes to an intimidating or offensive environment. . . ." It defines harassment as "bullying, . . . or workplace hazing, which can be humiliating, degrading, or cause emotional

or physical harm." The policy then explicitly states that such conduct can result in termination, and reiterates the warning in the Discipline section. The "consistent framework" to measure the grievant's conduct here which the Union insists is lacking is provided by these work rules.

Grievant identified L[redacted] as the one who reported a problem with her behavior. This was a form of intimidation, letting L[redacted] know grievant knew what L[redacted] had done, and implying there might be repercussions. Even without evidence that grievant specifically told L[redacted] to "keep her mouth shut," one can reasonably infer that sentiment from her statement and gesture. Her intent to direct her remark at L[redacted] and let L[redacted] hear it is shown by saying it "out loud," and by the fact that L[redacted] actually did hear it.

The Union's argument that grievant's conduct cannot be considered "harassment," as she was actually charged with "retaliation," places too restrictive an interpretation on the policy. "Retaliation" for talking about a co-worker to management is a form of "bullying" which "contributes to an intimidating or offensive environment," and is thus within the meaning of "harassment." As indicated by her distress, L[redacted] was plainly intimidated by grievant's actions.

The Union further maintains that a single statement "taken completely out of context" cannot constitute harassment. Strictly speaking, the term "harassment" means to disturb or annoy "persistently." However, a single act can be deemed serious or severe enough to constitute harassment. Even though such an act ordinarily involves more than mere words, the Company's definition of the term may be permissibly broader than conduct which would be actionable under Title VII. Insofar as the contention that the statement was "taken out of context" is concerned, the statement was made immediately after both L[redacted] and grievant were summoned into the supervisor's office to talk about grievant's conduct, thus placing it within a setting where there was a real possibility that grievant might be disciplined as a result of information that L[redacted] revealed.

The Employer's conclusion that grievant engaged in retaliation in in violation of its harassment policies is thus supported by sufficient credible evidence. Management possesses broad discretion to determine the level of discipline that is appropriate when misconduct is proven. Arbitrators are typically reluctant to overturn or modify those determinations unless it can be shown that they were made in a way that was arbitrary, capricious or plainly unreasonable. In light of the grievant's prior discipline record leading up to the retaliation incident, which included active Oral and Written Reminders resulting from customer complaints, two additional Coaching and Counselings for the same offense, a Written Reminder for attendance and a Written Reminder for Work Performance, the Employer's decision to place grievant on a DML for the retaliation offense was neither arbitrary, capricious, nor unreasonable.

Finally, there are the two incidents that resulted in the termination. The validity of the Solmis complaint and the just cause basis for discipline that it supplied have been previously discussed. The second incident concerned what the Employer characterized as another example of "retaliation." Grievant was found by the Employer to have engaged in that form of misconduct once again when she made a comment that "you don't want [L[redacted]] to tell on you" after a new employee L[redacted] was training acknowledged that she might have made a mistake handling a transaction.

The Union maintains that grievant was joking when she said this, and that everyone around laughed at the comment. Because L[redacted] did not mention that she was intimidated or threatened by the comment, the most it amounted to in the Union's view was a "petty slight, annoyance, or 'snub,' and not retaliation because it was not made in reference to any ongoing investigation.

L[redacted], however, took offense, and was upset by it, as it made her "look bad." C[redacted] was also offended, and did not think it was a joke. Another witness, M[redacted] G[redacted], also did not feel the remark was made in jest. Further, L[redacted] mentioned to the LIC that when grievant

made the statement, everyone turned quiet, thus contradicting grievant's claim that the comment caused everyone to laugh. Grievant's alerting the trainee that she did not want L[redacted] to "tell on" her underscored the untruthfulness of the statement grievant offered in defense of the first "retaliation" allegation that she was not directing her "I know who did it" utterance at anyone in particular. Grievant's overall lack of credibility accordingly casts doubt on her assertion that she was joking, particularly in the face of contrary testimony from three other witnesses.

Viewing the remark in light of the prior one which led to the DML lends it added significance and enhances its impact. It was demeaning and humiliating, especially since it was made to a new employee whom L[redacted] was training, and in the presence of other employees as well as customers. It once again singled L[redacted] out as someone who could not be trusted. The Company could reasonably conclude that it had an intimidating and chilling, retaliatory effect on those who brought problems with their co-workers to management's attention.

Grievant's conduct in this instance additionally demonstrated that corrective measures had little if any positive effect on her. She had been brought to the brink of discharge for a similar remark, yet the possibility of serious consequences for like conduct in the future was insufficient to convince her of the need to modify her behavior.

Even assuming for the sake of discussion that the July 24 statement to C[redacted] was insufficient to provide a basis for enhanced discipline, the S[redacted] complaint alone violated the DML. As per the Positive Discipline Guidelines, termination may result when another disciplinary problem occurs within the 12-month active period of a DML.

The Company has accordingly satisfied its burden of proving that grievant committed a series of policy violations which supplied cause for discipline. Through their mutually agreed-upon Positive Discipline policy, the parties have recognized that consistent with just cause principles, except for the most serious offenses, the object of discipline should be correction,

rather than punishment. Minor offenses justify only minor discipline. The employee is given an opportunity to modify his/her conduct so that it conforms with the Employer's reasonable expectations. When these offenses are repeated, however, advancement to more serious discipline levels is appropriate and consistent with just cause. Though each individual violation found here, viewed in isolation, might not provide a legitimate basis for severe discipline, the sum total of those offenses, and the strong indication that grievant was either unwilling to or incapable of correcting her behavior, established that management's decision to terminate the grievant was within its broad discretion, and neither arbitrary, capricious, nor plainly unreasonable.

AWARD

The grievance is denied. Grievant S[redacted] B[redacted] was discharged for just cause.

Dated: December 16, 2017

MATTHEW GOLDBERG
Neutral Chairperson

F.E. DWYER
Union Board Member
Concur __ Dissent__

Dated:

MIKE GRILL
Union Board Member
Concur __ Dissent__

Dated:

ROBIN WIX
Company Board Member
Concur __ Dissent__

Dated:

CHRIS ZENNER
Company Board Member
Concur __ Dissent__

Dated: