IN ARBITRATION PROCEEDINGS BEFORE

A BOARD OF ARBITRATION

In the Matter of a Controversy between LOCAL UNION 1245, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Union, and PACIFIC GAS AND ELECTRIC COMPANY, Employer. Termination	OPINION AND AWARD ARBITRATION CASE NO. 180

APPEARANCES:

On behalf of the Union:

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On behalf of the Employer:

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This arbitration arises out of a dispute between Local Union 1245, International Brotherhood of Electrical Workers, AFL-CIO ("Union") and Pacific Gas and Electric Company ("Employer") involving the termination of P Employer and Union are parties to a Collective Bargaining Agreement, ("Contract") pursuant to the provisions of which Walter L. Kintz

was named as Chairperson of a Board of Arbitration. The parties stipulated that all procedural requirements of the Contract have been met, and the matter is properly before the Board with jurisdiction to render a final and binding award.

Hearing was held on June 8, 1990, in San Francisco, California. The parties were given full opportunity to examine and cross-examine witnesses, to introduce relevant evidence, and to file post-hearing briefs. The matter having been submitted on the briefs, the following opinion and award is issued:

ISSUE

Was the discharge of the Grievant, P for just cause? If not, what is the appropriate remedy.

RELEVANT PROVISIONS OF THE AGREEMENT ON POSITIVE DISCIPLINE

POSITIVE DISCIPLINE GUIDELINES

II. 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. Since it is the supervisor's approach to a performance problem that often brings about the employee's decision to change behavior, it is critical that the supervisor be prepared. Coaching/counseling is intended to be a deliberation and discussion between the supervisor and employee. Normally, performance problems can be resolved at this step. Coaching/counseling memo or notes kept in the supervisor's operating file should be deactivated in the same manner as oral reminders (Section VI.A). . .

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 PGandE, this means following all the rules and performing in a fully satisfactory manner.

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

III. TERMINATION

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

B. Notwithstanding the foregoing, if a performance problem which normally would result in formal discipline occurs during an active DML, the Company shall consider mitigating factors (such as Company service, employment record, nature and seriousness of violation, etc.) before making a decision to discharge, all of which is subject to the provisions of the appropriate grievance procedure for bargaining unit employees. In addition, a summary of the decision not to terminate should be documented and placed in the employee's Personnel (701) File, and the employee should be given a copy of the summary.

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.

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

Attendance:

Absenteeism
Tardiness
Sick Leave Abuse (Positive Discipline will not circumvent or supersede sick leave abuse sections of any Labor Agreement)
Unavailability
Extended Lunches/Break Periods
No Call/No Show

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CONTENTIONS OF THE PARTIES

The Union contends that the Employer failed to notify the Grievant that she risked discharge for the legitimate use of accrued sick leave, and that such discipline is unprecedented.

The Employer argues that the Grievant was terminated pursuant to the express terms of the parties' Agreement on Positive Discipline ("Discipline Agreement"), by virtue of which she was on notice that any further disciplinary problems, including attendance, could result in her discharge.

FACTS

The material facts are substantially undisputed and resolution of the matter involves the analysis of those facts in connection with the parties' agreements in order to ascertain whether the just cause standard has been met.

The Grievant was employed as a meter reader from July, 1984, until her termination on February 3, 1989, which gave rise to this arbitration. The quality of her work is not an issue, rather her discharge grows out of a series of disciplinary actions

which in part involved her unsatisfactory attendance record.

The Employer's case is based partly on the Grievant's attendance history; i.e., in 1986 117 hours of unavailability, in 1987 840 hours, 500 of which resulted from a skateboarding accident and which continued two months into 1988.[1] The Employer does not rely on a subsequent period of absence caused by an industrial accident. Against this attendance background the Employer focuses on the Grievant's two consecutive days of sick leave in May followed by a six-day absence occasioned by the Employer's discovery that she was operating its vehicle without a valid driver's license. As discipline for the latter offense the Employer placed the Grievant on DML status on June 7.[2] On June 8 the Grievant's supervisor, Mike Hedley, conducted a counseling session with her concerning the DML, during which he also told her that her attendance record was unacceptable and she must meet all employment requirements including availability.

On June 20 and August 5 the Grievant was again counselled concerning unavailability problems relating to tardiness, medical appointments and time off with permission. It is undisputed that at the June 20 session Hedley expressly warned the Grievant concerning tardiness, stating ". . . because of DML, if it occurred again it would probably mean dismissal." The Grievant testified that Hedley did not expressly warn her that the

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[1]All dates hereinafter are in 1988 unless otherwise indicated.

[2]DML refers to a decision making leave as described in the Discipline Agreement set forth above. The purpose of this discipline step is to give the employee a paid day off to make a serious assessment of future employment commitments.

use of legitimate sick leave could result in termination, but confined his remarks to the warning that she should not be late and was using too much time off for personal business. She did, however, admit that Hedley discussed her "attendance" and warned about allowing personal business to interfere with work.

On August 22 the Grievant was involved in an avoidable accident while driving a company vehicle. An initial decision to terminate her employment because of this incident was subsequently reconsidered because of facts which the Employer deemed to be mitigating. This decision was discussed with the Grievant at a counseling session on September 2. Hedley's contemporaneous memorandum of this counseling session reflects prior counseling of the Grievant on June 8 and June 2Ø concerning attendance problems as well as a reminder that she must continue to meet her DML commitments.

From September to December the Grievant was absent 64.5 hours (excluding absences attributable to an industrial accident).[3] In January 1989 the Grievant was absent on sick leave for 27 hours. While this period of absence immediately preceded and apparently precipitated her discharge there is no contention that she was malingering or otherwise improperly using leave.

A Union official testified that there was no instance in which the Employer terminated an employee for legitimate use of sick leave when the employee was on a DML for an offense unrelated to attendance. The Union also offered evidence of the resolution of grievances by the parties which date back to 1979 and which

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[3]Approximately 32 hours of absences are described by the Grievant as attributable to abortion related medical problems.

involve issues related to those presented here.[4] These actions indicate that the parties agreed to rescind discipline which related to industrial accident caused absences. It also appears that the parties have agreed to discipline employees for excessive absenteeism even where legitimate sick leave was a component of that absenteeism. In no instance was a discharge for unavailability sustained in the absence of an express warning. In the only post Discipline Agreement example, a discharge was sustained with the following discussion:

> Company noted that a Decision Making Leave is for total performances but moreover, the grievant continued to be unavailable for work, the reasons notwithstanding. That pattern of absenteeism is what caused him to be on a Decision Making Leave; he did not reach that step of the discipline procedure in another category or for reasons other than unacceptable attendance and that his actions in declining to pursue prudent advice may have contributed to his continuing absenteeism. Company noted that the grievant was not discharged immediately after the Decision Making Leave but after a three-week period of intermittent attendance and after additional coaching and counselling.

In terminating the Grievant the Employer relied on her attendance, her September 2 avoidable accident and her DML status.

ANALYSIS AND CONCLUSIONS

The record discloses a background of progressive discipline culminating in a DML which must be accepted here as proper because it was not grieved. It is also clear that while the DML was precipitated by the Grievant's driving offense it also

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[4]A ruling on the admissibility of Union Exhibit 5, which evidences these resolutions, was reserved at hearing. Examination of these documents discloses that they evidence the parties' interpretation and application of their Contract. They therefore have some relevance and are received. It is noted that only one of these grievance resolutions postdates the adoption of the Discipline Agreement, a factor which affects the respective weight to be given the resolutions.

included a specific warning about attendance.

The Employer based the discharge on continued unsatisfactory attendance while under the 12-month probationary status imposed by the DML and also expressly relied on the September 2 avoidable accident. The DML is by its terms the last step of the disciplinary process before discharge and requires the employee to adhere to all job requirements. Thus the unsatisfactory attendance is merely one factor which lead to the Grievant's termination.

The Union seeks to overcome the Employer's case relying on three points: (1) the alleged absence of sufficient warning that discharge could result from legitimate use of sick leave; (2) the unprecedented discharge for use of sick leave; and (3) condonation.

The weight of the evidence supports a conclusion that the Grievant knew or had reason to know that she was subject to discharge for failure to meet all of the obligations of her employment, including availability. The Grievant's testimony, even if credited, that tardiness was the only attendance subject about which she was warned at counselings on June 8, June 20 and August 5 does not avoid this conclusion. A reprimand for tardiness, including a discussion of the possibility of discharge, logically applied to other forms of absenteeism. It is also significant that on cross examination the Grievant conceded that "attendance" was discussed by Hedley during these counseling sessions and he also told her not to let personal problems interfere with her work. Hedley's testimony that he discussed the Grievant's attendance, including tardiness, leaving work early and

days off, and specifically warned that unavailability for work could lead to discipline is supported by his contemporaneous written records of the counseling sessions. Further, these documents apparently were available to the Grievant.

The record also establishes that the DML put the Grievant on notice that she was required to "meet all Company work rules and standards" for the next 12 months under pain of discharge. The work rules and standards expressly include under the DML program "absenteeism, tardiness, sick leave abuse, unavailability." For all of these reasons it is concluded that the weight of the evidence establishes that the Grievant was on notice that continued attendance problems could result in termination. On at least three occasions the Employer imposed progressive corrective discipline aimed at the Grievant's unavailability problems. It therefore cannot be concluded that the Employer made a surprise reliance on legitimate use of sick leave.

The fact that the Grievant had accrued sick leave and was using it legitimately is an important but not controlling consideration. A discharge motivated even in part by such cause would be difficult to accept as just or reasonable in most circumstances. However, here there are factors which make the Employer's action more reasonable. The express terms of the Discipline Agreement establish the intent of the parties to subject employees to discipline for enumerated attendance problems. The separate enumeration of unavailability, absenteeism, tardiness and sick leave abuse suggest that even legitimate sick leave might generate discipline. The prior

grievance resolutions do not provide much guidance in resolving the issues here. Neither does the evidence that discharge is unprecedented for use of sick leave where the DML was for another disciplinary area. With respect to the latter point, the evidence does not establish a grievance resolution on comparable facts. More significantly, the subject of attendance was unmistakably a part of this DML even though it was precipitated by other misconduct. Finally, the discharge was based not only on attendance but also on the second driving offense.

The condonation principle requires cautious application to avoid a result which encourages an employer to seize on a preliminary offense. There is an obvious tension between progressive corrective discipline and the concept of condonation. This discharge must be seen as occurring against the background of the DML. Having exhausted the preliminary steps of the disciplinary procedure the Grievant's employment was hanging by a slender thread. It may be somewhat puzzling that the Employer decided to mitigate the second driving offense and rely in part on the attendance issue. This mitigation does not make the subsequent discharge unjust or unreasonable; nor does it undermine the Employer's reliance on subsequent attendance problems. Neither does granting the Grievant permission to be off for four days to attend to personal business constitute condonation of the collective impact of her absences.

The Union argues that some periods of unavailability may not be properly considered to support the discharge. The Employer's brief does not indicate reliance on periods attributable to industrial accidents and it does not appear that

the Employer would be privileged to do so. Judson Steel Corporation v. Worker's Compensation Appeals Board, 150 Cal Rptr. 250, 586 P2d 564. The Union also argues that 32 hours of absence in November cannot be considered because they resulted from a pregnancy related medical condition. The strong public policy embodied in federal and state statutes (42 U.S.C. 2000e(k) and especially Cal. Govt. Code Section 12945) which proscribe discrimination against women because of pregnancy is recognized. The extent to which such policy considerations apply where a pregnancy related absence is a small part of a record of unsatisfactory attendance is less clear.[5] In any event it does not appear that the 32 hour absence was the triggering event which lead to the February 1989 discharge.

For the reasons set forth above it is concluded that the weight of the evidence discloses that the Grievant was discharged for just cause pursuant to an agreed upon progressive discipline system.

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[5]As is the extent to which it is appropriate for an arbitrator to go beyond the "four corners" of the parties' agreement and interpret and apply external law. See Fairweather, Practice and Procedure in Labor Arbitration, 2nd ed., 458-459 and cases cited therein.

AWARD

The discharge of the Grievant, P , was for just cause and the grievance is hereby denied.

DATED: October 9, 1990

WALTER L. KINTZ
Chairperson

I concur:

Margaret A. Short 10/11/90

10-11-90

I dissent:

Dorothy Fortier

Kathy Mars