**A MATTER IN ARBITRATION**

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| In a Matter Between: | | |
| INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1245 | Grievance: | Discharge |
| (Union) | Hearing: | October 6, 2000 |
| and | Award: | January 28, 2002 |
| PACIFIC GAS AND ELECTRIC COMPANY | McKay Case No. | 00-265 |
| (Employer) | Arbitration Case No. 246 | |

**DECISION AND AWARD**

**GERALD R. McKAY, NEUTRAL ARBITRATOR**
**DEBBIE MAZZANTI, UNION ARBITRATOR**
**ROY RUNNINGS, UNION ARBITRATOR**
**MARGARET SHORT, EMPLOYER ARBITRATOR**
**PAMELA BENITEZ, EMPLOYER ARBITRATOR**

Appearances By:

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| (Employer) | | |

## STATEMENT OF PROCEDURE

This matter arises out of the application and interpretation of a Collective Bargaining Agreement which exists between the above-identified Union and Employer.[1] Unable to resolve the dispute between themselves, the parties submitted it to a panel of arbitration pursuant to the terms of the contract to hear and resolve the matter. A hearing was held in San Francisco, California on October 6, 2000. During the course of the proceedings, the parties had an opportunity to present evidence and to cross-examine the witnesses. At the conclusion of the hearing, the parties sought the advice of an expert on the question of the appropriateness of Dr. Robert Perez's disclosure of the Grievant's alleged threat to kill or harm various company

[1] Joint Exhibit #1

personnel. The question raised was whether the disclosure was appropriate in light of the California Supreme Court's decision in Tarsoff v. The Regents of the University of California, (1968) 69 Cal.2d 108. On August 17, 2001, Dr. James Missett issued his report to the parties on this particular question. The parties, in turn, chose to file a written brief dated December 26, 2001 which the Arbitrator received on or about January 3, 2002. Having had an opportunity to review the record, the Panel is prepared to issue its decision.

## ISSUE

Was the Grievant terminated for just cause? If not, what is the appropriate remedy?

## RELEVANT CONTRACT LANGUAGE

TITLE 7. MANAGEMENT OF COMPANY

7.1 MANAGEMENT OF COMPANY

The management of the Company and its business and the direction of its working forces are vested exclusively in Company, and this includes, but is not limited to, the following: to direct and supervise the work of its employees, to hire, promote, demote, transfer, suspend, and discipline or discharge employees for just cause; to plan, direct, and control operations; to lay off employees because of lack of work or for other legitimate reasons; to introduce new or improved methods or facilities, provided, however, that all of the foregoing shall be subject to the provision of this Agreement, arbitration or Review Committee decision, or letters of agreement, or memorandums of understanding clarifying or interpreting this Agreement.

## BACKGROUND

The Grievant began working for the Employer on April 16, 1975 as an Auxiliary Operator. During the course of his employment, the Grievant has served as a Meter Reader, Shop Meter Person, Apprentice Equipment Mechanic, and, at the time of his termination, Materials Handler. At the time of his termination, the Grievant was on an active written reminder for conduct and a coaching and counseling for attendance. It is the position of the Employer that the Grievant engaged in behavior which threatened the life and safety of his fellow workers and intended to intimidate and frighten these individuals. In addition, it is the Employer's position that during the course of a medical evaluation, the Grievant made a threat on the life and safety of company personnel. The Employer asked that the grievance be denied but that in any case, the remedy not involve the Grievant's reinstatement. The Union argued that the Grievant's conduct, at best, amounted to forgetfulness and did not involve any real or actual threats of violence. The comments the Grievant made to his therapist during a session should not have been revealed by the therapist and, therefore, the alleged statement is not admissible evidence in the present arbitration proceeding. The Union asked that the Grievant be reinstated with full back pay and benefits.

The Grievant's present problems begin when the Grievant wrote on the back of his timecard, "Help me or I will threaten you."[2] Several employees saw the note on the back of the Grievant's timecard before it found its way to the Grievant's supervisor. As a result of the Grievant's writing this statement, a meeting was called on June 3, 1999 by Gary Commick, the Employer's Superintendent, to find out what the Grievant meant by his statement and why he put the statement on his timecard. When the Grievant came into the office, he acknowledged that he wrote the note on the back of the timecard. Mr. Commick asked the Grievant if he needed help

[2] Joint Exhibit #2, attachment 7

and the Grievant stated, no he did not need help. When the Grievant was asked what the note meant, the Grievant responded by saying the note was a joke. According to the Grievant, he was recalling a rock which his father kept on his desk which had written it, "Help me or I will kill you." The Grievant recalled the conversation somewhat differently and stated that he remembered a note his father had framed which said, "Help me or I will kill you." The note had been written in red ink in a way that made the letters appear to be drops of blood. The Grievant asserted that his father found that note to be extremely humorous. The Grievant was advised that other people found notes of that nature threatening. The Grievant responded by suggesting that Mr. Commick was paranoid.

According to the Grievant, he believed that the incident was over at the end of the meeting with Mr. Commick. However, Mr. Commick stated that he did not consider the matter over at the end of the meeting but intended to pursue the matter further. According to Mr. Commick, he informed the Grievant that if the Grievant writes notes to himself that he should keep those notes to himself and not put them in a place where others might be exposed to them.

The Director of the Department, Pete DeMartini, decided that the incident concerning the Grievant's timecard required a coaching and counseling session, which was conducted with the Grievant and a shop steward on June 7, 1999. During the course of the coaching and counseling, the Grievant was informed by Mr. DeMartini that he was not to leave threatening material in the facility. The Grievant was informed that threatening material had the potential to upset many employees causing a disruptive work environment. The Grievant responded by stating that he had already been told this. The Grievant was informed that if he continued to engage in this behavior by leaving threatening material in the workplace that he could be fired. In addition, the Grievant was directed to see Dr. Raffle in Oakland for a fitness for duty threat assessment

examination. The examination was set for Wednesday, June 9th at 11:00 a.m. At the end of the session, the Grievant asserted that he was being harassed and needed to see his lawyer. He informed Mr. DeMartini that his last examination indicated that he was fit for duty and that he saw no reason for another examination.

The Grievant was suspended and it was difficult for the Employer to reach him with information. The Employer attempted to get a letter to the Grievant dated June 8, 1999 informing the Grievant of this examination with Dr. Raffle and to give him the address to where the Grievant was to report.[3] To serve the letter, the Employer hired a courier service called A.S.A.P. Express.[4] The courier took the letter to the Grievant's house and the Grievant refused to take it from the courier. The courier called the office and was advised by the Employer's Law Department that it would be appropriate simply to leave it on the porch. As the courier, who was a female, was making the call, the Grievant was yelling at her. The courier sent a note to the Employer describing the attempt to make the delivery in which she stated, "I felt that my life was threatened by one of your customers." She went on to state, "The man was very irate and yelling at me after handing him this letter. . . ." She called her office and was informed to leave the letter. She stated, "They told me to leave, because I felt threatened. The package I had delivered is on Mr. M 's porch on a table."[5] The Grievant stated that he was not angry at the courier but was angry at the situation.

An assessment of fitness for duty was done by Dr. Stephen Raffle and a report of the examination was provided to the Employer dated June 22, 1999. In the assessment, Dr. Raffle expressed concern about the Grievant's tendency toward violence, but assessed his risk of

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[3] Joint Exhibit #2, attachment 11
[4] Joint Exhibit #2, attachment 12
[5] Joint Exhibit #2, attachment 12

actually engaging in violence as low to moderate. He concluded in response to several questions presented to him by the Employer that "Mr. M... does pose a threat of violence to co-workers based on his history of e-mails and timecard statement, but this risk should be placed to the low-moderate range for the reasons given above." He went on to conclude that the Grievant needed strict consistent limit setting because the Grievant had no ability to set internal limits. He stated, "His internal limits are porous." He further advised that the Grievant should remain in contact with an EAP administrator every two weeks for the next year.

Based on the evaluation, which permitted the Grievant to return to work, the Grievant was returned on June 14th, after having a meeting with the Superintendent and Director, Mr. DeMartini wanted to make sure that the Grievant understood the parameters of his return to work so that the Grievant would remain out of trouble. During the course of this meeting, the Grievant was told specifically that he was to refrain from leaving personal notes, letters, or papers in the workplace. He was also told that he was not to use the computer during work hours for personal business. He was told further that if it was required, he was to seek assistance from EAP. The Grievant acknowledged that he was told these things during the course of this meeting.

A number of personal items involving the Grievant were found in the workplace. In November 1999 two envelopes were found. One of the envelopes contained a receipt for the purchase of two handguns from the Beretta Corporation. The envelopes were not sealed. They were left on top of the refrigerator which is in plain sight and in an area where other employees would clearly have seen the envelopes. The Grievant was investigated by corporate security concerning the purchase of the pistol. The Grievant was asked if there were weapons in his car and an investigation was conducted and no weapons in the Grievant's car were discovered. The

Grievant asserted that having the receipts for the purchase of a pistol at work did not constitute a threat and he saw no problem in having those documents present.

Other personal documents of the Grievant's were also found at the workplace earlier in his career. One letter was addressed to his father and another letter was a letter to the Editor of Soldier of Fortune magazine. A copy of the Soldier of Fortune magazine was also left on the premises. The Grievant denied the magazine was his but the quotes from the letter to the Editor appeared to have been taken out of that magazine. In a letter addressed to his father, the Grievant made the following comment, "For one thing I am still interested in how to blow things up -- The old dynamite, TNT and C-4 days haven't left me. I still am fascinated with things that go 'BANG!'"[6] The Employer conducted an investigation particularly focusing on the purchase of the pistols on November 24, 1999.[7] As a result of the investigation, the Grievant was terminated.

Subsequent to the termination, and during the course of an examination for purposes of a worker's compensation claim, Dr. Robert Perez, a clinical psychologist, was examining the Grievant when the Grievant threatened to hurt Mr. DeMartini if certain things happened. According to Dr. Perez, if the Grievant lost his home and if his wife's health deteriorated because he lost his health insurance as a result of the problems that were being created for him by Mr. DeMartini at work, he intended to hurt Mr. DeMartini and other personnel. When asked if he had a gun, the Grievant stated no but he told Dr. Perez that "he has knowledge of other means of hurting individuals."[8] As a result of these statements, Dr. Perez warned Mr. DeMartini of the potential threat and also informed the Employer's Manager of Corporate Security, Lyman

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[6] Joint Exhibit #2, attachment 10
[7] Joint Exhibit #2, attachment 16
[8] Employer Exhibit #3

Shaffer, of the threats made by the Grievant. The threats did not form a part of the Employer's initial decision to terminate the Grievant, but form a portion of the Employer's request with respect to remedy. The Employer argued if it did not have just cause for the initial termination, the Grievant's subsequent misconduct precludes his reinstatement.

The Union asserted that Dr. Perez's findings during the course of his examination did not give him license to inform Mr. DeMartini or the Employer of the Grievant's statement. The Grievant should be protected by the privilege between patient and therapist and the statements attributed to the Grievant should not be entered as evidence. To address this particular question, the parties mutually selected James Missett, who possess a M.D. and Ph.D. and was considered by the parties to be an expert in the area of Tarasoff warnings. Dr. Missett prepared a report dated August 17, 2001 in which he addressed the concerns of the Union regarding the release of this information by Dr. Perez. It was Dr. Missett's conclusion in his report that Dr. Perez had exercised reasonable care and professional judgment in determining that the Grievant did pose a real and potential threat to Mr. DeMartini and others. The release of the information, according to Dr. Missett, was appropriate and professionally required. There was no violation of Tarasoff in Dr. Missett's opinion by Dr. Perez in his release of the information concerning the threats made by the Grievant to Mr. DeMartini and other PG&E personnel. According to Dr. Missett, the warning was appropriate and did not violate any rules of ethics or standards of conduct. It is the type of warning, according to Dr. Missett, contemplated by the Tarasoff decision written by the California Supreme Court.

## POSITION OF THE PARTIES

### EMPLOYER

The Employer asserted that the Grievant's termination was for just cause. He was terminated for inappropriate and threatening behavior. After being transferred into the Fremont Warehouse, the Grievant was reminded that he was not to bring any materials into the warehouse that could be viewed as threatening to others. Despite this warning, within a few weeks of his arrival at the warehouse, the Grievant wrote the words, "Help me or I will threaten you" on his timesheet. The Grievant was unequivocally reminded again not to engage in this type of behavior. At the time of the timesheet incident, the Grievant had a written reminder for misconduct and insubordination. After being reminded specifically not to bring threatening material to work, the Grievant brought receipts reflecting the purchase of a personal handgun and left it in the employee lunchroom. The evidence demonstrates that the Grievant enjoyed intimidating his peers and management through his subtle and not so subtle actions. In the event the Arbitration Board disagrees with the Employer's decision to terminate the Grievant, the Employer asserted that the death threat made by the Grievant against Pete DeMartini, which resulted in Dr. Perez issuing a Tarasoff warning, precludes the Grievant from being reinstated. The Employer pointed out that Dr. Missett agreed that Dr. Perez made the proper call in warning the Employer about the Grievant's threats. But even if the Board believes the Grievant should, nevertheless, be reinstated, his conduct does not warrant back pay. The Employer asked that the grievance be denied.

**UNION**

The Union argued that the decision of Dr. Perez to give the Tarasoff warning should not affect this case in any way and should not affect the Grievant's back pay. The issue which gave rise to the Grievant's termination was, at best, the Union asserted, trivial. The Grievant brought paperwork concerning two handguns he had recently purchased. In bringing the paper to the Employer's premises, he violated no company rule and it cannot be said that the act was malum in se. In examining the Grievant's conduct in context, the Union argued, his disciplinary record is not remarkable. He was not hanging onto his job by a proverbial thread. In June 1999, the Grievant doodled the words, "Help me or I will threaten you" on his timecard. When asked about the doodles, the Grievant admitted that he had done it and that it was a joke. Despite the fact that the Grievant was already at the written reminder stage of positive discipline, the Employer never considered the "help me" doodle as a possible ground for escalating the Grievant to the next step of positive discipline. Instead, the Grievant was given a coaching and counseling, which does not even constitute a formal step of discipline.

The Employer gave the Grievant a warning in June 1999 about bringing threatening material to the workplace. He was told to refrain from personal notes, letters, and papers in the workplace. The Employer did not place these expectations of the Grievant in writing in June. The Union pointed out that the termination relied in part on prior disciplinary action against the Grievant which the Employer was contractually precluded from using. A second point, the Union raised, is that the Employer had been advised by the Grievant's treating psychologist that as a result of an automobile accident, the Grievant was complaining of memory loss and irritability. In looking at the negotiated positive discipline language, the Grievant's conduct in

November did not represent a single offense of such major consequence as to justify immediate termination.

The Tarasoff warning, the Union argued, was not given appropriately. First, Dr. Perez stated flatly at the arbitration that he had not found that the Grievant's threat to Mr. DeMartini was one of imminent harm. Second, Dr. Missett did not contact the Grievant to hear his side of the conversation with Dr. Perez. Third, whatever frustration the Grievant was felling when he spoke to Dr. Perez was the direct result of the Employer's actions in terminating him for an offense, which did not warrant termination. At the time of his termination, the Grievant was approaching his 26th service anniversary with the Employer. He is a long time employees with a completely unexceptional disciplinary record. As a result of a trivial incident, he was fired. The Union asked that the Grievant be reinstated with full back pay and benefits.

## DISCUSSION

The Union argued that the evidence to support the Grievant's termination is trivial. According to the Union, bringing receipts for the purchase of handguns to work and leaving them in locations where employees will find the receipts is not a violation of any company rule or law. When one looks at the bare record as the Union has set it forth, it is difficult not to agree with the Union that the cause for the Grievant's termination appears to be trivial. However, it is not appropriate to look at the record, as the Union has so carefully couched it; it is necessary to look at the record in the context of the Grievant's workplace behavior to understand the real concern of the Employer. The Grievant is a long term employee who over the years has had difficulty accepting authority and getting along with other employees. If one reads the medical records of the Grievant, it is abundantly clear that the Grievant has certain personality disorders

that might well make him difficult to work with on a day-to-day basis. It is the Arbitrator's observation, based on a reading of the entire record, including the medical record, that the Grievant is best described as a bully.

Based on the joint fact finding report, it was difficult for the parties to find witnesses who were brave enough to come forward and testify concerning the Grievant. In the Arbitrator's experience, when this situation occurs, it usually reflects the relationship that has developed between those employees and the Grievant. In one way or another, the Grievant has made it clear to his fellow workers and his supervisors that if he does not get his way, he is willing to do things that are threatening to the workers and the supervisors. Whether in fact the Grievant would do anything to these workers and supervisors is a matter of pure speculation. The fact that the Grievant wishes to convey that he would do something is a matter of fact. The Grievant's conveyance of this information is intended to and apparently does have the affect of frightening his co-workers and, at the very minimum, making them feel uncomfortable. The question in this context is whether the Employer is obligated to continue the employment of a bully.

The Grievant's leaving of the pistol purchasing information was something the Grievant knew or should have understood to be in the category of prohibited activity based on his conversations with Mr. DeMartini and his Superintendent. The Grievant was told not to bring personal notes or documents to work. There is nothing work related about the Grievant's purchase of pistols. At a minimum, it conveys information to his co-workers that the Grievant now is armed with pistols and possibly knows how to use them. How the Grievant could conclude that this was not threatening to employees that he has been bullying is a mystery to the Arbitrator. Why the Grievant found it necessary to bring receipts of that nature to work is also a mystery to the Arbitrator. The most logical conclusion, based on the Grievant's history, was that he did so hoping that his co-workers would see the fact that he was armed with pistols which is

precisely what occurred. It is consistent with the Grievant's approach toward interaction with co-employees which appears to be, do what I ask or I will hurt you.

Some of the material DeMartini relied upon in terms of the Grievant's intimidations and threats to fellow workers, including his possession of a Soldiers Fortune magazine and letters to his father, may have fallen outside the time limits for which the Employer could rely upon them for purposes of discipline. What those documents demonstrate, however, is that the Grievant, even though he has been repeatedly warned and disciplined, has not changed his attitude or approach toward interacting with fellow workers and supervisors. The Grievant has been a bully for a considerable period of time and even though he has been warned about this type of behavior, he has not changed. It is for these reasons that the Arbitrator does not agree with the Union that the Grievant's conduct of leaving the receipts for the purchase of pistols is trivial. Placed in its proper context, it reflects a continuing pattern of misbehavior that demonstrates the Grievant is clearly a bully.

Having stated that the Union's characterization of the Grievant's misconduct as trivial is incorrect, the Arbitrator, nevertheless, agrees with the Union that the approach the Employer took toward disciplining the Grievant for his acts as a bully is not appropriate. The Grievant was given a coaching and counseling session in June related to the comment he wrote on his timecard. In light of the Grievant's prior history, the Employer should have escalated his step in the disciplinary process at that point and given the Grievant either a written warning or a decision making leave. By minimizing the Grievant's conduct, in light of his prior behavior, the Employer has undermined its disciplinary position. This is particularly true in light of the fact that Mr. DeMartini sent the Grievant to a psychiatrist for a fitness for duty examination as a result of the comments on the back of the Grievant's timecard. That fitness for duty report

suggests strongly that the Grievant has serious personality disorders. For the most part, the Employer appears to have ignored this.

In November, when the Grievant showed up with the pistol receipts, the Employer jumped on them as a basis to get rid of the Grievant. Under any concept of progressive discipline using the Employer's negotiated disciplinary process, the Employer escalated its discipline excessively fast in light of the manner it treated the timecard incident in June. Bringing the receipts to work probably warranted at least a written warning, if not a DML, but, it did not warrant immediate termination as the Employer chose to impose. The Arbitrator in this sense agrees with the Union that the decision to terminate the Grievant in November 1999 was without just cause. The Arbitrator does not agree with the Union that the incidents were trivial for the reasons stated above. The problem was serious but the Employer chose to ignore the appropriate disciplinary approach and cannot escape the consequences of its negligence in this regard.

Having concluded that the Employer did not have just cause to terminate the Grievant, the Panel is faced with the question of the appropriate remedy. In the context of appropriate remedy, the Employer has raised an issue which occurred during an examination of the Grievant by a psychologist named Dr. Perez. During the course of that examination, which had nothing to do with the Grievant's termination directly, the Grievant threatened to do bodily harm to Mr. DeMartini and other employees. The Grievant's threat was serious enough that Dr. Perez believed he had an ethical and legal obligation to warn Mr. DeMartini and the Employer. Contrary to the Union's assertion that the warning was not appropriate, Dr. Missett, the individual selected mutually by the Union and the Employer to address this questions, concluded that Dr. Perez did the right thing. The Union cannot escape the conclusions of Dr. Missett since it agreed to be bound by those conclusions. Based on Dr. Missett's findings, it is

the Arbitrator's conclusion that Dr. Perez made a finding that the Grievant posed a real and present danger to Mr. DeMartini and other employees who work for PG&E. As a result of losing his job, if the Grievant lost his house and his wife's health deteriorated, he was going to do harm to Mr. DeMartini and other employees. Under the circumstances, those were likely consequences. The Grievant's threat to do physical violence to his supervisor and other employees must preclude him from returning to work even though the initial termination was not for just cause.

It is the Arbitrator's opinion that employees and supervisors have a right to work free of intimidation and threats. No employee should have to go to work in a situation where the employee fears for his life or the safety and health of his family. Whether or not the Grievant would kill or do physical harm is irrelevant. No one, including the best psychologists can ever make that determination with absolute certainty. What is relevant is that the Grievant chooses to make those kinds of threats and the individuals against whom he makes those threats believe that there is validity to them which, of course, is the message the Grievant intended to convey. Under these circumstances, those employees should not have to work with the Grievant and fear for their life regardless of how many years the Grievant has worked for the Employer.

It is the Arbitrator's conclusion that based on the Grievant's post discharge misconduct that he has forfeited his right to reinstatement based on the threats he made to do bodily harm to Mr. DeMartini and other employees. No Employer has to tolerate the presence of employees who chose, as a matter of interaction, to threaten the health and safety of co-workers. If the Grievant wishes to engage in that behavior, he will have to find employment elsewhere. The appropriate remedy, under these circumstances, is to set the termination aside because the Employer did not have just cause at the time to terminate the Grievant. The Grievant is entitled to back pay from the period of his termination until August 17, 2001 when Dr. Missett concluded

that the warning given by Dr., Perez was properly given. The record will reflect that as of August 17, 2001 the Grievant's employment is terminated because of the physical threats he made to Mr. DeMartini and other employees.

The Grievant is entitled to back pay and all of his benefits from the period of his termination until August 17, 2001. That would include his retirement and any other benefits to which he was entitled. The amount of back pay and benefits is remanded to the parties for their further calculation. The Grievant is directed to cooperate in this process by presenting to the Employer evidence of outside earnings which can include W-2 forms and tax returns. The Grievant's failure to cooperate in the determination of back pay will result in a deduction of entitlement. In addition, the Grievant is directed to provide information concerning is outside employment or his efforts to seek outside employment. To the extent the parties are not able to agree on an exact amount of back pay and benefits, the Panel retains jurisdiction over the dispute.

## AWARD

The Employer did not have had just cause to terminate the Grievant. However, the Grievant's post-discharge misconduct precludes the Grievant from being reinstated. The Grievant is entitled to back pay and benefits from the period of his discharge until August 17, 2001 when a determination was made by Dr. Missett that Dr. Perez's conclusions in reporting the Grievant's misconduct was correct.

IT IS SO ORDERED.

Dated: 1-28-02

**Gerald R. McKay, Arbitrator**

Dated: 2-4-02

**Debbie Mazzanti, Union Arbitrator**

Dated: 2-4-02

**Sam Tamimi, Union Arbitrator**

Dated: 2/5/02

**Margaret Short, Employer Arbitrator**

Dated: 2/7/02

**Pamela Benitez, Employer Arbitrator**