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S.A. CAMPOS

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**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1245,**

Complainant,

and

PACIFIC GAS & ELECTRIC COMPANY,

Respondent.

Re: Arbitration Case No. 267.

Opinion & Decision

of

Board of Arbitration

-oOo-

BOARD OF ARBITRATION

Company Board Members

Margaret Short
Molly Williams

Union Board Members

Sam Tamimi
Frank Saxsenmeier

Barbara Chvany, Neutral Chairperson

APPEARANCES

On Behalf of the Union:

Lynn Rossman Faris, Esq.
Leonard Carder, LLP
1330 Broadway, Suite 1450
Oakland, CA 94612-5660

On Behalf of the Employer:

Stacy A. Campos, Esq.
PG&E
Law Department
P.O. Box 7442
San Francisco, CA 94120

INTRODUCTION

This dispute arises under a Collective Bargaining Agreement (“the Labor Agreement”) between the above-captioned Parties (JX 1). Pursuant to the Labor Agreement and the Submission Agreement executed by the Parties (JX 2), the Board of Arbitration (“the Board”) was selected and hearings were conducted on November 9, 2004 and January 31, 2005, in San Francisco, California. At the hearing, the Parties had a full opportunity to examine and cross-examine witnesses, and to present relevant evidence and argument. The Parties stipulated that the grievance at issue was pursued through the grievance procedure of the Labor Agreement (JX 2; TR 6), thus the matter is properly before the Board for final and binding decision. A verbatim transcript of the proceedings was taken.¹ The matter was submitted for decision upon receipt of post-hearing briefs on April 26, 2005.

Grievant O’ (‘the Grievant’) was a System Operator assigned to the Company’s Stockton Control Center. His supervisor during the relevant time frame was Jim Elizondo (TR 36). The Grievant worked for the Company for 34 years (TR 189), having held the position of System Operator or the equivalent since approximately 1971 (TR 189-190). He was terminated effective October 15, 2003 for improperly handling a 911 telephone call from the California Highway Patrol (“CHP”). At the time of the termination incident, the Grievant was on an active decision-making leave (“DML”) under the Parties’ negotiated Positive Discipline Agreement. The termination was grieved. The Parties did not resolve the grievance in the prior steps of the grievance procedure, leading to this arbitration proceeding.

¹ References to the transcript are cited herein as (TR #); references to Joint Exhibits, Employer Exhibits and Union Exhibits are cited as (JX #), (EX #) and (UX #), respectively.

ISSUE

The Parties stipulate that the issue before the Board is as follows:

Was the Grievant, J.O., terminated for just cause? If not, what shall be the remedy? (TR 6; JX 2)

REMEDY REQUESTED

The Union seeks removal of the termination from the Grievant's record; the Grievant's reinstatement to employment; and a make-whole remedy for all lost wages, seniority and benefits (JX 3, p. 14; TR 7; Un. Brf. 37). The Company seeks denial of the grievance in its entirety (Er. Brf. 24).

RELEVANT AGREEMENT PROVISIONS

TITLE 3. CONTINUITY OF SERVICE

* * *

3.3 Employees who are members of Union shall perform loyal and efficient work and service, and shall use their influence and best efforts to protect the properties of Company and its service to the public ...

* * *

TITLE 7.1 MANAGEMENT OF COMPANY

7.1 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;... (JX 1)

PERTINENT PROVISIONS OF POSITIVE DISCIPLINE AGREEMENT

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

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

Application

This step is applied when:

An employee's commitment to improve is not met during the twelve (12) month active time period for a written reminder; or

An employee commits a very serious offense whether or not previous discipline has taken place.

Documentation

Notes are to be written covering the key points of the conversation. The exact date and offenses should be included. Employee excuses, protests, and reasons should be included.

When the employee returns from the Decision Making Leave, the employee will be given a letter summarizing the Decision Making Leave incident and the employee's decision. This letter should be written by the supervisor using the notes mentioned in (a) above. The letter will advise the employee

that termination could follow should they fail to live up to their commitment to maintain total performance and abide by all Company rules.

The original copy of the letter is given to the employee. The immediate supervisor retains a copy of the letter and a copy is placed in the employee's Personnel (701) file. The supervisor will also make a notation of this discussion on the Employee's Performance Record sheet (Attachment 1).

A DML is active for twelve (12) months.

* * *

TERMINATION

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, such as:

- Theft (See Review Committee Decisions 1451 and 1452)
- Striking a member of the public
- Energy Diversion
- Curb reading of meters

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.

(JX 5B)

BACKGROUND

The Grievant's Position and Responsibilities for Emergency Calls:

The Grievant was an experienced System Operator who has rotated through various assignments and has been assigned to train other System Operators and Distribution Operators

(TR 191-192). System Operators are responsible for the operation of the electrical distribution system within their jurisdiction, which entails the substations, the overhead and underground power lines, and all associated equipment. System Operators respond to alarms and outages and troubleshoot problems. Their priority is to maintain or restore power for customers. They also write switch logs and perform switching to de-energize equipment, which allows crews to maintain and repair equipment safely (TR 37, 88, 189-191, 193).

Calls from public agencies, such as police or fire, are generally referred to as "911 calls." Direct ring down lines² are used for such calls, which means the agency needs to make only one call. The Company has an emergency response duty with respect to such calls. (TR 45, 251) Service Operators, another classification, are the employees who usually handle such calls, issue tags using a computer program, and dispatch Troublemens to the field (TR 190). Emergency service calls from public agencies were routed directly to Service Operators during daytime hours; but, at the time in question (2002-2003), such calls rolled over to the Stockton System Operator for a specific period at night. During that time frame, the System Operator in Stockton was responsible for answering such calls and issuing service tags. (TR 80, 194, 251)³

The night shift System Operator in Stockton worked alone, and was expected to exercise discretion and judgment in handling 911 calls in terms of assessing the appropriate response (TR 88-

² A ring down line is a direct line that outside agencies use to report incidents, provide information, and obtain an emergency response from PG&E (TR 45).

³ The Grievant and other System Operators thought these calls should be routed directly to the Fresno Service Operators (Fresno SO) at night, because they believed it was irrational for the calls to come to the System Operator when dispatch was going to be handled by the Fresno SO (TR 80-81). The duty was changed to the Fresno SO a few months after the Grievant's termination, thus at the time of the hearing, System Operators in Stockton no longer handled such calls (TR 80-81, 194-195).

89, 324, 327). The System Operator first assessed the severity and urgency of the problem, for example, if there was an outage or significant service interruption (TR 88), and then decided if it was necessary to send a Troublemaker out immediately (TR 89-90). If service was required, the System Operator was responsible for documenting the work order by generating a service tag on the computer, which creates a record and provides information electronically to dispatch field personnel to respond to the incident (TR 45-46, 286). Even if immediate service was not required, the System Operator was responsible for ensuring that the issue was addressed before his shift concluded (TR 90). It was also the usual procedure to follow up with a call to the Fresno SO to be sure they received the tag (TR 45-46). Also, if for some reason the System Operator was unable to generate a tag, he was to call the Fresno SO and request assistance (TR 47, 64, 99). Without a tag and/or a telephone call, the Fresno SO would not be aware of the incident and would not know of the need to dispatch field personnel (TR 46, 47 66).

As the Union points out, the 911 procedure was not set forth in writing (TR 99), however the record is clear that the Grievant was aware of the required procedure for 911 calls (TR 99, 201, 208-209, 2130214, 238, 246-247, 261-262, 282, 291).

The Computer Program:

During the relevant period (2001 to 2003), CorDaptix was the software program used to generate service tags (TR 295). The software program was changed sometime after the Grievant's termination (TR 86).

The Union asserts that most System Operators received little or no training on CorDaptix, used the program only occasionally, and had problems with it. The Grievant's Supervisor testified

about the training provided (TR 84-85, 127, 139-140). The record does not show that a lack of training was at the root of the problems leading to discipline in this case.

The testimony of Union and Company witnesses shows that there were problems with the software program, including a complex and lengthy process to generate a tag and problems with the computer freezing or going down on a regular basis, particularly around midnight (TR 64, 82-83, 84, 99, 204, 209, 246, 295, 298-299). The Grievant's Supervisor, Elizondo, was aware of some of these complaints and problems (TR 83, 99, 205). He developed a "cheat sheet" – an aid setting forth steps to follow to generate a tag (TR 83, 210); he went over the steps with some of the Operators; and he testified most had no problem with the process (TR 84). The Grievant was aware of the sheet and used it, but testified it was not a "good working process" (TR 210).

As discussed further below, the evidence developed in the investigation of the termination incident fails to show that CorDaptix was not functioning at the time in question or that the Grievant tried but was unable to generate a tag using the system on the date in question.

Grievant on Active DML Status:

At the time of the termination incident, the Grievant was on an active DML for work performance under the Positive Discipline Agreement (JX 3, pp. 18-19, JX 5). The DML, dated August 5, 2003,⁴ was issued to the Grievant for mishandling a 911 call on July 22 from the Stockton Fire Department (SFD). The call came in on a ring down line and was the second call⁵ requesting that the electricity be turned off at the location of a structure fire on Willow Avenue in Manteca.

⁴ All dates herein are 2003 unless specified otherwise.

⁵ The Grievant had not been the recipient of the initial call (TR 224).

(TR 269-272) Upon receiving the call, the Grievant, contrary to policy, directed the SFD dispatcher to call the Fresno Service Operator directly and provided the phone number (TR 224-225, 270).

When the SFD called the Grievant back almost an hour later to request an update on the arrival of field personnel, the Grievant again did nothing more than provide the number for the Fresno SO (TR 271). The individual calling for SFD told him, "Well, we're not supposed to call any other number except for this ring-down line. That's why we pay for this ring-down line" (TR 272). The Grievant told the caller, "I called them and haven't got a call back from them" (TR 272). However, the record shows that the Grievant did not call the Fresno SO until after this second conversation with SFD, and he did not generate a service tag at any time (TR 46, 47, 265-266, 276, 277-278, 281).

When the Grievant did contact the Fresno SO after the second call he received from SFD, he found no tag had been created (TR 281). These events resulted in an unacceptable delay in the dispatch of field personnel to the structure fire (TR 273). SFD fire dispatch called back twice more to complain to the Grievant about the manner in which their calls were handled concerning this incident. The Grievant handled those calls in an inappropriate, argumentative, and patronizing manner, for example by continuing to insist that SFD should have followed his instructions to call the Fresno SO directly (TR 271-279).

Elizondo met with the Grievant and a Union shop steward to issue the DML (TR 47-49, 117). In the meeting, Elizondo told the Grievant he should have cut a tag, should not have directed the SFD to another number, and expressed concern about the delay that resulted in responding to the 911 call (TR 47-48, 119-120, 120, 230-231). Elizondo documented the DML in a memo, which he provided to the Grievant in the meeting and which the Grievant and the shop steward reviewed

(TR 47; JX 3, pp. 18-19). The Grievant does not dispute reviewing the memo in the meeting (TR 230), but testified he did not get a copy of the memo to take with him (TR 230-231, 252-253). The memo states that another meeting would be held for the Grievant to “present his decision on changing and complying with ECCO standards and office policy, or leave the Company” (JX 3, p. 19). It also states, “This DML will be active for one year from date of issuance 8/5/03 to 8/5/04. This DML will be under the category of work performance” (*Id.*).

The Grievant served the one day paid leave for the DML on the following day (TR 48). After the DML, the Grievant had pre-scheduled vacation, which he was allowed to take (TR 49, 231). Upon his return from vacation, Elizondo held a DML follow-up meeting with the Grievant, pursuant to the Positive Discipline Agreement (TR 50, 233-234; JX 3, p. 20; JX 5). In that meeting, the Grievant stated he wanted to stay with the Company. Elizondo informed him “his DML was active for one year” (TR 50; JX 3, p. 20). The Supervisor prepared a memo of the meeting, which states in part, “I [Elizondo] asked him if he was ready to come back to work and comply, or leave the company. He informed me he wanted to stay with PG and E, and said that if the Service Operator had did [sic] his job, we wouldn’t be having this conversation. I informed M that the DML level is active for one year” (JX 3, p. 19).

There is no evidence that Elizondo followed up on the Grievant’s comment blaming the Service Operator for the incident. This remark suggests the Grievant failed to acknowledge his role in the incident. The record fails to show that the Grievant was clearly notified in either DML meeting or memo that his decision to return to work meant a year-long commitment to meet all Company work rules and standards, in other words a total performance commitment, nor was he notified clearly that the consequence of a failure to meet that requirement was termination.

The Grievant did not grieve the DML (TR 6, 231).

The Termination Incident:

The termination incident occurred on September 19 (TR 201-202). The Grievant was working on switching logs required to de-energize a large transformer slated for repair in the next day or two when a 911 call came from the CHP on a ring-down line at 23:31 (TR 55, 201, 205, 211-212). The CHP reported that a pole with a street light located on Ryde Avenue had been struck by a car and was “about halfway sheared off” (TR 55). The Grievant responded, “Okay” (*Id.*). There are potential hazards in a car/pole incident, and the purpose of the CHP call is to have Company field personnel check the pole (TR 258-259). Dealing with reports of such incidents, and generating a service tag to ensure dispatch of a Troublemaker, fell within the Grievant’s duties at the time in question (TR 191, 259, 286).

Elizondo testified that he considered a call of this nature to be a potential hazard requiring an emergency response (TR 62, 86-87, 127-128, 141). Although he offered reasons, discussed below, for his failure to take appropriate action sooner, the Grievant acknowledged that this 911 call required his immediate attention and that an exposed electrical line to a streetlight could constitute a hazard (TR 239, 243, 258).

The Grievant testified that he twice attempted to input the pertinent information into the computer to generate a service tag in response to the call, but “the screen locked up” or “froze” on both attempts (TR 201, 202, 203-204, 205). He checked available maps and was uncertain if it was a Company pole (TR 206-207). There were no customer calls complaining of an outage (TR 207).

Although he was not able to generate a tag, the Grievant did not call the Fresno SO for assistance (TR 52-53). Instead, he called the CHP back at 23:34 to find out whether an officer was

standing by at the location and to ask if there were any wires attached to the pole (TR 56-57, 205-206). The CHP operator informed the Grievant that it had been necessary to divert the officer to another call. The CHP operator was unsure about the wires, but thought there were power lines for the street lights attached to the pole. (TR 57-58) The Grievant stated, "We'll get somebody by there as we can get them by" (TR 58).

The Grievant testified he would have called the Fresno SO immediately to give them the tag if the CHP had an officer standing by; but, because the CHP had already left the location, he concluded the pole did not present a hazard requiring an immediate response (TR 206, 207, 210-211, 240-241, 285). He based this conclusion on the belief that the CHP was required by law to stand by if the situation was hazardous (TR 206-208, 242-243). Elizondo testified that relying on hearsay of non-experts concerning the status of the equipment was not acceptable (TR 62-63).

The Grievant testified further that he intended to have a Troubleman dispatched to the location shortly by making another attempt to generate a tag or by calling Fresno (TR 208-209, 214). However, he resumed checking the switching logs (TR 211-212). Completing that task took longer than he expected, resulting in an admittedly unacceptable delay in a response to the broken pole (TR 211-213). Elizondo testified that generating the tag and making the call to the Fresno SO about a car/ pole incident should have taken priority over reviewing switching logs (TR 63).

At 00:27, the Grievant received a call from a Troubleman who was out in the field, informing the Grievant he was going home (TR 59, 214, 261).⁶ Because the Grievant had not created a service tag or telephoned the Fresno SO, the Troubleman and dispatch were unaware of the car/pole incident

⁶ Prior to this call, the Grievant was not aware the Troubleman was out in the field, although he should have been notified by the Troubleman (TR 60, 214).

(TR 53, 61-62). The Grievant told the Troubleman about the car/pole report, and the Troubleman agreed to go to the location and check it out (TR 60, 214-215). Notwithstanding the approximately hour-long delay by the time of this call, the Grievant told the Troubleman he did not care if the Troublemens went to check on the pole or not, stating "I was going to wait until he called somebody out. If we did, let him check by it. Other than that, I was going to hang on it. Your choice. You want to do it or not?" (TR 60).⁷ The Troubleman asked for the location. The Grievant replied he did not have a tag and gave him the address orally (TR 61). The Grievant made no attempt to generate a tag at that time (TR 61, 261, 286).

A few minutes later, the Grievant received a call from the Service Operator asking if he [the Grievant] was going to generate the tag for the car/pole on Ryde Avenue, to which the Grievant responded, "No, I'm not" (TR 59, 215). The Grievant offered no explanation for his failure to generate the tag (TR 59). The Service Operator said, "Okay, I'll make the tag" and did so (TR 59, 215; JX 3, p. 32).

⁷ These comments contradict the Grievant's testimony, summarized above, that he intended to dispatch a Troubleman promptly, but got distracted by finishing the switching logs. To the contrary, his remarks indicate that he was intentionally holding on responding to the call. Moreover, he expressed no urgency that the Troubleman check the pole, notwithstanding a delay of approximately an hour since the CHP 911 call came in.

Investigation and Decision to Terminate:

There was no complaint from a customer nor any proven adverse impact on the Company related to the Grievant's handling of this call (TR 92). Elizondo learned of the incident as the result of a request he had made to hear the tapes of any 911 calls handled by the Grievant on that night shift (TR 52, 54, 76-77, 92).⁸ Because the Grievant had received a DML for his handling of a 911 call, Elizondo "wanted to double check he was following the process" (TR 76, 140-141). The Union contends this shows the Grievant was improperly singled out and targeted for discipline by his Supervisor. However, the record establishes that Supervisors are expected to monitor employees on DML closely to ensure that the behavior that led to the DML has changed (TR 187). Thus, the Supervisor had a legitimate reason to check the Grievant's handling of 911 calls. The evidence fails to show that the Grievant was singled out for more scrutiny than any other System Operator on DML for improperly handling 911 calls.

After listening to the tape, Elizondo held an investigatory meeting with the Grievant and shop Steward D , and asked the Grievant if he had cut a tag in response to the call (TR 63, 93, 108, 216-217, 305-306). The Grievant, without hesitation, told Elizondo that he had attempted to generate a tag but was unable to because the computer froze (TR 50-52, 63, 67, 93, 306).

Elizondo asked the Grievant to demonstrate what he had done by creating a tag for the Stockton Control Center (TR 64, 93, 218). The Grievant, using the cheat sheet to follow procedure, input the information as instructed, and he was unable to create the tag because the computer froze (TR 64, 93, 218, 306). They did not try to make a tag for any other address, including the location of the car/pole accident (TR 98, 306). Elizondo testified that he later learned the tag would not

⁸ All calls made and received by System Operators are recorded (TR 53).

generate for an unmetered address, and many Company facilities “do not have a service point or a meter, so they are not in the data base” (TR 52, 92, 95).⁹ The Grievant testified that it is possible to generate a tag for that address; it was often used in training (TR 218, 249, 296).¹⁰ Elizondo did not investigate whether others had had similar problems with the CorDaptix program (TR 98). He checked the steps on the cheat sheet and testified it worked fine for him (TR 67).

As part of the investigation, working with Human Resources, Elizondo reviewed computer records to determine (a) if there had been problems that night with CorDaptix and (b) if the Grievant had taken steps on the computer to try a generate a service tag in response to the CHP 911 call, as he claimed (TR 68, 132). The computer records generated for the relevant time frame on September 19 indicate that CorDaptix was available and in use; and further that there was no activity on the Grievant’s computer (TR 68-69, 132, 153-156, 164-165, 170-171; EX 3,4).¹¹

Ortez described the computer footprints as “the behind scene tracking of an individual as they maneuver through CorDaptix”, reflecting all the step-by-step navigations done by the user (TR 153). Each employee has a unique LAN ID (TR 154, 163-164). Ortez testified unequivocally that the

⁹ The Union contends this is unreliable hearsay. Elizondo testified he heard this from another employee, but he could not recall who (TR 96-97).

¹⁰ The Union contends that Ed Dwyer corroborated the Grievant’s testimony on this point. Dwyer’s testimony was that he asked someone else to look up the address on the computer, that there was an entry in the computer for that address, and from that he concluded the computer would generate a tag, assuming it was operational. He did not ask the person to actually generate a tag. (TR 296) Like Elizondo, he had no personal knowledge that CorDaptix could generate a tag for the Stockton location (TR 299-300).

¹¹ The Union’s brief argues that Human Resources requested the computer footprint only nine months later, citing Employer Exhibit 4 (p. 28). Testimony in the record indicates the computer records were requested as part of the investigation conducted by Human Resources after the Grievant told Elizondo he had tried to generate the tag and prior to his termination (TR 67-68, 97, 131-132). E-mails in the record show that Human Resources communicated the information to Margaret Short and Sam Tamimi in June, 2004, but the e-mails refer to “the footprints (CorDaptix activity) we have on file for O’ .”; they do not show that the records were first generated then (EX 6; see also TR150-151).

computer footprint would reflect if the Grievant had logged onto CorDaptix during the relevant time frame and attempted to make a service tag (TR 154, 158, 164, 170-171). The computer records, therefore, contradict the Grievant's claim that he attempted twice to generate a tag for the car/pole incident and was unable to do so.

The Union attacks the reliability of the above information, contending the Company failed to establish by reliable evidence that the computer records would have reflected activity under circumstances when the computer froze during the process. On the other hand, the Union failed to present any evidence establishing the contention that the computer records would not reflect any activity under such circumstances.

The Union also attacked the expertise of Business Customer Services Consultant Antonio Ortez, who testified concerning the computer records (TR 152). Ortez, a 28 year employee with the Company, testified to his familiarity with the computer records in question (TR 153). His testimony demonstrated skill, experience and knowledge regarding Company computer records beyond that of a lay person; his testimony was reasonably based; and it was of assistance to the Board in interpreting the technical records submitted in evidence. Sufficient foundation was established to find this witness qualified to testify about the significance of the computer records. Cal. Evid. Code §§ 720, 801.

Level of Discipline:

Elizondo regarded the September 19 incident as "major" because it involved a second failure by the Grievant to follow the 911 process when he was on DML for the same issue (TR 125-126). He regarded termination as the appropriate penalty (TR 68). He conferred with his manager and

director, Human Resources, and Margaret Short, Manager Industrial Relations Field Services, with respect to the appropriate level of discipline (TR 69, 135).

Before deciding upon discipline, Elizondo took into consideration the fact that field personnel had been dispatched to the call (TR 90). He did not speak with the Troubleman who was dispatched to the scene, and did not know what action the Troubleman had decided to take concerning the pole repair or when the pole was fixed (TR 91, 144). Elizondo acknowledged that it is not uncommon for damaged poles to be fixed later, not immediately (TR 91-92).

While Elizondo was cognizant of the Grievant's length of service, it did not weigh in his decision to terminate (TR 124-125, 135). Nor did Elizondo consider alternatives such as reassignment, retraining, or demotion (TR 124). Short testified that she recommends demotion or retraining in lieu of discharge in some cases where competency is an issue, but that was not the problem in the Grievant's case (TR 347-348). The Grievant knew how to perform the work in question; his actions notwithstanding an active DML demonstrated an unwillingness to comply with Company standards (TR 135-136, 185).

Short testified that a DML "is a total performance commitment. Any problem thereafter ... during the 12-month active life of that DML, if there is another occasion to discipline the employee then termination is usually what follows" (TR 186). The average bargaining unit employee has considerable longevity of service, approximately 20 years, and this is the result even with employees of long tenure (TR 186, 339, 347-348).

Sam Tamimi testified for the Union that he is unaware of terminations of such a long term employee based strictly on work performance (TR 323). He recalled situations in which demotion or other appropriate measures were taken in lieu of termination (TR 318-320, 324). He further

testified that it violated the letter and spirit of the Positive Discipline Agreement to fail to consider mitigating factors such as length of service prior to termination (TR 322, 332).

The Grievant was terminated on October 15. The termination notice also includes reference to switch log errors (JX 3, p. 16). The record is clear, however, that but for the September 19 incident while he was on DML, the Grievant would not have been terminated. The switch log errors are not determinative in this case and are not discussed further.

Relationship of Grievant and Supervisor:

Elizondo had been a supervisor for six months at the Pittsburgh transmission control center before transferring to the Stockton call center in 2003 (TR 35-36, 100). The record establishes the relationship between Elizondo and the Grievant was poor at the time of the termination (TR 92). Shop Steward D , who represented the Grievant at the investigatory meeting about the termination incident, testified that he asked Elizondo “if he was trying to fire M ” (TR 307). According to D , Elizondo said yes. D further testified, as follows:

Q. And did he say anything else?

A. Well, I kind of asked him, you know, what was the problem. And he said, the office being right there, his door being open, he could actually hear M make comments about him, and he just didn't like it. And if he could get rid of him, he would. (TR 307)

While Elizondo did not recall a specific conversation to this effect, he did not dispute it (TR 123-124). Margaret Short was unaware of a personality problem between the Supervisor and the Grievant at the time (TR 349). In his statements to the Review Committee, Elizondo indicated, “he has no grudges or personal problems with [the Grievant]” (JX 3, p. 4).

Since the Grievant's termination, Elizondo has transferred to a different location and is no longer the supervisor at the Stockton control center (TR 124).

POSITIONS OF THE PARTIES

The Company:

- » The Company had just cause to terminate the Grievant. Overwhelming evidence establishes he failed to perform his assigned tasks related to the CHP 911 call in question.
- » Public safety agencies are charged for special ring down lines. They reasonably expect a proper response when they call for assistance.
- » The Grievant was on notice that he was required to generate a service tag. He failed to do so. He also knew that, if he was having difficulty generating a tag, he was to contact the Fresno SO. He failed to do either.
- » The Grievant's DML memo spells out that he was to "answer the ring down lines after hours, and create a service tag" (JX 3, p. 18). His experience and admitted knowledge of the applicable procedures refute any claimed ignorance on his part with respect to the applicable procedure.
- » The Grievant lied to the Company and at the arbitration hearing concerning his alleged attempts to generate a service tag for the CHP call. The evidence clearly shows the Grievant did not log onto the computer and attempt to generate a tag.
- » Even assuming he could not generate a tag, an assertion rebutted by the evidence, there is no excuse for not taking a few moments to notify the Fresno SO.
- » When contacted by the Fresno SO and asked if he was generating a tag, the Grievant's response was uncooperative and discourteous. He offered no explanation or apology for his failure to perform his assigned tasks.

» The record shows that the Grievant elected not to follow the prescribed Company procedure for 911 calls, because he did not want to perform the tasks involved. The Grievant's attempts to explain or excuse his failure to follow procedure are not worthy of belief and defy common sense.

» The Grievant demonstrated a cavalier attitude concerning field personnel assessing the urgency of the pole hazard. His reliance upon the fact that the CHP officer left the scene to conclude the situation was not urgent was unreasonable, contrary to procedure and unsupported by law, contrary to the Grievant's assertions otherwise. The CHP contacts the Company in such an instance to have its experts check the condition of the pole. The Grievant had represented to the CHP that it would be dispatching a Troubleman to the scene.

» Contrary to the Union's claim, the Grievant did not act with reasonable discretion in handling the call. Rather, he chose to ignore or defy the clear instructions he had been given in connection with his DML only 35 days earlier. With his attitude, the Grievant has no business working for a Company with a public duty to serve its customers.

» The Grievant's actions resulted in unnecessary delay in responding to the call, in circumstances that can expose the Company to liability.

» The fact that no customers called to complain of an outage did not relieve the Grievant of his responsibility to generate a tag and/or call Fresno SO to ensure a Troubleman is dispatched promptly.

» Performing this work was a higher priority than the switching logs, yet the Grievant put the tag aside to continue that other work.

» The Company's decision to terminate the Grievant's employment was in accordance with the Parties' negotiated Positive Discipline Program. The Grievant was at the DML level at the time of his termination. The DML was for the same performance deficiency.

- » Other long service employees have been terminated for failure to perform their work in a satisfactory manner while on an active DML. Such terminations have been upheld in arbitration and by the joint Company and Union Review Committee.
- » The Union's suggestion that the Grievant should have been demoted or retrained rather than discharged should be rejected. Such actions are appropriate only when there is a competency issue, which is not the case here.
- » The Union's assertion that termination is too severe a penalty should be rejected. The Grievant was treated the same as other employees on active DML who failed to perform in a fully satisfactory manner.
- » The Grievant's long service is not sufficient to mitigate the penalty of discharge under the circumstances. Long service is the norm at the Company.
- » The Grievant's attitude was demonstrated at the hearing, when he openly mocked the Stockton Fire Department Dispatch Supervisor as the tape of her complaint, which led to his DML, was played for the record. His disdain for authority and direction was evident. It supports the conclusion that he would be unlikely to follow correct procedures in the future.
- » The Grievant refuses not only to take directions, but to take responsibility for his actions. He makes excuses, blaming others or the computer system. He shows no remorse. He is not deserving of reinstatement.
- » Elizondo's role in the termination and/or his comment to the Shop Steward do not negate the seriousness of the Grievant's actions. The termination was reviewed by a manager, a director, human resources and the manager of industrial relations.

» The Company presented ample evidence of just cause. The Board should deny the grievance and uphold the termination.

The Union:

» The Grievant was terminated without just cause and in violation of the Company's binding Agreement on Positive Discipline. The Company bears the burden of proving, by a preponderance of the evidence, that the termination was for just cause.

» The Grievant, with 34 years of service, has devoted his entire working life to the Company.

» The termination was prompted by a new supervisor's personal dislike for him rather than the alleged problems with his work performance. The supervisor's pre-determined decision to fire the Grievant led to targeted surveillance of his phone calls, in an unprecedented search for evidence to use against him.

» The Company terminated the Grievant for failing to make a tag immediately after receiving a public agency call, although he was unable to do so because of a computer malfunction.

» The 911 procedure was unwritten and vague. System Operators have discretion to determine the level of urgency. It is not uncommon for the Company to service poles later, not immediately.

» At worst, there was a minor breach of unwritten procedure, which had no adverse impact on the Company or its customers. Discharge in this case is excessive and disproportionate to the offense, out of step with the principles of progressive discipline, and punitive rather than corrective.

» Elizondo acknowledged the September 19 incident, alone, was not so serious, yet he failed to consider lesser actions than termination. He was determined to punish the Grievant, not correct any perceived deficiency in performance.

» The Supervisor's bias colored each step of the discipline process and violated the explicit terms and the spirit of the Positive Discipline Agreement. The Company relied on factors it should not have considered and ignored mitigating circumstances it had an affirmative obligation to consider.

» The Supervisor gave exaggerated and dishonest statements to Human Resources and the Review Committee.

» The Company terminated the Grievant despite his long and quality service, without serious consideration of alternatives to dismissal. In other cases involving performance issues, the Company has utilized retraining, demotion or other means of salvaging the employment of long-term employees.

» The Company did not charge the Grievant dishonesty or insubordination, thus insinuations of these serious offenses cannot be considered in evaluating the grounds for termination. To find otherwise would be inconsistent with principles of due process and fundamental fairness.

» The termination of the Grievant was unduly harsh and grossly disproportionate to any minor offense involved. The termination ignored two fundamental principles of the Positive Discipline Agreement: fostering behavioral change as opposed to simply punishing, and considering mitigating factors prior to imposing discipline.

» The Grievant reasonably and correctly concluded that the call at issue did not require an immediate emergency response. The CHP had left the scene, and the record fails to show a safety hazard or interruption of service existed. To the contrary, the Troublemaker who later visited the broken pole found no danger requiring immediate service (JX 3, p. 32). Elizondo did not investigate the work required on the pole.

» The Grievant tried twice to generate the tag and the computer froze. He also knew the computer regularly went down around midnight each night and there would necessarily be a brief delay in entering the tag. He returned to working on the switching logs. The Grievant should not be terminated for this reasonable exercise of discretion in prioritizing his work.

» When the Grievant attempted to generate a tag as instructed by Elizondo in the investigatory meeting, the computer froze again. Elizondo did nothing to verify or correct the problem with the computer.

» The Company's investigation of the incident was cursory and biased. It was not conducted fairly and objectively. Discipline based on such a flawed investigation cannot stand.

» Elizondo did not investigate what repairs were made to the pole, or when, or whether any adverse consequences resulted from the brief delay in dispatching a Troublemaker to the location.

» The nature of the investigation conducted establishes that Elizondo did not want to know the truth, but was determined to focus only on inculpatory information to support terminating the Grievant.

» Elizondo requested a computer footprint for September 19 several months after the termination. The record fails to show by reliable evidence that a computer footprint would reflect any activity if the computer froze mid-way in the tag-generating process. The Company could have produced such evidence, if it existed, but did not, undermining the Company's position.

» Elizondo was an inexperienced supervisor. He had a personal dislike of the Grievant, which spurred the surveillance and disciplinary action.

- » The Grievant's DML for the prior incident was seriously mishandled. He was not given a letter summarizing the DML incident and advising him that termination could follow if he failed to maintain total performance, as required by the Positive Discipline Agreement.
- » At the time of the DML, a need for retraining was apparent but that was not suggested or required. Further, Elizondo did not ensure the Grievant took responsibility for the incident or understood the seriousness of the DML.
- » In connection with the DML, there was no discussion of the entire process for handling 911 calls. Elizondo did not explain to the Grievant that he was at risk of termination if another disciplinary problem arose within a year. He also failed to provide the Grievant with the appropriate documentation required by the Positive Discipline Agreement.
- » As a result of the above, the Grievant lacked a full understanding of his wrongdoing, the seriousness of the DML, or the consequences of any further problems, and he did not "take it [the DML] as seriously as [he] should have" (TR 232).
- » The September 19 incident is not an identical violation of the unwritten 911 procedure. The DML incident involved admittedly poor customer service, in which the Grievant told the SFD to contact the Fresno SO instead of handling the call himself. He then handled the complaint call from SFD poorly. No complaint or customer service failure occurred in connection with the September 19 call.
- » Termination is not automatic under the Positive Discipline Agreement, even for an employee on DML.
- » Elizondo gave no weight to the Grievant's length of service. The offense charged was not serious enough to warrant ending a lifetime career with the Company.

» Human Resources relied on Elizondo's exaggerated characterization of the incident and disavowal of bias toward the Grievant to reach the erroneous conclusion that retraining would not have helped.

» Because the Company did not have just or sufficient cause to terminate the Grievant, and his termination violates the Agreement on Positive Discipline, reinstatement with full back pay, seniority and benefits is required. The Grievant should be restored to the *status quo ante*, that is, the position he held when he was terminated and a make-whole remedy, subject to 9.5 remaining on a DML.

DISCUSSION

A number of factual findings are contained in the summary of the evidence, above, and are not reiterated here. The record shows that the Grievant failed to perform his duties with respect to the CHP 911 call on September 19; specifically, he did not create a service tag or call the Fresno SO to ensure field personnel were dispatched promptly to the car/pole incident. The record shows he knew he was supposed to carry out these responsibilities. Because a tag and call were not made, Fresno dispatch was unaware of the 911 call and the need for a response (TR 45-47, 62-63, 66, 141-142).

The Grievant's failure to perform his assigned job functions in connection with this 911 call does not fall within the purview of reasonable discretion nor is it excused by the various rationales he offers. The switching logs did not take priority. The fact that pole repairs, including this one, may be carried out later does not reduce the importance of an initial prompt response. The very purpose of dispatching a Troublemaker is to have an expert assess the hazard and make a judgment as to the need for immediate service (TR 62-63, 131, 145). Timely dispatch of a Troublemaker to make that

initial judgment is important, even if the determination is ultimately made that the repair can wait.

The fact that the CHP officer had to leave the scene did not provide a reasonable basis for the Grievant's inaction. While normally an officer would remain, the Grievant did not know why the officer was diverted; the CHP called because it wanted the Company to assess the situation; their personnel are not experts on Company equipment; the pole containing a street light was sheered in half; and the Grievant acknowledged this type of scenario can present a hazard.

As found above, the computer records refute the Grievant's claim that the system was down and/or that he attempted twice to generate a tag. The evidence presented by the Company is sufficient to conclude that, had the Grievant logged on to the computer to generate a tag, it would have been reflected on the computer footprint. The claim that the computer froze, in any event, does not excuse his failure to make a telephone call.

In addition to the other contentions discussed in the factual summary, the Union contends the Company should have produced the footprint for the unsuccessful attempt to generate the tag for the Stockton facility; and argues the fact that it did not do so undermines the Company's position regarding the computer records. The absence of this additional evidence does not undermine the Company's case on this point. If the Union contends that unsuccessful attempts to produce a tag are not reflected on a computer footprint in these circumstances, then it had the burden to request and produce rebuttal evidence so establishing. It did not do so. Even if the computer froze midway in an attempt to generate a tag, as the Grievant claims, and for that reason the records did not show the steps he took, that would not explain the evidence that he did not log on during this time frame.

The Union contends that the Grievant was not charged with dishonesty, and it would be a violation of due process and just cause to consider such charges here. The Union is correct that

dishonesty was not charged and may not be considered as independent grounds supporting discharge in this case. Dishonesty is not advanced by the Employer as a charge supporting termination; however, it is a contention the Company makes in response to the Grievant's explanation for failing to generate a tag. The Grievant opened the door to this issue when he explained his failure to create a tag based on a computer malfunction. The Company is within its rights to rebut that defense by relevant evidence in the form of computer records without having to assert dishonesty as a separate charge.

Similarly, the fact that the Grievant's conduct was knowing and deliberate, as opposed to inadvertent or a matter of incompetency, is relevant to the charges levied and penalty imposed by the Company in this case. The Grievant opened the door to this issue when he raised the defense that his actions constituted reasonable discretion, or inadvertent distraction by other duties. The Company is entitled to rebut these claims by evidence concerning his attitude about this work and his motive for failing to carry out his responsibilities.

The record contains ample evidence that the Grievant resented and resisted performing the work of generating tags and following up on 911 calls routed to Stockton at night during that time frame (see *e.g.* TR 270-271, 271-279). He believed it was the work of the Fresno SO (JX 3, p. 20). This evidence, combined with his inaction and statements to the Troublemaker and the Fresno SO in the telephone calls on September 19, establish that his behavior was intentional. While the policy was in place requiring Stockton Systems Operators to perform this work, the Grievant was responsible for carrying out his assigned functions in an appropriate manner. His objections to the 911 procedure did not entitle him to ignore it. (TR 127)

Because of the nature of the Grievant's violation, the Company's decision not to consider retraining, reassignment or demotion was reasonable. The Grievant knew how to make a tag and a telephone call. The problem in this case was not a question of poor training or lack of familiarity. The Grievant knew what he had to do, he was just unwilling to do it. Only recently, his duties regarding 911 calls were reviewed with him in connection with the issuance of the DML. In addition, retraining is not an option to consider at this stage. The duties in question are no longer performed by this classification.

The Union contends this was a minor incident sought out by a Supervisor with a personal vendetta against the Grievant. The Union rests its contention that Elizondo was looking to fire the Grievant on the testimony of Union shop steward Jeff Ding (TR 307). However, Ding's testimony, taken in context, establishes that Elizondo's statement was (a) a reaction to the Grievant's negative attitude; and (b) made after the termination incident (TR 307). The Supervisor's wish to terminate the Grievant at that point is neither surprising nor nefarious given the course of events. As found above, Elizondo had a legitimate reason to monitor the Grievant's 911 calls. It is not an uncommon workplace scenario for a long-term employee to resist and resent the directives of a new supervisor; and for a new supervisor not to tolerate employees who resist performing up to standard. It is questionable that this scenario is properly characterized as personal animosity or a grudge, as opposed to a clash of an employee's recalcitrance and a Supervisor's legitimate performance expectations. Finally, the fact that no adverse consequence or customer complaint resulted from this incident is fortuitous, but does not absolve the Grievant of responsibility.

Impact of the DML:

The Arbitrator ruled at the hearing that the DML stands, as written, and was not subject to challenge as though it had been grieved (TR 12-13, 129-130). However, the Company and the Union were not precluded from making pertinent arguments based on the contents of the DML, for example, whether or not it involved a similar offense and the nature of the notice it afforded the Grievant (TR 13-14, 315-317).

According to the testimony of both Elizondo and Short, the fact that the Grievant was on an active DML for his handling of another 911 call was central to the decision to terminate him for the 911 call from the CHP on September 19 (TR 68, 125-126, 135-136, 185-186). For example, Short testified as follows on direct examination:

Q. And in this instance, why did you not recommend demotion in lieu of termination?

A. Mr. O had been an operator for many years, and apparently did his job successfully and satisfactorily until he got into the disciplinary process. And the DML event and the termination event were similar in terms of what they covered, and they were close in time. And it would appear that the steps of the positive discipline were not having the desired effect.

Q. And did that weigh in your decision to support termination in lieu of another step of discipline?

A. Yes. (TR 347-348)

The Union contends that the DML was defective because Elizondo never gave the Grievant the DML memo. While the Grievant apparently did not take the memo with him when the meeting concluded, the record is devoid of evidence that he was prevented from retaining the memo he had been given.

The Union also contends that the DML was not issued for a similar violation, because the SFD call involved a customer service issue and the CHP 911 call did not. This contention is rejected. The violations were similar; both involved the failure to create a tag in response to a 911 call. This aspect of the violation is clearly noticed in the written DML notice: "the process that has been in place for many years is to answer the ring down lines after hours, and create a service tag ...

O' choose [sic] not to follow this process ..." (JX 3, p. 18).

The Union further contends that items that should not be considered, such as inactive discipline, were included in the DML and the LIC packet. The DML was not grieved and stands as a valid element of the Grievant's past record (TR 12-13). With the exception of investigative meetings related to switching logs, the items challenged by the Union are not cited in the termination notice; nor were they relied upon by the Company to support of the termination (JX 3, p. 16; TR 42-44, 71-75, 109-111, 197-201, 220-223).¹²

The record establishes, however, that the following aspects of the DML are faulty:

It is undisputed that the day the Grievant was off for the DML was served in conjunction with a pre-scheduled vacation. It is recommended in training that the DML not be scheduled in this manner because it downplays the seriousness of it (UX 1, p. 2; TR 317). This is a recommendation, not a negotiated requirement, however (JX 5; TR 336-337). Standing alone, it would not amount to grounds to overturn the termination.

The Positive Discipline Agreement and the hearing testimony establish that an employee returning to work on a DML is expected to make a total performance commitment for the next

¹² Elizondo did consider a performance evaluation (TR 111), which should not be utilized to support discipline (JX 4). However, the evaluation is not cited in the termination notice and was not shown to be a significant element. No prejudice to the Grievant or harmful error was established on this ground.

twelve months, in which the employee commits to abide by all rules and to perform in a fully satisfactory manner in all areas: attendance, conduct and work performance (JX 5, TR 184-185, 186, 312-313, 328-329). The negotiated Positive Discipline Agreement provides that an employee is to be provided documentation of this: "The letter will advise the employee that termination could follow should they fail to live up to their commitment to maintain total performance and abide by all Company rules" (emphasis added) (JX 5A, 5B; TR 333-334, 336).

This total performance commitment is also to be a subject of discussion in the Supervisor's meeting with the employee about the DML. Termination occurs when the DML has failed to bring about a positive change in the employee's behavior (*Id.*). However, even "if a performance problem which normally would result in formal discipline occurs during an active DML," the Positive Discipline Agreement provides as follows:

...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. ...
(JX 5, p. 7-8)

Shop stewards are also trained on the significance and consequences of a DML, and often advise employees on this subject (TR 307, 334-335, 336).

While the intended meaning of an active DML is clear, there is no showing that the Grievant was specifically apprised, orally or in writing, in connection with the imposition of the DML that it involved a "total performance commitment." Further, the record fails to show that the Grievant received notice, orally or in writing, that termination was the consequence of failing to meet that commitment during the period of the active DML. Elizondo's testimony does not show that he provided this notice orally to the Grievant in the meeting imposing the DML or in the follow-up

meeting. The documentation of the DML fails to reflect this notice (JX 3, pp. 18-19, 20). The record does not establish that the shop steward provided specific notice of this (TR 252, 342-343).

The absence of notice regarding the total performance commitment, and the consequences for failing to meet it, is significant. It is a central factor of due process under the Positive Discipline Agreement, set forth in mandatory not permissive terms (“The letter will advise the employee ...”). Moreover, the evidence shows that this error was harmful. The Grievant admits he failed to take the DML as seriously as he should have (TR 232). He was unfamiliar with this level of discipline and its potential consequences (TR 232-233).

A final aspect of the DML that was facially defective involves Elizondo’s failure to follow up regarding the Grievant’s comment in the post-DML meeting blaming the incident on the Service Operator. This statement underscores that the Grievant continued to believe the work in question should have been performed by the Fresno SO, not him; and that, even after the leave and initial DML meeting and memo, he failed to acknowledge his violation. This attitude does not reflect the commitment to improve that the Company is entitled to expect when an employee decides to return to work following a DML. The Supervisor’s failure to address this directly and secure the appropriate recognition of responsibility from the Grievant prior to allowing him to return to work did not foster the change in attitude required for the Grievant to avoid termination.

Given the central role the DML had on the decision to terminate, the problems summarized above with respect to the DML are mitigating factors which, taken together, are sufficient to undermine the termination. The seriousness of the risk of termination for a 34 year employee is especially grave, and that factor is considered in this case, also. As a matter of policy, it is important to ensure that those on active DML have acknowledged their responsibilities, are on clear notice of

the seriousness of that step, the applicable performance expectations, and the consequences of failing to meet them. Because these key elements are absent in this case, the termination must be overturned.

The decision here vindicates an important due process policy. This finding does not in any way condone the Grievant's actions. On the contrary, the record shows that the Grievant was on specific notice concerning his responsibilities with respect to handling 911 calls and chose not to carry them out. He showed no recognition of responsibility or remorse for his actions. He was less than candid in his testimony. He demonstrated a remarkably cavalier and uncooperative attitude even as he testified in the arbitration hearing (see *e.g.* TR 238, 263, 281). While the defects in the DML require mitigation of the ultimate penalty of termination, an award of back pay and benefits is unwarranted and would send the wrong message to this Grievant. The termination is overturned not because he acted properly but because the DML step was mishandled. The denial of back pay for the lengthy period the Grievant has been off work is intended to send an unmistakable message regarding the seriousness of his actions and to impress upon the Grievant the need for full compliance with all Company policies and standards for the remainder of the active DML period.

The Grievant shall be returned to work in DML status with nine and one-half (9½) months remaining to be served. Upon his return to work, the Company shall provide him with written notice of the total performance commitment and the consequences for a failure to comply for the time period remaining on his active DML, and shall meet with him in person to emphasize these principles orally.

Accordingly the following decision is rendered:

DECISION

The Grievant, Mr. O' , was not terminated for just cause because the DML notice was defective.

As a remedy, the termination is overturned and Mr. O' shall be returned forthwith to his former position with full seniority but without back pay or benefits. The Grievant's return to work shall be in active DML status with nine and one-half (9½) months remaining to be served. Upon his return to work, the Company shall provide him with written notice of the total performance commitment, and of the consequences for failing to comply with that commitment, for the time period remaining on his active DML. The Company shall also meet with the Grievant in person to provide this documentation and emphasize these principles orally.

Any issues concerning implementation of the remedy are hereby remanded the Parties, subject to the Board's continuing jurisdiction to resolve any disputes (TR 7).

Molly [Signature]
Company Board Member

CONCUR DISSENT

12-30-05
Date

Margaret Short
Company Board Member

CONCUR DISSENT

12/23/05
Date

Salim A. Kaimi
Union Board Member

CONCUR / DISSENT

1-3-06
Date

Ronald L. Bell
Union Board Member

CONCUR / DISSENT

1-8-06
Date

Barbara Clancy
Neutral Chairperson

CONCUR / DISSENT

11-21-05
Date