CHARLES A. ASKIN
31 LOMA VISTA
WALNUT CREEK, CA 94597

IN ARBITRATION PROCEEDINGS

PURSUANT TO AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy

Between

PACIFIC GAS AND ELECTRIC COMPANY,

Employer

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245,

Union

Involving the termination of S.

OPINION AND AWARD

Arbitration Case No. 290

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

A hearing was held in San Francisco, California on eight dates between March 18, 2009, and January 19, 2010. During the course of the hearing, the parties were given full opportunity to examine and cross-examine witnesses and to introduce relevant exhibits. The Employer and the Union submitted post-hearing written briefs which were filed on June 15 and June 17, 2010, respectively. The matter was deemed submitted upon the Arbitrator's receipt of the last-filed brief on June 17, 2010.

APPEARANCES:

On Behalf of the Union:

Robert Remar, Esq.
Leonard Carder, LLP
1188 Franklin Street, Suite 201
San Francisco, California 94109

On Behalf of the Employer:

Valerie Sharpe, Esq.
Pacific Gas and Electric Company
77 Beale Street, Suite 3112
San Francisco, California 94105

ISSUE

1. With regard to Grievance Number 16461, did the Employer have just cause to consider Grievant as a "refusal to test," and hence a "first time positive," on or about January 24, 2006, under the Letter Agreement and the DOT regulations; and, if not, what is the appropriate remedy?[1]

2. Did the Employer have just cause for terminating Grievant's employment on or about March 26, 2007; and, if not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

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 the Company, and this includes, but is not limited to... discipline or discharge employees for just cause.

* * *

RELEVANT PROVISIONS OF THE LETTER AGREEMENT

Section D: Prohibited Conduct

2. If the employee refuses to provide an alcohol or controlled substance specimen (to be tested) or willfully fails to follow test procedures causing the test to be invalid, the exempt supervisor will immediately remove the employee from his/her work responsibilities for insubordination and his/her refusal will be treated as if he/she had a verified positive result.

3. Following a verified positive result, the employee will be required to complete the return-to-duty process with a Substance Abuse Professional,

[1] The parties were unable to agree on a joint statement of the first issue, and authorized the neutral arbitrator to frame the issue (Tr. 1524). It is concluded that the parties' statements of the first issue have substantially the same content, but the Union's statement is more clear and should be adopted.

follow his/her instructions, and comply with the treatment/education recommendations and be subject to follow-up testing. A non-compliance letter from a Substance Abuse Professional will result in discharge.

* * *

APPENDIXES TAB A - Items of Understanding

20. Employees that refuse to test or refuse to cooperate in the collection process will be considered to have a verified positive test result and be subject to discipline or discharge.

* * *

APPENDIXES TAB M - Guidelines for Reasonable Suspicion Testing

The DOT regulations require a covered safety-sensitive employee to submit to a test when the employer has reasonable suspicion that the employee has used a prohibited drug or has misused alcohol. The request to undergo a reasonable suspicion test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odor of the covered safety-sensitive employee.

1. An exempt supervisor that has completed the required behavioral observation training in making reasonable suspicion determinations, who suspects drug use by an employee shall require the employee to submit to a controlled substances test when the supervisor has reasonable suspicion to believe that the employee has violated the prohibitions outlined in Section D of this policy. If a second exempt supervisor is available at the site, a second observation will be made. Prior to requiring an employee to submit to a reasonable suspicion test, the supervisor shall contact the DER or the DER's designee and obtain concurrence to test.

2. The exempt supervisor's determination that reasonable suspicion exists must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee. The observations may include indications of the chronic and withdrawal effects of controlled substances.

3. The employee's immediate supervisor will contact the DER to make arrangements for the test.

4. The DER will make the necessary arrangements with the designated collection site facility and will notify the immediate supervisor of the time and place the employee must report for testing.

5. The exempt supervisor will accompany the employee to the collection site facility.

6. The exempt supervisor shall remove the employee from safety sensitive duties pending the test result.

If an employee refuses to be tested, it will be considered a verified positive test and the exempt supervisor will take immediate steps to remove the employee from work. The employee will be subject to the DOT requirements for return to duty after a verified positive at a minimum, and be subject to discipline up to and including termination.

* * *

APPENDIXES TAB P - Urine Collection Procedures

...

The following steps describe a typical urine collection conducted under DOT-mandated procedures:

10. The collector directs the employee to go into the room used for urination, provide a specimen of at least 45 mL, not to flush the toilet, and return with the specimen as soon as possible after completing the void... The collector may set a reasonable time limit for the employee to be inside the bathroom and this time frame should be explained to the employee.

Note: The collector should also tell the employee that the temperature of the specimen is a critical factor and that the employee should bring the specimen to the collector as soon as possible after urination. The collector should inform the employee that if it is longer than 4 minutes from the time the employee urinates into the container and the collector takes the specimen temperature, the potential exists that the specimen may be out of range and an observed collection may be required.

14. ...

Note: The collector must not ask the employee to initial the labels/seals while they are still attached to the CCF; they must be initialed after they are placed on the bottles. The collector should also inform the employee to use care during the initialing process to avoid damaging the labels/seals.

...

Test Refusals - There are a number of behaviors defined in the regulation that constitute a test refusal. These are listed below.

1. Failure to appear for the test within the timeframe defined by the employer.
2. Failure to remain at the testing site until the testing process is complete.
3. Failure to attempt to provide a specimen.
4. Failure to provide sufficient breath with no valid medical explanation for inability to provide the required specimen.
5. Failure to undergo a medical examination associated with insufficient volume procedures.
6. Failure to cooperate with the collection process.

Anytime an employee exhibits any of these behaviors, the collector must immediately terminate the test, notify the DER directly, and note the test refusal on the form.

Shy Bladder - If an employee is unable to provide a sufficient amount of urine for a drug test, the employee will be encouraged to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, whichever occurs first. It is not a refusal to test if the employee declines to drink.

1. If the employee refuses to make the attempt to provide a urine specimen or leaves the collection site before the collection process is complete; the collector will discontinue the collection and immediately notify the DER.

2. The collector will inform the employee when the three-hour time limit begins. If the employee has not provided a sufficient specimen within three hours of the first unsuccessful attempt to provide the specimen, the employee will be removed from work with permission, without pay until the results of a medical evaluation are obtained. Within five days, the Company will direct the employee to attend an evaluation with a licensed physician, that is acceptable to the MRO, who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen. (The MRO may perform this evaluation if the MRO has sufficient expertise.) The Company will inform the employee of the location and date/time of the appointment.

3. Upon completion of the evaluation, the referring physician that performed the evaluation will provide the result to the MRO in a written statement.

4. The MRO will cancel the test if there is adequate basis for determining that a medical condition precluded the employee from providing a sufficient amount of urine. The employee will be reinstated with back pay.

5. The MRO will rule the test a Refusal to Test if there is not an adequate basis for determining that a medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. The employee will be referred to a SAP for an evaluation and is subject to the Verified Positive Drug Test Procedures if applicable.

* * *

APPENDIXES TAB T - SAP Procedures

An employee who tests positive for drugs or alcohol or refuses a test, will be removed immediately form his or her safety-sensitive functions and evaluated by a Company-designated Substance Abuse Professional (SAP).

1. The SAP will evaluate each employee to determine what assistance the employee needs in resolving problems associated with substance abuse.

2. The evaluation will consist of a clinical assessment, treatment recommendations, and referrals, as appropriate.

3. The SAP will inform the Company, in writing, of the clinical assessment based treatment recommendations, which must be complied with. In addition, the SAP will specify the duration and frequency of follow-up drug and/or alcohol tests.

4. The SAP's evaluations, assessment, treatment recommendations, referrals and follow-up testing recommendations will be in accordance with 49 CFR Part 40.

//

//

FACTS

S (Grievant) was employed by Pacific Gas and Electric Company (Employer) for approximately 22 ½ years until his termination on March 26, 2007. He was employed as a Miscellaneous Equipment Operator, which involved driving to different sites and replacing old gas pipes. The job is classified as a safety-sensitive position, and is thus subject to the Department of Transportation drug and alcohol testing regulations.

On January 24, 2006, Grievant reported to work in what appeared to be an impaired state. He was taken to a drug testing clinic for DOT reasonable suspicion testing. He was unable to provide a urine specimen at the clinic, and was deemed to be "out a compliance," resulting in a "refusal to test" determination that was considered to be a positive test result. The Employer's Medical Review Officer verified that test result, and thereafter Grievant was evaluated by a Substance Abuse Professional, pursuant to the DOT process for positive drug tests. The Substance Abuse Professional referred Grievant to an inpatient drug treatment facility, which had a non-smoking policy. Grievant entered the program, violated the facility's rules on several occasions, and was ultimately discharged from the program for leaving the treatment ward without permission. Upon Grievant's discharge from the treatment program, the Substance Abuse Professional determined that he was out of compliance with his treatment recommendation. The Employer then made the decision to terminate his employment.

The Employer's Case

Grievant's Behavior on the Morning of January 24, 2006

On January 24, 2006, Grievant arrived to work in a physically and/or mentally impaired state. Supervisor Raymond Hester testified that when he arrived at work that morning, multiple employees approached him and told him that Grievant was behaving erratically and that he should prevent Grievant from driving (Tr. 25). Two employees told him that Grievant was staggering around and that he was repeatedly spilling his coffee (Tr. 69). Another employee reported that Grievant was slurring his speech (EX 4). Hester testified that it was the first time in his career as a supervisor that employees had reported such behavior about another employee to him. Supervisor Cleve Whatley, who not Grievant's direct supervisor that day, testified that several employees likewise approached

him and told him that Grievant was staggering around the yard, and that he needed to "check out" Grievant and prevent him from driving (Tr. 127). Hester and another supervisor, Tim Chappelone, both testified that it was the only time they could recall that any employee had reported another employee as possibly intoxicated.

Upon receiving these reports, Hester went to look for Grievant. He found him in the "hoedown yard" across the street in his truck, with the ignition turned on. Hester asked Grievant how he was doing, and Grievant responded that he was fine. Hester then asked Grievant to accompany him to the office. Hester testified that he did not have concerns about Grievant's health at that time because he thought that Grievant was likely on drugs (Tr. 92). He testified that Grievant took a few minutes to get out of his truck, and that he appeared sluggish and was talking incoherently (Tr. 73). Hester took Grievant into his office and called the Employer's DOT coordinator, Kathy Barquero. Hester had not completed reasonable suspicion training at that point, so Barquero instructed him to bring in a another supervisor, Mr. Chappelone. Hester also summoned Whatley and the shop steward, B , to join them.

Whatley had completed reasonable suspicion testing training prior to January 24, 2006. The DOT regulations provide for random drug and alcohol testing, as well as mandatory testing when there is "reasonable suspicion" that an employee may be under the influence. Chappelone and Whatley thereupon began the reasonable suspicion procedures.[2] They both filled out a form titled "Supervisor's Behavioral Observation Checklist." Both noted on the form that Grievant showed unusual signs of drowsiness or sleepiness; staggered while walking or swayed while standing; slurred his speech; was unable to perform normal job tasks; had difficulty concentrating or demonstrated confusion; and showed mood swings and a low frustration level. In addition, Chappelone filled out a fitness for duty form, which lists the same categories, and noted that in addition to the symptoms listed on the reasonable suspicion form, Grievant was slumped over, was favoring his back, that his speech was "unusually rapid or exceptionally slow," and that his pupils were constricted or dilated.

---

[2] Whatley and Chappelone initially filled out a "fitness for duty" form rather than a "reasonable suspicion" form. Fitness for duty forms apply to non-DOT covered employees; thus, they were using the incorrect form. Barquero eventually instructed them to fill out a reasonable suspicion form, after they had already completed a fitness for duty form. Ultimately, they did not fill out the second page of the reasonable suspicion form (Tr. 1033).

Hester testified that while they were talking to and observing Grievant, he had difficulty in staying awake and spilled coffee on himself. Hester asked Grievant if he had a medical condition that might be impairing his behavior, and Grievant responded that he did not (Tr. 78). In his contemporaneous notes, Hester wrote that Grievant fell asleep at least twice, and that "his eyes were extremely red" (EX 4). Whatley testified that Grievant kept falling asleep in the office, and they had to wake him up "quite a few times" (Tr. 129). Whatley recalled that Grievant told them that he could drive and said that he wanted to go out and drive (Tr. 130).

Chappelone was a Gas Distribution Supervisor for the Employer in January of 2006, and was responsible for identifying situations that called for reasonable suspicion testing (Tr. 875-876). He had received training with respect to making reasonable suspicion determinations, and he had also received EMT training in connection with his participation in a volunteer fire department (Tr. 879). He was familiar with Grievant, who had worked in one of his crews out of the Potrero yard. On the morning of January 24, Chappelone was contacted by Hester, who told him that he needed support in making a reasonable suspicion determination. He went to the office and observed that Grievant sitting in a chair with sunglasses on, that he looked extremely tired, that his eyes were red, and that he did not appear to be entirely aware of his surroundings (Tr. 878-880). Chappelone stated that based on his EMT training, he did not see anything that indicated to him that there might be a medical emergency (Tr. 880).[3] He testified that while in the office, he and Hester performed a fitness for duty evaluation. Chappelone testified that prior to January 24, 2006, he had never seen Grievant appear intoxicated and that he was a good employee. Approximately ten to fifteen minutes after observing Grievant in the office, Chappelone wrote a narrative on the "Supervisor's Behavioral Observation Checklist," which is part of a required form for reasonable suspicion testing (Tr. 882). The narrative states:

> On Tuesday, January 24, 2006 at approximately 0700 Distribution Supervisor Raymond Hester was notified by 2 employees that each of them had observed

[3] Chappelone testified at the LIC hearing that they needed a professional to determine his health and that they made the determination the grievant needed a fitness for duty evaluation. Chappelone testified that he was concerned about Grievant's health due to the fact that his behavior was very different from his normal mood (Tr. 894-895). He further testified that when he made the above statement to the LIC, he understood it to mean that a determination was made that Grievant needed to undergo a drug test (Tr. 903).

abnormal behavior from S One employee observed S staggering across the yard and that his speech was slurred. Another employee observed S pouring coffee while in the Potrero Office; he was spilling the coffee and had trouble cleaning it up. He was also having difficulty standing and his speech was slurred. Raymond Hester immediately brought S into the Potrero meeting room along with Distribution Supervisor Cleve Whatley and Shop Steward B . Raymond Hester and Cleve Whatley observed the following abnormal behaviors from S : slurred speech, drowsiness, staggering while walking, favoring his back. Raymond Hester contacted Distribution Supervisor Tim Chappelone who came to the Potrero Office to observe S 's behavior. Tim Chappelone observed the following behaviors from S drowsiness, almost falling asleep, he looked extremely tired, slurred speech, he was wearing sunglasses while sitting in the office chair, when he took them off, his eyes were red.

Barquero has worked as the Employer's Human Resources DOT Coordinator for about four years, and is the DER for purposes of the DOT regulations. She oversees the DOT process for all of the Employer's approximately 6,000 covered employees. Prior to working for the Employer, she was a medical review coordinator – assisting the MRO – for a variety of different parties. She also was a urine specimen collector for a Concentra, an occupational medical facility, for approximately nine years.

Barquero was notified of the situation involving Grievant early in the morning on January 24, 2006, by Francis Azofeifa, a Human Resources Advisor. She testified that fitness for duty evaluations are not applicable to DOT covered employees. When she became aware of Grievant's situation, she contacted Hester and Whatley, who told her that they had completed the fitness for duty checklist. She instructed them that they needed to fill out a reasonable suspicion form and checklist, and that they needed to call in another supervisor with reasonable suspicion training since Hester had not received such training (although one supervisor was technically sufficient) (Tr. 919). Barquero emailed the supervisors a copy of the reasonable suspicion checklist. She then discussed the situation with Hester, Whatley, and Chappelone, and concluded that based on what they had witnessed with respect to Grievant's behavior that there was reasonable suspicion for a drug test (Tr. 924-925). Barquero testified that no one she talked to that morning expressed concern that Grievant might have a serious medical or health problem, and that she did not inquire as to whether he did (Tr. 1035). She then determined that Grievant would be tested at St. Francis, and directed that one of the supervisors escort him there. She also called the collection site and asked the receptionist to call her when Grievant arrived (Tr. 930).

The Drug Testing Process

After filling out the checklist, Hester, Whatley, and Chappelone decided to require Grievant to undergo a reasonable suspicion test (Tr. 79). Whatley escorted Grievant to a medical clinic at nearby AT&T Park, the St. Francis Medical Center, for a urine sample test. Whatley escorted Grievant because Hester had not received DOT testing training (Tr. 136).

DOT reasonable suspicion testing is governed by 49 CFR Part 40 (JX 7). Section 40.191 defines a "refusal to take a DOT drug test." It provides, in pertinent part:

> (a) As an employee, you have failed to take a drug test if you:
>
> ...
>
> (3) Fail to provide a urine specimen for any drug test required by this part or DOT agency regulations...
>
> ...
>
> (5) Fail to provide a sufficient amount of urine when directed, and it has been determined, through a required medical evaluation, that there was no adequate medical explanation for the failure;
>
> ...
>
> (8) Fail to cooperate with any part of the testing process (e.g., refuse to empty pockets when so directed by the collector, behave in a confrontational way that disrupts the collection process).
>
> (d) As a collector or an MRO, when an employee refuses to participate in the part of the testing process in which you are involved, you must terminate the portion of the testing process in which you are involved, document the refusal on the CCF... immediately notify the DER by any means... that ensures that the refusal notification is immediately received.

Section 40.193 sets out the procedures to be used when an employee does not provide a sufficient amount of urine for a drug test, known as the "shy bladder" process. It provides, in pertinent part:

> (a) This section prescribes procedures for situations in which an employee does not provide a sufficient amount of urine to permit a drug test (*i.e.*, 45 mL of urine).
>
> (b) As the collector, you must do the following:
>
> (b)(1) Discard the insufficient specimen, except where the insufficient specimen was out of temperature range or showed evidence of adulteration or tampering...
>
> (b)(2) Urge the employee to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, whichever occurs first. It is not a refusal to test if the employee declines to drink. Document on the Remarks line of the CCF (Step 2), and inform the employee of, the time at which the three hour period begins and ends.

(b)(3) If the employee refuses to make the attempt to provide a new urine specimen or leaves the collection site before the collection process is complete, you must discontinue the collection, note the fact on the "Remarks" line of the CCF (Step 2), and immediately notify the DER. This is a refusal to test.

(b)(4) If the employee has not provided a sufficient specimen within three hours of the first unsuccessful attempt to provide the specimen, you must discontinue the collection, note the fact on the "Remarks" line of the CCF (Step 2), and immediately notify the DER.

(b)(5) Send Copy 2 of the CCF to the MRO and Copy 4 to the DER. You must send or fax these copies to the MRO and DER within 24 hours or the next business day.

(c) As the DER, when the collector informs you that the employee has not provided a sufficient amount of urine (see paragraph (b)(4) of this section), you must, after consulting with the MRO, direct the employee to obtain, within five days, an evaluation from a licensed physician, acceptable to the MRO, who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen. (The MRO may perform this evaluation if the MRO has appropriate expertise.)
...

(d) As the referral physician conducting this evaluation, you must recommend that the MRO make one of the following determinations:

(1) A medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. As the MRO, if you accept this recommendation, you must:

(i) Check "Test Cancelled"... on the CCF.
...

(2) There is not an adequate basis for determining that a medical condition has, or with a high probability could have, precluded the employee from providing a sufficient amount of urine. As the MRO, if you accept this recommendation, you must:

(i) Check "Refusal to test because"... on the CCF and enter reason in the "remarks" line...

(e) For purposes of this paragraph, a medical condition includes an ascertainable physiological condition (e.g., urinary system dysfunction) or a medically documented pre-existing psychological disorder, but does not include unsupported assertions of "situational anxiety" or dehydration.
...

(i) As the employer, when you receive a report from the MRO indicating that a test is cancelled as provided in paragraph (d)(1) of this section, you take no further action with respect to the employee. The employee remains in the random testing pool.

Prior to the clinic, Whatley told Grievant to wait while he went to get his truck. When he returned, Grievant had wandered off (Tr. 137). When Watley found him, he told him that they had

to get going, and Grievant stood staring at him before replying that he had to "go get some stuff." Whatley and Grievant arrived at the clinic at approximately 10:00 a.m. (Tr. 138). They approached the window, a receptionist handed Grievant some forms to fill out, and they sat down while Grievant worked on the forms. Whatley testified that Grievant was slow to complete the forms; he continued to drift off to sleep and was put his sunglasses on (Tr. 139). Grievant told Whatley that his eyes were sensitive to the sun. Grievant filled out the forms after abourt 30 minutes, and then handed them in to the receptionist. He then "took off down the hall" rather than return to his seat (Tr. 140). The receptionist then told Whatley that Grievant had not completed the consent forms. Whatley went to find Grievant, who had gone to the bathroom. Whatley asked Grievant to come out of the bathroom; when he did, Grievant he had water on his face (Tr. 141). Whatley then told Grievant that he needed to complete the consent forms. Whately testified that Grievant spent approximately another 30 minutes filling them out (Tr. 141). During this period of time, Whatley asked Grievant if he needed help and Grievant said that he did not (Tr. 142).

A few minutes after handing in the consent forms, Grievant was admitted for a breath test, after which he returned to the waiting room and told Whatley that he had passed. A short while later, a nurse summoned Grievant to give a urine sample. Whatley testified that when Grievant returned, the nurses told him (Whatley) that Grievant was unable to give a urine sample. Grievant asked if there was a coke machine; when he found out that there was not, he began drinking water from a cooler at the clinic (Tr. 143). Grievant and Whatley then waited another hour and a half for another opportunity to give a sample (Tr. 144). Whatley grew concerned that Grievant was drinking too much water, which might dilute his sample; he therefore called Barquero and asked her how much water Grievant was allowed to drink. Barquero told him that Grievant was only permitted to drink 40 ounces (Tr. 145). Grievant was drinking out of six to eight ounce paper cups, and Whatley testified that he repeatedly drank the contents of cup and immediately filled it again (Tr. 223-235). Whatley estimated that Grievant drank about eight cups of water (Tr. 230).[4]

---

[4] Andrea Finucane, one of the collectors, testified that the cups are six ounces, and that clinic employees typically advise patients to drink six cups in shy bladder scenarios (Tr. 267). There is no evidence that Grievant received this specific instruction.

Shortly thereafter, Grievant was called in for the second test. Whatley heard him hollering, saying roughly, "How do you expect me to pee? I can't pee?" (Tr. 146). The collector came out to the lobby to retrieve Whatley, and told him that Grievant was refusing to come out of the bathroom (Tr. 146). Whatley testified that the collectors told Grievant while he was in the bathroom that he would receive a positive test result if he refused to come out (Tr. 146).[5] Grievant exited the bathroom after Whatley went to the door and told him he needed to come out. Whatley stated that when Grievant emerged, he continued to argue with the collectors and asking how he could produce a specimen when he was unable to pee (Tr. 147). Whatley and Grievant then returned to the lobby to wait for a third testing opportunity. Whatley testified that while they were sitting in the lobby, Grievant got up and started wandering down the hall and looking into the rooms, at which point one of the collectors told him that he needed to sit down and behave (Tr. 148).

Prior to the third test, Whatley called Barquero again, who told him to instruct Grievant that if he did not produce a specimen on the next try he would receive a positive test (Tr. 149). Whatley informed Grievant of what Barquero had said, and Grievant kept asking how could give a specimen when he could not pee (Tr. 149). Shortly thereafter, one of the nurses came to the lobby while Grievant was drinking a cup of water, and asked him to give her the cup (Tr. 150). Grievant responded that he needed the water to pee. Grievant ultimately surrendered the cup after the nurse had asked for it three times (Tr. 150).

Whatley accompanied Grievant when he went for a third attempt to give a urine sample. He testified that Grievant stayed in the bathroom for approximately ten minutes and was unable to produce a sample (Tr. 152). The collectors instructed Grievant to come out of the rest room (Tr. 151).[6] Whatley then called Barquero again and reported that Grievant had been unable to produce a sample (Tr. 155). He testified that he "knew the test was positive" at this point because "when I

---

[5] Similarly, according the summary of Whatley's LIC testimony, he stated: "the collectors came out to get the grievant to retrieve a specimen. [Grievant] left with the clinician, I then heard her say, "≤ come out!" The clinician further stated, "If you don't come out it will be a false positive" (JX 1, 7).

[6] The report of the LIC hearing summarizes Whatley's testimony as follows: "Mr. Whatley stated after third attempt, the grievant was unable to provide a urine sample. The clinician told me that he had reached the 3 hour time limit to produce a specimen so we were free to leave" (JX 1, p. 7).

went down there to get him out of the bathroom, he didn't produce a sample" (Tr. 210). Barquero told Whatley that it would count as a positive test and requested that Whatley to take Grievant home. Whatley dropped Grievant off at the Potrero yard and instructed him not to come to work the following day (Tr. 157). Grievant arrived at work the following day, and did not present any of the symptoms he showed the previous day (Tr. 215). Whatley wrote a detailed statement summarizing the incident the following day (JX 1, 5).[7]

---

[7] The statement is as follows:

On the morning of January 24, 2006, I took S to Saint Francis clinic for a drug and alcohol test. As we prepared to leave, I told S we would go in my company truck. I went over and started my truck and S was over by the bull room. I looked around and he was still by the bull room, so I backed my truck up and pulled over to the bull room and motioned to S to come over and he indicated O.K. but went to get a cup of water and carry his bag. Then he got into the truck and we went to the clinic.

We went to the check in station and the nurse receptionist gave S some papers to fill out. After about 15 to 20 minutes, S gave them back to her and he sat down about 10 feet away from me because the waiting room was full.

After a few minutes he headed down the hall away from me. I thought what is he doing now and where is he going? As he turned the corner, I got up to check on him. As I passed the nurse, I asked her how long it would be before S would be seen and she replied, "I don't know because he didn't fill out the consent form." I immediately went down the hall to see where S had gone. When I turned the corner, I didn't see S because he had gone into the restroom. I told S to come out immediately, and he opened the door wiping water from his face. He asked "what's the problem I needed to go to the bathroom?" I told him, you cannot, and told him to go back and sit down and finish the consent forms. He went back to the nurse and she handed him the papers again and he sat down next to me. He looked over at me and said "I need to read these papers first; my lawyer may need to look at them." he started to read them and then fell asleep. I woke him up and he started turning the papers sideways and then back around. I thought maybe he is having trouble, so I asked him if he needed me to read them to him and he said, no. He then got his sun glasses out and started to wipe them off. Then he said my eyes are sensitive to the sun. He put his sun glasses on and started to fall asleep. I woke him up again and said, we need those consent forms signed, and he replied O.K. He finally finished them and gave them back to the nurse. This took about one hour.

It seemed to me he had been stalling. At 10:42 . S was tested. On the first try he could not give a sample. He came out and asked, "is there a coke machine here"? The nurse said no but there was a water cooler there. He went over and got a cup of water started drinking. As we sat there he started falling asleep again and I would wake him. After several cups of water, I was thinking, man he is drinking water like a fish! Again I had to wake him because he was about to spill his water on himself or on the floor. He said, "thanks man" and turned back around and went to sleep and spilled some water on the floor. He got up and went to get some paper towels and cleaned it up. He went to go throw them away and headed down the hallway where the patients rooms were located. The nurse came out to me and said "you need to control him he's not allowed in the hall where the patient's rooms are." I got up to get S ad he was coming back. I told him he was not allowed back there. He said, "why are they treating me like a criminal?" I told him there were not and to sit down and stay out of the way. He said I need some more water and went over to the water cooler to get more, but it was empty. He started to put a new bottle on the water cooler. I thought as woozy as he is I better do it. I wasn't about to let him do something wrong and have the nurse get mad again. I asked the nurse how long S had to produce a sample. She said three hours or anytime he can. She also informed me that S was instructed on exactly what he needed to do on the test. He was sitting there drinking the water saying, let's get this over with. He repeated this about three or four times as he drank the water.

By this time an hour and a half had passed and it was time for S to give his second sample. While I was sitting there, I called Kathy Barquero at H.R. and asked her how much water S should be drinking. She said only 40 oz. in the three hours. I asked her why someone had not told me because I thought he had already had that much. She said she would call the nurse. The nurse came back and told me S was not doing as instructed and this could put him out of compliance for the test. He would not come out of the restroom and was [past] the allotted time in there. The nurse and I went back to the restroom where I instructed S to come out immediately. I had to tell him a couple of times. S

Andrea Finucane is employed as a supervisory nurse at Saint Francis Health Center in San Francisco. She has acertification in DOT drug testing, as has Lorena Sotelo, who also worked at the clinic on January 24, 2006. Finucane testified that she first became aware of Grievant that morning when Sotelo approached her and told her that he was being belligerent, loud, and intimidating, and was refusing to follow instructions (Tr. 244). Sotelo reported that on the second or third time that Grievant was asked to provide a sample, he refused to leave the bathroom when his allotted time (four minutes) had elapsed (Tr. 245).[8] Finucane testified that if patients stay in the bathroom too long, the sample may fall below the required temperature range, and it may give the patient time to tamper with the sample. She approached the bathroom door with Sotelo and asked Grievant to come out, but he refused to do so and was "shouting" about how he could not pee (Tr. 247). Finucane testified that she felt unsafe around Grievant that morning (Tr. 250).

Finucane advised Sotelo to terminate the collection after the third attempt because Grievant was out of compliance as a result of his refusal to come out of the bathroom in a timely manner (Tr.

---

opened the door yelling very loudly, "how can I give you a sample when I can't pee"? He said "this is ridiculous and maybe I should call my lawyer." The two nurses and I told S to quiet down to not disturb the other patients. He was still loud and I told him again to quiet down so he did.

S then went over to one of the nurses and in a low voice kept asking her "how can I give a sample when I don't have to pee"? They both told him the second test was over and he had one and a half hours to provide the next sample. S and I went back to the waiting room where he got another cup of water and started drinking it. One of the nurses came out and said she had called H.R. and told her about the incident with

I guess Kathy at H.R. told her what I said about the amount of water S had been drinking. The nurse [then] instructed S he had all the water he was supposed to have. She then asked S for the cup of water he had and he refused to give it to her. The nurse again became upset and said S was not complying and said she was calling Kathy. I got up and asked S for the water which he handed to me reluctantly. He then said again, I'm calling my lawyer. "How can I give a sample when I can't drink water"? He also kept asking "how can that be a positive if I can't pee"? And "I passed the alcohol test didn't I"? I said yes but that was only half the test and now we need a sample. By now he was saying "I am not a criminal, this is ridiculous." I told him to calm down and that way he may be able to give a sample on the last try. On the last try he went to the restroom and the two nurses waited but S could not give a sample. S again got on his cell phone and said "I'm calling my lawyer."

The nurse called Kathy with his results. I then called Kathy and was talking to her when I S started asking me to take him to another hospital where they could take a blood test. Kathy said no. His test was positive and we needed to get him a taxi cab to take him home because of the condition he was in. I told Kathy he lived in Escalon, but he was staying in Larkspur Landing in South San Francisco and we could take him there...

The next day S showed up for work. I asked him why he showed up for work. He said H.R. called him but only spoke to his wife. I informed him that he was off work until further notice. I then told him if he wanted to I would contact Francis or Kathy. Francis called back and said to send him home. S was still asking why he couldn't work. He felt he didn't test and did not understand why it was considered a positive test. He was also informed to call E.A.P.

[8] Finucane testified that Grievant locked himself in the bathroom and refused to come out twice (Tr. 262). She stated that she thought one of the times was Grievant's fourth attempt to give a sample, but it does not appear that there were four attempts.

251).[9] She testified that a patient staying in the bathroom longer than four minutes does not in itself constitute a refusal to test, but Grievant's refusal to exit the bathroom when he was directed to do so constituted a refusal to test (Tr. 332-333). Finucane explained that her understanding of the applicable rules and regulations is that *any* failure on the part of the donor to follow instructions or expectations, no matter how significant or insignificant, automatically constitutes a "refusal to test" (Tr. 337). She asserted that she and Sotelo complied with and satisfied the DOT shy bladder procedures by allowing him to drink up to 40 ounces of water and affording him three hours to give a sample after the first attempt (Tr. 252). However, she was not aware of whether Grievant actually drank 40 ounces of water, and she also stated that the process was terminated prior to the three-hour period having elapsed because Grievant was out of compliance (Tr. 268, 314-315). Finucane testified that Immediately after Grievant and Whatley left the clinic, she called Barquero and stated that Grievant was classified as a "refusal to test" because he had been disruptive and had refused to leave the bathroom (Tr. 257-258).

The clinic has a standard five-part form that is filled out when a urine sample is taken, which is part of the chain of custody procedure. Grievant's form was filled out by Sotelo. The form has a field headed "Step 2: Completed By Collector," which has two questions to be answered by the collector, Sotelo. The first question states, "Read specimen temperature within 4 minutes. Is temperature between 90° and 100° F?" Sotelo checked the "Yes" box. The second question states, "Specimen Collection:" and Sotelo checked "Split."[10] The form has a field that reads, "SPECIMEN

---

[9] The Employer's "Guidelines For Reasonable Suspicion Testing" state that "[t]he collector may set a reasonable time limit for the employee to be inside the bathroom and this time frame should be explained to the employee" (JX 1, 10, p. P-4). Finucane stated that she had this guideline in mind when she determined that Grievant was "out of compliance" (Tr. 326). The Guidelines further state that:

> The collector should also tell the employee that the temperature of the specimen is a critical factor and that the employee should bring the specimen to the collector as soon as possible after urination. The collector should inform the employee that if it is longer than 4 minutes from the time the employee urinates into the container and the collector takes the specimen temperature, the potential exists that the specimen may be out of range and an observed collection may be required (JX 1, 10, p. P-4).

Finucane testified that if a patient refuses to come out of the bathroom after four minutes, it is a "refusal to test" and she therefore does not use the above procedure (Tr. 334).

[10] "Splitting" a specimen is transferring the sample into two separate receptacles. (Tr. 284.)

BOTTLE(S) RELEASED TO:" and the "Airborne Express" box is checked. The form has another field calling for the sample collector's signature affirming that "I certify that the specimen was given to me by the donor identified in the certification section on Copy 2 of this form was collected, labeled, sealed and released to the Delivery Service noted in accordance with applicable Federal requirements." Sotelo signed this affirmation, and recorded the time as 10:42 a.m. (JX 1, 13). The record herein supports a finding that each of the preceding statements and checkmarks about Grievant's specimen are false statements because, in fact, he never produced a specimen.

The form also has a detachable seal that the donor is supposed to sign when it is affixed to the sample bottle. Sotelo had Grievant sign the seal while it was still attached to the form (Tr. 1072). This was contrary to the Employer's collection procedures, which state that "the collector must not ask the employee to initial the labels/seals while they are still attached to the CCF; they must be initialed after they are placed on the bottles" (JX 1, 17). The form also has a "remarks" section, in which Sotelo wrote, "Donor is out of compliance." Finucane testified that the form thus states that a sample was collected from Grievant (Tr. 274). She stated that parts of the form, for example whether it is "split" or "single," are typically filled out by the collector prior to the collection of the sample Tr. 288).[11] However, she also testified that the staff does not mark of the box concerning whether the sample is in the correct temperature range, or enter the time of collection prior to collecting the sample. She testified that filling out these fields prior to the collection of the specimen would be "wrong" and would "affect the integrity of the test" (Tr. 304). Finucane stated that, notwithstanding the form, Grievant never provided a urine sample to her knowledge (Tr. 313).

Sotelo and Finucane both drafted brief written statements summarizing the incident.[12]

---

[11] Filling out this field prior to collecting the sample is contrary to the DOT "Urine Specimen Collection Guidelines." See JX 1, 17, p. 14.

[12] The statements are unsigned and undated. There is some dispute as to when these statements were written and when they were received. They each bear a February, 2007 time stamp from a fax machine. Barquero testified that she did not receive these documents directly, but that Finucane told her on January 24, 2006, that she had prepared her statement and sent it to Dr. Smith, the Employer's MRO, on that day (Tr. 1047). She further testified that she contacted Finucane in preparation for the 2007 LIC hearing, that Finucane told her that she and Sotelo had prepared statements for Dr. Smith in 2006, and that she then asked Finucane to fax the statements to her, which explains the time stamp (Tr. 1020). It appears from Barquero's testimony that she does not regard these statements as the "affidavits" required by the DOT regulations (Tr. 968-969). Dr. Smith testified that these statements were affidavits that he received and relied upon when making a determination about the test result, but he was unable to recall when he first read or received the

Sotelo's letter states,

> On January 24, 2006, Mr. S , came to Saint Francis Health Center for a reasonable suspicion of cause drug test. I, Lorena Sotelo-Malaga, made four attempts to collect a specimen from the donor. During the third and fourth attempt, the donor refused to leave the restroom on my command, forcing me to contact his accompanying supervisor for assistance. Due to the donor's behavior, in the fourth attempt I requested the presence of my supervisor Andrea Finucane because I felt unsafe.

Fincucane wrote,

> Mr. S , the donor, was out of compliance with the collection procedure at St. Francis Health Center. I advised Lorena Sotelo, the collector, [t]o discontinue the collection. The donor was a refusal to test.

The DOT drug testing regulations, found in 49 CFR §§ 40.199-208, provide procedures for cases where there are problems in the collection process. The regulations state, in pertinent part:

> **40.199 What problems always cause a drug test to be cancelled?**
>
> (a) As the MRO, when the laboratory discovers a "fatal flaw" during its processing of incoming specimens... the laboratory will report to you that the specimen has been "Rejected for Testing."... You must always cancel such a test.
>
> (b) The following are "fatal flaws":
>
> (1) There is no printed collector's name and no collector's signature.
> (2) The specimen ID numbers on the specimen bottle and the CCF do not match.
> (3) The specimen bottle seal is broken or shows evidence of tampering.
> (4) Because of leakage or other causes
>
> ...
>
> **40.201 What problems always cause a drug test to be cancelled and may result in a requirement for another collection?**
>
> As the MRO, you must cancel a drug test when a laboratory reports that any of the following problems have occurred...
>
> (a) The laboratory reports an "Invalid Result."
> (b) The laboratory reports the result as "Rejected for Testing."
> (c) The laboratory's test of the primary specimen is positive and the split specimen is reported by the laboratory as "Failure to Reconfirm: Drug(s)/Drug Metabolite(s) Not Detected."
> (d) The laboratory's test result for the primary specimen is adulterated or substituted and the split specimen is reported by the laboratory as "Adulterant not found within criteria," or "specimen not consistent with substitution criteria," as applicable.
> (e) The laboratory's test of the primary specimen is positive, adulterated, or substituted and the split specimen is unavailable for testing.

---

statements (Tr. 723, 744). Barquero also testified that she believed that the "affidavits" from the collectors clearing up errors "can be in any form or way" (Tr. 970).

(l) The examining physician has determined that there is an acceptable medical explanation of the employee's failure to provide a sufficient amount of urine.

40.205 How are drug test problems corrected?

...

(b) If, as a collector, laboratory, MRO, employer, or other person implementing these drug testing regulations, you become aware of a problem that can be corrected..., you must take all practicable action to correct the problem so that the test is not cancelled.

(1) If the problem resulted from the omission of required information, you must, as the person responsible for providing that information, supply in writing the missing information and a statement that it is true and accurate. For example, suppose you are a collector, and you forgot to make a notation on the "Remarks" line of the CCF that the employee did not sign the certification. You would, when the problem is called to your attention, supply a signed statement that the employee failed or refused to sign the certification and that your statement is true and accurate.

(3) You must maintain the written documentation of a correction with the CCF.

(4) You must mark the CCF in such a way (e.g., stamp noting correction) as to make it obvious on the face of the CCF that you corrected the flaw.

...

40.209 What procedural problems do not result in the cancellation of a test and do not require corrective action?

(a) As a collector, laboratory, MRO, employer or other person administering the drug testing process, you must document any errors in the testing process of which you become aware, even if they are not considered problems that will cause the test to be cancelled as listed in this subpart. Decisions about the ultimate impact of these errors will be determined by other administrative or legal proceedings, subject to the limitations in paragraph (b) of this section.

(b) No person concerned with the testing process may declare a test cancelled based on an error that does not have a significant adverse effect on the right of the employee to have a fair and accurate test. Matters that do not result in cancellation of a test include, but are not limited to, the following:

(1) A minor administrative mistake (e.g., the omission of the employee's middle initial, a transposition of numbers in the employee's social security number);

(2) An error that does not affect employee protections under this part (e.g., the collector's failure to add bluing agent to the toilet bowl, which adversely affects only the ability of the collector to detect tampering with the specimen by the employee);

(3) The collection of a specimen by a collector who is required to have been trained, but who has not met this requirement;

(4) A delay in the collection process...;

(5) Verification of a test result by an MRO who has the basic credentials to be qualified as an MRO... but who has not met training and/or documentation requirements...;

(6) The failure to directly observe or monitor a collection that the rule requires or permits to be directly observed or monitored, or the unauthorized use of direct observation or monitoring for a collection;

(7) The fact that a test was conducted in a facility that does not meet the requirements of § 40.41;

(8) If the specific name of the courier on the CCF is omitted or erroneous;...

(c) As an employer or service agent, these types of errors, even though not sufficient to cancel a drug test, may subject you to enforcement action under DOT agency regulations...

Barquero testified that St. Francis is a certified DOT collection site that the Employer had used on numerous occasions. She was informed that Whatley and Grievant arrived at approximately 9:30-10:00 a.m. (Tr. 931). Whatley called her at approximately 10:45 a.m., and informed her that Grievant had gone to a patient bathroom without having been instructed in between filling out forms, that he later locked himself in the bathroom when asked to give his urine sample, and that he was "screaming and hollering" that he could not provide a sample (Tr. 934-936; EX 11). She testified that it was her understanding that the collection process began, i.e., the first time he was asked to be tested, at around 10:45 a.m. (Tr. 938). Shortly thereafter, she received a call from Sotelo, who told her that Grievant had locked himself in the bathroom, refused to come out for ten to fifteen minutes, and was shouting that he was unable to produce a sample (Tr. 947). Sotelo reported she had tried to explain to Grievant that noncompliance would be a refusal to test, and told Barquero that she (Sotleo) wanted to call it noncompliance; however, Barquero asked Sotelo to give Grievant another opportunity (Tr. 947-948).

Barquero called Whatley approximately fifteen minutes later, and Whatley told her that Grievant was "drinking water like a fish" (Tr. 943, 945). He also told her that Grievant was nodding off and spilling water on himself (Tr. 940). Barquero testified that she told Whatley during this conversation that Grievant had three hours to produce a sample, that he could not leave the facility, and that he was entitled to drink up to 40 ounces of water (Tr. 946). She considered the shy bladder process to have been initiated by that time, since Grievant had said that he was not able to produce a sample on his first try (Tr. 952). She also spoke to Grievant on the same call, related the same information, and told him that he needed to cooperate with the collectors or he would get an automatic positive as a result of a refusal to test (Tr. 946). Barquero testified that she specifically told Grievant that he needed to exit the bathroom when asked to do so (Tr. 954), and she stressed to both Whatley and Grievant that Grievant needed to stop being confrontational with the collectors

(Tr. 949). Barquero testified that when she spoke to Grievant, he was slurring his words and yelling that he wanted to have a blood test, that he could not urinate, and that he wanted to contact his lawyer (Tr. 952). She explained to him that blood tests were not allowed under the DOT regulations and that he would be allowed to drink 40 ounces of water (Tr. 953). Barquero further testified that Grievant told her during the call that he was unable to urinate (Tr. 1018). She told Whatley to monitor Grievant's water intake to ensure that he did not exceed the 40 ounces., and she also called Sotelo back and asked her to monitor Grievant's water intake (Tr. 955-956).

After this telephone call, Barquero went to lunch. When she returned, Barquero received another call from both Sotelo and Finucane (on a speaker phone) at approximately 1:30-1:40 p.m., wherein they told her that Grievant had again locked himself in the bathroom (Tr. 960-961). They reported that they asked Grievant numerous times to come out of the bathroom, that he had been locked inside for approximately half an hour, and that they had been compelled to bring Whatley to convince Grievant to come out (Tr. 961). They informed Barquero that they had terminated the process as a result, and were not going to give him another opportunity. Barquero testified that Sotelo stated that she was scared of Grievant, and Finucane said his latest conduct was the "last straw (Tr. 962)."[13] Barquero asked both Sotelo and Finucane to write statements summarizing the incident and to fax her the CCF (Tr. 963). Barquero testified that both Finucane and Sotelo told her during this conversation that Grievant never provided any sample (t. 1017-1018).[14] Immediately thereafter, she received a call from Whatley and told him to escort Grievant home and to tell him not to come to work until further notice because the DOT regulations required that she remove Grievant from safety-sensitive duties (Tr. 964). Barquero testified that Whatley did not tell her during this conversation that he or Grievant had been told that they were supposed to leave, or "free to leave,"

---

[13] The summary of Barquero's LIC testimony about this telephone call states: "Ms. Barquero stated she received a call from the collector around 12:30 pm or 1:00 pm stating the grievant was non-compliant and that she had enough of his disruptive behavior.... Ms. Barquero stated after 2.5 hours the collector deemed grievant non-compliant." (JX 1, 7.) Barquero also drafted notes on January 24, one of which states: "Couldn't provide a sample. Donor noncompliant. Finally at about 1:30 p.m. after explaining the donor his rights, what his options were, to please comply with regulation, failed to do. Refusal to test."

[14] The Employer's collection policies provide that if an employee gives a specimen that has an insufficient amount of urine, the collector is directed to discard it (JX 1, 17). Therefore, Barquero testified that if Grievant had given an insufficient sample, it would have been discarded rather than kept (Tr. 1079).

due to the expiration of the three hour shy bladder period (Tr. 1043). She also spoke to Grievant and told him that he would be off work for approximately 45 days, that he needed to contact the EAP immediately, and that she would also contact the EAP for him. She also explained the evaluation and return-to-work process that he would have to complete (Tr. 964-965).

Barquero then called Dr. Smith to verify that he had received the chain of custody form, and gave him the contact information for the collection site so that he could verify the refusal to test finding (Tr. 967-968). The final task she carried out on January 24 was to notify Azofeifa that Grievant was being removed from safety-sensitive duty (Tr. 971). The following morning, Whatley called her and told her that Grievant had shown up to work, and she instructed him to send him home (Tr. 972). Grievant called her later in the day and stated that he had not refused a drug screen (Tr. 974). Barquero spoke with Dr. Smith on January 27, and they both concluded that any medical reasons or lack thereof Grievant might have had for not being able to urinate were irrelevant because his conduct had resulted in a refusal to test (Tr. 986-987).[15]

Barquero testified that in her experience as a urine specimen collector, it was not uncommon for collectors to fill out some of the sections of the chain of custody form prior to receiving a specimen due to the high volume of drug screens each day. She further testified that she herself sometimes pre-filled the forms to streamline the process, which she admitted was not a best practice (Tr. 910-911). Barquero stated that in her DER capacity for the Employer, she sees pre-filled chain of custody forms as much as three times per week, and estimated that it occurs 80 percent of the time

---

[15] The summary of Barquero's LIC testimony states: "Ms. Barquero was asked why a Shy bladder evaluation was not taken; Ms. Barquero stated a shy bladder evaluation did not start b/c the 3-hour time period had not yet lapsed." The Employer's SAP, Mike Watson, had a discussion with Barquero on January 26, 2006, and took notes regarding the conversation. The notes state, in pertinent part:

> I called [Barquero] the DOT coordinator to find out the circumstances of [Grievant's] refusal. [Barquero] said... when [Grievant] was at the clinic he lock himself in the restroom for 25 minutes and was unable to produce a sample. The tech accompany the client the second time to see if he could produce a sample. The second time [Grievant] lock the tech out of the restroom. The tech had to call [Grievant's] supervisor to get [Grievant] to open the door. [Grievant] still did not produce a sample. So the test was deemed a refusal. (UX 1.)

Watson also testified about his conversation with Barquero as follows:

> Q: She told you [S] did not produce a urine sample, right?
> A: Correct.
> Q: And she told you because of this, the test was deemed a refusal?
> A: Correct. (Tr. 451).

(Tr. 911, 1027). According to Barquero, this practice is not a "fatal flaw" that annuls a test result, for purposes of the DOT regulations (Tr. 912),[16] and that pre-filling substantive information on the forms is correctable provided that the collectors submit affidavits, as occurred here (Tr. 1030). Barquero also stated that the practice when she was a collector was to have the donor sign the seal while still on the chain of custody form, before it was affixed on the bottle, because when collectors accept the bottles they are wearing latex gloves, which then stick to adhesive seals (Tr. 1074).

Dr. David Smith is a licensed physician who specializes in addiction medicine, a filed in which he has practiced and specialized since 1965. He serves as the Employer's designated MRO for DOT testing. Dr. Smith has been certified as an MRO since 1991, and serves in that same capacity for other Bay Area employers such as U.C. Berkeley, BART, and SamTrans. He regularly consults with SAPs as part of his MRO duties. His duties as an MRO for the DOT regulations are limited to certifying positive tests and evaluating whether there is an acceptable medical explanation for positive test results; he also has an expanded role for the Employer which includes being "deeply involved" in treatment (Tr. 599). He is responsible under the regulations to report all test results to the Designated Employer Representative, who for this Employer, is Ms. Barquero.

Dr. Smith received the chain of custody form filled out by Sotelo (JX 1, 13), which states "Donor is out of compliance." He reviewed the form, as well as other documentation in his file, talked at length with Barquero, and ruled that Grievant's result was a refusal to test (Tr. 604). He testified that Barquero told him that it was a cause test for impairment in the workplace, that Grievant stayed in the bathroom for an excessive period contrary to instructions, was disruptive, violated procedures, and was given adequate water. He then called the collection site and spoke with a nurse as well as Watson, and verified what Barquero had told him (Tr. 605-607). Dr. Smith also also requested affidavits from Sotelo and Finucane because the chain of custody form indicated on its face that a sample had been collected (Tr. 628).[17]

---

[16] She testified that the regulations list a number of examples of fatal flaws, and that pre-filling substantive information on a form is not listed (Tr. 1029).

[17] Dr. Smith did not speak directly to either Sotelo or Finucane (Tr. 715).

Dr. Smith testified that Grievant's series of behaviors constituted a refusal to test pursuant to the DOT regulations (Tr. 616). He stated that Grievant's refusal to come out of the bathroom was a particularly serious problem because there is a substantial problem with donors adulterating their tests, which the time limits are designed to limit (Tr. 630). Based on his conclusion, he filled out an "MRO Report" and recorded the verified result of the test as "refusal" (JX 1, 14). Dr. Smith testified that he did not look into possible shy bladder issues because Grievant's disruptive behavior constituted a refusal to test, thereby rendering a shy bladder inquiry unnecessary (Tr. 625-626). He further testified that to the extent that Grievant's disruptive behavior was caused by Oxycontin intoxication it did not excuse Grievant's uncooperative conduct because, according to his MRO training and experience, the DOT regulations do not include any "diminished capacity" defense to a refusal to test (Tr. 809). With respect to the shy bladder issue, Smith stated that the DOT regulations require that any medical condition that purportedly explains the inability to produce a sufficient urine sample must be documented prior to the date of the test. He further stated that the shy bladder provisions are only invoked when a patient cannot produce a sufficient sample, and not when a patient says that he or she is unable to produce any sample (Tr. 632-633).[18] It was Dr. Smith's understanding that Grievant did not produce a urine sample, but that if he had produced a small sample the shy bladder procedures of the DOT regulations would have applied (Tr. 786).

Dr. Smith testified that although he was not obligated to consider potential medical explanations for Grievant being unable to provide a specimen, Barquero asked him to consider Grievant's proffered explanation of occult (undiscovered and untreated) diabetes (Tr. 636). He responded to Barquero with a letter stating, "diabetes would not be a suitable medical reason for failure to void in a timely manner. In fact, in this case where the diabetes is poorly controlled, the patient would actually void more often." He testified that untreated diabetes causes polyuria, or frequent urination; thus; that explanation for failing to produce a sample was illogical (Tr. 637). Smith received a letter from Dr. Margaret Chan, approximately one year later, wherein Dr. Chan wrote, "in my opinion, this retention could be from his diabetes that was occult until 2/2006 when

---

[18] Smith later testified that the failure to provide any amount of urine triggers the shy bladder process (Tr. 795).

he was hospitalized. It is true that the retention could be from his medication also... it is more likely that his urinary retention episode was due to his diabetes."[19] Smith testified that, in his medical opinion, Dr. Chan's explanation did not make sense for the reason stated above (Tr. 640). In making this determination, Dr. Smith consulted medical literature on diabetes, and contacted a diabetes expert (Tr. 751-752; JX 8). He further testified that Oxycontin, at high doses, may result in urinary retention, but that consumption of 40 ounces of water would almost always relieve the urine retention (Tr. 639). According to Dr. Smith, even if Grievant had not been subject to the refusal to test procedures, Oxycontin use would not have been an acceptable medical explanation for his failure to provide a sufficient specimen pursuant to the DOT regulations (Tr. 653).

Dr. Smith testified that he has extensive experience in diagnosing both Oxycontin intoxication and diabetic ketoacidosis, and that he teaches those subjects to physicians (Tr. 656). He stated that he also has experience in distinguishing between the two conditions. Based on his experience and on the reports of Grievant's behavior on the morning January 24, 2006, it is Dr. Smith's opinion that Grievant's behavior was more likely due to Oxycontin intoxication than diabetic ketoacidosis (Tr. 656). He explained that ketoacidosis results in a "global chemical impairment of the brain" that compromises "goal-oriented behavior," whereas Oxycontin addiction produces goal-oriented behavior, which he believes that Grievant exhibited (Tr. 657). Dr. Smith further explained that ketoacidosis, if untreated, gets worse and does not resolve on its own, whereas Oxycontin intoxication wears off (Tr. 658). He stated that the fact that Grievant appeared at work the next day without symptoms therefore suggests Oxycontin intoxication was a more likely cause, because he would not have recovered from diabetic ketoacidosis without medical treatment (Tr. 658). Dr. Smith testified that a patient with ketoacidosis had, on at least one occasion in his experience, locked himself in the bathroom but that that patient smelled like acetone and was covered in urine (Tr. 810-811).

---

[19] Dr. Chan did not testify at the arbitration after a ruling by the Neutral Arbitrator that she could not testify if Grievant refused to sign a release authorizing the production of pertinent medical records sought by counsel for the Employer for the purpose of cross-examining Dr. Chan. Grievant declined to sign such a waiver and was given time to re-consider his position after the ruling was explained, but he declined to release the requested pertinent medical records.

The Substance Abuse Professional Evaluation and Recommendation

The role of the Substance Abuse Professional ("SAP") is outlined in Subpart O (49 CFR §§ 40.281-313) of the DOT regulations. The regulations state, in pertinent part:

Substance Abuse Professionals and the Return-to-Duty Process

40.285 When is a SAP evaluation required?

(a) As an employee, when you have violated DOT drug and alcohol regulations, you cannot again perform any DOT safety-sensitive duties for any employer until and unless you complete the SAP evaluation, referral, and education/treatment process set forth in this subpart and in applicable DOT agency regulations. The first step in this process is a SAP evaluation.

...

40.289

(b)... If you offer [an] employee an opportunity to return to a DOT safety-sensitive duty following a violation, you must, before the employee again performs that duty, ensure that the employee receives an evaluation by a SAP... and that the employee successfully complies with the SAP's recommendations.

40.291 What is the role of the SAP in the evaluation, referral, and treatment process of an employee who has violated DOT agency drug and alcohol testing regulations?

(a) As a SAP, you are charged with:
- (1) Making a face-to-face clinical assessment and evaluation to determine what assistance is needed by the employee to resolve problems associated with alcohol and/or drug use;
- (2) Referring the employee to an appropriate education and/or treatment program;
- (3) Conducting a face-to-face follow-up evaluation to determine if the employee has actively participated in the education and/or treatment program and has demonstrated successful compliance with the initial assessment and evaluation recommendations;
- (4) Providing the DER with a follow-up drug and/or alcohol testing plan for the employee;
- (5) Providing the employee and employer with recommendations for continuing education and/or treatment;

(b) As a SAP, you are not an advocate for the employer or employee. Your function is to protect the public interest in safety by professionally evaluating the employee and recommending appropriate education/treatment, follow-up tests, and aftercare.

40.293 What is the SAP's function in conducting the initial evaluation of an employee?

As a SAP, for every employee who comes to you following a DOT drug and alcohol violation, you must accomplish the following:

(a) Provide a comprehensive face-to-face clinical evaluation.

(b) Recommend a course of education and/or treatment with which the employee must demonstrate successful compliance prior to returning to DOT safety-sensitive duty.

...

(d) Appropriate treatment may include, but is not limited to, in-patient hospitalization, partial in-patient treatment, out-patient counseling programs, and aftercare...

(f) For purposes of your role in the evaluation process, you must assume that a verified positive test result has conclusively established that the employee committed a drug and alcohol regulation violation. You must not take into consideration in any way, as a factor in determining what your recommendation will be, any of the following:

(1) A claim by the employee that the test was unjustified or inaccurate;
(2) Statements by the employee that attempt to mitigate the seriousness of a violation of a DOT drug or alcohol regulation.

(g) In the course of gathering information for purposes of your evaluation in the case of a drug-related violation, you may consult with the MRO. As the MRO, you are required to cooperate with the SAP and provide available information the SAP requests. It is not necessary to obtain the consent of the employee to provide the information.

40.297 Does anyone have authority to change the SAP's initial evaluation?

(a) Except as provided in paragraph (b) of this section, no one (e.g., an employer, employee, a managed-care provider, any service agent) may change in any way the SAP's evaluation or recommendation for assistance. For example, a third party is not permitted to make more or less stringent a SAP's recommendation by changing the SAP's evaluation or seeking another SAP's evaluation.

(b) The SAP who made the initial evaluation may modify his or her initial evaluation and recommendation based on new or additional information.

40.301 What is the SAP's function in the follow-up evaluation of an employee?

(a) As a SAP, after you have prescribed assistance under §40.293, you must re-evaluate the employee to determine if the employee has successfully carried out your education and/or treatment recommendations.
(1) This is your way to gauge for the employer the employee's ability to demonstrate successful compliance with the education and/or treatment plan.
(2) Your evaluation may serve as one of the reasons the employer decides to return the employee to safety-sensitive duty.

(b) As the SAP making the follow-up evaluation, you must:
(1) Confer with or obtain appropriate documentation from the appropriate education and/or treatment program professionals where the employee was referred; and
(2) Conduct a face-to-face clinical interview with the employee to determine if the employee demonstrates successful compliance with your initial evaluation recommendations.

...

(d) (1) As the SAP, if you believe, as a result of the follow-up evaluation, that the employee has not demonstrated successful compliance with your recommendations, you must provide written notice directly to the DER.

(2) As an employer who receives the SAP's written notice that the employee has not successfully complied with the SAP's recommendations, you must not return the employee to the performance of safety-sensitive duties...

.....

(4) As the employer, following a SAP report that the employee has not demonstrated successful compliance, you may take personnel action consistent with your policy and/or labor-management agreement.

Michael Watson is a licensed marriage/family therapist, a certified employee assistance professional, and a qualified SAP for purposes of the DOT regulations. He has 20 years of experience as an employee assistance counselor, which involves conducting drug and alcohol assessments, monitoring employees' progress through treatment, and conducting follow-up assessments. In January of 2006, he was employed by a company called ValueOptions Behavioral Health, which provides EAP services and mental health services for the Employer. He was assigned that month to conduct a preliminary assessment of Grievant, which involved "conduct[ing] an assessment and develop[ing] a plan, in order to address any type of substance abuse issues that have come up" (Tr. 345-346). Watson's SAP role required him to ensure that patients are able to operate safely when they return to work (Tr. 359).

Watson's standard practice when he receives a referral is to conduct an in-person assessment that reviews the circumstances of the test, examines the drug and alcohol history of the patient, conducts a psychosocial analysis, and results in his formulation of a treatment recommendation (Tr. 347). Watson followed this procedure in this case and first met with Grievant in Watson's Oakland office on January 31, 2006. (Tr. 352.) Grievant told the SAP that he was unable to produce a urine sample and that he thought there was a medical reason for his failure to do so. In addition, Grievant stated that he had taken Oxycontin prior to coming to work on January 24, pursuant to a medical prescription.[20] Dr. Margaret Chan filled out a prescription on December 7, 2005, that recommended that Grievant ingest 2 80MG tablets of Oxycontin three times a day (EX 5)., and Grievant told Watson that he had taken one of the tablets before arriving at work (Tr. 355). Watson testified that he was concerned about the amount of Oxycontin that Grievant was taking and his ability to operate

[20] Barquero testified that Oxycontin is not one of the drugs that is tested for in reasonable suspicion DOT drug tests (Tr. 1024).

equipment safely; Watson also concluded from the entirety of the factors outlined above that Oxycontin use had been the cause of Grievant's erratic behavior on January 24 (Tr. 350).[21]

Watson contacted Dr. Albert Chan, who was covering for Dr. Margaret Chan during that period. Dr. Chan reported that Grievant was on a high dose of Oxycontin, that he had been taking it for approximately five years, and that Dr. Chan was planning to start tapering the patient off the Oxycontin (Tr. 354). Watson testified that in his experience, when a patient is prescribed Oxycontin for that length of time, it is highly likely that the patient will develop a physical dependence (Tr. 436). Watson told Dr. Chan that he was considering recommending drug treatment for Grievant because he was concerned that the Oxycontin was compromising his ability to work in a safety sensitive position. Dr. Chan recommended that Grievant needed detoxification prior to treatment (Tr. 355).[22] Dr. Chan also told Watson that Grievant was physiologically dependent on Oxycontin (Tr. 432-433).

Watson concluded that Grievant's refusal to test was the result of having taken Oxycontin, and Grievant had to address that problem in order to return to work due to the safety concerns.[23] Watson filled out an "SAP Initial Evaluation/Recommendation" form for Grievant, and wrote, under "initial treatment plan,"

> 28 days of inpatient hospital treatment and 1 year of aftercare. [Grievant]'s medical providers have recommended treatment that prevents [Grievant] from being referred at this time. I will refer client to treatment when I obtain a release from his medical providers. I will refer him to treatment.

Watson recommended that the 28 day inpatient treatment be conducted at the Merritt Peralta Institute ("MPI") at Alta Bates in Oakland. He recommended MPI because he considers it one of the top treatment programs in Northern California and because it has a specialized pain management

---

[21] Grievant had two prior DUIs in 1989 which Watson considered to be an additional risk factor. According to Watson, Grievant acknowledged that he sometimes drank alcohol while on Oxycontin, which Watson testified enhances the effects of the Oxycontin and presents yet another safety risk (Tr. 559).

[22] Watson believed that Dr. Chan was unaware that Grievant worked in a safety-sensitive position (Tr. 551).

[23] In his contemporaneous notes, Watson wrote, in connection with Grievant's final attempt to produce a sample (referring to information he received from Barquer) that "The client still did not produce a sample. So the test was deemed as a refusal." (UX 1). Barquero denied that she told Watson that Grievant's test was deemed a refusal because he was unable to produce a sample (Tr. 1120).

program (Tr. 357). Watson recommended 28 days of inpatient treatment on the basis of the refusal to test, and based on what Grievant told him with respect to his drug and alcohol use and the consequences such use was having "from work, and personally and legally" (Tr. 357-358). Watson discussed his recommendation with Dr. Smith, who concurred with the recommendation (Tr. 358).[24] Watson also referred Grievant to Dr. Smith for the purpose of determining whether there was a medical explanation for his being unable to provide a urine sample (Tr. 455).

Watson explained his recommendation to Grievant in early February. Grievant responded that he felt that the treatment was not needed, but Watson told him that he was concerned that he had misused the Oxycontin on the day of the test (Tr. 361). On March 1, 2006, Grievant told Watson that his medical providers had recommended a medical leave of absence from his employment due to his diagnosis of Type 1 diabetes.[25] Grievant told Watson that he thought his diabetes condition may have been responsible for his inability to provide a urine specimen. Watson contacted Barquero and Smith to report Grievant's claim (Tr. 473). They both told Watson a week later that diabetes did not provide an explanation for the failure to produce a urine sample (Tr. 478). Watson testified that he did not have any knowledge at that time as to whether or not diabetes could induce symptoms of acting as if one is drunk or impaired, and he continued to believe that Grievant's behavior on January 24 was caused by Oxycontin use (Tr. 538). Since Grievant was going on medical leave, Watson decided to hold his recommendation in abeyance until Grievant was ready to return to work (Tr. 362). Grievant had neck surgery, stemming from the problems from the 2000 auto accident, several months after the day of the drug test (Tr. 421).

Dr. Smith testified that he consulted extensively with Watson about Grievant's treatment plan (Tr. 664). After Watson performed his assessment, he was "deeply involved" with the treatment. Dr. Smith did not, however, have any conversations with Grievant as part of this process (Tr. 712). The MRO stated that the Employer's process for a verified positive test result is that the employee must complete the treatment program that has been devised and produce a clean urine sample prior

---

[24] Watson spoke with Dr. Smith two days before Watson's discussion with Dr. Chan (Tr. 466).

[25] Watson testified that Grievant did not tell him at any time that he had been hospitalized due to the diabetes.

to being able to return to work. Dr. Smith testified that since Grievant had been on Oxycontin for a long time, it was highly likely that he had become physically dependent upon it (Tr. 668). The doctor further testified that pain and addiction is among the most difficult set of problems to treat in addiction medicine (Tr. 669). Dr. Smith concurred with Watson's recommendation that Grievant be sent to MPI, because MPI is the only facility in the Bay Area that has a pain management program with detox, and was therefore, in his view, the only facility equipped to deal with the complexities of Grievant's case (Tr. 672). He explained that it is very difficult to get off opiates, which is why methodone maintenance therapy is used. However, this option was not available in Grievant's case because he would not be allowed to work in a safety-sensitive position on methodone maintenance therapy because it involves taking a Schedule II drug (Tr. 671). Dr. Smith further stated that, in his opinion, the amount of Oxycontin that Grievant was being prescribed for his neck pain was inconsistent with working in a safety-sensitive position (Tr. 801). Dr. Smith stated that most programs only offer methadone maintenance programs, and that MPI was the only program that had a non-opioid maintenance pain management program (Tr. 673). In addition, he testified that MPI tests for prescription drugs, which many programs do not, and that this was an additional factor that indicated that MPI was the best choice for Grievant (Tr. 679). According to Dr. Smith, sending Grievant to an outpatient program would have virtually assured treatment failure (Tr. 868).

With respect to MPI's non-smoking policy, Dr. Smith explained that there is an increasing emphasis on encouraging smoking cessation in the addiction medicine community, and that patients often use unescorted smoking breaks to use drugs (Tr. 674-675). He also testified that holding addiction patients strictly accountable to a set of rules is crucial because the violation of rules is a part of addiction; patients must learn to change this pattern (Tr. 675).

Grievant's Participation in the Treatment Program

Barquero testified that in January of 2007 it came to her attention that Grievant's physician had given him a medical authorization to return to work because his diabetes was under control. At that point, she contacted Watson and asked him to resume the treatment process (Tr. 991). She also discussed the contents of Dr. Chan's letter with Dr. Smith.; she asked him whether diabetes could be a legitimate medical explanation for an inability to urinate, and he told her that, on the

contrary, diabetes would cause frequent urination (Tr. 993-994). Barquero stated that she learned around this time that Grievant had been under a prescription for Oxycontin in January of 2006.[26] In early 2007, Barquero contacted Dr. Margaret Chan to elicit information about Grievant's diabetes because she was concerned about whether he was insulin-dependent, which is prohibited for commercial drivers.[27] Dr. Chan reported that Grievant had prohibited the release of any information (Tr. 1021-1022). Barquero testified that the Employer's policy is that if an employee with a positive test is noncompliant with his treatment recommendations, he will be terminated (Tr. 1000).

Watson testified that he was notified that Grievant received medical clearance to return to work starting January 1, 2007, and that he had another in-person appointment with Grievant on February 1, 2007, to conduct a reevaluation. Following this appointment, Watson reaffirmed his original recommendation of 28 days of inpatient treatment at MPI because Grievant had not undergone any treatment that would help him deal with his pain issues in the interim (Tr. 364). Grievant told Watson during this appointment that his diabetes might have caused the refusal to test [illegible]. Watson replied that it was a non-issue because Dr. Smith (the MRO) had already made his medical determination on that question (TR. 495-496).

Watson recommended that Grievant begin treatment at MPI on February 6, 2007. Grievant had not taken any drugs in six weeks, that he was able to manage his pain, and that was in need of [illegible]. Watson told Grievant that he was concerned that pain management issues would arise again if he returned to work, and maintained his recommendation. Watson informed Grievant that MPI had a non-smoking policy. Grievant expressed considerable concern about this policy because he did not want to stop smoking and was not sure he could successfully withdraw while at MPI. Watson told Grievant that he would receive patches and medications to manage his withdrawal from nicotine, and that "steps will be taken to manage his withdrawal" (Tr. 369, 503). Grievant requested that he be placed in a non-smoking facility and/or

---

[26] Barquero testified that, to her knowledge, Grievant never informed a supervisor about this prescription, which is a safety violation under the DOT regulations (Tr. 1005).

[27] Grievant might have been assigned other work duties than working as a commercial driver if he returned to work with an insulin dependency.

a facility closer to his residence in San Mateo County. Watson denied this request because of MPI's pain management program, which did not exist at other facilities (Tr. 505). Ultimately, Grievant agreed to attend MPI, and started on February 6, 2007. Upon entry, he signed a document entitled "MPI Treatment Services Smoking Abstinence Contract," which stated:

> I agree to ABSTAIN from smoking cigarettes or chewing tobacco for as long as I am receiving services from MPI Treatment Services. I have been made aware that any use of cigarettes or chew during my treatment is a violation of this contract, and can result in being discharged from this facility.

Watson testified that his role as SAP, when a patient enters treatment, is to monitor progress and to make sure the patient is complying with all of the treatment recommendations. He typically stays in touch with the treatment providers at least once a week during treatment. Watson wrote out a series of "Return to Work Criteria" for Grievant, which he sent to the treatment staff at MPI. The document states:

> [Grievant] has a refusal to test under the DOT guidelines published in August of 2001 and has to meet the following criteria before he can return to work.
>
> - Abstain form the use of alcohol and drugs.
> - Participated in a drug-testing program while in treatment, and have a series of negative test[s], which includes aftercare.
> - Client has attended and participated in all components of treatment program, including 12-Step meetings.
> - Client understands and can demonstrate knowledge of the disease process, including cross-addiction.
> - Client understands and can demonstrate knowledge of the 12-Step program process.
> - Client has developed a plan to prevent relapse.
> - Client has accepted that abstinence from drugs and alcohol is required in order to maintain employment in a safety-sensitive position.
> - Client understands that the consequence of a positive drug test once he has been returned to duty is termination of employment.
>
> The client's Case Manager or Counselor is required to provide a treatment plan and weekly updates on the clients progress to Michael Watson.
> Please give a copy of this memo to [Grievant.]

Watson received a call while Grievant was in treatment from Terry Arnold, the program manager at MPI, who stated that Grievant had been caught smoking on the unit – a rule violation – and that staff members had at other times reported that Grievant smelled of smoke (Tr. 372-373). Arnold told Watson that if it happened again, Grievant would be discharged. Watson then requested and attended a meeting, conducted on or about February 12, with Grievant and his Case Manager,

Charlene Hendricks. Watson testified that the purpose of the meeting was to discuss the smoking incident and let Grievant know that if he was discharged from the program, it would be deemed noncompliance (Tr. 373). Prior to this meeting, Hendricks told Watson that Grievant had a positive drug test upon admission, and another positive test three days later for a different drug than the first positive test (Tr. 374). According to Watson, Hendricks stated that Grievant was very likely an addict, in her opinion (Tr. 567).

Watson testified that these test results called into question Grievant's statement that he had been off drugs for six weeks prior to starting the program. He also testified that Grievant initially claimed that he had not taken any drugs prior to coming to treatment, but later admitted it; based on Watson's experience, lying about drug use is an indication of addictive behavior (Tr. 569). Watson expressed his concerns about the positive tests and the violations of the smoking policy to Grievant during the meeting. Watson also told Grievant that he was at risk of being discharged from the program, which would mean that he would be deemed noncompliant with the treatment recommendations and thereby subject him to termination (Tr. 377). Finally, he gave Grievant a letter which stated as follows:

> I was notified by Terry Arnold on February 10, 2007 that you have violated the... MPI non smoking policy twice. You[r] next violation will result in you being discharged from MPI. If you are discharged from MPI for this violation or any other reason, a report will be made to Kathy Barquero, PG&E DOT Program Coordinator, this report may result in you being place[d] in the positive discipline process or being terminated from PG&E.[28]

Grievant told Watson during the meeting that he did not want to stop smoking and requested to be transferred to a smoking facility, but Watson denied the request (Tr. 510).

Watson received another call from Arnold the following week, on February 20, wherein Arnold advised that Grievant had been discharged from the program for leaving the unit without permission (Tr. 379). He received a written confirmation of the discharge from Hendricks,[29] which stated:

---

[28] Watson testified that he is instructed by the Employer to include the "may result in you being placed in the positive discipline process or being terminated from PG&E" language in these types of letters. The language used and included in the letter to Grievant reflects the Employer's policies, not the DOT regulations (Tr. 522).

[29] The letter is signed "Charlene Carter," who is the same person as Charlene Hendricks.

> This is to inform you that [Grievant] was admitted to MPI Treatment Services on February 6, 2007 and was discharged at staff request due to non-compliance of resident guidelines. He was referred back to you for further assistance.
>
> [Grievant] was adamant about not having any addiction to any drugs. He came here on February 6, 2007 and a urine drug screen was taken which once received was positive for Morphine... Another drug screen was taken on February 9, 2007 and this was positive for Morphine, Hydromorphone and Oxymorphone... The first negative test was on February 12, 2007. [Grievant] continues to claim that the last time he took any drug was mid-December and this was Norco. [Grievant] continues to say he is not an addict. There appears to be much suspicion.
>
> [Grievant] was discharged due to non-compliance of resident guidelines. He also signed a smoking abstinence contract he did not abide by. [Grievant] left the unit without staff to get coffee and was caught smoking. He was informed that this behavior would not be tolerated... He was discharged at staff request.

On the same day that Arnold called Watson about Grievant's discharge from the treatment facility, Grievant left a message on Watson's answering machine stating that he had been discharged and requesting that he be referred to another treatment program. Watson testified that Grievant sang the message, rather talking in a normal tone of voice, from which the SAP concluded that Grievant was not taking the process seriously (Tr. 381). Watson returned Grievant's call and stated that he was going to deem Grievant non-compliant and make a report to Barquero. He also wrote a two-page letter to Grievant dated February 22, 2007, which stated that Watson had reported to Barquero that Grievant was non-compliant (JX 2, 4). Watson's letter that his assessment that Grievant had a substance abuse problem, that Grievant needed to complete the treatment recommendations in order to return to work, and referred him to the Sequoia Center in Redwood City (JX 2, 4). Watson testified that he gave Grievant another referral because it is standard practice to offer further resources if a patient wishes to participate in treatment at a later date (Tr. 383). Watson wrote a similar letter to Barquero apprising her of the situation (Tr. 525).

Dr. Smith testified that MPI's decision to discharge Grievant from the program was consistent with common medical practice in the field (Tr. 678). In his capacity as MRO, he routinely examines lab reports from drug testing facilities. He testified that Grievant's February 6, 2007 test indicated that Grievant took a high dosage of prescription opiates for either maintenance or pain relief within the preceding three to four days (Tr. 684-686; EX 9). Dr. Smith further testified that Grievant's February 9 test indicated that after admittance, he took two additional unauthorized

prescription narcotics, Dilaoudid and Percocet, for which he did not have a prescription (Tr. 688). The MRO testified that this conduct was both dangerous (because it created a risk of a negative interaction with the detox drugs) and severely disruptive to the climate of the ward (Tr. 699).

Arnold, the Manager of Assessments at MPI, testified generally about MPI's procedures; he did not have any personal knowledge about Grievant. He testified that patients are given a copy of a smoking abstinence contract to sign upon admission, and that the rules at the facility are discussed at least once a week (Tr. 41-42). He further testified that when patients violate the smoking policy or the policy against leaving the facility, they are given a warning; that if they violate the policy a second time, it is grounds for discharge, coupled with referral to another treatment facility (Tr. 38, 45). MPI enforces the smoking policy and other rules strictly as a means of providing structure, which many of their patients are lacking (Tr. 43).

The Termination Decision

Watson contacted Barquero the day that Grievant was discharged from MPI and told her that Grievant had been found to be non-compliant (Tr. 1123). Barquero testified that, as the DER, she lacks discretion to take action other than termination when an employee is deemed to be non-compliant, based on the Employer's policies (Tr. 1001). She concluded that, based on Watons's report of Grievant's non-compliance, Grievant had to be terminated pursuant to express terms of the Letter Agreement (Tr. 1124). She wrote a memorandum to the Employer's Human Resources Department on February 28, 2007, which stated:

> The purpose of this communication is to formally notify you that an employee in your jurisdiction has been identified as being in non-compliance with respect to the DOT First Time Violator Policy. The employee is [Grievant.]...
>
> [Grievant] is an (sic) Miscellaneous Equipment Operator and is covered under Letter Agreement 04-16, dated April 15th, 2004, for commercial drivers, which states, "The refusal of an employee covered by this policy to comply with the specified guidelines shall result in the immediate discharge of that employee."
>
> In order to meet our obligations under the applicable DOT regulations requiring documentation of the disposition of all cases, please forward copies of any change of status forms that result from the resolution of this matter.

John Moffat has been Director of Labor Contracts for the Employer for one and one half years, and has been involved with numerous grievances related to the DOT testing procedures. He

testified that he is not aware of any situations where the Employer treated a refusal to test as anything other than a verified positive, and is not aware of any situations where the Employer did not terminate an employee upon a report from an SAP that an employee was non-compliant with the treatment process (Tr. 1172).

The Union's Case

Grievant has worked for the Employer since May of 1996; prior to 1997, he worked for Switzer, where he performed demolition and grading work as well driving a commercial vehicle. He has completed a course in the operation of heavy equipment and received a training certificate. He was a "field person" for the Employer for approximately six years, which involved operating a commercial vehicle with a Class A license, during which time he was supervised by Whatley, Hester, and Chappelone. He became an MEO in 2004, and was supervised by Whatley and Hester; the latter was his supervisor in January of 2006. Grievant described the MEO position as a "jack of all trades," and involved operating loaders, back hoes, mini-excavators, commercial vehicles, and other heavy equipment. Grievant estimated that he took and passed approximately 13-14 random drug tests during his tenure with the Employer.

Grievant sustained neck injuries as a result of an automobile accident in 2000. He was treated by Dr. Margaret Chan, who prescribed Oxycontin to treat pain resulting from the neck injury as well as pain from a previous back injury that resulted from being hit by a backhoe while on the job.[30] Grievant testified that he took, and continues to take, Oxycontin daily, starting in about 2001 (Tr. 1348). Grievant testified that he told Whatley that he was on medication shortly after the accident, but did not identify the type of medication and did not report that the medication had a warning label relating to driving and operating heavy machinery (Tr. 1203, 1400). Grievant also did not notify any other representatives of the Employer that he was on medication; however, listed his Oxycontin prescription on his medical exam forms for the DMV, information he believes the DMV

[30] Dr, Chan initially prescribed Vicodin, and then started prescribing Oxycontin at a later time when Grievant's neck pain persisted (Tr. 1330-1331).

transmits to the Employer (Tr. 1204).[31] Grievant testified that he experienced urinary retention due to the Oxycontin on more than one occasion prior to January of 2006, which lasted five to ten minutes (Tr. 1338, 1341). He stated that in January of 2006, he was likely physically dependent on the Oxycontin, and had periodically broken into a sweat when he had tapered off of it (Tr. 1404).

Grievant called in sick on several consecutive work days prior to January 24, 2006, and made a request to use vacation time instead of sick leave, which was granted. He testified that he was feeling drained and lethargic, was constantly thirsty, and that cysts had started to break out on his skin (Tr. 1206). He recalled that he still felt tired and thirsty when he went to work on the morning of January 24 (Tr. 1207). Grievant testified that he did not take any drugs outside of his normal course of treatment that morning, or the previous evening (Tr. 1211). He stated that he should not have gone to work that day, but believed that he should because he had already missed several days and was at risk of being subject to discipline for attendance. Grievant's wife told him that he should not go to work that morning, but he told her that he would be alright (Tr 1208).

Grievant arrived at work that day at approximately 5:40 a.m., for a 6:30 a.m. start to his shift. When he arrived, he went to the estimator's room to get a cup of coffee. He testified that he did not realize at the time that he was having problems, i.e., staggering, when getting the coffee, but he knew that he was not "feeling right." Grievant recalled that he spilled the coffee, but was not aware of the extent to which he appeared to be impaired (Tr. 1210-1212). After getting his coffee, Grievant went outside and talked to another employee, and was then called inside to speak to Hester. He recalled that a clerk asked him if he was feeling alright, and he responded that he felt sick and that his medication might be acting up (Tr. 1214). Grievant then went to Hester's office, and Hester and Chappelone asked him how he was feeling and if he was having any problems. He told them that he was feeling not quite right, and that he was, and had been, sick (Tr. 1215). Grievant testified that he was sitting with his elbows on his knees staring into the ground, that he heard Hester's and Chappelone's voices coming "in and out," and that eventually he was told that he was going to be taken for drug testing (Tr. 1216-1217).

---

[31] Barquero testified that the DMV does not transmit any specific medical information to the Employer, but only sends notification confirming that an employee has a commercial license (Tr. 1521).

Whatley drove Grievant to the clinic to be tested. Grievant did not recall walking into the testing facility, and did not recall other events that happened on January 24. Grievant did recall that after arriving, he was asked to urinate but that he could not at that time (Tr. 1220). He also recalled that he had trouble filling out his paperwork because he was not feeling well (Tr. 1221). Grievant testified that after he completed the paperwork, and about an hour after arriving at the clinic, he was given a Breathalyzer test and was told that he had passed . After taking the Breathalyzer test, he was asked again by one of the two collectors at the facility if he was ready to urinate, and he said that he could not (Tr. 1223). He stated that he then went to the bathroom unaccompanied to wash his face and hands because he was feeling hot. Grievant recalled that before he entered the bathroom, Whatley said something to the effect of "what are you doing? You got a test (sic)" (Tr. 1224). Grievant testified that neither of the collectors he dealt with said anything to him about going to the bathroom to wash his face at that time. Grievant then returned to the lobby. He was told he that had not finished his paperwork, and proceeded to complete it (Tr. 1225).

Grievant was subsequently given a cup and sent to the bathroom to produce a specimen. He testified that he was sent to the bathroom with a cup twice, but was unable to recall the specifics of either instance, or how far apart they were temporally (Tr. 1227). He recalled standing in the bathroom and staring at the wall, thinking to himself that he had to pee but he was unable to do so. He also recalled Whatley exhorting him to complete the test, ands that during one of the tests he was able to produce a small amount of urine, which he gave to one of the collectors. However, the sample he produced was not a sufficient amount to meet the test requirements; he recalled that one of the collectors said that it was not enough urine (Tr. 1226, 1228, 1414).

Grievant did not recall the collectors calling for him to come out of the bathroom, or at any time appearing to be upset with him (Tr. 1226, 1229). He also did not recall whether or not the collectors gave him a time limit for how long he could stay in the bathroom (Tr. 1412). Grievant testified that he was still quite thirsty while at the clinic, and that he drank water from a water cooler in the lobby of the clinic (Tr. 1231-1232). He recalled that at a certain point, Whatley told him that he was drinking too much water and instructed him to stop. Grievant also recalled that he received at least two calls from Barquero while at the clinic. She told him that he had to give a sample, but

he explained that he was unable to do so (Tr. 1230). On the last call, Barquero told him that if he did not give a sample it would be considered a "refusal to test" (Tr. 1231). Grievant testified that no one told him while he was at the clinic that he had three hours to complete the test, or that he was entitled to drink up to 40 ounces of water. He recalled that he finally left the clinic at approximately 2:00 or 2:30 p.m. (Tr. 1230).

Grievant went on a medical leave of absence in February for neck surgery. On March 29, 2006, before the surgery, he was hospitalized as a result of a diabetic episode and was diagnosed with Type I diabetes (Tr. 1292, 1294, 1469; UX 14). Grievant went to the emergency room after experiencing intense thirst, nausea, and frequent urination; in addition, his mouth had turned white (Tr. 1303, 1308). He was told that was in ketoacidosis, a state of dangerously low blood sugar, at the time of his admission (Tr. 1294; UX 14). Grievant was also found to have polyuria, and had experienced a weight loss of 30 pounds over the prior four weeks (Tr. 1295; UX 14).

Grievant was released to return to work in January of 2007 (Tr. 1271). Watson told him that he was required to attend rehabilitation at a facility that had been chosen before he would be permitted to return to work. Prior to this conversation, Grievant had discussed tapering off the Oxycontin with Dr. Chan (Tr. 1465). Grievant testified that Watson did not tell him that he could or would be terminated if he failed to attend or complete rehabilitation, or that the rehabilitation facility had a non-smoking policy. He placed a call and talked to the receptionist at Meritt Peralta, who told him that it was a non-smoking facility, after which he called Watson back, expressed concern about the non-smoking policy, and asked if he could go to a different facility closer to his residence in Escalon. Watson denied his request and told him that he should not worry about the smoking issue – that if it became an issue, Grievant should not worry about it. Grievant testified that he accepted Watson's assurances and checked into the facility on February 6, 2007 (Tr. 1274).

Grievant denied telling Watson or the MPI staff that he had not taken any pain medication for six weeks at the time he started at MPI; he still had a prescription for Oxycontin.[32] Grievant also testified that MPI staff did not ask what prescription medication he was taking when he checked in,

[32] Grievant testified that he explained to the MPI staff that he had been weaned off a drug in December, but that he still on other medication (Tr. 1484).

but he told them that he was being prescribed medication by Dr. Chan (Tr. 1481). When he checked in, Grievant was notified of the non-smoking policy. He told Arnold that he was a smoker but that he would "give it his best shot," and further stated that Watson had said that he would "take care of it" if it became an issue (Tr. 1275). Grievant was not permitted to take any medication prescribed by Dr. Chan at the rehabilitation facility. He experienced some pain as a result, but no more pain than he had been dealing with since the auto accident. Grievant did want to attend rehab and did not believe he needed it, but stated that he was willing to do so if required.[33] Grievant stated that he did not take any prescription pain medication while he was at MPI, and that he did not understand how his February 9 drug screen was positive for hydromorphone and oxymorphone (Tr. 1484-1485).

Grievant testified that the MPI's non-smoking policy did, in fact, become an issue, as he had problems complying with that policy (Tr. 1275). He was given nicotine patches, but they were ineffective. He was also given nicotine gum when he explained that the patches were ineffective, but the gum also did not work in the allowed doses (Tr. 1276). Grievant testified that during the second week, he periodically smoked in an outdoor break area[34] – he denied that he smoked inside the facility – and the staff at the facility smelled the smoke on him (Tr. 1277). He subsequently had a meeting with Watson and Charlene Hendricks, who worked at the facility, and he reminded Watson of their earlier discussion; according to Grievant, Watson replied that it was "against my recommendations now" (Tr. 1279). Grievant asked Watson and Arnold to be referred to another facility, but Watson denied his request. Grievant told Arnold that he could be fired, and Arnold told him that he would discuss the matter with Watson (Tr. 1281). Grievant testified that Watson did not subsequently contact him with respect to a referral to a different facility (Tr. 1282).

---

[33] Grievant's notes have an entry dated February 7, 2007, the day after he entered MPI, which states: "Amber called Aaron. What can I do to get S. out of there?! Said to call Mike Watson & get a copy of S's file." An entry dated February 12, 2007, states: "A[mber] called Tom Delzell to find out status. Left msg. said don't feel Hunter Stern is representing S ; very well as his union rep. Would like to know who else can represent S ? Asked to please advise me on status of situation? What else needs to be don to get S out of there?" The next entry states: "Sam Tanini [number 2 official for the Union] called A[mber] back... Told him pls. call Char at MPI as she can give status that she doesn't believe S is an addict and that he shouldn't be there." Grievant testified that he did not want to be in treatment and that Hendricks told him he did not need to be in treatment (Tr. 1514).

[34] MPI had only recently become a non-smoking facility. The patio area was formerly the designated smoking area for MPI patients (Tr. 1486).

When Grievant was discharged from the facility, Hendricks informed him that Watson would contact him and arrange for him to go to another facility (Tr. 1283). On the day he left, he contacted Watson, who stated that he would get back to him. Grievant ultimately received a letter from Watson in mid to late March, which had been sent on February 27 (Tr. 1285). The letter contained a referral to the Sequoia rehabilitation center. Grievant enrolled in a program at Sequoia which was to start on March 22, the day he was terminated (Tr. 1287). Due to his termination, Grievant did not have medical insurance and was therefore unable to enter the program (Tr. 1287).

The Union introduced a hearsay report by a forensic toxicologist, Dr. Vina Spielher, who reviewed documents related to this matter. The "analysis and conclusions" of the report state:

> The expected specific signs of opiate intoxication (pinpoint pupils that are non-responsive to light and a low raspy voice) were not observed or were not noted by any means of the witnesses. The DOT Reasonable Suspicion check list signed by Cleve Whatley and Tim Chappelone did note that Yes "the employee's pupils are constricted or dilated" but does not indicate which was observed constricted or dilated. This critical observation was not checked as yes or no at all on the Supervisor's Behavioral Observation checklist signed by Raymond Hester and Cleve Whatley. Mr. S was observed to be wearing sunglasses inside the office. Wearing sunglasses in normal room light is often associated with dilated rather than constricted pupils.
>
> The principal signs noted by all the witnesses were slurred speech, impaired balance and motor function, excessive drinking of water, drowsiness and confusion. These can be signs of hyperglycemia or high blood glucose (sugar) in people with diabetes. If untreated, hyperglycemia can lead to diabetic ketoacidosis, diabetic coma and death. According to Wellpoint Web-MD, the early signs of hyperglycemia in diabetes include increased thirst, headaches, difficulty concentrating, blurred vision, frequent urination, fatigue and weakness. Signs and symptoms of diabetic ketoacidosis are dehydration and excess thirst, excess urination, vomiting, abdominal pain, drowsiness, difficulty breathing, fruity smell to the breath and unconsciousness. [Citations omitted.]
>
> Based on the witness statements and descriptions of Mr. S 's behavior, it is not possible to determine whether his confused and uncooperative behavior was due to drug or alcohol intoxication or to an episode of hyperglycemia form his, at that time, uncontrolled diabetes. Blood or urine drug tests and/or glucose tests are necessary for that differential diagnosis. It is my opinion that his signs and symptoms were not due to opiate intoxication from his prescription oxycodone or from any other opiate narcotic. (UX 24.)

CONTENTIONS OF THE PARTIES

The Employer

The record unequivocally establishes that there was just cause to terminate the Grievant. The Employer proved that Grievant engaged in the conduct which resulted in his termination. He arrived at work on January 24, 2006, exhibiting symptoms of intoxication, and was taken for drug and

alcohol testing. At the clinic, he refused to follow the instructions of the collector, and was deemed non-compliant. He was accordingly referred to a treatment facility, where he violated the rules that he had agreed to comply with. Grievant admits that he was impaired in the workplace and that he violated the rules of the treatment facility. As a result of the above misconduct, he was ultimately terminated. All of the consequences and penalties imposed upon him were dictated by the express terms of the Letter Agreement, as well as by applicable DOT regulations. Since the Employer has proven that Grievant committed the alleged offenses and that the discipline imposed was not unreasonable, the grievance must be denied.

The Employer had more than adequate grounds to require Grievant to submit to reasonable suspicion testing on January 24, 2006. Under the Employer's DOT testing program, drug and alcohol testing is required where the Employer has reasonable suspicion that a covered employee, such as Grievant, is under the influence of drugs or alcohol. Whatley and Chappelone clearly had such reasonable suspicion based upon Grievant's conduct that morning. Both noted that Grievant's speech was slurred, his eyes were red, he staggered while walking, he did not appear to be coherent, and he repeatedly fell asleep. Dr. Smith testified that these symptoms are common indicators of Oxycontin intoxication. As such, the Employer had ample reasonable suspicion that Grievant was intoxicated, and correctly determined that he was required to undergo drug and alcohol testing. T he Union's argument that Grievant should have undergone a Fitness for Duty examination instead of reasonable suspicion testing is a red herring and has no merit. The Employer is required to conduct reasonable suspicion testing as a safety sensitive employer, and in any event a fitness for duty evaluation also would have resulted in a drug and alcohol test based on the same criteria that resulted in the test under the DOT regulations.

After being taken to the clinic, Grievant refused to cooperate with the collectors, who terminated the collection process and declared Grievant a refusal to test. In doing so, the collectors were in full compliance with the Letter Agreement and with the applicable DOT regulations, both of which state that a donor is deemed a refusal to test if he fails to cooperate with the collection process. Indeed, the Letter Agreement and the DOT regulations state that the collector "must" terminate the collection process in such cases.

The collectors terminated the collection and deemed Grievant "out of compliance" (synonymous with "refusal to test") because he intimidated the collector and refused to follow her instructions. Consistent with the Letter Agreement and the DOT regulations, the collector set a reasonable time limit of four minutes for Grievant to be in the restroom. Grievant ignored the collector's instructions with respect to the time limit on two separate occasions, when he refused to exit the restroom. His conduct in this regard was disruptive to the testing process, as he refused to abide by a rule established to prevent tampering. Barquero's testimony leaves no doubt that after the first instance, Grievant was clearly warned that if he did not abide by the four minute time limit, he would be deemed a refusal to test, which would be treated the same as a positive test result.

The Union cannot credibly dispute that Grievant engaged in the conduct that resulted in the determination of a refusal to test. Whatley testified that he was present on two occasions where the collectors ordered Grievant to come out of the bathroom and he refused to do so. Finucane likewise testified that she was present on the second of these occasions, that she instructed Grievant to come out of the bathroom, and that he refused to follow her instructions. Whatley's and Fincane's testimony is further corroborated by Sotelo's contemporaneous written statement, and by Barquero's and Dr. Smith's testimony, as to what Sotelo told them. Although Grievant denied that he failed to follow instructions, he admitted that his recollection of the entire day was hazy and his testimony therefore merits little credence.

The Union may argue that the collection process should not have been terminated and deemed a refusal because it was a harmless error in that the purpose of the time limit is to prevent tampering with a sample, and Grievant did not produce a sample. However, this argument must be rejected as it lacks any support in the Letter Agreement or the DOT regulations. Nothing in either authority states that a failure to cooperate must be linked to proof of tampering, or that a failure to cooperate must materially frustrate the integrity of the collection process. Rather, the Letter Agreement and the DOT regulations contemplate a broad interpretation of what constitutes a refusal to test: a refusal to test occurs "anytime" an employee fails to cooperate with "any part" of the collection process. Here, Grievant *twice* refused to cooperate with the time limit, and therefore there can be little doubt that he was a refusal to test. To conclude otherwise would be to add an exception

to the circumstances which the Letter Agreement states constitutes a refusal to test, which is beyond the Arbitrator's authority. It clearly states that a refusal occurs "anytime" an employee fails to cooperate, and simply does not contain any exceptions regarding the purpose of the various rules. To the extent that this result seems harsh, it is important to consider the important public safety considerations underlying the testing procedures. The Employer has approximately 6,000 employees working in safety-sensitive positions, and the drug and alcohol testing program is a crucial component of its efforts to ensure employee and public safety. As such, strict enforcement of the testing policy is entirely appropriate. The wisdom of strict enforcement is particularly evident in this case. The evidence irrefutably demonstrates that Grievant was impaired in the workplace. He admitted that one wrong move in the performance of his duties could lead to serious injury or even death. On the morning of January 24, he was incoherent, could barely stay awake, and then repeatedly failed to cooperate with the collection process despite clear warnings as to the consequences of such failure. Therefore, there can be no doubt that the Employer was justified in concluding that Grievant was a refusal to test.

Dr. Smith's verification, as MRO, of the refusal to test determination was fully justified, despite various Union objections. First, the Union notes that several parts of the CCF were filled out incorrectly at the clinic. It is conceded that the collector made several mistakes in filling out the CCF, e.g., the form indicates that a sample was collected in the correct temperature range and that it was released to Airborne Express, but these mistakes were not "fatal flaws" pursuant to the DOT regulations that warrant a cancellation of the test. The only errors on a CCF that can cause a test to be cancelled are errors that create doubts as to the integrity of a submitted specimen. Obviously, no such error occurred in this case, because no sample was collected. Indeed, the regulations provide that Dr. Smith would have been *prohibited* from canceling the test based on these errors. The regulations state that "no person concerned with the testing process may declare a test cancelled based on an error that does not have a significant adverse effect on the right of the employee to have a fair and accurate test."

Here,, Dr. Smith took appropriate steps to correct the errors, consistent with DOT regulations. Thus, when he observed contradictory information on the CCF, he contacted Barquero,

who explained to him that the test had been terminated due to Grievant's refusal to cooperate with the instructions he had been given. Dr. Smith also asked the collectors to submit affidavits recounting the incident, which were indeed submitted and verified that Grievant's misconduct had resulted in a refusal to test. (The Union's attempts to claim that these statements were not sent contemporaneously to the collection since they have fax time stamps with a 2007 must be rejected, as Barquero clearly testified that she asked Finucane to fax her copies of the original statementss a year later.) Dr. Smith also considered Grievant's diagnosis of diabetes, although he was not even required to do so, and concluded that diabetes would have have been a valid medical reason for Grievant's claimed inability to urinate; he testified that an acute diabetic episode would have caused frequent urination, not an inability to urinate. He therefore made a good faith effort to verify the refusal to test result. Once the MRO verifies a test result, the Employer is legally bound to abide by that determination.

As a result of the refusal to test determination, Grievant was required to comply with the treatment recommendation of Watson, the SAP, in order to avoid discharge. Pursuant to the DOT regulations, an employee who receives a positive test result must undergo an examination and successfully complete treatment as determined by the SAP in order to return to work. The Letter Agreement states that for a first time violator of the drug and alcohol policy, the employee must "complete the mandated return to duty process prescribed by the [SAP.]" Grievant was therefore required to comply with Watson's treatment recommendation in order to return to work.

After conducting a face to face clinical assessment of Grievant, Watson determined that Grievant's Oxycontin use presented a threat to public safety and recommended that Grievant undergo a 28 day in-patient treatment program at MPI, followed by one year of aftercare. The Employer had no authority under the DOT regulations to alter or modify Watson's recommendation. Therefore, despite the Union's contention that Watson's treatment recommendation was unjustified, it is not subject to review, and any finding of impropriety in the recommendation cannot serve as a basis for determining that the Employer lacked just cause for terminating Grievant's employment.

The Employer contends that the record reflects that Watson's recommendation was eminently reasonable and proper. Watson chose MPI because it is one of the top programs in northern

California that specializez in addiction and pain management. Dr. Smith, who has practiced addiction medicine since 1965, fully concurred with the recommendation. He also concluded that Grievant was not just dependent upon Oxycontin, but appeared to be addicted to it, as demonstrated by the fact that his use appeared to be having life-damaging consequences. Grievant's own physician confirmed that Grievant was physiologically dependent upon Oxycontin and planned to taper him off. Finally, Grievant himself testified that he was "sure" that he was physically dependent Oxycontin as of January 24, 2006.

The Union's suggestion that Watson's recommendation was improper because it involved a referral to a non-smoking facility has no merit. Dr. Smith testified that the addiction medicine field has for a long time moved toward non-smoking policies in treatment facilities, as smoking-related illnesses are a leading cause of death among alcoholics, and there is evidence that smoking increases relapse rates. As such, Watson's referral was consistent with addiction medicine practices. Moreover, the DOT regulations specifically authorize the imposition of lifestyle restrictions on rule violators. Therefore, any argument that Grievant's termination was unjustified because he was referred to a non-smoking facility must be rejected.

When Grievant entered treatment on February 6, 2007, he tested positive for morphine, despite having claimed that he had been "clean" for six weeks. Three days later, he tested positive morphine, hydromorphone, and oxymorphone, indicating that he had taken prescription narcotics while in treatment. When confronted with the test results, Grievant lied and stated and that he had not taken any narcotics immediately before or during treatment. These facts reinforce the soundness of Watson's recommendation.

Finally, the Union's contention that Grievant's discharge from MPI was unjustified and cannot be a justification for termination is unavailing. Grievant signed two contracts upon entering MPI whereby he agreed to adhere to numerous rules. Watson and Dr. Smith both testified that the rules were consistent with standard addiction medicine practice. Further, Grievant had notice, by signing the contract, that he was prohibited from smoking while in treatment, and that breaking the rules could lead to discharge from the facility. Grievant admitted in his testimony that he violated the rules that he was bound to follow on multiple occasions, even after receiving a second chance.

The drug test results clearly demonstrate that he violated the rules by taking prescription narcotics. He also admits that on several occasions he deliberately evaded security cameras in order to access an outside landing where he could smoke cigarettes.

Both of these violations were brought to his attention at a February 12, 2007 meeting that Watson arranged. Grievant was explicitly instructed that further rule violations would result in his discharge from MPI, and that such a discharge would cause Watson to report him as non-compliant, which could result in the termination of his employment. Watson reiterated this warning in a letter that Grievant was given shortly thereafter. Nevertheless, Grievant subsequently violated the MPI rules again, by his own admission, and was accordingly discharged from the facility. He was discharged for leaving the ward without permission in order to smoke a cigarette. Accordingly, Watson sent a letter to Barquero, advising her that Grievant had been discharged for non-compliance with resident guidelines, and that he was therefore out of compliance with his treatment recommendation. Barquero recommended to labor relations that Grievant be terminated. The Letter Agreement states clearly that "A non-compliance letter from a Substance Abuse Professional will result in discharge." Therefore, the termination decision was at that point automatic, and it is clear in these circumstances that the Employer had just cause to terminate Grievant.

Although termination is the harshest consequence an employer can impose for employee misconduct, in this case Grievant's termination was for just cause and should not be disturbed. The standards of conduct and rules to which Grievant was held accountable were clearly set out in the Letter Agreement and he was given fair warning of the consequences of failure to abide by the rules and standards. Nonetheless, he reported to work in an impaired state, failed to cooperate with a mandatory drug and alcohol test, and subsequently failed to comply the SAP's treatment recommendation. Accordingly, the Employer was justified in terminating his employment, and indeed was legally obligated to do so under the DOT regulations. Based on the foregoing, the grievance should be denied in its entirety.

The Union

A careful, detailed review of the record in this case indicates that the Employer mishandled Grievant's reasonable suspicion drug test, and ultimately wrongfully terminated his employment.

The Employer's handling of the entire case was rife with mistakes. The Employer disregarded the written protocols regarding Grievant's drug test, wrongfully placed him in the MPI program, interfered in his legitimate medical care, and ultimately terminated his employment after a wrongful discharge from the treatment program. In light of the Employer's numerous mistakes and misrepresentations, the Board should sustain the grievances and reinstate Grievant.

During his ten years of employment in a safety-sensitive position, Grievant was required to submit to approximately 13-14 DOT drug tests, and passed each of them without incident. During much of this time, he was being prescribed Oxycontin by his physician due to a work-related accident. On January 24, 2006, he arrived at work feeling lethargic, thirsty, and generally "not right." He believes he should not have come in to work that day, but was concerned about receiving discipline in light of prior absences. He did not take any drugs outside of his regular, prescribed treatment plan. When employees report to work with a physical or medical problem, the Employer's supervisors conduct a Fitness of Duty examination. Chappelone began to conduct such an examination, believing that there was a problem with Grievant's health. However, this process was interrupted by a call from Barquero, who instructed Chappelone and Whatley to instead fill out a DOT reasonable suspicion form and directed them to send Grievant for a drug and alcohol test. It is clear that had they been left to their own observations and judgments, the supervisors would have treated the matter as a medical situation. A fitness for duty examination would have far more appropriate, given that Grievant suffered at that time from undiagnosed diabetes, the symptoms of which are nearly identical to the symptoms of intoxication.

Grievant was thereupon escorted to a drug testing clinic by Whatley, where he was unable to produce a sufficient urine sample. Whatley is the only witness who was in Grievant's presence throughout the testing process. In addition, his testiony about the event is anchored by a contemporaneous statement. As such, Whatley is by far the most credible and reliable reported of what occurred at the testing facility that day.

It is clear from Whatley's accounts that the collectors administered the three-hour shy bladder procedure. The procedure began at 10:42 a.m., when he failed to produce sufficient urine in his first attempt. The collectors informed both Grievant and Whatley shortly thereafter that they had started

the shy bladder process, and would make further collection attempts at ninety minute intervals. During his time at the testing facility, Grievant neither received nor violated any directive or protocol regarding his time spent in the bathroom. Whatley testified that the collectors never gave Grievant any instructions or notice as to the amount of time he was expected or permitted to be in the bathroom. Barquero similarly testified that she had no knowledge that the collectors at any time informed Grievant that staying in the bathroom longer than four minutes could result in a refusal to test determination. Whatley estimated that during his attempts to produce a sample, Grievant was in the bathroom for ten minutes at most, and that on every occasion he exited the bathroom as soon as Whatley requested that he do so. At no time was there any suspicion that Grievant was using his time in the bathroom to relieve himself without using the specimen container, or to tamper with any specimen.

Even if the purported "four-minute rule" had been adequately communicated to Grievant, it was grossly misapplied to his situation. Finucane mistakenly believed that the "four-minute rule," which is the amount of time permitted by the protocols between urination and temperature measurement, somehow also restricted the amount of time Grievant was permitted to be in the bathroom during each attempt. She later confirmed at hearing that the actual purpose of the four-minute rule is to prevent tampering. However, she was unable to explain, or even to understand, how the four-minute rule could be violated in the absence of a specimen, other than to insist that "those are the rules." The Arbitrator correctly noted that, "if there is no specimen, it doesn't appear to me that the rules apply for their intended purpose." Moreover, this mistakenly-applied rule is different from the Employer's own guidelines for urine specimen collection, which state only that "the collector may set a reasonable time limit for the employee to be inside the bathroom and this time frame should be explained to the employee." Even had it been proper for the clinic to strictly impose a four-minute time limit, there is no evidence that anyone bothered to explain it to Grievant. Further, the Employer's testing guidelines clearly state that the consequence of improper conduct in the bathroom relates the conduct of an observed test, and not to automatically end the test and declare a refusal. As such, there was no legitimate basis upon which to conclude that the amount of time Grievant spent in the bathroom constituted a refusal to test.

Grievant's allegedly disruptive behavior at the clinic also did not result in a refusal to test determination. Although Barquero and Dr. Smith attempted to characterize Grievant's conduct as belligerent and threatening to the collectors, the testimony of Whatley and Finucane – who were actually present – does not bear out these allegations. Finucane testified that Grievant raised his voice "only in the bathroom" in order to express his frustration at being unable to urinate. She stated that Grievant did not at any time become threatening or physical. To the extent that Grievant behaved in a rude manner, such conduct would not constitute a refusal to test.

In fact, the collection process was ended because Grievant completed the three-hour shy bladder process – not because his conduct resulted in a refusal to test. Finucane and Barquero simply lied after the fact in order to cover up their mistakes. It is clear from Whatley's accounts that Grievant was at the clinic for about four hours, including the three-hour shy bladder process, and that he completed the shy bladder process. His testimony is supported by his contemporaneous account, in which he wrote that he called Barquero "before [Grievant's] last attempt to urinate. She told him that if [Grievant] didn't provide a sample, the test would be considered a false positive." Whatley also testified in the LIC hearing that "the clinician told me that [Grievant] had reached the three-hour time limit to produce a specimen so we were free to leave." After Grievant's last attempt, the collectors told him that the test was positive because "he didn't provide a sample." All of Whatley's statements confirm that the test ended due to the exhaustion of the shy bladder process.

The contrary testimony of Barquero and Finucane – that the test ended because of Grievant's misconduct – constitutes blatant, self-serving lies. Watson's detailed, contemporaneous notes of his conversation with Barquero state that "the client still did not produce a sample[,] so the test was deemed a refusal," and he independently recalled that Barquero told him that the test was deemed a refusal because Grievant did not produce a sample. Barquero's and Finucane's stories do not make any sense. Finucane testified that the only basis for Grievant being out of compliance was that he spent too long in the bathroom, and could have been tampering with a specimen. However, this explanation is simply absurd, given that no sample was actually produced, and flies in the face of Whatley's contemporaneous account. Moreover, the DOT regulations require that collectors "document the refusal in the CCF," which did not occur.

Grievant's CCF contains numerous, severe errors which reflect misconduct and fraud on the part of the collectors. Under the Letter Agreement and the DOT regulations, the CCF serves as the core documentation for the implementation of and compliance with the required procedures for collecting urine specimens. It is undisputed that Sotelo disregarded numerous protocols when filling out Grievant's CCF in advance of any collection. Thus, the CCF indicates that a sufficient urine specimen was obtained at 10:42 am, that it was split into two containers, that it was measured at the appropriate temperature within four minutes of urination, and that it was shipped via Airborne Express. None of these entries are accurate, and even Finucane testified that these errors, particularly verifying the correct temperature, affect the integrity of the test. On top of these glaring errors, the CCF fails to document the time and circumstances of each collection attempt, as required by the Letter Agreement and the DOT regulations. It is undisputed that the shy bladder process was at the very least commenced, but no notations were made regarding *any* of the collection attempts.

The Employer also failed to obtain timely or adequate "affidavits." Neither Barquero nor Dr. Smith obtained anything resembling a signed "affidavit," and did not even secure any written statements that day or even that year. Barquero offered contradictory and nonsensical testimony concerning her receipt of the written statements from the collectors. The only writings provided by the collectors are the unsigned, undated, unsworn, conclusory, and cursory statements that were faxed to the Employer a year later in preparation for the LIC hearing. Barquero insisted at first that she received these written statements on January 24, but later conceded that she had not in fact received any statement in 2006, and explained that "I don't need it." She went on to claim that the "verbal statements" she supposedly received on the phone on January 24 were sufficient to serve as "affidavits." Moreover, Sotelo's statement does not even state that Grievant was declared a refusal to test, which only bolsters the conclusion that the test was in fact terminated due to the completion of the shy bladder process.

The Employer failed to conduct the mandatory procedures for shy bladder cases. In such cases, the DOT regulations require the MRO to personally interview the employee to determine if a legitimate medical condition was responsible for the failure to produce a urine sample. It is undisputed that Dr. Smith failed to conduct such an interview. Nor did he conduct a timely medical

analysis, on the basis of the mistaken belief that the shy bladder process was not concluded. Rather, without an interview or any real analysis, Dr. Smith determined on the day of the test that Grievant's result was a refusal to test. His collection and review of the facts supporting this determination did not occur until much later. Indeed, no serious analysis of whether there was a medical explanation for Grievant's inability to urinate ever took place. Dr. Smith never subjected him to a medical examination, and never directly consulted his physicians. The only information he received, in an after-the-fact perfunctory analysis, was filtered through Barquero. The record contains conflicting medical opinion, from Dr. Chan and Dr. Smith, as to whether Grievant's untreated diabetes could have caused his behavior on January 24, and the Employer never undertook a sufficiently serious analysis to clear up that conflict. The record is therefore left fatally ambiguous with respect to a key issue in the Employer's case against Grievant.

The Employer must show, as part of its just cause burden of proof, that the DOT regulations and the guidelines in the Letter Agreement were complied with. It cannot do so in this case. It is well-established that arbitrators have full authority to rule that there is no just cause to terminate an employee on the basis of the failure to comply with drug testing procedures. In the arbitration award PG&E (Termination of Deborah Allen), Arb. No. 287, involving similar facts, Arbitrator Silver held that the shy bladder procedures had been invoked and were applicable, that the Employer (and Dr. Smith) improperly deemed the test in that case a refusal, and that Dr. Smith's consequent failure to conduct the medical examination required by the shy bladder procedures precluded a finding that there was just cause for the employee's discharge on the basis of the test. This case contains even more numerous and serious procedural defects than the Deborah Allen case. Accordingly, the appropriate finding is that the Employer did not have just cause to terminate Grievant in view of the multiple procedural violations involving the drug test.

Grievant was referred to Watson on the mistaken basis that he was guilty of a refusal to test, and Watson then made the misguided decision to subject Grievant to an inpatient detoxification program that was contrary to his medical needs and interfered with a longstanding course of treatment for his chronic pain. Watson testified that he understood that Grievant had a legitimate, medically appropriate prescription for Oxycontin, yet made the unjustified determination that he was

a drug addict and substance abuser. Dr. Smith testified that some physical dependency is a natural consequence of five years of being prescribed narcotics, and such dependency only becomes addiction when the medication causes "life-damaging consequences." However, the only "life-damaging consequence" that Dr. Smith was able to point to was Grievant's behavior on the day of the drug test, which could very well have been a diabetic episode. Further, Watson's recommendation of detox was contrary to the recommendations of Grievant's physicians, according to his own notes. It was also Dr. Smith's medical opinion that Grievant needed to stay on opiates to manage his severe pain. It is absurd, then, that Watson's consultations with Dr. Smith led to a recommendation of mandated detoxification. Accordingly, Watson's recommendation was severely misguided and cannot be justified. The Letter Agreement and the DOT regulations do not prohibit Grievant was continuing to work while taking prescription medication. Barquero and Watson both agreed that there is no general ban on the use of narcotics in safety-sensitive jobs. It would have been appropriate for the Employer to conduct a medical evaluation of Grievant in order to determine if he could perform safety-sensitive duties given his legitimate prescription, but it was wrong to insist that Grievant undergo detoxification, contrary to the medical advice of his physicians.

The Employer exceeded its authority under the Letter Agreement and the DOT regulations when it forced Grievant to attend a non-smoking treatment program. Watson directed Grievant to attend MPI, knowing that it was a non-smoking facility and that Grievant was a smoker. It is undisputed that Grievant immediately told Watson that the non-smoking policy would be a serious problem for him and requested placement at a smoking facility. Watson assured Grievant that if the non-smoking policy became a problem, he would take care of it. Watson's decision was unreasonable and exceeded his authority. There is no Employer policy or DOT regulation requiring employees in rehabilitation to be non-smokers. The Employer also does not have any proper authority to impose lifestyle restrictions on its employees. Indeed, Dr. Smith testified that it is inappropriate for an employer to direct its employees to quit smoking.

The improper non-smoking mandate directly led to Grievant's discharge from MPI. The nicotine patches and gum that he was provided proved insufficient to correct the problem. As a result, Grievant found himself sneaking into employee break areas to smoke. After being caught a

first time, Watson attended a meeting with Grievant at which Grievant again requested to be transferred to a non-smoking facility. Watson responded that it was "against his recommendations," thereby reneging on the assurances that he had previously provided to Grievant. Predictably, Grievant was caught taking another cigarette break, and was discharged from MPI. Significantly, Watson then referred him to the Sequoia Center, a smoking facility, which he could easily have done at the outset of the process.

Shortly after Grievant's discharge from MPI, Barquero ordered that his termination, which exceeded her authority as DER to assure compliance with DOT regulations. Even assuming that Grievant's placement at and discharge from MPI were proper, it would still not require termination. The DOT regulations and the Letter Agreement do not require that an employee who fails to complete a properly ordered rehabilitation program be terminated; it is left at the discretion of the Employer. Given the unreasonable restrictions placed upon Grievant by virtue of the referral, and the numerous other mistakes and problems in the case, it would not be appropriate for the Board to sustain the discharge even if it was found that the placement and discharge were proper.

It is clear that Barquero is the primary source of the numerous problems in this case. She provided false, misleading, unreliable, and highly biased information to those around her throughout the case. At hearing, she was more intent on arguing the points she believes support the Employer's case than on providing clear facts. She made repeated efforts to justify or excuse the numerous procedural defects in the case under the guise of her supposed expertise as DER, a position she had held for only a few weeks prior to the original drug test. She claimed that it was perfectly fine for collectors to pre-fill critical information on the CCF, implausibly stated that none of the procedural violations affected the integrity of the test, and ironically insisted that the length of time Grievant was at the clinic was of no importance, while the amount of time he spent in the bathroom was crucial. She further claimed that there is no provision in the DOT regulations which allows the MRO to change a refusal to test based on a medical explanation, despite the fact that an entire section of the regulations (40.149) is devoted to just that. It is a grim irony, given Barquero's conduct in the case, that one of her responsibilities as DER is to audit clinics to ensure that they comply with DOT regulations and company guidelines.

In summary, the Employer violated the Collective Bargaining Agreement in each of the following ways: wrongfully subjecting Grievant to a reasonable suspicion drug test, despite the evidence that a medical condition was responsible for his behavior; falsely declaring his drug test result a refusal to test; failing to conduct a medical examination regarding his failure to produce a urine specimen in the three-hour shy bladder period; improperly interfering in his on-going medical care by forcing him to attend MPI and thereby to discontinue his legitimate opiate medication; improperly placing him in a non-smoking facility; improperly determining that he failed the MPI program due to his nicotine cravings, rather than referring him to a smoking facility; and, ultimately by terminating his employment. The termination should be overturned on any of multiple grounds.

The Union respectfully requests that Grievant be reinstated and made whole.

OPINION

While there is some dispute between the parties as to the framing of the issues in this case, this is fundamentally a dispute about whether the Employer had just cause to terminate Grievant's employment. In order to demonstrate just cause in this drug test and drug treatment case, the Employer bears the burden of proving that 1) that the determination that there was "refusal to test" that was then deemed a positive test result was proper, and 2) whether the ultimate decision to terminate Grievant for failing to comply with Watson's treatment recommendations based on the positive test result was consistent with the just cause standard in the context of the Letter of Agreement and applicable DOT regulations regarding drug testing for safety-sensitive employees.

There is little doubt that the Employer had information to support a reasonable suspicion that Grievant might be under the influence of drugs or alcohol when he reported to work on the morning of January 24, 2006, and the information was sufficient to require Grievant to undergo drug and alcohol testing. Multiple supervisors observed Grievant engage in numerous behaviors consistent with intoxication. He was incoherent; he had having trouble staying awake; he had slurred speech, and he spilled coffee on himself. The Union urges that Grievant's symptoms may have resulted from his undiagnosed diabetes, and that the Employer should have conducted a fitness for duty examination instead of subjecting Grievant to reasonable suspicion testing. While it is possible that Grievant's intoxication-like symptoms may have been caused by a diabetic episode, or some other

explanation besides being under the influence of alcohol or drugs, the Letter Agreement provides that testing is required where "the employer has a reasonable suspicion that the employee has used a prohibited drug or misused alcohol." There is no requirement that the Employer prove that the suspicion is grounded in actual drug or alcohol intoxication; on the contrary, the purpose of drug and alcohol testing is to determine whether the reasonable *suspicion* of such conduct is, in fact, grounded in actual drug or alcohol intoxication. Grievant's behavior that morning, even if not caused by drug or alcohol intoxication, was clearly sufficient to create a reasonable *suspicion* of intoxication. The Letter Agreement and the DOT regulations for safety-sensitive employers *require* testing in the circumstances of such significant evidence supporting reasonable suspicion. Therefore, whether or not a fitness for duty examination would have been appropriate in the circumstances, the Employer had a legal and contractual obligation to send Grievant for drug and alcohol testing on that date.

The Refusal to Test Determination

The crux of this case is the propriety of the testing process – in particular of the refusal to test determination. Clearly, the testing process itself was rife with errors. The collectors at the clinic violated numerous policies and rules that are crucial to the integrity of the testing process. Sotelo disregarded the protocols for filling out the CCF by filling in many of the fields before collecting a sample. The CCF that she filled out states that she received a urine specimen from Grievant at 10:42 am, that she split the specimen into two containers, that she verified that the temperature of the specimen was in the appropriate range, and that she shipped the specimen via Airborne Express. None of these entries are accurate; Grievant did not, in fact, produce a sufficient specimen.[35] Sotelo also signed the CCF, affirming that the information was accurate, and procured Grievant's signature on detachable labels still attached to the form, in violation of the protocol requiring that the donor sign the label only after the label has been affixed to a sample bottle. Further, it is undisputed that the shy bladder process was initiated after Grievant's first attempt to produce a sample, but Sotelo failed to note the beginning of the process on the CCF, failed to monitor Grievant's water intake, and failed to document the "time and circumstances" of each collection attempt.

[35] There is some dispute as to whether Grievant was able to produce any specimen at all. Ultimately, this dispute is not material because it is clear that Grievant did not produce enough urine to be tested.

The multiple violations outlined above support a finding that Sotelo exhibited an inexcusable disregard for the applicable policies and procedures. However, the nature of the above violations pertain to the integrity of the test result of an actual specimen. These procedures are triggered and intended to apply to the handling of a specimen produced and submitted for testing. Violations of these procedures are thus material and prejudicial to an affected employee in those circumstances *where a sample is provided* for subsequent testing. Thus, pre-filling information on the CCF, such as stating that a sample was split and that it was in the correct temperature range, and obtaining a donor's signature while the labels were still on the CCF instead of a sample bottle, are errors that would cast serious doubt upon whether a provided sample was the correct sample, or whether it was handled properly – i.e., *whether the sample was tainted.* However, if no urine specimen is produced for testing, it is self-evident that the question of a "tainted" sample is not at issue because there is no sample to test. Similarly, the failure to monitor an employee's water intake, or the failure to issue the proper instructions about entitlement to drink up to 40 ounces of fluid, pose significant issues – and potential prejudicial errors – with respect to *the validity of a test result.* However, if there are violations of "drinking" rules in connection with a drug test *but no specimen is tested* because no sample is produced for such testing, then such violations of the testing procedure are of no moment *because no sample is tested if one is not produced.* Since, in this case, it is clear that Grievant never produced a sample to be tested – and no sample was tested – Sotelo's multiple clerical errors *pertaining to a non-existent sample* are very disturbing, but they are not material herein because this case does not involve the validity of a test result for any sample that was submitted for a positive or negative presence of alcohol or drugs.

The Union also objects to the fact that Dr. Smith and/or the Employer failed to obtain "affidavits" from the collectors in order to clear up these mistakes, and/or to verify the alleged refusal to test determination. Technically, the DOT regulations do not actually use the term "affidavit." However, Section 40.205 states that the collector must, "if the problem resulted from the omission of required information... supply in writing the missing information and a statement that it is true and accurate," which is arguably equivalent to an affidavit. Neither Sotelo's nor Finucane's statements are signed or dated, nor do they contain an express affirmation that their

contents are true and accurate. However, Section 40.205 of the regulations relates to the correction of "correctable flaws" which "cause a drug test to be cancelled unless they are corrected." These "correctable flaws" appear to address the kind of test result or specimen-handling rules discussed above. As discussed previously, the errors on the face of the CCF in this case are not material or prejudicial because no urine sample was collected, and therefore asserted problems relating to the compromise of the integrity of a specimen were never triggered. Moreover, contrary to the Union's related claim, the signed statements that are required by Section 40.205 are not required in a refusal to test situation where no sample exists. The collector appropriately documented on the CCF that Grievant was out of compliance. In the absence of a separate formal requirement, it appears that Dr. Smith's efforts to clarify the confusion between the refusal to test determination and the indications on the CCF that a sample had been collected were reasonable and adequate. Accordingly, it is concluded that the multiple, serious errors in the collection process, e.g., the errors in filling out the CCF and in properly monitoring Grievant, were errors affecting "test results." They were not errors that were material or prejudicial to Grievant regarding the refusal to test determination, where no test result was triggered in the absence of a sufficient specimen from Grievant.

Here, the critical issue regarding the testing process is whether there was a proper determination, based on Grievant's conduct, of a refusal to test; or whether the testing procedure was in fact terminated – or should have been terminated– upon completion of the three-hour shy bladder process. Thus, based on the provisions of the Letter Agreement and the DOT regulations, if Grievant's test ended upon the expiration of the shy bladder process, he was entitled to a subsequent medical evaluation and an in-person interview by the MRO, Dr. Smith, concerning his inability to produce a sufficient specimen during the three hours provided in the shy bladder procedure. It is undisputed that Dr. Smith did not conduct an in-person interview, and no inquiry into possible medical explanations for Grievant's failure to produce a sample took place until nearly a year later. Therefore, if it is found that the conduct-based refusal to test determination either was erroneous or, as argued by the Union, never occurred at all – and that the testing procedure was terminated because the shy bladder process was completed without a sufficient specimen – then it would be appropriate to conclude that the Employer violated Grievant's procedural rights under the Letter Agreement and

the DOT regulations. In such an event, the subsequent actions taken by the Employer that were premised upon the conduct-based refusal to test likewise could be deemed improper and in violation of the governing testing rules, and the just cause standard.

The Union strongly urges that Whatley's testimony, along with his contemporaneous written statement and his testimony at the LIC hearing, demonstrates that Grievant's test was terminated due to the conclusion of the three-hour shy bladder process. The Employer cites the testimony of Finucane, Barquero, and Dr. Smith and argues that the test ended due to Grievant's refusal to cooperate with instructions. The dispute is made more difficult by the fact that Sotelo, the collector primarily responsible for administering Grievant's test, did not testify, and provided an unsigned hearsay statement, which is ambiguous: it notes that Grievant was being disruptive and refused to leave the bathroom on two occasions, but does not expressly state that the test was terminated due to that misconduct. In addition, Grievant's recollection of the testing process is admittedly hazy.

Whatley produced a detailed written statement shortly after the test, and testified at the LIC hearing and this hearing. Many of his statements support the conclusion that Grievant's test was terminated due to the end of the shy bladder process. In particular, according to the summary of his LIC testimony, "Mr. Whatley stated after third attempt, the grievant was unable to provide a urine sample. The clinician told me that he had reached the three hour time limit to produce a specimen so we were free to leave." This statement strongly supports the Union's claim that the collectors terminated the test because Grievant was unable to produce a sample by the end of the three-hour shy bladder process, rather than because of his misconduct in refusing to leave the bathroom. Whatley's contemporaneous statement, in which he wrote that, "[o]n the last try he went to the restroom and the two nurses waited but S could not give a sample," is also consistent with a finding that the test was terminated because Grievant was unable to produce a sample, although it is less clear. Similarly, at the arbitration hearing, Whatley testified that he reported to Barquero after Grievant's last attempt that he had been unable to produce a sample – not that he had refused to follow instructions – and that he "knew" that Grievant's test was positive because he had not been able to urinate. Whatley's testimony with respect to the last collection attempt arguably supports either account of why the test was ended:

> They gave him the allotted time, three hours. And he hadn't produced a specimen. And they told him to come out. And he goes, "I'm trying to pee. How do you expect me to give a specimen if I can't pee?" And they said, "come out now." Again he was not going to come out until I told him, "come out, S It's over."

It appears from this testimony that the collectors were ending the shy bladder process, but also that Grievant for some time refused to leave the bathroom after being so instructed. Whatley also corroborated much of the evidence of Grievant's misconduct. All of his statements indicate that Grievant talked in a loud voice, spent an inordinate amount of time filling out his paperwork, wandered down the halls of the clinic, and on at least one occasion refused for some time to leave the bathroom after being instructed to do so by Sotelo. Nevertheless, Whatley's testimony, standing alone, is reasonably strong evidence that the test was not terminated due to Grievant's misconduct. At the very least, it appears that Whatley's understanding was that the test ended due to the expiration of the shy bladder period.

Conversely, Finucane, Dr. Smith, and Barquero all testified unequivocally that the test was terminated because Grievant refused to leave the bathroom when instructed to do so, and thereby "fail[ed] to cooperate with the testing process," which accordingly required a refusal to test determination. Of course, it must be noted that only Finucane was present at the clinic. Finucane testified that she advised Sotelo to terminate the test due to Grievant's refusal to leave the bathroom during his third attempt, and that the test ended prior to the end of the three-hour shy bladder period. Her written statement also indicates that the test ended because Grievant was "out of compliance," i.e., a refusal a test. She further testified that Grievant's conduct during much of the process was "belligerent" and "intimidating." Dr. Smith testified that he was told by a collector that the test was terminated because Grievant's behavior was disruptive and because he refused to come out of the bathroom after the four minute time period had expired. Barquero testified that both collectors informed her that the collection was terminated because Grievant failed to leave the bathroom, which they said was the "last straw" after multiple instances of misconduct. She also stated that Sotelo told her that she was afraid of Grievant based on his conduct.

Based upon a review of the entire record, it is concluded that the weight of the reliable evidence supports a finding that Grievant's drug test on January 24, 2006, was terminated by the

collectors due to their determination that he was refusing to cooperate with their instructions. This finding is supported in particular by the four following factors. First, the evidence establishes that the CCF contains the notation stating, ""Donor is out of compliance," which is very significant evidence as a contemporaneous statement of what decision was made on the date in question.[36] Second, there is the simple fact that three witnesses testified unequivocally that the result was a conduct-based refusal to test, and only one witness offered an (arguably) different account. The Neutral Arbitrator is not persuaded that three different witnesses – clinic employee Finucane, PG&E employee and DER Barquero, and the respected and experienced MRO, Dr. Smith – all lied about their contemporaneous knowledge that Grirevant's test was terminated based on the determination that he was "out of compliance" by failing to follow the instructions of the collectors at the clinic. The numerical superiority of three witnesses, who testified that there was a refusal to test decision

---

[36] Dr. Smith credibly testified that the chain of custody form he received after the January 24, 2006 occurrence at the clinic contained the "out of compliance" notation. There is no evidence of any CCF from the clinic involving Grievant's testing that day without that notation (as might be the case if the notation was added later, if someone was engaged in the kind of "cover-up" or falsification as the Union argues occurred on this issue). It seems clear that this notation "Donor is out of compliance" was made on the form sent to Dr. Smith in the ordinary course of business.

The Arbitrator is mindful that the reliability of the notation entry, "Donor is out of compliance" is undermined by the established fact that the form contains multiple false entries relating to chain-of-custody issues as noted above in this Opinion. Thus, it can be argued that if clinic collectors wrote demonstrably false statements on the form, then why should the Board believe that the notation "Donor is out of compliance" was any more truthful than the other false statements? While the entry of improper and false statements is, in the Neutral Arbitrator's view, a very serious matter and raises questions about the integrity and honesty of at least one clinic employee, there are also significant differences in these entries that suggest that the "out-of-compliance" notation is a reliable notation of what occurred.

Based on the evidence presented in this record (and common sense), it seems clear that some clinic employees develop inappropriate bad habits in the form of "short-cuts" for CCF entries that are made routinely and do not generally vary from test to test, e.g., "normal" temperature ranges for urine specimens provided many times a day. These false entries are thus made because the collectors "expect" (as in the vast majority of tests) that a donor will produce a sample, that the sample will be a normal temperature, etc. While the practice is improper, it is understandable how some employees could, over time, take short-cuts to save time when the "same" entries are made on most of the forms every day. It is submitted that the notation, "Donor out of compliance" is *not* the same kind of expected outcome that can be predicted with some degree of accuracy (and thus written in advance of the occurrence); rather, a determination that a donor is "out-of-compliance" is an unusual outcome, and a clinician ordinarily would make that notation only *after* it was, in fact, determined that a donor was out-of-compliance, which is an unexpected event and outcome.

In the Neutral Arbitrator's view, the false chain of custody entries, while untrue, appear to have been made by employees who believed that those entries would be true as the testing unfolded, i.e., they did not intend to make entries that they knew were (or would be) false, but made them believing the entries would be accurate and made them before-the-fact to "save time." There is no evidence, and the Neutral Arbitrator does not believe, that a clinician "made up" the notation, "Donor is out of compliance," i.e., that the entry was made by a clinician at a time when it was known that the entry was a fabrication and contrary to what had occurred. Rather, the Neutral Arbitrator believes that the entry "Donor is out of compliance" was made on the date in question, and only after the clinician knew that determination was made.

made at the clinic, is more reliable than the contrary testimony of a single witness, Mr. Whatley. Third, in addition to the numerical weight of three witnesses versus one witness, it is noted that the three witnesses cited by the Employer were, without exception, persons with substantial experience in the DOT drug testing procedures and protocols, so they were very familiar and knowledgeable about the pertinent terms, protocols, and rules with respect to most, if not all, of the many issues that surface in drug testing cases. Mr. Whately, by comparison, was a novice in the specialized world of drug testing and did not handle, address, or experience these issues on a daily basis, as did each of the three witnesses relied upon by the Employer. The Neutral Arbitrator is persuaded that Mr. Whately is a truthful person and that he tried to provide truthful testimony, to the best of his ability, with respect to his recollection and observations of the events on January 24, 2006. However, in view of his comparative inexperience with drug testing protocols and terminology, it is submitted that he was more susceptible to a misunderstanding of the technical or procedural aspects of the test, and there is some question about the scope and accuracy of his understanding of the distinction between a refusal to test due to the failure to cooperate and the exhaustion of the shy bladder process. Accordingly, the comparative expertise of witnesses Finucane, Barquero, and Dr. Smith compared to the knowledge and experience of supervisor Whately is a third factor that favors the reliability of the three witness cited by the Employer. Fourth, it is submitted that there is some ambiguity in Whatley's account, while the other accounts are far more unequivocal and far less ambiguous. Whatley's statements may be explained in ways that do not contradict Fincane's, Barquero's, and Dr. Smith's accounts. It is clear that the shy bladder process was initiated after Grievant's first attempt to produce a sample, and Whatley was therefore aware that Grievant had a three-hour time limit. Grievant's final attempt was at or near the end of this process. It was therefore perhaps natural for him to assume that when the process was terminated at the end of that attempt, it was terminated due to expiration of the three hours. Further, Finucane and/or Sotelo would not necessarily have explained to him the precise reason the test was being terminated at the time – and there is no evidence that they did. In short, it is plausible that Whatley misunderstood and/or was simply mistaken as to the reason the test was terminated. Based on the foregoing and the entire record, it is concluded that Grievant's test was terminated based upon his refusal to cooperate.

The Union also contends that even if the test was terminated due to Grievant's conduct, his conduct did not warrant such a result. This argument is not persuasive. The DOT regulations state that a refusal to test occurs when a donor "[f]*ail[s] to cooperate with any part of the testing process* (e.g., refuse[s] to empty pockets when so directed by the collector, behave[s] in a confrontational way that disrupts the collection process)" (emphasis supplied). The Letter Agreement provides that collectors may set a "reasonable time limit" for employees to be in the bathroom. Grievant's failure to exit the bathroom when instructed by the collectors was plainly a failure to cooperate with the testing process.[37] While the rule is designed to prevent tampering and there is no evidence that Grievant was attempting to tamper with his sample, he nevertheless had an obligation to abide by the reasonable and proper instructions of the collectors. Grievant's failure to leave the bathroom in response to the collector's instruction on his last attempt was only the final instance of a pattern of uncooperative and "intimidating" conduct at the testing site, which included a dilatory completion of the required paperwork, speaking in an inordinately loud voice, wandering the halls, and refusing to leave the bathroom during a prior attempt to produce a sample. The record supports a finding that Grievant failed to cooperate with the testing process on multiple occasions. The clinic's refusal to test determination was therefore proper and fully consistent with the regulation that a refusal to test occurs when a donor fails to *cooperate* "with any part of the testing process...."[38]

---

[37] The Union contends that Grievant never "refused" to exit the rest room and in fact emerged, twice, after Whatley instructed him to do so. This contention ignores the reality of who was conducting the test (and making the determination of whether Grievant was cooperative), and ignores what occurred before supervisor Whatley, twice, told Grievant to leave the rest room. The persons charged with the responsibility of conducting the test – and issuing the instructions – were the collectors at the clinic, not supervisor Whatley. The evidence shows that not once, but twice, the instructors directed Grievant to exit the rest room, and twice he refused to do so *in response to those instructions*. The fact that he exited later (in one case, 10 minutes after being in the restroom) does not change the fact that the failed, and refused, to cooperate *with the instructions of the collectors*.

[38] As noted above, if it had been concluded that Grievant's test was terminated due to the exhaustion of the shy bladder process, he would have been entitled to a formal medical review, including an interview, which he did not receive immediately after the January 24, 2006 events at the clinic. It is noted that while no formal medical review by the MRO was required in this case because of the refusal to test determination on January 24, 2006, about a year later Dr. Smith did, in fact, consider Grievant's claim that his later diagnosed condition of diabetes was a possible explanation of his inability to produce a sufficient specimen in January, 2006. Dr. Smith testified, unambiguously, that he considered and rejected this explanation of Grievant's inability to urinate at the clinic when the issue was later referred to him by Ms. Barquero. He testified that in his medical opinion (and based on supporting documentation from medical treatises), a diabetic episode would have caused *frequent* urination rather than an inability to urinate.

The Treatment Process and Termination

Since the refusal to test determination was proper, Grievant was required to undergo an assessment from a SAP (Watson) and to comply with Watson's recommendations for education and/or treatment prior to returning to safety-sensitive duty, pursuant to the applicable DOT regulations and the Letter Agreement. The Union argues that Watson's recommendation that Grievant undergo 28 days of inpatient treatment at MPI was unreasonable in that it was contrary to the advice of his physicians, placed inappropriate behavioral restrictions on Grievant by requiring that he comply with MPI's non-smoking policy, and that Watson was not justified in concluding that Grievant was addicted to Oxycontin. In evaluating these contentions, the Board must be mindful of the scope of its authority, i.e., ensuring that Grievant's rights under the Letter Agreement and the DOT regulations were not violated. In this regard, it is noted that the SAP, under the DOT regulations, is not an agent of the Employer or the employee, but rather is charged with protecting public safety. Therefore, while it would certainly be inappropriate for an employer to demand that an employee quit smoking during non-work hours, the Employer in this case did not so. It also must be recognized that the regulations provide that no "third party," e.g., the Employer, is permitted to change the SAP's recommendation.

Based on the evidence herein, there is no legal basis upon which to conclude that Watson's recommendation exceeded his authority as a SAP under the DOT regulations. The regulations provide that:

> For purposes of your role in the evaluation process, you must assume that a verified positive test result has conclusively established that the employee committed a drug and alcohol regulation violation. You must not take into consideration in any way, as a factor in determining what your recommendation will be, any of the following:
>
> (1) A claim by the employee that the test was unjustified or inaccurate;
>
> (2) Statements by the employee that attempt to mitigate the seriousness of a violation of a DOT drug or alcohol regulation.

Here, Watson was required to assume that Grievant's positive test resulted from intoxication. He also obtained statements from Grievant with respect to the amount of Oxycontin he was being prescribed and was taking on ongoing basis. Based on the information he obtained, Watson reasonably concluded that the amount of Oxycontin Grievant was taking posed a safety risk in his

job as a Miscellaneous Equipment Operator.[39] Watson also reasonably concluded that Grievant's use of Oxycontin was likely the cause of Grievant's erratic behavior on January 24, 2006.[40] In these circumstances, Watson's determination that Grievant should be referred to treatment for addiction to Oxycontin was reasonable, appropriate, and arguably required in view of his responsibility as an SAP to ensure that Grievant could safety return and perform work in his safety-sensitive position.

Watson's decision to require Grievant to attend MPI also had a reasonable basis. Critically, Watson and Dr. Smith both testified that MPI has the best pain-management program in Northern California, and that treatment was exceedingly unlikely to succeed in the absence of a strong pain-management program in view of Grievant's chronic pain resulting from a back injury. While the Union challenges Watson's recommendation on the basis that it was contrary to the advice of Grievant's physicians, the recommendation was fully consistent with Watson's responsibility and authority as an SAP with regard to Grievant's ability to return to work safely. More specifically, the evidence herein supports a finding that Watson reasonably concluded that Grievant needed to be free of Oxycontin in the interests of public safety, notwithstanding whether or not such a course was required or desirable in Grievant's role as a private citizen. The regulations specifically state that the SAP is not an "advocate" for the employee; rather, the SAP's role is to ensure that employees who have positive drug tests can safely return to duty. It is concluded that Watson did not exceed his authority when he concluded that Grievant's level of Oxycontin use was incompatible with the performance of safety-sensitive duties, notwithstanding whether such treatment was consistent with Grievant's personal interest or the medical prescriptions issued by his personal physician.[41]

---

[39] Dr. Smith credibly testified that he concurred with Mr. Watson's assessment. More specifically, Dr. Smith testified that in his medical opinion it was highly likely that Grievant was physically dependent upon Oxycontin, and that pain and addiction is one of the most difficult problems to address in addiction medicine.

[40] Based on the evidence presented herein, this explanation is not only reasonable but is a far more persuasive explanation of Grievant's unusual symptoms and behavior on January 24, 2006 than Grievant's diabetes diagnosis.

[41] Watson's decision to refer Grievant to a non-smoking program in the context of Grievant's stated preference for continuing to smoke is troublesome; as noted above (and acknowledged by Dr. Smith), the Employer has no legal right to insist that an employee cease all smoking, including smoking during non-work hours. Here, the evidence shows that addiction treatment facilities in recent years have adopted a policy that smoking addiction should be addressed in the course of treating addiction to illegal and other addictive drugs. Ultimately, based on MPI's reputation as the "best" pain medication treatment facility, it cannot be concluded that Watson's referral to MPI was unreasonable or improper.

Grievant was ultimately discharged from MPI for violating the program rules by leaving his ward without authorization in order to smoke. It is undisputed that prior to being discharged from the treatment facility, Grievant violated this policy at least once before, for which he had received a prior warning. Grievant also twice tested positive for narcotics, first upon entry to the program and subsequently after having been in the program for a few days. The Union argues that Watson's determination that Grievant was "out of compliance" after his discharge from MPI was inappropriate on several grounds. First, Grievant testified that Watson assured him that if the non-smoking policy became a problem for him, it would be taken care of, and that Watson subsequently reneged on this promise. Second, given that Grievant's discharge from MPI was due in large part to his attempts to sneak cigarettes, Watson should have referred Grievant to a smoking facility and given him a chance to complete it prior to making the "out of compliance" determination. Third, the Union argues that leaving the facility to smoke is simply a *de minimus* or technical violation that is insufficient to support a decision to terminate Grievant's employment.

The record in this case establishes that, despite whatever reservations he had (and expressed), Grievant agreed to enter MPI despite its recent conversion as a non-smoking facility. He also signed a written agreement acknowledging that he agreed to refrain from smoking cigarettes or chewing tobacco for the duration of his treatment by MPI, and that his use of cigarettes during his treatment was a violation of his "contract" with MPI that could result in his discharge from treatment. It does appear that Watson gave Grievant some assurance that he help deal with problems with the non-smoking policy, if they arose. However, there is no evidence or legal citation to any requirement or obligation upon Watson in his SAP role to respect Grievant's preference for a smoking facility, especially when, in his view, the "best" available facility for Grievant's particular addiction was MPI, a non-smoking facility (like many others). The record also shows that Watson did advise Grievant that assistance in dealing with his nicotine habit/addiction was available in the form of nicotine gum and/or patches would be provided by MPI. Moreover, at the meeting held after Grievant's first violation of the policy, both Watson and MPI staff made it clear to Grievant that further violations could lead to discharge, and Watson explicitly told Grievant that he would not transfer him to another facility.

Based on the foregoing, Grievant had clear notice of the consequences of violating the rules established by the treatment facility, including the ban on smoking. Notwithstanding these multiple warnings, Grievant thereafter committed another violation of the rules by leaving the treatment ward without permission, was caught smoking, and was discharged from the program for violating the treatment program rules. There is no dispute that Grievant violated at least two rules (leaving the ward without permission and smoking during the treatment period) on the date that triggered MPI's decision to discharge him from the facility, nor is there any dispute that he committed multiple prior violations of both the smoking policy and evidence he committed the serious offense of using prohibited narcotics after he entered the treatment program. There is little doubt that MPI's decision to discharge Grievant for these multiple violations was reasonable and proper in the context of Grievant's multiple violations, including the serious violation of narcotic use while in treatment.

The record reflects that, after his discharge from MPI, Watson referred Grievant to another treatment facility that permitted residents to smoke cigarettes; however, Grievant was unable to pursue that treatment because his employment was terminated and he was therefore deprived of the medical benefits to pay for such alternate treatment. The final issue before the Board is whether the Employer's decision to terminate Grievant after his discharge from MPI for failing to comply with the rules at treatment facility violated the just cause standard in the parties' Collective Bargaining Agreement. The DOT regulations provide that when a SAP notifies an employer's DER that an employee is out of compliance with his or her recommendations, the employer "may take personnel action consistent with your policy and/or labor-management agreement." The Union correctly notes that the regulations do not mandate that the Employer terminate employees who have been deemed "out of compliance" by an SAP. However, Section D(3) of the Letter Agreement states that:

> Following a verified positive result, the employee will be required to complete the return-to-duty process with a Substance Abuse Professional, follow his/her instructions, and comply with the treatment/education recommendations and be subject to follow-up testing. A non-compliance letter from a Substance Abuse Professional will result in discharge.

It is clear, based on the foregoing language, that an employee's proven non-compliance with an SAP's treatment recommendation, as occurred in this case, warrants summary discharge under the parties' Letter Agreement. It is also clear that the parties' agreement that non-compliance with

an SAP's recommendations for treatment after a positive drug test "will" result in discharge must still satisfy the just cause provision of the Bargaining Agreement, which necessarily incorporates the Letter Agreement and the pertinent, applicable DOT regulations. However, the Board does not agree with Employer's contention – and apparent belief in this case, as reflected in Ms. Barquero's testimony – that it had "no discretion" to take any disciplinary action *except* termination if, for example, an SAP acted unreasonably, in bad faith, or relied on proven mistakes of fact.

Notwithstanding the foregoing, the evidence herein does not establish that the decision to terminate Grievant, in all of the circumstances disclosed in this record, violated the just cause standard. At first blush, Grievant's discharge from MPI – which directly led to termination of his employment – for violation of MPI's smoking policy seems to be a harsh result, especially since there is no independent legal basis for the Employer to impose disciplinary penalties upon an employee for smoking a cigarette during a break period. However, Grievant was not discharged from MPI for a single violation of the facility's no-smoking policy; rather, his final violations (for smoking *and* leaving the treatment ward) were the last in a series of violations. In this case, Grievant was dishonest to MPI staff officials when he claimed not to have taken any opiates for six weeks upon admission, and subsequently continued to use prohibited prescription drugs during his first few days in treatment, which is obviously an extremely serious violation. He was previously caught leaving the ward to smoke before the final incident which led to his discharge, at which point he was explicitly warned not to do so. It is noted that leaving the ward without permission is a more serious offense in light of the fact that he tested positive for prescription drugs while in treatment; leaving the ward presented an opportunity to procure prohibited substances, and as such is an offense that must be taken very seriously. Thus, Grievant was not discharged from MPI (or from his job) after one, relatively minor violation, but was rather discharged after repeated and multiple violations, including serious and fundamental violations. Accordingly, it is concluded that Watson's decision to advise the Employer that Grievant was non-compliant with his treatment recommendations, and the Employer's subsequent decision to terminate his employment, were reasonable and proper in the circumstances herein, and did not violate either the Letter Agreement or the just cause standard in the parties' Collective Bargaining Agreement.

Conclusion

The evidence supports the following key findings: 1) the Employer had reasonable cause on January 24, 2006 to require Grievant to submit to a drug and alcohol test based on his symptoms and behavior upon reporting to work that morning; 2) the clinic determined that Grievant failed to cooperate with the testing process and properly reported a conduct-based refusal to test, which was then properly treated as a positive test result under applicable regulations; 3) based on the positive test result, SAP Watson determined that Grievant was likely dependent upon and/or addicted to Oxycontin such that he could not safely perform his safety-sensitive position without treatment for that problem, and issued an appropriate treatment recommendation in accordance with his authority under applicable DOT regulations; 4) Grievant violated multiple rules at the treatment facility and was properly discharged from the treatment facility for those multiple and repeated violations; and 5) the Employer's decision to terminate Grievant, in the facts and circumstances disclosed herein, was consistent with the Letter Agreement and the just cause standard.

AWARD

1. The Employer had just cause to consider Grievant a "refusal to test" and a "first time positive" on or about January 24, 2006 under the Letter Agreement and the DOT regulations.

2. The Employer had just cause to terminate Grievant on March 26, 2007.

DATED: August 12, 2010

Charles A. Askin, Neutral Arbitrator — 9/23/2010 — Date

John Moffatt, Employer Panel Member — CONCUR/~~DISSENT~~ — 9/16/10 — Date

Kathy Barquero, Employer Panel Member — CONCUR/DISSENT — 9/17/10 — Date

Bob Choate, Union Panel Member — CONCUR/DISSENT — 9/16/10 — Date

Hunter Stern, Union Panel Member — CONCUR/DISSENT — 9/17/10 — Date