In the Matter of an Arbitration

Between

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245,

Complainant,

And

PACIFIC GAS AND ELECTRIC COMPANY,

Respondent

Involving the Discharge of Dustin Faust

Opinion & Decision

of

Anne Andrews Ellis

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May 10, 2019

Grievance 24128 ARB-343

APPEARANCES

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INTRODUCTION

This grievance arose under the terms of a collective bargaining agreement between IBEW Local 1245 and Pacific Gas and Electric Company with a term of January 1, 2016 to December 31, 2019 (JX 1). Pursuant to this Agreement, the undersigned Arbitrator was mutually selected, and hearings were conducted on December 13, 2018 and February 4, 2019 in Vacaville, California. A verbatim transcript of the proceedings was taken, cited herein as TR ___. At the hearings, the Parties had a full opportunity to examine and cross-examine witnesses, and to present relevant exhibits. The Parties stipulated that the prior steps of the grievance procedure had been complied with or
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waived, and that the matter is properly before the Arbitrator for final and binding decision (TR 8). The Parties submitted closing briefs on April 15, 2019.

ISSUE

The Parties stipulated to the following issue:

> Whether the discharge of the grievant D[redacted] F[redacted] was for just cause, and if not, what shall the remedy be? (TR 7-8).

REMEDY REQUESTED

The Employer seeks a finding that termination is the appropriate penalty for the actions of the grievant in reporting to work under the influence of alcohol on March 3, 2017, and in driving a Company vehicle to work, thus violating the Employee Code of Conduct and basic rules that apply to public safety. The grievant admitted these violations of policy, and according to precedential decisions between the bargaining parties, termination is the proper penalty for these offenses.

The Union cited the fact that the grievant was an excellent employee of eight years' tenure with no prior discipline of this nature. He was called in to work on his day off after having worked a 24-hour shift. He reported to work and did not feel impaired by alcohol at the time, although he had consumed several beers at home hours before reporting. He performed his job function of locating the pipeline without incident, but tested by breath test at .067 and .069, well under the legal limit for intoxicated driving in California. The Employer failed to consider the grievant for a return to work agreement as negotiated by the bargaining parties, and for this reason the grievant should be returned to work and granted this opportunity.

[redacted]

RELEVANT PROVISIONS OF THE AGREEMENT

The Agreement (JX 1):

Disputes involving the following enumerated subjects shall be determined by the grievance procedure established herein:

...

(b) Discharge, demotion, suspension or discipline of an individual employee....

Agreement on Positive Discipline (January 1992) (JX 2):

III TERMINATION

A. Termination occurs when Positive Discipline has failed to bring about a positive change in an employee's behavior, such as another disciplinary problem occurring within the twelve (12) month active duration of a DML. Termination may also occur in those few instances when a single offense of such major consequence is committed that the employee forfeits his/her right to the Positive Discipline process, such as:

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

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

V. CRISIS SUSPENSION

As has been past practice, a crisis suspension should be sued when an employee's inappropriate behavior is so serious immediate removal from the workplace is necessary because the employee's actions indicate that remaining on or returning to the job may be detrimental to the employee, fellow employee, customers, or the Company. The employee shall be required to leave Company property pending investigation. Some examples would be theft, insubordination, threat of violent action, destruction of Company property, or reporting to work under the influence of alcohol or drugs. These situations will be handled in the following manner:

1. If, upon completion of its investigation, Company finds that there is insufficient evidence to support the alleged misconduct, the employee will be placed back to work and will be paid for the investigating time off.
2. If, upon completion of its investigation, Company finds that there is sufficient evidence to support termination, the employee's employment will be terminated and the investigatory time off will be without pay.
3. If, upon completion of its investigation, Company finds that there is sufficient evidence to support disciplinary action but not termination, the appropriate step of Positive Discipline will be administered and the employee will be reimbursed for the investigatory time off without pay. However, should an employee be unfit for work or otherwise unavailable, the employee shall not be reimbursed for such time.

FACTUAL BACKGROUND

The grievant D[redacted] F[redacted] was a Senior Gas Compliance Representative assigned to "locate and mark" job duties, specifically, to locate gas lines as needed, whether on an emergency basis or simply for normal business calls for customers involved in digging of construction projects. F[redacted] had been employed by PG&E since April 2009, and his most recent evaluation in late 2016 had granted him an overall rating of "excellent" by Supervisor Ron Yamashita (UX 6). On March 3, 2017,[1] F[redacted] was called at about 6 p.m. by Yamashita for an emergency location of a gas line that other employees had been unable to locate (EX 1). According to the Local Investigating Committee Report (EX 1), F[redacted] cited to Yamashita that he was tired from a 24-hour shift he had worked the day before, and Yamashita asked F[redacted] if he should call another locator, but F[redacted] agreed that he would take the assignment.

About an hour and 45 minutes later, Yamashita received a call from another supervisor Vicente Pimentel that the crew leader on site had noticed a smell of alcohol on the grievant and had observed him staggering and appearing to be tired (EX 1). Yamashita drove to the job site and observed F[redacted] and heard the reports of the

[1] Unless otherwise indicated, all dates hereafter are in 2017.

observations from the crew leader. Yamashita called Superintendent Shonda Abercrombie for guidance, and she instructed him to make certain observations of the grievant.

Yamashita did so, and in speaking to F[redacted] smelled a strong odor of alcohol on his breath. The two went to Yamashita's truck, and Yamashita asked F[redacted] if he had been drinking (EX 1). F[redacted] admitted to having consumed "a couple of beers" earlier in the day. Yamashita asked F[redacted] why he had taken the call, and the grievant replied that he did not want to let Yamashita down on locating the gas line. Yamashita reported this information to Abercrombie, who then instructed Yamashita that an alcohol test would be performed on the grievant. Yamashita contacted Kathy Oceguera, Supervisor of Department of Transportation Regulation and Compliance, who asked what type of vehicle the grievant had been driving because a Class C vehicle needed only one supervisor to complete observations. F[redacted] had been driving a Class C Company vehicle to the job site, and Oceguera told him that a qualified person was being sent to perform a breath test. The vehicle that the grievant drove to the job site on March 3 did not require a commercial license (TR 91).

A DOT-qualified tester arrived and tested the grievant on site. The test result was .067 the first time, and .069 the second time, greater than the .02 to .04 tolerance limit for the Employer, but less than the .08 limitation for impaired driving under state law. Yamashita drove the grievant home in his Company vehicle, dropped him off at his home, and searched the vehicle later and found no evidence of any alcohol-related cans or bottles in the truck (EX 1).

Senior Labor Relations Specialist Maria Eggert testified in this proceeding concerning the reasons for the Employer's decision to terminate the grievant. Eggert attended the Local Investigating Committee meeting on March 28 and prepared the report in evidence as EX 1 (TR 25-26). As a result of this meeting as well as Eggert's own investigation of the facts, she believed that F[redacted] was under the influence of alcohol on duty, and he was terminated for this reason as well as the fact that he had driven a Company vehicle while under the influence of alcohol (TR 34). According to Eggert, F[redacted] violated the Employee Code of Conduct in these actions, and the grievant was aware of this Code through various training that occurs annually and throughout his tenure of employment (TR 35-36, EX 5). Specifically, F[redacted] signed for the Code of Conduct on 8-26-16, according to EX 6 (TR 40-42).

Senior Director of Labor Relations Robert Joga amplified this view in rebuttal testimony that a violation of the Code of Conduct involving driving a company vehicle under the influence of alcohol or drugs always has resulted in termination (TR 320-321). Joga has been with the Employer in his capacity since October 2014 (TR 319). He was not aware of the circumstances of certain employees prior to his hiring who were granted a return to work agreement even though they had tested positive and drove a company vehicle under the influence (TR 321). Joga believed that the Letter Agreement of UX 2 did not have application when there was a violation of the Code of Conduct, although he conceded as follows: "...you can violate multiple policies within the company when you do something, and ...it's the analysis of those violations taken as a whole that leads to the discipline and you don't just take one over the other" (TR 323). On the other hand, a violator of the Code of Conduct is not given a free pass or "immunized" simply because

he or she is a first-time offender under UX 2 (TR 323). Otherwise, someone not subject to the DOT program could be treated more harshly than a person in a safety-sensitive position with the Employer (TR 324). Joga believed that labor relations representatives in his department should take into account the underlying conduct that is a violation of the Code of Conduct when issuing discipline, and should not simply focus exclusively on the first-time offender protocol (TR 327-328).

Ms. Eggert's role in reaching the Employer's decision to terminate the grievant involved researching case histories that are considered precedential decisions between the Parties to determine the appropriate level of discipline (TR 50-61). These cases were as follows: EX 10, a 2009 Review Committee decision where an employee of long tenure who had been through a prior rehabilitation program purchased and consumed alcohol while on duty, and drove under the influence while working overtime. This employee's termination was upheld by the Parties; EX 11, a 2010 Pre-Review Committee decision where an employee reported for pre-arranged overtime driving a Company vehicle and tested at .035 seven hours after reporting (which would have been .14 at the time of reporting). This termination was upheld by the Parties; EX 12, a 2018 Pre-Review Committee decision where the employee drove to a call in a Company vehicle, hit a CHP vehicle, was tested at .08 and arrested by the Highway Patrol. This termination was upheld by the Parties; EX 13, a 2012 Pre-Review Committee decision where an employee was observed to be impaired on the job by four observers, had a smell of alcohol, and declined a test of collection of bodily fluids. This termination was upheld by the Parties; EX 14, a 2018 Review Committee decision where an employee was a passenger in a Company vehicle who purchased alcohol and concealed it in a thermos, and transported

this alcohol in a Company vehicle in violation of the open container law. This termination was upheld by the Parties.[2]

The Union introduced UX 1, a March 2004 Letter Agreement between the Parties pertaining to return to work agreements when employees have tested positive under a reasonable suspicion policy. This Letter Agreement contemplates a return to work for employees who test positive based on the evaluation of a substance abuse professional (SAP). This agreement was the product of collective bargaining between the Parties (TR 71). Although the agreement speaks in terms of an employee who tests positive being allowed or advised to consult an SAP, Eggert did not know whether Faust was granted this opportunity (TR 75-76). She also did not know if he was offered a shop steward to consult prior to submitting to the breath test (TR 73-74). Eggert distinguished the applicability of UX 1 to F[redacted]'s situation based on the fact that he had been found to have driven a Company vehicle under the influence of alcohol; according to Eggert, driving a Company vehicle is not specifically referenced in UX 1 (TR 81-83). Eggert testified that the return to work process is normally handled by Ms. Oceguera, and she estimated that there have been two such returns of employees that she could recall (TR 84, 89).

The Union also introduced several instances of employees who had been returned to work after positive reasonable suspicion drug testing. UX 3, 4 and 5 related to a gas compliance representative who had fallen asleep at his desk while engaged in a training exercise, was observed by two supervisors who filled out observation checklists showing various indicia of impairment, tested positive for cocaine and was sent to rehabilitation with an SAP evaluation (UX 4). This employee was returned to duty in 2017 with an

[2] For reasons of privacy, the names of each employee cited in these Review Committee decisions have not been referenced in this Decision.

agreement to participate in treatment and aftercare, and to be subject to random testing for 80 months (UX 5).

A second employee was the subject of a Review Committee determination in 2018 (UX 9). This employee drove the vehicle in which a passenger had transported alcohol in a concealed manner (see EX 14). The Review Committee found circumstantial evidence that this employee did in fact know that alcohol was transported in the vehicle he was driving. Nevertheless, the Employer gave this employee the benefit of the doubt and reinstated him with seniority, no back pay, and a DML (Decision-Making Leave) for conduct (UX 9).

In UX 10, a Review Committee reinstated an employee in 2000 who had driven to a call in a Company vehicle after being called in to work from a social occasion. The employee was tested by a CHP officer and tested .065 and .067, both below the legal limit of .08 for impaired driving. The employee had been issued a DML in June 1999 for the incident, and the Review Committee deactivated this DML as of May 26, 2000 (UX 10).

In UX 12, an employee who tested in a random test at .039 was removed from duty and issued a written reminder in 1998. The Review Committee reduced the written reminder to an oral reminder.

In UX 14, Arbitrator Sara Adler reinstated an employee in 2018 and substituted a DML for violating the Code of Conduct involving threats and intimidation of a security officer (not for a drug test result). The grievant had a prior clean record and no prior violations of the Code of Conduct. And in UX 15, Arbitrator Michael Prihar in 2016 reinstated an employee with back pay and benefits who had transported alcohol in a

Company vehicle in violation of the Code of Conduct. The grievant had left an unopened container of hard lemonade in her truck inadvertently, and was unaware of the policy against transporting alcohol in a Company vehicle. There was no evidence of being under the influence of alcohol at work, or of consumption of alcohol while driving the Company vehicle. Arbitrator Prihar reduced the incident to an oral reminder on the employee's record.

In UX 16, an employee who was a gas compliance representative in 2017 had alcohol on his breath and had slurred speech according to a reasonable suspicion checklist, and tested at .030 and .027. His supervisor referred this employee to the employee assistance program (EAP) for alcohol abuse, and he was removed from duty with an agreement to return him to work following completion of treatment and re-testing prior to return.

Finally, in UX 17 an employee tested positive at .088 and .076 in 2013. He was referred to an SAP and entered into a return to work agreement in 2014 conditioned upon completion of all recommended treatment and subject to random testing for 80 months. Ms. Eggert was not aware of the circumstances involving the reinstatements of employees as detailed in UX 3, 4 and 5, 16 or 17.

The Union presented Joe Osterlund as a witness to describe the evolution of UX 1, the Letter Agreement which merged several prior agreements between the Parties involving drug and alcohol testing issues. Osterlund is a senior assistant business manager for the Union, and he has been involved in labor relations issues concerning PG&E for approximately forty years (TR 172). According to Osterlund, the Letter Agreement covers gas workers and employees who operate with a commercial license

(TR 177-178). The grievant would be covered by UX 1 as a gas worker (TR 177-178). The first-time violator provision of Section T-1 (page 3) should have applied to F[redacted], according to Osterlund (TR 178-179).

Osterlund also provided his view of the precedential nature of some of the prior Review and Pre-Review Committee decisions presented by both Parties. According to Osterlund, UX 11, 12, 13 14, 15 were precedent-setting decisions (TR 181-188). On cross examination, Osterlund agreed that EX 11 and 12 were also precedent-setting decisions (TR 190-191).

The grievant's supervisor, Ron Yamashita, testified about the events of March 3, but also testified on behalf of the grievant with respect to his exceptional work performance, attitude and overall character. Yamashita does not directly supervise the utility workers and gas compliance reps under his supervision, as they largely work in the field independently (TR 94). As an on-call supervisor, Yamashita's function is to call in employees to work from a list of available on-call locators, and this is what he did on March 3 (TR 95-96). The Employer's policy is that employees may refuse a call-out either by not answering the telephone call, or stating simply that he or she is not available; according to Yamashita, employees had refused calls in the past with no disciplinary consequences (TR 96).

Yamashita recalled that when he called F[redacted] to work as a locator on March 3, F[redacted] had completed an eight-hour rest period required after working a 24-hour shift the day before (TR 97-98). Yamashita asked F[redacted] to work to find the gas line that others could not locate, and F[redacted] agreed (TR 97). About an hour later, Yamashita received a call from Supervisor Pimentel that he had received a call from Foreman J[redacted] B[redacted]

that F[redacted] was "acting a little funny" at the job site (TR 99-100). Yamashita drove to the site, and B[redacted] told him that F[redacted] smelled like alcohol, and was dozing off while leaning on a shovel (TR 102). The locating had been completed by F[redacted], and maintenance was at work on the site (TR 103). Yamashita stood next to F[redacted] shoulder to shoulder and smelled alcohol on his breath (TR 104). Yamashita took F[redacted] to his truck and asked him in private whether he had been drinking. F[redacted] cited that he had had a couple of beers earlier in the day, and thought he was fine to take the work assignment (TR 105-106). At that point Yamashita called Abercrombie for direction, and Oceguera then walked Yamashita through the testing process that ensued (TR 107-108). Oceguera instructed Yamashita to drive the grievant home and to take possession of his Company vehicle (TR 113). Yamashita did not ask F[redacted] if he wanted a shop steward present to consult about the reasonable suspicion testing (TR 126).

The next day, Yamashita interviewed F[redacted] with Pimentel present and asked questions of him as directed by Supervisor Eggert; Yamashita confirmed that F[redacted] had been drinking prior to reporting to work on the shift of March 3 (TR 114-115). Yamashita tried to "make sure {F[redacted]} didn't lose his job" by talking to Oceguera to see if there was something the Employer could do to prevent that outcome (TR 113, 116). Yamashita sent a detailed email to Eggert on March 7 on behalf of Faust, and he provided this email to the Union as well (TR 118, UX 2). In this email, Yamashita described the grievant as a "great employee" who is honest and who no longer drinks alcohol, and who is currently employed at Browning Contractors performing underground work in conjunction with the Employer. Yamashita did not know whether F[redacted] qualified for a rehabilitation program under UX 1 because he had driven a Company vehicle under the

influence of alcohol (TR 137-139, 145). He did not believe that the employee cited in UX 3, 4 and 5 had driven a Company vehicle under the influence as he was observed with indicia of impairment while engaged in training at a desk (TR 150). Yamashita did not make the decision to terminate the grievant, and he was not privy to any of the details related to the underpinning of this decision (TR 145).

The Union presented two other character witnesses on behalf of the grievant who testified as to his honesty, integrity and work ethic. Tony Guzman, a senior gas compliance representative, had worked with F[redacted] since 2010 (TR 159-160). The grievant was involved with developing a handbook for locate and mark employees which had been presented to upper management in New York, and this work was "cut short" unfortunately by F[redacted]'s employment incident and termination (TR 161). Guzman had also observed the grievant in social situations post-termination and observed that he no longer drank alcohol (TR 160-161). Guzman expressed a hope that F[redacted] could be reinstated to their team (TR 162).

Similarly, Steve Cleaver has worked with F[redacted] both at PG&E and at Browning, and also wrote a general letter of recommendation for the grievant in May 2017 (TR 164, UX 8). Cleaver was aware of F[redacted]'s termination at PG&E for the result of an alcohol test, but expressed no concern for safety at Browning working along side the grievant in locate and mark duties due to his excellent work performance (TR 170).

The Union also called as a witness the operations manager of Browning Contractors Cynthia Cantu (TR 192-193). Ms. Cantu was aware of F[redacted]'s termination from PG&E and aware of the reason for his termination because he disclosed it to her (TR 194). F[redacted] was hired after a third party administrator investigated his past, but

Cantu was unaware of the details of this investigation (TR 200-201). She did attest to F[redacted]'s high quality of work at Browning, and his efforts to expand safety training, OSHA compliance, and damage prevention to avoid hitting gas lines in underground construction work (TR 195-199). She also had observed that F[redacted] did not consume alcohol at various Company social functions (TR 199-200).

POSITIONS OF THE PARTIES

The Employer:

The Employer contended that there was just cause for the termination of the grievant for the serious violation of the Code of Conduct involving operating a Company vehicle after consuming alcohol. This policy is reasonably related to operational efficiency and safety in a hazardous industry. The grievant was well aware of this policy which was communicated to him as recently as during his annual training of August 2016. The rule against reporting under the influence of alcohol or driving a Company vehicle in this condition is reasonable and critical to safety of the public and employees.

The Employer conducted a fair investigation of the circumstances of this violation. Employees and F[redacted]'s supervisor observed his impairment at the job site, and his test result established that he had consumed alcohol recently as his test result was rising. The grievant was interviewed a week later with his shop steward present, and he admitted to consuming 3-4 beers off duty prior to reporting to a call-out. Pre-Review and Review Committee decisions cited by the Employer as precedential were relied upon by the Employer to determine that F[redacted]'s conduct warranted termination. The Union introduced a Pre-Review decision that was not precedent-setting, and it should not be considered by the Arbitrator in deciding the instant grievance.

The Agreement on Positive Discipline also supports the Employer's right to terminate the grievant for reporting to work under the influence of alcohol. This behavior required an immediate removal of the grievant from the workplace.

The Union's examples of differential treatment of other employees do not vary the result of termination in F[redacted]'s situation, according to the Employer. In the case of the employee in UX 3, that employee was tested under reasonable suspicion for abnormal behavior in the office, and not for driving to work in a Company vehicle. The Employer asserted that this employee's "after the fact testimony about his purported use of a company vehicle was clearly not relevant to PG&E's discipline decision at the time of his drug test" (which was positive for cocaine) (Brief, p. 19).

Similarly, the employee in UX 16 told his supervisor that he had an alcohol problem before he was tested, and he was therefore processed under an EAP program. And the employee in UX 17 was randomly tested under DOT, and the Employer had no indication whether this employee had operated a company vehicle prior to the testing. These instances are distinguishable from F[redacted]'s situation, according to the Employer.

Although the Employer agreed that F[redacted] was subject to the Letter Agreement for first- time violators as relied upon by the Union, the Employer argued that this Agreement did not prevent it from enforcing other policies as set forth in the Code of Conduct (Brief, p. 21). In the event that F[redacted] should be reinstated as a result of this Decision, the Employer contended that no back pay should be owed both because he was under the influence of alcohol at work, and because he has not followed the required process of an SAP evaluation and treatment referral under 49 C.F.R. Section 40.285 (a). F[redacted] is not and has not been eligible to perform safety-sensitive tasks since his alcohol

test result greater than .04. Given this ineligibility, he is not entitled to back pay, but could be reinstated to the position he held formerly but with a requirement to complete the SAP evaluation and treatment process.

For all of these reasons, the Employer requested that the termination be upheld for the egregious conduct of the grievant's faulty decision-making in driving a company vehicle to work and working on a voluntary on-call assignment after having consumed alcohol.

The Union:

The Union claimed that a termination was not warranted for violation of the Code of Conduct based on the grievant driving a Company vehicle under the influence of alcohol both because the grievant was an exceptional employee, and also because a violation of the Code of Conduct does not mean that termination is the appropriate result. Precedential decisions UX 14 and 18 (Arbitrators Adler and D'Orazio) confirm that termination is not mandatory for violations of the Code of Conduct.

The Union also argued that F[redacted] did not in fact violate the Code of Conduct by consuming alcohol at home on his day off. The Union contended that the grievant was not "under the influence" of alcohol based on his test results under the legal blood alcohol level of .08. His test results were higher than the DOT permitted levels of between .02 and .04, but these levels are not imported into the vaguely worded Code of Conduct language of "improper use" of alcohol.

The precedential decisions cited by the Employer all involved test results of other employees over the legal limit of .08 (EX 10, 11 and 12). And even if F[redacted] is found to have violated the Code of Conduct, termination would not be the appropriate result

because the Code contemplates an evaluation based upon the employee's disciplinary record, years of service and job duties (Code, p. 5). F[redacted] had no prior discipline and a "stellar record of service" (Brief, p. 17).

Moreover, the Employer's decision to terminate the grievant violated both the Letter Agreement (UX 1) and the Agreement on Positive Discipline (JX 2). Under the Letter Agreement, a written reminder was the appropriate level of discipline for a first violation. The grievant was also entitled to an individualized assessment with an SAP, an opportunity to satisfy the steps set forth by an SAP for him, and a chance to submit to further testing and to be reinstated on a return to work agreement. The Employer denied F[redacted] access to the entire process that would have enabled him to obtain treatment and to be reinstated (Brief, p. 18).

The Employer ignored its obligations under the Letter Agreement which had clear applicability to the grievant as a gas line worker. F[redacted] was a DOT-covered employee who was tested under this policy. The Employer chose to rely solely on its Code of Conduct while disregarding its obligations under the collectively bargained Letter Agreement.

Finally, this termination is contrary to the principles set forth in the Agreement on Positive Discipline, which considers the nature of the misconduct, the employee's work history, and prior attempts at corrective action. A "zero tolerance" approach to an employee driving a Company vehicle after consuming alcohol cannot pass muster, citing UX 18 (D'Orazio decision). The Union established that three other employees drove a Company vehicle, tested positive for alcohol or drugs, and were granted an opportunity to

seek treatment and were returned to work. These actions show disparate treatment of the grievant, but also establish that employees can be given a second chance safely.

The Union seeks reinstatement with full back pay based on the premise that the Employer denied the grievant an opportunity for a timely SAP evaluation, and cannot now use this denial as a basis for denying the grievant back pay. The Employer should be obligated to pay for the injury which the Employer caused to Mr. F[redacted], and should arrange for an SAP evaluation promptly so that he may be returned to work.

DISCUSSION

The grievant was a Senior Gas Compliance Representative involved in a safety-sensitive position for the Employer. Robert Joga, Senior Director of Labor Relations, emphasized the importance of public safety and employee safety as part of the Employer's obligation as a public utility company (TR 154-155). Both the collective bargaining agreement and the Employee Code of Conduct address the duty of both the Employer and employees to provide a "safe and healthful workplace" (TR 153-154, JX 1, EX 5).

In this matter, the grievant engaged in unsafe conduct that is undisputed by him or the Union. Mr. F[redacted], apparently unwittingly, drove a Company vehicle to a work site while under the influence of alcohol, and then located a gas line successfully for the Employer while under the influence of alcohol. There is no question that he was "impaired" by alcohol to some degree when he engaged in this conduct on March 3. The observations of his crew leader, co-workers, and Supervisor Yamashita were all consistent that F[redacted] was in fact not acting normally in the workplace: he had indicia of staggering, leaning on a shovel, demonstrated drowsiness or sleepiness, and had the smell

of alcohol on his person (UX 7). While he may not have been impaired under the legal standard of .08 for driving, he tested well beyond the Employer's standard of tolerance of .02 to .04. The Employer proved a violation of the Code of Conduct that is a very serious violation. The offenses of reporting under the influence and driving a Company vehicle under the influence are issues that could result in discipline up to and including termination. The question in this proceeding is what should have occurred once these offenses were established by the Employer.

The Parties had in place Letter Agreement No. 14-16-PGE negotiated by the Parties and in effect continuously since 2004 (UX 1). This Agreement on its face would seem to apply to any reasonable suspicion drug or alcohol testing of employees in which the employee tested positive. The Agreement is silent as to any exclusion of offenses in which an employee may not only have been working impaired by management observation, but who also drove a Company vehicle. The Agreement applies to any employee who operates a commercial vehicle with a commercial driver's license, and also to any gas employees performing operation, maintenance or emergency response functions on a pipeline. The grievant F[redacted] was covered in the latter category.

This Agreement prohibits employees from "using alcohol or illegal drugs at work" (Section D-1). Following a positive test 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" (Section D-1). Non-compliance with treatment as prescribed by an SAP results in discharge. Section E-1 states that the employee "will be returned to full

job duties upon approval of the Substance Abuse Professional and completion of the return to duty test."

Finally, Attachment 2 of this Letter Agreement sets forth a DOT First Time Violator Policy which states that the guidelines contained therein are "alternatives to immediate discharge." A first-time violator could be discharged, however, if his/her prior employment/disciplinary history were unsatisfactory, or if s/he was on probationary status. Otherwise, an employee covered by the first-time violator policy is required to complete the mandated return to duty process prescribed by an SAP selected by the Company's Employee Assistance program. The employee bears the cost of this program, but can use vacation, sick leave or medical leave in order to participate in the program. Upon successful conclusion, the employee is subject to follow-up testing for 80 months, and must execute a DOT Return to Duty Agreement, a copy of which is included in the Letter Agreement, and is a commitment to complete all treatment and aftercare programs prescribed by the SAP.

This Agreement must be evaluated in conjunction with JX 2, the 1992 Agreement on Positive Discipline, which sets forth general principles of progressive discipline for performance issues, certain unrelated offenses that warrant termination without positive discipline being applied, and immediate removal for certain situations which involve "Crisis Suspension." One of these circumstances is "reporting to work under the influence of alcohol or drugs" (Section V). If the investigation of this offense results in "sufficient evidence to support termination," an employee may be terminated. There is also an instance listed for "sufficient evidence to support disciplinary action but not termination," but examples of that determination are not specified.

In addition, the bargaining Parties also have a practice of considering certain Review and Pre-Review Committee decisions and arbitration decisions to constitute precedent for future handling of similar situations. This understanding is set forth in Title 102.4 of the collective bargaining agreement (TR 22, JX 1). Both Parties introduced a number of these past decisions in support of their respective positions as to the expected outcome of Mr. F[redacted]'s grievance based on past precedent. Some of these decisions had factual patterns that did not match the grievant's situation, such as transporting alcohol in a Company vehicle, hitting a CHP vehicle and testing over the legal limit and being arrested, or other misconduct not related to being under the influence (the Adler arbitration decision).

In reviewing these past decisions, the Arbitrator finds compelling and relevant the Employer's reinstatement decisions involved in UX 3, 4, 5, 16 and 17, and the circumstances involved in UX 10, although this Review Committee decision was considered to be "without prejudice" and dated from 2000, prior to the negotiation of the 2004 Letter Agreement concerning reasonable suspicion and other testing. In UX 3, 4 and 5, an employee tested positive for cocaine while at work training on computer, and having been observed to be impaired. This employee, unlike F[redacted], had other indicia of deficient performance noted in the observation checklist (unreliable attendance, difficulty performing normal job tasks, lacks interest in quality of work) (UX 3). He was referred to an SAP for treatment and granted a return to work agreement (UX 4 and 5). In the second day of hearing, the Union established that this employee had driven a Company vehicle to work on the day that he was observed to be impaired on the job (TR 216-218, 222-223).

In UX 16, an employee had alcohol on his breath at work, tested positive at .03 and .027, and was granted a referral by the Employer to an EAP counselor and treatment. These events occurred in August 2017 (TR 227, UX 16). In the second day of hearing, this employee testified on behalf of the Union that he had driven a PG&E vehicle on the date that he was tested for alcohol (TR 227-228). This employee was out in the field after having driven a company vehicle when his supervisor met him in the field and smelled alcohol on his breath (TR 228). This employee was placed on leave without pay, referred to an EAP counselor, and completed a program (TR 230-231). He was returned to work and has been tested at random periodically since his return pursuant to the return to work agreement (TR 232).

In UX 17, an employee was called to the yard by his supervisor and advised that he was to be tested in a random DOT test (TR 238-239, UX 17). This event occurred in November 2013 (TR 238, UX 17). The employee was not subject to DOT testing as a troubleman, but his supervisor had put him into a bidding pool for transfer to another location to assist him (TR 244-245). This employee tested at .088 and .076 (UX 17). In the second day of hearing, this employee testified that he drove a company vehicle when he was summoned to the yard for testing (TR 238-239). The employee was suspended, and then notified by Supervisor Oceguera that if he wanted to keep his employment, he would have to accept a referral to an EAP counselor and complete treatment, which he accepted (TR 240-241). The employee completed this treatment, and was returned to work approximately three months later on a return to work agreement (TR 241-242, UX 17).

In UX 10, although a non-precedential decision of the Parties, the facts were very similar to the grievant's fact pattern. The employee in question had been called in to work from a social occasion and drove to the call in a Company vehicle. He was tested by the CHP and tested at .065 and .063, and therefore was not arrested as he was under the legal limit. The grievant was a first-time offender and had been issued a DML which was deactivated as a result of the Review Committee decision. The employee did not believe that he was impaired when he responded to the call. [3]

Applying the principles set forth in the Code of Conduct, the Letter Agreement, the Agreement on Positive Discipline, and the relevant precedential decisions, it was not correct for the Employer to deny the grievant a referral to an SAP as a DOT first time violator under the reasonable suspicion testing policy. The Parties mutually bargained for this rehabilitative process to occur unless the employee had an unsatisfactory work history or was in probationary status. Neither was the case in Mr. F[redacted]'s situation. Moreover, under the Agreement on Positive Discipline, the Employer should have evaluated the numerous factors of mitigation of penalty in this matter to determine that there was sufficient evidence to support disciplinary action lesser than termination. And the Code of Conduct, as Director Joga stated, must be evaluated and "taken as a whole" with these other policies in order to grant proper weight to each of these relevant guiding principles (TR 323). It was improper for Supervisor Eggert to consider the violation of the Code of Conduct by the grievant to be the sole determining factor in this matter.

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[3] The Employer did not establish that the Parties have an agreement that neither Party may rely upon non-precedential decisions (TR 209). The Arbitrator acknowledges that UX 10 is in fact non-precedential, and has only cited it for the similarity of fact pattern to the present situation. In addition, UX 3, 4, 5, 16 and 17 are also not precedential Pre-Review or Review Committee decisions, but rather are unilateral Employer actions that demonstrate evidence of disparate treatment of the grievant, as the Union has claimed. The Union established that the three employees in these Employer actions also tested positive for drugs or alcohol at work, also drove company vehicles, and yet they were reinstated after receiving EAP referrals and completing treatment.

These mitigating circumstances are as follows. First, it is significant that the grievant reported to work on an emergency call-in basis rather than a scheduled shift. He accepted a call from Supervisor Yamashita in a desire not to let him down and to accomplish the pipeline assignment that others had been unable to locate. Clearly, he made the wrong decision to accept this work assignment, but he did so in good faith. The Arbitrator credits the grievant that he was not aware that he may have been impaired at the time he agreed to come in at an unscheduled time. This situation is distinguishable from some of the precedential decisions where employees either drank on the job or did so knowingly prior to a scheduled shift without regard to their possible impairment.

Secondly, the grievant did not consume alcohol at the job site, in his vehicle, and he did not transport any alcohol to the job site in the Company vehicle. Supervisor Yamashita searched his vehicle after impounding it and found no such evidence of open or empty alcohol containers. This situation is very dissimilar to the precedential decision involving an employee who transported alcohol in a Company vehicle and concealed it in a thermos, intentionally violating the state open container law as well as the Employee Code of Conduct.

Third, this was a first offense of the nature of <u>any</u> misconduct on the part of the grievant. He had no prior disciplinary history, no prior Code of Conduct violations, whether alcohol related or otherwise, and he had been employed for nearly eight years. As such, he was a prime candidate to benefit from the DOT first time violator agreement as set forth in UX 1.

Fourth, the grievant's work performance, ability and productivity were considered excellent, and comments on his late 2016 evaluation were uniformly laudatory of his

skills and attitude (UX 6). Moreover, Supervisor Yamashita went out of his way to highlight F[redacted]'s work ethic, drive, and the fact that he had "given his all and more to the company" (UX 2) in an email sent to Supervisors Eggert and Abercrombie shortly after the March 3 incident. And, in the Arbitrator's experience, it is highly exceptional for a non-bargaining unit supervisor to come forward and testify in a termination grievance proceeding in the compelling way that Yamashita did. This supervisor was anguished about the termination of the grievant, and "did everything what I thought I can do in my power" to try to save F[redacted]'s job from termination (TR 116).

Finally, a very important factor of mitigation is the grievant's own efforts at rehabilitation post-termination after he had been denied an opportunity for an SAP referral and possible return to work agreement under the Letter Agreement of 2004. The grievant testified that he quit drinking alcohol altogether with the help of Alcoholics Anonymous (TR 290, UX 23). He also participated in a recovery program through his church (TR 291-292). While on suspension, he attempted to contact an EAP counselor contracted with the Employer, but she told him that she could not assist him without clearance from the Employer, which did not occur (TR 285-286). Mr. F[redacted] also expressed a sincere acknowledgement that he had a problem with drinking that he had failed to address prior to the termination event (TR 315-316). In retrospect, he agreed that it was his obligation to reach out for help through EAP, and that he failed to do so (TR 316).

In deciding the appropriate penalty for the very serious offense committed by the grievant on March 3, the Employer failed to give proper weight to these various elements of mitigation. The Employer instead seemed to reach a "zero tolerance" conclusion, as

articulated by Supervisor Eggert, that the simple fact that the grievant drove a Company vehicle under the influence of alcohol resulted in automatic termination as a penalty (TR 56). There is no support for this finding in the Letter Agreement, the Agreement on Positive Discipline, or the precedential decisions as cited by the Employer. The Employer was required to weigh the grievant's prior work record, the fact that he was not in probationary status, and all the circumstances surrounding the March 3 event as analyzed above. The grievant should have been granted the same opportunity as the employees in UX 5, 16 and 17 of a referral to an SAP, the chance to complete a treatment and/or rehabilitation program, and an agreement to be subject to follow-up testing. If Mr. F[redacted] had completed treatment to the satisfaction of an SAP, he should have been granted a Return to Duty Agreement pursuant to UX 1 which would require completion of prescribed aftercare. This is the agreement that the Parties entered into in an affirmation of the principles of a rehabilitative return to work process based upon substance abuse counseling treatment as an alternative to discharge.

By way of remedy, and because the grievant cannot be reinstated absent compliance with CFR 40.285 as cited by the Employer, F[redacted]'s reinstatement to a senior gas compliance rep position must now be conditional upon completion of an SAP evaluation, referral, and education/treatment process in applicable DOT regulations. The Employer is correct that the grievant cannot perform safety-sensitive duties for the Employer without complying with these requirements. Lack of compliance with this provision is also a legitimate basis for denial of back pay in this matter. Moreover, the Agreement on Positive Discipline, Section V (3) also contemplates that an employee "shall not be reimbursed" for time off work if the employee was unfit for work or

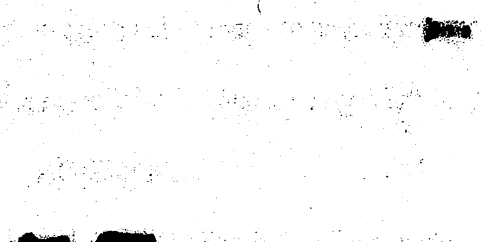
unavailable. Clearly, the grievant remained "unfit for work" until such time as he completed a mandatory SAP evaluation and treatment program required for a safety-sensitive position under DOT regulations.

Accordingly, the Employer is ordered to refer the grievant to an SAP for this process to commence. Upon successful completion of any recommended treatment and with the approval of the SAP, assuming that this approval is granted, the grievant then will be reinstated to his prior position by the Employer with seniority but without back pay or benefits. Because the grievant was deprived of the SAP referral at the time it should have occurred, and his vacation, sick leave and medical leave presumably are not available to him post-discharge, the Employer is ordered to pay the costs of the SAP evaluation and any treatment/rehabilitation program that may be prescribed in order to qualify Mr. F[redacted] for reinstatement to his position.

For all of the above reasons, the following decision is rendered:

DECISION

The discharge of the grievant D[redacted] F[redacted] was not for just cause. The Employer is ordered to reinstate him to his previous position with seniority but without back pay or benefits, conditioned upon the following process. The Employer will provide a referral to an SAP, and with the approval of this SAP upon completion of a treatment/rehabilitation program, the grievant will receive a Return to Duty Agreement under the First Time Violator Policy of Attachment 2 of the Letter Agreement between the Parties (UX 2), and be subject to testing for the period specified in that agreement. The cost of the SAP and treatment program will be paid by the Employer. Pursuant to



the stipulation of the Parties, the Arbitrator will retain jurisdiction over the issue of remedy in this matter (TR 8).

Anna Andrews Ellis