A MATTER IN ARBITRATION

In a Matter Between:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1245,

UNION

And

PACIFIC GAS AND ELECTRIC COMPANY,

EMPLOYER

Grievance: 24147 ARB-345

Hearing Dates: January 7 & 10, 2019

Award: May 14, 2019

Hirsch Case #: H18-054

DECISION AND AWARD
ROBERT M. HIRSCH, ARBITRATOR

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STATEMENT OF PROCEDURE

This matter arises as the result of a dispute between Local 1245 (Union or Local) and PG&E (PG&E or Employer) over the decision by the Employer to discharge Grievant (Grievant or Grievant) effective March 31, 2017. The parties are bound to a collective bargaining agreement (CBA) which requires all such disputes to be submitted to final and binding arbitration. The parties jointly selected this Arbitrator to hear the dispute at hand.

I find that this matter is properly before the Arbitrator and all procedural requirements have been met. A hearing was held in this matter on January 7 & 10, 2019 in Contra Costa County, at which time the parties had the opportunity to present evidence and cross-examine witnesses. At the conclusion of the hearing, the parties agreed to file post-hearing briefs, which they have done. Having had the opportunity to review the record in its entirety, this Arbitrator is prepared to issue a decision.

ISSUE

The parties agreed to the statement of the issue:

Was the grievant discharged for just cause, and if not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

A. Title 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, the following: to direct and supervise the work of its employees, to hire, promote, demote, transfer, suspend, and discipline or discharge employees for just cause; to plan, direct, and control operations; to lay off employees because of lack of work or for other legitimate reasons; to introduce new or improved methods or facilities, provided, ***however, that all of the foregoing shall be subject to*** the provisions of this Agreement, ***arbitration or Review Committee*** decisions, or letters of agreement, or memorandums of understanding clarifying or interpreting this Agreement. (Jt. Exh. 1, p. 6) (emphasis added)

B. Title 102 – Grievance Procedure

102.4. Finality

> The resolution of a timely grievance at any of the steps provided herein shall be final and binding on the Company, Union and the grievant. A resolution at a step below Step Four, while final and binding is without prejudice to the position of either party, unless mutually agreed to otherwise. (Id. at 14.)

FACTUAL BACKGROUND

Grievant was a fifteen-year employee with PG&E until he was terminated from his employment in March 2017. He served as a Gas Service Representative (GSR) based in Bakersfield, where he performed a variety of duties including responding to calls about gas leaks, turning gas on and off for customers, changing gas meters and responding to fires. Grievant also served in various capacities with the Employer over the years as a supervisor, member of a work-quality improvement group, and most recently before his termination as a new member of Operator Qualification (OQ) Refresher team. The OQ Refresher team was designed to assist PG&E employees with the OQ examinations – exams designed to comply with legally mandated, training certification requirements. Federal regulations require PG&E to ensure that its employees who perform gas-line work are proficient at handling the dangerous jobs and can recognize pipeline abnormalities.

The OQ exams are short – ten to twenty minutes – multiple choice tests. Each affected employee must pass several such exams with a perfect score, pursuant to PG&E guidelines. The Employer provides its employee test-takers with a testing book which can be used during the exam. Other outside material is prohibited. The employees have also been permitted to discuss the exam, afterwards or before sitting for the test, with co-workers and/or supervisors.

The OQ exams are patrolled by proctors who open the testing sessions with a review of the rules and an admonition to the employees to stow away "all electrical devices." The Grievant acknowledged during his testimony in this arbitration that he was aware of this warning.[1] Employees are permitted to retake the exams, up to three times, if they fail to achieve the required perfect score. If an employee fails the third time, the test-taker is provided with a one-on-one meeting with a proctor who reviews the questions missed by that individual. He then may retake the exam, after thirty days have elapsed. The exam questions in any given subject area remain the same on each successive exam, however the order is rearranged to make cheating more difficult.

The OQ Refresher team helps employees prepare for the tests and utilizes more senior employees as resources to assist less seasoned workers understand how to recognize and perform various, dangerous job functions.

Having been recently recruited for the OQ Refresher team, the Grievant came up with a plan to get better test information to the OQ Refresher team. Grievant was scheduled to take several OQ tests on February 28, 2017 in Bakersfield California. Randy Smith, a Senior Gas Qualification Specialist served as one of the exam proctors that day. He advised the class that cell phones were to put away and no electronic devices were permitted to be used during the test. Only the Employer provided iPads and documents could be used by the test-takers.

Grievant decided that he would surreptitiously us a GoPro camera exam to capture the questions on the tests. He hid the camera in his shirt pocket and then whispered into the device so he would not disrupt others and so he would not appear to be cheating. The Grievant

[1] Transcript (TR) 278-79.

recorded in this manner for about 17 minutes before the camera became too hot and he was forced to abort the recording.

After the test was over, Grievant told his acting, field service supervisor, Paul Race that he, Grievant, had tried to record the exam with a GoPro camera but hadn't been very successful. According to Race, who testified in this matter, he told the Grievant not to try and record the test. Race acknowledged that he did not report what he considered to be Grievant transgression to anyone up the chain of command. The Grievant testified that Race never told him that what Grievant had done was wrong.

The following day, after failing to pass some of the exams the day before, Grievant planned to sit for exams again. He approached Race with a new plan – Grievant wanted to communicate via a Bluetooth device to Race while the Grievant was taking the exam – giving the supervisor exam questions. Race rebuffed this offer and testified that he once again told Grievant not to record the test. Once again, the Grievant's testimony contradicted Race's. Grievant said under oath that he was not told to stop.

With the Bluetooth plan scrapped, Grievant used the GoPro camera to take pictures of the exam on day two. After the exam, Grievant tried to show the exam pictures to Race who wanted no part of it and advised the Grievant, according to Race, that he should not record the exams.

The next morning, March 1, 2017, Grievant re-took three OQ tests which he had failed. This time he photographed all of the exam questions and eventually transcribed both the questions and his answers. After the test he approached supervisor Max Miller and asked if Miller wanted to see the exam questions. Miller said he did not. The Grievant contends that Miller did not tell Grievant to stop using the GoPro. Miller testified that he discussed this exchange with Paul Race, who told Miller about his interactions with Grievant over the GoPro

camera and test questions. Miller then called his manager and ultimately, Deborah Harper in the Labor Relations group.

The same day, Race and Miller went together to meet Grievant in the field where they met up with Grievant, escorted him to his home where he picked up his company computer which had the transcribed test questions.

The following day, PG&E decided to suspend the OQ testing at Bakersfield in light of the revelation that the Grievant had surreptitiously recorded the actual questions. The site was closed and the testing equipment removed. Greg Williams, from the Employer's Corporate Security Department was asked to conduct an investigation into the matter.

The parties disagree about the thoroughness and accuracy of the Williams investigation. Williams, a former CHP officer for 28 years where he served as a lieutenant and oversaw four investigative units, interviewed Miller, Race, and Grievant.[2] He reviewed Grievant work issued computer and relevant documents related to the test and alleged violation. Williams also interviewed 21 other GSRs to determine whether the Grievant had shared the copied test material with anyone else. As it turns out, he had not.

Williams issued a final report based upon his investigation – it was admitted into evidence in this matter as Joint Exhibit 3 (4a, 4b, 4c, 4d, 4e) – and formed the basis, with the underlying evidence, for the Employer's decision to terminate Grievant.

DISCUSSION

As with all discharge cases, the Employer caries the burden of establishing that the subject employee committed the misdeeds as alleged, and that the penalty is appropriate. Here,

[2] The Employer contends that the investigation was fair and extensive in scope. The Union argues that Williams showed a clear bias in favor of PG&E by accepting Race's version of events over Grievant's.

there is little disagreement about what happened – little dispute that Mr. Grievant surreptitiously recorded or attempted to record, on more than one occasion, questions on PG&E's OQ exams. In fact, the parties seem to agree that Grievant was motivated by his desire to provide study aids to OQ Refresher team, which he was joining as a new member.

The Union and the Employer however, disagree about the appropriate discipline for Grievant transgression. PG&E concluded that the Grievant had violated three "elements of the Employee Code of Conduct." It found that he had knowingly violated Employer policies about copying test material, had knowingly disclosed this material to other employees (a supervisor and an acting supervisor) and had failed to be truthful during the investigation.

PG&E urges that it was made clear to Grievant, several times, that he was not free to use electronic devices to record test material. The proctors warned test-takers to put away all "electronic devices."[3] The written instructions distributed during the exams advised employees to stow their cell phones. And the Employer points to the Grievant's own statement made during the Williams investigation, that he, Grievant, secretly attempted to record the exam questions with a pocketed GoPro camera so that it wouldn't appear as if he were cheating.

PG&E states that the Grievant's act of using the video recording device to help himself "more easily pass the test," and possible help others is egregious and merits termination.

The Local describes Grievant actions as minor "misconduct" at best, and more accurately as good faith attempts ("extra initiative") to assist the Employer's training objectives. The Union argues that Grievant state of mind must be considered as a mitigating factor when applying the just cause standard to the Employer's termination decision. Grievant, it says, was not trying to pass test questions to other test takers, as Williams confirmed when he interviewed

21 GSRs, none of whom had received information from the Grievant. Nor was Grievant warned by his supervisors that he should cease his efforts to record test questions, or that his behavior could lead to termination.[4]

The Local asks this Arbitrator to note that the Employer's own written test instructions only advise the test-takers to stow cell phones – no other electronic devices are mentioned. And the Union emphasizes the fact that the written PG&E policy addressing the use of GoPro cameras addresses safety issues only (use in the line of duty), not the use of the camera during a company test.[5] Thus, argues the Union, Grievant had no notice that his use of the camera during the OQ exam was a terminable offense.

Finally, the Union maintains that PG&E investigator Williams was simply wrong when he stated in his report that the Grievant had failed to honestly admit that he had offered to provide the copied test material to his supervisors. Grievant has repeatedly acknowledged this point, says the Local.

The Grievant has certainly been forthcoming with his use of the camera to record the test material. He was open with his supervisors at the time, apparently candid during the investigation about his attempt to record the questions, and honest again during his testimony during the arbitration hearing. The problem for the Grievant however, starts with his extremely poor judgement in deciding to secretly record the OQ exam questions for the benefit of the OQ Refresher team.

Why didn't Mr. Grievant ever alert the OQ Refresher coordinator Steve Lehr, of his intentions and seek his approval? Why didn't Grievant inform Randy Smith, one of the test

[3] Grievant acknowledged that he heard this admonishment. (Transcript, 278-279).

proctors of his intent to record the questions for the Refresher team? Why didn't he seek clear approval from his supervisor, Max Miller? These questions are unanswered and lead us to believe that the Grievant really didn't want to seek permission in all likelihood because he suspected he couldn't get it. In fact, when he did approach his acting supervisor Paul Race, who was still a member of the Local 1245 bargaining unit, Race says he warned Grievant not to proceed with the recording plan. Race's testimony at the arbitration hearing on this point was clear and credible. No reason was offered by the Union why Race would falsify his testimony and say he warned the Grievant not to record the test questions when he had not. And Race's testimony is consistent with his refusal, conceded by all, to participate in a two-way Bluetooth conversation with Grievant while the Grievant was in the testing room.

Grievant also fails to fully appreciate the fact that the recorded test material, if ultimately shared by the OQ Refresher team with potential test-takers, *would* result in written copies of the exact test questions being made available to employees – something PG&E has prohibited. Although the Union repeatedly maintains that the Grievant never shared this material with any other GSRs, wouldn't that be the very point of providing the written exam questions and answers to the Refresher team? The Union argues in its Post-Hearing Brief that the Refresher team's "objective (is) helping future test-takers pass…"[6] The Employer therefore had reasonable concerns that the material copied by Grievant would end up in the hands of its employees.

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[4] Acting supervisor Race says he warned the Grievant more than once not to record the questions.
[5] This policy is referred to as the Five Minute Meeting tailboard document.
[6] Union's Post-Hearing Brief, p.8.

It is true that PG&E allowed a great deal of discussion among its test-takers and supervisors about the OQ exams. It clearly wanted its employees to pass. But PG&E is free to decide where the line will be drawn – what information will not be shared. And that line, according to all accounts, prohibits copies of the full test to be shared among its staff. Nothing in this record supports the notion that the Grievant may have been misled by his Employer into believing he could take pictures of the OQ exams in order to help other employees pass the test.

Finally, the Union challenges the decision by PG&E to summarily discharge Grievant for the misconduct at issue. The strongest argument made in support of this position is the fact that acting supervisor Race didn't warn the Grievant that he was potentially committing a terminable offense and didn't report Grievant activity up the chain of command. But this contention ignores the very nature of the Grievant's transgression. Whether he cares to acknowledge it or not, he betrayed the trust of his Employer in a sensitive setting – OQ testing, required by the Department of Transportation. A company engaged in the transportation of gas must certify that its workforce is qualified to do this work.[7] The OQ exams serve that purpose. The Grievant's actions can only be considered a form of cheating, even if he was motivated by noble intentions – to help other test-takers. It compromised the integrity of the test and caused PG&E to shut down that testing site. Such conduct, so clearly antithetical to an honest and fair work environment rightfully leads to severe consequences. The surreptitious recording of exam questions is tantamount to lying or cheating or stealing. All call into question a person's honesty, integrity and trustworthiness going forward.[8] Arbitrators historically and routinely

[7] 49 C.F.R. § 192.805(b).
[8] Although the Union cites several arbitration decisions as persuasive authority, where arbitrators reduced terminations to lesser penalties, none of those cases involved serious questions of integrity and honesty.

have found that termination is appropriate for such misconduct. Unfortunately for the Grievant, I do as well.[9]

AWARD

Based upon the record in its entirety and the arguments of counsel, I find that the Employer had just cause to terminate the employment of Grievant. Accordingly, the grievance is denied.

IT IS SO ORDERED.

Date: May 14, 2019

Robert M. Hirsch, Arbitrator

[9] I make no finding or draw any conclusion about the allegation that the Grievant lied during his investigative interview as there is sufficient basis to uphold the discharge without it.