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IN ARBITRATION PROCEEDINGS PURSUANT TO

AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy Between:	
IBEW LOCAL 1245	Arbitrator's File No. 94-206-LA
and,	
PACIFIC GAS & ELECTRIC COMPANY	ARBITRATION OPINION AND AWARD (February 8, 1996)
[Re: Termination Grievance, Arbitration No. 205]	

Appearances: Tom Dalzell, attorney for IBEW Local 1245; Maureen L. Fries and James Goodfellow, attorneys for Pacific Gas & Electric Company.

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between IBEW Local 1245, and Pacific Gas & Electric Company. The Union claims that the Company dismissed clerical employee A without just cause. The Company maintains

that Ms. A was dismissed because of her willful misrepresentation regarding a dependent for medical coverage.

The undersigned was selected by the parties to conduct a hearing and render an award as part of a labor-management arbitration panel. The hearing was held on March 3, 1995 in Walnut Creek, California. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses, and for introduction of relevant exhibits. The dispute was deemed submitted on January 12, 1996, the date the final documentary package was received in this and in another arbitration raising similar issues. (See PGE and IBEW 1245, Arb. No. 207.)

ISSUES

The parties agreed on the following statement of the issues to be resolved: Was the grievant terminated for just cause; if not, what is the remedy? (Tr. 4.)[1]

[1]Under Section 24.1 of the labor agreement, the Company has the authority "to discipline or discharge employees for just cause."

FACTUAL ANALYSIS

1. Facts Giving Rise to the Dispute

This case concerns A , a clerical employee hired by the Company in February 1975 and dismissed from employment in April 1993.[2] Prior to the incident that gave rise to this dispute, Ms. A had never been disciplined by the Company. (Tr. 51.) For 15 years before her dismissal, Ms. A had been a Union shop steward. (Tr. 72.)

The Company's termination decision was premised on Ms. A having medical insurance coverage that included an ineligible dependent. In 1986, the Company's medical coverage was provided through a health plan administered by Blue Cross. Under this plan, Blue Cross received monthly service fees from the Company for paying claims submitted by employees. Absent an actual claim, there was no premium paid by the Company for employees, unless they were on a leave of absence. (Tr. 26-29.) For those on leave, an average premium was calculated. As relevant here, permissible dependents for claims have been limited to married spouses and unmarried dependent children. The largely uncontested facts related to the allegation of an ineligible dependent are the following.

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[2]Ms. A was married in 1994. For convenience, the name she used during the period relevant to this case shall be used in this decision.

In June 1986, Ms. A submitted an enrollment change form for her medical coverage as a Company employee. (Jt. Exh. 4, p. 13.) The form listed W Smith as her husband, noting a marriage date of May 31, 1986. At the time, Ms. A was not married to Mr. Smith. (Tr. 54-55.) More recently, the Company has required proof of marriage to secure health benefits for a spouse.

Company personnel records do not include any written document ever being submitted by Ms. A to have Mr. Smith removed from coverage. This opportunity was available to the grievant because the Company distributed enrollment change forms on an annual basis. (See Matthews Declaration (3/31/95), atts. 1 - 4.) An inference adverse to the grievant also can be drawn from her Company savings plan benefit. As to that program, in July 1986 Ms. A made a change that deleted her former husband as a beneficiary and substituted one of her sons. (Tr. 79.) In addition, in 1987, the Company initiated an amnesty program permitting employees to delete ineligible dependents without penalty. (Un. Exhs. 4, 5.) Ms. A was aware of the amnesty program, but there is no evidence that Mr. Smith was deleted during this time frame. (Tr. 59-60, 72.)

In May 1987, a claim was submitted to Blue Cross for treatment reportedly given to Mr. Smith for an elbow examination and for an x-ray. (Co. Exh. 1; Un. Exh. 2.) The claim was

forwarded by the doctor's office, and not by Mr. Smith or by Ms. A . The submission resulted in a $64 payment by the plan administrator. Apart from this payment, there was no evidence of any other claim submitted by Ms. A on behalf of Mr. Smith, or by Mr. Smith himself, or by a doctor treating Ms. Smith, utilizing Blue Cross or any other medical carrier available through the Company. Medical offices providing health care services to Ms. A and her family were subpoenaed to produce such information, but none was discovered. (Co. Exhs. 1 - 3.)

For about six years Mr. Smith's listing was unchanged. In 1993, the Company learned that Mr. Smith was maintained as a dependent on Ms. A 's medical coverage. An investigation was undertaken, resulting in her dismissal on April 30, 1993. This arbitration followed.

Underlying the grievant's dismissal is the Company's policy regarding ineligible dependents that was adopted in 1990, and that prescribes disciplinary consequences for such activity. (Jt. Exh. 4, pp. 25-26.) The policy statement was sent to employees at their homes. (Tr. 43-44.) It provides that a written reminder shall be utilized for simple negligence, or Category "A" cases. For willful misrepresentation - Category "B" cases - the policy states that discipline ranging from a decision-making leave (i.e., a suspension) to a dismissal shall be appropriate, depending on the facts of each situation. A

third type, Category "C" cases, is not relevant here as it applies to a failure to cooperate in the Company's investigation. There is no dispute that Ms. A as a Company employee was on notice that willful misrepresentation with respect to medical coverage would be the basis for discipline. (Tr. 77, 84.)

2. The Grievant's Account

In the course of the Company's investigation and in her testimony, Ms. A admitted that the enrollment form stating that Mr. Smith was her husband was incorrect, and that she was aware it was false at the time his name was added. (Tr. 75-76.) The grievant' explained that she and Mr. Smith intended to get married in mid-1986, but then postponed and then abandoned the plan. (Tr. 54-55.) Several years later, in 1994, Ms. A and Mr. Smith were married. (Tr. 52.)

The grievant recalled that after 1986, at a time she could not specify, she submitted an enrollment change form to remove Mr. Smith as a covered dependent. (Tr. 56.) Ms. A kept no record of the deletion document, and the Company's personnel file does not reflect that such a submission was received. (Tr. 82-83.) The personnel officer identified by Ms. A as being aware of a removal inquiry had no recollection of such a request. (Tr. 41.) Regarding the annual enrollment modification forms, Ms. A explained that in subsequent years she did not submit

any additional written document deleting Mr. Smith, or utilizing the amnesty program, because she assumed he no longer was covered by the plan. (Tr. 60.) For this reason, she testified that she did not examine the annual documents sent to her because she did not wish to change her insurance plan, and instead she discarded the materials. (Tr. 59, 87.)

With respect to Mr. Smith's elbow examination in spring 1987, the grievant stated she was not aware that he had such a medical problem or that he had ever sought treatment from the doctor who submitted the claim. (Tr. 57, 62, 67.) Indeed, according to Ms. A , the physician who submitted the claim had never been used by any member of her family, although her son did see another doctor in the same suite of offices. (See, e.g., Un. Exh. 3; Tr. 65.) The document offered by the Company does not include Mr. Smith's signature.

As further evidence regarding the grievant's intent, Ms. A testified that during the period of her long-term relationship with Mr. Smith, he was employed most if not all of the time, with separate medical insurance coverage. (Tr. 67-69, 91-92.)[3] In addition, the grievant testified that, without

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[3]Ms. A 's testimony that Mr. Smith had separate coverage most of the years of their relationship based on his own employment was partially inconsistent with a file note in the joint investigation report summarizing her statement that Mr. Smith was unemployed in 1986. (Jt. Exh. 4, p. 18.) This investigatory statement is in accord with the dependent enrollment form which stated that Mr. Smith was <u>not</u> covered by

charging the health plan, Ms. A paid for thousands of dollars of medical benefits for Mr. Smith in connection with an alcohol rehabilitation program in summer and fall 1986. (Tr. 58, 92; Jt. Exh. 4, p. 11.) Ms. A also recalled that Mr. Smith subsequently had back surgery in 1989 for a work-related injury without a claim being filed under the Company's plan. (Tr. 58, 99.)

3. Evidence of Disparate Treatment

Two areas of evidence were examined regarding the issue of the Company's disciplinary treatment of employees who had medical coverage for ineligible dependents. One area was an overall categorical and statistical summary of cases. A second area involved specific examples of disciplinary action.

Regarding the case summary, there were 111 cases of ineligible dependents identified for a period between 1992 and 1994.[4] Of the cases cited, only 52 involved any discipline, including but a handful of terminations for Category B misrepresentation cases. The probative value of the few termination cases is weakened because one concerned an employee

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another insurance plan. (Id., p. 13.)

[4]Although questions have been raised by the Union about the sufficiency of the Company's fact-gathering, at this stage a satisfactory presentation of evidence has been offered for the findings set forth above.

who was not in the bargaining unit, and another involved an employee who was permitted a voluntary severance of employment.

A review of the case summaries shows that the greatest number arose from employee retention of former spouses, sometimes for years and at great expense to the Company. In almost all instances, these employees have been treated as Category A offenders with their actions being deemed negligent, even when years have past or when large sums were at issue. The most common penalties have been written reminders and warnings. Often these have been coupled with the restitution of premiums, claims, or other specific expenditures incurred for the individuals who were not entitled to coverage. For example, in one remarkable case, an employee was given a decision-making leave despite carrying his former wife on his coverage from 1978 to 1994. By Company policy, this employee's restitution was limited to the two years preceding the discovery, amounting to more than $3,500.

The second area of disparate treatment evidence concerned individual cases. The Company cited two cases to support its termination action. In one, a 1991 labor-management pre-review decision sustained the dismissal of an employee who had added a woman who was not his wife, with the Company suffering a major expense as a result. (Jt. Exh. 4, p. 29.) In the second case, a labor-management fact-finding report in 1992, the panel upheld the dismissal of an employee who had not dropped his wife from

coverage after a divorce, resulting in a substantial cost to the Company. (Jt. Exh. 4, p. 28.)

In contrast, the Union offered evidence that in at least two instances employees had added ineligible dependents - unmarried companions - to their plans, but the employees were given brief decision-making leaves along with a direction to repay any funds that had been allocated improperly. In one 1993 case, the ineligible dependent had been covered for five years, and restitution of $3,500.00 was required. In the second case in 1994, an employee's common law wife was covered for 14 years, and the employee was directed to make restitution of about $4,000.

DISCUSSION

1. Introduction

The Company contends that Ms. A was aware that Mr. Smith was not an eligible dependent when he was added in 1986. The Company also maintains that there was insufficient proof of any action by Ms. A to delete Mr. Smith, and that her claim to that effect was not credible. Further, in the Company's view, evidence of the medical payment made on behalf of Mr. Smith strengthens its case, as do the multiple opportunities that Ms. Arjona had to remove Mr. Smith through the amnesty program and

annual enrollment change periods. In this context, the Company urges that dismissal was within its discretion and was consistent with the limited evidence of previous ineligibility cases involving misrepresentations.

The Union maintains that the Company failed to satisfy its heavy burden to establish that Ms. A had the willful intent to defraud the employer. In this regard, the Union argues that a negative inference on the issue of intent should be drawn from Ms. A 's payment of a major alcohol rehabilitation expense for Mr. Smith just after he was added. This is consistent, according to the Union, with there being no other claims in the seven years of ineligible enrollment, and with Ms. A 's testimony that she sought to drop Mr. Smith from the plan. The Union also points to the questionable nature of the single claim for $64.00, citing the possible billing mix-up in the doctor's office. The Union contends that the amnesty concept utilized in 1987 should apply here, since Ms. A assumed that Mr. Smith no longer was covered, and it is not reasonable to infer wrongdoing from her failure to act in response to annual letters she may not have seen. Finally, the Union urges that the Company's disparate treatment of employees in ineligible dependent cases is an additional consideration weighing against dismissal.

Reviewing a dismissal requires an analysis of several factors. First, has the employer relied on a reasonable rule or policy as the basis for the disciplinary action? Second, was there prior notice to the employee - express or implied - of the relevant rule or policy, and a warning about the discipline? A third factor for analysis is whether the disciplinary investigation was appropriately conducted with statements and facts fully and fairly gathered. Fourth, did the employee engage in the actual misconduct as charged by the employer? In this regard, many cases are influenced by credibility determinations. Last, are there any countervailing or mitigating circumstances requiring modification of the discipline imposed? For example, is there evidence of substantial seniority justifying a final employment opportunity, or of disparate disciplinary treatment of comparable offenses? For the reasons noted below, it is concluded that the Company has not demonstrated just cause for Ms. A 's dismissal and a lesser penalty would be appropriate.[5]

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[5]This outcome is consistent with the arbitrator's contractual authority to determine the sufficiency of cause for discipline. (See, e.g., Hill and Sinicropi, Remedies in Arbitration (2d ed.), at pp. 267-268.) As one arbitrator stated in modifying the dismissal of an employee:

> ...it is an essential element of "just cause" that the penalty be fair and fitting to the circumstances of the case. For although an employee may deserve discipline, no obligation to justice compels imposition of the extreme penalty in every case or a penalty that is more severe than the nature of the offense requires. (Wolverine Shoe & Tanning Corp. (Platt 1952) 18 LA 809, 812.)

2. The Issue of Just Cause

First, there can be little dispute that the Company's ban on ineligible dependents is a reasonable rule of a traditional nature serving to check excessive medical costs, one of society's pressing work place concerns. If there is a disagreement about the restricted scope of coverage and the limitations affecting unmarried companions, this should be addressed at the bargaining table and not by disregarding the rule itself.

Second, the Company offered ample evidence that Ms. A had notice of the rule limiting eligibility to married spouses, along with the Company's warning of possible discipline. Indeed, Ms. A admitted her awareness of the rule and of the prospect of discipline for a violation.

Third, there was sufficient evidence of a willful misrepresentation by Ms. A to trigger discipline. Ms. A frankly admitted her wrongdoing, which was compounded by her confessed negligence in failing to use the repeated opportunities she presumably had to correct the situation. Ms. A 's testimony that she attempted to delete Mr. Smith was

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The exercise of arbitrator discretion to modify discipline is appropriate when the employer's finding of cause is procedurally or substantively flawed, or if the penalty is excessive or arbitrary. (See, e.g., Hill & Sinicropi, supra; Monfort Packing Co. (Goodman 1976) 66 LA 286, 293-294.)

weakened because it was not supported by customary business records or by any copy she retained.

Fourth, the Company's investigation was fair and thorough under the circumstances. Ms. A was given an opportunity to offer her comments before discipline was imposed, and the Company also sought relevant information from appropriate medical offices and providers.

Last, regarding the level of discipline, the Company's termination decision should not be disturbed without strong reasons. The employer is large in size, geographically widespread, and diverse in its fields of activity. Given the relatively modest number of ineligible dependent cases, it appears that most employees are conscious of the limits of coverage and act accordingly. This is consistent with the general experience of the undersigned that employees pay careful attention to health plans that affect them and their loved ones. When the evidence convincingly proves a misrepresentation took place of the nature charged, the Company understandably might view dismissal as the preferred penalty. Certainly, by the Company's position in this and in the related arbitration, the Union has been placed firmly on notice of the Company's intent regarding future disciplinary action. However, despite these considerations, the Company is on weaker ground when the discipline is analyzed in this specific case.

In this proceeding, mitigating circumstances should be considered, particularly because the Company's policy states that its disciplinary discretion may range from a decision-making leave to dismissal for willful misrepresentation. It is not evident that such discretion was applied.

As one mitigating factor, Ms. A .'s seniority of nearly two decades of service compels a close analysis of the facts. An employee with such a substantial contribution to the Company's well-being should be dismissed only if her misconduct clearly warrants that outcome.

Related to the degree of wrongdoing, there is doubt in the record that Ms. A engaged in a scheme or design to use the medical plan benefit for treatment for Mr. Smith. Even if it can be inferred that Mr. Smith actually was treated in one instance based on the limited documentary evidence and his failure to testify, it was not shown that Ms. A was aware of this treatment. Most likely, her enrollment of Mr. Smith anticipated marriage plans that did not materialize in that time period. Perhaps, thereafter, Ms. A was reluctant to give up hope or fearful that an attempt to delete Mr. Smith would be her undoing, or both. This is consistent with other negative inferences from the record, including the several years of coverage, the evidence of only a single claim despite a canvas of medical offices used

by Ms. A , and the evidence of other major medical expenditures for Mr. Smith that were not submitted as claims for Company coverage.

Another mitigating consideration is the evidence of disparate treatment. This is an appropriate criteria in assessing a dismissal penalty, according to Company precedent and to well-established views in the field of labor arbitration.[6] Although there are few Category B cases to compare, still they demonstrate conflicting results in the Company's treatment of willful misrepresentation. Indeed, there are at least two cases of a troubling nature involving lengthy coverage at great cost for ineligible dependents added by the disciplined employee, and yet these were treated with a relatively modest decision-making leave. There is no evidence in the record to suggest that these cases had characteristics providing material distinctions from the misconduct charged in this instance.

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[6]See PG&E and IBEW Local 1245 (Re: Arb. No. 99), Letter Award, March 7, 1983, at pp. 12-14; Bornstein & Gosline, Labor and Employment Arbitration, at p. 19-11; Elkouri and Elkouri, How Arbitration Works (4th Edition), at pp. 684-685. The latter commentators summarize the relevant principles as follows:

> It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for variations in the assessment of punishment (such as different degrees of fault or mitigating or aggravating circumstances affecting some but not all of the employees). (Id. at p. 684.)

On the subject of evenhandedness, adverse inferences also can be drawn from what appears to be the Company's near-automatic treatment of after-divorce cases as Category A negligence situations. Many of these cases involve long periods of ineligibility, large expenditures, and routine annual notifications, all of which support inferences of willfulness similar to those invoked by the Company in this proceeding. Granted, there are several difficult questions in determining whether an after-divorce case is a matter of negligence or of willful misrepresentation, but the treatment of virtually all such cases as negligence alone raises doubt about the fairness of discipline in this proceeding. Unfortunately, the Company's disciplinary record has sent mixed messages to employees and to the Union about how the issue of ineligibility shall be treated, particularly following the Company's attempt to start from a clean slate after the amnesty program and after the restatement of Company policy several years ago.

3. The Remedy

Substantial discipline is appropriate in this instance because of the persuasive evidence of willful wrongdoing in violation of an important Company policy. That the harm was not worse is fortunate, but the employee's action skirted the edge of serious financial abuse and she should not be granted a monetary make whole benefit for her time out of work. Nevertheless,

employment to avoid the sacrifice of an entire career.

For the reasons noted, it shall be ordered that Ms. Arjona's dismissal shall be converted to a long term disciplinary suspension without pay, and that she be reinstated to employment without loss of seniority.[7] As an alternative, at Ms. A 's election and subject to applicable Company rules, she shall be afforded an opportunity for a voluntary resignation and/or retirement. Either reinstatement or voluntary separation shall be conditioned upon Ms. A 's restitution to the Company of any funds paid by the Company for her ineligible dependent coverage or claims. Pursuant to the stipulation of the parties, the arbitrator shall retain jurisdiction to resolve any disputes over implementation of the remedy.

AWARD

Based on the testimony and documentary evidence, and the findings and conclusions set forth above, the undersigned renders the following Award:

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[7]Comments by the parties at the hearing suggest that there may be doubts about Ms. A 's fitness to return because of medical problems unrelated to this case. The directive in this decision shall not preclude a further examination of this issue.

1. The grievance shall be sustained in part and denied in part.

2. Ms. A 's dismissal shall be converted to a long term disciplinary suspension without pay, and shall extend to the date of this decision.

3. Ms. A shall be reinstated to employment without loss of seniority. As an alternative, at Ms. A 's election and subject to applicable Company rules, she shall be afforded an opportunity for a voluntary resignation and/or retirement. Reinstatement or voluntary separation shall be conditioned upon Ms. A 's restitution to the Company of any funds paid by the Company for her ineligible dependent coverage or claims.

4. Pursuant to the stipulation of the parties, the arbitrator shall retain jurisdiction to resolve any disputes regarding implementation of this Award.

Date: February 8, 1996

BARRY WINOGRAD
Arbitrator

~~concur~~/dissent)
JOHN MOFFAT
Company Arbitrator

(concur/~~dissent~~)
ROGER STALCUP
Union Arbitrator

~~concur~~/dissent)
STEVE RAYBURN
Company Arbitrator

(concur/~~dissent~~)
ENID BIDOU
Union Arbitrator