REVIEW COMMITTEE

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MARGARET A. SHORT, CHAIRMAN

☐ DECISION
☐ LETTER DECISION
☐ PRE-REVIEW REFERRAL

Review Committee File No. 1770-94-5
Arbitration Case No. 207

This case involved the discharge of a Transmission Mechanic for adding two ineligible dependents to his medical plan. The arbitrator reinstated the grievant without backpay conditioned upon his making restitution to the Company of any funds paid by the Company for his ineligible dependent coverage or claims.

Additional conditions of return as agreed to by the Chairman and Secretary of the Review Committee are:

successful completion of the pre-employment physical examination including the drug screen and;

placement on a Decision Making Leave active for one year from the date of his return.

This case is closed on the basis of the foregoing adjustments.

Margaret A. Short
Margaret A. Short, Chairman
Review Committee

2/26/96
Date

Roger Stalcup
Roger W. Stalcup, Secretary
Review Committee

2/29/96
Date

BARRY WINOGRAD
Arbitrator and Mediator
1999 Harrison Street, Suite 1300
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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. 95-119-LA
and,	
PACIFIC GAS & ELECTRIC COMPANY	ARBITRATION OPINION AND AWARD (February 8, 1996)
[Re: Termination Grievance Arbitration No. 207]	

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 transmission mechanic B without just cause. The Company maintains that Mr. B was dismissed because of his

willful misrepresentation regarding his dependents 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 June 19, 1995 in San Francisco, California. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses, and for introduction of relevant exhibits. As part of the record, the parties incorporated evidence presented in another proceeding involving a dismissal based on similar grounds. (Tr. 6-8 (re: PGE and IBEW 1245, Arb. No. 205).) The dispute was deemed submitted on January 12, 1996, the date the final documentary package was received in this and in the related arbitration.

ISSUES

The parties agreed on the following statement of the issues to be resolved: Was the grievant B terminated for just cause; if not, what is the remedy? (Tr. 5.)[1]

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[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 B , hired by the Company in 1973 and dismissed in November 1993. At the time of his dismissal, Mr. B was working as a transmission mechanic on pipeline projects. (Tr. 42.) During Mr. B 's service with the Company, he was disciplined on one occasion for a minor offense. (Tr. 88.)

The Company's dismissal decision was based on Mr. B having medical health plan coverage for two ineligible dependents. One ineligible individual was identified as K B . Her son J Y also was listed. This coverage was in addition to coverage for Mr. B and for his son N . The expanded coverage was effective as of November 1989. (Jt. Exh. 2, att. 3.) In 1989, Mr. B was not married to K B , whose real name was K Y . Mr. B never did marry Ms. Y , and they eventually ended their shared living arrangement in late 1992. (Tr. 88.) Indeed, Mr. B , although separated from his first wife in 1985, did not get his final divorce decree until November or December 1989. (Tr. 44.) His first wife had been removed from coverage before Ms. Y was added. (Tr. 82.)

In 1989, 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. (Arb. No. 205, 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. (Tr. 38; Co. Exh. 2.)

The evidence supporting the Company's contention that Mr. Burruel had health plan coverage for ineligible dependents did not include an enrollment form bearing his signature. The relevant form apparently had been misplaced or lost as a result of earthquake damage in 1989, and a copy never reached his Company personnel file. (Tr. 22, 29.) Nevertheless, another Company business record shows that as of November 1, 1989 Mr. B .'s plan coverage included the four individuals noted above: Mr. B , his son N , K (B .) Y and her son J Y (Jt. Exh. 2, att. 3; also see Co. Exh. 1 (A - C).) More recently, the Company has required proof of marriage to secure health benefits for a spouse. In the years after 1989, Ms. Y and her son were not removed from the health plan coverage. This would have been possible based on annual

enrollment change documents that had been forwarded to Mr. B for his review. (Co. Exh. 1.)

Documents offered by the Company demonstrate that one medical payment claim was submitted to Blue Cross for a December 1989 visit by K Y . (Jt. Exh. 2, att. 7; Jt. Exh. 4; Tr. 23.) A $20 payment was made on this claim. On the claim form, Mr. B . was identified as the primary insured. Other medical insurance records were searched, but there was no evidence found of additional medical claims being submitted. (Jt. Exh. 2, atts. 6, 7.)

Mr. B 's ineligible dependent coverage came to light in August and September 1993. At that time, he sought to add coverage for his new wife, J M . B . (Tr. 16, 18.) In processing Mr. B 's request, the Company discovered that an individual named K B . already was identified as his wife, with J Y also being listed. Initially, Mr. B denied any knowledge of K B or J Y being covered, and he explained to a Company representative that he was not married to K B . (Tr. 60.)

At a subsequent pre-disciplinary meeting, a Company representative recalled that Mr. B . modified his account by commenting that K Y had been added because they had planned to marry. (Tr. 25.) The Company's termination decision

was issued November 22, 1993, with a grievance and this arbitration following. (Jt. Exh. 2, atts. 1, 2.)

Underlying the grievant's dismissal is the Company's policy regarding ineligible dependents that was adopted in 1990, and that is set forth in written documentation prescribing disciplinary consequences for such activity. (Jt. Exh. 3.) The policy was sent to employees at their homes. (Arb. 205, 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 Mr. Burruel, as a Company employee,was on notice that willful misrepresentation with respect to medical coverage would be the basis for discipline. (Tr. 80; Co. Exh. 2.)

2. <u>The Grievant's Account</u>

The grievant testified that he was unaware of the existence of ineligible dependent coverage under his insurance plan until the disclosure was made to him in 1993. (Tr. 43, 45-46.) He also flatly denied having added K or J Y to his

insurance plan. (Tr. 43, 60.) In Mr. B .'s testimony, he denied having admitted at a pre-disciplinary meeting that he had added dependents in advance of an intended marriage. Nevertheless, Mr. B recalled that he had planned to marry K Y at one time. (Tr. 71.) The grievant also testified that he assumed K Y had her own medical coverage because she was a county employee. (Tr. 44.)

With respect to notice of coverage, Mr. B explained that he did not remember receiving annual enrollment forms regarding his medical insurance, which he had not planned on changing, that he moved around a great deal as a pipeline worker, and that he often did not open or read the mail he received. (Tr. 53-57.) In this context, the grievant denied any intent to defraud the Company. In particular, the Union has emphasized that only ten months after supposedly adding two ineligible dependents, Mr. B designated K . Y as a life insurance and savings fund beneficiary, using the name Y and describing her on the relevant Company document as his "girlfriend." (Jt. Exh. 2, att. 4; Tr. 27.) On the insurance and savings form, there was no designation of J Y

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.[2] 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 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

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[2]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.

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 there was convincing evidence that Mr. B knowingly added Ms. Y and her son to his medical plan coverage. Documentary evidence of the existence of such coverage was offered, along with testimony about Mr. B 's admission of wrongdoing during the investigation. In the Company's view, this evidence is sufficient to demonstrate his misconduct despite the absence of an actual enrollment form, which apparently was lost due to reasons beyond the Company's control. The Company urges that Mr. B 's denial that he added the ineligible dependents is not credible, and no other explanation has been suggested of how Ms. Y and her son came to be listed. The Company maintains that discipline also is supported by evidence of an actual claim paid on behalf of Ms. Young, with Mr. B being identified as the primary insured on the medical payment form. Since Mr. B had multiple opportunities to remove the ineligible dependents during the annual enrollment periods, the Company urges that his wrongdoing was compounded. In this context, the Company believes that dismissal was within its discretion and was consistent with the limited evidence of previous cases involving misrepresentations.

The Union counters that the Company failed to prove that Mr. B . actually added Ms. Y and her son, and that such proof is an essential element of the employer's theory of fraudulent misconduct. The Union contends that Mr. B 's action should not be imputed on the basis of other corporate records or by his failure to read annual enrollment letters. Apart from these considerations, the Union would draw negative inferences regarding Mr. B 's intent from other listings in his personnel file describing Ms. Y as his "girlfriend," from the single instance of a claim in four years, and from Mr. B 's voluntary comments regarding Ms. Y when he went to add his new wife to coverage in 1993. 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 Mr. B ''s dismissal and a lesser penalty would be appropriate.[3]

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

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[3]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.)

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.)

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, there was persuasive evidence offered by the Company that Mr. B had notice of the Company's rule limiting eligibility to married spouses and dependent children, along with the Company's warning of possible discipline. Mr. B acknowledged as much in his testimonial disclaimers of wrongdoing.

Third, the Company offered sufficient evidence of a willful misrepresentation by Mr. B , even without production of his actual enrollment form. In particular, Mr. B 's investigatory admission as recounted in credible testimony, the Company's documentary evidence of coverage for the relevant period, and the multiple notifications of enrollment opportunities, all support the Company's conclusion of wrongdoing. If Mr. B did not see the annual notifications because they were ignored or disregarded, this negligence on his part should not be held against the Company.

Fourth, the Company's investigation was fair and thorough. Mr. Burruel was given an opportunity to offer his 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, Mr. B '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 his misconduct clearly warrants that outcome.

Related to the degree of wrongdoing, there is doubt in the record that Mr. B engaged in a scheme or design to use the medical plan benefit for treatment for Ms. Y . On this point, there was evidence of only a single claim in four years, and no evidence that this claim actually was known to Mr. B . It is more likely that Mr. B added Ms. Y in hopeful anticipation of marriage, but this did not come to pass. Also weighing against a finding of egregious wrongdoing is that it was Mr. B himself who prompted the Company's discovery through his action seeking to add his new wife in 1993, and by his initial voluntary disclosures.

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.[4]

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[4]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:

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.

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

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> 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.)

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 he should not be granted a monetary make whole benefit for his time out of work. Nevertheless, mitigating factors cited above justify a final opportunity for employment to avoid the sacrifice of an entire career.

For the reasons noted, it shall be ordered that Mr. B 's dismissal shall be converted to a long term disciplinary suspension without pay, and that he be reinstated to employment without loss of seniority. As an alternative, at Mr. B 's election and subject to applicable Company rules, he shall be afforded an opportunity for a voluntary resignation and/or retirement. Either reinstatement or voluntary separation shall be conditioned upon Mr. B .'s restitution to the

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:

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

2. Mr. B 's dismissal shall be converted to a long term disciplinary suspension, and shall extend to the date of this decision.

3. Mr. B shall be reinstated to employment without loss of seniority. As an alternative, at Mr. B 's election and subject to applicable Company rules, he shall be afforded an opportunity for a voluntary resignation and/or retirement. Reinstatement or voluntary separation shall be conditioned upon Mr. B 's restitution to the Company of any funds paid by the Company for his 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~~)
MICKEY HARRINGTON
Union Arbitrator