In the Matter of an Arbitration Between **IBEW LOCAL 1245** **and** **PACIFIC GAS AND ELECTRIC** **Grievance: Termination**	**AWARD & OPINION** **Arbitration Case No. 215 NB1604**

BEFORE

NORMAN BRAND,
Neutral Arbitrator

ROGER STALCUP,
Union Appointed Arbitrator

FRANK HUTCHINS,
Union Appointed Arbitrator

MARGARET SHORT,
Employer Appointed Arbitrator

BRUCE A. TISON,
Employer Appointed Arbitrator

APPEARANCES

FOR IBEW LOCAL 1245
TOM DALZELL, ESQ.
Staff Attorney

FOR PACIFIC GAS AND ELECTRIC COMPANY
STACY A. CAMPOS, ESQ.

May 16, 1996

BACKGROUND

By memorandum dated April 29, 1994, Pacific Gas and Electric ("Company" or "PG&E") advised Mr. C "Grievant") that it was putting him on Decision Making Leave ("DML") because of allegations that he had improperly rented the Division Clubhouse to outside parties. (J-4, Exhibit 4) On July 20, 1994, the Company advised Grievant he was being terminated, effective July 22, 1994, as the result of an avoidable accident on July 15, 1994. IBEW Local 1245 ("Union") grieved both the DML and the termination. By agreement of the parties both cases were consolidated for arbitration. I held a hearing on February 15, 1995, at the Company's facilities in San Ramon, California.

Both parties were present at the hearing, and represented by counsel. Each party was given a full opportunity to examine and cross-examine witnesses, present evidence, and argue its position. Neither party objected to the conduct of the hearing. A stenographic record of the proceedings was made. At the close of the evidence the parties asked to file post-hearing briefs. I received the last brief on May 7, 1996, at which time I declared the hearing closed.

ISSUES

At the hearing the parties stipulated the following issues:

1. Was there just cause for the Decision Making Leave?

If not, what remedy?

2. Was there just cause for the termination?

If not, what remedy?

The parties entered the following further stipulations:

1. The lower steps of the procedure have been met or waived and the matter is properly before the Arbitration Board for determination.

2. If any remedy is awarded, the Arbitration Board shall retain jurisdiction over the implementation of the remedy.

RELEVANT CONTRACT LANGUAGE

TITLE 7. MANAGEMENT OF COMPANY

7.1 Management of Company

The management of the Company and its business and the direction of its working force are vested exclusively in the Company, and this includes, but is not limited to, the following: to ... discipline or discharge employees for just cause ... (J-1)

POSITIVE DISCIPLINE GUIDELINES

IIII. 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, ...

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 ...

IV. ADMINISTRATIVE GUIDELINES

A. Rule infractions are generally divided into three categories: These are: 1) work performance, 2) conduct, and 3) attendance. The maximum number of oral reminders that may be active at one time is three (3), and these must be in different categories. Should another performance problem occur in the category where there is already an active oral reminder, the discipline step must escalate to a higher level of seriousness; usually a written reminder. The maximum number of written reminders that may be active at one time is two (2), and these must be in different categories. Should another performance problem occur in the category where there is already an active written reminder, the discipline step must escalate to a DML.

The above language refers to escalation to the appropriate disciplinary step once a decision to formally discipline has been made. In lieu of taking formal disciplinary action, the supervisor may opt to coach/counsel an employee, taking into consideration mitigating factors.

B. The following list, which is not intended to be all inclusive, gives examples of rule violations in general categories they fall into:

Conduct:

Insubordination: Refusal to Follow Supervisor's Instruction

Work Performance:

Failure to Adhere to Safe Work Practices and Accident Prevention Rules

FACTS

Grievant was hired on April 4, 1972, and became a Journeyman Lineman in 1976. In January 1993, he was elected President of the Fresno Chapter of the Hispanic Employee Association ("HEA"). This is a Company chartered employee association, eligible for certain benefits provided by the Company.

One of the benefits available to HEA is the free use of PG&E's Fresno Clubhouse for meetings and events. This facility has a kitchen, bar, restrooms, and a large hall with a stage. HEA is entitled to use it for its meetings and events. It may not be used by individuals (even if they are members of a chartered organization), or be rented to outside organizations. The use of the Clubhouse is governed by "operating instructions and policies," which define the types of events for which the Clubhouse may be used and the practices to be followed in using the Clubhouse. (J-3, Exhibit 8) Grievant was aware of the restrictions on the use of the Clubhouse, both through the written rules, and regular monthly "roundtables" attended by the chartered organizations who used the Clubhouse, as well as its manager. (Tr. 110:16-20) At the roundtable meetings those present discussed any problems with the use of the Clubhouse, scheduling events in the Clubhouse, and upcoming events sponsored by their organizations.

In order to reserve the Clubhouse, a person must call the Facilities Department, where a secretary keeps a calendar of the Clubhouse reservations. After ascertaining that the Clubhouse is available, the secretary pencils in the name of the party and organization requesting the Clubhouse and forwards a reservation form to the person calling. The reservation form asks whether it is a Company or Company sponsored event.[1] The form asks the purpose of the event, the hours of the event, the facilities and setup needed, and the name of the responsible party. The form must be signed by the party reserving the Clubhouse below a statement that he or she agrees to supervise the function, follow the "operating instructions," and leave the facility in a clean, safe, and secure condition. The Clubhouse Manager must approve the reservation in order for it to be confirmed.

Written Reminder

On July 8, 1993, Grievant was given a "Written Reminder-Conduct" for his behavior on June 17, 1993. On that night Grievant drove his line truck between two buildings and struck two parked gas service trucks. He did not report this accident until approximately six hours later. The stated reason for the written warning is: "for not reporting the accident immediately, and for driving between the two buildings after being told not to drive between them. All Electric Construction employees were told this more than once during the weekly tailboard meeting." (J-3, Exhibit 4) Grievant did not grieve this Written Reminder.

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[1] Company sponsored events include "all events sponsored by chartered company organizations (PSEA, BEA, HEA), retirement parties, dealer or industry association meetings. (J-3, Exhibit 8) These are the only two types of event permitted at the Clubhouse.

Events Leading To The DML

At an HEA event in August 1993, Grievant met Martha Salas, who talked to him about putting on a fundraiser for striking Teamsters. (Tr. 88:16-21) According to Grievant, he told Salas, "We could do a profit sharing type thing, if there was a profit, take approximately $300, but that would be going to the scholarship program." (Tr. 89:4-7)[2] Grievant reserved the Clubhouse for February 12, 1994, at which time the event was held. He never filled out a reservation form to use the Clubhouse on that date. His name appears on the Clubhouse reservations calendar for that date, along with the notation "HEA." Grievant remembers telling the participants at the January roundtable meeting that HEA was having a dance on February 12. He did not mention that it was being done in conjunction with anyone else, or that it was to benefit the Diamond Walnut strikers. (Tr. 92:3-7) Rick Carter, the Director of Community and Governmental Affairs for the southern area, runs the employee association roundtables, prepares agendas, and takes notes. He did not recall any mention of the February 12th event at the January 13th roundtable. In addition, his notes -- which reflect upcoming events of different organizations -- do not reflect any mention of this event by Grievant. (E-6)

The flyer for the event calls it a "Teamsters Helping Teamsters Fundraiser Valentine Dance." It makes no mention whatsoever of HEA. It shows that the event will be held in the PG&E Clubhouse from 7 to midnight. (J-3, Exhibit 6) Nothing at the dance indicated that HEA was a co-sponsor of the event. According to the Local Investigating Committee (LIC) the Teamsters provided the Company with a copy of a handwritten invoice and a check for $748. The

[2] There is no allegation that Grievant ever sought to make a personal profit from this transaction.

invoice, which Grievant said was not in his handwriting, showed his name and address, and itemized costs as follows: Hall- $300; cleaning - $75; bud. $373 for a total of $748. According to Grievant, HEA purchased the liquor license and the beer, for which it was reimbursed $373. The Teamsters "were not a sanctioned organization," so they could not have obtained a liquor license. (Tr. 92:8-20) The statement attached to the check -- which was made out to Grievant -- shows that this was a "Diamond Walnut" benefit dance, and indicates "PG&E Hall rent paid in full for 2-12-94 $300.00." (J-3, Exhibit 7) Grievant and two other members of HEA attended the dance. Grievant is unaware of the "profit" made by the Teamsters as a result of the dance.

In December 1993, Grievant spoke with a Mr. Sierra, who had been the disc jockey at the HEA Hot August Nights dance. According to Grievant, Mr. Sierra asked Grievant if he could arrange the PG&E Clubhouse for his daughter's wedding reception, in return for which Mr. Sierra would donate $300 and the proceeds from the bar to HEA. According to Grievant, he turned Mr. Sierra down. Subsequently, Mr. Sierra called him and Grievant told him "it sounds like a good fundraiser," but indicated that he would have to get the PG&E policy changed. According to Grievant, in that conversation he did not definitely tell Mr. Sierra he could have the Clubhouse for his daughter's wedding reception. (Tr. 97-98) Grievant further testified that he went down to the Clubhouse and had the secretary put the date of the Sierra wedding reception May 28th, on the calendar. (Tr. 100:16-21)[3] Although Grievant testified the date was "tentative" that is not reflected on the calendar. At some time after March 12, 1994, Grievant contacted Mr. Sierra and told him that he could not use the Clubhouse. (Tr.112:11-14) Grievant was aware that Mr. Sierra had contacted the Company to complain about

[3] The calendar reads: "HEA, C 8AM.→"

Grievant "backing out on a rental agreement which I never signed or made any kind of rental agreement with these people and they were out all kinds of money and they wanted to be compensated." (Tr. 113: 7-10) According to Company Investigator Michael Perry, Sierra provided him with a copy of the printed announcement of the wedding reception showing that it would take place at the PG&E Clubhouse. (E-2) According to Phil deYoung, the Director of Support Service for the Fresno Division, he spoke with Mr. Sierra and told him that Grievant did not have the authority to make arrangements for private use of the Clubhouse and that Sierra realized that PG&E was not responsible for any sums Mr. Sierra might have expended on invitations. (E-1)[4]

The Accident of July 15, 1994

The facts surrounding the accident are not in dispute. Grievant turned his head toward the side of the road to look for an address while driving forward. He rear ended a vehicle in front of him when it stopped. The force of the collision pushed that car into another car. Grievant promptly reported the accident and his belief that the brakes on the truck were not working properly. A competent mechanic pulled two wheels to check the brakes and drove the truck while making "panic stops." The mechanic testified that he found the brakes to be in good working order.

[4] The Union stipulated that Mr. deYoung's notes containing this exchange would have been his testimony. (Tr: 29:5-9)

DISCUSSION

The Company argues that there was just cause for both the DML and termination of Grievant. It makes three arguments in support of its position that the DML was appropriate. First, it argues that Grievant conceded knowing the rules governing the Clubhouse. The Company has the right to make rules about the use of its property, and these rules were reasonable. Second, the Company argues that Grievant falsified the Clubhouse calendar by reserving February 12 and May 28 for HEA events when the scheduled events were not HEA events. The event on February 12, was neither sponsored, nor co-sponsored, by HEA. It was a Teamsters event and Grievant simply charged them $300 for the use of the PG&E Clubhouse. Grievant told Mr. Sierra that he could use the Clubhouse for his daughter's wedding by paying $300 to HEA. Although Grievant asserted that he was trying to get the rules changed so that this would be possible, no such effort appears in the evidence. Third, the DML was procedurally fair because the Company conducted a fair investigation into Grievant's behavior, allowing him to tell his side of the story, before it reached any conclusion. There has been no discrimination against Grievant in issuing the DML, and it is appropriate both to his position in the Positive Discipline system, and the severity of his conduct.

The Company makes three arguments in support of its position that there was just cause for Grievant's termination. First, Grievant was aware both of the rule requiring safe driving and the penalties for failing to drive safely. Since he was on DML, he had been warned that any further violations could result in his being terminated. Second, Grievant's unsafe driving was carefully investigated. When he alleged that there was a problem with the brakes the Company had a mechanic check the brakes to be sure they were in proper working order. Third, the Company has terminated other employees for unsafe driving.

The Union makes three arguments in support of its assertion that there was neither just cause for the DML, nor just cause for the termination. First, it asserts that Grievant did nothing wrong in making a profit sharing arrangement with the Teamsters to benefit both the Diamond Walnut Strikers and the HEA scholarship fund. Grievant's motives were not personal profit, but a continuation of his substantial community efforts to raise funds for good causes. Second, as to the Sierra wedding, the Union argues that the Company has failed to prove -- through non-hearsay evidence -- anything more than a misunderstanding on Mr. Sierra's part. Grievant did nothing wrong. Third, the Union argues that both the DML and the termination are procedurally flawed under the Positive Discipline Guidelines. The DML was imposed by Mr. Heimgartner, the General Construction Superintendent for the San Joaquin area. His action was based upon Grievant having an active written reminder in the conduct category. But, that written reminder was improperly categorized and should have been in the performance category. By agreement of the parties: "failure to adhere to safe work practices and Accident Prevention Rules" are in the work performance category and not the conduct category of the Positive Discipline Guidelines. (Joint Exhibit 2; Letter Agreement 89-164-PGE, dated September 7, 1989)

If Grievant's earlier written reminder had been properly categorized, the Union argues, Heimgartner would have had the option of giving him a second written reminder, this one in the conduct category, rather than a DML. It is only because the written reminder was improperly categorized that Heimgartner was obliged to put Grievant on DML. This procedural error was compounded by the Company's failure to consider mitigating factors before terminating Grievant. He was a twenty-two year employee with an admirable record, who had a couple of minor accidents and engaged in what he thought was a proper fundraising effort.

The accidents themselves were not serious. If the Company properly applied its own Positive Discipline Guidelines, Grievant would have gotten nothing more than a written reminder for the second accident. Thus, there was no just cause for Grievant's termination.

Grievant's assertions about his conduct in scheduling events at the Clubhouse cannot withstand close scrutiny. None of the credible evidence supports his assertion that the Teamsters and HEA entered into a profit sharing arrangement for a joint event on February 12, 1994. It is important to note that HEA could have run an event, sold tickets to whomever it liked, had the assistance of other organizations in promoting the event, and given all or a portion of the money to the Diamond Walnut strikers. But that is not what the evidence shows occurred.

The credible evidence contradicts Grievant's assertion that HEA and the Teamsters had a profit sharing arrangement for the February 12 event. The flyers show this is a Teamster event. They show no connection with HEA. The credible evidence is that Grievant did not announce the event at the January meeting of the roundtable, or attempt to sell tickets for it. His promotional activities were limited to putting up the one flyer he was given. Grievant's assertion that there was a profit sharing arrangement for an HEA event is undercut by three further facts. First, Grievant had no knowledge of what profits were made by the event. Second, all of the written documents show that as far as the Teamsters were concerned, they believed that they were paying rent for the PG&E Clubhouse, not a portion of the profits. Third, nothing at the event -- not even the attendees -- suggested that it had anything to do with HEA, or was anything but a Teamster sponsored event. Grievant's failure to fill out the reservation form, strongly suggests that Grievant was well aware of the impropriety of his behavior. The

form requires his signature acknowledging the rules for using the Clubhouse, and the penalty of losing the right to use the Clubhouse if it is misused. Grievant never turned in this form.

There is no question that Grievant reserved the Clubhouse for the Sierra wedding. Although he asserts that it was only a "tentative" arrangement, pending his getting the rules changed so that a private party unaffiliated with PG&E could use the Clubhouse, the evidence suggests otherwise. There is no support for Grievant's assertion that he told the person in charge of keeping the calendar that the arrangement was tentative. He admits having discussed the arrangements for the Clubhouse with Mr. Sierra, and agreeing upon a $300 figure for the use of the Clubhouse. This figure, curiously, is precisely the same as the amount that he charged the Teamsters to use the Clubhouse. Though Grievant asserts that he never told Mr. Sierra that the arrangement was firm, it is clear that Mr. Sierra had a strong enough belief that it was firm to print invitations to a reception at the Clubhouse. Furthermore, Grievant took no actions consistent with his assertion that he was attempting to have the rule changed. According to his testimony, Grievant merely hoped that the appropriate person would turn up at the roundtable so he could discuss it with him. Thus, the Company has shown by the preponderance of the evidence that Grievant falsified the Clubhouse log by reserving it for HEA on May 28th when he intended to permit Mr. Sierra to use it for his daughter's wedding.

Grievant's procedural argument is flawed in its premise. The argument is premised upon the assertion that Grievant's active written reminder was improperly placed in the conduct category. The underpinning of this argument is Letter of Agreement 89-164-PGE, contained in the Positive Discipline Guidelines. That letter contains an agreement to put failures to adhere to safe work practices

and Accident Prevention Rules into the work performance category. What Grievant's argument fails to take into account, however, is that Grievant did not have a written reminder for a failure to adhere to safe work practices or Accident Prevention Rules. Rather, the July 8, 1993, memorandum faults Grievant for driving between certain buildings after being told not to do so "more than once during the weekly tailboard meeting." It also faults him for "not reporting the accident immediately." (J-3, Exhibit 4) According to the evidence, Grievant was not disciplined because he drove unsafely, but because he drove in a place where he was told not to drive at all. It is reasonable to characterize that behavior as insubordination, an offense which is listed under conduct in the Positive Discipline Guidelines.

The Positive Discipline Guidelines require going to DML when there is a performance problem in a category in which there is currently an active written reminder. In April 1994, Grievant had an active written reminder in the conduct category. Thus, the Positive Discipline Guidelines, mandated DML. In light of the firm factual basis for finding that Grievant had engaged in misconduct, there was just cause for the DML.

There is no dispute about the factual predicate for the termination. Grievant had an accident because he took his eyes off the road while driving. Although the behavior was negligent, rather than intentional, precedent decisions permit the Company to terminate employees for accidents caused by negligence. The remaining question is whether the Company has adequately considered mitigating factors, as it is required to do under the Positive Discipline Guidelines. I accept the proposition cited by the Union, that Grievant's long service "compels a close analysis of the facts." The facts are that Grievant disobeyed directions not to drive his truck between two buildings, had an accident, and failed to report it

until some six hours later. He knew the rules restricting the Clubhouse to use for Company sponsored events. Nevertheless, he rented it out for a Teamster event and reserved it for a wedding. It is certainly true that Grievant did not intend to make any personal profit from his activities. He intended them to benefit the HEA scholarship fund. No matter how good Grievant's intentions, however, he is not entitled to use Company property in a way that violates the Company's rules and exposes it to liability. Finally, it is true that the accident which precipitated Grievant's termination was "about in the middle" of the range of severity of accidents. Moreover, it was caused by the sort of inattention that each of us has undoubtedly engaged in. Nevertheless, it is not so trivial that the Company was obliged to counsel him, rather than terminate him. Grievant had an active DML; he had been warned that termination was the next step; his accident was substantial misconduct. Consequently, there was just cause for his termination.

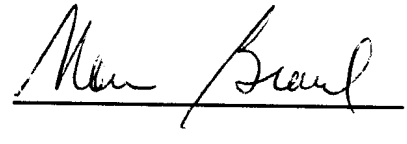
By reason of the foregoing, I make the following:

AWARD

1. **There was just cause for the Decision Making Leave.**
2. **There was just cause for the termination.**
3. **The grievance is denied.**

San Francisco, CA

May 16, 1996



Norman Brand