

**IN THE MATTER OF ARBITRATION BETWEEN**

**International Brotherhood of Electrical  
Workers, Local 23 [Patrick Dick-Grievance  
#3405]**

**And**

**Xcel Energy**

**Opinion and Award**

**American Arbitration Association Case No.**

**56 300 03667 09**

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**ARBITRATOR**

Joseph L. Daly

**APPEARANCES**

On behalf of IBEW, Local 23

M. William O'Brien, Esq.

Timothy Louris, Esq.

Miller O'Brien Cummins

Minneapolis, Minnesota

On behalf of Xcel Energy

Michael J. Moberg, Esq.

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**JURISDICTION**

In accordance with the Labor Agreement between Metro East Region of Northern States Power Company and the International Brotherhood of Electrical Workers, Local No. 23 dated January 1, 2008 to December 31, 2010; and under the jurisdiction of the American Arbitration Association, New York, New York, the above grievance arbitration was submitted to Joseph L.

Daly, arbitrator, on August 2, 2010. Post hearing briefs were filed by the parties on September 15, 2010, and received by the arbitrator on September 17, 2010. Decision was rendered on October 13, 2010.

### **ISSUES AT IMPASSE**

The Union and the Employer agree that the issues are: 1. Did the employer have just cause to discharge the grievant? 2. If not, what remedy is appropriate? [Post-hearing brief of employer at 2; Post-hearing brief of union at 4].

### **POTENTIALLY APPLICABLE CONTRACT LANGUAGE**

#### ARTICLE I METHOD OF NEGOTIATION

Section 4. It is agreed that an employee who has attained seniority shall be presented with written notice of discharge at the time of discharge and the Company shall within fifty-six (56) hours furnish the Local Union with specific written reasons for such discharge.

### **POTENTIALLY APPLICABLE RULES AND POLICIES**

#### **3.1 Xcel Energy Code of Conduct (Uniform Policy)**

##### **Summary**

Xcel Energy Inc., its wholly owned subsidiaries and affiliates (“Xcel Energy”) is committed to the highest ethical standards in all it does. We adhere to these high standards because it is, and has always been, the right thing to do. It is essential that our employees demonstrate the highest ethical conduct when conducting business with fellow employees, customers, shareholders, suppliers and the community.

##### **Content**

##### **Legal and Ethical Standard**

Employees will be honest, fair and trustworthy in all company activities and relationships. Employees will go beyond literal compliance with legal requirements; employees will adhere to the spirit of the law. Employees will know and comply with this Code of Conduct and other applicable policies. No employee will conduct any unlawful or unethical activity or any activity that may appear unlawful or unethical. Employees will report suspected illegal or unethical business practices immediately to company management, Corporate Security, or the employee Compliance Hotline and, if necessary, cooperate in investigations. If an employee has any

question about the propriety of any proposed action, he or she should submit it to his or her supervisor or the Legal Department, or call the employee Compliance Hotline.

#### Record Keeping

Misrepresentation, inaccurate or incomplete information will not be tolerated.

#### Consequences of Violating Code

An employee or director who violates the law, the Xcel Energy Code of Conduct or Xcel Energy policies will be subject to the Positive Discipline Process and possible termination of employment or other penalty. Additional actions may include reassignment of work duties and limitation in future job opportunities. Violations of law may be referred to local law enforcement authorities for prosecution. [Company exhibit #4].

### **9.2 Discipline Guidelines/Positive Discipline (Uniform Policy)**

#### **Summary**

Positive Discipline is a system that emphasizes employees' responsibility for their own behavior. It focuses on communicating an expectation of change and improvement in a positive way while, at the same time, maintaining concern for the seriousness of the situation. Key aspects of this system include correcting performance, attendance or conduct issues through communication of expectations and building commitment to high work standards and sage work practices. If an employee has a conduct, attendance or work performance problem, corrective action may be appropriate. Positive Discipline is a means by which management may seek to correct problems and build commitment, not merely compliance, for all employees. Each type of discipline is a reminder of expected performance. Positive Discipline focuses on communication and individual responsibility, not punishment.

Based on the infraction or performance problem, the type of discipline will be determined at the discretion of Xcel Energy management, in consultation with Workforce Relations. The Positive Discipline policy is not intended to create a contract; it is merely a tool to be used at the discretion of supervision, which may or may not be followed in any given situation. In determining the appropriate type of corrective action, the company will consider previous actions for similar issues, the employee's record and the impact on the company, the customer, and/or coworkers, the nature of the issue itself and any other pertinent factors. Based on the seriousness of the issue, management may bypass Positive Discipline and take more serious action such as demotion or termination. Employees do not have the right to Positive Discipline. The company retains the discretion to determine whether Positive Discipline is appropriate in given circumstances and whether any or all forms of Positive Discipline will be administered.

## **Termination**

Termination of employment is the permanent removal of an employee from service. When the disciplinary process has failed to bring about a positive change in the employee's behavior, termination is likely to occur. Termination may result from a failure to meet the expectations of a Decision Making Leave or a lesser type of discipline.

Termination also may occur in those instances where a single offense is so severe or where performance shortcomings are of such a nature that the application of the Positive discipline System is unwarranted or inappropriate in the judgment of management. The following examples (this list is not all inclusive) illustrate some examples of situations that may result in immediate termination of employment:

- Criminal Acts on or off Xcel Energy's properties
- Violation of the Fitness for Duty/Drug and Alcohol Policy
- Violation of the Corporate Code of Conduct
- Violation of the Corporate Discrimination, Harassment and other unacceptable Behaviors Policy
- Violation of the Violence in the Workplace Policy
- False statements or responses on application, physical examination, medical claims, expense statements, or any other company records, or given during company investigations
- Stealing either from fellow employees, customers, vendors or contractors or the company
- Unauthorized use of company resources, including time for personal benefit
- Insubordination (refusal to obey instructions or perform work assigned)
- Possession or use of fireworks, explosives, unauthorized firearms, or any other weapon in violation of Xcel Energy policy or state law
- Willful destruction or defacing property of Xcel Energy
- Failing to report to work [Company exhibit #5].

## **FINDINGS OF FACT**

1. By letter dated August 6, 2009, Mr. Patrick Dick, a lineman employee with Xcel Energy since 1998, was terminated. The letter stated:

Effective immediately, your employment with Xcel Energy is hereby [sic] terminated. The decision to terminate is based on your falsification and misrepresentation of required information, as well as violations of the Xcel Energy Code [sic] of Conduct. [Company exhibit #1].

On August 10, 2009, the company informed the union by letter to Mr. Joseph V. Plumbo, Business Manager, that:

Effective August 6, 2009, Patrick Dick is terminated from Xcel Energy for known Company Policies and Procedures, which include but are not limited to violations of Xcel Energy's Code of Conduct. This written notification of termination fulfills requirements under article I, Section 4 of the Labor Agreement. [Company exhibit #2].

The union filed a grievance on August 11, 2009, stating:

The local union is not in agreement with correspondence from your office dated August 10, 2009, and are not in agreement with same.

Please arrange a grievance meeting per Article I, Section 3 to address this termination to the end the allegations can be substantiated and if true the proper discipline if any is administered.

Please provide the union with any and all evidence the company relied upon to conclude termination was appropriate. [Company exhibit #2 page 2].

2. In the late spring of 2009, the company received an anonymous tip that some current employees and a former employee were involved in possible theft of copper from the company. Eventually the informant identified herself. The informant had a longtime relationship with the former company employee. That employee resigned in May 2009, before the informant contacted the company. The informant provided information that the former employee and some current employees were involved in stealing copper from the company, stripping it, and selling it to a scrap yard to make money. Karly Gilman, Principal Workforce Relations Consultant for the company, interviewed the informant to find out if she had any relevant information about possible copper theft by company employees. The informant spoke to Ms. Gilman about allegations of copper theft, but much about her failed relationship with and recrimination of the former employee with whom she had a previous relationship. Ms. Gilman stated at the hearing “[S]ome of the information was relevant [to the copper theft investigation], but a lot of the information she provided me with, regarding her relationship with [the former employee] was totally irrelevant to the investigation.” [Transcript 33]. The informant did however provide names of some current employees who allegedly would take copper from job sites, drop off the copper at the former employee's house and assist the former employee in stripping the coating off of the copper wire so that the wire could be sold to a scrap dealer. The union alleges that the informant's information was “uncorroborated speculation in this rambling interview” and is the only indication Xcel ever obtained to suggest that Mr. Patrick Dick had any knowledge of copper

theft from Xcel. The company stated that “[the] information was detailed enough that it caused the company to investigate further the claims of possible copper theft.” [Post-hearing brief of company at 5].

3. After gathering as much information as possible from the informant, in July of 2009 Ms Gilman and Corporate Security representatives began interviewing various company employees who had been identified by the informant as possibly having knowledge of, or being involved with, copper theft. The company interviewed Mr. Patrick Dick on July 14, 2009. The company characterized the reason for interviewing Mr. Dick was that he “was identified by [the informant] as someone who was involved in or might know something about [the former employee] and copper theft.” [Post-hearing brief of company at 5].

4. Ms. Gilman and Security Investigator John West questioned Mr. Dick during the July 14, 2009 interview. During the interview, Ms. Gilman asked Mr. Dick some questions about his background and about the former employee and the possible copper theft. Mr. Dick claimed knew nothing he about copper theft; nor did he know anything about copper being stored at the former employee’s house. [Transcript 39-40; Company exhibit #9].

After the interview, company security employees reviewed the records that the company had on Mr. Dick when he applied for employment with the company. Mr. Dick first applied to work at the company as a temporary employee in 1998, and he applied again in 1999 for a full-time job. In 1998 Mr. Dick wrote on his application that he had been convicted of three speeding violations and a theft conviction in Pierce County, Wisconsin, in 1993. The application required that the applicant list all criminal convictions and the county where the conviction occurred. In his 1999 application, Mr. Dick again listed the three speeding citations, but did not list the theft conviction.

In 1992, Mr. Dick was arrested for possession of a police scanner in an automobile. This is a gross misdemeanor under Minnesota law, although it is not a crime in Wisconsin where Mr. Dick lived at the time. He was stopped in Minnesota. Mr. Dick pled guilty to this offense in 1993 and paid a fine of \$555. At the same time, Mr. Dick was charged with felony theft of copper, but the prosecution dropped that charge at the pretrial phase and the court accepted a plea of guilty for the gross misdemeanor of possession of a police scanner in an automobile in

Minnesota. The plea was entered in Wabasha County, Minnesota, which is nearby Pierce County, Wisconsin.

5. In the 1998 employment application Mr. Dick listed the more serious felony theft charge for which he was not convicted rather than the misdemeanor charge relating to the scanner. Further Mr. Dick wrote that the conviction occurred in Pierce County, Wisconsin, where he lived and where his probation was completed, instead of Wabasha County, Minnesota, where the charge occurred. This discrepancy came to the company's attention during the company's 1998 background check of Mr. Dick. The company interviewed Mr. Dick, found him forthcoming, and cleared him for employment after he fully explained the unintentional mix up of the charges and the counties. Denise Johnson, the Corporate Security employee who conducted the background check, wrote "this does not seem to be a willful omission issue because subject listed the more serious charges. I recommend we issue clearance." [Union exhibit #10]. The Pierce County/Wabasha County distinction was discussed at this time in 1998. The company was made aware that the arrest occurred in Wabasha County, Minnesota, and that Mr. Dick completed his probation in Pierce County, Wisconsin.

6. A year later in 1999, Mr. Dick applied for a full-time position with the company and the company mistakenly required him to fill out a new application. The union alleges that because Mr. Dick had recently and thoroughly disclosed the 1993 police scanner conviction with corporate security, he did not think he had to re-disclose the conviction information. Once again, Denise Johnson, the corporate security employee, spoke with Mr. Dick about the application issue and again concluded there was no impediment to Mr. Dick's employment because he had failed to disclose the police scanner conviction. At the times Mr. Dick applied in 1998 and 1999, a comprehensive computer database search for criminal convictions was not possible. Searches had to be done county by county. In 1998 and 1999 no theft conviction showed up on Mr. Dick's record since the arrest was not in Pierce County, Wisconsin, but instead was in Wabasha County, Minnesota. When security performed the criminal background search in the late 90s they discovered there was no record of any theft conviction, so security assumed it was a charge that had been dismissed.

7. After Ms. Gilman's discussions with the informant in 2009, Director of Security for the company, Tom Kayser, had his staff perform a more thorough criminal background check via an expanded computer database search. He also had his staff obtain the actual files from the court records of the arrest (1992) and conviction (1993) of Mr. Dick in Wabasha County, Minnesota. The court records show that Mr. Dick was charged with felony possession of stolen copper wire and other lineman items, and he was also charged with misdemeanor possession of a police scanner. On May 6, 2009 the prosecutor ultimately dismissed the felony theft of copper charge, in exchange for Mr. Dick pleading guilty to a gross misdemeanor of possessing an illegal police scanner.

The company alleges that the Wabasha County, Minnesota court records are not consistent with what Mr. Dick wrote on his applications. The company alleges that on the applications Mr. Dick failed to disclose either conviction for an illegal police scanner. He also told security in 1998 that the scanner was a weather scanner used for a construction where he was employed. But he told the police at the time of his arrest that he was transporting his mother's scanner from a friend's house to his parent's for use at his father's park. The company alleges that Mr. Dick did not provide "complete and truthful responses on his applications, nor to security in 1998 and 1999." [Post-hearing brief of company at 7-8].

On August 6, 2009, Mr. Dick was again interviewed. This time, Ms Gilman, Mr. Kayser, and former Security Manager, Mr. Mark Mullen, interviewed him. At the beginning of the interview, Ms. Gillman reminded Mr. Dick about the Code of Conduct requirement that employees must be honest in all dealings with the company and Mr. Kayser reiterated the importance of being truthful. Mr. Kayser then questioned Mr. Dick about whether he had ever been arrested. Mr. Dick responded negatively saying "not in 20 years, and when Kayser asked him if he was sure, Dick said no, except for hunting violation, he had never been arrested." [Post-hearing brief of company at 8]. "Dick also said he had no knowledge of copper at [former employee's] and that he had never stole copper from the company." [Id.] When Mr. Kayser pressed Mr. Dick about whether he had lied on his application about his criminal background, and whether he was lying in the interview, Mr. Dick did not answer the question. Instead, Mr. Dick said he had never stolen copper from the company. At the end of the interview, Mr. Kayser gave Mr. Dick "a last chance to be truthful" [Id.] about the applications and his history of criminal convictions. When Mr. Kayser asked Mr. Dick if there was anything else he wanted to

tell the company about his employment application, Mr. Dick said “no.” [See post-hearing brief of company at 8].

Mr. Dick testified at the arbitration that what he said when asked by Mr. Kayser if he had ever been arrested was “no, not in 20 years.” [Transcript 57, 81; Union exhibit #8]. In fact, Mr. Dick had been arrested 17 years prior. The company made no effort to follow up on the question, no effort to explore what Mr. Dick was referring to, or to clarify his answer.

8. At the end of the August 6, 2009 interview, Ms. Gilman, Mr. Kayser, and Mr. Mullen took a break outside the interview room and “obtained approval to move forward with terminating Mr. Dick...because we believe that he lied on his application and lied during the investigation.” [Testimony of Ms. Gilman Transcript 59-60]. “Based upon Dick’s employment applications and the court records the company was prepared to terminate Dick’s employment for his dishonesty unless Dick was completely forthright during the August 6<sup>th</sup> interview. Because Dick insisted that he had never been convicted of a crime during the interview and he was untruthful on his applications, the company followed through on the decision to terminate Dick’s employment. Mr. Dick’s employment was terminated on August 6, 2009.” [Post-hearing brief of company at 9].

9. The essential arguments of the company are:

A. Mr. Patrick Dick was terminated in August 2009 for being dishonest with the company during an investigation into possible copper theft, and for not providing complete and truthful information on his employment application. [Post-hearing brief of company at 1].

B. The company followed its policies in terminating Mr. Dick.

C. There was no disparate treatment of Mr. Dick.

D. The union’s arguments about the informant’s truthfulness and motivation are irrelevant. E. Mr. Dick was well aware of the company’s expectations that he be honest in all of his dealings with the company. Despite knowing what the company required, Mr. Dick was not forthright and truthful on his application about his criminal background, he was not truthful about it during the security screening process when he was questioned by security officials, and he was not truthful during the August 6, 2009, interview. Mr. Dick has already profited long enough from his dishonesty by the fact that he got hired and worked for the company for a number of years,

even though he failed to comply with the company's requirements about being truthful on his applications. The company had just cause to discharge Mr. Dick once it learned of his deception, and the union's grievance should be denied. [See generally Post-hearing brief of company].

10. The basic contentions of the union are:

A. The employer has failed to reach its heightened burden of proof. The burden of proof in discharge cases where criminal conduct or stigmatizing behavior is alleged is "clear and convincing evidence" while some arbitrators even require evidence beyond a reasonable doubt. In this case, Mr. Dick has been explicitly charged with falsification and misrepresentation of information and implicitly accused of covering up a plot to steal copper from an employer.

B. Mr. Dick did not falsify information on his employment application. In 1998 he mistakenly disclosed a felony for which he was never convicted, while omitting a misdemeanor for which he plead guilty. The company security person at the time determined that the omission of the misdemeanor was not intentional. Also, Mr. Dick explained that he lived in Pierce County at the time of the scanner charge and that he satisfied his probation there as well. Wabasha County was willing to allow him to satisfy his probation in Pierce County, Wisconsin. So he simply was confused when he misstated Pierce County rather than Wabasha County. Further the company found this to be a reasonable explanation until the informant "appeared on the scene with her tall tales of copper thievery." [Post-hearing brief of union at 15].

C. Mr. Dick did not lie during the investigatory interviews. Because Mr. Dick stated he had "not been arrested in 20 years" does not mean he lied. The arrest occurred 17 years prior to the interview in which Mr. Dick was asked if he had ever been arrested. Mr. Dick testified during the arbitration hearing that in response he actually said "...no, not for about 20 years, about 20 years...." [Transcript 140-41]. This was a quick, estimated response. "No, not in 20 years," cannot be viewed as a terminable offense. Rather, the employer made no attempt to follow up, no effort to seek clarity, but instead concluded that this "lie" could justify the termination. [Post-hearing brief of union at 16-17].

D. The employer stated reasons for discharge are pretext for its unsubstantiated suspicion. The employer has not met even a fair preponderance of the evidence standard, the lowest burden of proof in such a case.

E. The employer's termination did not comport with the contract or principles of industrial due process. Based on the language of the termination letter [Employer exhibit #1], Mr. Dick was denied the contractual right to specific information regarding his termination, and was afforded insufficient opportunity to respond. As noted by Joseph Plumbo, the union business manager at the time of the termination, the union could not determine the grounds for discharge based on the language of the termination letter. The employer has failed to clearly and specifically articulate the charges against Mr. Dick before the termination hearing. By issuing a vague, imprecise and open-ended discharge letter, the employer left itself wiggle room to discharge, even though it utterly failed in proving the charges that triggered and drove their investigation and termination.

The union contends that the employer did not have just cause to discharge Mr. Dick. The union requests a make-whole remedy, including but not limited to reinstatement, full back pay and benefits, together with restoration of all rights under the Collective Bargaining Agreement.

### **DECISION AND RATIONALE**

The investigation of Mr. Dick was triggered by the informant's allegations that a former employee, with whom she had a previous relationship, and several current employees, including Mr. Dick, were involved in copper theft. Mr. Dick denied involvement in copper theft at every interview and at the arbitration hearing.

As part of the investigation company security people went back into company records and re-examined Mr. Dick's 1998 and 1999 job applications. They determined that Mr. Dick was dishonest in both the 1998 and 1999 job applications "for not providing complete and truthful information on his employment application." [Post-hearing brief of company at 1].

Did Mr. Dick willfully lie on his 1998 and 1999 job applications? If he did so, the company has just cause to terminate him. In 1998 Mr. Dick erroneously listed the more serious felony theft charge for which he was not convicted, rather than the misdemeanor charge relating to the police scanner to which he plead guilty. The company corporate security person, Denise Johnson, conducted a further background check and concluded "this does not seem to be a willful omission issue because subject listed the more serious charges. I recommend we issue clearance." [Union exhibit #11]. Further the Pierce County/Wabasha County distinction was also discussed at this time. The company was aware that the arrest occurred in Wabasha County, Minnesota and Mr. Dick completed his probation in Pierce County, Wisconsin. Mr. Dick did not

attempt to hide any aspect of his criminal record in the 1998 application. It is held that Mr. Dick did not willfully lie on his 1998 job application.

A year later in 1999, Mr. Dick applied for a new full-time position with the company. In point of fact, Mr. Dick should not have been required to fill out a new application at that time. In the 1999 application Mr. Dick did not include the conviction for possession of a police scanner in his car. Mr. Dick testified he did not do so because he had thoroughly discussed this police scanner conviction with corporate security the year before. Ms. Johnson, the corporate security person for the company, again spoke with Mr. Dick about the application and again concluded that his failure to include the police scanner conviction was not an impediment to Mr. Dick's 1999 employment.

During the July 14, 2009, interview, Mr. Dick denied any knowledge of copper theft. Following the July 14, 2009, interview, the company pulled all of the old records from MR. Dick's prior background checks and obtained complete court records of Mr. Dick's 1993 police scanner conviction from Wabasha County, Minnesota. While the company alleges that the company's investigators notes from 1998 revealed that Mr. Dick said had a "weather scanner," court documents revealed that he had a police scanner. However, the 1998 background investigation report shows that Mr. Dick disclosed that "the scanner also had a band for police scanning...." [Union exhibit #11].

The August 6, 2009 interview involved Mr. Dick replying to the question if he had ever been arrested, "no, not in twenty years." [Transcript 57, 81; Union exhibit #8]. In fact, Mr. Dick had been arrested 17 years prior. Was this a willful lie? Mr. Dick further testified at the arbitration hearing that he responded by giving a rough estimate a rough estimate of how long ago the arrest occurred. He also testified that he said "...no, not for about 20 years, about 20 years...." [Transcript 140-41]. The union contends "[t]his can hardly be viewed as a terminable offense when the employer made no attempt to follow up, no effort to seek clarity, but instead speciously concluded that this 'lie' could justify the termination." It is held that Mr. Dick was not willfully lying when he answered "in 20 years" or "no, not for about 20 years, about 20 years."

It is understandable and proper that the company was very concerned about Mr. Dick's possible involvement in the copper theft. But the company did not obtain sufficient evidence about his involvement in such a crime, other than the unsubstantiated allegations by a discredited informant and its own unsubstantiated suspicions. According to the company security person at

the time, Mr. Dick's job application statements in 1998 and 1999 applications were not willful omissions. His answer that he had not been arrested "in 20 years" was not a willful lie. It was a miscalculation as to when the arrest took place. The company seems to have interpreted that statement as "I've never been arrested." They then accused him of lying and fired him on the spot. But this evidence does not add up to even a preponderance of evidence sufficient to support just cause for termination, let alone clear and convincing evidence.

Finally, when the company fired him it issued non-specific and generalized reasons for his termination [Employer exhibit #1]. This letter was in violation of the contractually required "specific" statement of reasons for the termination. Based on the language of the letter, Mr. Dick was denied the contractual right to specific information regarding his termination. The employer failed to clearly and specifically articulate the charges against Mr. Dick.

Based on the above reasoning, the employer did not have just cause to discharge Mr. Dick. Mr. Dick shall be made whole, including, but not limited to immediate reinstatement, full back pay and benefits, together with restoration of all rights under the Collective Bargaining Agreement.

October 13, 2010

\_\_\_\_\_  
Date

\_\_\_\_\_  
Joseph L. Daly  
Arbitrator