IN THE MATTER OF ARBITRATION BETWEEN

International Brotherhood of Electrical Workers, Local 23 [Laura Maxell & Kelly Douglas] **And** **Xcel Energy, Inc.**	**Opinion and Award** **American Arbitration Association** **Case No. 65-30-00144-13**

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of IBEW, Local 23
M. William O'Brien, Esq.
Miller, O'Brien, Jensen, PA
Minneapolis, Minnesota

On behalf of Xcel Energy
Michael J. Moberg
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Minneapolis, Minnesota

JURISDICTION

In accordance with the Collective Bargaining Agreement between IBEW, Local 23 and Xcel Energy; and, under the jurisdiction of the American Arbitration Association, the above grievance arbitration was submitted to Joseph L. Daly, Arbitrator, on February 4, 2014, in Minneapolis, MN.

Post hearing submissions were filed by the parties on March 11, 2014, and received by the arbitrator on March 13, 2014. The decision was rendered by the arbitrator on March 28, 2014.

ISSUE AT IMPASSE

The union states the issue as:

"[T]he Arbitrator's Award is to be interpreted consistant with the CBA which provides clearly that vacation allotment in the given is strictly a function of tenure (years of seniority and service)." [Union post-hearing submission at 1]

The company states the issue as:

"Did the Company comply with the your prior arbitration awards involving Kelly douglas and Laura Maxwell when the company did not allow Maxwell and Douglas to accrue vacation during the period of their unpaid suspensions?" [Company post-hearing submission at 1].

Relevant Contract Language

> **Article I – Method of Negotiation**
> **Section 5.** In the matter of suspension, demotion, or discharge, if after hearing witnesses, the charges are not sustained, the employee sshall have his/her record cleared of such charges and the arbitration board may rule that the employee shall or shall not receive full or partial wages from the Company. No discipline by suspension shall be administered to any member of the Local Union which shall impair his/her seniority rights.
>
> **Article IX – Vacation and Sick Leave**
> **Section 1.** All regular employees covered by this Agreement shall be entitled to vacations with regular pay each calendar year in accordance with the following rules and schedules:
> (a) Employees who have worked less than one (1) year shall not be entitled to any vacation or sick leave.
> (b) Employees who have seniority and have worked more than one (1) year and less than two (2) years shall be entitled to a vacation of one (1) week, containing five (5) work days, which must be taken prior to December 31 of the following calendar year and the usual sick leave granted by the Company with regular pay.
> (c) Employees who have seniority and have worked more than two (2) years shall be entitled to a vacation of two (2) weeks, containing ten (10) work days which must be taken prior to December 31 of the following year and the usual sick leave granted by the Company with regular pay.

(d) Employees who have attained both five (5) years or more service and five (5) years or more of seniority shall be entitled to a vacation of three (3) weeks, containing fifteen (15) work days which must be taken prior to December 31 of the following calendar year and the usual sick leave granted the Company with regular pay subject to Section 1, subsection (f).

(e) Employees who have attained both eleven (11) years of service and eleven (11) years of seniority shall be entitled to a vacation of sixteen (16) work days. Thereafter the aforementioned employee shall accrue an additional day of vacation for each additional year of service and seniority to and including twenty-five (25) years of service and twenty-five (25) years of seniority to provide a maximum of thirty (30) work days of vacation which must be taken prior to December 31 of the following calendar year and the usual sick leave granted by the Company with regular pay subject to Section 1, Subsection (f).

FINDINGS OF FACT

1. Kelly Douglas was terminated by Xcel Energy on January 12, 2012, for violating the Company's Code of Conduct prohibiting taking or using Company assets for unauthorized personal use. In an arbitration award by this arbitrator dated October 22, 2012, this arbitrator ordered that Mr. Douglas be returned to work effective November 1, 2012, with "no back pay or benefits from the time he was terminated up to his return on November 1, 2012. His DML will run from November 1, 2012, to October 31, 2013. He will return with the same seniority and benefits he was receiving on the date of termination."

Similarly, Ms. Laura Maxwell was terminated on April 17, 2012, sleeping during work time in a working area in violation of Company policies and her previous Decisions Making Leaves. Pursuant to an arbitration award by this arbitrator dated December 18, 2012, Ms. Maxwell was reinstated on January 1, 2013, with "no back pay or benefits from the time she was terminated up to her return on January 1, 2013. Her DML will run from January 1, 2013 to December 31, 2013. She will return with the same seniority and benefits she was receiving on the date of termination."

2. On May 7, 2013, the union filed a grievance on behalf of Kelly Douglas and Laura Maxwell alleging that they had not been allocated their proper vacation allotment while on suspension. The company responded on June 26, 2013 [Company exhibit #4] stating "the vacation benefit is based upon seniority *and* time worked." [emphasis in original]. "Further, Mr. Daly's ruling in Ms. Maxwell's and Mr. Douglas' decisions are clear in that their time away from work would be long term suspension and they would receive no back pay *or benefits* from the time of termination *up to their return*. Further,

the arbitrator ruled that they would return with the same seniority and benefits they were receiving *on the date of termination*." [emphasis in original]. As a consequence the company denied the grievance.

By letter dated July 15, 2013, the union stated it "is not in agreement with correspondence from your office dated June 26, 2013, concerning the above subject and will therefore arbitrate the issue in accordance with Article III of the Labor Agreement and our American Arbitration Association Agreement dated May 3, 1996." [Union exhibit #2]. The union alleged in its "statement of issue" that the company "has inappropriately denied Ms. Maxwell and Mr. Douglas their vacation entitlements under the Labor Agreement for 2013. This unilateral action by management is in violation of the following articles and sections of the Labor Agreement: Article I, Sections 1, 3, and 5; Article IV, Section 1; and Article IX, Section 1."

3. The basic contentions of the union are:

a) The arbitrator's award is to be interpreted consistent with the CBA which provides clearly that vacation allotment in a given year is strictly a function of tenure (years of seniority and service).

b) Article I, Section 5 of the CBA provides in plain language, that a disciplinary suspension, as issued here, may not impair seniority rights (*No discipline by suspension shall be administered to any member of the Local Union which shall impair his/her seniority rights).* [Union post-hearing submission at 2].

c) The vacation article of the Collective Bargaining Agreement, Article IX, provides additionally, and in similarly plain and unambiguous language, that (except in the first few years of employment and when determining pro-rata payout of vacation at separation) an employee's vacation allotment is strictly determined by seniority and, if applicable, (as where an employee works for part of his tenure in a non-union position and part in a union position), years of service. In this regard, Section 1(e) provides: *Employees who have attained both eleven (11) years of service and eleven (11) years of seniority shall be entitled to a vacation of sixteen (16) work days. Thereafter the aforementioned employee shall accrue an additional day of vacation for each additional year of service and seniority.* [Id.]

d) For purposes of determining the vacation allotment for Mr. Douglas and Ms. Maxwell for year 2013, the only question is how many years of service and seniority do they have they have. The

employer admits that Mr. Douglas and Ms. Maxwell each have more than 11 years of service.

e) The union's position in this matter is firmly grounded in CBA language which is absolutely clear and which provides, in no uncertain terms, that employees with eleven years of seniority/service are to have 16 days of vacation in a calendar year, with an additional day added for every year of seniority/service after eleven years (and up to a maximum of thirty days of vacation).

f) The union's position is also consistent with the terms of an agreement reached by these same parties in 1989 and concerning specifically the subject of vacation entitlement.

g) The union offered grievance settlements where the parties address the issue raised here, and in context of reinstatement after disciplinary termination. This includes a termination which was overturned by Arbitrator Fogelberg and reduced to a long-term suspension, but no back wages or benefits, together with a demotion. In this nearly identical setting to that presented here, the parties addressing the grievant's vacation allotment in the year following reinstatement (2008), reached the same result that the union urges here: in the full year following reinstatement without back pay and where a disciplinary termination has been reduced to a disciplinary suspension, the parties concluded that the grievant was entitled to the full vacation allotment as dictated by his seniority. [See union exhibit #6].

h) The same parties reached the same conclusion in a reinstatement case involving another employee. [See union exhibit #7]. There the employee was terminated in 2006, reinstated in 2007, and in 2008 received his full vacation allotment as dictated by his tenure.

i) In non-disciplinary settings too, the parties have consistently adhered to the rule that vacation is purely a function of tenure. [See union exhibit #8 where no loss of vacation in the year following a return from a leave of absence, and union exhibit #9 where no loss of vacation allotment in the year following a return from military leave]. In none of these instances involving long-term employee absences, some disciplinary and some not, did the employer raise the accrual contention that they raise here, that employees at issue somehow forfeit vacation in the year following return from their time off in the preceding year.

j) This is not to say that the parties never take an accrual approach to the vacation issue. Indeed the CBA makes clear that there are two circumstances where accrual calculation is appropriate. First, the CBA provides at Article IX, Section 1(a) that employees who have worked less than one (1) year shall not be entitled to any vacation. Section 1(b) provides that employees who have seniority and have

worked more than one (1) year and less than two (2) years shall be entitled to a vacation of one (1) week. The CBA also offers a second specific circumstance where vacation accrual analysis comes into play (at termination). The parties must have some means of determining a vacation-payout to an employee departing mid-year. And, in this regard, the CBA addresses this special circumstance at Article IX, Section 1(k): When an employee leaves the service of the Company or is laid off, his/her vacation time for the period under consideration shall be computed and paid on a pro rata basis according to the most time worked in a classification in the period under consideration. Obviously, in order to compute the proper vacation pay-out at separation there must be an accrual method that the parties agree upon. There is and they have, but not for the purpose that the employer hopes to employ here. There is nothing, whatsoever, in Sections 1(a), (b) or (k) of the CBA concerning enforcing an accrual forfeiture in the event of leave from the Company whether disciplinary or not. The vacation forfeiture that the company seeks in this case has no grounding whatsoever in contract language or the practice between these parties.

k) Connection between time "worked" and vacation allotment falls away from the CBA altogether after year two, as reflected in the CBA language. Sections 1(a) and (b), relating to vacation allotment in the first two years, used the term "worked", after year two and as reflected in Sections 1(d) and (e), the termed "worked" no longer appears in the CBA and is replaced by the terms "seniority" and "service." Once entitled to vacation, however, the only determining factor there becomes tenure, years of seniority/service. Section 1(k) then provides that at final separation of an employee, his/her vacation cash-out will be prorated over the last year worked.

l) The company's decision to deny Mr. Douglas and Ms. Maxwell appropriate vacation after the reinstatement adds a new and onerous penalty that cannot be reconciled with this arbitrator's award, not with clear and unambiguous CBA language, nor past bargaining and grievance history. In view of all of the above, the union seeks a determination that the employees here should receive vacation allotment for the calendar year following their return to duty that is commensurate with their tenure as the CBA requires. [See generally union post-hearing submission at 1-5].

4. The essential positions of the company are:

a) None of the documents introduced by the union from other arbitration awards, different grievances, and different circumstances support its claim. None of these documents are relevant to the matter since

they do not involve Ms. Maxwell or Mr. Douglas and they do not involve the same language used by this arbitrator in the awards concerning the two grievances. It is clear under the labor agreement that when an employee terminates that employee is paid a pro-rated portion of the vacation that they are earning in the year of termination, which would normally be awarded the subsequent year. The further proof that Labor Agreement established the lag between accrual and use is found in Arbitrator Mario Bognanno decision from April 6, 1989, which involved the appropriate vacation payment to an employee who retired. The subsequent dispute involving Arbitrator Bognanno's award was settled by the parties later in 1989. That settlement continued the accrual and pro-rata concepts already in existence in the Labor Agreement which were part of Arbitrator Bognanno's decision. Neither the Labor Agreement nor the Bognanno settlement agreement between the parties deals with the situation of what an employee's vacation entitlement ought to be when the employee has been terminated, and after an arbitration, the employee is reinstated without back pay or benefits.

b) The fundamental problem with the union's theory of vacation entitlement is that the grievants are put in a better position after being terminated and then reinstated with no back pay or benefits than their co-workers who continued to work without any interruption in service. At the time Ms. Maxwell and Mr. Douglas were terminated, the company paid each of them whatever earned and unused vacation they had carried over from the prior year, the vacation entitlement they were awarded in the year of termination, as well as a pro-rated portion of next year's vacation based upon how many months they had worked during 2012 prior to being terminated. The identical language in the Maxwell and Douglas awards stated that both Ms. Maxwell and Mr. Douglas were to receive no back pay or benefits from the time of their termination up to the time of return and that they would return with the same seniority and benefits that they were receiving on the date of termination.

c) Under the union's theory of vacation entitlement, the union wants the company to award Ms. Maxwell not only the incremental additional eight hours of vacation for another year of seniority that she already received when she returned to work on January 1, 2013, but the union also wants her to receive another 160 hours of vacation for time that she did not work in 2012 during her unpaid suspension that the union claims should be awarded in 2013. The union's position makes no sense for two reasons. First, the award reinstating Ms. Maxwell specifically said that she was not receive any benefits or any back pay during the time of her unpaid suspension and that she was supposed to returned to work with

the same seniority and benefits at the time of her termination. If Ms. Maxwell was returned to work and her time off was an unpaid suspension with no back pay or benefits, then she should not get vacation credit for the period of her unpaid suspension. Further, if Ms. Maxwell were to receive 160 hours of vacation in addition to the incremental eight hours that she received for another year of seniority, Ms. Maxwell would receive a windfall of vacation hours, which is greater than what a similarly situated employee with the same number of years of service who was not terminated. At the time Ms. Maxwell was terminated in April 2012, she received 53.33 hours of vacation, which she has accrued during the first four months of 2012 to be awarded for use in 2013. Ms. Maxwell already received credit for working the first four months of 2012 and if she were to receive an additional 160 hours of vacation on January 1, 2013, as the union requests, Ms. Maxwell would have received credit for vacation not only for the eight months of her unpaid suspension, but would have received double credit for the first four months of 2012 since she had already been paid out the 53.33 hours at the time of her termination. This partial double payment would be a windfall to Ms. Maxwell and would put her in a better position than an employee with the same number of years of service and seniority who was never terminated. Although the company cannot fathom that this arbitrator would intend to return Ms. Maxwell or Mr. Douglas to their positions with vacation benefits accruing during the time of their long term unpaid suspensions when the very terms of the unpaid suspensions said that they were to receive no back pay or benefits from the time of termination up to their return. Giving Ms. Maxwell and Mr. Douglas credit for vacation purposes would for the period of their unpaid suspensions is directly contrary to the language of the awards. The same situation is found with calculations of Mr. Douglas.

d) Simply put, the terms of the Maxwell and Douglas awards required reinstatement, but with no back pay or benefits during their unpaid suspensions, and it is appropriate that they not get credit for earning vacation during their unpaid suspensions. If Ms. Maxwell and Mr. Douglas are given credit for vacation purposes during the term of their unpaid suspension, it violates the language of the awards and puts Maxwell and Douglas in a better position than co-workers who remained employed during the entire time, such a result is inconsistent with the language of the awards and inconsistent with the philosophy behind an unpaid suspension without any benefits.

e) Neither employee had their seniority impaired, and the arbitrator has the inherent authority to decide that these employees do not receive vacation for the period of their unpaid suspensions, just as the

arbitrator had the authority to reinstate them without back pay in the first place.

f) All the documents the union introduced about other arbitration awards or other settlements have no bearing on this matter. Those other circumstances involved different facts and different language. All that matters is the language of the Maxwell and Douglas awards, and that language does not require that Ms. Maxwell and Mr. Douglas accrue vacation during the period of their unpaid suspensions with no benefits.

DECISION AND RATIONALE

These grievances involve a collision between reason and equity. "In addition to reviewing various indicia of the intentions of the parties such as past practice and even arbitral precedent, one arbitrator noted that he could not 'overlook' the equity aspects surrounding the grievances…which serves to guide him in making for a proper and fair interpretation of the language embodied [in the contract]'". Elkouri & Elkouri, **How Arbitration Works 6th ed**. 481 (BNA 2003), citing Arbitrator Nicholas in Jim Walter Ras., 87LA 857, 862 (1986). "'Equity' may also be a factor in the formulation of a remedy." [Id. at 482]. However it is widely recognized that if a contract "is clear and unambiguous it must be applied in accordance with its terms despite the equities that may be present on either side." [Id. at 481 citing Arbitrator Herbert in Firestone Tire and Rubber Company, 29LA 469, 473 (1957). If the language of the contract is clear and unambiguous, it should be applied. If the language of the contract is ambiguous, "arbitrators strive where possible to give ambiguous language a construction that is reasonable and equitable to both parties rather than one that would give one party an unfair and unreasonable advantage." [Id. at 481, citations omitted.].

The union boils this case down to interpreting this arbitrator's previous awards in the Maxwell and Douglas cases to be interpreted consistent with the Collective Bargaining Agreement which provides "clearly that vacation allotment in a given year is strictly a function of tenure (years of seniority and service)." [Union post-hearing submission at 1]. The company says "ultimately what this case comes down to is your interpretation of your prior awards." [Company post-hearing submission at 2]. The company contends that none of the other voluntary settlements of grievances or other documents submitted by the union involve the same language used by this arbitrator in the previous awards involving the two grievances. The company points out that the fundamental problem with the union's theory of

vacation entitlement "is that the grievants are put in a better position after being terminated and then reinstated with no back pay or benefits than their co-workers who continued to work without any interruption in service." [Id. at 3].

If the union is correct and the contract language is clear and unambiguous, then Article IX, Section 1(e) makes clear that vacation entitlement is simply a matter of seniority and service. The union makes an appeal reason in its argument.

If the company is correct in its interpretation, then what matters is the precise language in the Douglas and Maxwell awards. The company points out that "the Arbitrator has the inherent authority to decide that these employees do not receive vacation for the period of their unpaid suspensions, just as the Arbitrator had the authority to reinstate them without back pay in the first place. All of the documents the union introduced about other arbitration awards or other settlements have no bearing on this matter. Those other circumstances involve different facts and different language. All that matters is the language of the Maxwell and Douglas awards and that language does not require that Maxwell and Douglas accrue vacation during the period of the unpaid suspensions with no benefits." [Company post-hearing submission at 6]. Essentially, the company makes an appeal to both reason and equity.

When a contract is clear and unambiguous on its face, it should be applied in accordance with the terms despite the equities. The question here is: is the contract clear and unambiguous on its face? The union contends that Article IX, Section 1(e) makes clear that only "service and seniority" matter in the determination of the accrual of vacation. Are the terms "service" and "seniority" unambiguous and clear? When Mr. Douglas and Ms. Maxwell were suspended, they were not providing "service" to the company. While the contract makes clear that they do not lose any seniority when they return from their suspensions, there is nothing in the contract that says that they are providing "service" and do not lose the accrual of that service while on long term suspension. That is an ambiguity in the contract.

The job of this arbitrator is to "look at the language in light of experience and choose that course which does the least violence to the judgment of a reasonable man." [Elkhouri & Elkhouri at 481, citations omitted]. This arbitrator must not overlook the equity aspect surrounding these grievances. The equity aspects serve to guide him in making a proper and fair interpretation of the language embodied in the contract. It must be taken into account that if the union is adopted, Mr. Douglas and Ms. Maxwell would be put in a better position than an employee with the same number of years of

service and seniority who was never terminated or suspended for a long time. "The company cannot fathom that this arbitrator would intend to return Maxwell or Douglas to their positions with vacation benefits accruing during the period of their long term unpaid suspensions when the very terms of the unpaid suspensions said that they would receive no back pay or benefits from the time of termination up to their return." [Id. at 5, emphasis in original].

When the arbitrator returned Mr. Douglas and Ms. Maxwell to their jobs and overturned the terminations, he intended to make clear by the remedy that each had done something very wrong. The long-term suspensions with "no back pay or benefits from the time [he/she] was terminated up to [his/her] return was intended not to reward either for their behavior." This arbitrator did not intend to allow the accrual of vacation time during a long time suspension while not providing "service" to the company. While the contract makes clear that upon return the employee returns with the same seniority, there is nothing in the contract that says that the employee should accrue vacation time while not providing any "service" to the company. Equity cannot allow the contract to be interpreted to allow accrual of vacation time while not providing "service" and facing a long-term suspension for the behavior of the employee. This arbitrator did not intend for a "double payment" or a "windfall" to either. To allow Ms. Maxwell or Mr. Douglas credit for vacation purposes for the period of their unpaid suspensions is directly contrary to the language of the awards. It is appropriate that neither receive credit for earning vacation during their unpaid suspensions.

The awards and this decision are applicable to Ms. Maxwell and Mr. Douglas. These cases are not designed to set a precedent. The remedies were applied and interpreted based solely on the facts and circumstances of the Maxwell and Douglas cases. The union's position will be directly contrary to the language of the awards. Mr. Douglas and Ms. Maxwell cannot and should not receive a windfall of vacation hours greater than what a similarly situated employee with the same number of years of service who was not terminated. Equity simply would not permit this. This decision is specifically limited to the facts and circumstances surrounding the Douglas and Maxwell decisions. Their grievances are denied.

March 27, 2014

Date

Joseph L. Daly
Arbitrator