

**IN THE MATTER OF ARBITRATION**

**OPINION & AWARD**

**-between-**

**Grievance Arbitration**

**THE INTERNATIONAL BROTHERHOOD  
of ELECTRICAL WORKERS, LOCAL 949**

**Re: Employee Termination  
(M. Mazzitello)**

**-and-**

**NORTHERN STATES POWER CO.  
d/b/a/XCEL ENERGY, INC.**

**Before: Jay C. Fogelberg  
Neutral Arbitrator**

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**Representation-**

For the Company: Michael J. Moberg, Attorney

For the Union: M. William O'Brien, Attorney

**Statement of Jurisdiction-**

The Collective Bargaining Agreement duly executed by the parties, provides in Article VI, for an appeal to binding arbitration for those disputes which remain unresolved after being processed through the initial steps of the grievance procedure. A formal complaint was submitted by the Union on behalf of the Grievant on April 17, 2014. Thereafter it was appealed to binding arbitration when the parties were unable to resolve this matter to their mutual satisfaction. The under-signed was mutually selected as the neutral arbitrator and a hearing convened on July 29, 2014, in Minneapolis,

Minnesota. Following receipt of position statements, testimony and supportive documentation, each side indicated their preference for submitting written summary arguments. The briefs of the representatives were received on September 29, 2014, at which time the hearing was deemed officially closed. At the outset, the parties stipulated that this matter was properly before the Arbitrator for resolution based upon its merits, and that the question to be resolved can be fairly characterized as follows:

**The Issue-**

Did the Company have just cause to terminate Michael Mazzitello's employment? If not, what shall the appropriate remedy be?

**Preliminary Statement of the Facts-**

The record developed during the course of the proceedings indicates that the International Brotherhood of Electrical Workers, Local, 949 (hereafter "Union," or "Local") represents all hourly employees working at the Prairie Island Nuclear Generating Plant operated by Xcel Energy, Inc. ("Company," "Employer," or "Management") - a public utility supplying electrical power to the Greater Twin Cities Metropolitan Area. The parties have entered into a collective bargaining agreement covering calendar years 2013 through

2015 (Joint Ex. 1).

The Grievant, Michael Mazzitello, was hired by the Company in 2005 and assigned a position covered by the labor agreement identified as a "Radiation Protection and Chemical Specialist (RPCS)"

Contingent upon being hired, the Grievant was required to obtain unescorted privileges in the nuclear plant as part of his assigned duties entailed moving freely throughout the facility. To accomplish this a background check needed to be performed. In connection with that investigation, a new employee hired as a Chemical Specialist was obligated to fill out an extensive "Personal History Questionnaire (PHQ)" as mandated by the Nuclear Regulatory Commission (NRC). Consisting of some twenty pages, it seeks information about the Grievant's personal credit, and employment history, references, military service, as well as disclosing any criminal history if applicable (Union's Ex. 3). It also contained a section entitled "Suitable Inquiry – Self Disclosure" (*id.* at p. 15). In part, that portion of the questionnaire asked if the applicant had ever: "Used, sold or possessed illegal drugs or abused legal drugs." Mr. Mazzitello answered "no."

The Grievant was cleared after completing the PHQ and accordingly was hired in April of 2005. Thereafter, he was promoted to a Senior Radiation

Protection Specialist, following his first three years of employment. During that time, the Grievant compiled a good work record receiving positive performance appraisals from his supervisors.

On Christmas Day, December 25<sup>th</sup> of last year, Mr. Mazzitello reported for his night shift displaying what the plant guard thought were blood shot eyes and smelling of alcohol. This was reported to Management and he was tested at the facility immediately, the results of which confirmed that his blood level (.071) was over the specified limit to work at the plant. Under the Fitness for Duty Program utilized by the Company, employees testing positive for off-duty consumption are given an opportunity to submit to a treatment regimen in lieu of dismissal. The Grievant entered the program and ultimately completed it successfully. Thereafter, in order to return to work and reclaim unescorted access status in the plant, Mr. Mazzitello had to reapply which required that he complete another PHQ (Union Ex. 6).

In connection with his reapplication for access to the plant again, the Grievant's records from the treatment program were reviewed by the Employer. In the course of examining the documentation, the Company's Supervisor of Access Authorization, Tasha Stephens, discovered that Mr. Mazzitello had indicated on his "Chemical Use History" (Union's Ex. 11) that he had tried smoking marijuana "once" in his life. The statement raised

questions for Ms. Stephens who then reviewed the Grievant's original PHQ. When the discrepancy was discovered, the supervisor called Mr. Mazzitello on February 18, 2014, inquiring about the inconsistency and why he answered "no" to the relevant question in 2005.

According to the Employer, the Grievant first responded that he was not sure why he answered the way he did on the '05 PHQ, but that later in the conversation stated that he thought it would "look bad" if he disclosed that he had tried it once. Mr. Mazzitello, on the other hand, recalls Ms. Stephens asking: "is it possible that you answered the question the way you did because it would make you look bad?" The Grievant claims that he was "caught off guard" by the unannounced call and cannot remember exactly what his response was.

The following day, February 19<sup>th</sup>, Mr. Mazzitello, met with Ms. Stephens and another representative from Management, Gina Cowles, along with his Union Representative Jonathon Hauchidt, and his supervisor James Payton, to determine whether the Grievant understood the question addressing marijuana use in connection with his 2005 PHQ, and to "....determine whether omission was willful" (Employer's Ex. 2). The Grievant's consistent response was that he did not consider a one-time occurrence where he took one "toke off a joint" to constitute "use" as it was phrased in the

questionnaire. On the same date Ms. Stephens submitted notes of the meeting to her superiors in which she concluded the employee's answer to the critical question when he was first hired, was intentionally false and that accordingly she recommended that he be terminated (*id.*).

On April 14, 2014, the Grievant was notified by letter that he was being discharged for recording, ".....false information relating to your use of illegal drugs on your initial PHQ..." (Local's Ex. 2). Subsequently, the Union filed a formal grievance alleging that Mr. Mazzitello's employment was "unjustly terminated" in violation of Article III of the labor agreement and demanding that he be reinstated immediately and made whole (*id.*).

### **Relevant Contract & Policy Provisions-**

From the Master Agreement:

#### Article III Management Rights

**Section 1.** .....The Company shall have the right to exercise discipline in the interest of good service and the proper conduct of its business, but discipline can only be given for just cause...

From the Company's Disciplinary Guidelines:

\* \* \*

#### Termination

\* \* \*

Termination 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 situations that may result in immediate terminating of employment:

\* \* \*

- False statements or responses on application, physical examination, medical claims, expense statements or any other company records, or given during company investigations.

### **Positions of the Parties-**

The **COMPANY** takes the position in this matter that their decision to terminate Mr. Mazzitello's employment was fully justified under the circumstances. In support of their claim, the Employer contends that while the Grievant has worked for the Utility for eight years and during that time compiled a good work record, this does not alter the decision made in light of the fact that he deliberately falsified his PHQ in 2005 in an effort to gain employment in the first instance. Simply stated, both the Company's access policy for those working unescorted in a nuclear plant, as well as applicable NRC regulations specifically identify "falsification" on the questionnaire as grounds for immediate termination. Indeed, the very first page of the

document advises the applicant that, "...any falsification or willful omission of applicable information may be a violation of NRC regulations...." and cautions that the candidate "Read the instructions for each section carefully and comply with those instructions." It further states those who fill out the form providing their signature on the document equates to their certification that the information provided is complete and "correct." Yet in spite of these cautionary commitments, the Grievant proceeded to deliberately give a false answer to the very significant question asking specifically "Have you ever...used, sold or possessed illegal drugs...?"

Further, the Utility maintains that Mr. Mazzitello deliberately omitted listing a non-judicial punishment for making false statements while serving in the U.S. Navy, again in direct violation of the instructions on the same PHQ. Had Management been made aware of the drug use and the military episode which resulted in having his paycheck reduced, he most certainly would not have been granted clearance meaning that he could not be hired into the position he sought.

Additionally, the Employer charges that the Grievant knew full well that acknowledging prior drug use would have defeated his job application. During his interview with Ms. Stephens, he revealed his motive for lying: that it would have "looked bad" had he disclosed the fact. Also, they posit that by

declaring to the access authorization supervisor that he had become a “changed person” since working for the Utility, the Grievant effectively acknowledged the misstatement on his questionnaire in 2005. Accordingly, for these reasons, they ask that the grievance be denied in its entirety.

Conversely, the **UNION** takes the position that Mr. Mazzitello was not terminated from his job for just cause. In support, the Local argues that the Company’s decision is based on a single incident: the answer the Grievant gave to one of countless questions on the PHQ back in 2005 regarding marijuana usage. They maintain that the word “use” is not tantamount to trying the drug once, which is what Mr. Mazzitello did. The argument is made that it was a one time puff of the contraband and thereafter nothing more, upon discovering that it was distasteful to him. Trying marijuana and “using” it are not synonymous in the Local’s view. In fact the Employer has indicated they agree with this assessment when they altered the question which was contained in the most recent PHQ form “Have you ever used illegal drugs,” to “In the past 5 years...have you...tried, used, experimented with, sold or possessed illegal drugs.”

Further, the Local contends the Employer’s own published guidelines regarding denial of unescorted access in the plant mandate that Management consider “mitigating factors” such as a favorable employment

history (Union's Ex. 12). This however, was not done in this instance as Ms. Stephens has acknowledged that Mr. Mazzitello's personnel record was not considered prior to recommending his termination. Indeed, they charge that the supervisor went into the investigation and interview with the Grievant having predetermined the outcome. For all these reasons then, they ask that the grievance be sustained and that Mr. Mazzitello be returned to his former position and made whole.

### **Analysis of the Evidence-**

The near universal rule of arbitral jurisprudence holds that the employer must carry the initial burden of proof whenever the issue is one of discipline. While the quantum of evidence necessary to satisfy this assigned obligation may range from preponderant to the criminal standard of proof beyond a reasonable doubt, the tendency of arbitrators is to use a heightened measurement, but one that falls between the two extremes, when charges of a serious nature resulting in the employee's termination are involved. Previously, in numerous decisions I have applied the "clear and convincing" yardstick whenever the claim being made involves more egregious behavior leading to a dismissal of the accused. Such a measurement, it should be noted, is not as stringent as the criminal standard

of proof beyond a reasonable doubt, but at the same time requires a heightened degree of proof above the preponderance test in order to sustain the accusation. This obligation is particularly appropriate in situations such as this, where the Grievant's termination is essentially based upon a charge of deliberate falsification. An allegation of dishonesty and untrustworthiness is particularly stigmatizing and, if established, can carry with it long term adverse ramifications for the accused.

Following a careful review of the testimony and documentation introduced into the record, along with the respective arguments advanced by each side, I conclude that the Employer has fallen well short of their evidentiary burden in this instance.

In the course of his testimony, the Company's Nuclear Access Manager Randall Cleveland, offered a concise description of the issue at hand:

Union: "The entire area of inquiry....once you have concluded that he lies about something, the nature of the lie, the substantiality of the lie is really immaterial to you, a lie is a lie is a lie?"

Cleveland: No, that is incorrect.

Q: So you have some discretion?

A: Absolutely.

Q: Someone might state an answer on a PHQ that you think was a lie, but you have the discretion not to deny access?

A: You have got to look at the materiality and whether it was willful, that is what we consider.

Q: *And it's really in this case it's the willfulness issue that is at the crux of this?*

A: Yes.

Q: *What you wanted to determine is whether it was willful?*

A: *Yup*" (Tr. p. 116-117; emphasis added).<sup>1</sup>

No one disputes the fact that Mr. Mazzitello gave a negative answer to the critical question on the PHQ in 2005 when asked "Have you ever....used, sold or possessed illegal drugs or abused legal drugs?" in the course of filling out the application for employment at the nuclear plant (Union's Ex. 3; emphasis added). It has also been established that the Grievant, by his own admission, took a "drag" off of a marijuana cigarette in 2004 on a single occasion when he was about to be discharged from the Navy.

According to Management, Mr. Mazzitello's experience with the substance in 2004 constituted "use," and consequently his subsequent failure to disclose that on the application questionnaire in 2005 equated to a

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<sup>1</sup>All references to the transcript of the arbitration hearing are noted as "Tr." followed by the page number.

deliberate act intended to deceive Management in order that he might be cleared for unescorted access in the Company's Prairie Island Nuclear Generating Plant ("PINGP") - a key requirement of the job. In addition, they maintain that not only did the Grievant use marijuana, he also possessed it in March of 2004 when he held the "joint" in his hand while smoking it. As the same question on the form asks whether the applicant had ever "possessed" an illegal drug, this too constitutes a material omission and falsification on the part of the Grievant, lending further proof to their claim of falsification.

The weight of the evidence however, fails to adequately support these allegations.

To be clear, it is undisputable that the Utility has every right to insist upon honesty and truthfulness from its employees in matters relating to their job and the duties attendant to it. This expectation is all the more important when the requirements of the position include unescorted access to a nuclear plant. Falsification on an application, fraud, or intentionally misleading the employer for personal gain cannot be tolerated in the workplace and when demonstrated, most certainly constitutes grounds for possible termination. At the same time however, establishing such a serious charge requires due diligence on the part of the accusing party to insure a level playing field. Here, the Utility asserts that Mr. Mazzitello knew full well

the importance of accurately and honestly completing the lengthy and detailed document; that he was well aware of what was being asked of him, and; that he also knew an affirmative response to Question No. 3, in Section IX of the PHQ would most certainly result in a denial of an unescorted access in the facility. Present in the instant dispute however, are a number of critical factors which refute Management's allegations, not the least of which is the apparent ambiguity of the critical verb "used" as contained in the questionnaire.

The Grievant maintains that he did not believe that the term, as utilized in Section IX equated to a single draw on a marijuana cigarette. In the course of the February 19<sup>th</sup> face-to-face meeting with members of Management who were conducting an investigation into the charges, Mr. Mazzitello repeatedly stated that when he read the question, he believed that trying the drug one time did "...not fall under the word 'used'" (Tr. p. 184, 192-193).

I would concur with the Local that the manner in which the term was placed into the PHQ is far less than clear. The Grievant testified that he believed usage meant possessing the substance, saving it for later, purchasing it and smoking it on a more regular basis – not trying it one time (a single puff) and thereafter rejecting it (*id.*). Given the manner in which

the question is posed, Mr. Mazzitello's interpretation is not unreasonable. Webster's (on line) Dictionary definition of the transitive verb is particularly illuminating; defining it as being "To consume or take (as liquor or *drugs*) *regularly*" (emphasis added). In the context of liquor or illegal drug consumption, regularity would appear to be a critical element.<sup>2</sup> There is nothing in the record to indicate that the Grievant's encounter with marijuana was anything but a one time occurrence.

The Company's subsequent amendment to question No. 3 in 2014, lends further support to the Union's claim of ambiguity. As the undisputed evidence shows, Management at that time elected to add two significant terms to their inquiry. More particularly, the words "tried," and "experimented with" were placed on either side of the verb "used" (Local's Ex. 6, p. 22). Thus the key question then read: "Have you ever....*tried, used, experimented with, sold or possessed illegal drugs*" (emphasis added). This deliberate alteration in 2014 of the very question which Management now seeks to use as justification for their decision to effectively terminate the Grievant's employment, demonstrates their belief that it lacked sufficient clarity as written in the 2005 version of the questionnaire. Indeed, in the

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<sup>2</sup> See: [www.merriam-webster.com/dictionary/use](http://www.merriam-webster.com/dictionary/use). Further, in Webster's *New Universal Unabridged Dictionary*, Barns & Noble Books, 1992, no fewer than 26 separate definitions of the word are offered, the vast majority of which describe it in terms of reoccurrence. One in particular which would appear to be relevant to the instant dispute defines the verb as "practicing habitually or customarily; make a practice of" (at p. 1574).

course of his testimony Manager Cleveland explained that it was changed for the purpose of adding “more clarity,” and that it “created less ambiguity” (Tr. p. 118-119).

Supervisor Tasha Stephens' answer to the modified language of the question was far more evasive. Under cross-examination she gave the following testimony:

Union: “The Company changed the question, didn't it?”

Stephens: The Company goes by industry standards.

Q: That is not my question. The company changed the question, didn't they?

A: Based on an industry standard.

Q: For whatever reason, the question in 2014 reads: 'Have you ever in the past five years tried, used, experimented with, sold or possessed illegal drugs?' It's a different question isn't it?

A: It's not a different question. It's changed” (Tr. p. 57-58).

Clearly the question was “changed” to reflect other more particular scenarios. Had they been included in the 2005 version of the PHQ and had the Grievant responded in the negative, then Management's case would be far more convincing in light of Mr. Mazzitello's admission that he indeed tried marijuana on a single occasion. Basing the termination on his answer to the poorly worded and ambiguous question in 2005 however, does not

establish deliberate intent to deceive the Employer, which might otherwise rise to the just cause standard required.

Nor do I find adequate support for the Utility's claim that he also "possessed" the drug when he held the marijuana cigarette in his hand while "taking a hit." Adopting Management's version of the term, would mean that someone else would have had to literally hold the cigarette up to the Grievant's lips while he inhaled the smoke. Such an interpretation is obscure at best. As the Union has observed, someone charged with "possession" within the cultural context of using or selling illegal drugs most often (if not always) connotes carrying them on their person, or storing them somewhere. None of which can be attributed to Mr. Mazzitello.

In part, the Company claims that the Grievant's response to Ms. Stephens' questions during the February 18<sup>th</sup> phone call between the two, further buttresses their conclusion he had understood the question regarding the use of illegal drugs when he filled out the PHQ in 2005, and that he willfully did not disclose his experience in 2004 with marijuana. Management points to Mazzitello's response to the supervisor during that conversation where he told her that he answered the question the way he did because he believed it would "look bad."

A closer examination of the phone interview however, raises questions regarding the validity of the alleged admission relied upon by the Employer.

The Grievant testified that the phone inquiry came as a surprise to him as he had no notice of its purpose and had not viewed the 2005 questionnaire for several years at the time of the call (Tr. p. 164). The undisputed evidence demonstrates that his response to Stephens, when she asked him why he omitted using the drug in 2004, was that he wasn't sure. He remembered telling her that he could not recall what his thought process was some 8½ years ago. Stephens asked: "Is it possible that you maybe could have felt like that was going to make you look bad?" to which he responded "I don't know. Possibly...I can't remember what my thought was 8 years ago" (Tr. p. 165).

Supervisor Stephens testified that Mr. Mazzitello volunteered during the course of the call that he was, "...afraid of what it might look like to the fact that it might appear bad," rather than merely repeating that he couldn't remember the events and agreeing that it was "possible" that her account of his actions in 2005 was accurate (Tr. p. 39-40).

Clearly there is a discrepancy between the parties as to what actually transpired during the course of the call. The Grievant maintains that he was surprised by it; that he was suddenly being asked to recall with some

specificity whether he answered a single question within a lengthy questionnaire some 8½ years previously as he did in order to deceive the Company thereby avoiding rejection for employment, and; that he was unsure and simply did not remember at the time (Tr. p. 192-193). Ms. Stephens' recollection of the same call emphasizes the statement of the Grievant that his failure to acknowledge his involvement with the illegal drug in 2004 on the PHQ was because he thought it would make him "look bad" and was therefore a willful omission of a material fact. A review of her subsequent "Memo to File" however, would appear to be more consistent with the Grievant's recollections of the phone conversation. There, she noted that when she asked him whether he remembered how he responded to the particular question in issue, "...he stated he was not sure," and when asked what his thought process was at the time, he again "...stated he was not sure and did not know why he answered 'no.'" The supervisor then noted that Mazzitello told her that "...he *possibly* could not have listed it due to being afraid of what people may think and that he *could have been nervous* to put down anything that would make him look bad" (Employer's Ex. 2; emphasis added).

The totality of this evidence is inconclusive in my judgment, as it fails to demonstrate precisely what was or was not stated during the course of the

phone call. It is noteworthy that Ms. Stephens testified she took notes during the course of her phone conversation with the Grievant that evening, but subsequently discarded them (Tr. p. 50-51).

The following day, February 19, 2014, the Company conducted a face-to-face interview with the Grievant and his Union Representative at the nuclear plant. At that time, according to Management, Mr. Mazzitello changed his story from the day before, telling the Employer he did not consider a one-time experiment with marijuana to be "use" as listed in the questionnaire. Based upon the Grievant's educational background indicating that he possessed the capacity to understand the question in Section IX, and the totality of the circumstances, Ms. Stephens concluded that he willfully failed to disclose his 2004 experience with marijuana.

The weight of the evidence however, indicates there were other factors at play during the course of the investigation that raise significant questions regarding its objectivity and concomitantly, its fairness.

Also present at the February 19<sup>th</sup> inquiry was James Payton, a Chemistry Manager who supervised the Grievant. At the hearing he testified: "It was pretty clear to me that (the questioning by Stephens) wasn't an investigation. *It was more of we know what we want to hear, and... they were out to see or get Mike to admit that he lied*" (Tr. p. 145; emphasis

added). The witness labeled the Employer's approach to the investigatory meeting "accusatory" rather than neutral, noting the Company's representative came into the interview already convinced that the Grievant had lied (*id.*). Management's objective, in his view, was not to obtain Mr. Mazzitello's version of the incident, but rather to "get proof that he lied" (*id.*). Significantly, he testified that he was so troubled by their approach to the meeting, he felt compelled to notify his superiors telling them that the investigation was neither "fair" nor "appropriate" (Tr. p. 149).

Mr. Payton's assessment of the proceedings was shared by the Union's Chief Steward Jonathan Hauschildt, also present that day, who characterized Management's questioning of the Grievant as "...just badgering; and Tasha (Stephens) knew that Mike was guilty before we got there" (Tr. p. 152). This witness admitted that Stephens' approach to the questioning of the Grievant, "physically made me upset" (*id.*) Hauschildt further stated that he had, "....never seen treatment of an Xcel employee like that before," adding that it "...was not a search for facts" (*id.*) He also recalled that Ms. Stephens was argumentative and unwilling to listen to Mazzitello's interpretation of the word "use."

Notably, the recollections of Messrs. Payton and Hauschildt were unrefuted on the record. Moreover, the Local's argument is all the more

compelling given the fact that Payton himself was a member of management. It is axiomatic that in matters of industrial due process, just cause standards in connection with the administration of discipline include the obligation for a thorough and unbiased investigation.

I have also been influenced in my decision by the evidence pertaining to the Grievant's work history. There is no dispute but that during his tenure with the Utility, Mr. Mazzitello compiled a most favorable performance record. This included a promotion along with an absence of any significant disciplinary problems. His supervisor's assessment of his performance, who oversaw the Grievant for approximately seven years prior to his dismissal, was illuminating:

Union: "Are we in agreement that he was a good performer?"

Payton: Very good performer. I had no complaints whatsoever about Mike. Anything that I would ask him to do, he would do....

Q: Did he ever do anything in the years you supervised him since 2007 that caused you to question his integrity?

A: No.

Q: Did he ever do anything that caused you to question whether he presented a threat of nuclear safety or sabotage to the plant?

A: No.

Q: Do you feel fairly certain on both scores (that) he poses no risk?

A: Absolutely

Q: Would you feel comfortable working with him if he were returned to work?

A: Yes" (Tr. p. 143-144).

It is widely held that whenever discipline is being evaluated, an employee's favorable performance record can serve as a mitigating factor, or conversely support the action taken should their work history exhibit prior incidents of discipline. In this instance however, the Company takes the position that there was no basis on which to consider any mitigating factors concerning the denial of unescorted access. Management's stance is based solely on the false information provided on the PHQ in 2005, citing Attachment 5 to their Access Authorization Program (Items 22 & 23; Local's Ex. 12). They argue that the Grievant should not receive any benefit from a positive employment history at the nuclear plant when he was intentionally deceptive in completing the PHQ in the first instance.

As previously observed however, the evidence fails to establish a deliberate falsification of the form on the part of Mr. Mazzitello. Moreover, the same Attachment 5 lists "Favorable employment or length of service" as a mitigating factor when making access determinations (*id.*, at p. 6). In addition, it is noted the Utility's own policies provide that an individual's

“trustworthiness and reliability” shall be evaluated in light of both favorable and unfavorable information about the candidate for access purposes (*id.*).<sup>3</sup>

Finally, there is the matter of the Grievant's answers to questions contained in the 2005 PHQ in Section X pertaining to “Criminal History.” The evidence demonstrates that the day prior to the arbitration hearing, the Grievant and his representative were informed that the Company intended to address his failure to disclose the penalty he received while in the Navy for making a “false official statement” costing him half a month's pay for two months. According to the Employer, because of the warnings contained in the 2005 questionnaire, along with the Company's Code of Conduct, requiring employees to be honest warning that lying on an application is grounds for termination, Mr. Mazzitello's (additional) falsification relating to his experience in the Navy, further supports their decision to discharge him.

There are however, a number of reasons why I must respectfully disagree with their assertion.

First and foremost, this after-acquired evidence was clearly not the basis for the action taken. Arbitral history generally holds that an employer cannot pad their decision to discipline with evidence that does not surface

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<sup>3</sup> Additionally, it takes no quantum leap of faith to believe that had Mr. Mazzitello compiled a less than favorable work record during his 8½ years of service, such evidence would have been brought forward by the Employer as further support for their decision.

until the matter is contested in arbitration. There is no dispute but that at no time prior to the day before the hearing did Management ever address the matter of the answers given by the Grievant in Section X in 2005 (Tr. p. 68). Not only does this place the Union at a distinct disadvantage in terms of representing its client, it is also contrary to the parties' Collective Bargaining Agreement which requires Management to provide "specific written reasons" for their decision to terminate the employee.

Even if the charge is considered as "after-acquired evidence" of misconduct which the Company seeks to apply as support for their decision – something that has been allowed in the past by arbitrators and upheld by the courts when considering a reinstatement remedy – there are nevertheless present here other reasons, beyond the fact that it was raised at the eleventh hour, to reject their argument.

Just as ambiguity was demonstrated in connection with question 3 in Section IX of the 2005 PHQ, so too is their sufficient confusion present in Section X resulting from its wording. It is noted that the earlier questionnaire labeled the section "*Criminal History*," whereas the 2014 version was couched in terms of "Legal Actions." The two are significantly dissimilar. The former specifically asked for disclosure of any "military *criminal history*" (emphasis added) while the latter version was changed to "military

charges.” It is noteworthy that when reading this in the course of filling out the application again in 2014, the Grievant answered the question in the affirmative and provided a detailed explanation of the events.

In the course of his testimony Mr. Mazzitello explained: “I didn’t answer (yes to the question) in 2005 because the way I read this it’s criminal self-disclosure, military criminal history. I don’t have (a) military criminal history” (Tr. p. 170). Similarly, under cross examination, when addressing the wording of the opening paragraph to Section X in the 2005 PHQ and its reference to “military criminal history” listed therein, the witness his interpretation:

“This is about my criminal history. I didn’t feel that my non-judicial punishment was actually a crime. I didn’t commit a crime. I didn’t have a criminal history which included court martial or non-punishment....I mean it does say at the top ‘Criminal History Self Disclosure,’ so therefore I am in the mindset that this is asking about my criminal past” (Tr. p. 186-188).

Not unlike the language found in Section IX, Question 3 of the 2005 PHQ, I find the wording in the opening paragraph of Section X to be also ambiguous and therefore realistically subject to more than a single interpretation. Moreover similar to the action taken in 2014 to clarify the language in Section IX regarding illegal drugs, Management also altered Section X, broadening its scope by entitling that portion of the questionnaire

“Legal Action” while at the same time dropping the word “criminal” when addressing the applicant's military history (Union's Exs. 3 & 6).

This evidence when considered collectively, in my judgment does not meet the clear and convincing standard that has been applied to the instant dispute. The facts as presented simply do not support the Employer's assertion of a deliberate intent on the part of the Grievant to omit a material portion of his military history in order to deliberately deceive the Employer. That it was brought forward at the last minute in an effort to further establish the employee's lack of trustworthiness, coupled with the ambiguity of the section's wording,<sup>4</sup> and the fact that once corrected in 2014, was answered completely and truthfully by Mr. Mazzitello, does little to advance the allegations that have been made against him.

### **Award-**

In summary, while an employer has every right to expect honesty and truthful answers on an employment application, at the same time the questions posed must be plainly written and concise in order to obtain clear answers from the candidate. Based upon the foregoing analysis of the

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<sup>4</sup> Indeed, Ms. Stephens allowed that “someone could make a mistake,” when filling out this portion of the 2005 version of the PHQ, given the very close reading that they would have to give the question to understand it as she did (Tr. p. 72).

questionnaire in issue, and taking into consideration the flaws in the Company's investigatory process along with the Grievant's favorable work record, I find his grievance sustainable. Accordingly, Management is to forthwith reinstate Mr. Mazzitello to his former position and to make him whole for wages and/or benefits he may have lost as a consequence of their decision. In this regard, the Employer's financial obligation shall be offset by any income the Grievant may have acquired in the interim.

I will retain jurisdiction in this matter for the sole purpose of resolving any disputes that may arise in connection with implementation of the remedy ordered here.

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Respectfully submitted this 23<sup>rd</sup> day of October, 2014.

/s/  
Jay C. Fogelberg, Neutral Arbitrator