

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF RICE LAKE

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 953

Case 79
No. 66320
MA-13488

Appearances:

Ms. Connie L. Howard, Esq. Metcalf, Kaspari, Howard, Engdahl & Lazarus, P.A., 333 Parkdale Plaza, 1660 South Highway 100, Minneapolis, Minnesota 55416-1531 on behalf of the Grievant and Local 953.

Mr. Stephen L. Weld, Esq. Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, on behalf of the City Utilities.

ARBITRATION AWARD

Pursuant to Article XVIII of the effective labor agreement between the parties, the parties jointly selected Arbitrator Sharon A. Gallagher from a panel of five Staff Arbitrators submitted by the Wisconsin Employment Relations Commission. Hearing was originally scheduled for January 16 and 17, 2007 but was postponed and held at Rice Lake, Wisconsin on March 19 and 20, 2007. A stenographic transcript of the proceedings was made and received by April 2, 2007. In May, 2007, the parties advised the Arbitrator they were attempting to settle the matter and they requested the case be held in abeyance. Thereafter, when settlement negotiation did not prove fruitful, the parties submitted their written briefs having waived, reply briefs, by June 4, 2007 whereupon the record herein was closed. More than 450 pages of transcript were taken, over 40 exhibits were received and six individuals testified herein.

STIPULATED ISSUES

The parties stipulated that the Undersigned should decide the following issues:

- 1) Did the Employer have just cause to terminate the Grievant?
- 2) If not, what is the appropriate remedy?

7224

RELEVANT CONTRACT LANGUAGE
ARTICLE II – MANAGEMENT RIGHTS

The City possesses the sole right to operate the Utility and all management rights repose in it. These rights include, but are not limited to, the following:

- A. To direct all operations of the Utility.
- B. To hire, promote, transfer, schedule and assign employees in positions within the Utility and to create, combine, modify and eliminate positions within the Utility.
- C. To suspend, demote, discharge, and take other disciplinary action against employees for cause;
- D. To relieve employees from their duties;
- E. To maintain efficiency of operations;
- F. To take whatever action is necessary to comply with state or federal law;
- G. To introduce new or improved methods or facilities;
- H. To change existing methods or facilities;
- I. To determine the kinds and amounts of services to be performed as pertains to Utility operations and the number and kind of personnel to perform such services;
- J. To determine the methods, means and personnel by which Utility operations are to be conducted;
- K. To take whatever action is necessary to carry out the functions of the Utility in situations of emergency;
- L. To establish reasonable work rules and schedules of work. The reasonableness of any work rule is a grievable action;
- M. To contract out for goods and services as long as it does not result in the layoff of full time employees hired on or before January 1, 2001.

Any complaint as to the non-existence of cause in Section C may be presented as a grievance.

CODE OF ETHICS

RELEVANT WORK RULES¹

Providing safe and reliable service in compliance with laws, rules, and regulations and to the highest standards of our industry at fair prices.
Having excellence as the only acceptable method in everything we do.
Being fair, honest, and open in all business relationships and contacts with the public, the people we serve, the people from whom we buy, the people to whom we sell, and our fellow employees.

Conducting our business and personal affairs in such a manner as to earn the respect, credibility, and confidence of the community we serve.

Being totally dedicated to the achievement of the highest quality of life for our community.

Rice Lake Utilities Work Rules

These “Zero Tolerance” for abuse work rules include but are not limited to, the following:

1. Employees will be ready to begin their regular workday at or before your scheduled start time based on a particular contract. This means:
 - a. You will be here on time.
 - b. Fully dressed with the appropriate clothing.
 - c. Have your boots or work shoes on for the day’s work.

2. You will engage in only those activities that are pertinent to the business of the Rice Lake Utilities and those tasks as described in the weekly staff meeting or as instructed by the appropriate supervisor or designee. This means:
 - a. Absolutely no personal businesses (sic) on company time.
 - b. No carrying of personal cell phones while on duty absolutely no using personal or utility cell phones for personal use while on duty.
 - c. No stopping at the convenience store for coffee or pop. Remember, you all chose to have your daily breaks at (sic) from 3pm to 3:30pm.
 - d. No stopping at the store to pick up lunch then coming back here to take you’re (sic) 30-minute lunch. Remember as per the contract your break or lunch begins when you leave the job site and ends when you return to the job site.

¹ As no other Code of Ethics and Work Rules were submitted, I must assume the above-quoted Code and Rules were effective at all times relevant thereto.

3. Company vehicles will be used only for authorized utility business.
4. Computers and Internet use. No personal business shall be conducted on facilities owned by Rice Lake Utilities during the regular workday. Email use is for Rice Lake Utilities business only.
5. Purchasing policy: All purchases must be approved in advance. In addition all invoices must list clearly the truck number or the project in which it will be used on, and the persons (sic) name making the purchase.
6. Personal use of Utility owned Equipment is not permitted except for the tables and chairs.
7. Smoking Policy is attached. Smoking in Utility owned Buildings and in Utility owned vehicles is prohibited. Smoking is permitted outside while on your breaks.
8. Outside work policy is attached.²

These work rules may be revised on an as needed basis. Failure to comply will result in disciplinary action.

RELEVANT EXCERPTS from the MEUW Safety Manual:

209 Personal Protective Equipment (PPE)

- a) All employees shall be equipped with the appropriate PPE necessary to safely perform their jobs. The employer shall ensure that a preliminary assessment of work operations is performed to adequately evaluate the hazards and select suitable PPE for the employees. Any time PPE is worn, a job hazards analysis (JHA) should be completed prior to starting work.
- b) Before any employee is assigned a new article of PPE to use during the course of their job, training should be conducted to instruct the employee on the use, care, inspection, and maintenance of the PPE.
- c) When working on or near live electricity, the employer shall consider an arc flash/blast analysis of the electrical system. The arc flash/blast analysis would provide the qualified electrical workers with the flash protection boundary based upon the incident energy produced by the equipment. Limited, restricted, and prohibited approach boundaries should also be considered when performing the arc flash/blast analysis. The appropriate PPE may be selected based on the flash protection and approach boundaries.

² No attachments to this document were proffered herein.

For more information regarding arc flash/blast analysis, refer to NFPA 70E Standard for Electrical Safety Requirements for Employee Workplaces and IEEE 1584 Guide for Performing Arc-Flash Hazard Calculations.

. . .

305 Parking

- a) When vehicles must be parked on the roadway, they shall be parked on the right-hand side facing in the direction of traffic flow, whenever possible.
- b) When parking on a roadway, vehicles shall park off the traveled road surface, whenever possible. When vehicles must park closer than 10 feet to the traveled road surface, appropriate warning devices shall be used.
- c) Trucks or trailers stopped on any public roadway shall be protected by proper warning lights, reflectors, or red flags in accordance with state or local requirements.
- d) Vehicles shall not be parked on an incline, the driver shall make sure the vehicle is left in a safe position. The engine shall be turned off, the vehicle placed in the lowest gear or “park” position, and the parking brake set. The front wheels shall be cut into the curb, or if a curb is not present, the rear wheels shall be chocked.

. . .

Section 4 WORK AREA PROTECTION

401 General

- a) Work area protection is the adequate safeguarding or protecting of pedestrians, motorists, Utility workers, and equipment by the use of adequate barriers, warning signs, lights, flags, traffic cones, high level standards, barricade rope, flagmen, etc., on approaches to work areas, excavations, open manholes, parked equipment, etc.
- b) Work area protection is accomplished by the use of good informative and protective devices, keeping in mind that a safe installation requires the use of these devices in relation to the location of the workers and the equipment involved. The use of these devices must be coupled with proper planning, design, installation, inspection, maintenance, and the use of good common sense. It is of the utmost importance that the work area be properly identified and that warning devices clearly convey the message to the traveling public well in advance of arrival at the work area.

- c) The public must be warned in advance, then regulated and guided safely through or around the work area. Proper work area protection shall be planned to ensure the safety and protection of the public, the worker, and the equipment.
- d) The possibility of accidents occurring is greatly minimized by proper planning, design, installation, operation, and maintenance, coupled with the use of common sense.
- e) Refer to the “Manual on Uniform Traffic Control Devices.”
- f) For additional information concerning work area protection, refer to OSHA Standard 29 CFR 1910.269.

402 Equipment

- a) Only those signs, standards, barricades, flags, and cones that conform to state or local codes shall be used.
- b) All state and local traffic codes shall be followed when providing work area protection.
- c) During night operations or in periods of reduced visibility, special precautions shall be taken. Adequate warning equipment which may include flashing lights, flares, or area illumination, shall be used.
- d) Warning devices and equipment shall be removed as soon as the hazard is eliminated.
- e) Warning devices and equipment not in use shall be stored in a proper manner or shall be removed from the work area.

. . .

604 Use and Care of Rubber Gloves

- c) Rubber gloves are recommended to be worn while working on any pole or other structure on which energized lines or equipment are located, on which lines and equipment that could be energized are located, or that are located close to energized lines or equipment where an employee could make contact. The rubber gloves should be put on before the employee ascends a pole or structure or raises an aerial device off the ground or device’s cradle. Furthermore, employees should not remove the gloves until they have descended the pole or structure or returned the aerial device to the ground or cradle. As a minimum requirement, gloves shall be put on before the employee comes within falling or reaching distance (in any event not less than 5 feet) of unprotected energized circuits or apparatus or those that may become energized, and they shall not be removed until the employee is entirely out of falling or reaching distance of such circuits or apparatus. Employees shall refer to Utility policy regarding additional rubber glove requirements.

- d) In addition, rubber gloves shall be worn during the following condition:
- (1) Working on or within falling or reaching distance of conductors, electrical equipment, or metal surface (crossarms, crossarm braces, or transformer cases), which are not effectively grounded and which may be or may become energized.
 - (2) During wet or stormy weather, working on or within falling or reaching distance of any conductor or equipment that may be or may become energized at any voltage.
 - (3) Required by supervision.
 - (4) Removing lead sheath and sleeves from cables and joints and opening or cutting cables (until they have been proven to be de-energized at the work location by positive tests).
 - (5) Performing tests on cables using approved testing devices.
 - (6) Operating manually controlled air-break switches.
 - (7) Opening and closing manually operated oil circuit breakers.
 - (8) Using approved switch sticks or live-line tools for opening, closing, removing, or replacing hot clamps, fuses or fuse doors on cutouts or when making or breaking any circuit and during inclement weather. (Exception: gloves may not be worn when using an extendo stick from the ground at a minimum of 20 feet.)
 - (9) Using approved switch sticks or live-line tools for making tests to determine if lines are de-energized, in applying and removing grounding devices, and during inclement weather.
 - (10) Working on or near series street lighting circuits even though they are disconnected from the source of power.
 - (11) Repairing series fixtures or attachments, the circuit of which is exposed to energized conductors, except where the fixtures are disconnected from the line.
 - (12) Pulling in wires or handling other conducting materials near circuits, apparatus, or equipment that is or may become energized.
 - (13) Working on or near telephone or other circuits that are subject to induced voltages from energized high voltage circuits, unless such circuits to be worked are adequately grounded.

. . .

**RELEVANT 2003 WORK ZONE SAFETY GUIDELINES FOR
CONSTRUCTION, MAINTENANCE, AND UTILITY OPERATION:**

Worker Safety

The safety of workers in a work site is just as important as the safety of the public traveling through the work zone. The best protection for both is good work zone traffic control.

. . .

Workers close to traffic should wear bright, highly visible clothing such as vests, shirts, or jackets. For daytime work, these garments shall be either orange, yellow, yellow-green or fluorescent versions of these colors. Flaggers shall be attired in similar bright, highly visible clothing. Other specific agency requirements for garments can also apply, such as OSHA requirements for private sector employees.

. . .

Channelizing Devices

Channelizing devices are used to warn and alert drivers, bicyclists and pedestrians of conditions in work zones, to separate traffic from the work area, and to guide and direct traffic. Channelizing devices include cones, tubular markers, vertical panels, drums, and barricades.

Cones are used most commonly for short-duration maintenance and utility work. Cones used at night shall be retro-reflectorized as shown on page 8. Drums are used most commonly where they will remain in place for a prolonged period. Channelizing devices should be crashworthy. Ballast shall not be placed on top of channelizing devices.

NESC Rules applicable to first-level Supervisors:

421. General operating routines

A. Duties of a first-level supervisor or person in charge

This individual shall:

1. Adopt such precautions as are within the individual's authority to prevent accidents.

2. See that the safety rules and operating procedures are observed by the employees under the direction of this individual.
3. Make all the necessary records and reports, as required.
4. Prevent unauthorized persons from approaching places where work is being done, as far as practical.
5. Prohibit the use of tools or devices unsuited to the work at hand or that have not been tested or inspected as required.

B. Area protection

1. Areas accessible to vehicular and pedestrian traffic
 - a. Before engaging in work that may endanger the public, safety signs or traffic control devices, or both, shall be placed conspicuously to alert approaching traffic. Where further protection is needed, suitable barrier guards shall be erected. Where the nature of work and traffic requires it, a person shall be stationed to warn traffic while the hazard exists.
 - b. When openings or obstructions in the street, sidewalk, walkways, or on private property are being worked on or left unattended during the day, danger signals, such as warning signs and flags, shall be effectively displayed. Under these same conditions at night, warning lights shall be prominently displayed and excavations shall be enclosed with protective barricades.

BACKGROUND

Darrell Scott was hired by the City Electric Utility (Utility) in 1980 as a Journeyman Lineman.³ The Lineman Position Description (effective 7/94) reads in relevant part as follows:

Definition: Under the direct supervision of the Electric Superintendent the Electric Journey Lineperson does various duties associated with installation, maintenance, repair and servicing electric distribution facilities.

³ In 1987, Scott received a 30 day suspension which was the subject of a settlement agreement between the parties. For reasons stated infra, I have not considered this suspension in reaching this Award.

Essential Responsibilities:

1. Repairs and replaces transmission and distribution powerlines between substations and consumers, requiring use of precautionary work methods and safety equipment due to electric hazards.
2. Opens switches or clamps grounding device to energized equipment to de-energize line or accessories as directed by Line Supervisor.
3. Climbs poles or rides in bucket attached to truck-mounted boom to remove broken or defective wires.
4. Secures new wires to crossarm insulators and splices wire to adjoining sections of line to complete circuit.
5. Transfers wires from defective poles to poles erected by ground helper.
6. Installs pole hardware and such auxiliary equipment as transformers, lightning arresters, switches, fuses and insulators, using handtools.
7. Suspends insulated ladders and platforms from pole crossarms and covers energized line with rubber mats to facilitate safe handling of high-voltage lines without interrupting service by power shutoff, and uses long insulated poles (hot sticks) fitted with mechanically or hydraulically operated grasping and crimping tools.
8. May service streetlight systems.
9. May patrol powerlines.
10. Perform other duties as assigned by electrical superintendent.
11. Follow Utility Safety Manual.
12. Troubleshoots as necessary.
13. All other duties as assigned by supervisor.

To do this kind of work, you must be able to:

- skillfully use handtools or machines needed for your work.
- read blueprints or drawings of the items to be made or repaired.
- measure, cut or otherwise work on materials or objects with great precision.
- use arithmetic or shop geometry to figure amounts of material needed, dimensions to be followed and cost of materials.
- picture what the finished product will look like.
- accept responsibility for the accuracy of the work as it is turned out.

...

In April, 1988, Scott was one of two men who were promoted to foreman (a non-unit position) at the Utility. Beginning in 1991 and ending in 1994, the Utility issued Scott various warnings (ER Exh. 7⁴), as follows:

- 1) Incident on 3-26-91: Written warning issued 4-2-91 for the movement of a broken pole while the line was still energized, causing a phase to phase fault, (DS was foreman of the employees who performed the work);

4 Although these incidents were not listed as reasons for Scott's discharge, the Utility raised these incidents herein.

- 2) Incident on 3-25-91: Warning issued on 4-2-91 because employees having caused a pole to lean and the circuit to shake (DS was foreman);
- 3) No incident date: Verbal warning issued on 10-25-91 for failing to be more responsible and to supervise employees properly and effectively;
- 4) No incident date: Warning issued on 11-17-92 because employees under him failed to properly install a crimp on a project which caused an outage, burning up several components (DS was foreman);
- 5) No incident date: Warning issued 11-17-92 for working overtime despite Monday staff meeting plan to allow overtime work that week but wait to “see how Monday’s work goes first before we start;”
- 6) No incident date: Verbal Warning issued 2-14-94 for failing to follow policy on checking in and out for breaks and DS advised to let someone know “if no break is taken.”

Each of these warnings was issued by current Utility Superintendent Reimer as Darrell Scott’s direct supervisor. Regarding Warning Item 1) Reimer wrote thereon that termination or suspension would result from future incidents. Regarding Item 2), Reimer stated that similar action would “not be tolerated in the future”; on only one Warning Item 5), Reimer stated that the “problem was discussed with Darrell;” and on Warning Item 6), Reimer stated that Scott’s breaks would be monitored “on a daily basis.” Scott did not receive any other warnings regarding his breaks or overtime and no evidence was placed in this record to prove Scott’s breaks were, in fact, monitored daily. In addition, Warning Items 1) through 5) were issued to Scott in his capacity as foreman, not as a unit employee. It is significant that no warnings were placed in this record concerning Warning Items 1) through 5) issued to the unit employees who were involved in those incidents, who actually performed the defective work.

The Utility placed three of Scott’s evaluations into this record (completed by Reimer) covering the years 1990, 1991 and 1994. During these years, Scott occupied the position of Lineman Foreman, a non-unit position he was demoted from in 1994 at which time he was returned to his former position as a Lineman. In his June, 1990 foreman evaluation, Scott was rated below average in four categories - Quality of Work” “Quantity of Work,” “Dependability” and on “Performance Skills,” but above average on “Knowledge & Versatility” and average on “Attitude and Cooperation, and “Relation w/Others” (ER. Exh. 8).

On his January, 1991 foreman evaluation, Scott was rated average in all categories he had been rated as below average the year before and he maintained his average and above average ratings in the “Relation w/Others” and “Knowledge & Versatility” categories (ER. Exh. 9). On his April, 1994 foreman evaluation, Scott was rated average in all categories (ER. Exh.10). At the time of this satisfactory foreman evaluation, the Utility had already decided to demote Scott back to Lineman based upon the following observation by Reimer, handwritten in Section 2 of Scott’s April, 1994 evaluation:

. . .

1. Has employee fulfilled objectives outlined, to management expectations?
Explain –
No. Darrell Did Not Funtion (sic) Well in the Foreman Position. But Will React Better As A Lineman. 1994 Will Be A Year For Change & Darrell Must Change With the times
2. Areas for improvement in knowledge, skill or performance. Explain –
Darrell Needs To Put More Heart In To His job vs. Doing only The Minimum. Make Better Use of Time. Motivation self confidence Team Concept & Consistency

...

In April, 1994 Scott was demoted from Foreman back to Lineman but his pay remained the same and all other Lineman were given pay increases to raise them to Scott's pay level at that time. From 1994 to 2004, Scott worked as a Lineman until his selection in April, 2004 to fill a Meter Technician position in the Utility's Meter Department. On November 30, 2004, Scott was removed from the Meter Technician position and reassigned as a Lineman. Reimer memorialized Scott's lateral transfer and Reimer's meeting with Scott thereon by issuing the following memo⁵ to Scott:

...

Darrell Scott was given the opportunity to take over the meter department for the Rice Lake Utilities in April of 2004 with the notion that if it did not work out he would be reassigned back on the linecrew. Since that time Matt Pociask the electric foreman has raised several issues of concern with the situation. Matt has talked to me several times about these issues and began documenting them in August of 2004. Several instances occurred prior to that that were not documented. Mostly for the reason that Matt thought the whole situation was just too new and it would work it self (sic) out, basically giving the benefit of doubt. Some of the issues that have been documented to date include:

1. Darrell consistently violated the no smoking in the building policy. No other smoking employee has been given this privilege. Darrell continued after numerous requests. It is understood that Darrell may have quit smoking but this does not take away from the fact that Darrell, for many years has ignored this policy and snubbed his nose at the management of this company.

⁵ The Utility refers to this memo as its "last chance" or "Come to Jesus" notice to Scott to improve his performance or face termination.

2. Darrell came into this trial position with no formal training of the new technology of electronic metering or the operation of any of the equipment used in testing meters or the other related equipment. It would only stand to reason that there would be much time spent by the person (Matt Pociask) vacating that duty in training Darrell and getting him up to speed with how the department ran. Many attempts were made with some being successful however many others met resistance. Darrell on several occasions threatened filing a grievance against Matt for showing him how things should be done in the training process. I do not know any other way of Darrell being taught. This is the way he would be instructed in any training program he attended. In other cases Darrell became annoyed by Matt's job shadowing during the training process and started calling him a diaper to his face and then it escalated to doing it in public. To contractors and to others as the opportunity would present itself. This behavior is totally unacceptable by anyone's standards, is very unprofessional and shows a total lack of respect for Matt. This is one more thing that we will not tolerate out of Darrell or any other employee that (sic) that matter.
3. Insubordination has been seen on at least one occasion. It is likely that other instances have occurred however they have not been documented lately. The instance that is evident occurred on November 27, 2004. A serious problem occurred when a failed inline disconnect switch failed and one of the feeds for N17 fell to the ground rendering the entire South end of Rice Lake out of power for 1 hour and 42 minutes. Tim was on call and responded to the dispatch call within minutes. Matt was also at the shop because he noticed the power out. It was decided that more help was needed and Matt started calling. He got a hold of Darrell and he initially refused to come in due to the fact that he had a pot roast in the oven. He later came (sic) in after Matt had exhausted all other resources. Darrell's (sic) dedication to this company and our customers showed that day. There was no compelling reason why he could not come in right away. Darrell has a lack of dedication to this company by refusing to come in and thus making the difficult and trying situation more stressful and difficult for everyone on site and potentially exposing our customers to a longer outage than necessary. This type of emergency response is a job requirement that Darrell knew about when he got into this business. It is not likely to go away anytime soon. Customer service is more important now than ever and everyone needs to understand and expect that. If this is not what Darrell wants or expects out of this job any longer, maybe he should reevaluate his career goals into something that suits his personal needs more.
4. Customer relations and an uncooperative work attitude have been seen as an issue. Throughout the training process Darrell, despite being instructed otherwise has changed policy by refusing to work with a customer on a

duel metering situation, changed the way the department operated successfully for no apparent reason, procrastinated on completing tasks concerning customer metering and just a general resistance to the entire work situation.

5. I have made the observation that Darrell takes this opportunity for granted. He has made the comment on occasion that this is the easiest job in the company and obviously thinks its reactionary work rather than proactive and has yet to grasp that it is filled with many tasks that require attention to detail. It is apparent that he does not understand the importance of the job and is taking it lightly. One example is that Darrell works many days in tennis shoes despite knowing that this is not the proper footwear for this profession.

In Summary

I (sic) light of the documented issues that have come about in the past 4 months I see no hope for this situation. Therefore, effective upon the end of the workday November 30, 2004 I am relieving Darrell Scott of his temporarily (sic) duties in the electric shop and as of the start of the workday December 1, 2004 he will resume his role as a lineworker. He will be working with Jim Smith out of truck 7.

These events are disturbing to say the least and I regret having to make this decision. This is not the first time we have had conversations like this with Darrell over his career. Changes have to be made by Darrell in order for him to remain employed by Rice Lake Utilities.

In order to improve and continue the employment relationship Darrell needs to:

- Make positive changes in his work attitude and work ethic.
- He needs to get serious about his work and be thankful for what he has with Rice Lake Utilities.
- Stay on task with his work and stop taking productive time away from other employees with unnecessary requests and questions that do not effect his work yet keeping them from completing there (sic) goals and work.
- Become an employee indicative of a 20+ year professional career and start conducting himself in a professional manor (sic).
- Respect this company and treat its employees with respect and dignity.
- Stop the derogatory comments against this company and its employees.

I realize these comments and demands may seem harsh but they are necessary and I don't think we are asking too much. I have spent countless hours over the years dealing with these issues with employees over and over with short-lived results at best and I am tired of it. It just doesn't seem to sink in and I am tired of walking on eggshells and dancing around deficiencies. What we are asking is not out of line and is not uncommon in our world today.

This comes with no negotiations and must be fully complied with immediately. I will understand if these are guidelines that you cannot live with, however to remain employed by Rice Lake Utilities you must. It's your choice.

. . .

The Utility placed two of Scott's Lineman evaluations in this record, one concerning 1995⁶ and the other dated April 14, 1998, each completed by Reimer (ER. Exhs. 11 and 12 respectively). It should be noted that the evaluation instrument used in 1998 was substantially different from the one consistently used in 1990 through 1995. Regarding the 1995 evaluation, Scott was rated Above Average in "Quality of Work," "Knowledge & Versatility" and "Relation w/Others" and he was rated Average in all other categories.⁷ Reimer noted on this evaluation that Scott fulfilled the objectives of his job to management's expectations and wrote,

Darrell has been instrumental in helping this Utility become more reliable & more efficient than most (ER.Exh. 11).

The new evaluation instrument used by Reimer in April, 1998 used performance ratings with point values, as follows:

PERFORMANCE RATINGS

EXCELLENT: The performance factor has been uniformly and consistently demonstrated to a superior degree with virtually no supervision. Results show achievements of extremely high value to organizational goals beyond the objectives, duties and responsibilities of the classification. Performance far exceeded what is reasonably expected of a well-trained individual in this classification.

AVERAGE: The performance factor has been generally demonstrated to a normal degree with the usual amount of supervision. Results generally show attainment of the objectives, performance of the duties and fulfillment of the responsibilities of the classification in a manner reasonably expected of a well-trained individual in this classification.

6 Scott's 1995 evaluation is dated 5-28-95 and 9-15-95. No explanation was given by the Utility for this discrepancy.

7 Those categories were "Quantity of Work" "Dependability" and "Attitude and Cooperation".

UNACCEPTABLE: The performance factor either has not been demonstrated or has been demonstrated to an objectionable degree. Results show a failure to attain the objectives, perform the duties and fulfill the requirements of the classification. Substantial, critical and immediate improvement is needed to perform in a manner reasonably expected of a well-trained individual in this classification.

RATING POINTS

- (3) = EXCELLENT
- (2) = AVERAGE
- (1) = UNACCEPTABLE

The areas specifically assessed and the point values Scott received in each area were as follows:

PERFORMANCE APPRAISAL SUMMARY

<u>FACTOR</u>	<u>RATING</u>	<u>POINTS</u>
QUANTITY	<u>A</u>	<u>2</u>
QUALITY	<u>A</u>	<u>2</u>
ORDERLINESS	<u>A</u>	<u>2</u>
INITIATIVE	<u>A</u>	<u>2</u>
RELIABILITY	<u>A</u>	<u>2</u>
PERSEVERANCE	<u>A</u>	<u>2</u>
STABILITY	<u>A</u>	<u>2</u>
ATTENDANCE	<u>A</u>	<u>2</u>
COMPREHENSION	<u>A</u>	<u>2</u>
WORK RELATIONS	<u>A</u>	<u>2</u>
SAFETY	<u>A</u>	<u>2</u>
KNOWLEDGE	<u>E</u>	<u>3</u>
JUDGEMENT	<u>A</u>	<u>2</u>
INNOVATION	<u>A</u>	<u>2</u>

TOTAL OVERALL RATING: 28

Unacceptable	14-21
Average	22-35
Excellent	36-42

Reimer made no comments in any of the specific categories but stated that Scott's "principal strength" was "good Knowledge of job." Reimer stated Scott's "goals for continued improvement" as follows:

Self Motivation, Common sense approach more, More Decisive Decisions, less procrastination get down to business, check out for breaks. Do the right thing, working ethically. Learn to accept some thing (sic) for what they are.

The Utility placed no other evaluations into this record regarding Scott's performance as a Lineman after 1998.⁸

Evidence of Misconduct by Other Lineman:

The Union submitted documents showing discipline of other unit employees which concerned incidents of misconduct from 2004 through 2006 (U. Exhs. 2-8, 12-13, and 15-22).⁹ These Exhibits can be summarized as follows:

- A) Two verbal and four written warnings for six incidents from 4/89 through 2/03 involving Gary Haus: Discipline was given for insubordination, doing personal business on work time, abuse of sick leave, break policy violation and having received a speeding ticket on the job (U. Exh. 13);
- B) Incident on 8/6/03 involving Gary Haus and Jimmy Smith: Supervisor observed employees talking on cell phones, wasting time, taking extra breaks, parking the Utility truck incorrectly (i.e., obstructing traffic) (U. Exh. 12);
- C) Incident week of January 20, 2004: Gary Haus was observed by Pociask using a cell phone on work time (U. Exh. 3);
- D) Incident on 2/28/05: Gary Haus was observed by Pociask using a cell phone while driving Utility Truck No. 5 in violation of the Utility's Code of Ethics and Work Rules, (U. Exh. 4);
- E) Warning issued on 8/10/04 to Jimmy Smith: Smith wasted time, criticized his supervisor, and was insubordinate (U. Exh. 7);
- F) Incidents on 3/16/05 and 3/28/05: Gary Haus received a written warning (which stated suspension and discharge would follow for further incidents) for being late on 3/16 and for taking a lunch break in excess of thirty minutes on 3/28, neither of which was "the first offense" (U. Exh. 5);¹⁰

8 The Union placed two of Scott's evaluations in this record (1999 and 2005). All of the ratings Scott received were average or just below average. (The 2005 evaluation was completed one month after the November 30, 2004 letter issued.)

9 On Union Exhibits 2, 3, 4, 6 and 8, no verbal or written warnings were issued. Also, no verbal or written warnings were issued to Aaby and Scott regarding Union Exhibits 12 and Jt. 5, Att. 11 p. 2 and Union Exhibit 22.

10 The Union filed a grievance and this warning was removed from Haus' file by September 16, 2005.

- G) Incident on 8/30/05: Gary Haus “failed to perform three steps (1, 8, and 9) of the Utility’s after-hours call-out procedure which included not picking up the Gold Cross trouble ticket fax, not notifying Gold Cross after power had been restored, and not filling out paperwork on the call-out (U. Exh. 6);
- H) “Close Call” Incident on 6/16/06 involving Jimmy Smith: Smith’s actions while working with hot lines in the bucket resulted in a fuse being blown at a transformer (U. Exh. 8); and
- I) “Close Call” Incident on 8/14/06 involving Gary Haus: Haus used inadequate barriers and did not use rubber gloves while his truck was in the roadway (U. Exh. 2);

Jimmy Smith’s Testimony:

Jimmy Smith, a Lineman employed by the Utility for more than seven years, testified herein regarding relevant evidence as follows:

- 1) Smith complained to Utility Commissioners about Pociask’s treatment of other employees, about Pociask temper (Tr. Vol. II, 47-50, 51), and his disrespect for other linemen (Tr. Vol. II, 51-53).
- 2) Prior to August 8, 2006, Smith believed linemen only had to wear their non-flame retardant safety vests in the roadway and there were no written rules that said otherwise (Tr. Vol. II, 59-60; 74-75).
- 3) On August 8, 2006, MEUW Safety Inspector John Boogren told Scott and Smith that wearing safety vests was “a good habit to get into,” Boogren never told them it was mandatory (Tr. Vol. II, 71, 74-74, 82-83).
- 4) The rule regarding wearing safety vests was confusing because it was not applied to other Utility employees (such as meter readers) who also worked in the roadways (Tr. Vol. II, 78-9). Smith forgot safety equipment and was not disciplined (Tr. Vol. II, 66-67).
- 5) After August 8, 2006, there was a “new policy” to wear newly purchased flame retardant safety vests at all times (Tr. Vol. II, 79).
- 6) Later on August 8, 2006, when Pociask drove up to the second jobsite, (after the Boogren incident), Scott was standing in the yard, not in the roadway, wearing no safety vest (Tr. Vol. II, 79-80).
- 7) Groundmen are expected to work with the Lineman who is in the bucket, watching, preparing, and supplying materials and tools for the job to the Lineman above (Tr. Vol. II, 53-4); being within shouting distance of the Lineman above is insufficient (Tr. Vol. II, 54).
- 8) Smith stated he saw others smoking in the garage.
- 9) Regarding playing cards at the garage and/or extending breaks, Smith stated that he stopped playing cards but that until Scott’s termination, other employees overstayed their breaks and some continued to play cards on their breaks with impunity (Tr. Vol. II, 60, 61-2).
- 10) Smith stated he believed that Pociask treated Scott and Haus more harshly than

In addition, Smith stated that there is generally only one terminating kit on each truck. Regarding the August 8, 2005 incident where Smith was working in the bucket with Scott as his groundman, Smith stated:

. . .

(by Ms. Howard)

Q: And on that day you were functioning as the aerial worker?

A: Yes, I was.

Q: And Mr. Scott was functioning as the groundman?

A: Yes, he was.

Q: What discussion did you have with Mr. Scott regarding that?

A: We had a tailgate before the work begun, and I had asked him if he could keep close eye on me while I was up doing this particular job because I was going to be going up within and without my minimum approach distances. At the time we had been very busy. We had a lot of work. I had had a close call a couple of weeks before this, and I was just a little bit on the cautious side that morning, that I just wanted Darrell to pay attention to what I was doing in the air.

Q: And when Mr. Pociask arrived, do you recall the discussion between he and Mr. Scott?

A: Yes.

Q: Please tell the arbitrator what was said.

A: Matt arrived and asked how it was going, and we said fine. And Matt asked Darrell if he would start terminating the elbows that were in the other end of the cable in the transformer.

Q: How far away was the transformer?

A: 100 feet, 120 feet. It's an estimate.

Q: I understand. Go ahead.

A: Darrell made Matt aware of what I had asked him, that Jimmy said that he wanted me to pay attention to what he was doing and that I did not want him over there terminating. I thought, I'm going to be up here an hour, two at the most, and I just wanted him paying attention to what I was doing and that I did not want him over there terminating. I thought, I'm going to be up here an hour, two at the most, and I just wanted him paying attention to

what I was doing.

Q: And you were going in and out of the distances?

A: Yes.

Q: You weren't staying in it?

A: No.

...

A: Yes. I was going in approach distance and coming back out.

Q: [By Ms. Howard, continuing] What happened next?

A: I believe an argument took place. I believe I was up in the air. I couldn't really hear everything that was said. I believe I was told – I was told to come down by Matt, and there was some continued argument. I can't remember the words. And Matt asked me, or told me that him and Darrell were going to be leaving. I can't remember for sure if he told me exactly what for, but he told me that if I wanted to continue working, I could. If not, they would be back in a few minutes.

Q: And did you choose to go back up without a groundman? Did you wait until he got back? What do you remember?

A: I believe I stayed down.

Q: And why was that?

A: Well, I just didn't feel comfortable that morning going up myself with nobody there.

Arbitrator Gallagher: And did they return?

The Witness: Yes, they did.

Arbitrator Gallagher: And how many minutes was it, approximately, if you know?

The Witness: 10, 15. (Tr. Vol. II, 63-65)

...

Gary Haus' Testimony:

Gary Haus, a 20-year Lineman with the Utility testified on relevant points herein as follows:

- 1) In the Spring of 2005, Pociask got angry with Haus and Scott and threatened "to get" them (Tr. Vol. II, 84-5).

- 2) Haus complained to Reimer and two of the Utility Commissioners regarding Pociask's harsher treatment of him for extension of break time, granting vacation requests, and the use of safety vests (Tr. Vol. II, 88-9).¹¹
- 3) Pociask made uncalled-for, snide and critical comments to Haus at work (Tr. Vol. II, 90).
- 4) Haus agreed with Smith regarding the use of the Groundman and cited an example in the Summer of 2006, when Pociask directed Scott to stop watching Haus and do work on the ground while Haus was in the bucket working in a hot area (Tr. Vol. II, 90-92).
- 5) Pociask changed the Utility practice which allowed linemen to extend their breaks to play cards or talk on the phone without notice.
- 6) Haus told Pociask that he and Scott could not complete the inventory, which had previously been done by five employees, in the shorter amount of time (two days) allotted (Jt. 5, No. 7; Vol. II, Tr. 93-4).
- 7) Given the circumstances of each case, Haus agreed with Scott's actions regarding the use of barricades at the J. Building, Scott's tipping the meter and his putting a yellow cover on the meter and Scott's treatment of the struck pole while on-call (Tr. Vol. II, 94-102). Haus stated that all linemen would test a line for energy before working on it (Tr. Vol. II, 114).
- 8) Haus stated that several times, faxes from the Gold Cross answering service would not come through for work Haus did on-call at night (Tr. Vol. II, 102-3).
- 9) Haus was not disciplined for failure to get faxes or for parking his truck in the roadway without putting out cones (Tr. Vol. II, 106-7).

In addition, Haus described Pociask's attempt to discipline him for failing to put out cones and for arriving late to work after visiting his chiropractor for a work-related injury in the Summer of 2006, as follows:

[By Ms. Howard]

Q: On August 17th, did you have a safety meeting with Mr. Pociask regarding Union Exhibit 2?

A: Yes, I did. I don't know if that was the date, but I definitely had a meeting here, yeah.

Q: And did he review that with you at the meeting?

A: Yes. Actually, I remember this well. He told me in the morning that he wanted a meeting with me at 12:30. So on my lunch period, I called Dave, because I told Dave I

¹¹ Four year Lineman Tim Aaby agreed with Haus and Smith that prior to August, 2006, linemen were required to wear safety vests in the roadway only; and that before August 17, 2006, Pociask did not treat Utility employees the same; that Pociask "blew up" at him once (Tr. Vol. II, 119), and that he (Aaby) extended his breaks to play cards and he forgot safety equipment but he was not disciplined (Tr. Vol. II, 118, 120).

- Q: Explain who Dave is.
A: Dave, my union rep, Dave Loechler.
Q: Go ahead.
A: I needed to know if I needed Dave there to meet with him. And Dave told me, he said, no, you don't need me there. You just need to ask him before the meeting begins if - or right away when it begins if it's disciplinary action, and I did that.
Q: And were you told that it was?
A: He said no, it was not.
Q: And you were not disciplined for this, correct?
A: Well, at the end of the meeting he tried to disciplinary me, yes, he did. Which I in turn told him, he wanted to give me a letter, and I told him I wasn't taking it, and I went right to Scott (Reimer) about it.
Q: And were you, in fact, disciplined for the event?
A: The next morning he withdrew it because of some Weingart law, or something like that.

. . .

[By Mr. Haus]

- A: But the disciplinary action was for something else. It was for when I went to the chiropractor for being on workman's comp., and - well, when I was coming to work, I stopped at Kwik Trip to get coffee, and my chiropractor come in there and asked me how my back was. And I said it wasn't good, and he said why don't you run over, I'll get you fixed up before work. And I went over there and he, he worked on me and said I needed to take that day and the weekend off work. And by the time I got here to work, it was five after seven, because he worked on me right before work, so he wanted to write me up for being late for work. And at the end of this -
Q: By this, you mean the meeting with regard to Union Exhibit 2?
A: At the end of the meeting of this, he said, and by the way, I got to give you this for being late for work. And I said, I was trying to do a favor. I was on workman's comp. I was trying to get it done before work. And I said, you're going to write me up for being late for work. I said, here's my doctor's excuse. He wants me to take off for the rest of the day. And he says, you got to have more

than that. He blew up.

Q: When you say blew up, what do you mean? What did he do?

A: Well, he just told me it was ridiculous. How do you get hurt spraying weeds and whatever. I said, Matt, I got a doctor's excuse. (Tr. Vol. II, 104-106)

...

FACTS:

On August 22, 2006, without first seeking any input or comment from Scott, Reimer and Pociask gave Scott the following termination letter, but failed to give Scott any of the attachments thereto:

...

RE: Insubordination
Darrell,

The following incidents occurred between the dates of November 30, 2004 and August 14 of 2006:

- **Exhibit 1:** Opposition to terminating elbows in the new transformer at 1550 Macauley Ave. as instructed to do by your Supervisor. Disrespect and derogatory comments made by you, to your Supervisor [8/7/06]
- **Exhibit 2:** Opposition to wearing your safety vest as instructed to do by your Supervisor. Disrespect and derogatory comments made by you, to your Supervisor [8/8/06]
- **Exhibit 3:** Opposition to barricading the Utility truck with cones and to wearing your safety vest as instructed to do by your Supervisor [8/14/06]
- **Exhibit 4:** Violation of safety rules witnessed by your Supervisor [6/28/05; 6/1/06]
- **Exhibit 5:** Inaccurate time sheet documentation [6/20/05]
- **Exhibit 6:** Not following directions presented to you by your Supervisor. Derogatory comments as to communication procedures I utilize [6/1/06; 5/31/06]
- **Exhibit 7:** Failure to meet your inventory deadline [2/28/05]
- **Exhibit 8:** Work slowdown [2/23/05]
- **Exhibit 9:** Failure to follow specific directions given to you by your Supervisor. Failure to wear PPE, nor having it on the job site with you. [1/31/05]
- **Exhibit 10:** Recording false information on your time sheet, insufficient work practices, not following specific directions from your Supervisor, safety violations, and exceeding your lunch break period. [2/21/05; 2/20/05]
- **Exhibit 11:** Failure to follow procedure, failure to report this incident to your Supervisor, poor time management, causing non productive time with unnecessary requests to another employee, disrespect to

your Supervisor and derogatory comments to your Supervisor
[1/26/06]

Page 24
MA-13488

- **Exhibit 12:** Poor time management getting involved with an area that does not pertain to him [1/19/06]
- **Exhibit 13:** Poor time management, unproductive [1/9/06]
- **Exhibit 14:** The letter dated November 30, 2004 along with instances prompting this letter

The letter dated November 30, 2004 gave you clear and decisive direction for corrective action. It also clearly spelled out what would happen if you chose not to comply.

It is evident to us that you have made the choice not to comply with the Utilities (sic) demands in order to continue your employment with Rice lake utilities.

We reviewed all the documentation with the Utility Commission this morning. We advised the Commission that we see no attempts by you to change or improve.

The Commission then agreed to terminate employment effective immediately.

Please turn in your keys.

. . .

It is undisputed herein that the last time Scott had been formally disciplined by the Utility was on November 30, 2004, when the Utility laterally transferred Scott from the Meter Technician position back to his Lineman position. In the Utility's November 30, 2004 letter to Scott (Jt. Exh. 5, Att. 14), it listed the following requirements for Scott to retain his Lineman position:

In order to improve and continue the employment relationship Darrell needs to:

- Make positive changes in his work attitude and work ethic.
- He needs to get serious about his work and be thankful for what he has with Rice Lake Utilities.
- Stay on task with his work and stop taking productive time away from other employees with unnecessary requests and questions that do not effect his work yet keeping them from completing there [sic] goals and work.
- Become an employee indicative of a 20+ year professional career and start conducting himself in a professional manor [sic].
- Respect this company and treat its employees with respect and dignity.
- Stop the derogatory comments against this company and its employees.

Thus, Scott's alleged failure to meet the above-quoted 2004 requirements and the incidents listed in Attachments 1 through 13 to the August 22, 2006 letter (Jt. Exh. 5) constitute the instances of "insubordination" which the Utility then claimed was the sole reason and support

Page 25
MA-13488

for Scott's immediate discharge without his having received any prior written warnings or suspensions since 1994 (ER Exh. 7).¹²

Attachment 1-3, part of 4, 5, and 7-10 to the August 22nd letter cover incidents which occurred in 2006. In only three cases which occurred in 2006 did Pociask issue some kind of Incident Report or Memorandum which Scott saw at the time of the incident and which he was asked to sign, as follows:

- A) Attachment 2: (Boogren Inspection 8/8/06):¹³ The corrective action Lineman ordered was to read Sections 305, 401, and 402 of the MEUW Safety Manual, to use traffic control devices before beginning work and to use all such devices on the job even when in doubt.
- B) Attachment 4: (6/1/06: Top Step of Ladder Incident) The corrective action order by Lineman was for Scott to read the Safety Manual on ladder safety and be conscious of the top step of the ladder when using ladders.¹⁴
- C) Attachment 6: (6/1/06 Memo on Failure to Read Job Note.) No corrective action recommended by Pociask.

Regarding the 2006 incidents covered by Attachment 1, 3, and 11 through 13, no evidence was offered to show that Scott or any of the other employees involved was shown Pociask's notes/memos. In fact, Lineman admitted herein that he kept a private file on Scott—outside Scott's official personnel file—where Pociask kept these notes and memos regarding Scott's alleged misconduct.

Regarding the 2005 incidents covered by Attachment 4 (in part), 5, and 7 through 10,

12 It is undisputed herein that Scott's thirty-day suspension given in 1987 was by its terms to be removed from his file thereafter as part of the agreement between the Union and the Utility to settle that matter. In the view of this Arbitrator, such settlements give the employee a chance to clear his or her record by good behavior and they allow both parties to put disputes to rest. As the evidence showed that Scott received no discipline as a unit employee between 1987 and the (arbitrated) suspension of Scott in 1994 (ER Exh. 7) which involved different misconduct, this Arbitrator has therefore not considered any of the evidence proffered surrounding this very stale 1987 suspension.

13 Pociask issued both a "Supervisor Incident Report" and an "Incident Analysis and Corrective Action Report" covering the Boogren inspection and Scott's stepping on the top step of a ladder.

14 This Attachment also contained documentation regarding an incident which occurred on June 28, 2005 wherein Smith and Scott had failed to wear rubber gloves on a job but put them on when Pociask requested that they do so.

Pociask never issued any kind of Incident Report and no evidence was presented to show Pociask shared his notes/memos with Scott or any other involved employees. Based upon the documents themselves and Pociask's testimony herein, Pociask did not take any corrective action regarding any of the 2005 incidents.

Page 26
MA-13488

Scott never grieved the issuance of the November 30, 2004 letter. Regarding the remaining incidents covered by the Attachments to the August 22, 2006 discharge letter, the facts regarding the 2005 incidents are as follow in chronological order:

D) Attachment 9—January 31, 2005: Lineman told Scott to bring barricades to the J Building jobsite after lunch; at 1:00 PM when Pociask went to the jobsite, Haus and Scott had cones out and were doing the work (Haus, Tr. Vol. II, 94-5) because Scott had admittedly forgotten the barricades. After Pociask told him to get safety glasses on, Scott put on Haus' safety glasses because he did not have his with him.

E) Attachment 10—February 20 and 21, 2005:

- i) 2/20/2005: Scott's after-hours call to the Colan Boulevard Duplex fire site—Fire chief asked Scott to cut power to one-half of the duplex and Scott turned the meter and used a yellow disconnect device he found on the Utility truck because the approved sock cover was not on the truck and time was of the essence as one-half of the duplex was still on fire.
- ii) 2/21/2005: At the Monday morning staff meeting, Scott stated he had not de-energized Colan Boulevard and admitted that he had turned the meter in the socket and that he had not used an approved cover for the meter. Pociask then told Aaby to go to Colan Boulevard, remove the meter and put on an approved cover.
- iii) 2/21/2005: Scott and others extended their thirty-minute lunch breaks playing cards at the shop, which Pociask discovered at 12:31 PM. Lineman simply said, "Well, let's get going," which Scott did by 12:33 A.M.
- iv) 2/21/2005: Scott got another after-hours call about a struck street light pole at Camelot Acres, an area where the electric service had been put in by a different utility, NSP. Scott found the pole down and the light on. He coned off the area, disconnected the photocell to the light and decided not to try to find where the wires to the light were fed from as this would be difficult and dangerous on this NSP wiring job in the dark. Later on February 21, Pociask asked Scott about why he had not completed the work at Camelot Acres while on call and Scott essentially gave the reasons above and stated that he and Haus had returned there and completed the work that morning.

F) Attachment 8—February 23, 2005: Pociask's note accuses Scott and Haus of engaging in a "work slow down"¹⁵ because when Pociask arrived at the Wal Mart

15 The evidence failed to prove Scott and Haus ever engaged in a "work slow down."

jobsite at 1:15 PM he saw Haus and Scott sitting in the truck talking, and Pociask felt they could have finished the job sooner. Pociask then stood behind Scott and Haus and watched them for 25 minutes while they finished the work.

Page 27
MA-13488

- G) Attachment 7—February 28, 2005: Reimer ordered Pociask to assign Haus and Scott to recount the Utility's inventory in two days which had previously been counted incorrectly by unidentified employees. Both Scott and Haus told Pociask it could not be done in such a short time. Reimer and Pociask met with Haus and Scott on March 4, 2005, when the inventory was not completed in the time allowed.

On direct examination, Attorney Weld asked Pociask why he did not fire Scott in February, 2005. Pociask responded:

A: Again, it's the, you know, it's the thing, you just, you know, I didn't want to do it, you know. I think, my God, Darrell, come on, we can get through this. You just got to step up to the plate. He's a buddy, he's a coworker, he's you know, just thinking that he would, you know, with a come to Jesus letter, he would come to Jesus. Call it what you want. Wake up and smell the coffee here. Hopefully.

Q: Goodness gracious, Matt, you sent the come to Jesus letter three months before in November of '04. Why didn't you fire him in February of '05?

A: Good-hearted. Trying to think he's going to finally meld with us and not buck the system anymore. Trying to show him that I'm working with him and we have to work as a team here and I'm trying to bring things to a head so we can get them taken care of. (Tr. Vol. I, 78; See also Tr. Vol. I, 82-3)

Two incidents listed on the August 22, 2006 discharge letter occurred in June of 2005 and this Arbitrator finds the facts thereof to be as follows:

- H) Attachment 5—June 20, 2005: Both Smith and Scott admittedly recorded "truck time" on 6/20/2005 when only one of them should have done so. Pociask told Scott to communicate with Smith "as to who will record truck time each day" and to "please make sure it gets recorded each day."
- I) Attachment 4—June 28, 2005: At the Diamond Lane project, neither Smith nor Scott was wearing rubber gloves. Pociask saw this and told them to put on their gloves and they did so immediately.

In January, 2006, several incidents occurred which were covered by Attachments 11-13, and this Arbitrator finds the facts thereof as follows:

- J) Attachment 13—January 6 or 9, 2006: Pociask accused Scott and Haus of being

disorganized and wasting 25 minutes' work time; Scott stated he was looking for needed screws and his safety glasses while Haus stated he was waiting for Scott and getting materials for work. Scott's partner and work truck were changed frequently during this time.

Page 28
MA-13488

- K) Attachment 12—January 19, 2006: Five minutes before quitting time, Pociask observed Scott sitting at the Water Department computer talking to Aaby who had previously asked Scott why the computer was slow. Lineman told Scott “not to mess with the computer...” and that he had “no business being on the computer at all.” At this, Scott got up and walked away.
- L) Attachment 11—January 26 and 27, 2006: On the 27th, Scott asked Aaby if he had seen a fax for work Scott had done on-call on January 26th. Pociask overheard this and asked about it. Scott stated he had been called out twice on January 26th, but Gold Cross had not sent a fax. Pociask asked if Scott had called Gold Cross to see why no fax was sent and Scott said no. The Gold Cross faxes came in later for the work. Scott sent a letter to Reimer in which he complained about how Pociask had shouted at and belittled him in front of the other employees on January 27th (U. Exh. 17). Later on January 27th, Pociask observed Haus and Scott wasting time—Haus was looking for Scott and Scott was looking for Haus.

On direct examination by Mr. Weld, Pociask again asked why Pociask had not fired Scott at this point:

(Q): We've been talking about three incidents in January on January 9th, poor time management, that's the search for the safety glasses and the screws, another one in January, the time spent on the water department computer, the third being this failure to follow the Gold Cross procedure. Why didn't you fire him in January of '06?

A: Again, the same thing, Steve. You know, I guess, you know, just thinking that he's going to come around. I hate to do it. He's a friend, you know. You know, another example, the friendship that we had, I attended the same church as Darrell for a few years, and I had left the church. And his wife made a call to me and said, hey, you belong here, you're part of the church, stay here. We were friends. The hunting incident when the hunters got killed, one of the people that got killed was a former employee here. Darrell hunts up in that area where this happened not too far from there. I called his wife when I heard about it and asked her, you know, if Darrell is okay. That's how much, you know, his safety meant to me on the job as well as off the job, you know, including everybody else and myself around here. Again, it's harder

than hell to fire somebody, or even to get after them when you're hoping that they will just come around and get with it and see that I'm trying to make the best effort I can and the effort that Scott has made through the years to, you

Page 29
MA-13488

know, to hope that the guy comes around. You don't want to, like I said, I'd rather have Darrell and his family ticked at me for the rest of his life by losing his job rather than having someone or himself killed and having to talk to his family about that. (Tr. Vol. I, 100-101)

Two June, 2006 incidents are described in Attachment Exhibits 4 (in part) and 6, the facts of which I find were as follows:

- M) Attachment 6—June 1, 2006: Pociask counseled Scott regarding Scott's failure to read a note Lineman wrote him when he assigned him that morning to work on Macauley Avenue. (The project had been changed from overhead service to underground service after Scott worked on it on May 31st.) Pociask issued a memorandum concerning this incident (which Scott refused to sign), which stated:

On Thursday June 1, 2006 at approximately 1:00 PM I had a discussion with Darrell Scott as to why he did not follow directions as written out for him pertaining to the Township service project on Macauley Ave.

Scott refused to sign the memo because the map of the project was changed after the project began and because Scott thought Pociask had given him complete verbal instructions regarding Scott's assignments. Also, Pociask did not direct Scott to look at the notes handed to him or state that the project had changed from URD to OH when Lineman handed Scott the notes.

- N) Attachment 4—June 2, 2006: Scott (admittedly) stepped briefly on the top step of a ladder and, in an Incident Report, Pociask stated that Scott admitted his error and said he would never do so again. On this report, Pociask recommended that Scott re-read the (MEUW) Safety Manual (Section 130) on ladder safety. Scott signed this Report.

The final five incidents occurred in August, 2006—and this Arbitrator finds the facts thereof to be as follows:

- O) Attachment 1—August 7, 2006: Pociask came to the Macauley Avenue jobsite to check on Smith and Scott twice on August 7th—once at 8:10 AM and once at 9:30 AM. Smith had asked Scott to watch him while he worked in the aerial bucket that day because Smith had had a close call a couple of weeks before while working with hot wires in the bucket. When Pociask arrived, he ordered Scott to terminate elbows which were 100 to 120 feet away from the truck. Scott explained that there

was only one terminating kit on the truck and Smith was using it aloft and that Smith had asked Scott to watch him that day so Scott would be able to get Smith down using the truck controls if necessary. Pociask strongly disagreed, asserting that Scott needed only to be in shouting distance of Smith. Pociask then asked Smith

Page 30
MA-13488

whether he would be okay working aloft, Smith answered affirmatively but stated that he wanted Scott to watch him. Scott argued with Pociask about terminating the elbows. Pociask then ordered Scott into his truck and told Smith they were going back to the shop. Scott went with Pociask. (Smith came down from the bucket for the 10 to 15 minutes Scott and Pociask were gone because he was uncomfortable working aloft; alone.) In Pociask's truck, Scott reminded Pociask of the incident in 1994 when he got a two day suspension for not acting as Groundman for a man aloft when requested. Pociask wrote a note on his memo concerning this incident: "Work slow down?" because he had seen Haus at the jobsite at 8:10 AM.

P) Attachment 2—August 8, 2006:

9:30 AM: MEUW Inspector Boogren and Pociask visited the Barker Street job where Smith and Scott were working. Boogren told Smith and Scott that they should have cones out and that it would "be a good habit to get into" for them to wear their (non flame-retardant) safety vests. Both Smith and Scott then put on their vests and put cones out.

12:50 PM: Pociask went to the jobsite where Scott and Smith were working. Smith was working aloft and Scott was standing between the house and the truck, which was out of the roadway. When Pociask ordered Scott to put his vest on, Scott did so and when asked by Pociask to come with him back to the shop, Scott did so. Pociask then ordered Scott to write a narrative regarding when he believed he should have to wear a safety vest. Scott did so. Pociask also had Smith write a similar narrative.¹⁶ (Neither Smith nor Scott believed the rules regarding wearing vests were clear. On the Incident Report¹⁷ Pociask filled out, he advised Smith and Scott that, if unsure, they should put their vests on and wear them all day. And regarding whether cones or barricades should be used, he wanted this to be "overdone rather than not done."¹⁸

16 Smith stated he did not violate any safety rules concerning wearing his safety vest on August 8th, and noted other employees were treated disparately, but that he understood the "new policy."

17 Pociask signed this Incident Report form on August 18, 2006; Scott refused to sign it because he disagreed with it.

18 After August 17, 2006, Boogren submitted a field visit form requested by Pociask (apparently misdated 7/1/06), which stated:

Men were not wearing vests at my arrival at work site. Trucks (sic.) were not used. Although this was a work area that had very little or no traffic, vests and cones should be used to develop safe work habits (U. Exh. 10).

Q) Attachment 3—August 14, 2006:

9:58 AM: Smith and Scott were working on Pioneer Avenue when Pociask checked on them. He found “the bucket truck parked in the driveway entrance to the garage at the Coke building just off the curb.” Pociask told Scott (who was then working on the truck and acting as Smith’s Groundman) to cone off the truck and put on his safety vest. Scott did so. (Smith was then aloft.) Neither the truck nor the men were in the roadway.

10:20 AM: Pociask sent Smith and Scott to an emergency outage at the Dairy Queen. Scott and Smith parked the truck out of the roadway in the parking lot. When Pociask stopped by later to check on them, he saw Scott without a safety vest and no cones around the truck. Pociask told Scott to cone off the truck and put out cones. Scott did so.

On August 17, 2006, Pociask met with Smith and Scott and went over his Incident Report with them. Pociask recommended training Smith and Scott, that they re-read the MEUW Safety Manual Sections 305, 401 and 402 and that they use safety devices “as a common practice” and “before work procedures are commenced.” Neither Smith nor Scott was disciplined further at this time.

Regarding the 2005 incidents, Haus was also involved in three of these 2005 incidents (Jan. 31, and Feb. 23 and 28), but he never received any discipline therefor. Indeed, Scott received no discipline for any of these incidents until his August 22, 2006 termination. Although Pociask stated that he talked to Scott about each of these incidents, Pociask admitted that he never told Scott that Scott would be discharged or suspended if he repeated any of the listed misconduct (Tr. Vol. I, 203). In fact, Pociask also testified regarding his informal approach to dealing with Scott’s alleged misconduct, as follows:

Q: Did you ever have a conversation with Darrell about writing him reprimands rather than talking to him?

A: As far as I remember, you know, I guess other than this, this (November 30, 2004) letter that came up, you know, was just trying to talk to him, trying to get through to him, you know, as a friend and as a coworker and new into the position, you know, you’re trying to get a rapport with the guys and hopefully that they’re responsive to it. I don’t remember telling him anything about, you know, writing him up or, you know, a written warning or anything. (Tr. Vol. I, 52)

Regarding the 2006 incidents reflected in Attachment 1, 3, and 11 through 13, to the August 22, 2006 termination letter, no evidence was proffered to show that Pociask's notes and memos were given to Scott or any of the other employees involved therein. Of the 2005

Page 32
MA-13488

incidents covered by Attachment 4 (in part), 5, and 7 through 10, on none of these Attachments did Pociask issue any kind of Incident Report and there was no evidence to show that Pociask shared any of his personal notes with Scott or any other involved employees or that Pociask took corrective action regarding any of these incidents.

POSITIONS OF THE PARTIES

Employer:

The Utility argued that it had cause to discharge the Grievant for violating safety rules, failing to follow instructions, and insubordination toward Foreman Pociask. In this regard, the Utility noted that the record clearly showed that Scott engaged in misconduct as alleged, that the discipline imposed by the Utility was appropriate and that discharge was the correct penalty for Scott's misconduct. The Utility urged that between November, 2004 and August, 2006, Scott became resistant first to following Pociask's verbal commands and then to his written instructions, pointing to two incidents (in June of 2006) in which Pociask gave Scott written instructions which Scott failed to follow. The Utility next pointed to the August 7th incident, in which Scott argued with Pociask when the latter ordered Scott to perform other work at the MacCauley Road jobsite while his partner, Jimmy Smith, worked aloft in a bucket. On August 8th, Scott failed to wear his safety vest and cone off the Utility's truck after MEUW Safety Inspector John Boogren (while on an unannounced annual inspection) instructed Scott to put on his vest and cone off his truck for safety (which direction Scott and Smith complied with). Pociask also asserted that Scott threatened him when Pociask directed Scott, later the same day, to wear a safety vest and cone off the truck when in the roadway with children present at a different jobsite.

The Utility urged that Scott's excuses for his conduct in August of 2006—that they were working on a quiet, dead-end street, or not in the roadway; that it was hot; that he was not on the ground but in the truck; and that the truck was not parked within ten feet of the road surface—should all fail based upon Pociask's testimony to the contrary regarding where Scott's truck was parked on each occasion, and the fact that the OSHA and the MEUW Safety Rules do not recognize Scott's excuses as valid.

The Utility noted that on August 17th, Scott refused to sign the Incident Reports for the August 8th and 14th incidents and it was at this point that Pociask went to Reimer to request Scott's discharge. Here, the Utility urged that Scott was well aware that safety was the Utility's first priority. In this regard, the Utility urged that in the 26 years Scott was employed there, the Utility trained, re-trained and in-serviced all their employees regarding the safety requirements of OSHA, MEUW, NECA, and the State of Wisconsin¹⁹; that in weekly staff

19 There was no evidence offered to show that Utility employees were trained regarding State safety laws,

meetings Pociask annually read aloud the entire MEUW Safety Manual and discussion of safety issues and close calls are held; and eight safety meetings per year are also held by the MEUW.

Page 33
MA-13488

Furthermore, the Utility urged that on August 8th, Scott was working in the “roadway” and he should have known he was required to wear a safety vest and put out cones—that it was not a “judgment call” as Scott claimed he should be able to make, but actions required by the applicable safety guidelines and rules. In this regard, the Utility noted that in order to walk from the truck to the yard or grass as Smith observed he did, Scott had to cross the roadway on August 8th which required him to wear his safety vest. Also, in May of 2006, Scott’s answer on an MEUW quiz demonstrated he knew he was required to wear his vest when “in the road right of way.” The Utility noted that Scott signed for receipt of his MEUW Safety Manual (in 1994) “under protest,” which the Utility urged was part of a pattern of conduct which included failing and refusing to follow his Foreman’s directives, arguing with and disrespecting his Foreman and endangering himself, fellow employees and the public.

The Utility further argued that the November 30, 2004 notice to Scott from Reimer was a “last chance” or “Come to Jesus” letter which clearly put Scott on notice that his behavior had not met expectations and that it had to change immediately: Specifically, that Scott’s attitude and work ethic, his ability to stay on task and not waste time, his professionalism, his negative comments about the Utility and its employees, and his treatment of Utility employees had to change. In the Utility’s view, the fact that Pociask counseled Scott regarding his misconduct on each occasion, constituted sufficient notice to Scott that his conduct was unacceptable. As the contract requires no specific procedure or sequence in discipline cases, Pociask’s choice to use less formal discipline to try to get his friend, Darrell Scott, to perform better should not detract from the seriousness of the offenses. In the Utility’s view, Pociask’s message to Scott was clear -- that he (Scott) must improve or face termination.

Contrary to the Union’s assertion, the Utility contended that the record failed to prove that Pociask was “out to get” Scott. Rather, Lineman was simply taking his supervisory duties seriously as required by the NESC Rules (ER. Exh. 1). Finally, the fact that Scott was not given copies of the attachments referred to in his August 22, 2006 termination letter and that the Utility did not ask for Scott’s views thereon before his termination were insignificant in the Utility’s view, because Pociask discussed each of the underlying incidents with Scott at the time they occurred so Pociask knew Scott’s position in each incident. Also, contractually, there was “no requirement that the Employer provide all related documentation” (ER. Br. p. 22).

The Utility also asserted that Scott’s denials of wrongdoing are not credible. First, the Utility urged that Scott’s self-interest in getting his job back makes his testimony herein questionable. Second, Scott’s assertions that the November 30, 2004 letter from Reimer did not notify him that he would be terminated if he failed to improve do not ring true. In this

regard, the Utility noted that had Scott been truly unaware of the weight and significance of the November 30, 2004 letter, he would not have asked to have it removed from his file; and it was Scott's choice not to meet Pociask's conditions for removal from his file, to get a "fresh start" at the Utility. Third, the Utility noted that despite ample proof of his repeated misconduct, Scott seldom acknowledged any wrongdoing (Scott only admitted wrongdoing

Page 34
MA-13488

once regarding August 8, 2006) and Scott often changed his story after the fact, making his testimony further suspect. Regarding the latter argument, the Utility discussed 1) the Colan Boulevard call-out in February of 2005, when Scott wrongly rotated a meter in its socket covering it with a yellow disconnect device (about the origin of which Scott had lied); and 2) the February 21, 2005 struck street light when Scott falsely reported he had disconnected the URD power and removed the light pole while on-call when Scott did not do so.

Furthermore, the Utility noted that Scott's admission that he engaged in theft of overtime in 1987 at the Utility weighed against his credibility. Scott's assertion herein that he was not in the roadway and therefore had no knowledge of the requirement to wear safety vests and that wearing vests should be a judgment call by the Pociask was belied by other testimony and the effective safety rules at the Utility. Also, Scott's assertion that the placement of cones around the Utility truck should be based upon traffic flow and speed was unsupported by any evidence herein. Finally, the Utility urged that the fact that the Utility required vests after Scott's discharge does not constitute an admission that its previous policy was flawed.

The Utility argued that in these circumstances, that the appropriate penalty was discharge because Utility work is inherently hazardous/dangerous. Scott should be required to strictly follow the Utility's safety rules regarding cones and safety vests. The Utility also urged that Scott had a bad attitude, noting that Scott had signed receipt of his MEUW Safety Manual "under protest" (ER. Br. P. 28) and that he showed that he believed himself to be above the rules when he refused to sign Incident Reports involving the (more recent) August 8th and 14th incidents, while other Utility workers (Smith and Haus) signed similar Reports covering the same or like incidents.

Furthermore, in the Utility's view, Scott's lack-luster work record supported the Utility's decision to discharge him and showed that he "probably should have been terminated long ago." In this regard, the Utility noted that Scott's 1990 and 1991 foreman evaluations stated he followed safety rules only 75% of the time; that twice in April of 1991, and once in November of 1992, he received warnings and a two day suspension in 1994, all for violating safety rules. The Utility argued that after Reimer was elevated from foreman to General Manager of the Utility in 2000, Reimer had less time to supervise field employees "and no discipline was documented" (ER. Br. p. 30).²⁰

From April to December of 2004, Scott refused Pociask's efforts to train him in the Meter Technician position and on November 30, 2004, the Utility issued Scott its "last

²⁰ The Utility submitted no evidence to support the assertion.

chance”/“Come to Jesus” letter. And yet in mid-February, 2005, Scott responded to two call-outs during which he violated safety rules and was later dishonest about the work he performed. Although the Utility admitted that Scott “could have been and probably should have been terminated” (ER Br. p. 31) at that time, Pociask gave Scott another chance. But when the June and August, 2006 incidents occurred, Scott’s “history of failing to follow basic

Page 35
MA-13488

safety rules...in an industry where lax safety practices cannot be tolerated...” and Scott’s lack of demonstrated “regard for established safety procedures and a total disregard for his supervisors” (ER Br. p. 32) clearly showed that Scott should remain discharged. Therefore, the Utility urged the Arbitrator to deny and dismiss the grievance.

Union:

The Union urged that the City failed to follow progressive discipline and it denied Scott, a 26-year employee of the Utility, due process in several areas when it terminated Scott for “insubordination” on August 22, 2006. The Union asserted that the Utility used “stale charges” which had either been stockpiled by Pociask concerning which Scott received no discipline or for which Scott had already received some verbal discipline or training. In Scott’s case, the Utility also failed to fairly administer its rules and evenhandedly issue penalties for infractions. Here, the Union noted that the Utility has the burden to establish it had just cause to discharge Scott for “insubordination” based upon his alleged misconduct over a twenty-month period after the November 30, 2004 letter, (even though Reimer told Scott the letter was meaningless). In this case, the Union urged the Arbitrator to apply Arbitrator Daugherty’s seven-pronged test to decide the just cause issue. The Union urged that the record evidence in this case demonstrates that Scott’s termination fails “virtually all prongs of this test,” as follows:

... Pociask and Reimer failed to provide clear notice to Scott that his conduct would lead to his termination. They failed to conduct a prompt, fair, and thorough investigation of each of the incidents of alleged insubordination cited in the discharge letter, and failed to establish that conduct attributed to Scott rose to the level of insubordination. Pociask played favorites in enforcing City rules. The City violated double jeopardy principles by terminating Scott based upon a combination of conduct for which he had already been disciplined, conduct for which Pociask had determined Scott should receive corrective training in lieu of discipline, and conduct which Pociask chose to note in his personal files, but not to discipline at the time. In such circumstances, termination was far too severe a penalty for Scott’s shortcomings. (U. Br., p 27)

In addition, the Union argued that the Utility sent Scott mixed messages about the consequences of his actions. In this regard, the Union noted that Reimer did not deny he told Scott in 2004 that the November 30, 2004 letter meant nothing—Reimer merely stated herein that he did not recall the conversation (Tr. Vol. II, 194-5). Also, for the 20 months after November 30, 2004, Pociask’s inconsistent treatment of employees and his tendency to blow

up at more senior employees Scott and Haus showed Pociask's insecurity and incompetence as a new foreman and his wish to bolster his supervisory authority over his former coworkers. By failing promptly and clearly to discipline Scott, the Utility led Scott to believe his conduct was acceptable. Furthermore, the Utility's delay of up to 20 months in disciplining Scott for his alleged misconduct constituted a poorly veiled attempt to allow Scott's misconduct to pile

Page 36
MA-13488

up so that the Utility could support the harshness of the penalty assessed here, citing this Arbitrator's Award in CITY OF HORICON, CASE 27 No. 58942 MA-11120 (GALLAGHER, 12/00). Applying this Arbitrator's analysis in Horicon, the Union argued that all charges against Scott older than seven months prior to his discharge should be disregarded in reaching this Award. In fairness, the Union contended that incidents which occurred after November 30, 2004 regarding which no disciplinary action was taken or which resulted in Pociask ordering corrective training and/or monitoring in lieu of discipline should not be considered by the Arbitrator pursuant to principles of double jeopardy.

Furthermore, Scott was not the only Pociask who believed the Utility's policies regarding the use of vests and the need to cone trucks were confusing. Indeed Pociask's August 17, 2006 Incident Report regarding the August 8th Boogren inspection called for Smith and Scott to be trained and monitored. The fact that the Utility changed its vest policy on or after August 17th— requiring *all* safety devices to be used on all jobs even when employees were not sure they were necessary -- shows that the Utility knew its policy was flawed and unclear. As Scott committed no further alleged misconduct after August 14th he was never given a chance to follow the Utility's new policy before the Utility fired him for his prior alleged safety violations, again in violation of double jeopardy and due process standards. Also, the Union asserted that double jeopardy principles should preclude the Utility from punishing Scott twice for the same misconduct by basing his discharge on matters covered by Reimer's November 30, 2004 letter since Scott's transfer and the letter in his file constituted full punishment for the incidents prior to November 30, 2004.

The Union also urged that the Utility treated Scott more harshly than other employees, thereby violating procedural due process. The Union noted that in several of the incidents listed in Scott's termination letter, other employees were equally involved but they received no discipline whatsoever. Also, other employees who engaged in misconduct similar to that used by the Utility to terminate Scott (such as smoking, failing to pick up Gold Cross faxes and/or complete trouble tickets, failing to use cones and to put on safety vests and rubber gloves, failing to record truck time, failing to complete inventory, overstaying breaks, wasting time and being unorganized and unproductive) were given a pass. Thus, the Union argued that due process concepts dictate that the Utility should not be allowed to discharge Scott for conduct for which it failed to discipline other employees. The Union also urged that the Utility had no real means of distinguishing Scott's work record and disciplinary history from that of Haus to justify its discharge of Scott.

Finally, the Union asserted that the Utility failed to establish that Scott actually engaged in conduct which constituted insubordination. Once the stale charges, the conduct for which

Scott had previously been disciplined or given a pass and conduct for which the Utility had failed to discipline other employees is stripped away, the only incident left for consideration, in the Union's view is the August 7, 2006 incident. The Union urged that Scott's questioning Pociask's instructions to terminate elbows some 100 feet from Smith working aloft in the bucket did not constitute insubordination.

Page 37
MA-13488

In this regard, the Union noted that true insubordination requires a finding that the employee knowingly and willfully refused to perform a clear work assignment or to obey an explicit and reasonable work-related order given by his/her supervisor or someone else in authority and that the employee was given a chance to weigh the consequences of failing to perform the work or follow the order. In this case, the Union strongly argued that Scott never refused to obey a clear, direct order after being warned of the consequences therefor. Thus, on August 7, 2006, Scott raised serious safety concerns and reasonable questions regarding Pociask's order to terminate elbows while Smith was aloft and, the lack of a second terminating kit on the truck. It was not until August 17th that the Utility made it clear that employees would have to wear their safety vests when working outside the roadway. In the circumstances of this case, the Utility failed to prove Scott had, in fact, been insubordinate and the Arbitrator should therefore sustain the grievance and reinstate Scott with full backpay and benefits.

DISCUSSION

Several preliminary items should be noted before the merits of this case are dealt with. First, it is significant to this Arbitrator that this case involves an employee with more than 25 years employment with the Utility at the time of his discharge whose only formal discipline was issued in 1994 and 2004. Second, I note that the Utility's Work Rules and Code of Ethics do not address insubordination in any way and that its Work Rules make only one aspirational reference to "safe and reliable service." Third, between August 17, 2006 and August 22, 2006 when the Utility terminated Scott, Scott had engaged in no misconduct (Tr. Vol. I, 171, 173). Finally, on several occasions herein, Pociask admitted that the Utility never formally warned Scott between November 30, 2004 when the "Come to Jesus" letter issued and August 22, 2006, the day Scott was terminated. It is in this context that the merits of this case must be judged.

The Utility has placed into this record virtually every piece of evidence in its possession which describes Scott's short comings and misconduct across the 26 years of his employment. As stated in note 12 above, Scott's 1987 suspension has not been considered in reaching the Award herein as the parties entered into a settlement regarding that suspension which by its terms required that evidence thereof be removed from Scott's personnel file one year after the occurrence. In my view, such settlements are laudatory and arbitrators should honor them. Furthermore, it is also significant that in April, 1988, the Utility promoted Scott to act as Utility foreman which showed that the Utility must have believed the conduct for which Scott had been suspended in 1987 had not reoccurred so that he was entitled to a promotion to foreman. In

addition, I note that the Utility offered no evidence to show Scott had engaged in any misconduct after his 1987 suspension but prior to his 1988 promotion. Indeed, no evidence was proffered to show that Scott received any discipline herein until 1994 (ER Exh.7).

Page 38
MA-13488

Therefore, consideration of Scott's 1987 suspension would be inappropriate simply based on the record facts surrounding that suspension and the year following Scott's suspension. However, beyond the facts of Scott's 1987 suspension, as stated above, in my view, the continued consideration herein of that suspension could essentially undermine the parties' relationship and affect their future willingness to enter into voluntary settlements of their disputes. This Arbitrator refuses to contribute in any way to such deeply negative potential results and she has, therefore, not considered Scott's 1987 suspension in reaching this Award.

The Utility also submitted evidence showing six warnings issued from 1991 to 1994 to Scott in his capacity as foreman as part of the evidence in support of Scott's discharge herein. A close analysis of these warnings showed that three of the warnings were issued to Scott solely because employees under his direction made mistakes on certain projects, not because Scott personally committed any misconduct. Concerning the other three warnings, the Utility issued Scott two verbal warnings and one written warning for his own misconduct as a foreman. In these circumstances, the three warnings issued to Scott merely because he was foreman when employees under his direction committed misconduct are neither relevant nor material to this case.²¹ In regard to the three warnings issued to Scott for his own misconduct while acting as a foreman, it is important to remember that, as a general rule, an employer is free to treat its non-represented employees as it pleases and that managers' pay, benefits, discipline and other terms and conditions of employment are of no relevance in cases involving the same employer's union-represented employees. Based upon the record facts herein this Arbitrator finds that the six warnings issued to Scott while he was a foreman are not relevant to this case and in fairness they have not been considered in reaching this Award.

The Utility also submitted evidence regarding the 1990, 1991 and 1994 evaluations of Scott while he occupied the foreman position. I note that these evaluations were not disciplinary in nature and were really offered as part of Scott's general employment history and as such, they have been considered herein. However, in regard to these foreman evaluations, I note that Scott's evaluations were generally average or just below average and that in all instances Scott's work was rated satisfactory overall even at the time he was demoted from foreman to lineman. In these circumstances, the evidence of Scott's foreman evaluations at the Utility tend to support the Union's assertions herein that the Utility sent Scott mixed messages regarding the acceptability of his work/conduct and that it failed to put Scott on clear notice, as far back as the early 1990's, that some of his conduct was unacceptable and if continued, would result in his discharge.

²¹ The fact that no evidence was proffered to show that the involved unit employees received any discipline for their own misconduct supports this approach.

I turn now to the November 30, 2004 “last chance” or “Come to Jesus” letter issued to Scott when the Utility transferred Scott from the Meter Technician position back to a lineman position. First, this letter shows that as far back as April, 2004, Pociask admittedly failed to document Scott’s alleged misconduct and that Pociask was, even then, giving Scott “the benefit of the doubt.” The specific unacceptable conduct Reimer listed as causing Scott’s

Page 39
MA-13488

transfer was 1) smoking in the shop “for many years;” 2) threatening to file grievances against Pociask for Pociask’s performance of unit work while training Scott in the Meter Technician job and calling Pociask a diaper; 3) insubordination for refusing to come in immediately on November 27, 2004 when Pociask called Scott to request extra help; 4) refusing to work with a customer on a dual metering situation, procrastination and having an uncooperative work attitude; 5) not being grateful for his job and failing to take his job seriously by working in tennis shoes.

In regard to each of these specific items, assuming that Scott committed the misconduct as alleged, I note that Scott quit smoking in 2004 and according to this record Scott has not repeated the misconduct in Item 1) since 2004. Also, the Union submitted convincing evidence that other employees smoked in the shop in 2004 but they were never warned or disciplined therefor. Furthermore, Pociask admitted herein that he never formally disciplined Scott or any other employee for smoking in the shop before Scott was issued the November 30, 2004 letter. Regarding Item 2), Scott’s threatening to file grievances and calling Pociask a diaper, the evidence failed to show that Scott has repeated any of this conduct between November 30, 2004 and his August 22, 2006 discharge. In addition, I note that this allegation specifically referred to Scott’s performance of the Meter Technician position which Scott has not performed since his November 30, 2004 transfer.²²

Concerning Item 3), Scott’s refusal to come into the shop immediately when Pociask called him in on November 27, 2004. I note that according to the undisputed evidence herein, Scott was not on-call that day. Rather, he was on approved vacation on that date. Also, according to Pociask, Scott never refused to come in on November 27th; and Pociask admittedly never ordered Scott to come in immediately. It is significant that Scott came in when Pociask called him back and asked him to do so on November 27th. Furthermore, I note that when Scott arrived at the shop, Pociask never warned Scott about that his attitude toward Pociask or that he had not arrived timely at the shop.

Regarding Item 4), again, the specific misconduct listed did not re-occur after Scott was removed from the Meter Technician position. In addition, I note that no evidence was offered herein to show that prior to November 30, 2004, Scott attempted to change Utility policy as a Pociask and no evidence was proffered to show that Scott was ever told by management that he had an uncooperative work attitude or that his procrastination and his general resistance to his

22 To this Arbitrator, Scott’s “diaper” comment was worthy of immediate discipline, whether said to Pociask alone or in the presence of private contractors. However, when Scott made these comments Pociask chose to give Scott a pass, (issuing Scott no discipline at the time) which in my view requires a conclusion that giving the comments more than historical value herein would be unfair and inappropriate.

work situation would result in disciplinary action for further such misconduct. Finally, regarding Item 5) on the November 30, 2004 letter, again, as a lineman, Scott cannot and has not worn tennis shoes and his lack of appreciation for the Meter Technician job (which it appears on this record no other employee wanted), is a thing of the past after Scott's removal from that position on November 30, 2004.

Page 40
MA-13488

I note that Reimer added several bullet points to the November 30, 2004 letter designed which were apparently intended to show Scott what areas he needed to improve in in order to retain his employment with the Utility. However, in my view bullet points 1, 2 and 4 lacked sufficient specificity to put Scott on notice what actions he needed to take. In this regard, telling Scott to "make positive changes" in his work attitude and work ethic, to "get serious" about and "be thankful" for his employment at the Utility and to conduct himself "in a professional manor (sic)" gave Scott no real direction, nothing concrete to go on, so that he could make his conduct acceptable to the Utility and avoid discharge. As such, these bullet points have been disregarded herein.

The remaining bullet points (3, 5 and 6) mentioned specific actions Scott could take - - to stay on task and to stop interfering with other employees' work;²³ respecting Utility employees and ceasing derogatory comments about the Utility and its employees - - which were specific enough to have put Scott on notice how to avoid future discipline and discharge. As such, Scott's conduct after November 30, 2004 which may have involved conduct similar to that listed in these bullet points has been considered here.

The Union has persuasively argued that even if I found Scott's past misconduct to be relevant and probative here, double jeopardy principles require that Scott's past misconduct cannot be used to buttress his discharge as he was either disciplined therefor or he was given training in lieu of discipline or Pociask gave Scott a "pass" because Pociask was unwilling or unable to clearly and firmly discipline Scott. I agree. This record is replete with examples (detailed above) of Pociask, by his own admissions, failing to clearly discipline Scott for conduct Pociask later found unacceptable. Rather than truly letting the misconduct go or clearly warning Scott and telling him the consequences of future misconduct, Pociask kept track of Scott's conduct in a secret file, the contents of which Pociask later brought forth to use against Scott in August, 2006. This approach clearly violated Scott's rights to due process as well as principles of progressive discipline. Pociask's approach deprived Scott of clear notice of his wrong doing and it therefore made it impossible for Scott to change his ways in order to avoid future discipline. It deprived Scott of needed information regarding the real consequences of continued misconduct so Scott was not forewarned that his actions would result in his discharge. In these circumstances, Scott could not learn from his mistakes or demonstrate that he could work successfully and meet Pociask's expectations.

Furthermore, Pociask's approach denied Scott procedural due process as Scott was

²³ I fail to see how "respecting" the Utility is different from bullet point 6.

never asked for his version of any of the incidents during an independent investigation of Scott's alleged misconduct which occurred after November 30, 2004. Rather, the Utility simply assumed Scott was in the wrong and that Pociask's account of each incident was completely true. There is absolutely no record evidence showing that the Utility attempted to investigate any allegation Pociask made against Scott. Thus, Scott had no opportunity to

Page 41
MA-13488

explain himself²⁴ or defend against Lineman's assertions. Indeed, Pociask's assertion herein that the Utility did not need to ask Scott for his position on each incident listed in the August 22, 2006 termination letter because he (Pociask) knew Scott's position from Pociask's contact with Scott when he "warned" him in each instance, at the very least, shows the Utility's lack of sensitivity to due process issues.²⁵

The Utility urged that its rules were clear, and that they were necessary and related to the very dangerous work done by this municipal electric utility. I have read and studied every document submitted by the Utility herein and carefully considered this evidence. What I did not find was any clear and unequivocal rule requiring lineman to wear vests when not in the roadway and to cone off or barricade their trucks when those trucks are not in the road right-of-way. The fact that after Scott's discharge the Utility upgraded its safety vests (so that lineman could wear them even when working with hot lines) and that it issued a new policy requiring lineman to wear their vests at all times tends to show that the rule regarding the use of safety vests was unclear prior to Scott's discharge. In regard to the use of cones or barricades, Pociask's comments on the August 17, 2006 written warning issued to Scott showed that Pociask believed he had been unclear about the need to use these at all times or that the Utility's rule thereon was unclear because Pociask stated the use of these PPE's should be "overdone rather than not done" (Jt. 5, Exh. 2).

In fact, the employees who testified herein also generally supported the Union's arguments on this point, that the Utility's safety vest and coning/barricading rules were far from clear. In this regard, I note that employee Smith, (who had no axe to grind herein and who was a very credible witness in my opinion) corroborated Scott in regard to the fact that there were no written rules that stated lineman had to wear safety vests outside the roadway. Furthermore, on August 8, 2006, MEUW Safety Inspector Boogren told Scott and Smith that wearing safety vests (outside the roadway) was nothing more than a "good habit" to get into, which Boogren later confirmed in writing to the Utility.²⁶ I note that none of the other employee witnesses contradicted Scott and Smith on this point.

24 Herein, Pociask Lineman asserted stated that because he had talked to Scott about every incident at the time each occurred, the Utility did not need to investigate or seek any information from Scott regarding them. This approach is simply wrong and unfair to Scott.

25 I note that no evidence was submitted herein to show that either Pociask or Reimer had had any education or training in personnel/human relations. The fact that Pociask gave Reimer the option of discharging Scott or himself when Pociask went to Reimer to seek Scott's discharge shows either that Pociask was ill-informed regarding proper personnel procedures that he or wished to pressure Reimer to discharge Scott.

26 Boogren's report corroborated Scott and Smith on this point (U. Exh. 10).

The Utility has argued that Scott's credibility should be questioned because he stands to get his job back and receive backpay pursuant to the Award. However, I believe Pociask had as much of an axe to grind as Scott for several reasons. The readers of this Award will note that I have quoted at length from Pociask's testimony which not only reveals his supervisory style

Page 42
MA-13488

but also shows that even he realized that he had been remiss in failing to properly warn and discipline Scott. I have also quoted at length from Smith and Haus' testimony. In my view, these latter excerpts demonstrate the credibility of the unit employee witnesses²⁷ and their testimony proves the difficulties (to say the least) that Pociask has had in directing subordinates and facing the conflicts inherent in supervising employees. In addition, the record evidence, detailed above, from Smith, Haus and Aaby tends to support the Union's assertion that Scott was treated more harshly than other employees to whom Pociask gave "friendly reminders" concerning the same kind of conduct which Pociask kept track of in his secret file and later listed as reasons for Scott's discharge in the August 22, 2006 letter.

Put another way, Pociask's excuses for not properly disciplining Scott across the two year and four month period Pociask was foreman simply do not ring true. Clearly, Scott was no longer Pociask's friend (by Pociask's own admission) following Scott's 2004 "diaper" comments. So it made no logical sense for Pociask to give Scott a pass on his later misconduct. Furthermore, the disinterested unit employees who testified basically corroborated Scott, not Pociask, regarding the supporting facts of this case. Also, in my view, Scott was a generally even-tempered witness who carefully considered his answers herein and admitted his mistakes.²⁸ Based on the above as well as the other record evidence,²⁹ I find that Scott's testimony should be credited over Pociask's. In this regard, it is significant that Reimer failed to deny the occurrence of as well as the content of a conversation Scott asserted he had with Reimer concerning the November 30, 2004 "Come to Jesus letter" where Scott delivered his response to the November 30, 2004 letter (Union Exhibit 16) to Reimer and Reimer told Scott to just forget about filing a grievance regarding the November 30, 2004 letter because the letter did not mean anything (Vol. II, Tr. 129-130). This evidence also supported Scott's credibility.

In addition, it is clear on this record, as the Union asserted, Scott was not "insubordinate" as the Utility asserted (the sole stated basis for Scott's discharge) regarding the incidents which occurred after November 30, 2004. Rather, as Pociask confirmed, Scott never refused to follow a direct order from Pociask, although Scott may have initially objected to or disagreed with some of Pociask's orders. This is not to say that Scott cheerfully did as Pociask directed. Often, Scott was reluctant, argumentative, even churlish. However, in labor relations parlance, employees are

28 Union Exhibits 18 through 20, in my view, show the proper placement of Scott's truck on the dates in question. Furthermore, I do not find Scott's refusal to sign Incident Reports he disagreed with to be evidence that Scott believed he was above the rules.

29 Pociask's attitude toward Smith's concerns while working in the air on August 8, 2006, Pociask's treatment of Haus when he needed to see his Chiropractor and his volatile temper and tendency to make critical even snide comments to Smith, Haus and Scott also supported this conclusion.

not insubordinate who act as Scott did. Where, for example, the employee had honest concern for a co-worker's (Smith's) well-being and honestly disagreed with his supervisor's (Pociask's) interpretation of the (Utility and MEUW) rules, yet the employee consistently followed direct orders given by his supervisor, the employee is not "insubordinate."

Page 43
MA-13488

The Utility has highlighted a litany of Scott's alleged misconduct across 20 months (from November 30, 2004 to his discharge in August, 2006) in support of its decision to discharge Scott. This misconduct included Scott's stepping on the top step of a ladder, his rotating a meter in a socket and his failing to de-energize the call-outs at Colan Boulevard and Camelot Acres, his failure to complete inventory on time and to properly record truck time, his lack of organization/procrastination/alleged work slow downs, his sitting at the Water Department computer/distracting Aaby from his work, and his failure to read notes handed him by Pociask. As correctly pointed out by the Union, in each instance, Pociask either failed to properly warn Scott at the time that his conduct was unacceptable and if repeated would result in his discharge or Pociask determined that training in lieu of discipline should occur. Also, I note that Pociask was not present and never investigated Scott's conduct concerning the call-outs.

In these circumstances, it is simply too late now for the Utility to try to use 2004-06 misconduct to support its discharge decision after it already either disciplined or it chose not to discipline Scott for the same conduct.³⁰ It must be remembered that Scott had worked for the Utility for more than 25 years and received at least average evaluations from both Reimer and Pociask when Reimer and Pociask recommended Scott's discharge in August, 2006, and that Scott had received no formal discipline except for his 1994 suspension and his November 30, 2004 transfer back to a Lineman position.

Based upon the above analysis and all of the relevant evidence and argument I issue the following

AWARD

The Employer, Rice Lake Utilities, did not have just cause to terminate the Grievant. The Employer shall therefore immediately reinstate the Grievant to his former Lineman

30 Regarding bullets 3, 5, and 6 of the November 30, 2004 letter, the evidence failed to show that Scott was properly warned for having engaged in any of the conduct listed therein after November 30, 2004. Furthermore, no evidence was submitted to show Scott made any derogatory comments about the Utility or that he failed to treat Utility employees with dignity and respect. Regarding the allegation that Scott wasted other employee's time after November 30, 2004, the evidence regarding Scott's use of the Water Department Computer failed to show that Scott wasted Aaby's time. The other examples given of failing to stay on task or wasting Smith or Haus' time - including Scott's forgetting equipment and/PPE's at the shop or in a different truck - were minor mistakes which were later blown out of proportion by Pociask, in my view. Also, some of these incidents could be explained by Pociask having switched Scott from partner to partner and from truck to truck during the time periods involved.

dag
7224

position and pay him full backpay and benefits from the date of his discharge forward.

Dated at Oshkosh, Wisconsin, this 10th day of December, 2007.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator