

**IN THE MATTER OF THE VETERANS PREFERENCE HEARING**  
**BETWEEN**

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CITY OF PRINCETON	)	
	)	
	)	BMS NO. 09-PA-0820
	)	
“EMPLOYER”	)	DECISION AND AWARD
	)	
	)	RICHARD R. ANDERSON
And	)	NEUTRAL PANEL MEMBER
	)	
	)	CHERYL D. JONES
ALLEN EMILE “PETE” DONNER	)	VETERAN PANEL MEMBER
	)	
	)	WILLIAM S. JOYNES
“VETERAN”	)	CITY PANEL MEMBER
	)	
	)	JANUARY 23, 2010
	)	

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**APPEARANCES**

**For The Employer**

Richard J. Schieffer, City Attorney  
Mike Karnowski, City Administrator  
Bob Gerold, Public Works Director  
Steve Jackson, Finance Director  
Todd Frederick, Princeton Police Officer  
Kristina Ege, Fairview Northland Hospital Laboratory Technician

**For the Veteran**

Teresa L. Joppa, Veteran’s Attorney and Staff Attorney American Federation of  
State, County and Municipal Employees Union, Council 65  
Allen Emile “Pete” Donner, Veteran and General Maintenance II Employee  
Dr. Horacio Marafioti, St. Louis MRO, Inc. (Testified by telephone)  
Jennifer and Ann, Representatives of Boehringer-Ingelheim Pharmaceutical (Testified by  
telephone)

## **JURISDICTION**

The hearing in the above matter was conducted before a Hearing Panel including City Panel Member William Joynes, Veteran Panel Member Cheryl Jones and Neutral Panel Member Richard R. Anderson on October 19 and November 23, 2009, at the City Hall in Princeton, Minnesota. Both parties were afforded a full and fair opportunity to present their case. A written transcript of the hearing was recorded by Michelle Gapinski of Benchmark Reporting Services. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced and received into the record. Post-Hearing Briefs were mailed timely on January 8, 2010, and received from the City on January 9, 2010 and from the Veteran on January 11, 2010 whereupon the record was closed. Thereafter, the Hearing Panel convened on January 18, 2010 to consider this matter.

This matter is submitted by the Hearing Panel pursuant to a Veterans Preference Act, hereinafter VPA, [Minn. Stat.197.46 *et seq*]. The parties stipulated that the matter is properly before the Hearing Panel for final and binding decision. The parties further stipulated that there are no procedural issues present.

## **BACKGROUND**

The City of Princeton, hereinafter the City, is a municipality located in Milaca County in Central Minnesota. The American Federation of State, County and Municipal Employees Union, hereinafter the Union, represents a unit of non-essential public employees including maintenance employees employed by the City. There are approximately thirteen employees in this bargaining unit. The parties have a history of collective bargaining dating back to early 2000.

On March 3, 2009, City Administrator Mark Karnowski notified Pete Donner, hereinafter the Veteran, that he was recommending to the City Council that he be discharged for the alleged failure of a random drug test administered to him on February 9, 2009.<sup>1</sup> City Administrator Karnowski submitted his written discharge recommendation to the City Council on March 5, 2009.<sup>2</sup> That same day, the Council met in a closed meeting attended by the Veteran wherein City Administrator Karnowski's recommended termination was discussed.<sup>3</sup> Thereafter, the City Council adopted a resolution sustaining City Administrator Karnowski's recommendation that the Veteran be discharged together with his required 60 day termination notice pursuant to the VPA.<sup>4</sup> On April 22, 2009, the Veteran filed a timely request for a VPA hearing to contest his termination.<sup>5</sup> The Veteran retained his employment with the City pending the resolution of his appeal; however, the City reduced him to a GM I grade level because he was not permitted to operate GM II classified heavy equipment.

## **THE ISSUE**

There are two issues before the Hearing Panel. The first issue is whether the City terminated the Veteran, Pete Donner, for just cause, and if not, what is the appropriate remedy? The second issue raised by the Veteran's Counsel is whether the City was justified in demoting the Veteran and reducing his pay during the pendency of the final disposition of his appeal; and if not, what is the appropriate remedy? Counsel for the

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<sup>1</sup>City Exhibit No. 9, p. 2. This recommended termination letter also apprised the Veteran of his veteran preference rights pursuant to the Veterans Preference Act.

<sup>2</sup>City Exhibit No. 10.

<sup>3</sup>City Exhibit No. 11.

<sup>4</sup>City Exhibit No. 12

<sup>5</sup>City Exhibit No.2

Veteran attempted to raise a third issue involving the City's alleged violation of the Minnesota Data Practices Act, which was rejected for a lack of jurisdiction by Neutral Panel Member Richard R. Anderson, who presided over the hearing.

## **RELEVANT VETERANS PREFERENCE ACT PROVISIONS**

### ***197.46 Veterans Preference Act; removal forbidden; right of mandamus.***

*Any person whose rights may be in any way prejudiced contrary to any of the provisions of this section, shall be entitled to a writ of mandamus to remedy the wrong. No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing. Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge. The failure of a veteran to request a hearing within the provided 60-day period shall constitute a waiver of the right to a hearing. Such failure shall also waive all other available legal remedies for reinstatement.*

*Request for a hearing concerning such a discharge shall be made in writing and submitted by mail or personal service to the employment office of the concerned employer or other appropriate office or person.*

The VPA provides that a covered veteran may be discharged from public employment only for "incompetency or misconduct." The Minnesota Supreme Court has interpreted these grounds as the equivalent of a "just cause" standard for discharge.<sup>6</sup> The Court explained that, "the cause [for discharge] must be one which specifically relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the officer or his

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<sup>6</sup>AFSCME Council 96 v. Arrowhead Regional Corrections Board, 356 N.W.2d 295, 297-98 (Minn. 1984)

performance of its duties, showing that he is not a fit or proper person to hold the office".<sup>7</sup>

The law also requires the employer to pay the employee until the 60-day appeal period expires; or, if a hearing is requested, until a final disposition of the appeal. The burden of establishing statutory grounds for discharge lies with the public employer.<sup>8</sup> The Court also has clarified the responsibilities of the hearing officer in applying this standard. The Court stated that, "[in] conducting a veterans preference hearing the task of the hearing board is twofold; first, to determine whether the employer has acted reasonably; second, to determine whether extenuating circumstances exist justifying a modification in the disciplinary sanction".<sup>9</sup>

## **FACTS**

The Veteran received an honorable discharge from the Minnesota Army National Guard on March 13, 1973 after approximately two years of active duty service in the U.S. Army and 13 months service in the U.S. Army Reserve and Minnesota Army National Guard.<sup>10</sup> This service qualified him for coverage under the VPA. The Veteran, who had previously worked as a truck driver, was hired by the Employer in mid-2000. The Veteran was employed in the Public Works Department, hereinafter the Department, as a maintenance man (GM II) operating various forms of light and heavy equipment doing street sweeping, snow plowing, sewer cleaning, park and cemetery maintenance and waste water plant maintenance. Bob Gerold is the Public

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<sup>7</sup>Ekstedt v. Village of New Hope, 292 Minn. 152, 193 N.W.2d 821, 828 (1972).

<sup>8</sup>Johnson v. Village of Cohasset, 263 Minn. 425, 116 N.W. 2d 692, 698 (1962).

<sup>9</sup>Schrader, 394 N.W.2d @801-802(Minn. 1986).

<sup>10</sup>City Exhibit Nos. 8 and 9.

Works Director. He has held this position since December 2008. Prior to this, he was the Department's foreman.

There are eight employees in the Department, including the Veteran, who operates commercial motor vehicles and are required to have commercial driver's licenses. As such, they are subject to Federal Omnibus Transportation Employee Testing Act (FOTETA) alcohol and drug testing requirements.<sup>11</sup> Department of Transportation (DOT) regulations require the following testing—pre-employment, post-accident, random, reasonable suspicion, return to duty and follow-up.<sup>12</sup>

The City in its Employment Guidelines has a substance abuse policy that covers all City employees.<sup>13</sup> This policy "*prohibits the use of drugs and alcohol on the job or their use that will affect job performance*". Prior to June 2008, this substance and abuse policy applied to all employees.<sup>14</sup> While other employees continued to be governed under this policy, the City formulated a new substance abuse policy, hereinafter the Policy, for its licensed commercial drivers effective June 2008.<sup>15</sup> Among other things, this Policy lists the basis for a drug and alcohol test e.g. pre-employment, random, etc. as well as the testing procedure, medical review and notification of tests results. This Policy also spells out the consequences for commercial drivers engaging in prohibited drug and alcohol conduct including the removal from their driving function and discharge for a third offense.<sup>16</sup> Evidence adduced at the hearing indicated that the

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<sup>11</sup> 49 CFR Part 382.

<sup>12</sup> U.S.C.A. § 31306

<sup>13</sup> City Exhibit No. 13, Subd. 10.6, p.4.

<sup>14</sup> City Exhibit No. 13.

<sup>15</sup> City Exhibit No. 14

<sup>16</sup> Id. p. 15 and Appendix A of the Policy.

Union did not participate in the formulation of any of the City's drug and alcohol policies. Evidence also indicated that the Policy was approved by the DOT.

The City's drug and alcohol testing provisions are administered by Finance Director Steve Jackson. The City is a member of the Minnesota Municipal Utilities Association drug testing pool that has a contract with MRO of St. Louis, Inc. to administer its testing provisions. Finance Director Jackson receives notification of Department GM II employees to be randomly tested from a Medical Review Officer (MRO) employed by MRO of St. Louis, Inc. Finance Director Jackson then furnishes a drug testing kit to Public Works Director Gerold who escorts the employee to Fairview Northland Hospital in Princeton to be tested by a certified drug sample medical technologist known as the Collector.<sup>17</sup> Strict protocol is utilized in the collection process. The employee arrives with the drug testing kit along with a Collection Custody Control record known as the Chain of Custody Form.<sup>18</sup> This Form has the name, address, phone number, driver license number, social security number and company name of the employee to be tested. The Form is filled out and signed by each responsible individual as the sample moves through the testing procedure.

The employee is then sent to the bathroom where a urine sample is collected. The bathroom is specially prepared for the test. All water is shut off and the water in the commode is tinted blue. All chemicals are also removed from the bathroom. The completed sample is then given to the Collector who separates the sample into two vials. The vials are labeled and signed by the tested employee. The Collector then signs the Form and seals it along with the test samples where they are refrigerated

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<sup>17</sup> City Exhibit No. 18.

<sup>18</sup> City Exhibit No. 1.

until a courier for the testing lab picks it up. During this process, the Collector does not ask the tested individual if they have taken any medications that could affect the test sample nor does the Collector ever receive a report of the subsequent test results.

There are two types of urine drug tests, a primary screening test and a secondary or confirmation test. The primary screening test is an immunoassay test designed to look for the presence of drug and/or illicit metabolite in the employee's urine. Most urine drug tests screen for marijuana, cocaine, opiates, PCP, and amphetamines. Some tests also screen for benzodiazepines and methadone. The secondary or confirmation test is performed by gas chromatography/mass spectrometry (GC/MS) or high-performance liquid chromatography (HPLC). The GC/MS test is highly specific and is typically used when testing for the presence of a specific drug is warranted. This test also determines whether a positive test result was caused by non-narcotic over-the-counter medications.<sup>19</sup>

The test kit is then delivered to a certified drug testing laboratory where the primary sample is tested using immunoassay to detect any prohibited drugs. The test results are then forwarded to the MRO in St. Louis for review. If the test is positive for illicit drugs, the MRO will call the employee and discuss the test results with the employee.<sup>20</sup> If the employee wishes a confirmation test, the secondary urine sample vial is then sent to a different federal certified laboratory for GC/MS testing. [This test is performed when the employee indicates during the positive test discussion with the MRO that he was taking a medication that could affect the immunoassay test.] The

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<sup>19</sup> A false positive reading.

<sup>20</sup> The MRO does not discuss negative test results with the employee. Instead, the results are sent to Finance Director Jackson who may not even inform the employee of this negative result.

GS/MS test rules out false positive readings that could affect an immunoassay test such as non-narcotic medications including Zantac. Certain other ingested medications such as over-the counter cold medications can still result in false positive readings. There is a third test available known as a D&L test to differentiate between over-the-counter and prescription or illegal drugs. During this testing process, the molecular structure of the previously detected prohibited drug is analyzed.

The MRO does not discuss the results of the confirmation test with the employee. However, Finance Director Jackson does receive detailed test results from the MRO for both the immunoassay and GC/MS tests.

On January 12, 2009,<sup>21</sup> the MRO sent a written notification to Finance Director Jackson that the Veteran was selected for random drug testing.<sup>22</sup> The Veteran was notified on Monday February 9 by Public Works Director Gerold that he was to accompany him to the Fairview Northland Hospital for a random drug test. [Finance Director Jackson testified that the delay from MRO notification to testing is not unusual since it depends on the supervisor and employee availability as well as the Department work schedule. Finance Director Jackson further testified that he does not keep the MRO notification letter in a secure or locked cabinet; rather he kept it in under his computer key board or in his computer stand.] The test was administered at the Fairview Northland Hospital by the Collector—Laboratory Technician Kristina Ege who had 13 years of drug screening experience. The established drug testing protocol was strictly observed and the test samples were sent to Lab One d/b/a Quest

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<sup>21</sup> Hereinafter, all dates are in 2009 unless indicated otherwise.

<sup>22</sup> City Exhibit No. 19, p.2.

Laboratories in Lenexa, Kansas, a certified federal drug screening laboratory, for analysis.<sup>23</sup>

The Veteran's immunoassay test results were then sent to Dr. Horacio Marafioti of St. Louis MRO, Inc. for interpretation which disclosed that the Veteran tested positive for amphetamines and methamphetamine.<sup>24</sup> Pursuant to drug testing protocol, Dr. Marafioti then conducted a telephone interview with the Veteran on February 24. During the interview, the Veteran testified that he told Dr. Marafioti that he had taken the acid blocker drug Zantac sometime during the week of the drug test and also had used an inhaler on the day of testing. During this conversation, the Veteran asked for a confirmation drug screening.

This confirmation drug screening analysis from the Veteran's second sample was conducted by federally certified drug testing laboratory Advanced Toxicology Network located in Memphis, Tennessee.<sup>25</sup> The results of the GC/MS test were again sent to MRO, Inc of St. Louis for interpretation by Dr. Criscione, a colleague of Dr. Marafioti. The results confirmed the positive results interpreted by Dr. Marafioti on February 24.<sup>26</sup>

Both the primary and confirmation test results were reported to Finance Director Jackson. Thereafter on an unknown date, the City received a more detailed drug report from Dr. Criscione.<sup>27</sup> The report disclosed that the Veteran exceeded the positive threshold of 1000 ng/ml for amphetamines and methamphetamines on the immunoassay test and the positive threshold of 500ng/nl on the more definitive GC/MS test. The

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<sup>23</sup> City Exhibit No. 8, p. 5. (Federal Register dated February 3, 2009)

<sup>24</sup> City Exhibit No.2, P. 2.

<sup>25</sup> City Exhibit No. 8, p. 4. (Federal Register dated February 3, 2009)

<sup>26</sup> City Exhibit No. 2, P. 3.

<sup>27</sup> City Exhibit Nos. 1 and 2.

quantitative results for the GC/MS analysis disclosed that he had 1,171 ng/ml of amphetamines and 9,861 ng/ml of methamphetamines in his urine sample. Dr. Marafioti testified that the amounts reflected moderate drug levels in the Veteran.<sup>28</sup>

Counsel for the Veteran argued in her opening statement that the Veteran had ingested an over-the-counter acid blocker (Zantac) as well as over-the-counter cough medication and or a Vicks Inhaler. She also introduced numerous publications obtained via the internet that disclosed that these medications can cause false positives in drug tests.<sup>29</sup> RN Ann \_\_\_\_\_ of the drug firm that manufactures Zantac testified that Zantac is know to cause false positive readings in the immunoassay test. Dr. Marafioti testified that while the immunoassay analysis will disclose false positive readings for certain non-narcotic medications such as Zantac, the GC/MS analysis utilized in the secondary or confirmation test eliminates this possibility.

There still was a possibility that the drugs in the Veteran's system could have come from over-the-counter cold medications including a Vicks Inhaler. This is why he ordered the laboratory to conduct a D&L test according to Dr. Marafioti. The subsequent D&L test ruled out the possibility that the amphetamines or methamphetamines detected in the Veteran's urine sample were from over-the-

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<sup>28</sup> According to the Wikipedia web site after ingestion, marijuana remains in the urine sample for 3-7 days, amphetamines 3-5 days and methamphetamines 1-3 days. If the individual is a heavy user, the period is longer.  
[http://en.wikipedia.org/wiki/Drug\\_test#Detection\\_periods](http://en.wikipedia.org/wiki/Drug_test#Detection_periods)

<sup>29</sup> Veteran Exhibit Nos. 1-7.

counter drugs or medications including an inhaler.<sup>30</sup> His conclusion from the D&L test results was that the Veteran had ingested illegal drugs.<sup>31</sup>

When Finance Director Jackson, who was acting as City Administrator, received an e-mail from the MRO on February 25 disclosing that the Veteran had tested positive for amphetamines/methamphetamines, he suspended the Veteran until City Administrator Karnowski returned from vacation. According to the testimony of Finance Director Jackson and a memorandum that he authored on February 26, he had a discussion with the Veteran and informed him of his drug test failure, and that he was being put on paid administrative leave pending the outcome of the confirmation test that the Veteran had requested.<sup>32</sup> According to Finance Director Jackson, the Veteran denied using drugs and speculated that someone must have put something in his soft drink while it was stored in the refrigerator at the Public Works Garage, citing an earlier incident where a fellow Department employee had ingested mercury, allegedly through someone tampering with his food while it was stored at the Garage.<sup>33</sup>

City Administrator Karnowski, upon returning to duty on Monday March 2, was advised by Finance Director Jackson of the Veteran's failure of a random drug test. On that same day, the City received the results of the Veteran's failure of the confirmation test sample. City Administrator Karnowski then drafted a Notice of

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<sup>30</sup> Counsel for the Veteran raised the question of whether Sudafed could have resulted in a false positive reading. According to Dr. Marafioti, this was not a possibility since Sudafed is a L drug. Moreover, the Veteran would have had to ingest such a large amount of Sudafed that it would have been fatal.

<sup>31</sup> The Veteran never indicated in his interview with Dr. Marafioti that he had a legal prescription for those drugs nor has he ever asserted such.

<sup>32</sup> City Exhibit No. 3.

<sup>33</sup> This incident will be discussed more fully later herein.

Recommended Dismissal letter to the Veteran dated March 3.<sup>34</sup> In the letter City Administrator Karnowski advised the Veteran of the confirmation test failure. He also apprised the Veteran of a City Council meeting on March 5 wherein he was going to recommend that the Veteran be terminated for a third violation of the City's Policy which states, "*An employee's third offense shall result in termination.*" City Administrator Karnowski also apprised the Veteran of his veteran preference rights pursuant to the VPA in the letter. This letter was hand delivered to the Veteran at his home by Public Works Director Gerold.

On March 5 City Administrator Karnowski drafted a Memorandum to the City Council members that contained his recommendation and rationale for terminating the Veteran.<sup>35</sup> In the Memorandum he cited the Veteran's recent drug test failure and the drug test failures of 2002 and 2008. The letter is as follows:

As described in the city's letter to Mr. Donner (which you were emailed a copy on March 3, 2009) and pursuant to reasons supported by the City's Personnel Policy, I am recommending the termination of Allen "Pete" Donner's employment with the City of Princeton. Below is the rationale behind the decision to recommend Mr. Donner's discharge.

**History:** Mr. Donner has been employed by the City of Princeton's Public Works Department in the position of General Maintenance II since mid-2000.

On December 18, 2002 and pursuant to the Federal regulations concerning the retention of a commercial driver's license (49 CFR Pat 382), Mr. Donner failed a random DOT Controlled Substance Test and was, subsequently, removed from all safety sensitive functions of his job. He was re-tested at a later date and was reinstated for all the required functions of his job.

In May of 2008, Mr. Donner again failed the random DOT Controlled Substance Test and tested positive for marijuana, amphetamine and methamphetamine. Upon confrontation, Mr. Donner acknowledged that he'd used some marijuana but denied that he'd taken and amphetamine or methamphetamine. A re-test of the split sample supported the findings of

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<sup>34</sup> City Exhibit No. 9.

<sup>35</sup> City Exhibit No. 10.

the initial test. As the result of that test. Mr. Donner was, again, removed from all safety sensitive functions of his job. He participated in a Primary Chemical Dependency Treatment (Phase One) at Riverplace Counseling Center. Again, Mr. Donner was re-tested at a later date and was reinstated for all the required functions of his job.

At that time, Mr. Donner was given a memo outlining the impact of the second positive DOT Controlled Substance Test and was advised both in writing and verbally that failure to pass a third test would, pursuant to the city's Substance Abuse Policy, result in termination. Mr. Donner signed a copy of that memo acknowledging the consequences of failing a third drug test.

While the City Administrator was on vacation, Mr. Donner again failed a DOT Controlled Substance Test on February 19, 2009 and was put on paid leave. A re-test of the split sample obtained for the test was done on March 2<sup>nd</sup> and it was confirmed that there was the presence of both amphetamine and methamphetamine. Those results were similar to the results of the tests received in May of 2008.

In a conversation with City Finance Director, Steve Jackson, Mr. Donner first asked if there was anything he could do to get rid of the last test result. Later in the conversation Mr. Donner asserted that someone may have put the drug in one of his pop bottles when it was in the Public Works Garage refrigerator.

I discussed that claim with both Police Chief Brian Payne and with Princeton Police Department Sergeant Backlund, who has been trained on the use and effects of illicit drugs. I've been advised that, if meth was ingested in a soda, the party would be aware that the soda had been tainted. There has been no earlier claim of tainted soda noted.

Findings: City records indicate that Allen "Pete" Donner has failed three (3) drug tests. As a matter of public safety, the city cannot allow an employee who has a history of drug abuse operate vehicles or heavy machinery and put city residents unnecessarily in harm's way.

Further, the City believes that an employee who has been given several opportunities and fails to adequately address their personal chemical dependency issues can put both themselves and their co-workers at risk.

Just cause for termination exists under the City of Princeton's Personnel "Policy On Alcohol and Controlled Substances For Commercial Drivers" which, in appendix A, specifically notes that "An employee's third offense shall result in termination".

Recommendation: The staff recommendation is to immediately terminate Allen "Pete" Donner's employment with the City of Princeton. If you concur with that recommendation, a resolution to that effect is attached for your review and consideration.

The City Council considered City Administrator Karnowski's recommendation at a closed meeting on March 5. The meeting was closed at the request of the Veteran. During this meeting the Veteran's history of failing random drug tests was discussed.<sup>36</sup> Once again the Veteran denied using amphetamines or methamphetamines and reiterated his suspicion that someone had put something in his soft drink while it was stored in the refrigerator at the Department Garage. The Veteran further testified that he never informed the City Council that he was taking over-the-counter medications or drugs that could have produced a false positive in the drug tests. That same evening the City Council adopted a resolution terminating the Veteran.<sup>37</sup>

The Veteran was not immediately terminated. Pursuant to the VPA, his termination was held in abeyance pending the adjudication of his termination at the Veteran's requested VPA hearing.

Although he retained his employment, he was removed from his commercial driving assignments and reclassified to a non-driving GM I classification. According to City Administrator Karnowski, this removal was necessary to protect the safety and welfare of the general public in that the City could not allow an employee who repeatedly tested positive for drugs to operate commercial equipment on City streets. City Administrator Karnowski further testified that the reduction in grade and resultant pay reduction was consistent with City policy.<sup>38</sup>

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<sup>36</sup> City Exhibit No. 11.

<sup>37</sup> City Exhibit No. 12.

<sup>38</sup> He specifically cited two situations where employees were reduced to GM I until they successfully renewed their licenses that were necessary in order to work at the waste treatment plant.

The evidence adduced during the hearing established that the Veteran was given a return to work drug test on March 24 and a random drug test on June 29.<sup>39</sup> The results of both tests were negative for prohibited or illicit drugs. No further tests have been conducted.

As stated earlier herein, the Veteran had a history of failing drug tests. He failed a random drug test administered to him on Wednesday December 18, 2002 wherein he

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<sup>39</sup> City Exhibit No. 16, pgs. 1 and 3.

tested positive for marijuana.<sup>40</sup> This was the Veteran's first random drug test after his pre-employment drug test of June 30, 2000 wherein he tested negative for prohibited drugs and was hired.<sup>41</sup> The Veteran testified that he rarely smoked marijuana; however, he had smoked a "joint" with some friends during the preceding weekend while they were watching a football game.

As a result of failing this drug test, the Veteran was demoted to a GM I classification level. He could not operate heavy equipment or drive commercial vehicles and had to attend a chemical use assessment at Riverplace Counseling Center in Anoka, Minnesota.<sup>42</sup> He was reinstated to GM II after he tested negative for prohibited drugs on February 3, 2002.<sup>43</sup> The Veteran then had his next random drug test on March 2, 2005 where he tested negative for prohibited drugs.<sup>44</sup>

During his next random drug test on May 7, 2008, the Veteran tested positive for marijuana, amphetamines and methamphetamines.<sup>45</sup> The quantitative results were 58 ng/ml, 3,137 ng/ml and 17,728 ng/ml, respectively. His D&L test results disclosed that he had ingested illegal drugs since his D result was 97% and there was no evidence that he had legal prescriptions for the drugs.<sup>46</sup>

The Veteran testified that he had taken a couple of "hits" from a "reefer" on the weekend before his drug test. He stated that he "smoked" with a friend from Colorado after they had attended a mutual friend's funeral. He denied at the hearing that he had ingested amphetamines or methamphetamines.

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<sup>40</sup> City Exhibit No. 6, pgs. 1-7.

<sup>41</sup> City Exhibit No. 16, p. 7 and City Exhibit No. 16, p. 7.

<sup>42</sup> City Exhibit No. 6, p. 8.

<sup>43</sup> City Exhibit No. 16, p. 7.

<sup>44</sup> Id., p. 6.

<sup>45</sup> City Exhibit No. 4.

<sup>46</sup> City Exhibit No. 24, p.3.

As a result of this positive test, the Veteran was directed to attend drug counseling and treatment program at his own expense.<sup>47</sup> He was also reduced to a GM I classification level, required to undergo a retest before returning to work and threatened with discharge if he failed another drug test.<sup>48</sup> The Veteran was also apprised that he could take unpaid leave or paid vacation time and chose vacation time. The Veteran testified that he attended a night weekly drug treatment program for five and one-half weeks at the Riverplace Counseling Center in Anoka. He also attended approximately 12-14 sessions at either Narcotics Anonymous or Alcoholics Anonymous. The Veteran never had his classification reduced because he passed a subsequent drug test while he was still on vacation and was cleared to operate commercial equipment.<sup>49</sup>

The Veteran further testified that as result of these classes, he never smoked marijuana again. He again denied that he had ingested any amphetamines or methamphetamines, either in 2008 or 2009, that gave him the positive test results. He also acknowledged in his testimony that he was warned by City Administrator Karnowski in 2008 that he would be terminated if he failed another drug test.

As stated earlier herein, the Veteran denied using amphetamines or methamphetamines that led to his 2009 positive test results. Rather, the Veteran maintained before his termination notice that someone must have "spiked" his soda pop or energy drink, citing an earlier incident where a fellow employee had ingested mercury from a contamination source presumably while at work. City Administrator

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<sup>47</sup> The City only pays for one treatment program, which it did in 2002.

<sup>48</sup> City Exhibit No. 4. Memorandum dated May 20, 2008 from City Administrator Karnowski, which the Veteran signed acknowledgement on page 2.

<sup>49</sup> In lieu of unpaid leave, the Veteran chose to take vacation time while he attended a drug treatment program.

Karnowski testified that he told Public Works Director Gerold to contact the Police Department about an investigation into the Veteran's allegations. According to City Administrator Karnowski, no investigation to his knowledge was ever conducted. He speculated that it was because there was no physical evidence left to analyze.<sup>50</sup> He did say that he talked to a police officer trained in drug investigations who indicated that while a person may not taste amphetamines or methamphetamines in a soft drink, they would feel the effects of the drugs after ingestion.<sup>51</sup>

The Veteran was queried by City Council members during the March 5 meeting with respect to the Veteran's allegations that someone must have tampered with his soft drink while it was stored at the Department's Garage. According to the minutes of the meeting, the Veteran had no proof of such activity other than his reliance on the previous mercury tampering incident.<sup>52</sup>

The mercury incident occurred sometime during the summer of 2007. Apparently an employee became sick and was diagnosed with mercury poisoning. The Princeton Police Department through Officer Todd Frederick conducted an investigation. A trace amount of mercury was found in the sink in the Garage break area.<sup>53</sup> It was speculated that the small amount of mercury was in the sink drain presumably after this employee washed out his food container. According to Officer Frederick, the investigation never did determine where the source of the mercury came from, whether it originated at home or at work, or who was responsible for the mercury getting into something the employee ingested.

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<sup>50</sup> Due to the length of time between any alleged tampering and the Veteran's complaint, the soft drink bottle was no longer available.

<sup>51</sup> According to

<sup>52</sup> City Exhibit No. 11.

<sup>53</sup> The small amount of mercury was consistent with the amount in a thermometer according to Officer Frederick.

The evidence adduced at the hearing disclosed that only one other employee faced termination because of an alcohol/drug problem. This unnamed employee, who did not work in the Department and was not governed by DOT commercial driver regulations, had an alcohol problem.<sup>54</sup> This employee had been arrested by the Sherburne County Sheriff Department for an alcohol related incident. Pursuant to a City Council closed hearing determination, then City Administrator David J. Minke issued the employee a Letter of Reprimand/Return to Work memorandum on August 23, 2002.<sup>55</sup> The memorandum allowed the employee to return to work subject to the successful completion of an in-patient treatment program. Further, as a condition of employment the employee was subjected to random drug /alcohol testing and was warned that future poor performance, violations of personnel policies, or failure to follow his department rules could result in termination.

On June 21, 2006, this employee was suspected of being intoxicated at work and was subjected to alcohol testing by the Police Department. Two tests taken revealed that the employee had blood alcohol levels of 1.72 and 1.84 percent whereupon he was sent home. On July 19, 2006, City Administrator Karnowski issued a memorandum outlining these facts.<sup>56</sup> The employee was allowed back to work effective August 18, 2006 after completing an in-patient treatment program. In addition, the employee was forbidden to come to work intoxicated, was subjected to random breathalyzer testing by the Police Department and warned that any further misconduct could result in termination.

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<sup>54</sup> The individual is unnamed because of privacy issues.

<sup>55</sup> City Exhibit No. 20.

<sup>56</sup> City Exhibit No. 21.

On Monday October 21, 2007, this employee was suspected of being intoxicated while at work. He underwent an alcohol test administered by the Police Department that indicated that his blood alcohol level was .009 percent. He was re-tested within an hour and had no alcohol in his system. According to hearsay evidence presented by City Administrator Karnowski, this test result indicated that the employee had consumed one drink within the last hour.<sup>57</sup> On October 23, 2007, City Administrator Karnowski issued a memorandum setting forth these facts.<sup>58</sup> The employee was given a last chance agreement. As a condition of further employment, he agreed to attend Alcoholic Anonymous meetings and would be subjected to a zero tolerance alcohol policy and would be terminated if he had any alcohol in his system while at work. According to City Administrator Karnowski, the employee was not terminated because his blood alcohol level did not violate City policy, wherein the alcohol threshold limit is .04 percent. Adding, this is why the zero tolerance last chance agreement was formulated. This 10-year employee subsequently resigned in late 2008 or early 2009 (the exact date unknown) after another job related alcohol incident. According to City Administrator Karnowski, he would have recommended his termination to the City Council had not the employee resigned.

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<sup>57</sup> According to the hearsay testimony of City Administrator Karnowski citing a Police Officer's interpretation, the individual alleged that the last time he had anything to drink was the day before. According to this Officer the amount of alcohol in the individual's system clearly indicated that he had consumed one alcoholic drink during the preceding hour. According to Karnowski, the individual claimed the last time he had consumed alcohol was the previous day (Sunday).

<sup>58</sup> City Exhibit No. 22.

## **POSITION OF THE EMPLOYER**

It is the position of the City that it has sustained its required burden of proof and had just cause to terminate the Veteran under the provisions and Court interpretations of the Veterans Preference Act. In support of this, the City argues:

- As a commercial driver, the Veteran was subject to a random drug test pursuant to FOTETA as well as the City's Policy for commercial drivers. The drug testing procedure followed the strict protocol mandated by FOTETA.
- The Veteran failed the immunoassay and GC/MS drug tests for amphetamines and methamphetamines.
- The Veteran's defense that he had ingested Zantac, which affected the test results, has no merit. The GS/MS drug test analysis ruled out Zantac as a cause for a positive reading in the immunoassay test.
- The testimony of Dr. Marafioti disclosed that the amphetamine and methamphetamine levels in the Veteran's system as measured by the D&L test was not a result of him ingesting cold or any other medication including an inhaler, rather was caused by him ingesting illegal drugs.
- The evidence failed to substantiate the Veteran's assertion that someone must have tampered with his soft drink.

It is also the City's position that termination was the appropriate discipline for the Veteran's failure of the 2009 drug tests. In support of this, the City argues:

- The Veteran had a history of failing drug tests in 2002 and 2008.
- The Veteran admittedly was informed by City Administrator Karnowski after he failed the 2008 drug test that the next drug test failure would result in his termination.

- The City's Policy for commercial drivers established that the penalty for a third drug test failure was termination. This Policy was widely disseminated to all commercial drivers including the Veteran. The Veteran understood and did not question this Policy. The Union has also never questioned this Policy.

It is also the City's position that it was justified in reducing the Veteran's grade classification and resultant pay reduction. In support of this, the City argues:

- The Veteran was removed from his safety sensitive position as a commercial driver for failing a drug test. The Veteran had a history of failing drug tests. Allowing the Veteran to continue to drive a commercial City vehicle would put the public at risk and subject the City to a legal liability if the City continued to allow the Veteran to operate commercial equipment knowing he had a history of drug use.
- Since the Veteran could no longer drive a commercial vehicle, which is a GM II classification, he was reduced to a GM I classification. This was consistent with City policy.
- The reclassification of the Veteran did not constitute removal under the VPA. His GM I classification was commensurate with the work he was performing.<sup>59</sup>

### **POSITION OF THE VETERAN**

It is the Veteran's position that the City failed to sustain its burden of proof that the Veteran engaged in "incompetence" or "misconduct" under the VPA and did not have just cause to terminate him. In support of this, the Veteran argues:

- The Veteran testified that he did not use amphetamines or methamphetamines; however, he did he use Zantac and cold medications and/or a Vicks inhaler just prior

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<sup>59</sup> Citing *Gorecki v. Ramsey County*, 437 N.W. 2d 646 (Minn. 1989)

to the 2009 drug test. Both Zantac and cold medications including inhalers will result in false positive drug tests. This was verified in the Veteran Exhibits introduced at the hearing and through the testimony of representatives of the company that manufactures Zantac.

- The City failed to counter conclusively that Zantac did not cause a false positive drug reading. The doctor who testified has a self interest and bias against admitting that over the counter or other substances might interfere with test results. His testimony should be discounted and dismissed. His lab is run for profit and would not be interested in serving the interests of anyone but itself and the multitude of employers who pay for the expensive drug tests run by this company. It would be against his self interest if the chemical composition of methamphetamine or amphetamine, in small amounts, is found in everyday products that people use routinely, and on occasion can result in someone's urine sample wrongly indicting them for illegal drug use.<sup>60</sup>
- If there were amphetamines or methamphetamines in his system, he unknowingly ingested them and should not lose his job over someone else's action. Some unknown individual must have put the drugs in the Veteran's soft drink while it was stored in the Department Garage refrigerator. A fellow employee suffered mercury poisoning due to someone tainting his food. An investigation by the City Police

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<sup>60</sup> The Veteran argues that the doctor was only called to testify on behalf of the Veteran because the City's counsel refused to do so even to justify the submitted evidence that further tests run by their lab allegedly showed that the Veteran's test results were due to an illegal substance, not an over the counter substance. (D&L test)

Department revealed that mercury was found in the Garage sink presumably from the employee's food container that was washed out in the Garage sink.<sup>61</sup>

- The Veteran raised this possible contamination with City officials when he first learned that he had tested positive for drugs in late February 2009. He also raised this possibility with the City Council at the March 5 closed meeting. In spite of this, the City failed to conduct an investigation into the probability that the Veteran's soft drink had been contaminated.

The Grievant's further position is that City reduced the Veteran's pay rate while awaiting the adjudication of this matter. The Veteran argues that Minnesota Courts have held that a veteran is due his full rate of pay from the date of termination until the date the hearing panel decision issues, even if the termination is subsequently upheld.<sup>62</sup>

## **OPINION**

The first issue before the Hearing Panel is whether the Employer had just cause to terminate the Veteran. It is the City's burden to show that it has acted reasonably in terminating the veteran; second, to determine whether extenuating circumstances exist justifying a modification in the disciplinary action. In other words, it is the City's burden to show that it had just cause that the Veteran engaged in conduct warranting discipline and that the appropriate discipline was termination. The City bears this burden by a preponderance of evidence that the Veteran failed his February 2009 drug test because he was using amphetamines and methamphetamines, and that this failure warrants

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<sup>61</sup> The Veteran argued in its brief that mercury was found in the food container; however, the testimony of Officer Frederick disclosed otherwise. Transcript pages 145 and 146.

<sup>62</sup> Citing, Johnson v. City of Cohasset, 116 N.W.2d 692, (Minn. 1962), Henry v. Metropolitan Waste Control Comm'n, 401 N.W.2d 401 (Minn. App. 1987), Leininger v. City of Bloomington, 299 N.W.2d 723 (Minn. 1980), Kurtz v. City of Apple Valley, 290 N.W.2d 171, (Minn. 1980).

termination. The standard of proof by a preponderance of evidence means that the event is more likely to have occurred than not to have occurred.

The Veteran, who was initially employed with the City in the summer of 2000, was terminated on March 5, 2009. The Veteran received an honorable discharge from the Minnesota Army National Guard after he completed his military obligation. He had served two years of Active duty in the U.S. Army and approximately 13 months in the active reserves. This military service qualified him for termination protection under the Minnesota VPA. The City timely notified the Veteran of his right to appeal his termination under the VPA on March 5. The Veteran then timely filed his appeal on April 22.

The Veteran asserts that he did not use amphetamines or methamphetamines; and that the positive drug tests were the result of his ingesting Zantac and using an inhaler.<sup>63</sup> Contrary to the Veteran's assertions, the overwhelming uncontroverted evidence establishes otherwise. While the initial immunoassay screening test may cause a false positive reading for certain non-narcotic medications such as Zantac, the secondary GS/MS test, according to the testimony of Dr. Marafioti, rules this out. Dr. Marafioti also testified that cold medications such as inhalers can cause false positive results in this test; however, the D&L test clearly established that the positive results were not from any cold medication or inhaler.<sup>64</sup> Dr. Marafioti further testified that the

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<sup>63</sup> The Veteran did not argue that the testing procedure or "chain of custody" was flawed.

<sup>64</sup> Counsel for the Veteran argued that MRO of St. Louis was biased in its decision that the Veteran was using illegal drugs rather than Zantac or and an inhaler. This unfounded attack on the credibility of the federally certified and Dr. Marafioti's sworn testimony deserves no further comment.

D&L test established that the presence of amphetamines and methamphetamines in the Veteran's system was caused by the ingestion of illegal drugs.<sup>65</sup>

The Veteran further asserted that since he did not use amphetamines or methamphetamines, the drugs in his system must have been result of someone putting those drugs in his soda pop or energy drink while they were stored in the Garage refrigerator. In support of this the Veteran cited the 2007 mercury poisoning of a fellow employee.

This assertion has no merit for a number of reasons. While it was suspected that the employee's mercury poisoning was caused by contaminated food, it was never established where the source of mercury originated, whether it was at the employee's home or while the food was stored in a container at work. Further it was never established whether the mercury contamination was intentional or accidental, or that any individual had a motive for poisoning this employee.

There is absolutely no evidence that the illicit drugs were placed in the Veteran's soft drink, either at work or any place else for that matter. Surely, the Veteran would have known at the time that he ingested the soft drink that something was wrong. While he may not have been able to taste the illicit drugs, he undoubtedly would have felt its adverse effects.

Finally, there is no evidence that any employee had a motive to put any illicit drugs in the Veteran's soda pop. Rather, Public Works Department Director Gerold testified that the Grievant was well-liked and respected. Even assuming that an individual had a grudge against the Grievant and wanted to affect the Veteran's drug test, that individual

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<sup>65</sup> The drugs were illegal because the Veteran never had a prescription for those drugs and never asserted to Dr. Marafioti or during the hearing that he did.

would have had to have known not only that the Veteran was going to be tested but when the test was going to be administered.<sup>66</sup> Since the Veteran also asserted that he did not use amphetamines and methamphetamines in 2008 when he tested positive for those drugs, it follows that someone must have also “slipped” him the drugs unbeknownst to him then.<sup>67</sup> Quite frankly, this scenario is hard to fathom. Moreover, you would expect a person who asserts that someone else must have contaminated his soft drink would have protested more vociferously than the Veteran did.

Finally, the Veteran asserts that he should be exonerated because the City failed to investigate tampering allegations that he raised to both City management and the City Council prior to his termination. Under some circumstances in just cause discipline situations, a failure to investigate a disciplined employee’s defense may be mitigating grounds that could tarnish the termination. However, such is not the case here. Evidence adduced at the hearing through City Administrator Karnowski established that he instructed Public Works Department Director Gerold to contact the Police Department about an investigation. There is no evidence that Public Works Department Director Gerold did not follow through with this directive. There is also no evidence that the Police Department ever conducted an investigation or is there any evidence that they considered the request and then rejected it.

Even assuming an investigation had been conducted, it would be almost impossible to substantiate the Veteran’s assertions. The Veteran had no evidence of contamination, much less that a fellow employee would deliberately do this to him. Key

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<sup>66</sup>This event was only known to Finance Director Jackson. Even assuming that this individual somehow found out that the Veteran was to be tested, the individual would have no idea when the test would actually be administered.

<sup>67</sup> The record is also devoid of any complaints in 2008 that the drug tests were invalid.

physical evidence was unavailable to examine since the Veteran's empty soft drink container had long since been thrown away. Absent a confession, which is extremely unlikely, it could never be proven that someone tampered with his soft drink, if indeed it had been tampered with. Thus, there was really nothing to investigate. Finally, the Veteran's assertions lacked credibility and appear to be nothing more than a "smoke screen". He had a history of drug use. His May 2008 random drug test disclosed that he had the same illicit drugs in his system then. There is no record evidence that he denied using these drugs at that time; rather it appears that this was asserted for the first time at the hearing. Finally, as stated earlier, it is hard to imagine that he would not have felt the adverse effects of the drug if his soft drink had been contaminated; or, not bring this to the attention of someone at that time he felt the those effects.

In view of the foregoing, the evidence overwhelmingly established that the City had just cause to discipline the Veteran and the failure of the City to conduct an investigation into the Veteran's allegations of tampering do not mitigate against this causative action.

The question of whether termination is the appropriate discipline must now be examined. The City asserts and the evidence established that the Veteran had a history of drug use having failed two other drug screenings prior to 2009. The Veteran had been ordered to drug treatment after these test failures and in spite of drug treatment continued to use illicit drugs. Based upon his recidivism, drug rehabilitation efforts appear to be fruitless.

The Veteran is in a safety sensitive occupation wherein he operates heavy equipment on City streets where he comes in close contact with other employees as well as with the general public. He also operates heavy equipment in other City

controlled areas where he also comes in close contact with fellow employees and the general public. e.g. parks, cemetery, etc. There is no question that operating heavy equipment under the influence of illicit drugs puts the safety of other employees and the general public in jeopardy.

Based upon his past conduct, there is no reason to believe that the Veteran will refrain from using illicit drugs in the future. If the City continued to employ the Veteran, his continued illicit drug use could cause a potential legal liability for the City. Most assuredly the City would face a law suit if property was damaged or someone was injured or even killed after the Veteran was found to be under the influence of illicit drugs while operating heavy equipment. The City could be charged with egregious misconduct under those circumstances because it knowingly continued to allow a repeat drug offender to operate heavy equipment. Returning a repeat drug offender to work would also undermine the credibility and public trust of the City administration and elected public officials.

The evidence disclosed that the City's Policy mandates termination after the third failure of a drug screening. This same penalty was in the substance abuse policy that was previously applied to the commercial drivers. While the aforementioned policy as well as the current Policy was not negotiated with the Union, the Union never raised this as an issue prior to the hearing.<sup>68</sup> Moreover, the earlier policy had been in existence before April 2003 when it was revised.<sup>69</sup> A union may waive its right to object to a unilaterally implemented employer policy if such objection is not raised in a timely

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<sup>68</sup> Although it raised this issue at the hearing, it was not asserted in the Veteran's post-hearing brief. Nevertheless, it will be examined.

<sup>69</sup> City Administrator Karnowski did not know when this policy was first enacted; however, he believed it had been inexistence for long time before he arrived in March 2003.

manner. Under the aforementioned circumstances, any Veteran objection to the City's Policy is without merit.

The City's Policy is extremely liberal. Many employers have a zero tolerance policy regarding illicit drug use, especially where the employee is engaged in a safety sensitive position. The Veteran was well aware of this Policy and in fact admitted that he was warned after his 2008 drug screening failure that he faced termination for a third offense.

It also appears that the City has also applied progressive discipline in dealing with the Veteran since his first drug screening failure in 2002.<sup>70</sup> He received a written warning in 2002 and was in essence suspended in 2008 when he elected to take vacation leave rather than unpaid leave.

There is also insufficient evidence of disparate treatment to mitigate against termination. While it initially appears that an employee was retained and given a last chance agreement in 2007 after his third alcohol use infraction, a closer examination of the facts discloses otherwise. Even though this employee was given a last chance agreement for this 2007 alcohol incident, the incident did not violate the City's substance abuse policy since his alcohol level was only .009 while the policy threshold was .04. Moreover, it could never be proven that he had consumed alcohol while at work, since heavy drinking the day before could result in sufficient alcohol residue in his system to cause a positive reading the next day.

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<sup>70</sup> Failure to follow progressive discipline in just cause situations may negate a termination. However, certain egregious violations such as theft of company property, or fighting, or gross insubordination or drug use when the employee is in a safety sensitive position may not be amenable to requiring progressive discipline even where the contract mandates it.

Finally, the evidence disclosed that the Veteran, who had been employed for approximately nine years in February 2009, was a hard working and reliable employee. In spite of this, termination is the appropriate discipline. The Veteran has a history of illicit drug use. He has undergone drug treatment, yet continued to violate the City and FOTETA drug policies. Under those circumstances, the City could be prone to a substantial legal liability if it knowingly allowed a recidivist drug user to be employed.<sup>71</sup>

The second issue raised by the Veteran regarding his pay reduction has merit. The VPA requires that veterans who have been terminated are entitled to continue to be paid during the pendency of their appeal. Various Court of Appeals decisions have ruled that veterans are entitled to be paid even if their termination is upheld.<sup>72</sup> The Minnesota Appellant Court has also determined that the back wages are subject to an interest payment with said interest rate to be set pursuant to Minn. Stat. 334.01.<sup>73</sup> This rate is currently \$6.00 for every \$100.00 due or six per cent annually.

The evidence disclosed that the Veteran was paid; however, he was compensated at a reduced rate during the pendency of his appeal. According to the City, his classification had been changed since he no longer was allowed to drive a City commercial vehicle. In essence, the Veteran was demoted pending his appeal. This issue has been presented to the courts before. The Minnesota Court of Appeals has determined that there is no provision in the VPA for a veteran's demotion and he/she is

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<sup>71</sup>An alternative to termination would be to demote him to a permanent GM I classification and prohibit the Veteran from operating commercial equipment. While the Veteran was assigned a GM I classification during the appeal process, there is no evidence that there is sufficient work for a permanent GM I classification. In any event, work activities besides operating heavy equipment could put fellow employees or the public in jeopardy if the Veteran was under the influence of illicit drugs.

<sup>72</sup> See Johnson v. City of Cohasset, 116 N.W.2d 692, (Minn. 1962) and other cases cited by the Veteran.

<sup>73</sup> Henry v. Metropolitan Waste Control Comm'n, 401 N.W.2d 401 (Minn. App. 1987).

entitled to the full wages paid at the time of termination.<sup>74</sup> Further, the City's argument that he should not be paid the wages of a GM II classification because he could not drive is not consistent with Minnesota law. The Appellant Court rejected a similar employer argument and stated that a veteran is entitled to be paid even if there was a period when he could not drive and driving was a condition of his employment.<sup>75</sup>

In view of the foregoing, the Hearing Panel has determined that the Veteran's termination appeal is denied; however, his reduction in wage claim is sustained.

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<sup>74</sup> Leininger v. City of Bloomington, 299 N.W.2d 723 (Minn. 1980), Kurtz v. City of Apple Valley, 290 N.W.2d 171, (Minn. 1980).

<sup>75</sup> Harr v. City of Edina, 541 N.W. 2d 603 (Minn. App. 1996).

## **AWARD**

IT IS HEREBY ORDERED that the appeal of Allen Emile "Pete" Donner of his March 5, 2009 termination be, and hereby is denied.

IT IS FURTHER ORDERED that his wage claim be, and hereby is sustained.

IT IS THEREFORE ORDERED that Allen Emile "Pete" Donner be paid the difference between his regular GM II classification rate and the GM I classification rate that he was paid between March 5, 2009 and the date of this Decision together with six per cent interest.<sup>76</sup>

The Hearing Panel will retain jurisdiction in this matter for a period of forty-five (45) days from the receipt of this Award to resolve any matters relative to implementation.

**Dated:**

**January 23, 2010**

**/S/ Richard R. Anderson**  
**Richard R. Anderson, Neutral Panel Member**

**/S/ William S. Joynes**  
**William S. Joynes, City Panel Member**

**/S/ Cheryl D. Jones**  
**Cheryl D. Jones, Veteran Panel Member**

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<sup>76</sup> This is the rate set by Minn. Stat. Chap. 334, subd. 1 (2009).