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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-1160**

Barry LeDoux,  
Respondent,

vs.

St. Louis County (Public Works Department),  
Appellant.

**Filed July 8, 2008  
Affirmed  
Toussaint, Chief Judge**

St. Louis County District Court  
File No. 69-C7-05-600529

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Considered and decided by Toussaint, Chief Judge; Hudson, Judge; and Schellhas,  
Judge.

**UNPUBLISHED OPINION**

**TOUSSAINT**, Chief Judge

Appellant St. Louis County (Public Works Department) challenges the district  
court's vacation of the decision of the St. Louis County Veteran's Preference Review

Board (the review board) to terminate the employment of respondent Barry LeDoux, arguing that respondent was not deprived of a fair hearing by one review board member's undisclosed contacts with the county and with a witness. Because we conclude that the review board member's personal, financial, and confidential relationships with the county and a witness created the appearance of a conflict of interest and that the failure to disclose those relationships to respondent created an impression of bias, we affirm.

### **FACTS**

Respondent is an honorably discharged veteran who was employed by appellant as a heavy equipment operator for more than 28 years. After respondent tested positive for cocaine use in July 2004, appellant notified him that it intended to terminate his employment for violating appellant's drug and alcohol abuse policy. Respondent sought review of the decision by the veteran's preference review board under Minn. Stat. § 197.46 (2004). At the hearing, appellant presented evidence that respondent had violated appellant's drug abuse policy on several occasions. Respondent admitted this misconduct but argued that extenuating circumstances entitled him to modification of the sanction. The review board affirmed respondent's termination.

Respondent then appealed to the district court, to which he argued that he had been denied a fair hearing because one member of the three-person review board, attorney Laura Weintraub, had a three-pronged conflict of interest. First, Weintraub's law firm at that time presented itself as "Labor Relations Counsel for St. Louis County." Second, Steven Fecker of the same law firm had regularly represented the county in labor-relations and labor-management matters since 1995 and had advised the county on

its drug and alcohol policy. Third, Fecker’s wife, Peggy Fecker, is appellant’s drug and alcohol testing coordinator; in that capacity, she testified at respondent’s hearing about appellant’s testing policies and the disciplinary measures taken by appellant in respondent’s case. There is no evidence in the record that Weintraub disclosed her connection with the firm, the firm’s representation of the county, or her relationship with appellant’s testing coordinator, who was a witness on behalf of appellant at respondent’s hearing.<sup>1</sup>

The district court concluded that the “close personal, financial, and indeed, confidential relationships between [Weintraub], Mr. Fecker, Ms. Fecker and [appellant]” created a conflict of interest or at least the appearance of a conflict of interest, that Weintraub had an obligation to disclose these relationships to respondent in advance of the hearing, and that she did not make that disclosure. The review board’s decision was therefore vacated, and the matter was remanded for another hearing.

## D E C I S I O N

When the district court reviewing an agency decision makes independent factual determinations and otherwise acts as a court of first impression, this court applies the “clearly erroneous” standard of review to those factual determinations. *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 823 (Minn. 1977); *In re Hutchinson*, 440 N.W.2d 171, 174 (Minn. App. 1989), *review denied* (Minn. Aug. 9, 1989). We review the district court’s legal conclusions based on those factual determinations *de novo* and are not bound by the legal conclusions of the district court or the agency. *Hutchinson*, 440

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<sup>1</sup> Appellant does not contest the district court’s finding that there was no disclosure.

N.W.2d at 175.<sup>2</sup>

An honorably discharged veteran employed by a county is entitled to a hearing in the event of termination for misconduct. Minn. Stat. § 197.46 (2004). The hearing shall be held before a veteran’s preference review board. *Id.* The review board’s task is to determine whether the employer acted reasonably in discharging the employee and whether extenuating circumstances justify modifying the disciplinary sanction. *State ex rel. Laux v. Gallagher*, 527 N.W.2d 158, 161 (Minn. App. 1995). The veteran may appeal the review board’s decision to the district court. Minn. Stat. § 197.46.

The county first argues that the district court erred by reviewing the conflict-of-interest issue. But, in reviewing a county’s adverse employment decision, courts are to consider “questions affecting the jurisdiction of the board [and] *the regularity of its proceedings . . .*” *Sellin v. City of Duluth*, 248 Minn. 333, 339, 80 N.W.2d 67, 71 (1956) (emphasis added). Therefore, the district court properly reviewed respondent’s claim of conflict of interest.

The county also argues that the district court erred by considering evidence outside the review board’s record. But a reviewing court may consider evidence outside the administrative record when:

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<sup>2</sup> Respondent contends that the district court’s decision vacating the board’s decision is not a final order and is therefore not appealable. But the court’s order is a final order and is appealable under Minn. R. Civ. App. P. 103.03 (e), (g) because it vacated the board’s decision, ordered that any further hearings be held by a reconstituted board, reinstated respondent to his employment from the date of the board’s decision, with backpay, and ordered that respondent remain in employment with appellant until a proper veteran’s preference review board decides respondent’s case.

(1) the agency's failure to explain its action frustrates judicial review; (2) additional evidence is necessary to explain technical terms or complex subject matter involved in the agency action; (3) the agency failed to consider information relevant to making its decision; or (4) *plaintiffs make a showing that the agency acted in bad faith.*

*White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 735 (Minn. App. 1997) (emphasis added), *review denied* (Minn. Oct. 31, 1997). In light of respondent's assertion that the review board acted in bad faith by not disclosing one member's relationships with the county and a witness, the district court did not err by reviewing evidence outside the review board's record.

Nor did the district court err in vacating the review board's decision. An honorably discharged veteran is entitled to a fair and impartial review board hearing. "That a board created . . . to hear charges of incompetency or misconduct against . . . a veteran should be impartial and without bias is implicit in [its] design . . . ." *Johnson v. Village of Cohasset*, 263 Minn. 425, 435, 116 N.W.2d 692, 699 (1962). Appointing a county employee to a review board has been "unequivocally condemned." Failing to disclose the relationship between the board member and the county to the veteran and to obtain the veteran's consent to the appointment has been held to deprive the veteran of an impartial and unbiased review board. *See Indep. Sch. Dist. No. 316 v. Eckert*, 281 Minn. 445, 449-50, 161 N.W.2d 692, 695 (1968) (citing *Johnson*, 263 Minn. at 435, 116 N.W.2d at 699).

Analogously, in arbitration, both a conflict of interest and the corresponding duty to disclose that conflict arise when an arbitrator has a substantial interest in a firm that has done significant business with one of the parties. *Egan & Sons Co. v. Mears Park*

*Dev. Co.*, 414 N.W.2d 785, 786 (Minn. App. 1987), *review denied* (Minn. Jan. 20, 1988). “Failure [of an arbitrator] to disclose possible conflicts of interest creates at the least an impression of bias. An impression of bias contaminates the decision making process when neutrality is essential and is not condoned . . . .” *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 377 (Minn. 1989). The failure to disclose the facts giving rise to a conflict of interest is grounds to vacate the panel’s award. *Egan*, 414 N.W.2d at 786.

Although Weintraub is not a county employee, she does have a substantial interest in the law firm that has represented appellant in labor-relations matters since at least 1995. Admittedly, a citizen appointed to serve on a review board cannot be expected to be free of any contacts with veterans or the county or to disclose all such contacts. But here Weintraub’s knowledge that her firm represented the county and her contacts with Peggy Fecker should have indicated the risk of her not being perceived as a neutral or unbiased board member and prompted her to disclose the relevant facts to respondent before the hearing. The district court did not err in vacating the decision of the review board and remanding the matter for another hearing.<sup>3</sup>

**Affirmed.**

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<sup>3</sup> In its reply brief, appellant cites *Indep. Sch. Dist. No. 316 v. Eckert*, 281 Minn. 445, 161 N.W.2d 692 (1968), for the proposition that the review board’s decision should have been affirmed because “the evidence was not in dispute.” But issues not raised or argued in appellant’s brief cannot be raised in a reply brief. *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990). In any event, appellant’s reliance on *Eckert* for this argument is misplaced. In that case, the employee was informed of and consented to the board member’s conflict of interest in advance of the hearing. *Eckert*, 281 Minn. at 449-50, 161 N.W.2d at 695.