

**STATE OF MINNESOTA**  
**REMOVAL UNDER VETERAN'S PREFERENCE ACT**

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METROPOLITAN COUNCIL,

EMPLOYER,

ARBITRATOR'S AWARD

LAEL BEAMISH,

Removal of Veteran, MS 197.46

VETERAN.

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ARBITRATOR:

Rolland C. Toenges

VETERAN:

Lael Beamish

DATE & PLACE OF HEARING:

October 3, 2008

St. Paul, Minnesota

DATE OF AWARD:

October 9, 2008

**ADVOCATES**

**FOR THE EMPLOYER:**

**FOR THE VETERAN:**

Diane M. Cornell, Asst. General Council

Adam C. Wadd, Attorney

Metropolitan Council

Baker, Wadd & Williams, LLP

**WITNESSES**

Sam L. Jacobs, Director, Bus Operations

Fred Beamish, Veteran's Spouse

Mark Johnson, Manager, Heywood Garage

Lael Beamish, Veteran

Mark Crooks, Asst. Manager, Heywood Garage

**ISSUE**

**Was removal of Veteran in accordance with provisions of the Minnesota  
Veteran's Act, MS 197.46?**

## **JURISDICTION**

The instant matter at issue, removal of Veteran Lael Beamish, came on for hearing under provisions of the Minnesota Veterans Preference Act, MS 197.46.

Said Act provides as follows:

### **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 to 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.

In all governmental subdivisions having an established civil service board or commission, or merit system authority, such hearing for removal or discharge shall be held before such civil service board or commission or merit system authority. Where no such civil service board or commission or merit system authority exists, such hearing shall be held by a board of three persons appointed as follows: one by the governmental subdivision, one by the veteran, and the third by the two so selected. In the event the two persons so selected do not appoint the third person within ten days after the appointment of the last of the two, then the judge of the district court of the county wherein the proceeding is pending, or if there be more than one judge in said county then any judge in chambers, shall have jurisdiction to appoint, and upon application of either or both of the two so selected shall appoint, the third person to the board and the person so appointed by the judge with the two first selected shall constitute the board. The veteran may appeal

from the decision of the board upon the charges to the district court by causing written notice of appeal, stating the grounds thereof, to be served upon the governmental subdivision or officer making the charges with 15 days after notice of the decision and by filing the original notice of appeal with proof of service thereof in the office of the court administrator of the district court within ten days after service thereof. Nothing in section 197.455 or this section shall be construed to apply to the position of private secretary, teacher, superintendent of schools, or one chief deputy of any elected official or head of a department, or to any person holding a strictly confidential relation to the appointing officer. The burden of establishing such relationship shall be upon the appointing officer in all proceedings and actions relating thereto.

All officers, boards, commissions, and employees shall conform to, comply with, and aid in all proper ways in carrying into effect the provisions of section 197.455 and this section notwithstanding any laws, charter provisions, ordinances or rules to the contrary. Any willful violation of such sections by officers, officials, or employees is a misdemeanor.”

The Employer issued a “Notice of [intent to] Discharge” to the Veteran dated July 1, 2008, and provided the Veteran with notice of her rights as provided by MS 197.46, et seq.

The Veteran filed notice with the Employer dated July 1, 2008, requesting a hearing as provided by MS 197.46 and provided evidence of her status as a veteran.

The Employer and Veteran mutually selected Rolland C. Toenges as hearing officer (Arbitrator) of the discharge/appeal matter in lieu of a three-member panel and selected October 3, 2008 as the date of hearing.

The Employer and Veteran were afforded full opportunity to present evidence, testimony and argument bearing on the matter at issue. Witnesses were sworn under oath. Witnesses were subject to examination and cross-examination. The Employer and Veteran made closing arguments and waived filing post-hearing briefs.

A taped recording was made of the hearing proceedings.

### **JOINT STIPULATIONS**

Lael Beamish and the Metropolitan Council (Metro Transit Division) stipulate to the following facts:

1. Lael Beamish is an honorably discharged veteran who is entitled to a hearing pursuant to the Minnesota Veterans Preference Act (VPA).
2. The Metropolitan Council gave proper Notice to Ms. Beamish of her rights under the VPA and offered a hearing on her proposed discharge.
3. The parties agree to have Ms. Beamish's hearing before a single hearing officer rather than the panel of three hearing officers described in the VPA.
4. The Metropolitan Council will make an audiotape of the hearing and will provided a copy of the tape to the hearing officer and to Ms. Beamish if requested.
5. The parties agree that Employer Exhibits 2 through 13 are true and correct copies of documents found in Ms Beamish's personnel file and that they may be admitted into the record without further foundation.
6. The parties agree that Employer Exhibit 1 consists of true and correct copies of Ms. Beamish's request for a hearing and her Form DD 214.
7. The parties agree that Veteran's Exhibits V1 through V8 consists of true and correct copies of documents found in Ms. Beamish's personnel file and that they may be admitted into the record without further foundation.
8. Ms. Beamish acknowledges that the Metropolitan Council has continued her on full pay and benefits pending the VPA hearing and that she has no claim for back pay or other compensation.

### **BACKGROUND**

The Employer operates a public transit system serving the Minneapolis/Saint Paul metropolitan area. The instant matter arises out of the Employer's motorbus operations, which consists of some 713 motorbuses and 1490 motorbus operators operating out of five different locations.

The Veteran was employed as a part-time motorbus operator July 14, 1997 and most recently worked as a full-time operator out of the Employer's "Heywood Bus

Facility.” The Veterans immediate supervisor was Mark Crooks, Assistant Manager of the Heywood bus facility. Mark Crooks reports to Mark Johnson, Manager of Bus Operations at the Heywood Bus Facility. Mark Johnson reports to Sam L. Jacobs, Director of Bus Operations for Metro Transit.

The Employer’s basis for removal of the Veteran is incompetence and misconduct. The Employer’s notice of discharge to the Veteran states the grounds as gross misconduct – threatening a customer with bodily harm and operator responsibility for a pedestrian accident June 26, 2008 and her overall work record.

The Employer’s opening statement at the hearing was that the Veteran’s removal was due to a combination of incompetence and misconduct, citing safety violations, intentional road rage, verbal assault, rudeness to customers and absenteeism.

### **EXHIBITS**

#### **EMPLOYER EXHIBITS:**

1. Veteran’s request for a hearing and Form DD 214.
2. Notice of Discharge, dated July 1, 2008.
3. Investigation of Bike/Pedestrian Accident.
  - a. Hearing Summary dated July 1, 2008.
  - b. Notice of Hearing, dated June 30, 2008.
  - c. Accident/Incident Report, dated June 26, 2008 and Safety Conference dated June 30, 2008.
4. Accident Hitting Post.
  - a. Accident/Incident Report dated May 16, 2006.
  - b. Safety Conference, dated may 24, 2006 and referral to safety class.
  - c. Notice of Hearing and Record of Warning, dated October 18, 2006.
5. Collision with Bike Incident.
  - a. District Supervisor Collision/Incident Report, September 14, 2006.

- b. Accident/incident Report, September 14, 2006.
  - c. Safety Conference with Veteran, September 19, 2006.
  - d. One-On-One Safety Training, September 20, 2006.
6. Accident, October 3, 2007.
- a. Notice of Violation, no accident/incident report, October 3, 2007.
  - b. Special Situation Report, accident, October 3, 2007.
7. Chronological Work History, 12/20/2003 through 12/06/2008.
8. Customer Complaints:
- a. Customer Feedback, Threatening Behavior, June 27, 2008.
  - b. Customer Feedback, Inappropriate Conduct/Comment, Abusive Gestures, March 28, 2008.
  - d. Customer Feedback, Safety, Inappropriate Conduct/Comment, Abusive Words/Gestures, February 06, 2008.
9. Absenteeism Issues:
- a. Record of Warning, Attendance, February 07, 2007.
  - b. Record of Warning, Attendance, February 16, 2007.
  - c. Record of Warning, Attendance, May 29, 2007.
  - d. Record of Warning, Attendance, January 09, 2008.
  - e. Record of Warning, Attendance, April 19, 2008.
  - f. Record of Warning, Attendance, May 27, 2008.
10. First Step Grievance Report, Altercation, One-Day Suspension, May 15, 2006.
11. Notice of Violation, Not Following Schedule, October 24, 2005.
12. Metro Transit Bus Operator Rule Book & Guide, #7716.
13. Discharge and Grievance:
- a. First Step Grievance Record, Leal Beamish, July 9, 2008.
  - b. Second Step Grievance Response Record, Leal Beamish, July 28, 2008.
  - c. Third Step Grievance Response Record, Leal Beamish, August 14, 2008.

**VETERAN EXHIBITS:**

1. Commendation, Passed Inspection, November 10, 2005.
2. Customer Feedback, Compliment, July 12, 2006.
3. Customer Feedback, Compliment, January 20, 2007.
4. Memo, RE: Customer Compliment – Sign Work History, September 19,2005.
5. Customer Feedback, Compliment, May 15, 2005.
6. Designation of FMLA from June 14, 2007 through June 13, 2008, dated June 22, 2007.
7. Eight-year Safe Bus Operator Award, 2007.
8. Designation of FMLA from April 2, 2008 through May 02, 2008, dated April 30, 2008.

**POSTION OF THE PARTIES****THE EMPLOYER SUPPORTS ITS CASE WITH THE FOLLOWING:**

- Discharge of the Veteran is supported by a history of both incompetence and misconduct.
- The Veteran has a record of absenteeism, safety violations, intentional road rage, rudeness to customers and incidents creating a danger to the public.
- The Veteran is not suited to work as a bus operator.
- The Veteran has been trained and re-trained without satisfactory improvement.
- The Veteran has been referred to the Employee Assistance without satisfactory improvement.
- The Veteran's record shows that her continued employment would put the public at risk as she demonstrates poor judgment and lack of self-control.

- The Arbitrator does not have the authority to reinstate the Veteran to another job. The Arbitrator must either uphold the Veteran's removal or reinstate her to her old position.

#### THE VETERAN SUPPORTS HER CASE WITH THE FOLLOWING:

- The Employer's case lacks foundation. The Veteran is the only witness that has direct knowledge of the incidents at issue.
- The testimony of the Employer's witnesses is hearsay as none were present at the site of the alleged incidents.
- The evidence introduced by the Employer contains typographical errors which causes question of what other errors exist in the Employer's evidence.
- The Employer's witness (Jacobs) added emotion in his testimony that didn't need to be added.
- The Veteran suffers from depression and is working to get better.
- The language used by the Veteran, "dingle berry," does not meet the definition of rudeness alleged by the Employer.
- The "Safe Driver Award" issued to the Veteran last year is testimony to the quality of her service as a bus operator.
- The Veteran, in her effort to be accommodating, trusted her supervisor and signed documents without fully scrutinizing them.
- Veteran needs her job and is willing to do what is necessary to keep it, even pulling weeds.
- The Veteran requests that she be reinstated to her job as a bus operator with counseling, so she can again serve people.

#### DISCUSSION

Under provisions of the Minnesota Veterans Preference Act (Act), a Veteran may not be removed except for "incompetency or misconduct."<sup>1</sup>

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<sup>1</sup> MS 197.46.

The Parties have stipulated that the Veteran was given proper notice of her Veteran rights, provided a hearing pursuant to the Act and that the documents entered into evidence are true and correct copies with proper foundation.

The Parties have further stipulated that, pursuant to the Act, the Veteran has received full pay and benefits pending the instant hearing and has no claim for back pay or other compensation.

Case law established under the Act provides that, if the Arbitrator finds the Employer's removal of the Veteran reasonable, the Employer's action can be modified only if the Arbitrator finds extenuating circumstances supported by substantial evidence in the record.<sup>2</sup>

The record shows that the Veteran has about eleven years of service with Metro Transit, counting both part time and full time employment. The record further shows that the Veterans employment history contains incidents of misconduct, issues of poor attendance and several commendations.

The Veteran was awarded an eight-year "Safe Bus Operator Award," in 2007, even though the record shows there were several accidents occurring during this period. There is no evidence in the record regarding the requirements for receiving a "Safe Bus Operator Award."<sup>3</sup>

The Veteran's employment record contains several compliments received from bus riders and a favorable inspection report of her driving performance from the Employer. These are all dated from 2005 through 2007.<sup>4</sup>

### PERFORMANCE ISSUES

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<sup>2</sup> Southern Minnesota Municipal Power Agency v. Schrader, Supreme Court of Minnesota, No. C5-85-1356, Oct. 24, 1986.

<sup>3</sup> Veteran Exhibit #7.

<sup>4</sup> Veteran Exhibits #1, 2, 3, 4, 5,

The record shows that the final event prompting the Employer's decision to remove the Veteran was an incident on June 26, 2008. In this incident, it is alleged that the Veteran bumped into a rider who was attempting to place his bicycle on the carrier in front of the bus and forced him away with the bus because she wanted to move the bus closer to the curb. The Veteran's stated reason for doing so was to position the bus closer to the curb so that the lift could be lowered to exit a handicapped rider.<sup>5</sup>

The incident came to the attention of the Employer because of a complaint from the bicycle rider who filed a complaint. The complainant said that the bus was stopped at a red light behind two cars and that the Veteran had opened the bus door to let people off and on. The complainant said that he made eye contact with the Veteran and proceeded to place his bike on the rack. However, the light turned green and the Veteran started the bus forward hitting him and his bike and pushing him away. The complainant said that when he boarded the bus after it stopped, the Veteran yelled at him for being in front of the bus. The Complainant said he then asked the Veteran for her driver number and told her he was going to file a complaint. The Veteran then asked where he worked, to which he responded, "a tattoo shop." The complainant said the Veteran then said, "oh, that figures."

In an investigation regarding the incident, the Veteran said the two cars were not in front of the bus but on the left side and denied hitting the complainant twice. The Veteran acknowledged that some of the other stuff alleged happened. The Veteran acknowledged intentionally moving the bus into the rider, as she wanted him to be up on the sidewalk. The Veteran said she took full responsibility for what she did, but would like a second chance.

The record shows that a similar incident involving the Veteran occurred on September 14, 2006. In that incident, while the Veteran was starting away from the curb, a rider tried to place his bicycle on the rack. The bike fell off the rack and the

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<sup>5</sup> Employer Exhibit #3.

rider yelled to the Veteran, “what is your problem?” The Veteran replied, “What is your problem?” The Veteran then attempted to drive around the bike, but ran over it. The rider alleged injury, which was not confirmed.<sup>6</sup>

Following the September 14, 2006 incident, a safety conference was held with the Veteran as she was held responsible. The Veteran was counseled that, to have avoided the incident, she should have 1). Stopped the bus 2). Be more aware of her surroundings and keep her eyes moving at all times 3). Practice safety first and schedule second.

On September 20, 2006, a Company Instructor held a one-on-one on the job Safety Training Session with the Grievant. The session included proper procedures for operating the bus when bikes are loaded, avoiding going through yellow lights at intersections and a recommendation to seek professional assistance for personal issues that may be affecting her customer service attitude.

On May 16, 2006, the Veteran collided with a post while driving her bus out of the garage. The Veteran was held responsible and counseled how the accident could have been avoided: 1). Slow down in tight areas - do not force the bus into tight areas 2). Use your mirrors more often in tight areas 3). Place safety first and schedule second. The Veteran was given a one-on-one training session with an instructor to help her improve her performance. The Veteran was warned that failure to improve her performance might result in further discipline up to and including discharge.<sup>7</sup>

On September 25, 2007 the Veteran reported an accident to the Transit Control Center, but failed to file an accident/incident report as instructed and specified in the Bus Operator’s Rule Book and Guide. The accident involved the curbside mirror on the Veteran’s bus hitting a “yellow box,” breaking it. The Veteran was counseled

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<sup>6</sup> Employer Exhibit #5.

<sup>7</sup> Employer Exhibit #4.

to familiarize herself with the “Bus Operator’s Rule Book & Guide,” Sections 521, 526, 533 & 854.<sup>8</sup>

The Veteran was issued a “Record of Warning” and a “two-day suspension” for an incident that occurred on April 19, 2006. The record shows the incident involved another bus operator who had passed the Veteran’s bus several times. The Veteran, upset at being passed, angled her bus to the left to prevent the other operator from passing her again. The other bus operator stopped his bus and confronted the Veteran for cutting him off, pointing his finger at her. The Veteran responded by getting out of her bus and cursing at the operator. The Veteran grieved the discipline and a first step grievance meeting was held on May 10, 2006. The Employer acknowledged there were some extenuating circumstances and agreed to modify the discipline by removing the “Record of Warning” and one-day of the two-day suspension.<sup>9</sup>

On October 24, 2005 the Veteran was counseled regarding keeping her bus on the designated time schedule.<sup>10</sup> The Veteran had arrived at a bus stop earlier than what the schedule called for. This creates a problem for riders who will be by-passed if they arrive at the scheduled time. The Employer reviewed the relevant provisions of the “Bus Operator’s Rule Book & Guide with the Veteran, who signed an acknowledgement that she has a copy and is responsible for knowing its contents.<sup>11</sup>

On July 15, 2004 the Veteran was cited and warned (Class B Violation) for driving 19 miles per hour in a ten-mile per hour zone.<sup>12</sup>

The record shows these additional complaints filed against the Veteran:

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<sup>8</sup> Employer Exhibit #6.

<sup>9</sup> Employer Exhibit #10.

<sup>10</sup> Employer Exhibit #11.

<sup>11</sup> Employer Exhibit #12

<sup>12</sup> Employer Exhibit #7 and testimony of Sam Jacobs.

1. On March 28, 2008 a rider, who stepped into the street and waived to insure the Veteran would be sure to see her, filed a complaint.<sup>13</sup>

The rider said she had stepped into the street and waived because of having been passed by on previous occasions. When the rider saw the Veteran turn her signal on, indicating the bus was going to stop, the rider stepped back onto the curb.

Upon boarding the bus, the rider said the Veteran told her she didn't need to waive. The rider told the Veteran she waived because of being passed by on previous occasions. The Veteran told the rider that if she did it again she [Veteran] would be the one passing her up. The Veteran then held her hand about an inch from the riders face saying, "Good-bye, good bye, good bye." The rider told the Veteran to get her hand out of her face but the Veteran just kept it up and was very rude. The rider expressed her belief that if she had done that to the Veteran she would have been thrown off the bus.

Following the incident, the Veteran's supervisor reviewed the applicable section of the Bus Operator's Rule Book and Guide with the Veteran. The Supervisor also warned the Veteran that such behavior will not be tolerated and any future rudeness or inappropriate conduct/comment may merit further disciplinary action up to and including discharge.

2. On February 1, 2008 a motorist filed a complaint against the Veteran. The complaint stated that, when the Veteran's bus was merging onto the freeway, the motorist honked to let the Veteran know the motorist was there. The Veteran kept coming onto the freeway and honking back at the motorist. The motorist said he had to speed up because there was another car along side preventing him from moving over into the next lane. As soon as the motorist was in front of the Veteran's bus, the Veteran sped up behind him and followed dangerously close putting on her bright lights. The Veteran began to

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<sup>13</sup> Employer Exhibit #8b.

flash her lights and continue to follow extremely close. When the motorist got to I-94 and got into another lane, the Veteran passed him pulling up beside and “flipped him off” the whole time. The Veteran then exited on Fifth Street. The motorist emphasized that not only did he feel the Veteran’s behavior was extremely rude and vulgar, but put his entire family at risk with her unacceptable driving. The motorist stated that this was dangerous behavior and should not be acceptable.<sup>14</sup>

With respect to the second complaint, the Veteran acknowledged honking and turning on her high beams, but said she would never do the other things alleged by the motorist.

The Veteran’s supervisor reviewed with her the applicable sections of the Bus Operator’s Rule Book and Guide, which included the four-second rule about following another vehicle. The Supervisor instructed her to error on the side of safety and in the future she is to back off the accelerator and, if need be, brake to avoid safety issues.<sup>15</sup>

The record shows a history of attendance concerns involving the Veteran. The Employer’s Absenteeism Policy provides that seven (7) occurrences within a rolling calendar year will put an employee in “Warning Status.” An Employee having ten occurrences within a rolling calendar year will be issued a “Final Record of Warning.” Upon receiving a “Final Record of Warning,” three (3) additional occurrences will be “just cause” for termination.<sup>16</sup>

Employer witness, Sam Jacobs, Director of Bus Operations testified that employee attendance is critical to managing bus schedules. Jacobs testified that Metro Transit has some 700 buses and nearly 1,500 bus operators operating out of five different locations. Failure of an operator to report for work can mean that

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<sup>14</sup> Employer Exhibit 8c.

<sup>15</sup> Employer Exhibit #8c.

<sup>16</sup> Employer Exhibit #9a.

scores of riders, who depend on the bus to reach work and other destinations, can be left without a means to reach these destinations.

The record shows that the Veteran was absent from work seven (7) days between February 27, 2006 and February 7, 2007. The Employer scheduled a hearing with the Veteran on February 13, 2007 to discuss the Veteran's absence record.<sup>17</sup>

On February 13, 2007 the Employer issued the Veteran a "Record of Warning" and prepared an "Employee Counseling Record." The Counseling Record informed the Veteran that improvement in her overall attendance was imperative and that continued poor attendance may merit further disciplinary action up to and including discharge. The Counseling Record encouraged the Veteran to seek assistance from others within the company and suggested she may wish to seek assistance from the Employer's Employee Assistance Program.<sup>18</sup> The Veteran signed an acknowledgement that the "Counseling Record" accurately described the discussion that took place.<sup>19</sup>

The record shows that the Veteran was again absent on February 16, 2007. The Employer scheduled a hearing on March 6, 2007 to review the Veterans absence. The Employer issued the Veteran another "Record of Warning" and "Employee Counseling Record," dated March 6, 2007 that essentially repeated the information contained in the previous Record. Again, the Veteran signed an acknowledgement that the Record accurately described the discussion that took place.<sup>20</sup>

The record shows the Veteran was absent additional shifts on May 29, 2007, November 30, 2007, December 28, 2007, January 8, 2008, February 7, 2008, March 12, 2008, April 19, 2008 and May 27, 2008. The Employer scheduled

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<sup>17</sup> Employer Exhibit #9a.

<sup>18</sup> Employer Exhibit #9a.

<sup>19</sup> Employer Exhibit #9a.

<sup>20</sup> Employer Exhibit #9b.

further hearings regarding the Veteran's attendance on June 11, 2007, January 9, 2008, April 24, 2008 and June 6, 2008. In each instance, the Employer issued the Veteran a "Record of Warning" and repeated the "Employee Counseling Record." In each instance, the Veteran signed an acknowledgement that the Record accurately described the discussions that took place.<sup>21</sup>

On June 30, 2008, the Employer scheduled a "Gross Misconduct and Overall Record Hearing with the Veteran and Union Representatives that took place on July 1, 2008. Employer witness, Mark Crooks, prepared a summary of the hearing, the discussion of which primarily concerned the incident on June 26, 2008, but also cited violations of the Bus Operator's Rule Book & Guide (sections 100, 120, 270, 271, 245, 243, 244, 246, 247, 491, 496, 497c).<sup>22</sup>

Following the July 1, 2008 hearing, the Employer issued the Veteran a "Notice of [Intent to] Discharge" and provided the Veteran with her Veteran Preference Rights. The Notice cited "Gross Misconduct - Threatening a Customer with Bodily Harm, Operator Responsible Pedestrian Accident, June 26, 2008 and [her] Overall Record."<sup>23</sup>

The Veteran filed an appeal to the notice of intent to discharge and requested a Veteran's Preference Hearing.<sup>24</sup>

On July 9, 2008 a First Step Grievance hearing was held with the Veteran and her Union Representatives. The Veteran asked for another opportunity. However, the Employer denied the grievance.<sup>25</sup>

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<sup>21</sup> Employer Exhibits #9c, 9d, 9e and 9f.

<sup>22</sup> Employer Exhibit #3a.

<sup>23</sup> Employer Exhibit #2.

<sup>24</sup> Employer Exhibit #1.

<sup>25</sup> Employer Exhibit #13a.

On July 28, 2008 a Second Step Grievance hearing was held with the Veteran and her Union Representatives. The Veteran again asked for another opportunity. However, the Employer again denied the grievance citing concerns about the ability of the Veteran to change her behavior of repeated incidents of poor decisions for safety and conduct.<sup>26</sup>

On August 8, 2008 a Third Step Grievance hearing was held with the Veteran and her Union Representatives. The hearing involved a review of the Veteran's employment record involving accidents, absenteeism, misconduct and customer complaints. Although the Employer acknowledged there might be external factors influencing the Veterans work performance, the Employer ruled that the Veteran's work performance problems were unacceptable. The Employer again denied the grievance.<sup>27</sup>

#### EXTENUATION CIRCUMSTANCES

The record shows that the Veteran has been employed some eleven (11) years, counting part time and full time service. Length of service is a factor commonly considered in determining the appropriate degree of disciplinary action.

The record shows that the Veteran has received commendations from bus riders and from a bus inspector in 2005, when evaluating her bus operator performance. These commendations indicate that the Veteran has been able, at times, to demonstrate good customer relations and proper bus operation. However, the Veteran has not demonstrated this on a consistent basis.

The "Safe Bus Operator Award" issued to the Veteran in 2007, on its face, seems inconsistent with the Veteran's accident record. However, as noted earlier, there was no evidence offered as to the requirements for earning this award, which leaves the Arbitrator without a basis to know what weight it should be given.

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<sup>26</sup> Employer Exhibit #13b.

<sup>27</sup> Employer Exhibit #13c.

The Veteran challenges the Employer's evidence and testimony supporting charges made against her, as only she has direct knowledge of what took place. However, the documentation in evidence setting forth allegations of the incidents shows that the Veteran acknowledged the accuracy of much of the allegations.

The Veteran also challenges the Employer's documents in evidence based on some inconsistencies in the data shown. One inconsistency involves Employer Exhibit #11 where the "Details of Violation" section shows an obvious inconsistency in departure times. However, this document shows the correct departure times in the above section, which provides adequate clarity.

A second inconsistency appears in Employer Exhibit #9 where a typographical error appears in the "Employee Counseling Record." The error, which shows the word "our" immediately following the word "your," is an obvious error when viewed in context of the sentence where it appears. Employer witness, Mark Crooks testified that the same error appeared in later "Employee Counseling Record" documents because he used it as a template for the later documents and did not notice it.

The Veteran alleges that she did not view a video prepared for bus operators on bike and bus safety procedures. Employer Mark Johnson, Manager of the Heywood Facility where the Veteran was assigned, testified that he did not know whether the Veteran had seen the video. Johnson testified that the video was part of "Right to Know Training" and it was the responsibility of all employees, including the Veteran, to attend the training.

Employer witness, Mark Crooks, Assistant Bus Operations Manager and the Veteran's immediate supervisor, testified that, although he did not personally witness the incidents, he conducted investigations of them. On cross-examination, Crooks testified that his investigation included taking statements from the Veteran, complainants and any other witnesses. Crooks testified that he compared the content of the statements and timelines to insure accuracy.

The record indicates that the Veteran was under stress due to personal matters that were not related to her work environment, but may have influenced her behavior on the job. The record shows that the Employer counseled the Veteran on a number of occasions and suggested she seek support from others and from the Employee Assistance Program. The record indicates that, to whatever degree the Veteran availed herself of assistance with her personal matters, it did not appear to have a positive influence on her on-the-job performance.

The Veteran raises the matter of protection given to absences by The Family Leave Act (FMLA). The record shows that the absences at issue, for which the Veteran received repeated warnings, were not covered by FMLA.<sup>28</sup>

### **FINDING**

As noted earlier, case law under the Veteran's Preference Act provides that if the Employer's removal of the Veteran is "reasonable," the hearing officer can modify the sanction only if it finds extenuating circumstances supported by substantial evidence in the record.<sup>29</sup>

Based on the evidence and testimony in the record, the Arbitrator finds the Employer's action to remove the Veteran reasonable. The record shows that the Veteran committed numerous and repeated incidents of misconduct and poor judgment, notwithstanding numerous warnings, numerous efforts by the Employer to counsel the Veteran and offers of Employee Assistance.

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<sup>28</sup> Employer Exhibit #7.

<sup>29</sup> Southern Minnesota Municipal Power Agency v. Schrader, Supreme Court of Minnesota, No. C5-85-1356, Oct. 24, 1986.

The record shows that from July of 2004 through June 2008, the Veteran had three class B violations, four chargeable accidents, three customer complaints and at least seven warnings.<sup>30</sup>

Although there are extenuating circumstances in the instant case favoring the Veteran, the Arbitrator does not find them sufficiently substantial to offset the Veteran's record of misconduct, poor judgment and absenteeism.

Although personal issues may have influenced the Veteran's unacceptable job performance, the job requirements of a bus operator and the Metro Transit's obligation to its riders places practical limits on the acceptability of sub-standard performance, no matter what the cause.

There is no doubt that a bus operator must have a high degree of tolerance and self control due to the wide range of rider personalities and behavior they encountered. There may be other jobs within Metro Transit that are better suited to the tolerance and the Veteran's self control, but it is not within the authority of the Arbitrator to address such options.

#### **AWARD**

**The Employer's action in removing the Veteran is reasonable. Although there are extenuating circumstances favoring the Veteran, they are not sufficiently substantial to offset the Veteran's performance deficiencies.**

#### **CONCLUSION**

The Parties are commended on the professional and through manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this matter.

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<sup>30</sup> Employer Exhibit #7.

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ROLLAND C. TOENGES, ARBITRATOR