

**PROCEEDINGS UNDER THE MINNESOTA
VETERANS PREFERENCE ACT**

WALLACE J. MAIRE,
Employee/Veteran

**FINDINGS OF FACT,
CONCLUSIONS, AND DECISION**

INDEPENDENT SCHOOL DISTRICT #191,
Employer

Neutral Hearing Officer

Carol Berg O'Toole

Employee/Veteran's Panel Member

Keith Niemi

Employer's Panel Member

Lisa Rider

Date of Hearing:

April 29, 2011

Date of Receipt of Post
Hearing Briefs and Motion
To Reopen Testimony

May 23, 2011

Date of Order Denying Motion

June 14, 2011

Date of Decision

July 11, 2011

Representatives:

For the Employer:

Maggie R. Wallner, Esquire
Attorney for Independent School District #191
Kennedy & Graven, Chartered
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200 South Sixth Street
Minneapolis, Minnesota 55402

For the Employee/Veteran:

Bruce P. Grostephan, Esquire
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Appearances:

For the Employer:

Jon Deutsch, Director of Operations and Properties
Tania Z. Chance, Ph.D., Executive Director Human Resources
Daniel Kampf, Marketing Specialist, Krause Anderson Insurance
Mark Kampf, Vice President, Krause Anderson Insurance
Alan Strombach, Account Executive, Travelor's Insurance

For the Veteran:

Wallace J. Maire, Veteran and Master Plumber
Scott Anderson, S.E.I.U Local 284, Contract Organizer
Lou Strauss, B Shift Custodian and Union Steward
Tom Brown, Operations Supervisor

Preliminary Statement

The hearing in the above matter commenced at 9:00 A.M. on April 29, 2011, at the offices of Independent School District #191, 100 River Ridge Court, Burnsville, Minnesota. The parties involved are Independent School District #191 (School District) and the veteran, Wallace J. Maire (Maire) who is a member of Service Employees International Union, Local 284, (Union). The parties presented opening statements, oral testimony, oral argument, exhibits, and agreed to simultaneously submit, by U.S. Mail, post hearing briefs. The hearing was transcribed by Elizabeth Martin, Court Reporter, Depo International, Inc. The hearing was closed upon receipt of the post hearing briefs on May 23, 2011. Maire moved to reopen the hearing on May 23, 2011, to take further testimony related to an event occurring after the hearing. The motion was denied on June 14, 2011.

Statutory Jurisdiction and Standard of Review

The hearing was held under the provisions of Minnesota Statutes 197.46: Veteran's Preference Act; Removal Forbidden; Right of Mandamus which reads:

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.

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 within 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, 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. Nothing in this section shall

be construed to apply to the position of teacher. 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 parties agreed at the hearing that there were no procedural issues in dispute. Notice was timely and properly given by the School District. Maire timely replied within sixty days to the notice with proof of honorable discharge and a written request for a hearing before a neutral panel.

The Minnesota Veteran's Preference Act provides that an honorably discharged veteran holding a position in public employment can be removed from his position only for "incompetency or misconduct" proved after a hearing. Minnesota Statutes, Section 197.46. In a Veteran's Preference hearing the Hearing Officer and the panel are to determine whether the employer has met the burden of establishing by substantial evidence that it acted reasonably when it discharged the veteran. The Minnesota Supreme Court has interpreted this standard as equivalent to the "just cause" standard, which governs the discharge of public employees under the Public Employment Relations Act, Minnesota Statute Chapter 179A. *AFSCME Council 96 v. Arrowhead Regional Corrections Board*, 356 N.W.2d 295, 297-8 (Minn.1984). Minnesota law establishes that: suspension with pay pending a discharge hearing is permissible. *Kurtz v. City of Apple Valley*, 290 N.W. 2d 171, 173 (Minn.1980).

Issue Presented

Whether there is just cause for the discharge of the Veteran from his employment? If not, what is the proper remedy?

Findings of Fact:

1. Maire is employed by Independent School District #191 as a master plumber. Transcript (T.) at 38.
2. Maire is a veteran of the Air Force who had active duty service from 1974 to 1976. T. at 122.
3. Maire was honorably discharged from the Air Force in 1976. T. at 122.
4. Maire began work with the School District on April 23, 1984, and is currently on leave with full pay and benefits. School District Exhibit (S. D. Ex.) 26.
5. Maire was notified on July 22, 2010, that he was proposed for discharge. S. D. Ex. 1.
6. Maire's job classification, as termed on the district seniority list, is "district-wide custodian master plumber". Veteran's Exhibit (V. Ex.) 3
7. In that position Maire performs plumbing duties in all the district buildings and is required to drive a vehicle from building to building. T. at 38. The position is a one-person job and does not regularly require two people. T. at 227. When it does, the second person is usually from the building being serviced. T. at 43.
8. During the last six years Maire has been on numerous leaves of absence for a variety of medical reasons, some of which occurred because of injuries on duty. Some of these leaves have been extensive. S. D. 16, V. Ex. 8, 9, 10, 11, and 12.
9. Maire was assessed a 14% disability for a May 1, 1989, for an on- the- job injury. V. Ex. 10.
10. Maire's returns to duty have included periods where the School District provided light duty for him, the most recent of which was the summer of 2010. S. D. Ex. 14, 15, and 16.
11. During this 2010 assignment Maire did no plumbing tasks but primarily dusted and cleaned lockers. T. at 135.

12. Maire's most recent light duty was ended when Maire's doctor released him to full duty on July 28, 2010. V. Ex. 12.
13. Maire's record of employment with the School District includes performance problems.
14. On June 31, 1987, Maire was sent a letter indicating that, in checking driving records of employees who regularly operate a school vehicle, several violations were noted which the School District's insurance carrier objected to. Maire was told that "any new driving violations may result in disciplinary action". S.D. Ex. 24.
15. On April 12, 1999, Maire was issued a written reprimand for smoking on school property. He was observed smoking a cigarette that he made no attempt to extinguish. He was warned about further discipline if further failure to observe School District policy occurred. Maire refused to sign the Written Reprimand because it "[s]hould be oral". SD. Ex. 23.
16. Maire describes his first alcohol driving offence as occurring twenty-five years but claims the June 31, 1987, letter relates to a different driving offense. T. at 169.
17. On March 31, 2006, Maire was issued a Letter of Reprimand for smoking, a violation of the school district policy prohibiting smoking on all school property, including school vans. He was warned at that time that "failure to follow the above directives will result in discipline which could include suspension, demotion or discharge". S. D. Ex. 22.
18. On April 10, 2006, Maire was sent a letter placing him on paid administrative leave. In that letter, Executive Director of Human Resources Grissom states that Maire notified the Benefits Coordinator Kippley that he was drinking excessively, sometimes early into the morning. The letter states, "As a result, it is highly likely that you are under the influence when you come to work in the morning. This violates Board policy. Since you are a plumber and drive a district vehicle during the course of your day, your actions pose a significant danger to yourself and

others. There is also potential for significant liability to the District.” Maire was ordered to be evaluated for chemical dependency and, if prescribed, to undergo a chemical dependency rehabilitation program. Maire was warned that his employment with the School District was seriously at risk if he failed to address the problem. S. D. Ex. 25.

19. Following his 2006 arrest, Maire was evaluated for chemical dependency and attended a two week alcohol treatment program, provided under the School District health and hospitalization plan. These accommodations were provided by the School District based on Maire’s admission to Kippley that he was drinking excessively, but without the knowledge that the driving violations had occurred. S. D. 25.

20. The May 5, 2006 Sentencing Order states that Maire “[m]ay have CD Eval and Fee waived based on Private Eval.” S. D. Ex. 6.

21. As a result of his arrest and conviction and unknown to the School District, Maire’s driver’s license was revoked from April 16, 2006 to July 14, 2006. S. D. 3 and 4.

22. Maire was on School District paid leave of absence or Family and Medical Leave during most of that time until May 18, 2006. From May 18, 2006 to June 7, 2006, Maire worked part-time. S. D. Ex. 16.

23. Maire returned to full time work on June 8, 2006. S. D. Ex. 16.

24. It is unclear whether Maire drove while his license was suspended.

25. The School District’s insurance company flagged the 2006 license revocation in the fall of 2008. S. D. Ex. 19.

26. In a December 16, 2008, letter Maire was flagged by the School District’s insurance carrier, for having a Department of Motor Vehicle violation record for “open bottle, careless driving and implied consent” in April, 2006. These

violations surfaced following a routine Motor Vehicle Registration check on November 6, 2008 by the insurance carrier. S. D. Ex. 20..

27. There is no record that Maire informed the school district of his open bottle, careless driving and implied consent violations in 2006. T. at 53.
28. The School District agreed to accommodate Maire. The accommodation included no personal or home use of the school district vehicle, operation of the vehicle from only 6:00 A.M. until 6:00 P.M., locked school district vehicle with keys stowed in the supervisor's office, and reasonable suspicion testing. S. D. Ex. 18.
29. The School District's insurance company covered Maire under those circumstances.
30. On June 1, 2009, Maire was observed smoking in the School District van and circling the School District doing so. S. D. Ex. 21.
31. The School District prohibits smoking on School District property and in School District vehicles. S. D. Ex. 21.
32. On June 30, 2009, Maire was issued a Letter of Written Reprimand" for violation of the School District's smoking policy. Maire's circling of the School District in the School District van was considered an aggravation by the School District. The reprimand included a reference to the consequences of failure to adhere to the directives in the letter which included discharge. S. D. Ex. 21.
33. On February 12, 2010, Maire was arrested for operating a motor vehicle under the influence of alcohol and a violation of the open bottle law. S. D. Ex. 7.
34. The police report of the arrest states that Maire was found in his vehicle with the front right tires in a snowdrift and the back left tires on ice, attempting to accelerate, but unable to free the vehicle from snow and ice. S. D. Ex. 7.
35. The arresting officer stated he observed a twelve pack of beer in the front seat of the vehicle. Maire is described in the report as admitting he had consumed "a

couple of drinks” that evening before driving and further admitting, “I’m drunk”. Maire was described as stating he wanted to exit his vehicle at which time he stood up and nearly fell over due to his intoxication. S. D. Ex. 7.

36. The arresting officer stated in the police report that he did not ask Maire to perform field sobriety tests because he felt it would not be safe for Maire. After he was placed under arrest, the arresting officer stated that Maire lost his balance getting into the squad car and hit his face on the door frame and needed assistance from several officers during the booking process because of his unsteady balance. S. D. Ex. 7.

37. Maire’s responded to the School District’s proposed discharge by saying he is part of a federal challenge to the Intoxilizer which is still pending. T. at 142.

38. The School District’s insurance broker has stated that, regardless of the outcome of the appeal, Maire is not an acceptable driver and the insurance company will not cover Maire. S. D. Ex. 18.

39. The open bottle charge has not been appealed by Maire. S. D. Ex. 10.

40. Maire’s driver’s license was reinstated on August 10, 2010.. At the time of hearing on April 29, 2011, Maire had a driver’s license. S. D. Ex. 13.

41. Maire claims that the most recent charge of driving while under the influence of alcohol was due in large part to the medication he was taking, particularly two medications (Soma and Diazepam) that a different doctor put him on. He states that he should not have been on those two medications and that he has been taken off them. T. at 138 and V. Ex. 13.

42. Maire offered his prescription profile for January 27, 2010 to February 27, 2010, that included Lexapo, Provigil, Pantoprazole, Oxycodone, Clonazepam (Benzodiazepine), Carisoprodol (Soma), Diazepam (Benzodiazepine), and Oxycodone. V. Ex. 13.

43. Maire testified that he had been told not to drink alcohol. T. at 165.

44. Maire testified that he was drinking on February 12, 2010, while taking medication. T. at 162.
45. Maire testified that he continues to drink. T. at 165.
46. When asked about his own personal car insurance, Maire indicated he had no trouble obtaining it and, then, later, admitted he doesn't own a vehicle so having insurance is not necessary. T. at 180-181.
47. The School District's insurance carrier and the underwriter have determined that even if Maire wins his appeal, he is still not an acceptable driver because of his overall driving record. T. at 115 and 120 and S. D. Ex. 18.
48. The insurance broker and the underwriter maintain that if the School District knowingly allows Maire to drive a school vehicle with the unacceptable driving record, the School District risks negligently endangering School District students, employees (including Maire) and the public. The School District may be liable for punitive damages if Maire harms himself or others. S. D. Ex. 18.
49. Maire is a safety risk for himself as well as the employees and students at the School District and the public and the School District's primary concern is for the safety of students and staff. T. at 82.
50. Maire's claims that he can do his plumbing job for the School District with or without a driver's license if he can work with someone, as he has done while on light duty. T. at 127-128.
51. The light duty job or the two-person job Maire describes is not the district-wide custodian master plumber position he holds. T. at 38, 43, 71, and 72.

Discussion

The just cause analysis involves two types of situations: one, where the employee engages in a single incident of very serious misconduct; two, where the employee engages in misconduct over a period of time for which the employee has been progressively disciplined. The just cause analysis requires that the employer act

reasonably and provide the employee with due process. The due process includes timely, consistent, and non-discriminatory discipline in accordance with the employer's rules. There is a full and fair investigation of the misconduct. After the investigation and determination of penalty, the discipline may be adjusted. As in arbitration, the neutral hearing officer and panel members may modify the employer's discipline if extenuating circumstances exist. *In the Matter of Schrader*, 394 N.W. 2d 796 (Minn. 1986).

In this case, we have both situations. We have a very serious incident occurring on February 12, 2010. That incident was preceded by other incidents of misconduct in 1987, 1999, 2006 and 2009. Three of these incidents adversely affected Maire's driving record. Maire was progressively disciplined and warned for all of the incidents. These actions of the employee over an extended period of time fit the parameters outlined in *Schrader*.

The progressive discipline was meted out in a timely manner as soon as the School District became aware of the misconduct. The discipline was consistent, non-discriminatory and based on objective evidence. The rules of the School District were clear, published and reiterated in the disciplinary notices. Maire was warned in writing, repeatedly, that his job was at risk.

Normally, an employee's long work record, if good, would be an extenuating circumstance warranting a lesser penalty than discharge or removal. Maire has a long work record. The twenty-seven year work record has been besmirched by twenty-four years of misconduct and discipline, starting three years after Maire commenced employment. There are no extenuating circumstances that allow a lesser penalty.

The reasonableness of a policy terminating bus drivers for off duty driving under the influence of alcohol was upheld in *ATC/VANCOM of California, LP and Service Employees Int. Union Local 707, AFL-CIO/CLC*, 111 LA 244, 98-2 , Section.5348 (McKay Arb. 1998). The rationale is that the employee loses the right to drive for a period of time. Then, the conviction of driving under the influence impacts the employer's ability to obtain insurance. Next, it undermines the public confidence in the employer. Finally, there is potential liability for a subsequent accident in which the employee is involved. In such a case, the employer knew or should have known that the employee was an unsafe driver, but kept the employee on the payroll anyway.

The School District has similar problems with Maire. He has lost his right to drive several times during his employment with the School District. His convictions impact the School District's ability to obtain insurance for him. The School District's insurance broker, company and underwriter consider Maire an unacceptable driver and will not insure him. The confidence of the public in the School District would be undermined with the continued employment of a person breaking the laws of Minnesota as well as the rules of the School District. Letting an unsafe driver operate a School District vehicle places Maire and others in danger and the School District liable for the damages.

Incompetence may include a lack of license or certification, apart from an employee's ability to perform a job satisfactorily. *State ex rel Indep. School Dist., No. 625 v. Roettger*, 1988 WL 113746 (Minn. Ct. App. Nov. 1, 1988) (unpublished). In this case the employee's failure to obtain a master plumber license and certificate of competency within the specified time period rendered him incompetent to fulfill the duties of the plumber foreman position. The court found his termination did not violate the Veterans Preference Act.

In this case, Maire needs both a plumber's license and a driver's license to perform the job of district-wide custodian master plumber. Maire's master plumbers license is intact and not an issue here. His license to drive is. Although Maire may have currently regained his license through an appeal related to the Intoxillizer used in the arrest, the 2010 open bottle violation, still exists. And, more importantly, the damage has been done to his driving record in 2010 and before, in the eyes of the insurance broker, company, and the underwriter. They will not insure him and the School District will not employ him to drive throughout the district to perform plumbing jobs. without the insurance. He has rendered himself incompetent to hold the job by virtue of his actions.

During Maire's long employment period, the School District offered accommodations, primarily light duty, leaves of absence, and health and hospitalization benefits for nearly a quarter of a century. Maire continues his old behavior despite the many efforts of the School District to remediate him. Unfortunately, this old behavior is not consistent with the job. Maire's testimony in the hearing indicates a dismal and perhaps even non-existent inclination to remedy his behavior or even be honest about it. At the time of the hearing he admitted continuing to drink and recently has combined the drinking with taking strong medications. Maire has displayed no willingness to change. Endangering his own life is one thing. Endangering students, staff and the public is quite another.

Conclusions of Law

1. Any of the foregoing findings of fact more properly termed conclusion of law are hereby incorporated as conclusions of law. Any of the following conclusions of law that are more properly termed findings of fact are hereby incorporated as findings of fact.

2. The undersigned hearing officer and panel have authority to consider and decide this matter pursuant to Minnesota Statutes, Section 197.46.
3. The parties have met the procedural and notice requirements of Minnesota Statutes, Section 197.46.
4. Maire has been repeatedly progressively disciplined for misconduct since 1987, three years after he began work for the district.
5. Maire's misconduct has been for on-duty actions and off-duty actions affecting his work since 1987.
6. Maire has been repeatedly accommodated by the School District for a variety of reasons since 1987.
7. The most recent accommodation suggested by Maire, which is the same accommodation provided by the School District in 2008, is no longer reasonable because the School District's insurer will not cover Maire.
8. Employing two people to do one job is not a reasonable accommodation for the School District.
9. Maire has a long tenure with the School District which might be an extenuating circumstance if the employment record was good. However, Maire's employment's misconduct over twenty-four out of twenty-seven years of employment with the School District provides no extenuating circumstances that warrant leniency.
10. The neutral hearing officer and the panel can modify the removal only if they find extenuating circumstances, supported by substantial evidence in the record.
11. No such extenuating circumstances exist.
12. Maire has exhibited no intention to remedy his behavior despite many chances and remedying his behavior at this late date would not remedy his driving record.
13. Maire's past driving record makes him uninsurable by the School District.

- 14.** Continuing Maire's employment as a district-wide custodian plumber which includes driving a School District vehicle poses an unreasonable risk to the safety and health of Maire, the School District students, staff and the public. The record contains substantial and convincing evidence that discharge is warranted.
- 15.** The School District's discharge of Maire meets the just cause requirements because it provided Maire with due process including investigating the misconduct, having clear policies and procedures, imposing many years of progressive discipline, providing Maire numerous accommodations, and giving Maire multiple opportunities over many years to remediate.
- 16.** The School District's action in removing Maire for incompetence and misconduct is reasonable and for just cause. There are no extenuating circumstances supported by substantial evidence that constitute a basis to modify the School District's actions. The "School District has met its burden of establishing by substantial evidence that it acted reasonably when it discharged Maire. The discharge is upheld.

Dated this 11th day of July, 2011.

Carol Berg O'Toole, Neutral Hearing Officer

_____ I concur with the decision of the neutral hearing officer

_____ I disagree with the decision of the neutral hearing officer

Dated this 11th day of July, 2011. _____

Keith Niemi, Veteran's Panel Member

_____ I concur with the decision of the neutral hearing officer

_____ I disagree with the decision of the neutral hearing officer

Dated this 11th day of July, 2011. _____

Lisa Rider, School District's Panel Member