

**IN THE MATTER OF VETERANS PREFERENCE HEARING**

**Eric P. Leigland**

**and**

**Minnesota Department of Corrections**

**Opinion and Award  
BMS Case No. 11-VP-1279**

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**PANEL MEMBERS**

Joseph L. Daly, Chair  
Sandy Pagel, chosen by Veteran Eric P. Leigland  
The Honorable Eric Lipman, chosen by Minnesota Department of Corrections

**APPEARANCES**

On behalf of Eric P. Leigland:  
John D. Baker, Esq.  
Baker Williams  
Maplewood, MN

On behalf of Minnesota Department of Corrections:  
Brent D. Wartner, Esq.  
Krista Fink, Esq.  
St. Paul, MN

**INTRODUCTION**

In December of 2009, Eric P. Leigland was on military leave from his job as a Corrections Officer with the Minnesota Department of Corrections and serving on active duty with the Army National Guard.

Early in the morning of December 19, 2009, after an evening of drinking, an intoxicated Mr. Leigland went to the home of his former girlfriend. There he saw her with another man.

Enraged, Mr. Leigland smashed the window and severed the brake lines of the automobile owned by the woman's male companion. Wielding a hammer, Leigland then entered the home by breaking a glass pane on an outside door. Rousting the pair from sleep, a "totally wasted" Mr. Leigland, with a hammer in his hand, threatened the occupants of the home. Advised that the police had been called and were rushing to the scene, Mr. Leigland turned to flee. On his way out of the home, however, Mr. Leigland threw the hammer that he was holding into a

picture window above his male victim, showering the other man with shards of broken glass. Still later, Mr. Leigland telephoned his former girlfriend, and urged her to falsely report to police that the incident was a domestic dispute between her and her male companion.

Mr. Leigland was arrested later that same day and charged with five felonies – including Armed Burglary, felony Intimidation of a Witness, False Imprisonment, Aggravated Battery, felony Criminal Damage to Property.

On February 8, 2010, Mr. Leigland returned from military leave to work at the Minnesota Corrections Facility - Rush City. He did not notify his supervisor, or others at the Department of Corrections, of his misconduct seven weeks earlier or the pending criminal proceedings.

On December 3, 2010, officials of the Minnesota Department of Corrections learned of Mr. Leigland's misconduct while on military leave.

On December 16, 2010, the Department of Corrections terminated Mr. Leigland's employment as a Corrections Officer.

### **JURISDICTION**

In accordance with the Veterans Preference Act, Minn. Stat. §§197.447-197.481, Department of Corrections Policy 103.020; Minnesota Department of Corrections Policy 103.020 "Veterans Preference Commission Procedures G; and the jurisdiction of the Bureau of Mediation Services, this matter was submitted to a Veterans Preference Hearing Panel which followed the Minnesota Uniform Arbitration Act, Minn. Stat. Ch 572B. The panel consisted of Joseph L. Daly, Chair, Sandy Pagel and Eric L. Lipman. Sworn testimony was received by the panel on October 11, 2011 at the Office of Administrative Hearings, St. Paul, Minnesota. Post-hearing briefs were filed by the parties on October 20, 2011. The decision was rendered by the panel on December 11, 2011.

### **ISSUE AT IMPASSE**

The parties agree that the issue is: Did the employer have just cause to terminate Eric P. Leigland from his position as a Corrections Officer 3 at the Minnesota Correctional Facility – Rush City, a state prison operated by the Minnesota Department of Corrections?

**POTENTIALLY APPLICABLE CONTRACT AND POLICY PROVISIONS**

**Collective Bargaining Agreement**

Article 16 – Discipline and Discharge

Section 1. Purpose Disciplinary action may be imposed upon an employee only upon just cause.

Section 5. Discharge The appointing authority shall not discharge any permanent employee without just cause.

**Minnesota Department of Corrections Policies**

**Policy 103.020: Veterans Preference Commission**

POLICY: The department establishes a veterans preference commission, which follows the procedures outlined below to provide eligible veterans the right to a hearing to contest termination from state employment.

PROCEDURES:

G. Legal services contacts the Bureau of Mediation Services and obtains a list of seven neutral arbitrators. Legal services contacts the veteran and provides the list of potential arbitrators. The veteran must determine whether he/she elects to appear before a single neutral arbitrator selected from the list by elimination.

H. If the parties do not agree to appear before a single arbitrator, the veteran and the department each select an additional member for the three-person panel, which also includes the neutral arbitrator selected jointly by the parties....

J. The arbitrator or panel determines whether the veteran was removed for incompetency or misconduct. The courts have interpreted the arbitrator’s or panel’s authority to include a determination of whether the employer acted reasonably and whether extenuating circumstances exist justifying modification of the disciplinary sanction. The employer bears the burden of proof to show that it acted reasonably in light of the circumstances, including factors such as the veteran’s conduct, the effect upon the workplace and work environment, and the veteran’s competency and fitness for the job.

**Policy 103.0141: Employees Who Are the Subject of Criminal Investigation(s); Arrest(s) and/or Conviction(s)**

POLICY: Employees who are the subject of a criminal investigation, order for protection, arrested incarcerated, charged and/or convicted of a petty misdemeanor (when the charge is

related to drugs, drug paraphernalia, or guns) misdemeanor, gross misdemeanor or felony may be subject to discipline up to and including discharge based upon criteria outlined below.

**PROCEDURES:**

- A. An employee must immediately notify the appointing authority/designee if the employee is the subject of an order for protection, criminal investigation, petty misdemeanor (when the charge is related to drugs, drug paraphernalia, or guns), misdemeanor, gross misdemeanor or felony investigation, charge, arrest, and/or conviction, or is incarcerated for any reason. Notification may be a direct telephone call or written communication to the appointing authority/designee and must include the formal charge, date, time, jurisdiction of the alleged occurrence, arresting agency and any other relevant information. If an employee does not provide immediate notification to the appointing authority or designee, the employee is subject to discipline up to and including discharge pursuant to collective bargaining agreement.
  
- C The employee will follow-up initial notification with written notification on or before the employees next scheduled shift to the appointing authority/designee and human resource management by providing the following information:
  - 1. Employee name
  - 2. Employee identification (ID) number
  - 3. Date of written notification
  - 4. Description of issue including:
    - a) Date and time
    - b) What occurred, including if the allegations involved attempted/actual physical violence or threats of physical violence.
    - c) Action type: investigation, arrest, charge, conviction, other
    - d) Title of issue/offense: DWI, DUI, theft, other
    - e) Jurisdiction and arresting agency of occurrence or conviction
    - f) Offense level, if applicable
    - g) Drivers license suspension/revocation, if applicable
  - 5. Date of initial notification to appointing authority/.designee

6. Name and title of person initially notified and method of notification

**Policy 103.220 Title: Personal Conduct of Employees**

Policy: All Department employees, when on and off duty, will conduct themselves in a manner that will not bring discredit or criticism to the Department. Common sense, good judgment, consistency and the Department's mission will be the guiding principles for the expected employee standard of conduct. Workplace violence is strictly prohibited.

Procedures:

- F. Employees are expected to treat fellow employees, offenders and the public with respect and courtesy at all times. Employees must not exhibit behavior that demonstrates prejudice or that holds any person, group or organization up to ridicule or contempt. This includes, but is not limited to:
  1. Employees must develop and demonstrate conflict competency skills, including: recognizing, understanding and acknowledging conflict; respecting the point of view of others, bringing conflict to the attention of the appropriate individual and working to resolve conflict when directly involved, in order to manage and response to conflicts and disagreements in a positive and constructive manner to minimize negative impact, in keeping with the Integrated Conflict Management System Policy 103.220.
- G. Employees must avoid associations or dealings with persons who are known to be involved in criminal activities. Employees must immediately provide written notification to the appointing authority of any knowledge of criminal activity that has the potential to threaten public safety, the safety of staff.
- H. Employees must comply with all laws of the United States and of any state and local jurisdiction. This includes, but is not limited to:
  1. Any employee who is the subject of an order for protection, misdemeanor, gross misdemeanor, or felony investigation, charge, arrest and/or conviction or is incarcerated for any reason must immediately notify the appointing

authority/designee in accordance with Policy 103.0141, “Employees Who Are the Subject of Criminal Investigation(s), Arrest(s) or Convictions(s).”

2. Any employee who is required to carry firearm will report any possible loss of eligibility in accordance with Policies 103.130, Firearms Eligibility: and “Employees Who Are the Subject of Criminal Investigation(s), Arrest(s) or Conviction(s).”

## **FINDINGS OF FACT**

1. Eric Leigland has been employed as a Correctional Officer since 1995, and has worked at Minnesota Correctional Facility – Rush City since its opening in December, 1999.
2. On December 19, 2009, while Mr. Leigland was on military leave with the National Guard in the state of Wisconsin, he broke into his former girlfriend’s home, in the middle of the night, by breaking the door glass with a hammer. Mr. Leigland, by his own admission at the Veterans Preference Hearing, was “totally wasted” from drinking alcohol. He came into the home wielding a hammer, breaking glass and threatening his former girlfriend and a male visitor she had at her home. Mr. Leigland smashed the car windows and cut the brake lines of the male’s car. He fled the home after being informed that the police were on the way. As he left, he threw the hammer into a picture window shattering the glass. After the incident, it was reported to the police that Mr. Leigland contacted the former girlfriend and attempted to have her report the incident as a domestic dispute not involving him.
3. Mr. Leigland was arrested later the same evening and charged with five felonies – including Armed Burglary, felony Intimidation of a Witness, False Imprisonment, Aggravated Battery, felony Criminal Damage to Property.
4. Mr. Leigland returned to work at the Rush City Department of Corrections from military leave on February 8, 2010. He did not notify his supervisor or anyone else at the Department of Corrections of his misconduct or the pending criminal proceedings.

5. In 2010, Mr. Leigland was classified as a Correctional Officer 3 working in Industry Security. He was also a member of the facilities Special Operations Group (SOG) as a Marksmen Observer.
6. Between February 8 and November 29, 2010, Mr. Leigland did not reveal his involvement in the criminal proceedings.
7. On November 29, 2010 the Wisconsin criminal charges were amended to: misdemeanor Criminal Trespass; misdemeanor Intimidation of a Witness; felony False Imprisonment; misdemeanor Disorderly Conduct; misdemeanor Use of a Dangerous Weapon; misdemeanor Criminal Damage to Property; and a second misdemeanor Criminal Damage to Property.
8. On December 1, 2010 Mr. Leigland plead guilty to those reduced charges. The felony False Imprisonment was deferred. This charge is still pending until December 1, 2013.
9. The Wisconsin prosecutor and court allowed Mr. Leigland to plead guilty to five criminal misdemeanor counts. The prosecutor and the judge in Wisconsin permitted the plea deal because of Mr. Leigland's good military and work record. Mr. Leigland also plead "guilty/no contest" to felony False Imprisonment. The Wisconsin court has held open the felony false Imprisonment count for three years, giving Mr. Leigland a chance to try to successfully complete probation under the conditions placed on him. Mr. Leigland served a jail sentence in Monroe County from January 2-30, 2010.
10. Because of the underlying facts of his criminal offenses, Mr. Leigland is required to register as a Predatory Offender in Minnesota for a period of ten years.
11. On December 3, 2010, Bruce Reiser, Warden of the Minnesota Correctional Facility – Rush City, first learned of Mr. Leigland's criminal convictions from an Electronic Mail Message. The message was written to Warden Reiser by Warden Reiser's supervisor,

Assistant Commissioner Terry Carlson. Mr. Carlson learned of the convictions after Wisconsin authorities sought to transfer supervision of Mr. Leigland's probation term to Minnesota authorities under the Interstate Compact for Adult Offender Supervision. *See generally*, Minn. Stat. § 243.1605.

12. On December 6, 2010, Mr. Leigland sent an Electronic Mail Message to Human Resources disclosing his criminal convictions. He did not reference the felony False Imprisonment charge or details about the incident. The e-mail stated:

From: Leigland, Eric (DOC)  
Sent: Monday, December 6, 2010 1:33 PM  
To: Suloff, Stephanie S (DOC); Lombard, Kenneth (doc)  
Subject: Need to inform you

Unfortunately I need to inform you that legal action was taken against me in WI, on Dec. 1st It was regarding an incident that took place last year, 12-19-09 in Monroe county WI, when I was on Military Leave. My final court was last wed (I was on Vac), Dec 1<sup>st</sup>.

My Charges were Misdemeanors that include:

- criminal [trespass] to dwelling
- intimidate a [witness]
- disorderly conduct
- [criminal] damage to property x2

I have 3 years of probation and 28 days to serve in the Monroe Co jail. My dates for jail are Jan. 2 – 30, 2011. The military might be putting me on orders for that month being as I have work release approved. If not I will have to request a leave of absence.

Please let me know what else I need to provide.

Thank You,  
Sgt Eric Leigland

*Department of Corrections Exhibit 13-1*

13. Mr. Leigland was given the opportunity to participate in an investigation by the Department of Corrections into his misconduct. On December 7, 2010, Mr. Leigland was interviewed by Department officials. During the interview, Mr. Leigland said that after the incident and his arrest it did not cross his mind to notify the Department because he was on military leave of absence from the Department at that time. He stated that he did consider notifying the Department when he came back to work at the facility, but he had hired an attorney and thought that the charges would be dropped. He acknowledged he did not fully follow the Department policy regarding notification. When asked how his conduct reflected on the Department, Mr. Leigland stated that because he was arrested while on military duty, no one would have known what he did. Yet, for those who did know about his civilian career, he conceded that it did not look favorable.
14. At the Veterans Preference Hearing, Mr. Leigland asserted that he did not report to the Department of Corrections while he was on military leave. He notified his then-supervisors in the National Guard. Mr. Leigland also testified that he was not trying to hide anything when he returned to his work at the Department of Corrections in February, 2010. He testified that he was advised by his attorney that it was possible that some or all of these matters would be dropped.
15. By letter dated December 16, 2010, Warden Reiser informed Mr. Leigland that “you are terminated in your employment with the Department of Corrections.” The letter stated:

Dear Mr. Leigland:

This letter constitutes notice that effective immediately, you are terminated from your employment with the Department of Corrections. This action is being taken because of your violation of the Department of Corrections policies 103.220 “Personal Conduct of Employees,” 103.0141 “Employees Who Are the Subject of Criminal Investigation(s),

Arrest(s) and/or Convictions(s)” and for your omission of the facts during both the investigation and in disclosing your final convictions to the Appointing Authority.

On December 7 2010, you met with Scott Yozamp, Corrections Program Director and Lt. Darryl Goebel to discuss this matter. You were provided a Tennessen warning and offered the opportunity for union representation. You elected to representation which was provided by AFSCME representative Sandy Pagel.

During the course of your interview you were informed of the reason(s) for the interview and asked about the allegations against you.

The investigation into this matter revealed that allegation(s) against you were substantiated.

You are entitled to request an opportunity to hear an explanation of the evidence against you, and to present your side of the story. If you desire such a meeting it will be immediately following the receipt of this letter in the Wardens Conference Room. You may also have union representation at the meeting if you so desire. If you want union representation, it will be provided for you.

If you are a veteran who has been honorably discharged, you will need to notify Teri Hable as soon as possible as you are entitled to a Veteran’s Preference Hearing if you so choose. (See additional information attached) Please contact Ms. Hable at 651-603-2226 or via email at [Teri.Hable@state.mn.us](mailto:Teri.Hable@state.mn.us), if this applies to you.

If you wish to appeal this termination, you may do so pursuant to the grievance procedure specified in your collective bargaining agreement.

Sincerely  
/s/ Bruce Reiser

16. By letter dated February 9, 2011 Mr. Leigland informed the Department of Corrections “I’m exercising my right to a Veterans Preference hearing, in lieu of my termination on 16 December 2010.”
17. The Department of Corrections contends:
  - A. The Department asserts that it acted reasonably in terminating Mr. Leigland for incompetency or misconduct. Mr. Leigland committed flagrant violations of law

and willfully concealed his criminal status from the Department for an extended period of time. His off-duty conduct is pertinent to the employer's disciplinary authority when the employee's behavior harms the employer's reputation, renders the employee unable to perform his duties or leads to the refusal or reluctance of other employees to work with him or her. The behavior of Mr. Leigland undermines his ability to function effectively in his job. It is such a concern that there is more than sufficient evidence to support dismissal due to the great potential for harm. Specifically, Mr. Leigland arrived at the home of his ex-girlfriend in the middle of the night, broke down the door with a hammer, terrorized and threatened the occupants, smashed windows and tampered with the brake-line on one victim's vehicle and only fled after he was informed that the police had been called. The gravity of the circumstances is sufficient to warrant termination of any Correctional Officer. Correctional Officers must model good behavior for offenders and uphold and enforce the rules of conduct in order to better equip offenders for successful reintegration into the community. Mr. Leigland's criminal conduct has an immense impact on his ability to do his job in light of perception of other officers; and offenders who may have engaged in similar acts. If Mr. Leigland's conduct does not result in termination, contends the Department of Corrections, it is difficult to imagine what criminal conduct would be sufficient.

- B. The Department contends that Mr. Leigland's actions put the facility at risk of liability while he continued to use a firearm in his position as SOG Marksmen Observer. Minnesota statutes prohibit possession of a firearm for persons both charged with and convicted of a crime of violence and placed in pre-trial diversion programs by the court. Minn. Stat. §624.713, subd.1(2)(7). Furthermore, persons charged with a crime punishable by imprisonment for a term exceeding one year are prohibited from receiving or transporting any pistol or semi-automatic military-assault weapon. Minn. Stat. §624.713, subd. 1(a). Even a Correctional Officer not on the SOG must be able to respond to emergencies with use of a firearm, which is why all officers are expected to be firearm eligible. Mr.

Leigland's conduct created problems for the facility in managing staff morale. When the matter came to light in December 2010, there was disruption and dissention among staff based on the incident, contends the Warden.

C. The Department argues that no extenuating circumstances exist that would justify modification of the disciplinary sanction. While Mr. Leigland cites his prior stellar work history, excellent military record and tours of service in Iraq and Afghanistan, and alcohol addiction for which he has received treatment, the Department's ability to trust and rely upon Mr. Leigland is gone. Mr. Leigland demonstrated over an entire year his intent to minimize and conceal his behavior. He even acknowledges an attempt to manipulate the term of his military service to coincide with his jail time as further means to keep the information from the Department. He remains subject to probation conditions on his criminal charge, has an active record of felony False Imprisonment, and must register as a predatory offender for ten years. There Department asserts that there are no extenuating circumstances that would justify a modification of the disciplinary penalty to anything less than termination.

D. The Department contends that its standards and policies are reasonable.

18. Mr. Leigland contends:

A. Mr. Leigland asserts that he has an exemplary fifteen (15) year work history with the Department of Corrections. He has no other disciplinary matters in his record.

B. Mr. Leigland notes that he was on military leave from the Department of Corrections at the time of the incident. He immediately notified his army reserve unit commander of the charges against him.

C. Although his unfamiliarity with the Department of Corrections policy under criminal investigation does not excuse his failure to abide by the policies, Mr.

Leigland contends that an electronic mail message notifying the Department of Corrections Human Resources Unit of the charges shows that he no intention of deceiving his employer.

- D. Mr. Leigland was not discharged from the military as a result of the incident, rather he was allowed to serve until his honorable retirement after twenty-six years of service. He has spent several tours of duty in combat in Iraq and Afghanistan which clearly has had a dramatic effect on him.
- E. Mr. Leigland asserts that termination of his employment is unduly harsh and unfair in light of the fact that other Department employees have maintained their jobs, notwithstanding misdemeanor convictions and ongoing probation.
- F. Mr. Leigland contends that his primary duties as a Correction Officer do not require that he carry a firearm. He asserts that the Department has failed to show Mr. Leigland's ability to perform his duties.
- G. Mr. Leigland asserts that his co-workers regard him as competent and trustworthy.
- H. The Department of Corrections conceded that although the information was readily available, it made no attempt to verify whether Mr. Leigland was actually found guilty of the initial felony charges. Mr. Leigland argues that this is a violation of his rights to due process.
- I. Mr. Leigland asserts that the Department of Corrections failed to consider the extenuating circumstances, specifically, the influence of alcohol on Mr. Leigland's actions and his voluntary and successful completion of alcohol treatment. He asserts that these factors were important to the decision-making of both officials of the Army National Guard and the Wisconsin courts.

## **DECISION AND RATIONALE**

In Minnesota a public employer may not remove an honorably discharged veteran from employment except for “incompetency or misconduct shown after a hearing.” Veterans Preference Act, Minn. Stat. §197.46 (2010). There is no significant difference between the “misconduct” required by Minn. Stat. § 197.46 and the “just cause” standard governing termination under other public employment statutes. *See, e.g. Ekstedt Village v. New Hope*, 193 N. W. 2<sup>nd</sup> 821 (Minn. 1972) and *Leininger v. City of Bloomington*, 299 N.W. 2<sup>d</sup> 723, 726 (Minn. 1980). Under this standard, the “cause” must be of a substantial nature, directly affect the rights and interests of the public, and related to a manner in which the employee performs his duties. *Leininger* at 726.

The “just cause” standard first adopted in *Enterprise Wire Co.*, 46 Labor Arbitration Awards 359 (Arbitrator Daughtery, 1966) requires that 1) the employee had foreknowledge of possible consequences of misconduct, 2) the rule was reasonably related to proper business goals and reasonable employee expectations, 3) efforts to discover whether the misconduct occurred were reasonable, 4) a fair and objective investigation was conducted, 5) the discipline was based on a sufficient level of evidence, 6) the rules and penalties were applied in an even-handed manner, and 7) the penalties are consistent with the offense and the employee’s past work history.

A negative impact on public perception is “not sufficient to satisfy the laws requirements that the cause for discharge related to the way the employee performs duties.” *Minneapolis v. Moe*. 420 N.W. 2<sup>d</sup> 367, 370 (Minn. Ct. App. 1990). The employer bears the burden of proving that it acted reasonably in terminating the veteran, and there are no extenuating circumstances justifying a modification to the disciplinary action. *Matter of Schrader*, 394 N.W. 2<sup>d</sup> at 801-02.

The key questions the panel must address are:

(1) Given Mr. Leigland’s work and military record, is termination of his employment a proportionate response to the gravity of the misconduct?

(2) Was the employer's treatment of Mr. Leigland even-handed, consistent and non-discriminatory?

### Proportionality

Until the events of December 9, 2010, Mr. Leigland had a solid fifteen year work record at the Department of Corrections. He had never been disciplined. Even now, he has the respect of many of his fellow employees. He had moved up to the position of Correctional Officer 3, Sergeant. He was appointed to the Special Operations Group – a highly respected group of officers within the Department of Corrections. His military record was equally distinguished. Mr. Leigland served tours of combat duty in Iraq and Afghanistan. He operated competently and honorably in high stress jobs. He addressed his alcohol problems. Mr. Leigland's counsel urged the panel to consider these extenuating circumstances and to lower the penalty of termination because it is "unduly harsh" in light of his "high stress, high operational tempo jobs." *Post Hearing Brief of Leigland* at 6.

It is the decision of the majority of the panel, however, that while there are mitigating circumstances and extenuating circumstances, the hearing record does not justify a modification of the termination to a lesser level of discipline. Mr. Leigland's criminal misconduct strikes at the core of the Department's purpose and mission – that Corrections Officers only use their powers to detain others for just and lawful purposes. Mr. Leigland's disabling of another man's automobile brakes, forced entry into a home at night, drunken rampage, threats of violence, unlawful imprisonment and suborning of false police reports, disqualify him from exercising the authority to detain and direct others. The department carried its burden of proof to show it acted reasonably in light of all the circumstances, including factors such as the veteran's conduct, the effect upon the workplace and work environment, and the veteran's competency and fitness for the job.

The staff at the Minnesota Corrections Facility-Rush City is on notice that they are to conduct themselves in accordance with the law, while on duty and outside of the facility, and that termination may follow serious misconduct. If Mr. Leigland's misconduct does not result in termination, it is difficult to imagine what criminal conduct would be sufficient.

Further, Mr. Leigland's failure to report any information regarding his contact with law enforcement, his arrest, jail time, probation, transfer of supervision to Minnesota, and the numerous and serious criminal convictions, violate important Department policies.

Mr. Leigland had foreknowledge of the possible consequences of his actions. The rules are reasonably related to the proper goals of the Department of Corrections. The investigation was proper and done in a fair and objective manner. The discipline of termination was based on a sufficient and level of evidence. Even applying a "clear and convincing" standard of proof to this case in light of Mr. Leigland's work record and military service, the department has carried its burden and has showed that it acted reasonably in light of all the circumstances in this case.

Termination is reasonable under these circumstances. The employer acted reasonably upon proof.

#### Even-Handed/Non-Discrimination

Mr. Leigland asserts that the Department did not treat him in an even-handed and non-discriminatory manner. Two cases were instructive to the panel.

In one case, decided on December 15, 2003, a Department of Corrections Officer was placed on thirty day disciplinary suspension. The findings in the investigation of that case concluded that the officer, while at a Department of Corrections SORT training at Camp Ripley, had acted inappropriately. The officer grabbed the breasts of a female colleague; twisted her nipple; attempted to press the victim into the men's restroom; approached this same female throughout the night; threatened physical harm against another officer's life; and had to be physically restrained from "going after" a superior officer. This officer admitted he had been intoxicated at the time of his misconduct. In that case, the Department of Corrections gave a "last chance warning" and permitted the officer to continue employment.

The second case involved an arbitration decision. In the state of *Minnesota and American Federation of State/County/Municipal Employees, Council 6 [James Hill grievance]*, BMS Case Number 10-PA-1594, December 10, 2009, Arbitrator Richard A. Bean reinstated the grievant to his former employment without back pay or fringe benefits for eight months and further ordered that he be reinstated to a position that did not require the use or possession of firearms until his civil right were fully restored. In the *Hill* case the grievant was off-duty, intoxicated and made terroristic threats to his live-in girlfriend and her daughter. The grievant had a gun collection containing sixteen weapons, including a hand gun. While he was intoxicated, he told his girlfriend and her daughter that he was "...going to find the pistol on blow their heads off." She called police who arrested Mr. Hill.

Mr. Hill entered Hazelton where he completed a twenty-eight day chemical dependency treatment program. He pled guilty to two felony terroristic threat charges on January 4, 2010. Following a pre-sentence investigation, the district court judge sentenced Hill with a downward departure from the Minnesota Sentencing guidelines. The judge determined that Mr. Hill was guilty of a gross misdemeanor. The judge set out his reasoning for the downward departure "...intoxication, although not a defense certainly does go to the issue of intent and the issue of transitory anger." "Now, in the state of Minnesota transitory anger is not a defense to terrorist threats. However, it is certainly relevant and appropriate for this court to take consideration in analyzing whether there are substantial and compelling meditating circumstances." "The threats which were clear where made at a time when Mr. Hill never had procession of a weapon, there is no indication that Mr. Hill ever did anything to go get other weapons which he had, so the threat was not connected to the gun..." "It also appears to me that it is appropriate for me in consideration of this matter and in consideration of mitigating factors, victim input." "I think it is just as appropriate for me to consider the victim input in this case when the victim is asking for leniency under the circumstances based on her experience, her knowledge and her relationship with Mr. Hill." "And the plea was not assault in the second degree, but to a terrorist threat. So under these circumstances and based on reduced ability for intent, transitory anger, I find that there are substantial and compelling mitigating reasons to depart from the presumed guideline sentence." "Therefore, I'm going to proceed to a sentence of a gross misdemeanor...."

Mr. Leigland's case is far more severe than either of those described above. Mr. Leigland had, and used, a dangerous weapon in his crimes. He went beyond mere threats, descending into very violent action, placing his victims in fear for their lives. Even when crediting Mr. Leigland's alcoholism, stress from combat tours in Iraq and Afghanistan, and the "high stress, high operational tempo jobs in situations" both in the military and the Department of Corrections, the actions of Mr. Leigland on December 19, 2009 far outweigh whatever extenuating circumstances may exist.

Mr. Leigland was not disciplined in a discriminatory manner.

#### Resignation before Termination

At the initial conference that the Panel held to decide this case, the Panel discussed the possibility of allowing Mr. Leigland to resign from his job before the termination went into effect. There was discussion and initial agreement that the Panel hold that Mr. Leigland could have 48 hours to resign from the time the Opinion and Award in this matter is released. Initially the Panel agreed. However, as the First Draft was being written or had just been just been completed, two of the Panel members, upon reflection, determined that such a remedy was inappropriate for two key reasons. First, the behavior of Mr. Leigland was so extreme that despite whatever extenuating circumstances exist i.e. his excellent work and military record, his successful alcohol treatment, permitting resignation is not justified. Second, once it was determined that the extenuating/mitigating circumstances do not justify a lesser penalty, the majority felt that permitting resignation should be left to management.

The Dissenting Opinion argues that when the agreement to allow resignation before the termination became effective was made by the Panel after the first conference, the Panel members no longer have a right to change this remedy. However, the case is not ultimately decided until at least a majority of the Panel members sign the finalized decision and issue it. Until then, the "decision making process" continues. When the first draft was written two of the Panel members reconsidered and decided that the "resignation before termination" was an inappropriate remedy. The Dissent argues that once the Panel said "yes" to "resignation before termination" at the first conference, then the Panel is foreclosed from fashioning a more

appropriate remedy. The Dissent does not accept that the case is in the process of being decided, up to and until it is signed by a majority of the Panel and sent to the parties. There were multiple e-mails, a further conference and multiple drafts. This case was actually and ultimately decided on the date the majority of the Panel members signed the Opinion and Award and sent it. Only then is the Panel “functus officio”, that is, it has no further authority to alter, adjust, correct, change or amend the decision. In other words the jurisdiction of the Panel “ends when the final award is issued.” Elkouri & Elkouri, **How Arbitration Works 6<sup>th</sup> Edition** 325 (BNA 2003). “[T]he doctrine [of functus officio] is said to deter rash and hasty decision making.” **Id.** at 326. Until the final award is issued, the Opinion and Award can be changed with the vote of the majority. The Panel renders what, hopefully, will be the final word on the matter. That requires deliberate, careful discussion and reflection. If any Panel member, upon further reflection, realizes a conclusion is incorrect, it is the nature of a three-person-decision-making process, such as this, to correct mistakes before the final decision is issued. Only then is the Panel “functus officio”. The Panel has continuing jurisdiction to correct any errors, misjudgments or mistakes until the final Opinion and Award is signed by the majority and issued to the parties. Only then it is “functus officio”.

**CONCLUSION**

Based upon the reasons stated above, it is held that Mr. Leigland’s violations of Policy 103.0141 and Policy 103.220 provide “just cause” for his termination. Further, it is held that while there are some extenuating circumstances, they do not justify a modification of the disciplinary action imposed by the Department of Corrections. The Department has carried its burden of proof and acted reasonably in light of the circumstances in this case. The termination of Mr. Eric P. Leigland by the Department of Corrections – Rush City is upheld.

December 14, 2011

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Joseph L. Daly  
Chair

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Eric L. Lipman

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Sandy Pagel - Issued a Dissenting Opinion

I, Sandy Pagel, disagree with the Conclusion of the decision regarding BMS Case No. 11-VP-1279

Specifically I disagree with the part of the Conclusion which states "...it is held that while there are some extenuating circumstances, they do not justify a modification of the disciplinary action imposed by the Department of Corrections." I believe the extenuating circumstances do justify a modification of the disciplinary action imposed by the Department of Corrections by allowing Mr. Leigland to resign, for the following reasons:

1. In my opinion the process was inconsistent and did not allow Mr. Leigland a fair Veterans Hearing; instead it resembled an arbitration process.
  - a. After the hearing Mr. Daly made a statement that Mr. Leigland also had the right to arbitrate the case if he did not agree with the decision of the 3 person panel; that was not correct information and Mr. Daly did later confirm that it was either a Veterans Hearing or arbitration.
  - b. There was objection by Mr. Leiglands attorney that Mr. Lipman being selected by the State because he felt that it was a conflict if Mr. Leigland wanted to appeal being Mr. Lipman is an administrative law judge for Office of Administrative Hearings. I also agree with Mr. Baker that it is not appropriate to have the judge on the panel that could possibly hear the case at the appeal level.
  - c. I was informed by Mr. Daly that the 3 person panel would hear the testimony, then we would make a decision and as chair person he would be responsible to write the decision. Instead, after hearing the testimony I was informed that both parties would be writing post briefs and then we would have a conference call to make a decision.
  - d. During conference call on 11-1-11, after much discussion, the panel agreed that the facts in the case did show just cause, but due to other facts presented the panel members agreed it was appropriate to allow Mr. Leigland to resign within 48 hrs of the written decision. As chair person, Mr. Daly was responsible to write the decision and stated he would send a copy once completed.
  - e. Draft #1 was sent by email on 11/21/11. After reading the initial draft, I sent an email to Mr. Daly asking about the resignation part and Mr. Daly agreed that he forgot to include that and he would add a paragraph.
  - f. Received email 11/23/11 from Mr. Lipman stating that he reconsidered the appropriateness of granting Mr. Leigland a 48-hour grace period and would not be casting his vote for that portion. Mr. Lipmans rationale had to do with payouts of vacation and sick balances. Information Mr. Lipman provided was not accurate and Mr. Lipman later agreed it did not apply in this case.
  - g. Received an email on 11/23/11 from Mr. Daly stating he has changed his mind and agrees with Judge Lipman and he can not put such language into the decision.
  - h. I questioned how a decision can be changed so there was a conference call on 11/29/11 and I was informed by Mr. Daly and Mr. Lipman that they could no longer agree with allowing Mr. Leigland to resign and I could write a dissenting opinion. Mr. Daly added

Information regarding the change of decision on the document: **Resignation before Termination.**

Extenuating circumstances also include the following:

1. Prior to serving in combat in Iraq and Afghanistan Mr. Leigland had an exemplary career with the Minnesota Department of Corrections and no prior disciplinary actions. The potential effect of numerous combat tours was acknowledged by the military when they allowed Mr. Leigland to retire with honors from the military. The military stood by Mr. Leigland knowing all the issues soldiers face when exposed to combat.
2. The influence of alcohol on Mr. Leigland's actions and his voluntary and successful completion of alcohol treatment. These factors were important to the decision-making of both officials of the Army National Guard and the Wisconsin courts and should have been considered here.

In closing, I feel that the process failed in giving Mr. Leigland a fair hearing due to inconsistencies of the process. Mr. Daly wrote his report in a matter resembling an arbitrator's decision instead of just writing the written report of the original decision of the 3 person panel allowing Mr. Leigland to resign. The process resembles arbitration instead of a veterans hearing. I believe that if the panel had not consisted of an arbitrator and a Judge, the outcome would have been different.

Sincerely,



Sandy Page

Chosen by Veteran Eric P. Leigland

December 14, 2011