

IN RE VETERANS HEARING BETWEEN:

METROPOLITAN COUNCIL

and

RODNEY PIERRE - VETERAN

**DECISION AND AWARD OF VETERAN'S PREFERENCE PANEL
PURSUANT TO M.S. 197.46**

JEFFREY W. JACOBS

NEUTRAL HEARING OFFICER

August 24, 2016

Metropolitan Council

and

DECISION AND AWARD OF VETERAN'S PREFERENCE PANEL
Rodney Pierre Veteran's Preference hearing pursuant to M.S. 197.46

Rodney Pierre

APPEARANCES:

FOR THE EMPLOYER:

Sydnee Woods, Attorney for the Employer
Jovita Oghumah
Gloria Hunt
Dennis Johnson

FOR THE VETERAN:

Rodney Pierre, Veteran, appeared pro se,

PRELIMINARY STATEMENT

The hearing was held on August 22, 2016 at the Metro Transit Ruter Garage, 6845 Shingle Creek Parkway, Brooklyn Center, MN. The veteran appeared pro se and was advised of his right to retain counsel during the pendency of this matter and voluntarily waived that right. Ms. Sydnee Woods, attorney for the Metropolitan Council, appeared on behalf of the employer. The parties waived post hearing briefs.

STATUTORY JURISDICTION

The matter arose under the Minnesota Veteran's Preference Act, M.S. 197.46. Mr. Pierre is an honorably discharged U.S. military veteran and properly requested a hearing pursuant to statute.

ISSUE PRESENTED

Whether the removal/disqualification for employment of the veteran, Rodney Pierre, was proper within the meaning of Minn. Stat. 197.46? If not what shall the remedy be?

PARTIES' POSITIONS

EMPLOYER'S POSITION

The employer took the position that the veteran is not competent to perform the duties of a Metro Transit bus operator and that the removal from his position is justified. In support of this position, the employer made the following contentions:

1. The employer asserted that the veteran is not able to perform the essential features of his driving duties and that under the Minnesota Veteran's Preference Act is thus incompetent for duty.

2. The veteran was hired as a part time driver in June 2016 and was required to have a CDL in order to drive for the employer.

3. The employer noted that it provided training for the veteran to gain his CDL through several licensed trainers. The training included both classroom and behind the wheel training and lasted approximately three weeks. Training was for a minimum of 8 hours, although the veteran was provided more than that. The veteran was also afforded written tests during the training that should have given him the requisite knowledge and skills to pass the CDL exam. See Tabs 4 and 5 of the employer's exhibits showing the number of hours of training afforded the veteran.

4. The employer's clear policy allows a driver to take the test but if they fail to re-take it with additional training. If the driver fails a second time though they are disqualified from employment and terminated. See Tab 3 of the employer's exhibits at page 5. That policy clearly states that "If you fail a performance test, you may retake the test one time only. Additional instruction will be offered. If you fail the retake, you will be disqualified."

5. The employer noted that there is no dispute that the veteran failed his first test, even failing the pre-trip portion of that test but was allowed to continue to the driving portion. He failed that test however and was shown to have a lack of control of the bus. The road test on the streets was then discontinued due to the failure to maintain control of the bus. See testimony of Gloria Hunt, who conducted the first test on June 13, 2016.

6. The veteran was encouraged to re-take the CDL test and was provided additional training on June 14, 2016 through Mr. Scott Lindquist for approximately 4 additional hours. He re-took the test on June 15, 2016, this time with a different examiner.

7. The employer noted that even though the veteran passed the pre-trip test, See Employer Tab 7, during the second examination for the CDL, he failed the driving portion of the test due to too many deductions and errors. See Tab 7 and testimony of Mr. Dennis Johnson, who conducted the second test on June 15, 2016.

8. Pursuant to the employer clear policy, failure to pass after a second test disqualifies the veteran from employment. See above. There is no discretion in this regard and the veteran was given a Notice of Disqualification on June 15, 2016. The employer also noted that the veteran was afforded an exit interview as well, and acknowledged that he had not passed either test. See Tab 9 of the Employer's exhibits and testimony of Mr. Oghumah.

9. The veteran was given a Leaving Service Form and his employment was terminated. The employer seeks an award upholding the veteran's removal from office herein.

VETERAN'S POSITION

The veteran took the position that he is a competent bus operator and he should not have been disqualified from employment. In support of this position the veteran made the following contentions:

1. The veteran noted that he has experience driving a bus for a major transit authority, i.e. the Chicago CTA. He asserted that he understands the rigors of driving a commercial bus and can control the bus.

2. The veteran further asserted that during the pre-trip for the first test he did know where many of the operational portions of the bus were and simply pointed them out to the examiner but did not point to them specifically – only to the general place where they could be found within the various portions of the bus. He was not asked specifically where they were, only to point out generally where they were.

3. The veteran further noted that there were three, not two, other student drivers on the training trips he took and that the employer's documents are in error in that regard. He suggested that he may thus not have received the full measure of the training he was supposed to get during those trips since there were more than 2 other students who also received training that day.

4. The veteran acknowledged that he did not pass the first test but that he was not given a full road test as the employer's documents suggest since the test was terminated after the alley dock portion of the test, which occurred within the employer's parking lot.

5. The veteran further asserted that he passed the pre-trip part of the second test and disputed several of the findings the second examiner made that resulted in his failure of the test. Specifically, the veteran claimed that he believed that he did leave sufficient space on the highway and that he operated the bus safely. He noted that cars sometimes cut in front of busses and that shortens the space between the cars and that time is needed to adjust to the event. He further noted that he also did not agree with the deduction for going too slowly as he left the garage. He was driving through neighborhoods where the speed limit is 35 MPH and went about 26-27 MPH and should not have been deducted points for that.

6. The veteran also pointed to tab 2 of the Employer's exhibits and noted that he was never late, never absent for 21 days, that there were no incidents of him not appearing as scheduled nor accidents of any kind during the time he was in training. He pointed to that document and asserted that he was told that these were the events that would lead to his disqualification yet none of those events ever occurred.

7. He asserted that he is able to drive a bus and that the deductions that occurred during the second test should not be counted against him for the reasons set forth above.

The veteran seeks reinstatement to his position with the employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW & MEMORANDUM

1. Mr. Rodney Pierre, veteran, is an honorably discharged U.S. Military Veteran having served and been honorably discharged from the United States Air Force. See, Tab 12.

2. The veteran was hired as a bus operator in June 2016 and was required to successfully complete his CDL licensure in order to drive a bus for the employer.

3. The veteran was given training to obtain his Minnesota CDL during the month of June 2016. The evidence showed that the documents indicating the amount of training he received were accurate and that even if there had been more than two other students along for the in-service/behind the wheel training, the veteran was afforded the requisite number of hours of training.

4. The veteran was given a first test to obtain the CDL on June 13, 2016. The record revealed that he failed both the pre-trip and the road portions of this test. The remainder of the road test was ended due to a finding by the examiner that the veteran lacked control of the bus. See Tab 6.

5. The veteran was given additional training on June 14, 2016 and was allowed to re-take the CDL test.

6. The veteran failed the second test on June 15, 2016. The veteran passed the pre-trip portion of that test but the overall evidence supported the examiner's conclusion that the veteran failed due to too many deductions stemming from the road test and operation of the bus. There was no evidence of discrimination or error by the examiner nor was there any evidence of arbitrary or capricious action or conclusions by the examiner during either of the tests for the CDL.

7. The employer's policy set forth in Tab 3 was given to the veteran and showed that failure of the second CDL test disqualifies the student/employee from employment as set forth above.

8. The veteran failed both the first and second tests for his CDL and was thus appropriately disqualified from employment as a bus driver for the employer pursuant to the employer's policy.

9. The veteran was properly served with Notice of Disqualification of Veteran's Rights on June 15, 2016. See Tab 10.

10. The veteran was afforded his rights under the Minnesota Veterans Preference Act, Minn. Stat. 197.46 including his right to a hearing pursuant to that statute.

11. The veteran timely and appropriately requested a hearing pursuant to the Minnesota Veteran's Preference Act.

12. The veteran was advised of the right to retain counsel but waived that right and did not appear with an attorney.

13. The employer's action was appropriate pursuant to its policy regarding two failed tests herein.

CONCLUSIONS OF LAW

1. The veteran herein is entitled to a hearing pursuant to the Veteran's Preference Act, 197.46. The employer gave proper Notice of Intent to remove the veteran from office pursuant to the Act. The veteran properly requested a hearing pursuant to that notice.

2. The employer established by a preponderance of the evidence that the veteran was appropriately disqualified from employment due to failing his required testing as set forth herein and that there exist grounds for removal of the veteran from his position as a bus operator for Metro Transit.

MEMORANDUM

The veteran in this matter is an honorably discharged U.S. military veteran having served in the U.S. Air Force. He was hired as a bus driver in June 2016. At the time he did not possess a Minnesota CDL and was afforded training by the employer to get it. There was no dispute that a CDL is a prerequisite to driving a bus for the employer.

The evidence supported the employer's claim that the veteran was given appropriate training both in terms of the time spent with him and the substance of what was taught. He asserted that he may not have been given the full measure of the behind the wheel training due to there being more than 2 other student drivers along for some of the in-service rides.

The evidence though supported the employer's claim that even if there had been 3 students along, the record reflect accurately that the veteran received 9 hours of training, See Employer Tab 4, which showed that he received 9 hours. A minimum of 8 hours of such training is required but he received nine hours of CDL driving training hours.

The evidence showed that he failed both the pre-trip and the road test portion of the first test on June 13, 2016. Ms. Hunt testified credibly that she knew he had failed the pre-trip portions of the test but allowed him to continue so as not to disturb him, knowing that he could re-take the test. The veteran however failed the road portion of the test due to too many deductions in the operation of the bus and failure of the alley dock portion. This resulted in a finding that he lacked control of the bus and the remainder of the road test was terminated. See Employer Tab 6.

He was given additional training for 4 more hours on June 14, 2016 and allowed to re-take the test on June 15, 2016.

The veteran passed the pre-trip portion of the test this time but failed the road portion due to too many deductions. See Employer Tab 7. There was no evidence of any bias or arbitrary or capricious actions by the examiner. Mr. Johnson testified credibly that the veteran failed to operate the bus in a manner that demonstrated the requisite ability to safely operate the bus and failed him on the road portion of that second test.

According to the employer's policy, set forth at Tab 3, failure of the second test results in disqualification. Mr. Oghumah testified that he had no choice at that point but to disqualify the veteran from employment.

As noted herein, the veteran acknowledged that he had tried his best to pass the tests but that he had not done so. He was given appropriate notice of his rights under the Minnesota Veteran's preference act and exercised those rights to a hearing.

On this record, it was shown that the veteran failed to pass the CDL tests required of a bus operator and was thus appropriately disqualified from employment under the Veteran's Preference Act due to incompetency.

AWARD

The veteran was properly removed from office pursuant to M.S. 197.46.

Dated: August 24, 2016

Metropolitan Council and Rodney Pierre Veteran's Preference AWARD.doc

Jeffrey W. Jacobs, Neutral Panel member