

IN RE ARBITRATION BETWEEN:

METROPOLITAN COUNCIL

and

TERRY FULFORD - VETERAN

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

JEFFREY W. JACOBS

ARBITRATOR

January 12, 2016

Metropolitan Council

and

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

Terry Fulford

APPEARANCES:

FOR THE EMPLOYER:

Sydnee Woods, Attorney for the Employer
Mickey Young, Assistant Transit Manager

FOR THE VETERAN:

Veteran appeared pro se,

PRELIMINARY STATEMENT

The hearing was held on January 11, 2016 at the Metro Transit Training Center at 519 10th Ave. N. Minneapolis, MN. The veteran appeared pro se and was advised of his right to retain counsel at several points during the pendency of this matter and voluntarily waived that right. The parties waived post-hearing briefs.

STATUTORY JURISDICTION

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

ISSUE PRESENTED

Whether the removal of the veteran, Terry Fulford, was for incompetency 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 due to the loss of his Commercial Driver's License, CDL, and the failure to get the license reinstated within 30 days pursuant to Metro Transit Policy and that the removal for incompetence is justified. In support of this position, the employer made the following contentions:

1. The employer asserted that the veteran was hired as a driver for metro transit in April 2013. He was made aware at that time of the need to maintain a valid CDL in order to operate a bus for Metro Transit. He was also made aware at the time of his employment with Metro Transit of the Bus Operator's Guide and relevant policies regarding attendance and the other rules and regulations applicable to Metro Transit employees in general and to drivers in particular.

2. The employer also noted that bulletins regarding the need to maintain a valid CDL as a condition of employment as a bus operator and of the consequences of failing to do so are in place at the bus garages and that the veteran knew of these rules. See Employer Exhibits 3, 4 and 5.

3. The employer asserted that the veteran's attendance when he was employed as a cleaner and maintenance person prior to being hired as a driver was poor. See Employer Exhibit 14. The veteran had accumulated sufficient points under the employer's attendance policies to receive a Final Record of Warning and was within 1 point of termination under that policy.

4. Due to these underlying factors, the veteran was not eligible for re-employment within metro Transit upon his discharge as a driver. See Employer Exhibit 29, which provides that "an acceptable work record under this policy/procedure requires that an employee must not be in a warning status or under a Last Chance Agreement." The veteran was in a warning status and thus ineligible for a transfer upon his removal as a bus driver.

5. On August 6, 2015, Assistant Transit Manager, ATM, Young was made aware that the veteran had been arrested for a DUI offense the night before and that he would lose his CDL and his Minnesota driving privileges as a result. See Employer Exhibit 15, which provides that the veteran's right to drive was revoked as of August 13, 2015.

6. ATM Young checked with the State of Minnesota to determine the status of the veteran's driver's license and found that as of September 11, 2015 it was still in a revoked status and that it had not been reinstated.

7. The veteran was given appropriate notice of his Loudermill rights and was specifically informed of the need to present a valid CDL by September 11, 2015 or he would have to be terminated due to the loss of a valid CDL.

8. The veteran acknowledged at the investigative hearing that he had lost his CDL due to the DUI charge and further acknowledged his poor attendance record. See Employer Exhibit 18. Based on the loss of the CDL and the failure to obtain its reinstatement, the employer had no choice but to issue the Notice of Removal dated September 11, 2015, Employer Exhibit 20. The employer also noted that once there is a loss of a CDL, it places the employee in the same status as a new applicant and requires that there be no same or similar offenses for a period of 10 years. See Employer Exhibit 4.

9. The employer noted throughout the hearing that the veteran was terminated for the loss of his CDL and that the attendance issue was not the main reason for the discharge from employment. The attendance issue became only tangentially involved because the veteran was ineligible for transfer to another non-driving position due to the prior warning status.

The employer seeks an award upholding the removal from office of the veteran herein.

VETERAN'S POSITION

The veteran took the position that he is competent to perform the duties and is therefore not incompetent within the meaning of the Veteran's Preference Act, 197.46. In support of this position the veteran made the following contentions:

1. The veteran asserted that he did his best to maintain good attendance but due to a serious medical condition was unable to perform his duties. He further attempted to qualify for FMLA leave due to the medical issues but was unable to do so due to lack of hours and other factors necessary to qualify for FMLA leave. He maintained that without those serious health issues he would not be in this predicament and would be able to find employment elsewhere in the Metro transit system.

2. The veteran recognized that his attendance was poor and that he had accumulated sufficient points to warrant a final notice of warning pursuant to the employer's policy on attendance.

3. The veteran further recognized that due to an insufficient number of hours he did not qualify for FMLA leave.

4. The veteran acknowledged that he has been trying to get his CDL reinstated but that it hasn't been reinstated as of the date of the hearing.

5. The veteran maintained that he liked his job and that he did a good job both as a driver and as a bus maintenance person. There were no complaints about his work performance at any time during the course of his employment with the employer. He went to work every day even with his health problems and never complained about the pain or anything related to his work. He asserted that he is a good and loyal employee who simply wants to return to work for Metro Transit.

The veteran seeks reinstatement to his position with the employer and for the expungement of his record of all discipline herein.

FINDINGS OF FACT, CONCLUSIONS OF LAW & MEMORANDUM

1. Mr. Terry Fulford, veteran, is an honorably discharged U.S. Military Veteran having served and been honorably discharged from the United States Navy. He was hired by the employer in April 2013. He had been employed in the Maintenance Department but due to excessive absences was disqualified from employment there but not terminated from employment, on October 14, 2014. See Employer Exhibit 10. He also worked as a bus operator until the removal referenced herein.

2. One of the conditions of employment as a bus operator is that the employee must have and maintain a valid CDL.

3. The evidence showed that if the employee loses the CDL due to a DWI/DUI offense that person is ineligible to drive a Metro Transit bus for a period of 10 years. See Employer Exhibit 4. The veteran asserted that he was unaware of that 10-year rule but the evidence showed that this is a policy of the employer.

4. The evidence also showed that the veteran was made aware of the rules and regulations, including the need to maintain a valid CDL and of the consequences of the loss of his CDL due to DUI charges. The veteran did not claim at any time in this matter that he was unaware of these requirements or that they were not applicable to him.

5. The veteran was charged with a DWI/DUI offense on or about August 5, 2015. He appeared at the employer's facility and met with ATM Young on August 6, 2015 and informed him of the loss of the CDL due to the driving offense the night before. The veteran was sent home that day.

6. ATM Young commenced an investigation and determined that the veteran had indeed lost his CDL. See Employer Exhibit 15, which states that as of 8/13/2015 the veteran cannot drive in Minnesota. See also Employer exhibit 17.

7. ATM Young then sent a memo dated August 13, 2015 to the veteran outlining the requirement to reinstate his CDL or he would be considered unable to perform his duties and result in disqualification/termination from employment. That memo further advised the veteran of an investigation meeting set for August 18, 2015.

8. The parties held a meeting on August 18, 2015 and the veteran appeared with a union representative. The notes of this meeting revealed that the veteran acknowledged the loss of the CDL and of the consequences of failing to appear with a valid CDL within 30 days of its loss.

9. The evidence showed that as of September 11, 2015 – the 30th day- the veteran's CDL was still in revoked status. See Employer Exhibit 19.

10. The veteran was served with a letter dated September 11, 2015 advising him of a subsequent meeting to be held on September 14, 2015. This was the Loudermill hearing.

11. The veteran and his union representative appeared at this meeting as well and the veteran again acknowledged that he did not have a valid CDL at that time.

12. The veteran was properly served with a Notice of Discharge dated September 21, 2015. Employer Exhibit 23. He properly requested a hearing under Minn. Stat. 197.46. See Employer Exhibit 27.

13. The veteran was also aware of the requirement of regular attendance in employment and of the consequences of the failure to do so.

14. The evidence showed that the veteran had accumulated a sufficient number of absences, resulting in “points” under the attendance policy to warrant a Final Record of Warning. The evidence showed that there were no grievances filed or challenges to the validity of the points assigned to the veteran’s record. The record thus established that the points were validly assigned and were part of the veteran’s overall record.

15. The evidence further showed that he was thus ineligible for a transfer upon the loss of his position as a bus operator within Metro Transit due to his being in a warning status as of the time he was served with the Notice of removal herein. He was thus unable to return to his former employment in the Maintenance Department.

16. The veteran was properly served with notice of intent to remove from office on September 21, 2015 along with a Notice of his Veteran’s Preference rights under M. S. 197.46. See Employer Exhibit 23 and 24.

17. The veteran timely and appropriately requested a hearing pursuant to the Minnesota Veteran’s Preference Act. See Employer Exhibit 27. The veteran was advised of the right to retain counsel but waived that right. The veteran was further advised of the right to call witnesses or submit documents but did not call any witnesses on his behalf nor submit any documents at the hearing.

18. The evidence showed that under the terms of the employer's policy, the loss of a valid CDL disqualifies an employee from operating a bus for Metro Transit. Further, the evidence established that the veteran was unable to transfer to a different position due to the accumulated attendance points and the warning status in which he found himself at the time of the removal due to the loss of the CDL.

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 is incompetent within the meaning of the Veteran's Preference Act and that there exists grounds for removal of the veteran from his position with Metro Transit.

MEMORANDUM

The veteran in this matter is an honorably discharged U.S. military veteran having served in the U.S. Navy. He had worked for the employer in the Maintenance Department and the evidence showed that his attendance was a major problem while worked in that capacity. He had accumulated enough points under the attendance policy to warrant a Final Notice of Warning. He was at 12 points – one short of the 13 points that would have resulted in his termination under the attendance policy. The veteran claimed that this was due to a neck issue and surgery.

The evidence in this matter showed that the veteran applied for FMLA but did not qualify for those benefits. There was no challenge raised to the employer's position in this regard. Also, as noted above, there was no challenge to the number of points assigned under the attendance policy or to the policy of disqualification discussed above.

The veteran lost his CDL due to a DUI/DWI charge on or about August 5 or 6, 2015. He presented on August 6, 2015 and informed his supervisors of this and was sent home. Upon investigation it was discovered that he indeed had lost his CDL and was given 30 days within which to get it reinstated. He did not do so.

At this juncture the evidence showed that his removal was valid. There was no choice in this regard. A valid CDL is a prerequisite and a condition of employment as a driver and the hearing officer has no discretion to alter that requirement.

The attendance issue, while somewhat tangential to his discussion, comes into play in the context of whether the veteran had the option to apply for some other position. That discussion is not strictly relevant or material to the question under the Veteran's Preference Act – there was no question that without a CDL the veteran was thus “incompetent” within the meaning of the statute to continue employment as a bus operator. As discussed above, the veteran was ineligible for transfer due to the unfortunate situation in which he found himself as the result of the absences and the insufficient number of hours to qualify for FMLA.

As discussed above, there was little choice in this matter. The discharge must be upheld and the veteran removed from office.

AWARD

The veteran was properly removed for incompetency pursuant to M.S. 197.46.

Dated: January 12, 2016

Jeffrey W. Jacobs, Veteran's hearing Officer

Metropolitan Council and Terry Fulford AWARD.doc