

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Gerald Edward Scherbel v.
School District 833, South Washington
County

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Beverly Jones Heydinger at 9:30 a.m. on January 12, 2001 at the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, Minnesota 55401. The record closed on January 26, 2001, following the submission of memoranda from the parties.

Mark T. Porter, Director of Legal Services, South Washington County Schools, 7362 East Point Douglas Road S., Cottage Grove, MN 55016-3025, appeared on behalf of School District 833, South Washington County. Gerald Edward Scherbel, 6216 Birchwood Road, Woodbury, MN 55125, appeared on his own behalf, and was accompanied by Lou Poganski, union representative.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Veterans Affairs will make the final decision after reviewing the administrative record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions and Recommendation. Under Minnesota law^[1], the Commissioner may not make his final decision until after the parties have had access to this report for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact the office of Jeffrey Olson, Commissioner, Minnesota Department of Veterans Affairs, Veterans Service Building, St. Paul, Minnesota 55155-2079, to find out how to file exceptions or present argument.

STATEMENT OF ISSUE

1. Was Gerald E. Scherbel demoted from his position as a bus driver for the school district?
2. If so, was Mr. Scherbel denied a hearing prior to the demotion?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Gerald E. Scherbel is an honorably discharged veteran. He has been employed as a school bus driver by the South Washington County Schools, Independent School District #833 ("School District"), since 1980.

2. Prior to the beginning of each school year, the School District develops the school bus routes, and the bus drivers can bid on the routes. Routes are awarded based on seniority. Bus drivers earn an hourly wage.

3. Once the School District sets the route and the time estimated to drive it, that is the minimum time that the driver will be paid for the route. Routes are subject to change throughout the year if students are added or dropped from the route, and the estimated time to complete the route may be changed as well. ^[2]

4. If, because of route changes, a driver's route time drops below six hours a day, the driver can bid on another route. ^[3]

5. In addition to driving their normal routes, bus drivers may also bid on field trips, sports trips and other occasional school bus trips if the extra trip does not conflict with the driver's regularly scheduled route. ^[4]

6. All bus drivers for the district hold the same rank and grade. Their compensation is based on an hourly rate. The driver moves up through steps and receives increases to the hourly rate for longevity. Drivers are paid their hourly rate times the number of hours assigned to their regular route, plus overtime and extra trips driven. ^[5]

7. In the fall of 1999, Mr. Scherbel bid on and was assigned to route "Spec.8PM". This was an afternoon route transporting special education students. At the beginning of the year, Mr. Scherbel was given a route sheet that showed he would check in at 12:25 p.m., drive his route, return and check out by 3:55 p.m., for a total time of 3.5 hours. ^[6] As shown in Exhibit 5, this route included picking up four students at Highland Park High School in St. Paul, and delivering them to their homes. The last of these students (Student #2^[7]) lived within a half mile of the School District's bus garage in Cottage Grove. After dropping off Student #2, the driver had to drive to Stillwater High School to pick up Student #1 and return that student to Woodbury. After dropping off Student #1, the driver returned to the bus garage in Cottage Grove.

8. Mr. Scherbel notified Ms. Emily White, who scheduled the routes for the district, that he could not pick up students at Highland Park High School, drop them off, and still make it to Stillwater High School by 3:05 p.m., that school's dismissal time. He also informed her that completion of his route took 4 hours, rather than 3.5 hours. ^[8]

9. When a driver's route cannot be completed in the allotted time, he must sign a sheet showing the extended time and submit a voucher for the additional time to the transportation office. The driver is paid for the additional time. ^[9]

10.If the driver completes the route time in less time than the posted route time, the driver is paid for the posted route time.^[10]

11.On approximately October 1, 1999, Mr. Scherbel received a revised route posting, changing the route time to 4 hours, except on Friday, when one child did not require transportation. Also, the driver was notified that Student #2, the student who lived near the bus garage, had been taken off the route.^[11]

12.On October 11, 1999, Mr. Scherbel was notified that because Student #2 was no longer transported, his route time had been decreased to 3.7 hours.^[12]

13.In November, Student #2 returned to the route, but Student #1 was placed on hold and did not require transportation. On November 9, the route time was changed to 3 hours, Monday through Thursday, and 2 hours on Friday.^[13] Without Student #1, Mr. Scherbel completed his route when he dropped off Student #2, close to the bus garage in Cottage Grove, and returned to the garage at approximately 3:05, the same time that Stillwater High School was dismissed.

14.Around February, 2000, Student #1 required transportation again, about three days a week. Because Stillwater High School dismissed at 3:05, and the school district and parents did not want the student to wait approximately one-half hour to be transported, Student #1 was not added back to Mr. Scherbel's route. Instead, the School District contracted with an area transportation company to transport the student.^[14]

15.On November 11, 1999, Mr. Scherbel filed a grievance with Keith Paulson, the School District's Director of Transportation, about the posting and assignment of bus routes.^[15] At the time, Mr. Scherbel was the president of the Association of School Bus Drivers, District 833. A subsequent complaint was filed with Dan Hoke, Superintendent of the School District, on November 23, 1999.^[16] Joe Darwin filed another grievance with Mr. Paulson on behalf of Mr. Scherbel on October 12, 2000.^[17]

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Veterans Affairs and the Administrative Law Judge have jurisdiction in this matter.^[18]

2. The Department of Veterans Affairs gave proper notice of this hearing and has complied with all relevant substantive and procedural requirements of statute.

3. Mr. Scherbel is an honorably discharged "veteran" within the meaning of the Minnesota Veterans Preference Act ("VPA" or "Act"),^[19] and he is entitled to all of the protections and benefits of that Act.

4. The school district's personnel practices are subject to the provisions of the Act.^[20]

5. A public employer must give a veteran notice of the right to a hearing to establish incompetency or misconduct prior to any action to remove the veteran from his or her position.^[21] The employer must notify the veteran in writing of its intent to discharge, and inform the veteran of his or her right to a hearing within sixty (60) days of receipt of this notice.^[22]

6. Under Minnesota case law, a veteran is considered "removed" from his or her position, within the meaning of the VPA, if the public employer constructively discharges the veteran or, put another way, if the employer's action has the effect of taking away the veteran's employment.^[23]

7. Mr. Scherbel was not demoted. There was no change in his rank, grade, position or rate of compensation.

8. Mr. Scherbel was not constructively discharged or demoted from his position as a bus driver within the meaning of the VPA. Consequently, the School District did not violate the VPA by failing to give Mr. Scherbel notice of a right to a hearing, or by failing to notify him that, if a hearing occurred, the school district would have to establish incompetence or misconduct as the basis for the change in work assignment.

9. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner of Veterans Affairs DISMISS the Petition of Gerald E. Scherbel.

Dated this 15th day of February, 2001.

S/ Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

Reported: Tape Recorded (two tapes).

NOTICE

The Commissioner of Veterans Affairs is required to serve his final decision upon each party and the Administrative Law Judge by first class mail. ^[24]

MEMORANDUM

Mr. Scherbel contends that the School District's decision to shorten his scheduled route was the equivalent of a demotion, and that the School District was required by the VPA to give Mr. Scherbel a hearing before implementing that demotion. The evidence does not support his claim.

The Veterans Preference Act states, in relevant part, that:

[n]o 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. ^[25]

The Act also states that "[a]ny 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."^[26] The Act requires an employer to notify the veteran of its intent to discharge and his right to a hearing. In this case, the School District did not issue a notice that it intended to remove Mr. Scherbel from employment. If Mr. Scherbel was demoted, he is entitled to hearing rights under the VPA.

The facts of this case do not support a conclusion that Mr. Scherbel was demoted. Mr. Scherbel retained the same job responsibilities, the same seniority and rate of pay throughout the 1999-2000 school year. The only change was to the hours of assigned work. It is conceivable that hours could be decreased so much that a good case could be made that the employee was effectively reduced from full-time to part-time employment, but the testimony here was that decreases down to six hours of work per day were permissible under the collective bargaining agreement.

A demotion is a reduction to a lower rank, grade or lower type of position. ^[27] Here, the reduction in hours did result in less total pay, but did not affect Mr. Scherbel's status, seniority or job duties. The method for assigning bus routes allows drivers to bid for routes. The labor agreement between the drivers and the school district was not introduced into evidence. However, based on the testimony, it appears that the drivers bid with the knowledge that route times may change. If the route time is shortened, the driver will receive less pay for the route. If the total route time for the day drops below six hours, the driver may bid on another route. Drivers can also be assigned or bid on extra routes that do not conflict with their regular route. Problems with the bidding

process are addressed through the grievance process established by the collective bargaining agreement.

It is apparent that Mr. Scherbel's route was quite susceptible to significant swings in the route time. Both Highland Park Senior High in St. Paul and Stillwater High School were on the route, and the students' homes were dispersed throughout the district. In addition, Student #1 and Student #2 had inconsistent attendance that significantly affected the time to complete the route.

Mr. Scherbel has failed to show that the changes in route time and the decision not to add Student #1 back to the route effectively removed him from his position or demoted him, even though he earned less pay. The School District's decision to use a different transportation option for the student #1 was rational, even if it was more costly. It was uncontroverted that Mr. Scherbel could not be at Stillwater High School to pick up that student until 20 or 30 minutes after the 3:05 dismissal time if Student #2 was transported on the same day. It is true that Mr. Scherbel had criticized the district's transportation office and that the staff may have resented his complaints. But so long as their response did not lead to demotion or removal from his position, there is no right to a hearing under the VPA.

Since Mr. Scherbel was not demoted, he is not entitled to a hearing under the VPA. Consequently, the School District did not violate the Act by failing to notify Mr. Scherbel of his rights to a hearing.

B.J.H.

^[1] Minnesota Statutes, section 14.61 (2000).

^[2] Test. of Scherbel, White.

^[3] Test. of Paulson.

^[4] *Id.*

^[5] Test. of Scherbel, Paulson.

^[6] Ex. 5

^[7] The identity of the students is protected by the Government Data Practices Act. During the hearing, certain students were identified by number in the testimony. Their names have been redacted from the exhibits introduced at hearing and made a part of this record.

^[8] Test. of Scherbel.

^[9] *Id.*

^[10] *Id.*

^[11] Ex. 12; test. of Scherbel.

^[12] Test. of E. White.

^[13] Ex. 11.

^[14] Test. of E. White.

^[15] Ex. 3.

^[16] Ex. 1.

^[17] Ex. 2.

^[18] Minn. Stat. § § 14.50, 197.46.

^[19] Minn. Stat. § § 197.447, 197.46.

^[20] Minn. Stat. § 197.46.

^[21] Id.

^[22] Id.

^[23] Johnson v. County of Anoka, 536 N.W.2d 336, 339 (Minn. Ct. App. 1995).

^[24] Minn. Stat. § 14.62, subd. 1.

^[25] Minn. Stat. § 197.46 (emphasis supplied).

^[26] Id.

^[27] Ammend v. County of Isanti, 486 N.W.2d 3 (Minn. App. 1992).