

IN RE ARBITRATION BETWEEN:

METROPOLITAN COUNCIL

and

FRANK YANEZ - VETERAN

**DECISION AND AWARD OF ARBITRATOR
VETERANS PREFERENCE HEARING PURSUANT TO M.S. 197.46**

JEFFREY W. JACOBS

ARBITRATOR

MARCH 23, 2009

IN RE ARBITRATION BETWEEN:

Metropolitan Council,

and

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

Frank Yanez.

APPEARANCES:

FOR THE EMPLOYER:

Diane Cornell, Associate General Counsel
Jim Schmidt, Dir. of Mtce, Warehouse & Security
Lynn Schneider, Mgr. of Administration
Sam Rivera, Staff Liaison to MPCA

FOR THE VETERAN:

Frank Yanez, veteran, on his own behalf,
Taylor Vaillancourt, BUC, Steward, IUOE # 35
Floyd Mapson, President of IUOE # 35

PRELIMINARY STATEMENT

A hearing in the above matter was held on March 11, 2009 at the Metropolitan Council Offices at 390 North Robert St., St. Paul, MN. The parties presented oral and documentary evidence at that time. The parties waived Post-Hearing Briefs.

STATUTORY JURISDICTION

The matter arose under the Minnesota Veteran's Preference Act, M.S. 197.46. That section provides in relevant part as follows:

“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.”

The employee is an honorably discharged U.S. military veteran and entitled to a hearing on the demotion pursuant to the statute. He was properly notified of his rights to the hearing by letter dated September 10, 2008. The parties waived the tripartite panel provided for in the statute and selected the undersigned to conduct the hearing under the statute.

ISSUE PRESENTED

Was the veteran demoted from his position as a Business Unit Coordinator, BUC, on September 10, 2008 for “incompetency” pursuant to Minnesota Statute 197.46?

PARTIES' POSITIONS

EMPLOYER'S POSITION

The MCTO took the position that the basis for the demotion was incompetency, for the failure to obtain appropriate wastewater licensure within the required time frame as set forth in Metropolitan Council (Met Council) Policy and pursuant to the terms of the labor agreement between the Metropolitan Council and the International Union of Operating Engineers, IUOE, Local 35. The Employer did assert that there was no allegation of misconduct by the veteran and that the sole reason for the demotion was due to the failure to pass the test and obtain the required licensure. In support of this position, the MCTO made the following contentions:

1. The Employer pointed to the provisions of Article 6 section 16.02 and Appendix B Section II – Licensing of the labor agreement between the IUOE #35 and the Met Council in support of its position. Those two sections provide in relevant portion as follows:

Section 16.02 – Job Change Probationary Period

Employees changing job positions shall serve a probationary period during which time the employee must complete a certification of job classification duties and responsibilities in accordance with the provisions of Appendix “B” of this Agreement.

...

APPENDIX “B” - CERTIFICATION AND LICENSING

B. Miscellaneous Provisions –

The following licensing provisions shall be observed: ...

iii. Business Unit Coordinators who currently hold a license must obtain a “B” wastewater license within 2 years of assuming the BUC position.

iv. Business Unit Coordinators who do not hold a license must obtain a “B” wastewater license within 3 years of assuming the BUC position. NOTE: Operators must hold a “C” license for 1 year before becoming eligible to take the “B” test.

2. The Employer also points to Exhibit 4, which sets forth the same requirements:

LOCAL #35 POSITION REQUIREMENTS “This notice is posted and reiterates the requirements that Business Unit Coordinators and “all required to certify in every position in their Business unit and must B” wastewater license within 3 years of assuming the BUC position and those who hold a “C” license when assuming the BUC position must obtain a “B” license within 2 years.”

The Employer argued that these requirements are well known to the affected employees and was a provision negotiated with the Union.

3. The Employer noted that these provisions were negotiated with the Union and are part of the collective bargaining agreement. In fact, the Union brought these requirements up in negotiations to insure professionalism and competence in the positions for which licensure is required.

4. The license is actually required, not by the Met Council, but rather by the Minnesota Pollution Control Agency, MPCA, pursuant to Minn. Stat. 115.71. The Employer asserted that while the veteran may disagree with the impact of these provisions and of the requirements found in the collective bargaining agreement, they are part of the contract and cannot be changed now. The Employer noted that there was no grievance filed over the demotion since the Union was well aware of the contractual language and knew that any grievance over this demotion would not be successful.

5. The Employer asserted that the veteran was aware of these requirements and acknowledged that the licensure requirements were posted with the job posting when he applied for the job in 2006. These are the requirements as negotiated with the Union and the Employer. Whether the veteran disagrees with whether licensure is required is not at issue here.

6. The Employer further asserted that management personnel gave the veteran a “break” when he first applied. When testing for the position he needed to receive a 3.0 rating score yet he only achieved a 2.75. pursuant to a separate agreement though reached with the Union and the Employer, the veteran was allowed to take the job “with reservations” pending his performance and certification later. He started the job even though he did not achieve the required 3.0 score.

7. The Employer made it clear that the veteran’s job performance is not the issue. In fact, they stated several times during the hearing that his job performance is not in question nor is there any allegation of “misconduct” as that term is used under the Minnesota Veteran’s Preference Act. However, he lacked the critical piece that is required under the terms of the labor agreement – licensure. Without it that provision requires that he be sent back to his former position. The Employer further noted that there is no dispute that he does not have the license and that there was thus little it could do but to apply the clear terms of the agreement.

8. The Employer noted the efforts made in early to mid 2008 to get the MPCA to allow the veteran to take the certification exam to obtain the necessary licensure. At first, MPCA would not allow it based on conversations between the veteran and MPCA staff. They then relented but later changed their minds. It was almost entirely due to the efforts by Met Council staff that MPCA finally agreed to allow the veteran to take the exam.

9. The Employer even gave the veteran extra time to take the exam given the difficulties with the MPCA. While he really had until June 2008 to get his license, the Employer gave him until September 2008. Ultimately, he failed the exam and the Employer was left with no choice but to demote him pursuant to the terms of the agreement.

10. The Employer noted that the veteran's real dispute here is with the MPCA. Moreover, while he asserts that the BUC position does not "really need" wastewater licensure, that is a requirement of Minnesota law. While the veteran expressed frustration with the program in place for gaining licensure, that is not a matter than can be brought up in this context. The Employer asserted that these concerns with the training program could be raised in negotiations but that the hearing examiner does not have the power to determine that change now.

11. The Employer countered the veteran's claim that the was treated differently from Mr. Higgins by noting that the letter from MPCA denying him the opportunity to take the exam was dated in November 2000, before the negotiated standards found in Employer Exhibits 3 and 4. Thus it does not apply to this situation at all.

12. The essence of the Employer's argument is that the veteran needed to obtain licensure within a stated time frame, the Employer helped to persuade MPCA to allow him to take the test, they provided opportunities for training to help him pass the exam, he was finally allowed to take it but did not pass it. The Employer simply had no other option here – demotion was their only recourse.

The Employer requests an Order of the Veteran's Preference hearing officer upholding the demotion in this matter.

VETERAN'S POSITION

The veteran took the position that there was insufficient cause for the demotion. In support of this position the Veteran made the following contentions:

1. The veteran asserted that he has been with the Employer for nearly 30 years and has maintained continuous employment except for a period from approximately 1986 until 1988 when he was out with an injury from a motor vehicle accident.

2. The veteran asserted that he has been doing maintenance and that in his opinion the job he is actually doing, despite what it is called or formally classified by the Employer, does not truly require him to have a license as required by MPCA.

3. He applied for the current BUC position in 2006 and did not receive the requisite 3.0 rating at that time. He acknowledged that under an agreement with the Union and Employer that he was allowed to take the job with reservations since he had gotten a 2.50 on the certification. He interviewed again for the job and was given the position at that time

4. He asserted that the duties of the job are largely maintenance. He went on to describe the duties as cleaning, dealing with heavy equipment and scheduling for approximately 20 people.

5. He further stated that there are emergencies that frequently arise and that one must prepare for those as well and be ready to take people off one job and place them on another to deal with those. The job is quite busy and that on a daily basis, the requirements of the job keep one very occupied for most of the day.

6. He further asserted that he simply never had the time to avail himself of the Learning and Organization Development, LOD, classes give the duties of the job. The veteran further asserted that he was not aware of all of the other courses to train him on the BUC licensing examinations

7. The veteran and his Union representatives expressed concern over the process by which this was handled and noted that usually a BUC is given a review, which did not occur here, and that if someone was not likely to perform well in the job, that should have been known within 12 months. Instead the Employer waited until nearly 21 months had passed before pushing the licensure issue. The Union noted that this issue has been of ongoing concern and that Union and management personnel have discussed it several times in the recent past.

8. The veteran noted that it was not until nearly the end of his tenure as a BUC that he recalled needing the license and that he then contacted MPCA to inquire about it. That person never asked about his training or experience prior to 1986 nor was she concerned with that. She only applied the standards within the MPCA office very strictly without truly looking at his experience and training.

9. The veteran indicated that he very much enjoyed the work as a BUC and thought he was performing his duties well. He further argued that there was no reason other than the technical requirement of licensure that he should have been removed from it.

10. The veteran pointed to the provisions of Minn. Stat 115.71 and argued that he does not fit into that strict statutory definition and that the MPCA should have recognized this.

11. The veteran also brought up another employee's situation, a Mr. Higgins, wherein the MPCA took the very same position and determined that since he was not an operator, he was not eligible to take the exam. Mr. Higgins did not testify so it was not completely clear how his situation impacted this one but the letter from the same staff person at MPCA that had sent letters to the veteran here indicated, "since you listed your position as trainer, you clearly are not an operator and therefore are not eligible to take the exam."

12. Finally, while he did not pass the licensure test when he took it in September of 2008 he argued that he should not have been required to get a license given the job he was doing.

The Veteran seeks an award overturning the demotion and placing him back in his former position with the Employer.

MEMORANDUM AND DISCUSSION

There were few factual disputes in the matter. The veteran applied for the position of a Business Unit Coordinator in a wastewater plant operated by the Metropolitan Council in 2006. He did not achieve the requisite score of a 3.0 on the application requirements at that time; apparently only getting a 2.5. He was however given a special waiver of sorts and was “hired with reservations” under an agreement between the parties so he could begin the job of a BUC.

The evidence showed clearly that the posting requirements as set forth above were part of the job posting when the veteran applied for it. Further, he acknowledged his understanding of the requirement to obtain appropriate licensure when he accepted the job. He did not have a class C license when he took the job. He further acknowledged that he knew he had to get a class B license within 3 years of taking the job but that in his case that meant getting a C license and holding that for one year prior to getting the B license. See, Employer Exhibits 3 & 4. The Union witnesses acknowledge this requirement as well. The Employer’s witnesses testified credibly that the licensure requirements were negotiated with the Union and that anyone hired into the BUC position, including the veteran, is well aware of the requirements to get licensure, and of the time frames within which that licensure must be obtained, in order to retain that job.

The evidence further showed that the Employer had several training programs in place to assist people like the veteran in gaining appropriate licensure. Mr. Rivera testified credibly as to the training programs that the Employer makes available including classes, training manuals from Sacramento State University, which apparently has a training program to get the very licensure the veteran needed. Mr. Rivera even offered to tutor the veteran on company time in order to help him get his license.

Further, the evidence showed that the Employer worked very hard not only to accommodate the veteran but also to advocate for him with the MPCA. The MPCA was not even going to allow the veteran to take the licensure exam, See Employer Exhibits 5 & 6, which are letters from the MPCA initially denying Mr. Yanez the opportunity to take the exam. Significantly, the MPCA's denial was based in large measure on information Mr. Yanez provided the MPCA staff person over the phone in a personal conversation between the two.

Despite that, the Employer sought to get the MPCA to reverse the decision not to allow the veteran to take the exam. As the notations on Employer Exhibit 5 shows, the Employer's staff was in communication with each other about the issues raised by that letter and sought to discuss it with the MPCA staff person.

More to the point, Mr. Rivera made considerable efforts to get the MPCA staff person to reverse her decision and sent an e-mail outlining Mr. Yanez' work history to her with the statement at the end "Given Mr. Yanez's work history and the content of the job specification it appears that he should have been eligible to take the exam." The evidence showed that there was an exam offered in March of 2008 but that the veteran did not apply for it. Whether this was because MPCA did not let him was not clear but it was clear that he did not take it. Based on Mr. Rivera's efforts, the MPCA did reverse the decision and indicated that the veteran would be allowed to take the exam. See Employer Exhibit 9, June 12, 2008 e-mail from MPCA to Mr. Rivera. This appeared to be based on some supplemental information provided to MPCA about Mr. Yanez's work experience.

Mr. Rivera again went to bat for Mr. Yanez and asked MPCA to offer a special exam for him in June 2008 so that Mr. Yanez could get his license in time to meet the deadline under the Employer's rules for getting the appropriate license. See Employer Exhibit 11, in which MPCA responded to a phone conversation between Mr. Rivera and the MPCA staff person wherein he asked about a special proctored exam just for Mr. Yanez. The MPCA refused to offer a special exam but did offer to allow him to take an exam in Red Wing, Minnesota on June 26th.

Within a few days however, the MPCA person reversed herself again and reverted to her original decision to disallow Mr. Yanez from taking the exam. He apparently was not allowed to take the June 26th exam based on this reversal of the reversal so to speak.

Mr. Rivera again sought to get the MPCA to allow Mr. Yanez to take the exam and went to Mr. Charles Thompson, a supervisor to arrange a meeting to discuss this whole issue. See, Employer Exhibit 13. That meeting was held in late June 2008 and based on that Mr. Rivera sent a confirming e-mail to the MPCA making sure that everyone was on the same page. See also, Employer Exhibit 15.

The evidence showed that finally, the MPCA allowed Mr. Yanez to apply for the class C exam and that he submitted his application on or about July 24, 2008. That application has some information on it that the veteran claimed differed from what he would have told the MPCA staff person. However, since she was not called to testify about that phone conversation or why she made the decisions she did no firm determination can be made on that. Suffice it to say that he was allowed to take the exam in September of 2008 and that the Employer allowed a little extra time to allow him to get the license. This was apparently due to the facts scenario set forth above and was also apparently due to the job performance Mr. Yanez had shown in the job. As noted above, there was no assertion that his job performance was inadequate.

Mr. Yanez took the exam in September 2008 but did not pass it and was denied the class C license by the MPCA. As noted above, the virtually undisputed facts showed that under the rules in place and as negotiated between the parties, the Employer had little choice but to apply those rules and demote the veteran for failure to meet what the Employer's counsel correctly called a "critical piece," i.e. the license. He did not get the license in the required time frame despite all the efforts to enable him to do so. Thus, whether or not the veteran thought it was necessary, the written language of the Union contract and the clear requirements of the job posting clearly called for the license. The Employer acted appropriately to demote the veteran under these facts and circumstances.

The veteran raised issues about the statutory definitions here and whether the job he held truly needed licensure as required by MPCA and the Employer's rules in place. Minn. Stat. 115.71, subd. 8 provides as follows: “ ‘Wastewater treatment facility operator’ ” means a person who has direct responsibility for the operation of or operates a wastewater treatment facility.” This is consistent with the FAQ information found on the MPCA website. Minn. Stat. 115.71 subd 10 provides as follows: “ ‘Water system operator’ ” means a person who has direct responsibility for the operation of or operates a water supply system or such parts of the system as would affect the quality and safety of the water.”

The evidence also showed that there has been a concern about the MPCA's understanding of the job of BUC and whether it fits into the definition of “operator” found in their rules and governing statutes. The Union and Employer representatives have discussed this issue in the past but the rules in place have not changed. Further, that issue is not a matter that can be determined here and may be a matter for ongoing discussion between MPCA staff, Met Council staff and the Union. It may also be a matter for negotiation between the Employer and the Union.

Further, the veteran raised a concern about how another employee was treated in the past. As noted above however, the letter from the MPCA was dated November 2000, well prior to the rules in place that govern this matter. Moreover, that employee did not testify at the hearing and without actual evidence of some sort of disparate treatment no such determination can be made here; certainly not one that works to undercut the other findings and determinations made in this matter.

As noted, the question here is whether under the existing rules the demotion was appropriate. As noted above, the evidence fully supported the Employer's actions here. Accordingly, the removal from office under the Minnesota Veteran's Preference Act, Minn. Stat 197.46, must be upheld.

AWARD

The demotion is upheld as set forth above.

Dated: March 23, 2009

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Jeffrey W. Jacobs, arbitrator