

IN THE MATTER OF THE ARBITRATION BETWEEN

Robert Overton,

Employee/Petitioner.

and

OPINION AND AWARD

Veterans Preference Hearing
(Overton Termination)

Metropolitan Council (Metro Transit Division)

Employer/Respondent.

ARBITRATOR:

Janice K. Frankman, J.D.

DATE OF AWARD:

June 18, 2010

HEARING SITE:

Office of Metropolitan Council
Fifth Floor Conference Room
390 Robert Street North
St. Paul MN 55101-1805

HEARING DATE:

June 11, 2010

RECORD CLOSED:

June 11, 2010

REPRESENTING THE PETITIONER:

Robert Overton
6569 158th Street West
Apartment 220-D
Apple Valley MN 55124

REPRESENTING THE RESPONDENT:

Diane Cornell
Associate General Counsel
Metropolitan Council
390 Robert Street North
St Paul MN 55101-1805

JURISDICTION

The hearing in this matter was held on June 11, 2010. The Arbitrator was selected to serve pursuant to the parties' agreement to select one arbitrator, and not a panel of three, as provided by the Veterans Preference Act at Minn. Stat. §197.46 ("the Act"). Robert Overton ("Employee", "Petitioner", "Veteran") acknowledged that he could be represented at the hearing and chose to appear on his own behalf. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties provided closing oral argument at the hearing when the record closed and the matter was taken under advisement. The hearing was recorded by audiotape recorder. The Petitioner and the Hearing Officer were offered copies of the tape upon request.

ISSUE

Did the Metropolitan Council ("Employer", "Respondent") have just cause to terminate Robert Overton, and, if not, what is the remedy?

Background and Summary of the Evidence

Robert Overton was a Metro Transit Bus Operator when he was discharged from his position on March 5, 2010. The hearing record does not include his date of hire. An undated one page record provides notations of his work history for the period June 20, 2008, through March 19, 2010. Mr. Overton is an honorably discharged veteran and a member of Amalgamated Transit Union Local 1005. On March 5, 2010, Mr. Overton was provided with notice of determination to discharge him from his employment. The Union represented him at a Third Step grievance proceeding on May 17, 2010. Mr. Overton had been returned to work on February 3, 2009, following discharge on January 16, 2009, subject to a last chance agreement.

The Incident and Discharge

Mr. Overton reported an accident, which involved the bus he was operating and two cars, shortly after it occurred on February 25, 2010. The bus collided with the vehicle in front of it which was pushed into the car in front of it. There were no injuries. Minor vehicle damage included a crack on the front bumper of the bus, and the bicycle rack was dented.

A Safety Conference was held the following day at which it was determined that Mr. Overton was responsible for the accident. The same day, he was provided with notice of hearing "about (his) Operator responsible accident and violation of (his) LCA dated 2/03/2009....." Employer Exhibit 4 The discussion at the March 1, hearing was reported by Memo, and on March 2, 2010, Mr. Overton was provided with a Notice of Loudermill hearing on March 3, to address the Employer's intent to discharge him from his employment. The discussion at the March 3, hearing was reported by Memo the same

day. On March 5, 2010, Mr. Overton was provided a NOTICE OF DISCHARGE. The reasons for the discharge were provided:

1. Chargeable Accident, dated 2/25/2010
2. Violation of Last Chance Agreement, dated 2/03/2009
3. Over All Record

Employer Exhibit 1

Mr. Overton was advised of his Veteran's Preference rights and also that he might have grievance rights under the Metro Transit/ATU Local 1005 Collective Bargaining Agreement.

A Grievance was filed on Mr. Overton's behalf. On May 17, 2010, a Third Step Grievance meeting was held. The Grievance was denied by memo dated May 24, 2010.

A Stipulation of Facts signed by Mr. Overton and Ms. Cornell for the Employer on June 11, 2010, at this hearing, reflects that the matter is properly before the Arbitrator and addresses ministerial matters and other facts not in dispute.

Earlier Discipline

Mr. Overton was returned to work on February 4, 2009, following discharge on January 1, 2009. A RETURN-TO-WORK AND LAST CHANCE AGREEMENT provides as follows:

On January 16, 2009, Mr. Overton was discharged for Violation of the Metropolitan Council Operating Policy and Overall Record. The Amalgamated Transit Union, on behalf of Mr. Overton, filed a grievance challenging the discharge. Mr. Overton desires to remain employed by metro transit and Metro Transit is willing to allow Mr. Overton a last chance opportunity to continue as an employee with Metro Transit as long as he agrees and complies with all of the following conditions:

* * *

3. Mr. Overton agrees that within the next 36 months effective with his reinstatement:

- a) He cannot have a responsible accident.

* * *

5. Failure of Mr. Overton to comply with any term of this Agreement shall result in his immediate termination.

* * *

9. In the event Mr. Overton is discharged pursuant to this Agreement, he may file a grievance only to challenge whether his conduct constituted a violation of any employer rules or regulations as stipulated in this Agreement. Mr. Overton specifically agrees that he may not challenge the propriety of the discharge penalty in any stage of the grievance procedure.

Employer Exhibit 2, page 1

Relevant Statutory Provisions

Minn. Stat. § 197.46. VETERANS PREFERENCE ACT; REMOVAL FORBIDDEN; RIGHT OF MANDAMUS.

. . . . 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 veteran may appeal from the decision of the board upon the charges to the district court by causing written notice of appeal, stating the grounds thereof, to be served upon the governmental subdivision or officer making the charges within 15 days after notice of the decision and by filing the original notice of appeal with proof of service thereof in the office of the court administrator of the district court within ten days after service thereof.

Opinion and Findings

The record in this matter supports a conclusion that the Employer had just cause to discharge Mr. Overton from his position. He was in clear violation of the last chance agreement (“LCA”) which requires termination in the event of a chargeable accident within the 36 month time period beginning in February, 2009. While the Employer has also made reference to earlier and subsequent discipline in support of its action, its several Memo Notices issued March 1-5, 2010, reflect its clear focus on the chargeable accident in violation of the LCA. It is noted that the Petitioner did not deny the accident or request reduction of the discipline. His cursory reference to earlier undeserved discipline was not supported. He expressed remorse and gratitude for the opportunity to serve as a transit operator. He acknowledged that he could have been a better driver.

Jurisdiction

It is important to be clear that the Arbitrator takes her jurisdiction exclusively from the Veteran’s Preference Act. This hearing followed earlier step grievance proceedings and is separate and distinct from application of the Collective Bargaining Agreement provisions. The record made at this hearing provides the basis for the

decision made here. The findings and conclusions reached during the grievance process have no bearing on this analysis.

Just Cause

In determining whether there was just cause for Mr. Overton's termination, it is appropriate to consider whether he was afforded due process, whether a full and fair investigation supported the Employer's action, whether progressive discipline was appropriately applied and whether any mitigating circumstances exist to support his challenge to the Employer's action. These are all well-recognized elements of a just cause analysis.

The documentation and testimony presented at hearing support a conclusion that the Employer conducted a full and fair investigation of the accident and that Mr. Overton was afforded due process. He has not disputed that the accident was chargeable.

The terms of the Return to Work and Last Chance Agreement dated February 3, 2009, are clear and provide little room for consideration of mitigating circumstances. The terms also preclude consideration of appropriate application of progressive discipline in this case. Mr. Overton has presented no evidence or testimony which addresses a circumstance not contemplated by the LCA or which justifies disregard of the clear mandate of the Agreement that "Failure . . .to comply with any term of (the) Agreement shall result in (Mr. Overton's) immediate termination." Employer Exhibit 2, page 1

Finally, it is noted that the Veterans Preference Act, cited and quoted above at page 4, provides for appeal by the Employee from this decision.

AWARD

The Employer has sustained its burden of proof. The discharge is sustained.

June 18, 2010

Janice K. Frankman, J.D.
Arbitrator