

IN RE VETERAN'S PREFERENCE HEARING BETWEEN:

METROPOLITAN COUNCIL TRANSIT OPERATIONS, (MCTO)

and

GARY BLUEMKE/AMALGAMATED TRANSIT UNION (ATU), Local 1005

DECISION AND AWARD OF VETERAN'S HEARING OFFICER

JEFFREY W. JACOBS

ARBITRATOR

April 20, 2011

IN RE VETERAN'S PREFERENCE HEARING BETWEEN:

MCTO,

DECISION AND AWARD OF VETERAN'S HEARING OFFICER

and

Gary Bluemke/ATU, #1005.

APPEARANCES:

FOR THE EMPLOYER:

Tony Brown, Labor Relations Specialist
Christy Bailly, Director of Bus Operations
Ellen Jackson, Mgr. Nicollet Garage

FOR THE VETERAN:

Gary Bluemke, Veteran
Michelle Sommers, Union President

PRELIMINARY STATEMENT

The hearing in the above matter was held on April 9, 2012 at the MCTO Offices at 725 N. 7th St., Minneapolis, MN. The parties presented oral and documentary evidence and the record was closed on April 9, 2011. The parties waived Post-Hearing Briefs.

STATUTORY JURISDICTION

The matter arose under the Minnesota Veteran's Preference Act, M.S. 197.46. The parties waived the tripartite panel set forth in the statute and agreed to proceed with a single hearing officer.

ISSUE PRESENTED

Was the veteran discharged for incompetency or misconduct under the statute? If not what shall the remedy be?

PRELIMINARY ISSUES

The MCTO operates a transit system in and around the Twin Cities area. They operate both buses and LRT trains and it is clear from the evidence that safety of the traveling public as well as the public in general is the company's number one priority. It is of course a common carrier and by common law held to a very high standard of care in the operation of its vehicles.

PARTIES' POSITIONS

EMPLOYER'S POSITION

The MCTO took the position that the incident of October 10, 2011 was appropriately filed and should be counted toward one of the instances giving rise to the termination under the terms of the LCA. In support of this position, the MCTO made the following contentions:

1. The MCTO asserted that there is no dispute over what occurred on October 10, 2011 and that the veteran clearly violated the “no cell phone” policy by being on his cell phone while operating a bus. To make matters even worse, the bus was on the Nicollet Mall and 4th Street at approximately 6:10 p.m. during rush hour when there were pedestrians and many other motor vehicles around him.

2. The MCTO provided the report of Rail Supervisor, Mr. Scott Stone, who witnessed the veteran on his cell phone while operating the bus. He even spoke to him briefly. The veteran did not deny being on his cell phone nor was there any dispute that he spoke to the Supervisor. See MCTO Exhibit 17.

3. The MCTO further pointed out that the veteran received ample training and that every new driver is told repeatedly that they may not use their cell phone while operating the bus. They are also trained specifically and repeatedly that if there is a mechanical failure necessitating that they contact the Transit Communication center, TCC, they are to try to do that on the radio. If that does not work they are to stop the bus, put it in Park and get out of the driver's seat to make that call on their cell phone. The veteran acknowledged that he received this training and understood it yet he failed to follow this clear procedure. The MCTO further noted that this is not only part of their clear training, it is a common sense rule – if you need to make a call to report an emergency, stop the bus. See MCTO Exhibit 4 at page 3, and exhibit 15 and 16, wherein the veteran acknowledged that he received and understood the policy against cell phone use and the procedure for using it to report an emergency should one arise and the radio is non-operable.

4. The MCTO noted that the veteran was trained on the “old” policy and that the policy changed in June 2011 but that he was informed of this change and, as a new driver, should have been extra vigilant in proving his abilities to drive the bus safely and to follow all of the MCTO procedures, especially those on which he was just trained.

5. The MCTO also noted that the veteran was in his probation period, having been first hired in April 2011 and that his “turn out date,” i.e. the date on which he completed his bus training and the date on which the 6 month probationary period began, was May 13, 2011. The incident in question occurred on October 10, 2011. The sole reason he is entitled to a hearing is because of his status as a US Military veteran in Public Employment pursuant to M.S. 197.46; otherwise he would have been discharged without any rights to a hearing at all under the labor agreement between the MCTO and the ATU.

6. Here, the MCTO, noted that while the veteran was not making a personal call he used very poor judgment when deciding to make a call on his cell phone while on the Nicollet Mall and that he had multiple opportunities to report the mechanical problems on the bus well prior to this on his route. He had the bus stopped on 35W when it suddenly went into neutral and did not report the problem then. He noted problems while coming back downtown as a #18 route near 30th and Nicollet yet he did not report it then. He even passed directly by his own bus garage yet did not take the opportunity to stop the bus and report the issues then and get guidance from the TCC then.

7. The MCTO asserted that it expects and needs its drivers to make good judgment decisions while on their routes and expected that the veteran would have been thinking safety first – as all drivers are trained to do – and that the decision to take out a cell phone, even in the face of the mechanical difficulties the bus was experiencing and despite the trouble the veteran had trying to reach the TCC and his garage, showed very poor judgment.

8. Further, the veteran claimed he was unable to reach his garage yet he was trained to call the TCC, and that phone number is provided in multiple places in the manual, yet he did not follow that procedure either. See MCTO exhibit 8, where the TCC number is listed on multiple pages in multiple locations.

9. Moreover, he was only a few blocks from the end of his route and could easily have waited until he had the bus stopped at the north terminal to report this problem and follow proper procedure. The MCTO noted that the bus was operable – it was drivable and the video introduced at the hearing showed that it was operational at all times. There was no reason to panic and no reason he could not have waited the extra minute or so and get the bus stopped and then report the problems and do a bus exchange at the north point of the route.

10. The MCTO asserted that it fully and thoroughly investigated the incident and spoke to the veteran twice about this. He admitted using his cell phone while operating the bus and admitted that the bus began “acting up” near 30th and Nicollet yet he took no steps to deal with it then but rather waited until he was right in the middle of downtown on 4th and Nicollet Avenue before taking his cell phone and placing a call.

11. The MCTO acknowledged that the veteran was not making a personal call but asserted that using a cell phone even under these circumstances was a clear violation of the policy and that there was no true emergency that warranted deviation from the policy. As a probationary employee, the MCTO argued that the veteran showed that his judgment cannot be trusted and that he should not be allowed to continue driving a bus.

The MCTO seeks an award sustaining the decision to discharge the veteran.

VETERAN'S POSITION

The veteran and his Union, which provided representation of the veteran as a Union member, took the position that the employer did not prove incompetency or misconduct under the statute and that the veteran should be reinstated. In support of this position the Union made the following contentions:

1. The veteran, and his Union representative argued that the veteran showed over the course of nearly 5 months that he was an excellent driver and that this one incident should not be used to destroy what should be a budding career as a driver and does not truly represent his abilities as a driver or his judgment as an employee.

2. The veteran argued that he was not making personal or unnecessary calls but was trying to reach the appropriate personnel to report mechanical problems with the bus.

3. He noted that while operating a #554 route southbound on 35, the bus began having mechanical problems and that he had to stop at a bus stop on 35W. The bus suddenly went into neutral and lost power. He was able to restart the bus though and get it back into gear

4. He further noted that he tried to reach his garage without success because nobody answered. He was trying to get guidance on what to do and did not want to do a bus change while on the highway. He noted that trying to do that on a busy highway could have compromised the safety of his passengers.

5. He further noted that he was trained on safety but that it was also drilled into him that timeliness and customer satisfaction was also paramount. He was trying to get his passengers to their destinations and wanted to keep going in order to do that.

6. Further, he tried repeatedly to get his garage on the radio without success. He tried calling the garage to get the number for the TCC but no one answered. He became concerned that the bus would die again on the highway but he made a choice to keep going once he got the bus moving again in order to keep on time and get his passengers home.

7. When he got to Humboldt Avenue he made the turnaround and proceeded back north to Minneapolis as a local #18 route. The bus operated OK until 30th when lights began flashing and he again tried to reach people without success.

8. The veteran noted that as he got to 4th and Nicollet, very near the north terminal point of the route, lights began flashing and he did not want to break down on the Mall, since it is narrow and crowded and a broken bus there would create traffic havoc. He had been having trouble with the radio all day so he decided to do the right thing and call the garage to report the problem. He further noted that the bus was stopped when he made that call and that there were no passengers on the bus at the time. There was no safety concern nor was anyone in any danger of any kind.

9. The veteran and his union representative argued that almost anyone would have done the same thing and that he was faced with a difficult choice and was trying to do the correct thing by reporting the problem, waiting until everyone was off the bus and until he was stopped. When he was confronted with the rail Supervisor he told him he was having problems yet the Supervisor did exactly nothing to help but simply barked something about being on the black phone and drove off.

10. The veteran asserted that this one incident does not reflect his driving career and that he should not be judged by this one technical violation of the policy and lose his job over it.

The Union seeks an award overturning the decision to terminate the veteran and ordering his reinstatement.

MEMORANDUM AND DISCUSSION

The facts of the case were clear and for the most part undisputed. The veteran began employment with the MCTO in April 2011 as a new employee. He completed his training as a driver and his turn out date was May 13, 2011. There was no question that he received the policy against cell phone use and was trained that cell phone use while operating a bus was strictly prohibited. He was trained on what to do if there is a mechanical emergency on the bus and whom to call if there is.

He was trained on what to do if the radio is not operating and was informed that he could use his cell phone to deal with emergencies if there is no other way to contact the TCC or the garage.¹ MCTO exhibit 4 provides that the driver may use a cell phone to report an emergency by stopping the bus, securing it by placing it in park, getting out of the driver's seat, retrieving the phone and making the call and then by re-stowing the cell phone in the off position. There is no question that he did not perform any of these functions when making the call on October 20, 2011.

The veteran was in his probationary period when the incident in question occurred. The cell phone policy also clearly provides that "probationary employees who violate the [cell phone] procedure will be disqualified." See MCTO exhibit 4. The veteran is entitled to a hearing under the Veteran's Preference Act, M.S. 197.46 and the Employer must prove incompetency or misconduct, which is the same as just cause, to sustain the discharge. See, *AFSCME Council 96 v Arrowhead Regional Corrections Brd.*, 356 N.W.2d 295, 297 (Minn. 1984); *Leininger v City of Bloomington*, 299 N.W.2d 723, 726 (Minn. 1980); *Eckstad v Village of New Hope*, 193 N.W.2d 821 (Minn. 1972).

The events of October 10, 2011 were not greatly disputed. The veteran was assigned a bus and began driving a #18 route starting at 46th and Nicollet. He drove it without incident to Minneapolis but as he entered the gateway ramp the radio went dead. He was apparently there for some 9 minutes but made no attempt at that time to get in touch with anyone even though the bus was stopped.

He then began driving a #554 route bus southbound from Minneapolis and tried to call the TCC by radio without success because no one answered. As he pulled the bus onto the Lake and 35 stop the bus suddenly lost power and went into neutral without warning. He was able to get the bus stopped and tried to call TCC again without success. His passengers complained about the bus being broken down and the veteran wanted to keep going to complete his route. He was able to get the bus back into gear and proceeded without incident to the southern end of that route.

¹ It was clear that cell phones must be in the off position and stowed not on the driver's person. There was no issue on whether that part of the policy was violated or not here but the policy is quite clear on that point.

He then turned the bus around again and began driving it as a local route #18 northbound. He was able to do so without incident until about 30th when lights began flashing on the control panel of the bus. He became concerned that there was something quite wrong with this bus. He did not stop the bus at that time as he had a full load of passengers and again wanted to continue without have to change buses. He apparently passed directly by the Nicollet Garage while on this route but the veteran did not stop there to try to reach anyone to report the problems he had been having on the bus that day.

As he got to the intersection of 4th and Nicollet in downtown Minneapolis he indicated that several lights began flashing on the bus control panel and the evidence showed that he panicked somewhat and was concerned that the bus would stall on the Mall making it difficult for other buses and vehicles to get around him. The Mall is quite narrow and there are buses going both directions without much room to pass. There is little doubt that a stalled bus on the Nicollet Mall at 6:10 p.m. would have created quite a traffic snarl.

He got his cell phone out and used it to try to reach the TCC or the Garage to find out what to do. At the point Supervisor Stone came around the corner in an MCTO vehicle and witnessed him on the phone. The video does not make it clear exactly what was said but the audio does incident that the veteran told Mr. Stone that he had lights flashing. Mr. Stone's comments cannot be made out completely clearly but there is some indication that he said to use the black phone, or words to that effect. The veteran then ended the conversation, which was perhaps 2 or 3 seconds long, and said he had to get going.

The veteran then proceeded to the intersection and made a left turn and then a right turn a block farther down into the north terminal. There was no indication that the bus was stalled or that it would stall and no evidence that the bus was not operational at any time during or immediately after the veteran used his cell phone. While his trepidation was understandable, his use of the cell phone was in clear violation of the policy.

Further, there was evidence that he had several opportunities to report the problem in other ways than using his cell phone all along the route, including well before he entered the Mall portion of Nicollet Avenue.

The veteran's main argument is that he had no other choice and that he needed to report the problem right away and that he thought he was doing the right thing. Clearly his heart was in the right place, but the policy is clear and he acted in clear contravention of his training. He could have done several things: he could have reported the problem at gateway when he was on a 9-minute layover. He could have stopped the bus well before the Mall and made the call then. He drove right by the Nicollet Garage yet did not stop there. Finally, even the bus seemed to be operational while on the Mall and he left the Mall by making a left turn onto 4th Street a few seconds after the confrontation with Supervisor Stone. There was no evidence as to why he did not simply wait the 2 or 3 blocks to get to the north terminal and then make that call by following procedure.

The veteran's concern about the bus given what had happened that day was understandable but, as noted herein, the policy is clear and the evidence was equally as clear that the veteran violated it.

The remaining question is whether discharge is appropriate. The Veteran's Preference Act does allow for a remedy less than termination under appropriate circumstances. See, e.g., *Matter of Schrader*, 394 N.W.2d 796, 801 (Minn. 1986); *AFSCME Council 96 v Arrowhead Regional Corrections Brd.*, 356 N.W.2d 295, 297 (Minn. 1984); *Leininger v City of Bloomington*, 299 N.W.2d 723, 726 (Minn. 1980). The Court in *Schrader* directed the Veteran's Hearing Panel to ask two questions in this regard: did the Employer act reasonably and are there extenuating circumstances that would justify a lesser penalty than discharge.

The veteran and his Union made the argument that his 5 months of otherwise good service should be taken into account. They also argued that he tried to do what he believed was best and waited until the bus was stopped and empty before making the call.

The Policy though does not allow the driver to make a call just because the bus is stopped at a red light and there are no passengers onboard even if there are problems with the bus. Creating an exception on that basis would allow a driver to be fumbling with a cell phone if the bus is stopped with no one on board and the policy does not contemplate that sort of exception.

The next question is whether the veteran's actions here were based on such extenuating circumstances that it warrants a lesser penalty. Here they do not for the reasons set forth above. The bus was operational, there was no dire emergency requiring an immediate deviation from the policy and he had many other chances to make that call before he got to the Nicollet Mall.

Finally, there was no evidence that the employer acted unreasonably or arbitrarily in this matter. Further, as noted above, this determination is somewhat similar to a just cause analysis and on balance the short tenure of the veteran's employment² coupled with the seriousness of the cell phone policy do not warrant a deviation from the MCTO's policy of termination under these circumstances. The evidence thus shows that there was misconduct here at the very least which is sufficient to base a discharge under the Act.³

The termination must be upheld.

² Many arbitrators take length of service into account in a traditional just cause analysis and will sometimes rely upon longevity as a basis to impose a lesser penalty. Here that factor did not support the veteran's claim for reinstatement.

³ There was some discussion about whether this shows "incompetence" under the Act. On this record the driver may well have been doing an exemplary job otherwise but the Act requires only incompetence or misconduct, not both. There was thus sufficient evidence to base a determination of discharge under the Act. Thus it is not necessary to determine if the veteran was incompetent or not on this record.

AWARD

The veteran was appropriately discharged.

Dated: April 20, 2012

MCTO and Bluemke award.doc

Jeffrey W. Jacobs, arbitrator