

**IN THE MATTER OF ARBITRATION
BETWEEN**

**METROPOLITAN COUNCIL/METRO TRANSIT
DIVISION**

Employer,

and

**VETERAN'S PREFERENCE BOARD
DECISION**

TIMOTHY F. PATRIN,

VETERAN.

Veteran's Preference Board :

J.C. Fogelberg, Stephen Befort, and
Andrea Mitau Kircher

Date and Place of Hearing:

July 26, 2012
Metro Transit Office
515 Cleveland Avenue No.
St. Paul, MN 55114

Date Record Closed:

July 26, 2012

Date of Award:

August 23, 2012

APPEARANCES

For the Veteran:

Sarah McEllistrem, Esq.
Christopher Wachtler, Esq.
Collins, Buckley, Sauntry & Haugh
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332 Minnesota Street
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For the Employer:

Anthony Brown
Labor Relations Specialist
Metropolitan Council
390 Robert Street North
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INTRODUCTION

By a letter dated December 12, 2011, Metro Transit, a division of the Metropolitan Council, St. Paul, Minnesota, disqualified Timothy Patrin, from his position as a mechanic

technician and removed him from employment with Metro Transit (“Employer”). The Employer had concluded that Mr. Patrin was no longer able to perform the duties of the job due to disability. Because of his status as a Veteran, the Employer advised Mr. Patrin that he might be entitled to a hearing under the Minnesota Veteran’s Preference Act, Minn. Stat. § 197.46, *et. seq.* Mr. Patrin invoked his rights under the Act in a timely manner. A hearing Board made up of three neutral arbitrators, J.C. Fogelberg, Stephen Befort and Andrea Mitau Kircher, was selected in accordance with Minn. Stat. § 197.46 to hear and decide the issue.

On July 26, 2012, the Board convened a hearing in St. Paul, Minnesota. During the hearing, the Board accepted exhibits into the record; witnesses were sworn and testimony was presented subject to cross-examination. The parties concluded with oral argument and the record was closed on July 26.

ISSUE

The parties stipulated that the issue was:

Did the Employer act reasonably in disqualifying the Veteran, Timothy Patrin, from employment with the Metropolitan Council Metro Transit Division? If not, what is the appropriate remedy?

FACTS

Timothy Patrin began his employment with Metro Transit on September 9, 1989. At the time of his discharge, he had been employed for over twenty years in bus maintenance work and his job classification was Mechanic Technician. He had a good employment record throughout his employment. Nonetheless, he was notified in a letter dated December 12, 2011, that his employment would be terminated on February 10, 2012. The Employer terminated his employment claiming he was no longer qualified for the mechanic position because disabilities prevented him from performing essential job functions. Mr. Patrin

agrees that pain from his injuries prevents him from working as a Mechanic Technician at Metro Transit. He wants to continue working there in a different position, however, and has applied for over 100 open jobs with the Metropolitan Council that he believes are within his physical limitations. None of these jobs were offered to him. He believes this is not reasonable under the circumstances, discussed further below.

Mr. Patrin's Injuries. Mr. Patrin worked in bus maintenance during his entire career with Metro Transit. During the last three years of his employment, Mr. Patrin worked in the job class Mechanic Technician, and in January 2011, he bid on a position at the Overhaul Base in the non-revenue shop. The work in this shop was done on vehicles other than buses. On July 19, 2011, Mr. Patrin reported to his supervisor that he had injured himself at work the previous day. Mr. Patrin visited NorthWorks Clinic and returned to his workplace with a Report of Workability form, signed by a physician. The report diagnosed Mr. Patrin's condition as a work-related cervical strain and provided that he should not do work requiring reaching above his chest or below his knees. A second report dated July 26, 2011, recommended continuing these restrictions through August 9, so that Mr. Patrin was not to do twisting or turning or bending of his neck more than three times an hour, and was not to reach above his shoulders or below his knees at all, because of his acute cervical strain and chronic neck pain. The usual mechanic's duties include working with the arms above the shoulders, bending and twisting the neck, and lifting heavy objects.¹ From July 2011, Mr. Patrin was assigned to temporary "light duty" work so that he would not be likely to reinjure himself by doing regular mechanic's work while he recovered.

¹ The job duties of a Mechanic Technician are set out in the Employer's Job Description and its Job Analysis. (Employer Ex. 9 and 10.)

On August 8, 2011, David Klevan, M.D., Health Partners Clinics, reviewed Mr. Patrin's condition and recommended that he return to regular duty "except chronic restrictions assigned by neurologist." (Employer Ex. 14.) Dr. Klevan was apparently referring to a report from the Noran Neurological Clinic, which had earlier advised Mr. Patrin that he had permanent restrictions and should "avoid repetitive bending and twisting of the neck" as well as "repetitive work with arms outstretched or above the shoulders and to avoid static positioning of the neck." (Employer Ex. 16, undated.) Dr. Klevan's letter of August 8 surprised Metro Transit's management, because neither the Human Resources department nor Mr. Patrin's supervisors were aware that he was subject to "chronic restrictions."

Disability Management Process. Having learned officially that Mr. Patrin ought not to be performing key duties of his job, the Employer looked to its Disability Management Policies. On September 9, 2011, in accordance with its policies and procedures (Employer Ex. 6 and 7) a Disability Management Meeting was held to discuss Mr. Patrin's disability. Mr. Patrin, his manager, his Qualified Rehabilitation Counselor ("QRC"), the Employer's Human Resources manager, and the Assistant Director of Administration attended the meeting. A Functional Capacity Evaluation of Mr. Patrin's condition was scheduled as a result of the meeting. This evaluation took place in November 2011, and was conducted by a qualified physical therapist, John Hovde, at the Saunders Therapy Centers. Mr. Patrin was asked to participate in a three-day test of simulated work activities to determine his physical limitations. Mr. Patrin, while cooperative during the test, only completed two of the three days scheduled, because he was stricken with a "mechanical neck dysfunction" that caused

him too much pain to continue on the third day.² Mr. Hovde prepared a Functional Capacity Evaluation Interim Report in which he concluded that Mr. Patrin has “limitation of his neck and shoulder motion, and a lot of pain behavior and signs of distress in discussing his neck and upper back pain. He has poor balance.” Employer’s Ex. 17, Summary at 2. John Hovde recommended that Mr. Patrin have a follow-up visit with his physician. After testing Mr. Patrin and discussing his condition with him, Mr. Hovde concluded that Mr. Patrin should not continue working as a mechanic:

...The client does not have the ability to perform lifting [up to 50 pounds]. He does not have the abilities to perform reaching with his arms outstretched and almost no tolerance of working with his hands above shoulder height, which is a routine task done by mechanics.

id. at 6.

Based on this report and further information from Mr. Patrin’s physician and his QRC, the Employer convened a meeting on December 12, 2011, to discuss medical disqualification of Mr. Patrin under its Policies and Procedures. (Employer Ex. 20.) The Employer advised Mr. Patrin that it agreed that he had a medical condition preventing him from performing important mechanic job duties and that he should no longer work in that position. Mr. Patrin was given a written notice dated December 12, 2011, of “medical disqualification” because of permanent work restrictions. He was also given information about finding an open Metro Council job and an additional 60 days of employment.

Since 2009, Mr. Patrin has applied for over 100 jobs with the Metropolitan Council, for which he believed himself qualified. He met the minimum qualifications for some of these jobs and was interviewed for some of them, but he was never offered any of these positions. Mr. Patrin is aware of another employee, Tom Durand, who was injured on the job and is

² Employer’s Ex. 17, at 6, Functional Capacity Evaluation Interim Report.

now employed as a Stock-keeper with Metro Transit. He wanted the same treatment as Mr. Durand. Ms. Connie DeVolder, Disability Manager for the Employer, was familiar with the Durand case. She stated that after a disability management meeting where Mr. Durand was found to be unable to do certain mechanic's tasks, Mr. Durand applied for a job opening as a Stock-keeper. He was qualified to do the work, was interviewed, was the most senior applicant (applies because the job was in the same bargaining unit as the mechanic's position), passed a transfer physical and was appointed. The job was not specially created for him, and he was not given the job because of his status as an employee with a disability.

EMPLOYER POSITION

The Employer argues that it acted reasonably when it learned that Mr. Patrin had suffered an injury in his job as a mechanic. It claims that it followed all applicable policies and procedures, and allowed Mr. Patrin to do six months of light duty work when it learned that he had a permanent disability prohibiting him from working in the mechanic's position. The Employer claims it followed its policies and procedures for dealing with employees who are physically unable to continue in their job positions and gave him ample time to find another open position for which he was qualified. The Employer argues that after an employee is disqualified from a position, it need only continue to employ him if another job is open for which he is qualified, he passes the physical and interview evaluation, and he is the senior successful applicant. The Employer contends that it is not required to create a job for Mr. Patrin, and that although he applied for many jobs, he either was not the most qualified applicant or he was not physically able to do the job according to the results of his functional capacities evaluation.

VETERAN'S POSITION

Mr. Patrin argues that he has been a dedicated and competent employee, that he has applied for over one hundred positions at Metro Transit, and it is unreasonable *per se* that the Employer determined he is not be able to do any of them. He claims that another employee who was injured, Tom Durand, was given a position with the Employer as a Stock-keeper, and that the Employer should locate such a position for him. He believes that it is not reasonable for a large employer with many different types of positions to find him unqualified for all of them, especially where a Veteran is entitled to some preference under the law. Mr. Patrin points to Employee Ex. 37, the physical job description for Fueler/Helper, as a job he could do, and he seeks to be reinstated to employment.

DISCUSSION AND CONCLUSIONS

Minnesota Statutes §197.46 is known as the Veterans Preference Act, and its protections are available to any honorably discharged U.S. Veteran. Timothy Patrin is such a Veteran (Employer's Ex. 3), and he timely invoked the provisions of this law on his own behalf. The law provides in pertinent part:

...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.

Minn. Stat. § 197.46

The statute also sets out the processes by which a board shall be selected to conduct the removal hearing, and the undersigned Veteran's Board was selected accordingly. Based on the facts presented, all of the statutory time frames have been met, and the Board has

jurisdiction to hear and decide whether Mr. Patrin was properly removed from employment with Metro Transit. The Employer must establish that it acted reasonably to remove him from employment when it found that he was no longer qualified (or competent) to perform essential job duties of the Mechanic Technician position.

Mr. Patrin does not dispute the evidence of the Functional Capacity Evaluation and the Employer's subsequent conclusion that he is no longer able to perform the Mechanic Technician job. His neck and shoulder condition has worsened over the years, and it is sometimes very painful to work in the positions required. Instead, Mr. Patrin believes that he has been treated differently than a similarly situated employee, Tom Durand, who was disqualified from work as a mechanic, but is still employed by Metro Transit as a Stock-keeper. The Employer's explanation was that Mr. Durand got the job because it was an open position that required a lower level of physical competence to perform and that Mr. Durand qualified for it through the normal application process. No facts were presented undercutting the Employer's explanation. The Shop-keeper job was not open when Mr. Patrin was seeking another position, and no evidence substantiated Mr. Patrin's theory that he was not given the same consideration as Mr. Durand in finding another position.

Mr. Patrin applied for a number of lower-level bus maintenance positions for which he believed he was qualified. Some of these jobs he had held in the past. Employee's Exhibits 37, 38, and 39 are documents that describe physical requirements of the jobs "Fueler-Helper", "Bus Sweeper", and "Skilled Helper – Bay Service" for which Mr. Patrin unsuccessfully applied. Fueler-Helper, for example, includes occasionally reaching above shoulder level. "Occasionally" is defined as one to three hours a day, and the job requires an employee to handle on average, six buses per hour. Although Mr. Patrin believed he was

qualified for this job, his Functional Abilities form (Employer Ex. 17, Hovde Functional Capacity Evaluation) concludes the opposite. It states that he is not able to reach above shoulder level at all. The Bus Sweeper position, Employee's Ex. 38, requires cleaning a bus in 6 minutes, "occasional" bending at the neck, waist, and kneeling, and "constant" squatting and crouching. "Constant" squatting and crouching means 6-8 hours during the work shift. Mr. Patrin's functional abilities are limited to "occasional" crouching, kneeling and squatting, a far cry from 6-8 hours of it. No evidence was introduced which brought into question the accuracy of the Employer's written descriptions of the physical skills and abilities needed to effectively work in these jobs.

Other jobs for which Mr. Patrin applied were supervisory or managerial. According to Robert Milleon, Deputy Director of Bus Maintenance, selection for these positions is competitive and based on oral interview responses. The written minimal requirements for the job are only the first step in the process. The next step is to excel in the oral interview. Also, supervisory experience is taken into account. Mr. Patrin attended a Leadership Academy course, and that experience is equivalent to one year of supervisory experience according to Human Resources manager, Joyce Masar. The Employer seeks to recruit and select the best-qualified person for any given position. For the supervisory positions he sought, Mr. Patrin was unable to establish that he was the most senior qualified applicant.

Mr. Patrin also argues that the Employer gave him insufficient preference over other applicants based on his status as a Veteran. Employer's Exhibit 23 addresses the method used by the Employer to give extra points to Veterans during the application process. The Employer applies points to a Veteran applicant's score only after the applicant has qualified for a position through oral examination, the point at which Mr. Patrin's applications stalled.

Mr. Patrin did not establish that the Employer violated the provisions of the Veterans Preference Act in its job filling process.

Despite the fact that this result seems a poor reward for over twenty years of service with an unblemished work record, the Board finds that the Employer did not violate its obligations under the law or its own policies and procedures. Mr. Patrin was simply unable to find another position where he was the most senior qualified applicant, and Metro Transit acted reasonably in removing him from employment.

Dated: August 17, 2012

Andrea Mitau Kircher
Veteran's Preference Board Arbitrator

J.C. Fogelberg
Veteran's Preference Board Arbitrator

Stephen Befort
Veteran's Preference Board Arbitrator