

IN RE ARBITRATION BETWEEN:

METRO TRANSIT

and

LARRY HOTCHKISS - VETERAN

**DECISION AND AWARD OF VETERAN'S PREFERENCE PANEL
PURSUANT TO M.S. 197.46**

JEFFREY W. JACOBS

ARBITRATOR

December 28, 2012

Metro Transit

and

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

Larry Hotchkiss

APPEARANCES:

FOR THE EMPLOYER:

Sydnee Woods, Attorney for Metro Transit

FOR THE VETERAN:

John Baker, Attorney for the Veteran
Larry Hotchkiss, veteran

PRELIMINARY STATEMENT

A hearing in the above matter was held on December 20, 2012 at the Met Council Transit Operations Center, 725 N. 7th St., Minneapolis, MN. The veteran was represented by attorney John Baker. Metro Transit was represented by attorney Sydnee Woods. Mr. Frank Madden was selected as the employer's representative on the veteran's panel. Ms. Michelle Sommers was selected as the veteran's representative on the veteran's panel. The undersigned was selected by the parties to act as the neutral member pursuant to M.S. 197.46. The record closed on December 20, 2012 and the parties waived Post-Hearing Briefs.

STATUTORY JURISDICTION

The matter arose under the Minnesota Veteran's Preference Act, M.S. 197.46. Mr. Larry Hotchkiss is an honorably discharged U.S. military veteran having served in the United States Army and the United States Air Forces. The veteran properly requested a hearing pursuant to statute.

ISSUE PRESENTED

Whether the veteran's removal from office for incompetence for failure to maintain his commercial driver's license, CDL, was proper pursuant to the Veteran's Preference Act, M.S. 197.46?

PARTIES' POSITIONS

METRO TRANSIT'S POSITION

Metro Transit took the position that the veteran's failure to maintain his CDL and for the failure to reinstate his CDL within 30 days constituted incompetence sufficient to justify his removal from office pursuant to M.S. 197.46. In support of this position, Metro Transit made the following contentions:

1. The veteran has been a driver for Metro Transit for approximately 5 years and was aware of the policies regarding his CDL. The veteran received a copy of the Bus Operator's Rule Book and Guide covering all Metro Transit Bus Operators on December 9, 2010. See Metro Transit exhibit 3 and 4.

2. The Bus Operator's Rulebook makes it clear that a CDL is required to operate a bus. Further, Bulletin #9 dated February 1, 2011, provides in relevant part as follows:

If a CDL is suspended, canceled revoked or any other loss of CDL occurs, Bus Operators will receive 30 calendar days to get their CDL reinstated. (Medical CDL issues will be handled separately.) During this period, the operator may not drive a bus. Failure to reinstate within the 30 days will, except in extraordinary circumstances, result in disqualification from employment. Operators may apply for open positions during this time.

3. The veteran was arrested on December 2, 2011 on allegations that he improperly took a taxicab while intoxicated. As a result of the arrest and of the implied consent urine test he took that same night, the veteran lost his CDL on June 15, 2012. See Metro Transit exhibit 5. The veteran entered a Norgaard plea indicating that he was guilty of the charges against him but was unable to recall them due to intoxication or impairment. See Veteran's exhibit D, Metro Transit exhibit 18.

4. The CDL was revoked for a full year and the veteran does not have a CDL even as of the date of the hearing in this matter. As such he is prohibited from driving a bus for Metro Transit. There is therefore no possibility that he can return to his position, extraordinary circumstances surrounding the arrest and the plea of guilty notwithstanding.

5. Metro Transit asserted through its exhibits and by argument that it conducted a fair and thorough investigation of this matter and determined that the veteran lost his CDL in June 2012 and did not disqualify him until the expiration of 30 days.

6. Further, that Metro Transit's step two determination was delayed until after the veteran's Court sentencing date on September 10, 2012 to make sure of the final determination of the veteran's criminal matter.

7. Metro Transit asserted that there were no extraordinary circumstances warranting overturning the decision to disqualify him from employment. That the veteran did not understand the consequences of the implied consent does not constitute extraordinary circumstances under Bulletin #9. Metro Transit asserted that it has applied its policy consistently and even-handedly and that the loss of a CDL constitutes incompetency under the Act. See, Metro Transit exhibits 16 and 17.

8. Finally, Metro Transit took the position that it had no obligation to assign the veteran to alternate employment nor does the veteran's panel have jurisdiction to require that the veteran be placed in a "held off" status or assigned to alternate employment until his CDL is reinstated.

Metro Transit seeks an award upholding the removal from office of the veteran herein.

VETERAN'S POSITION

The veteran took the position that there was insufficient cause for his removal under the statute. In support of this position the veteran made the following contentions:

1. The veteran asserted that he is a good driver with no previous discipline or employment problems. He further asserted that he has served honorably in both the US Army and Air Force.

2. Turning to the events of December 2, 2011 he noted that he and some friends met for drinks and went to two separate locations, including the Green Mill restaurant in Bloomington. He knew that he was intoxicated and further knew that he was not able to drive a vehicle home. Instead of doing something illegal and irresponsible he decided to take a cab home. He engaged a taxi that was at the restaurant already. This was the responsible and sensible thing to do.

3. On the way home however the cabbie began taking a circuitous route and the veteran asked him to stop at a corner near his home in order to walk home; not wishing to have the fare increase any more than it already had. The veteran insisted that he handed the driver enough money to cover the cost of the fare but the cabbie took it and asserted that he had been shorted. The driver then exited the car, locked the door and called for police on his phone. The veteran asserted that he crawled over the seat and left the vehicle. He had no recollection of driving the cab at all and did not believe he had. He was later arrested and assaulted by a police dog, causing serious injuries to his arm.

4. He was disabled from working for a period of time due to the injuries. He took an implied consent test that night by urinalysis. He asserted that he was unaware that he would lose his CDL for a full year when he took that test.

5. The veteran noted that he immediately complied with the Rule and reported this incident to Metro Transit. He has been completely forthright with Metro Transit throughout the investigation and never did anything from them. He asserted that the allegation by Metro Transit that his credibility was somehow in question was unsubstantiated – he was been completely truthful to the very best of his knowledge in this whole affair.

6. The veteran further asserted that he was unaware of the implications of the Norgaard plea when he entered it. He further asserted that it was his understanding that the Norgaard plea would allow him to keep his job as a driver for Metro Transit and would not adversely impact his service in the USAF. The veteran noted that the Air Force also fully investigated this incident and was aware of his plea yet did not take any action against his position there. If he is good enough for the United States Air Force he should certainly be good enough to continue working in some capacity for Metro Transit.

7. The veteran asserted that he has been applying for positions but has not been hired. He contended that Metro Transit could have and should have hired him into an alternate position to keep him employed until his CDL was reinstated, just as Bulletin #9 contemplates.

8. The veteran contends that the overall circumstances here show extraordinary circumstances. He took a cab rather than driving home after drinking, he does not recall taking the cab or driving it while intoxicated, despite the Norgaard plea, and finally asserted he was completely honest with Metro Transit at all points here. He contended that these factors should be considered extraordinary by the panel and that he should be kept in employment.

The veteran seeks an award of reinstatement to his position with Metro Transit and for the expungement of his record of all discipline herein.

FINDINGS OF FACT, CONCLUSIONS OF LAW & MEMORANDUM

1. Mr. Hotchkiss is an honorably discharged U.S. Military Veteran having served in the United States Army and with the United State Air Force. He is entitled to a Veteran's Preference Hearing pursuant to Minn. Stat. 197.46. He has been with Metro Transit as a driver for approximately 5 years. The parties stipulated at the hearing that a CDL is a requirement of the position of driver for Metro Transit and that the veteran lost his CDL on June 15, 2012 and does not have the CDL as of the date of the hearing in this matter Further the parties stipulated that the veteran did not have his CDL as of the date of disqualification herein on July 15, 2012

2. The veteran was arrested on December 2, 2011 on charges of felony theft of a taxi vehicle as set forth in Metro Transit exhibit 18 herein.

3. The veteran took an implied consent test and was found to be well over the legal limit for alcohol in the State of Minnesota.

4. The veteran pled guilty to certain charges as set forth in Metro Transit exhibit 18 pursuant to *State ex rel Norgaard v Tabash*, 110 NW 2d 867 (1967), Norgaard plea. The plea indicates that the veteran had the opportunity to discuss with counsel his rights and that he understood that the Court could not accept the plea if he asserted that he was innocent of the charges against him. The Norgaard plea document signed and accepted by the Court indicated that the veteran did not claim that he was innocent of the charges.

5. The veteran's CDL was suspended as of the date of the hearing and the veteran does not currently possess a CDL as a result of the events and the implied consent test performed on December 2, 2011.

6. The totality of evidence showed that the veteran was incompetent for office and was properly removed from office within the meaning of the Veteran's Preference Act, M.S. 197.46 due to the loss of his CDL.

CONCLUSIONS OF LAW

1. The veteran is entitled to a hearing pursuant to the Veteran's Preference Act, 197.46. Metro Transit gave proper Notice of Intent to remove the veteran from office pursuant to the Act. The veteran properly requested a hearing pursuant to that notice.

2. The veteran was properly disqualified and removed from office for incompetency pursuant to the Act, 197.46

3. The veteran has not shown by a preponderance of evidence that there were sufficient "extraordinary circumstances" to warrant a reversal of Metro Transit's action here.

MEMORANDUM

The salient facts of the case are not in dispute. Mr. Hotchkiss is an honorably discharged US military veteran having served in the US Army. He also apparently is in the reserves with the United States Air Force as well. He has been a driver for 5 years with Metro Transit and by all accounts has a good work record.

On the evening of December 2, 2011 he and some friends went to various bars and restaurants and had some alcoholic beverages. The veteran realized that he was likely impaired and decided correctly to take a taxi home rather than driving home himself. His accounts of the events was that the cab driver began taking a circuitous route home and that he and the driver had a dispute about both the route home and the fare.

He then contended that he ordered the driver to stop at a corner near his home and handed the driver what he believed to be a \$20.00 bill, which would have been sufficient to cover the approximately \$9.05 fare. The driver contended it was only a \$5.00 and demanded more money. A dispute ensued and the driver eventually exited the vehicle and locked the doors. There was some evidence that the vehicle was a retired police car and that the back doors could be locked from the outside.

The veteran crawled over the seat and he claimed that he attempted to simply leave the car. The police and the cab driver saw it differently though and contended that the veteran attempted to drive the cab away. There was also some evidence that there was a physical altercation between the driver and the veteran and that the driver was assaulted. Eventually the veteran left the car and was later arrested in a park in Bloomington. Police used a dog to subdue the veteran. He was given an implied consent urine test, which showed a blood alcohol level in excess of the .08% under Minnesota law. He was also charged with robbery and theft charges as well.

The veteran engaged counsel to represent him in the criminal matter. As noted above, he eventually plead guilty to the charges under a Norgaard plea. He claimed that he did not recall the assault nor did he recall attempting to drive the vehicle. It was clear however that his plea indicated to the Court that he did not recall the events due to his intoxication that night. Thus, on this record it must be accepted that the events are as set forth in the plea agreement, Metro Transit Exhibit 18.

More importantly, the evidence showed that he lost his CDL as of June 15, 2012, that it has not been reinstated and that his CDL will not be reinstated until at least May of 2013. Thus, there is no question that the veteran is currently “incompetent” for office under the VPA, 197.46.

The veteran contended that the underlying facts show extraordinary circumstances under Bulletin #9 and that these factors showed be taken into account in reinstating him. The facts of this case however did not establish extraordinary circumstances.

The claim of extraordinary circumstances here, if any, had to do with the reasons for the arrest but not with regard to the loss of the CDL per se. The veteran further claimed that he was not aware of the consequences of the plea and of the implied consent but he had counsel representing him at the criminal hearing. The fact that he and perhaps even the Court were unaware of the consequences of the plea does not change that plea or the legal implications of making it. That fact did not rise to the level of circumstances so extraordinary to warrant overturning Metro Transit's decision and thus requiring it to hold the veteran's position open until May 2013.

Further, and more importantly, as a result of the plea and of the implied consent he lost his CDL, which is a clear requirement of the job. He does not possess a CDL currently. Accordingly, the panel is unable to order him reinstated to the position of driver at this time. The panel's jurisdiction is limited to determining whether the veteran was properly removed from office for incompetency due to the loss of the CDL. The facts here compel the result that the veteran was properly so removed.

It is of course not possible to define exactly what might constitute an "extraordinary circumstance" in each and every possible future scenario and no determination can be made in that regard here. Neither is there any jurisdiction to require Metro Transit to hold his job open until he gets his CDL back.

Also, while it was somewhat curious as to why he was not given other positions even though he apparently applied for them during the course of this case, there is no requirement in the Bulletin #9 that a person who has lost their CDL be reemployed in a light or alternate duty job. Further, there is no jurisdiction by the panel to determine or rule on the question of whether there is any obligation to re-hire him or place him in alternate duty. That is a separate issue and no determination can be or is made on that issue. The sole question here is whether the veteran was properly removed from office for incompetency due to the loss of the CDL. On these facts, there is no question that the removal was proper due to the loss of the CDL for more than 30 days.

AWARD

The veteran was properly removed for incompetency pursuant to M.S. 197.46.

Dated: December 28, 2012

Jeffrey W. Jacobs, Neutral Panel member

Frank Madden, Metro Transit's Panel member

Met Council and Hotchkiss Vet's Preference award.doc

Michelle Sommers, Veteran's Panel member