

IN THE MATTER OF THE VETERANS PREFERENCE HEARING BETWEEN

(Redacted)

VETERAN

-and-

Metropolitan Council
Metro Transit System

EMPLOYER

ARBITRATOR: Christine Ver Ploeg

DATE AND PLACE OF HEARING: October 8, November 28, 2012
Metro Transit Operations Center
Minneapolis, Minnesota

DATE OF CLOSE OF RECORD: December 20, 2012

DATE OF AWARD: December 29, 2012

ADVOCATESFor the Veteran

Jay Tentinger
1380 Corporate Center Curve, #318
Eagan, Minnesota 555121

For the Employer

Sydnee Woods, Associate General Counsel
Metropolitan Council
390 Robert St. North
St. Paul, Minnesota 55101

ISSUE:

Was the Employer's discharge of the Veteran for "incompetency or misconduct" as required by Minnesota's Veterans Preference Act? If not, what shall be the remedy?

BACKGROUND

This matter has been brought to hearing pursuant to Minn. Stat. Sec. 197.46, Minnesota's Veterans Preference Act. The Employee (hereinafter "Veteran") is an honorably discharged veteran previously employed as a bus driver by Metro Transit (hereinafter "Employer"). This dispute concerns the Notice of Discharge the Employer issued to the Veteran for his alleged violation of the Employer's Operating Policy and his overall record. The Veteran submits that his discharge was unlawful under the Veterans Preference Act; the Employer submits that it was proper.

The following facts are not in dispute. The Veteran began his employment with the Employer in 2002. On May 25, 2012, after a *Loudermill* hearing attended by the Veteran and his Union representative, the Employer issued a Notice of Discharge to the Veteran. The stated grounds for discharge are:

Metropolitan Council's Operating Policy
Overall record

The Employer submits that the Veteran's record considered in determining to discharge him includes:

1. July 31, 2008, responsible accident: hit a fixed object;
2. February 8, 2010, customer complaint: running a red light;

Debit # 1

3. October 13, 2010, customer complaint: being off route (logged);
4. February 3, 2011, responsible accident: hit an oncoming bus and left the scene without stopping;
5. October 31, 2011, responsible accident/customer complaint: passengers thrown to the ground, including one in a wheelchair, because the Veteran stopped short at a red light;

Debit #1

- 6. December 20, 2011, customer complaint: driving too fast and braking suddenly (logged);
- 7. December 20, 2011, responsible accident: hit a car while crossing traffic;

Debit #2

- 8. December 21, 2011, customer complaint: being off route (filed);
- 9. December 21, 2011, customer complaint: driving too fast and braking suddenly (logged);
- 10. December 28, 2011, customer complaint: not calling streets and being unhelpful;
- 11. March 27, 2012, adherence code violation: failing to follow the instructions of a Transit Supervisor; and
- 12. April 10, 2012, customer complaint: made improper left turn nearly resulting in an accident. (Filed).

Debit #3

The Veteran exercised his right under Minnesota law to challenge his discharge at this hearing, and the parties have stipulated that this matter is now properly before this hearing officer. The Veteran was represented by legal counsel and, in addition to the hearing held on October 8, and November 28, 2012, this case entailed several pre-hearing motions and decisions. The parties submitted post-hearing briefs which this hearing officer received on December 20, 2012. On that date this record was closed.

APPLICABLE STATUTORY STANDARD

Minn. Stat. Sec. 197.46, Minnesota's Veterans Preference Act, provides in part:

Any person whose rights may be in any way prejudiced contrary to any provision of this section shall be entitled to a writ of mandamus to remedy the wrong. No person holding a position by appointment or employment in...all other practical subdivisions in the state, who is a veteran separated from the military services under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after hearing, upon due notice, upon stated charges in writing.

APPLICABLE METRO TRANSIT POLICIES

Metropolitan Council Procedure 4-7d, The Bus Operating Policy, establishes thresholds for warnings in three different categories: Adherence Code violations, Customer Service complaints, and Safety violations within a rolling three-year period. With respect to accidents, which are addressed in the safety provisions, an employee is issued a verbal warning after a first “responsible” accident, a Record of Warning after the second responsible accident, a Written Final Record of Morning after a third responsible accident, and can be terminated after a fourth responsible accident. The policy penalizes only accidents occurring within a rolling three-year period.

DISCUSSION AND DECISION

In this case the Employer has had the burden of proving that the Veteran’s alleged misconduct warranted separating him from his employment. In finding that the Employer has met that burden, I have considered the evidence on the following questions.

1. *What are the facts regarding the incidents for which the Employer has discharged the Veteran?*

The January 25, 2012, Discharge letter states that the Employer has discharged the Veteran for:

Metropolitan Council Operating Policy
Overall record

At this hearing the Employer presented evidence regarding a significant amount of discipline in the Veteran's record. Specifically, the record indicated that prior to discharge the Veteran had been issued three Debits: a Record of Warning for Safety (Debit #1) on October 31, 2011, a Final Record of Warning for Safety (Debit #2) on December 20, 2011, and a Record of Warning for Customer Service (Debit #3) on April 10, 2012. In addition, the Veteran's work history included records of a previous Record of Warning for Safety, a filed violation, complaint and counseling record for running a red light.

The Veteran asserts that this record is not accurate. In addition, he charges that the Employer has failed to accord him due process, both *procedurally* by preventing him from completing the grievance process and *substantively* by virtue of supervisory bias and discrimination based on his status as a disabled veteran.

In reviewing the parties' evidence and arguments it has become evident that the Veteran's broadly stated allegations are grounded largely upon the following specific claims: (1) he should not have been charged for a "responsible accident" for the incident which occurred on October 31, 2011; (2) he was improperly denied the opportunity to protest that determination in a second step grievance meeting; and (3) the decision to discharge him was not based on the evidence but was, instead, the result of discrimination and retaliation.

With respect to the balance of the Veteran's claims, he has repeatedly claimed that supervisors improperly penalized him without adequate evidence. However, on those claims the Veteran has either failed to provide any specifics other than those set forth in the previous paragraph, or his claims have been decisively contradicted by videotapes of the relevant incidents. Therefore, the following discussion is limited to the three issues stated above.

October 31, 2011, Responsible Accident

On October 31, 2011, the Employer received a customer service complaint regarding an event which had occurred on the bus that the Veteran was operating. On that day the Veteran hit his brakes and caused passengers to lurch forward, including a customer in a wheelchair who fell out of his seat. All of this is recorded on a video, and is not in dispute.

After investigating the matter, which the Veteran did not himself report although under his own analysis he was obliged to do so, the Employer charged the Veteran with a “responsible accident.” This in turn triggered a Record of Warning for Safety as this was the Veteran’s second responsible accident within the preceding rolling three years.

The Veteran makes two arguments regarding this event. The first concerns his claim that this event should have been characterized as a non-disciplinary “incident” rather than as a disciplinary “responsible accident.” The second argument is premised upon the Veteran’s claim that the Employer improperly denied him a second step grievance meeting. He argues that this denial of procedural due process denied him the opportunity to successfully protest this discipline, and that in so doing he would not have accumulated the record which has led to his discharge.

“Responsible accident?”

Thus, the first question is whether the event in question was properly characterized as a “responsible accident.” The Veteran submits that the video demonstrates nothing more than that as he was driving his bus he stopped hard when he approached an intersection. Although it is unclear from the video why he did so, the Veteran has testified that the woman in the brown jacket standing behind him came into his peripheral vision. This was particularly distracting to him as he had been assaulted by a passenger six days earlier. The Veteran further asserts that while it is true that the hard stop caused several passengers to fall to the floor, including a male

passenger who was seated in a wheelchair in the front of the bus, in any event there were no injuries. Therefore the event was at most an “incident” and not a “responsible accident” for which he could be issued a Written Record of Warning.

In support of the argument that this event is more properly characterized as an “incident,” the Veteran points to the Employer’s Rule Book, section 145 – 150, which, although it does not define either term, does state as its first sentence that in the event of a accident/incident an operator is to: “Report any accident/incident involving your bus, no matter how slight. This includes onboard injuries or incidents (E. g. Disturbances, ejections, sick customers, passenger falls etc.)”

The Veteran construes the title of this section, as well as this sentence, as evidence that the Rule Book distinguishes between accidents and incidents even if it does not expressly define either term. Moreover, the Veteran reads this language to mean that the events which occurred on October 31, 2011, fall within the provisions express reference to “ejections” and “passenger falls” and as such fall within the meaning of an “incident.”

I have reviewed this evidence and argument and cannot agree with the Veterans interpretation of section 145 – 150. There is nothing in any policy to suggest that the passengers’ lurching—an event precipitated by the Veteran’s sudden braking rather than by their own actions—is best understood as a blameless “incident.” On the contrary, the Employer has offered persuasive evidence that it has a long-standing, unwavering and widely understood policy of defining a “responsible accident” as one which an operator could have prevented.

The Employer concedes that this is a more demanding standard than that found, for example, in the law of negligence. However, it notes that as a public mass transit carrier it is always held to a higher duty of care than the average motorist. Because Metro Transit receives

federal and state funding, it must limit its liability whenever possible. For this reason among many important reasons, safety is always its main concern.

To achieve this overriding priority—safety—the Employer provides operators with extensive training in defensive driving and repeatedly informs them that they will be held responsible for any accident that they could have prevented. The Veteran’s sudden braking on October 31, 2011, caused numerous passengers to lurch forward and one passenger to fall out of his wheelchair. Like all bus operators, the Veteran was trained, and retrained, in the Smith Systems Five Safety Keys—training that highlights the ways by which operators are expected to drive defensively and avoid this very situation.

There is no basis upon which to now reject the Employer’s long-standing, unwavering and universally understood definition of “responsible accident.” A “responsible accident” remains one which an operator could have prevented.

The Veteran next argues that this October 31, 2011, event cannot be characterized as a “responsible accident” because no injuries resulted. However, this argument is unpersuasive for two reasons. First, there is no basis for asserting that injuries are a necessary prerequisite to such a finding. Only the most strained interpretation of Section 145 supports such a finding, nor has that ever been the case. Second, even if that were the case, at the hearing the Veteran admitted that on that occasion a passenger did approach him and report that she had been injured. Indeed, the video of their interaction shows that just before alighting the bus, the passenger told the Veteran that she “hurt her hand” and would “go to the hospital later.”

Denial of Procedural Due Process?

The Veteran’s second argument is that the lack of a second step response hearing regarding the October 31, 2011, event renders the discipline issued invalid. I have considered this argument as well and do not agree that the failure to hold the hearing – for reasons which are

not entirely clear – negates the issuance of a “responsible accident.” True, the Veteran is represented by a Union which has a collective bargaining agreement with the Employer which sets forth a grievance process, including a second step grievance meeting. However, there is no evidence that the Employer expressly refused any request for such a hearing, or otherwise improperly circumvented the terms of the collective bargaining agreement.

Moreover, the present proceeding is not an arbitration conducted pursuant to the terms of that collective bargaining agreement. This is a Veterans Preference Hearing to determine whether the Employer has properly terminated the Veteran under Minnesota Statute Section 197.46. As such, the processes set forth in the Agreement are not determinative in this case. In this case, the sole question is whether the Employer has discharged the Veteran for “incompetency or misconduct,” and to address this question the evidence is viewed in its totality.

For these reasons, the evidence does not support a finding that the “responsible accident” issued to the Veteran for the event of October 31, 2011 should be negated for procedural reasons.

Remaining bases for discharging the Veteran

Aside from the October 31, 2011, “responsible accident,” the discharge notice issued to the Veteran on May 25, 2012 identifies his “Overall record” as a basis for his discharge. The primary components of that overall record are set forth in the preceding “Background” section of this award. Although the Veteran has challenged management’s characterization of some customer complaints as disciplinary (such complaints are “filed”), the evidence demonstrates that management used its discretion to assess the severity of a complaint, and on occasion gave the Veteran the benefit of the doubt by classifying other complaints as “logged in.” Logged in complaints do not count towards progressive discipline but nevertheless remain part of an employee’s overall record. There has been no evidence to suggest that the Employer unreasonably dealt with those customer complaints. Nor is there evidence that the Employer’s

issuance of an Adherence Violation to the Veteran for his March 27, 2012, insubordination was based on anything other than the facts clearly revealed in a videotape of that incident.

In short, the record – as demonstrated primarily through the numerous videotapes which confirm the Employer’s version of the events in question – demonstrates that the Veteran did repeatedly engage in disciplinary misconduct. He did so despite extensive initial training and subsequent repeated counseling and training designed to help him correct his performance and behavior.

2. Does the record support the Veteran’s allegations of unfair, prejudicial and discriminatory treatment by his supervisors?

The Veteran is an honorably discharged Veteran subject to the protections of Minnesota’s Veterans Preference Act. He has also been diagnosed with PTSD and has thus been subject to the protections of the ADA. There is no claim that the Employer has failed to reasonably accommodate his disability. Nevertheless, the Veteran asserts that throughout these events two supervisors have discriminated against him because of his status as a disabled Veteran. In fact, he has filed a formal complaint with the Office of Diversity not only regarding his initial allegations of discrimination but also what he now claims is retaliation for the filing of that complaint.

I have considered these allegations but find no supporting evidence whatsoever. Despite the Veteran’s repeated claims that he was discriminated against, when pressed regarding the specific actions that cause him to claim discrimination, he cited only two examples. One complaint was that he had requested specific documentation and had not received it directly, although it was provided to his Union in a timely manner. The other specific claim was that a supervisor treated other employees better than him. However, the Veteran could not state how those employees were treated better or provide any names.

In short, the evidence demonstrates that management followed the same procedures regarding the Veteran as it does in all employee discipline cases. There has been no failure of procedural or substantive due process.

3. *Did the Employer prove "misconduct" per the Veterans Preference Act to support discharging the Veteran?*

The Veteran does not challenge the policies that have served as the basis for his discharge. Indeed, they are reasonable on their face and there is ample evidence that the Veteran is familiar with their terms. Nor has the Veteran offered evidence that would overcome the allegations against him which are undeniably confirmed by videotape.

There is no basis upon which to mitigate the Veteran's discharge. He has a long record of various types of policy violations. Moreover, the evidence demonstrates that management views its role as helping employees to succeed, not penalizing them. The Veteran has been the beneficiary of that support, having received extensive training, counseling and re-training. However, his record remains his record. For these reasons I find no bases upon which to return the Veteran to employment with the Employer as a bus operator.

AWARD

For the above reasons, the evidence demonstrates that the Employer has met its burden of proving that it lawfully discharged the Veteran.

December 29, 2012



Christine Ver Ploeg, Arbitrator