

VETERANS PREFERENCE HEARING BETWEEN

)	BMS Case No. 14-VP-0164
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METRO TRANSIT)	Issue: Employment Termination
)	
(“Metro” or “Employer”))	Site: Minneapolis, Minnesota
)	
&)	Hearing Date: October 11, 2013
)	
GEORGE BORGES)	Decision Date: December 10, 2013
)	
(“Veteran”))	Hearing Officer: Mario F. Bognanno

JURISDICTION

The parties to the above-captioned matter are Metro Transit, which operates a public transportation system that serves the Minneapolis and St. Paul metropolitan area, and George Borges who was a Metro bus operator and who is a Veteran, honorably separated from military service. Mr. Borges began work as a bus operator on January 28, 2013. Less than six (6) months later, on July 10, 2013, Metro Transit issued to Mr. Borges a “Notice of Disqualification,” which effectively terminated his employment for unsatisfactory work performance. (Metro Exhibit 29) *Per* his right pursuant to the Minnesota Veterans Preference Act, Mr. Borges requested that said “Notice of Disqualification” be stayed until after a Veterans Preference hearing. (Metro Exhibit 32) In relevant part, the Minnesota Veterans Preference Act states:

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 and misconduct shown after a hearing, upon due notice, upon stated charges, in writing.

(2013 Minnesota Statutes: 197.46 Veterans Preference Act; Removal Forbidden; Right of Mandamus. <https://www.revisor.mn.gov/statutes/?id=197.46>.)

On September 10, 2013, the parties advised the undersigned that they wished to convene a Veterans Preference hearing and that he had been selected to be their Hearing

Officer. On October 11, 2013, the undersigned heard the disputed matter in Minneapolis, Minnesota. Appearing for Metro Transit was Sydnee Woods, Associate General Counsel, Office of the General Counsel. Mr. Borges was self-represented. At the hearing, it was agreed that witnesses would be sworn and Metro's binder of exhibits was accepted into the record. Too, in so many words, the parties mutually agreed to the issue statement as set forth below, and they agreed to orally summarize their case in lieu of filing post-hearing briefs. Finally, the undersigned advised the parties that his decision would be issued within sixty (60) days of the close of the record.

I. APPEARANCES

For Metro Transit:

Sydnee Woods	Associate General Counsel
Christy Bailly	Director, Bus Operations
Ellen Jackson	Operations Manager, Nicollet Garage
Dereje Tafesse	Assistant Transportation Manager, Nicollet Garage

For the Veteran:

George Borges	Veteran
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II. ISSUE

Whether Metro Transit's intent to discharge Veteran Borges was for proven misconduct? If not, what is an appropriate remedy?

III. OPENING STATEMENTS & PROCEDURAL DELIBERATIONS

At the hearing, opening statements were presented first by the Employer and then by Mr. Borges. The Employer began by pointing out that with regard to the Veterans Preference Act the term "misconduct" is defined, in part, as a serious violation(s) of reasonable behavioral standards of the employer and, in relation thereto, the Employer alleged that the Veteran, Mr.

Borges, had repeatedly violated Metro Transit's standards while he was still a probationary employee.

The Employer observed that the Veteran was hired as a Metro Transit bus operator on January 28, 2013, working out of its Nicollet Garage. The Nicollet Garage's Operation Manager is Ellen Jackson. Derege Tafesse, the Veteran's supervisor at the time, is one of five Assistant Transportation Managers who reported to her. As prospective Metro witnesses, both of these managers attended the hearing.

Metro Transit, the Employer averred, has operating policies governing the performance of its bus operators that address safety, customer service and an "adherence" code that specifies prohibited conduct, such as operating early/late or off schedule, reckless driving and violating traffic laws. (Metro Exhibits 2 & 3) In the present matter, the Employer claimed that between March 6, 2013 and June 11, 2013, the Grievant had received nine (9) customer complaints, mainly for being off schedule. (Metro Exhibits 7-15) In addition, on March 8, 2013 and then again on June 28, 2013, the Veteran was issued a "Notice of Violation of Standards and Polices" by two different supervisors for his failure to adhere to schedule. (Metro Exhibits 17 & 18)

This, the Employer argued, constituted an inordinate number of pre-discharge standard and policy violations, particularly because, at the time, the Veteran was a probationary employee. The Employer pointed out that Metro expects zero negative events during a new employee's six (6) month probationary period; two (2) negative events" of any nature, could disqualify" a probationary bus operator for employment; three (3) negative events would disqualify a probationary bus operator for employment. (Metro Exhibit 1 - "Probationary

Standards and Exceptions”) Critically, a negative event or negative entry includes, *inter alia*, “Any verified customer service contact, logged or filed” and “Any violation written, filed or observed.” (Metro Exhibit 1)

Next, the Employer argued that the Veteran was well versed in Metro Transit standards and policies and that he was counseled and trained on them numerous times. (Metro Exhibits 4, 5 & 6) Indeed, the Employer continued, the Veteran received expectations counseling from Mr. Tafesse after each customer complaint that was entered into his record. Continuing in this vein, Metro Transit, the Employer emphasized, is a public mass transit carrier, where adherence to posted time schedules is imperative. A bus operator’s failure to arrive at a bus stop and his/her early or late arrival at a bus stop can cause discomfort and anxiety on the part of the schedule-conscious public, and can throw the transportation plans of customers into disarray (e.g., causing customers to be late for or to miss school, work, appointments, transfer connections and so forth). Thus, professionalism and timeliness are among Metro’s expectations of bus drivers, the Employer argued.

Mr. Borges, like all new bus operators, received operator training. Further, the Employer noted, he received additional training on March 11, 12 and 18, 2013. (City Exhibits 23 – 25) Moreover, it noted that neither this additional training nor his earlier set of customer complaint-counseling sessions succeeded in modifying the Veteran’s on-the-job performance: Post-training customer complaints continued to be reported. On June 28, 2013, Supervisor Michael Robeck observed that the Veteran was running “ahead of schedule” and, thus, he issued a “Notice of Violation.” (Metro Exhibit 17) This violation, the Employer noted, was the

last straw: Metro's attempts at remediation were not working; the Veteran's employment would end on July 10, 2013.

Mr. Borges' opening statement was brief. He admitted that all of the Employer's allegations of standards/policy violations were, in fact, true. He explained that often his schedule would be thrown off because passengers would ask him questions that sometimes would lead to protracted discussions. Also, inclement weather and/or traffic accidents sometimes would cause traffic to slow and become congested. Further, the Veteran acknowledged that while other drivers encountered these same troublesome factors they somehow managed to stay on schedule, but not him because he was probably too cautious, too old and probably should be "more risky."

The Veteran also stated in his opening remarks that he would not challenge the Employer's allegations and, indeed, he went further. Not only did he affirm the Employer's allegations but he took full responsibility for his missteps, and he agreed that there was no need for the Employer to present witness testimony and related documented evidence.

Thereafter, the record of the present matter was closed, with the Veteran requesting a "second chance" remedy.

IV. Opinion

The undersigned finds the Veteran, Mr. Borges, to be an unusual man. His personal code of conduct prevented him from denying or shading the truth of the matters alleged. He not only admitted wrongdoing, he took responsibility for his standards/policy violations and requested a "second chance" on the theory that he is a slow learner but once he mastered a job's skill set, his on-the-job performance was second to none.

Mr. Borges was one (1) of Metro Transit's fourteen-hundred (1,400) bus operators: A job where passenger safety and exemplary customer service are paramount. Mr. Borges might well be able to operate a bus on schedule, as the job demands, given enough time on-the-job – given a “second chance.” However, Metro’s “Probationary Standards and Expectations” state that “two (2) negative entries, of any nature, could disqualify you [the probationary bus operator] from employment,” yet the Employer did not disqualify Mr. Borges, at least not as soon as it might well have. Mr. Borges lost his job after having accumulated no fewer than nine (9) customer complaints, during a three (3) month period. (Metro Exhibit 1; emphasis added) Moreover, the Employer afforded Mr. Borges extraordinary training and counseled him again and again about the Metro’s expectations. The final straw came on June 28, 2013, when he was issued a second adherence violation by supervisor Robeck.

In the opinion of the undersigned, Mr. Borges’ nine (9) customer complaints and two (2) violations for not adhering to schedule, followed by counseling and sometimes by additional training, amounted to a “second chance” stacked atop of a “second chance,” courtesy of Metro Transit. Given the safety and customer satisfaction dimensions of a bus operator’s job and based on the record of this case, the undersigned is hesitant to substitute his judgment for that of Mr. Borges’ supervisors and to go beyond Metro management’s *de facto* grant of “second chances.”

Moreover, the fact that Mr. Borges was a probationary employee is most certainly an aggravating factor that commends sustaining his dismissal. Yet, Metro was both patient and lenient in its unsuccessful effort to develop Mr. Borges into a bus operator who met expectations. Explaining Metro’s response to Mr. Borges’ repeated incidences of misconduct

was a single mitigating factor, namely: Mr. Borges was an affable, honest and willing apprentice (i.e., probationary) bus driver. However, at this juncture, the undersigned finds that Mr. Borges tried his best but his best was unsatisfactory. Mr. Borges' mitigating factor (i.e., his affability, honesty and willingness), while commendable and the basis for Metro's previous grants of "second chances," is no longer a persuasive rationale for reinstatement – for another "second chance."

V. Decision

Veteran Borges was properly discharged for misconduct.

Issued and ordered this 10th day of December,
2013, in Tucson, Arizona.

Mario F. Bognanno, Hearing Officer