

**IN RE ARBITRATION BETWEEN:**

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**GAIL BURKE**

**and**

**STATE OF MINNESOTA – MINNESOTA STATE ARTS BOARD**

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**DECISION AND AWARD OF ARBITRATOR**

**BMS CASE # 08-VP-1069**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**November 26, 2008**

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Gail Burke,

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DECISION AND AWARD OF ARBITRATOR  
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State of Minnesota – Minnesota State Arts Board,

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**APPEARANCES:**

**FOR THE EMPLOYEE:**

Joe Nierenberg, attorney for the Employee  
Gail Burke

**FOR THE STATE**

Rebecca Wodziak, Labor Relations Representative Principal  
Thomas Proehl, Executive Director  
Sue Gens, Interim Exec. Dir. MN Arts Board  
Pam Weaver, MN. Arts Board  
Sue Wickham, HR Director for Dept. of Admin and  
Enterprise Technology  
Carol Stein, State Program Mgr. in HR

**PRELIMINARY STATEMENT**

The above matter was bifurcated on the question of procedural arbitrability and timeliness. The matter was first submitted on stipulated facts and briefs without oral testimony on the question of whether the matter was timely and procedurally arbitrable. The arbitrator ruled that it was timely and procedurally arbitrable by Decision and award dated September 11, 2008. The hearing on the merits was held October 3, 2008. The parties submitted post-hearing Briefs on November 10, 2008.

**ISSUE PRESENTED**

Did the State violate the terms of the Commissioner's Plan when it laid off Ms. Gail Burke? If so what shall the remedy be?

**PARTIES' POSITIONS**

**EMPLOYEE'S POSITION**

The Employee's position is that she was discharged, and not simply laid off, without just cause and that she is entitled to monetary damages resulting for her unlawful dismissal from the State Arts Board. In support of this position the Employee made the following contentions:

1. The Employee noted that she has been employed by the State from 1970 to 1977 when she worked for the MN Department of Public Safety. She left the State and returned in 1979 working for the precursor to the State Arts Board in the AFSCME bargaining unit until 1988 when she was promoted to a confidential position. She worked there until her discharge in November 2007.

2. The Employee acknowledged that she received a letter dated October 15, 2007 indicating that she was being laid off due to her position being abolished. This letter failed to notify her of her bumping rights and did not comply with requirements of Minnesota law.

3. The Employee argued that the terms of her employment were governed exclusively by the so-called Commissioner's Plan. See Minn. Stat. 43A.18, subd. 2, which provides in relevant part that "terms and conditions of employment for all classified and unclassified Employees, ... who are not covered by a collective bargaining agreement and not otherwise provided for in chapter 43A or other law are governed solely by a plan developed by the commissioner." Ms. Burke was not covered by a collective bargaining agreement or otherwise covered by a provision of Minn. Stat. ch. 43A and was thus covered exclusively by the terms of the Commissioner's Plan, hereinafter, the Plan.

4. Procedurally, the Employee argued that the letter of termination dated October 15, 2007 failed to comply with the clear provisions of Minn. Stat. 43A.33, subdivision 3. That section provides in relevant part as follows:

"The content of that notice [notice of termination as well as the employee's right to reply to the appointing authority shall be as prescribed in the grievance procedure contained the applicable plan established pursuant to section 43A.18, [the Commissioner's Plan]. The notice shall also include a statement that the employee may elect to appeal the action to the Bureau of Mediation Services within 30 calendar days following the effective date of the disciplinary action."

5. The Employee asserted that this matter is governed by the terms of Minn. Stat 43A.33. The Employee further asserted that the terms of Minn. Stat. 43A.33 are not limited to disciplinary discharges and should apply here as well. The Employee asserted that the only substantive difference between a layoff and other sort of involuntary dismissal is a limited right of recall. The Employee essentially equated a layoff with a disciplinary discharge for purposes of the applicability of the Plan.

6. The Employee further alleged that none of the Employee's duties were in fact abolished; rather they were simply reassigned to other Employees and other agencies. Based on this, the Employee alleged that her layoff was not truly a layoff at all. The Employee pointed to Article 10 of the Plan and argued that Ms. Burke's termination did not qualify as a layoff under the terms of that Plan. Article 10 provides in relevant part as follows:

A permanent or probationary employee may be laid off because of abolition of the employee's position, shortage of work or funding, a management-imposed reduction in a full time employee's normal work hours which continues longer than two consecutive weeks, ineligibility for appointment to a classified position, or other reasons outside the employee's control.

7. As noted above, the Employee argued that her job was reassigned to a different person and the State even used the Employee's job description as the basis for the new position.

8. The Employee further argued that she should have been reassigned to the newly created position since it was in fact based on her old job. Moreover, the Plan requires that the Appointing Authority "shall reassign the employee occupying the position to be eliminated to any vacancy the Appointing Authority determines to fill in the same class, agency, and employment condition and within 35 miles of the position which is to be eliminated unless the employee is determined not to be qualified for the position by the Commissioner of Employee Relations."

9. The Employee argued that the State failed to comply with that provision of its own Plan and that it should have never posted the new job but rather assigned the grievant into it. She was not determined to be unqualified for the position by the Commissioner and was therefore eligible to be placed directly into the job.

10. The Employee further asserted that even if it is determined that her termination is a valid layoff; she should have been allowed to bump into AFSCME jobs, such as the newly created position with the Arts Board.

11. The Employee pointed to Step 5 of the layoff provisions of Article 10 of the Plan and argued that it allows the laid off employee to “bump the least senior employee in the same agency (and organizational unit, if applicable) and employment condition in the same class or any comparable or lower class in which the employee previously served in order of previous service (i.e. with no geographic limits) unless the employee is determined not to be qualified for the position by the Commissioner of Employee Relations.”

12. The Employee countered the State’s claim that she had no rights under the AFSCME labor contract by arguing that the terms of the Plan govern her rights, not the AFSCME contract. The Employee argued that the State must make whatever accommodations necessary to accommodate the apparent conflict between the Plan and any labor agreements but that the employee should not have to bear the burden of this problem.

13. The relief sought by the Employee is her mitigated back pay, attorneys fees, costs and disbursements as the result of her unlawful termination. The Employee argued that she was unable to mitigate her damages by accepting the positions the State alleged were offered to her due to the very recent death of her brother and that her son had been badly injured after an accident. She was simply focused on other more pressing things and was unable to focus on getting another job at that moment in her life. Further, she is entitled to any of the relief she would be entitled to as if this were a contested case hearing under Minn. Stat. 15.471, including costs, attorneys fees if any and disbursements.

The Employee seeks reinstatement to her former position with the Arts Board with all back pay and accrued benefits as set forth above.

**STATE’S POSITION:**

The State took the position that the Employee’s position was eliminated due to budget cuts and that there was no requirement of just cause involved here. The State further argued that there was nothing improper in the decision to lay off the Employee or in the procedure followed in doing that. In support of this position the State made the following contentions:

1. The State argued vociferously that the grievant was laid off due to economics and was not terminated for cause. The State put on the former Director of the State Arts Board who indicated that the Employee's performance was never at issue and that there was no evidence whatsoever to indicate that the Employee was terminated for performance related reasons. He further testified that the agency was essentially top heavy and that he got clear direction from the Board that he needed to cut costs.

2. Pursuant to the direction from the Board, the Director determined that the Assistant Director position and the Employee's position needed to be cut and their duties and responsibilities reassigned to other personnel. The State argued that this is a classic layoff situation. Layoffs virtually always entail a reassignment of duties and there is moreover nothing to prevent this in statute or in the Commissioner's Plan.

3. The Employee's duties prior to the layoff were to supervise some of the clerical functions in the office, to be the agencies HR person and to perform some clerical functions herself. The Director determined that he could handle the supervisor duties previously done by the Employee himself. He further determined that the SMART team within the Department of Employee Relations could perform the HR functions. They in fact did that for no cost to the Agency. Finally, the Director posted a new position, at lower pay since the job was to perform just the clerical functions. The newly created position was an AFSCME position since it fell within the unit determination for that union.

4. The Director sent the letter dated October 15, 2007 advising the Employee of the impending layoff. The State asserted that this letter, while inaccurate in one minor, insubstantial way, fully complied with the requirements of the Plan.

5. Further, as evidence of the layoff, the Employee took the severance pay and received paid health insurance that would only have been available under the terms of the Plan to Employees who have been laid off. The State argued most vehemently that the Employee cannot now have it both ways; having accepted the benefits available to her under the layoff provisions and now claim that she was terminated for some other reason and is entitled to money damages.

6. The State further argued that there was no evidence whatsoever of an ulterior plan or subterfuge by the Arts Board to terminate the Employee and call it a layoff. The State argued that the Employee's duties were re-assigned because they can be re-assigned. It is a fundamental right of management under PELRA and general employment principles that the employer gets to re-assign select and direct the workforce. As a part of this inherent managerial right, the State had the absolute right to reduce the workforce at the Arts Board, a fact the Employee agreed to at the hearing.

7. The State alleged that the Employee was simply laid off due to economic reasons and that there was no evidence of disciplinary discharge. Moreover, the Employee accepted the benefits due a person who is laid off, such as severance pay and health insurance. The State asserted that these benefits would not have been paid to her if she had in fact been discharged for disciplinary reasons yet she accepted them and has not, oddly enough, offered to repay them. The Employee cannot now have it both ways by accepting the benefits to which she was entitled due to her layoff and now seek to claim that it was something else.

8. The State asserted that this was a classic layoff situation and was one driven by the legitimate need to reduce cost and refocus on the mission of the Art's Board. Accordingly, the Director examined the agency and determined to re-assign various duties to others, including himself, and to send the HR functions to DOER, SMART team at no cost to the Arts Board. There was no evidence that this was inappropriate or illegitimate. The State further noted that at the hearing the Employee's counsel acknowledged that the Art's Board had every right to do what it did.

9. The State further noted that the Employee's claim has been a moving target at best during the course of this matter. The Employee asserted various statutory and common law claims, i.e. Human Rights and EEOC and age related claims but those were eventually dropped. The Employee has not filed any claims in the agencies charged with those types of claims.

10. The State asserted too that there was no evidence of any procedural defects in the manner in which the layoff was handled under the Commissioner's Plan. As noted above, she was given appropriate notice, given all of the severance benefits to which she was entitled under the layoff provisions of the Plan and declined to exercise many of her rights under that Plan. She refused various alternate positions offered to her throughout this procedure.

11. The State asserted that the Plan defines a layoff and asserted most vehemently that it does not require that job duties be eliminated. There is nothing in the Plan that prohibits the reassignment of duties to other personnel or agencies as the basis for a layoff. To hold otherwise would severely undercut the State's statutory right to manage its workforce and to determine its programs, functions and organizational structure. The layoff was nothing more than the legitimate exercise of the inherent managerial right to restructure an agency.

12. The State alleged that the Employee did not have "bumping" rights into the AFSCME unit and thus no rights to the newly created position. The new job was placed in the AFSCME unit and the Employee produced no evidence to show that this was inappropriate. Further, she had no rights under the AFSCME contract due to her break in service in the 1970's. She thus had no seniority under the AFSCME contract and had no rights to bump into a job in that union. The Employee, as the HR person in the agency for years, clearly knew that and further was well aware of what her rights were and what they were not.

13. The State further alleged that the Commissioner's Plan does not give the Employee the right to violate a valid labor agreement negotiated under PELRA between the State of Minnesota and AFSCME.

14. Further, the Employee was given multiple opportunities for alternate employment but refused them all. The Director, Mr. Proehl, even testified that he gave her the chance to bid for the newly created position but she specifically declined it saying that it paid too little and that it was essentially beneath her.

15. The State further asserted that even if the arbitrator were to find that there were deficiencies in the way the layoff was handled the Employee is not entitled to damages since she refused jobs she could have performed and was eligible for. The State pointed to several communications to her by management personnel advising her of other positions she was eligible to take but that she refused them all. There is no question according to the State's argument, that the Employee has failed to mitigate her damages and the fact that she had suffered several tragedies in her life does not negate the requirement of such mitigation.

16. The essence of the State's argument is that this is a layoff, subject to the provisions of the Commissioner's Plan and arising under M.S. 179A.25 only. There was nothing prohibiting what the State did to reorganize the agency here, and in fact it was a perfectly legitimate exercise of managerial discretion to do it. Finally, there were no material procedural or substantive defects in the way this was handled, the notice given to the Employee here nor was there any violation of her rights under State law or the Plan itself.

The State seeks an award denying the grievance in its entirety.

#### **MEMORANDUM AND DISCUSSION**

The Employee commenced employment with the State of Minnesota in 1970 when she worked for the MN Department of Public Safety. She left State employment in 1977 and returned in 1979 working for the precursor to the State Arts Board in the AFSCME bargaining unit until 1988 when she was promoted to a confidential position as a part of the reorganization when State units were first brought under PELRA. The evidence showed that the Employee had a break in service and did not therefore have any seniority or rights under the AFSCME contract when she returned. She worked for the Arts Board until November 2007.

The Employee's functions at the Arts Board just prior to her layoff were to perform some clerical duties, some supervisory duties of the other clerical staff and to perform some HR functions of the Board. The evidence showed that the Board gave direction to the Executive Director that the agency needed to be reorganized to not only save money but to redirect the agency's funds to more direct arts related services. Mr. Proehl gave credible and persuasive testimony that pursuant to this direction he determined that the Assistant Director's position should be abolished and that those functions re-assigned to other staff. He further determined that the Employee's position could also be eliminated.

The evidence showed that her duties were in fact re-assigned to other staff and agencies. Her HR functions were given over to the SMART team at DOER at no cost to the agency. The Arts Board is a relatively small agency that did not need a separate HR staff person and that the functions previously performed by the Employee were more appropriately performed by the SMART department at DOER.

Further, the Employee's supervisory functions were re-assigned to the Executive Director. It was clear that this was an appropriate use of managerial discretion and that since the agency was so small, it was appropriate for him to take over these functions. Finally, the Director created a new position to perform the clerical functions that had also previously been done by the Employee. The evidence supported the State's assertion that this new position was in the AFSCME bargaining unit given its functions and duties.

There was no evidence to suggest that the decision to reorganize the agency was inappropriate nor was there any evidence to suggest that the actions taken were contrary to statute or the Commissioner's Plan. See e.g. Minn. Stat. 179A.07. The evidence showed that the Employee's position was abolished and the duties formerly performed by that position were reassigned to other staff or given to another State agency. There is nothing in the statutes nor in the Plan that prevents that. In fact this is a function under PELRA that is left completely within management's inherent right. Indeed, the Employee acknowledged that the State was within its rights to reorganize the agency in the way it did.

Mr. Proehl testified credibly that he extended an opportunity for the Employee to bid on this new job but that she declined, essentially indicating that the job was a demotion was beneath her or words to that effect. The evidence further supported the State's assertions that the Employee was made aware of multiple other positions that she was eligible for and could have bid for but that she failed to do so. See, State exhibits 4, 5 and 6.

The Employee acknowledged that she did not avail herself of these opportunities but claimed that she was distraught due to the recent death of a family member and the illness of another. Her failure to seek alternate employment under those circumstances was certainly understandable but severely undercut her claim now that the State acted improperly in the decision and action it took here.

More to the point, initially it must be noted that there was no evidence whatsoever that this was a disciplinary action against the Employee. There was no indication that her job performance was the reason for the layoff. Neither was there any evidence whatsoever to indicate that the layoff was a subterfuge for something else. Simply stated; this was a layoff due to the abolishment of the Employee's position – nothing more and nothing less. Thus, contrary to the Employee's assertions here, this matter does not proceed under Minn. Stat. 43A.33.

We must turn first to the question of whether the grievant was truly laid off or whether she was discharged for disciplinary reasons. The Employee asserted that her claim should proceed under that provision of law since "a discharge is a discharge is a discharge." This assertion finds no support in the law, the statute, the Commissioner's Plan nor in the literature pertaining to employment in general. There is clearly a substantive difference between a layoff and a disciplinary discharge even under the terms of the Commissioner's Plan. Section 10 of the Plan cited above defines a layoff as "... abolition of the Employee's position, shortage of work or funding, a management-imposed reduction in a full time Employee's normal work hours which continues longer than two consecutive weeks, ineligibility for appointment to a classified position, or other reasons outside the employee's control."

This was precisely what happened here – the Employee’s position was abolished due to economic reasons. Section 11 of the Plan is, of course an entirely different section dealing with disciplinary actions. The clear provisions of the Plan itself show that a layoff is not to be equated with or treated similarly to a disciplinary action and that the rules in place for one do not apply to other. Finally, as further evidence of the fact that this was a true layoff was the clear fact that the Employee herself treated it as a layoff. She received the severance pay and health insurance benefits that would only have been available to her upon a layoff, and would not have been available to her if she had in fact been terminated due to some performance related reason. It is thus abundantly clear that this was a layoff and that everybody involved, including the Employee, considered it a layoff when it occurred.

Moreover, a discharge for cause necessarily entails the allegation that performance was deficient. There was absolutely no evidence of that whatsoever here. Her performance was never in question. The evidence showed that she performed her duties as assigned, was never found to have violated work rules and appeared for work as directed. She was by all accounts an excellent Employee. That however is not the issue.

Minn. Stat. 43A.33 is prefaced in terms of “discharge, suspension without pay or demotion,” and cannot therefore be read to include a layoff for economic reasons. Expanding a layoff for economic reasons to include terminations for cause would be a radical shift in the law of employment in this State and would constitute a major addition to the provisions of law and the Commissioner’s Plan far outside the jurisdiction of the arbitrator.

The question now is whether there was anything unlawful or contrary to the Commissioner’s Plan in what happened here. This entails a determination of whether there were procedural defects in the way the layoff was handled. The Employee argued initially that the matter should be processed under Minn. Stat 43A.33. As noted above, there was insufficient evidence to support the claim that her termination was anything other than a layoff. Thus, the matter is not appropriately processed under Minn. Stat. 43A.33 and is appropriately handled under the Plan and Minn. Stat 179A.25.

The latter statute provides that every “public employee should be provided with the right of independent review, by a disinterested person or agency, of any grievance arising out of the interpretation of or adherence to terms and conditions of employment.” It further provides that “If no other procedure exists for the independent review of such grievances, the Employee may present the grievance to the commissioner under procedures established by the commissioner,” which here would be the Plan itself.

The Employee raised several substantive claims. First, she asserted that she should not have even been laid off at all. (It should be noted that the position taken that her determination was in fact a discharge was in stark contrast to the position taken here that in fact her layoff was a layoff but that it was done improperly. Notwithstanding that seemingly inconsistency, the claims will be dealt with in order on their merits.) The Employee argued that her position was simply redefined and not really abolished. The evidence did not support this assertion. As noted above, the duties were reassigned to other personnel and other agencies. This scenario is precisely contemplated by a layoff.

The Employee further asserted that the State’s action was a subterfuge and was really an attempt to eliminate the Employee under the guise of eliminating her position. There was no evidence to support this assertion. The former Director testified that the Employee’s performance was good but that the Board determined that the agency was essentially top heavy and needed to be reorganized. The State has the right to reorganize in the way that was done here. The State more than carried its burden of showing that there were legitimate business reasons for the decision made to reorganize the agency and reassign the Employee’s job duties here. Further, there was nothing to show that the State did not have the right to do this.

The Employee also asserted that the Employee should have been assigned to the newly created position under the terms of the Plan. Several pieces of evidence mitigated against this assertion. First, as noted above, the Director testified credibly that the Employee told him she did not want that position and would not even apply for it since it entailed a cut in pay and that she considered it a demotion. Indeed she did not apply for this job.

More to the point, the terms of the Plan did not grant her the right to the new job. Section 10, Step 2 of the Plan provides in relevant part as follows: To avert a layoff, the Appointing Authority shall reassign the employee occupying the position to be eliminated to any vacancy the Appointing authority determines to fill in the same class, agency and employment condition ...” This provision clearly grants to the Appointing Authority, here the Arts Board the right to determine what class the new position is in. Because the new job was not determined to be in the same class as the one held by the Employee she did not have a right to it under the terms of the Plan. Further, the evidence supported the State’s claim that the new job was appropriately placed in the AFSCME unit based on the duties required of that position.

The Employee further alleged that she should have been entitled to bump into another AFSCME position as a matter of right. The Employee based this assertion on the provisions of Step 3 of Section 10 of the Plan. That provides in relevant part as follows: “If a layoff cannot be averted through the reassignment procedures of Step 2, the Appointing Authority shall notify the incumbent of the position to be eliminated in writing at least three weeks prior to the effective date of a layoff. The Notice shall state the reasons for the layoff action, the effective date of the layoff period and the estimated length of the layoff period. It shall also state, or offer the employee the opportunity to discuss with the Appointing Authority, the options available to the employee in lieu of layoff.”

The Employee claims that the process by which she was laid off failed to comply with the terms of this section. The letter advising the Employee of the layoff was dated October 15, 2007. The effective date was stated in that letter as November 2, 2007. There was a technical violation of the terms of the Plan in sending the notice since it was not a full three weeks. Here though it was clear that the substance of this provision is to give the Employee options for re-employment if the Employee desires to explore these options. Here it is clear that at the time she did not.

As noted herein, Director Proehl gave credible testimony that the Employee was told she could apply for the newly created position and she declined indicating that it would be a demotion for her and that she would not apply for it. Indeed she did not. Moreover it appears that this allegation was raised very late in the game here and was not asserted as the basis for the damage claims here until well after the process had gone forward.

The evidence showed that the Employee was given multiple opportunities to apply for open positions; consistent with the terms of the Plan, and that she declined them or simply failed to follow up on them. An aggrieved employee cannot be allowed to sit on rights they might otherwise have and then assert a claim for damages later when those damages could well have been mitigated or even eliminated if the Employee had acted on those rights earlier in the process.

The Employee further asserted that the elimination of the position was not “real” since her old job description was used as the basis for the new job. See, Employee exhibits 5 & 7. There again was nothing improper in this nor was there any evidence that this was inconsistent with the terms of the Plan. Public employers are certainly allowed to reorganize their department, indeed it is an inherent managerial right, and the use of some portions of an eliminated position to be used in a newly created position is absolutely within that right. Here it was incumbent upon the Employee to show that there was a violation of the Plan or state law in what was done here; not the other way around.

Finally, the Employee asserted that she should have been allowed to bump into the AFSCME unit in order to get the newly created position. The basis for this claim is the assertion that option 5 of the Plan’s layoff provisions required it. That provisions states as follows:

The Employee may ... Option 5 bump the least senior employee in the same agency(and organizational unit if applicable) and employment condition in the same class or any comparable or lower class in which the employee previously served in order to preserve service ... unless determined to be not qualified for the position by the Commissioner of Employee Relations.”

The Employee asserted that she should have been allowed to bump into the newly created position without the necessity of applying for it competitively and that the terms of the AFSCME contract are not relevant. Here again the basis for the claim that she had bumping rights under the terms of Option 5 is that the employee be in the same class and it was clear she was not. Her AFSCME seniority expired as the result of her break in State service in the 1970's and she therefore had no rights under the AFSCME contract.

Moreover, the terms of the AFSCME contract are indeed relevant, contrary to the assertion by the counsel for the Employee. The terms of the Plan do not contemplate that the State may violate the terms of a binding labor agreement between the State and one of its certified exclusive bargaining representatives. Thus by its very terms Option 5 did not apply to grant bumping rights to the Employee under these facts. Bumping rights under the terms of a labor agreement are covered by the terms of that labor agreement. Thus any rights to an AFSCME position would be covered not by the terms of the Commissioner's Plan in her instance but rather by the terms of the AFSCME contract. Since she had no rights under the AFSCME contract, as explained by the State's witnesses, she had no rights to bump into an AFSCME position.

Due to the findings above that there was no violation of the terms of the Commissioner's Plan there is no need to determine the claims for back pay, attorneys fees and costs asserted by the Employee in the matter.

### **AWARD**

The Employee's claims are DENIED.

Dated: November 26, 2008

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Jeffrey W. Jacobs, arbitrator