

IN RE ARBITRATION BETWEEN:

STATE OF MINNESOTA DEPARTMENT OF VETERAN'S AFFAIRS

and

JULIE MORGAN, INDIVIDUAL GRIEVANT

DECISION AND AWARD OF ARBITRATOR

BMS CASE # 13-VP-0772

JEFFREY W. JACOBS

ARBITRATOR

March 3, 2014

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State of Minnesota, Department of Veteran's Affairs,

and

DECISION AND AWARD OF ARBITRATOR
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Julie Morgan, Grievant

APPEARANCES:

FOR THE GRIEVANT:

Phil Villaume, Attorney for grievant
Tom Priebe, Attorney for grievant
Julie Salland Morgan, grievant

FOR THE UNIVERSITY:

Joy Hargons, Attorney for Dep't of Veteran's Affairs
Carol Lynch, Agency HR Director
Laura Davis, MMB representative
Ann O'Brien, Assistant Comm'r of MMB

PRELIMINARY STATEMENT

The hearing was held on January 24, 2014 at the Minnesota Veteran's Home in Minneapolis, MN. The parties submitted briefs dated February 21, 2013 at which point the record was closed.

ISSUES PRESENTED

The parties stipulated to the issue: Did the employer MDVA violate Article 7, Probationary and Trial periods of the Commissioner's Plan (Plan)? If so, what is the appropriate remedy?

STATUTORY AND CONTRACTUAL JURISDICTION

MINN. STAT 179A.25 – INDEPENDENT REVIEW

It is the public policy of the State of Minnesota 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. When such review is not provided under statutory, charter, or ordinance provisions for a civil service or merit system, the governmental agency may provide for such review consistent with the provisions of law or charter. 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.

RELEVANT PROVISIONS OF THE COMMISSIONER'S PLAN

Section 7 Probationary and Trial Periods – page 20 of Commissioner's Plan

Failure to Attain Permanent Status. * * * An employee who has permanent status in another class and/or agency and who is notified by the Appointing Authority that (s)he will not be certified to permanent status in the new class and/or agency, shall be returned to a vacant position in the class and agency in which the employee served immediately prior to appointment in the new class and/or agency. * * * If there is no vacancy, the layoff provisions (including bumping rights) of the collective bargaining agreement or plan applicable to the former class and/or agency shall be applied.

Section 10 – Seniority, Layoff and Recall

Return Through Outside layoff – page 28-29 of the Plan

If the following conditions are met, the Appointing Authority shall allow an agency employee to return to a position by this Plan:

The employee previously had permanent or probationary classified status in a position (other than insufficient work time position) covered by this Plan;

The employee currently has permanent or probationary classified status in a higher or equal class, and;

The employee has received notice of permanent layoff and has exhausted all vacancy and bumping options available under the layoff provisions of the Plan or collective bargaining agreement covering him/her for purposes of layoff, and;

That plan or collective bargaining agreement includes a provision allowing the return of employees laid off under the Commissioner's Plan.

If all these conditions are met, the appointing Authority shall allow the employee to exercise option 1-6 in Step 4 of the permanent layoff, under the conditions specified there. In addition, before bumping another employee, the employee must accept a vacancy in an equal class for which the Employer has determined him/her qualified within thirty-five (35) miles of the employee's current work location and employment condition.

Section 12 – Resolution of disputes

Dispute resolution Procedure. Disputes shall be resolved in accord with the following steps, however at any step the parties may by mutual agreement, attempt to resolve the dispute through mediation.

* * *

Step 4a: The employee may appeal the decision of the Appointing Authority or his/her designee in writing to the Commissioner of Minnesota Management and Budget within seven (7) calendar days after the Appointing Authority or designees has given an answer. The Commissioner of Minnesota Management and Budget shall consider the information presented by the employee and the Appointing Authority and shall make a decision and notify the affected employee within thirty (30) calendar days. The Commissioner of Minnesota Management and Budget shall have final authority to decide whether the Appointing Authority shall settle the dispute prior to the hearing provided under Step 4b below.

Step 4b: A permanent status employee may appeal an unpaid suspension, demotion (other than one resulting from non-certification) or discharge at any step of the Dispute resolution procedure to the Bureau of Mediation Services as provided under M.S. 43A.33, subdivision 3 (see Appendix G).

The parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

GRIEVANT'S POSITION:

The grievant's position is there she did not voluntarily resign, should have been allowed additional time to decide whether to take a job some 200 miles from her home and should have been entitled to bump pursuant to the layoff provisions of the Plan. In support of this position the grievant made the following contentions.

1. The grievant asserted that the job she was "offered" in Silver Bay was not a reasonable offer. She asserted that the job duties were not the same; in fact involved considerable travel (which her position in Minneapolis did not) and had nearly 17 lines of job duties. Her prior position in Minneapolis had 6 such lines of job duties. Thus the job is not truly in the same "class" and should not have been considered a "vacancy" within the meaning of Section 7 set forth above. The grievant asserted that she disagreed with the MDVA's interpretation of the applicable policy and that she had the option of returning to her former employment because she had obtained permanent status there. She did not therefore have to either take the job as offered in Silver Bay or resign as the sole options available to her on these facts.

2. The grievant further asserted that she was given insufficient time to make a decision on these facts. She was given 3 days to decide whether to move her family some 200 miles to Silver Bay, Minnesota. The grievant is married and has children in school. Her husband also works full time and would have to move, get a new job and make considerable lifestyle changes. It required her to make a momentous decision on 3 days' notice and is unreasonable and was designed in fact to discharge her.

3. The grievant asserted that she did not at any time voluntarily quit her job. She very much wants to return to her position but cannot be expected to move 200 miles away to a different position. She should have been allowed to exercise her bumping and other layoff rights. The basis for this claim is that the "vacancy" was not a true vacancy given the vastly different location and job duties between the job she held in Minneapolis versus the one offered to her in Silver Bay.

4. The grievant also argued that there is no language whatsoever in the Plan requiring that the grievant resign if she did not accept the one open position at the time she was not certified in a permanent position. The grievant further argued that she should have been given more time to decide what to do or placed on a leave status to allow additional time for another more convenient position to open up within the Agency.

5. The grievant further asserted that the terms in the Plan are inherently ambiguous and unclear. The grievant further asserted that the Agency admitted in an e-mail dated January 28, 2013 that the terms of the Plan were “silent on how to handle this issue.” There is thus more than one reasonable interpretation of the Plan and that the term “class” is open to interpretation. There is further no time limit stated in the Plan for when a person in the grievant’s position must make a decision yet she was given only 3 days to decide whether to move her family 200 miles north of where she and her husband and her family live.

6. Thus, the grievant asserted, there are at least three areas of latent ambiguity at play; the time allotted to decide to accept a vacant position; the term “class” and whether that entails a job with vastly different duties, and the results under the Plan if there is a vacancy within an agency at the time a person is not certified and leaves a probationary position in another agency but is filled during the time the person is trying to decide whether to accept it.

7. Here the grievant was given an unreasonably short time to consider whether to take the vacancy in Silver Bay, even assuming that position met the definition of “class” under the Plan, and the position there was filled almost before she even had a reasonable chance to consider it. The Plan is again silent on how to handle this situation and this latent ambiguity should again be construed against the State as the drafter of this language and allow the grievant to have had additional time to decide whether to accept the job in Silver Bay.

8. Given the ambiguity in the definition of “class” the grievant argued that the position offered to her was not truly the same “class” as the position she held in Minneapolis. Thus, there was no vacancy within the meaning of the Plan, and the term class as that is used therein, and the grievant should thus be entitled to the layoff provisions of the Plan, including bumping rights.

9. The grievant asserted that a “reasonable time” must be applied to allow a person to decide whether to accept a vacant position, especially given the facts here. More than 3 days was required to make such a momentous and important decision yet the grievant was given only that time or effectively be fired. Further, if within this reasonable time the position in Silver Bay was filled, then there was no “vacancy” under the Plan and the last sentence of Section 7 set forth above applied to allow the grievant layoff rights.

10. The essence of the grievant’s arguments here is that the term “class” is ambiguous and that the job in Silver Bay was not truly the same class given the very different set of duties and responsibilities. Further, that she was given too short a time to decide what to do in response to the offer of the Silver Bay job. The Plan is silent on a location or a time frame within which to accept an offer and this ambiguity must also be construed against the drafter – the State – to allow additional time to decide.

The grievant seeks an award reinstating her to her former position at MDVA Minneapolis with full back pay and all accrued benefits and/or given all rights under the layoff provisions of the Plan.

STATE’S POSITION

The State’s position is that there was no violation of the Plan and that the grievant voluntarily resigned when she refused a vacant position with the agency after failing to be certified in another position. In support of this position the State made the following contentions:

1. The State asserted that the grievant is looking for something above and beyond what the Plan calls for and that the arbitrator has no power to add to or amend the Plan. The State asserted too that the terms of the Plan are in fact clear and unambiguous and contain no guarantee of a job in the Minneapolis office of the MDVA, as the grievant seems to want.

2. The State pointed to the language of Section 7 set forth above and noted that the language covering this exact scenario is quite clear and provides only that the grievant has the right to be “returned to a vacant position in the class and agency in which the employee served immediately prior to appointment in the new class and/or agency.” Here the grievant failed probation in the new agency, DPS, and was offered a position in the class and in the agency.” There is no guarantee of any specific location nor is there a specific time limit within which the person has to accept the job.

3. The State’s witnesses noted that the grievant was told about the job in Silver Bay well before the January 28th letter and was further given until February 8, 2013 to decide to accept it. Contrary to her attorney’s assertions, she was thus given far more than 3 or 4 days within which to decide to take that job or not.¹ The State asserted that she was given nearly 2 full weeks to decide whether to accept the job and several more days to report for duty in Silver Bay.

4. The State asserted that the job in Silver Bay was in fact in the same “class” as her prior job at MDVA in Minneapolis. The State explained that jobs in the same class do not have to be identical. There was a job audit done and these jobs were in the same class. The mere fact that the job duties varied slightly does not render these jobs in different classes.

5. The State asserted too that both Ms. Lynch and Ms. O’Brien testified that class determination is based on a detailed job audit; Tr. at 106, 110-111, and that the grievant knows this because she herself conducted job audits. Employer exhibit 2, p. 5. The State insisted that the grievant is being disingenuous and that she clearly knows what a “class” is.

¹ At the hearing grievant and her counsel insisted that she was given only 3 days within which to decide whether to accept the job in Silver Bay. In the post hearing brief, the assertion was that it was 4 days.

6. Further, the arbitrator has no power to alter the job classifications in the State system – these jobs are in the same class and agency. Thus, there *was* a vacancy at the time the grievant was not certified at DPS and the final sentence of section 7 regarding layoff and recall rights simply does not apply. That sentence applies *only* if there is no vacancy in the same class and agency.

7. The State further argued that the language does not say that the job to which a person can return must be in the same location or facility. The grievant thus took a calculated risk when she switched jobs and went to DPS that she might not pass probation and knew that she might not be able to return to her prior job at the Minneapolis location if that occurred.

8. Further the State asserted that the grievant was specifically told that she would have been treated as a travelling employee under State rules and thus entitled to lodging, meals and even travel reimbursement for a period of time. She could obviously have taken the job, traveled back and forth, had her lodging and meals and other expense paid for and continued to seek a job closer to home. Thus the dire predictions she asserted regarding having to relocate her family did not have to occur in terms of relocating her family.

9. The State further noted that the grievant clearly told her supervisor and the HR representative that she would not take the Silver Bay job. She said this multiple times even after she was clearly told she had two options: take the job or voluntarily resign. She was even given additional time to accept the job even after she told Ms. Lynch she would not take the job.

10. The State countered the claim that the grievant could have been given extra time or been placed on a leave of some sort by noting that she never asked for that even though as an HR professional she knew of that option. Even her attorneys failed to ask for that option despite many letters from them and a face-to-face meeting between the attorneys and the State's representatives to discuss the resolution.

11. The essence of the State's argument here is that the language is clear and provides no guarantee of re-employment in the same location, provides for no time limit within which to accept or reject a job, which of course means that she is subject to the State's need to fill an open position, and that she was in fact given several options and additional time yet she failed to avail herself of those. She could have accepted the job and preserved her right but failed to do so. The result is dictated by the clear terms of the Plan and was in substantial part due to her own actions.

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

DISCUSSION

FACTUAL BACKGROUND

The facts were relatively straightforward and for the most part undisputed. The grievant was hired by the MDVA in 1996 and eventually was promoted to the position of Personnel Officer Senior. She was certified as a permanent employee there and worked at the MDVA office in Minneapolis for approximately 16 years.

In October 2012 she voluntarily transferred to the Minnesota Department of Public Safety, DPS, located also in the Twin Cities Metro area. See Joint Exhibit 3, September 21, 2012 from the grievant to Ms. Kay Pierson, resigning employment with MDVA effective October 9, 2012. The evidence showed that this was a voluntary demotion. It was not clear why she took this position but it was clear that she was required to serve a 6-month probationary period at DPS. See Joint exhibit 4, letter dated September 24, 2012 from DPS to the grievant.

The grievant did not successfully pass probation in the new position at DPS. DPS sent her a letter dated January 28, 2013 notifying her of her failure to pass probation in her new position and further explaining her rights under the Plan to return to a vacant position at the MDVA.

That letter, Joint exhibit 4 page 14, provides as follows:

Under the Commissioner's Plan you have rights to return to a vacant position in a class that you have previously held permanent status at the Minnesota Department of Veteran's Affairs. There is a vacancy available for you in Silver Bay Minnesota. Please contact carol Lynch Director of Human Resources at MDVA ... should you be interested in that position by the end of the work day on February 1, 2013."

Clearly, the grievant was aware of not only her rights under the Plan but also of the vacant position in Silver Bay as a result of that letter. The letter also does not require her to take the position in Silver Bay but rather directs her to discuss it with Ms. Lynch by February 1st. Silver Bay Minnesota is some 200 miles from the grievant's home in Inver Grove Heights Minnesota and approximately that far from her prior location at MDVA in Minneapolis, Minnesota.

There were several conversations both by e-mail and by telephone between the grievant and Ms. Lynch in which the grievant was offered the position in Silver Bay. The evidence further showed that MDVA would have treated the grievant as a travelling employee for up to 90 days, paying her lodging for some of that time as well as meals and other expenses necessary as a travelling employee and would have paid her mileage to return home once per week to visit family. The grievant stated several times that she was not interested in nor would she accept the position in Silver Bay. She also stated that she did not consider herself as having voluntarily resigned but continued to maintain that she did not wish to accept the position in Silver Bay. This was communicated even before the February 1st date and was as early as January 30, 2013. Even after that date however, Ms. Lynch continued to offer her the position as well as the status of travelling employee with the benefit as outlined above.

The evidence also showed that neither the grievant nor her attorneys requested vacation or other leave time to consider the position in Silver Bay. The grievant maintained instead that she would not accept it and wanted her prior job at the Minneapolis location at MDVA or that she should be entitled to the layoff provisions of the Plan as if there were no actual vacancy within the agency.

Ms. Lynch sent the grievant a letter dated February 5, 2013 outlining her rights under the Plan and allowing her additional time to decide what to do. That letter offered vacation and unpaid leave to consider her options. No request for that was ever received. Ms. Lynch also gave the grievant until February 8, 2013 to decide what to do and until February 13, 2013 to appear for work in Silver Bay in the event she decided to accept that job. The record established too as noted above, that the grievant would have been placed in travelling employee status during which she could have continued to seek other positions within the State. The grievant then contacted Ms. Hargons at MMB to get a further explanation of the agency's position. See Joint exhibit 6 at pages 1-3. She again stated she would not accept the job in Silver Bay but was not resigning.

Having heard only that the grievant was not going to accept the job in Silver Bay the agency sent her a letter on February 14, 2013 deeming her actions to be a voluntary resignation. See Joint exhibit 6 at pages 5 –7. The grievant's attorneys sent several letters throughout February and March of 2013 outlining her position that she was not resigning and that the offer in Silver Bay was unreasonable, that she was given only 3 days to accept or reject that offer and that she should be reinstated to her former position in Minneapolis at MDVA. In the alternative, the attorneys argued that she should be entitled to her rights under the plan applicable to layoff and bumping rights and that she should be placed on a layoff and recall list for future vacancies within the Agency.

This grievance ensued. There was initially a dispute about whether this matter was considered a discharge or demotion and thus covered under Minn. Stat 43A.33 or whether it was covered under Minn. Stat. 179A.25 independent review. As discussed briefly below, this matter is covered under Minn. Stat. 179.A.25. It is against that general factual backdrop that the analysis of the case proceeds.

IS THIS GRIEVANCE COVERED BY 43A.33 OR 179A.25?

Minn. Stat 43A.33 applies only to situations involving “discharge, suspension without pay or demotion.” See, 43A.33 subd. 3(b). The grievant has asserted here that her resignation was not voluntary and that she was effectively discharged from her employment. The facts did not bear that out and even her counsel has agreed to proceed under Minn. Stat. 179A.25. See e-mail dated September 4, 2013, Joint exhibit 8 at page 14. There was also no allegation that her performance at MDVA was lacking or that the grievant was discharged, suspended or demoted by the Agency or through allegation of misconduct or lack of competency. Moreover, the evidence was clear that even though she failed to pass probation at DPS, that issue is not grievable under the clear terms of the Plan.

Minn. Stat 43A.33 thus does not apply. The record here shows that this is a dispute about the meaning of the Plan, whether the vacancy offered in Silver Bay was truly in the same “class” as the grievant’s prior position at MDVA in Minneapolis and whether there are grounds to place the grievant in a layoff under the Plan on this record.

The matter is thus a contract interpretation matter over the terms of the Plan. That sort of case is one appropriately covered by the terms of Minn. Stat. 179A.25. While the procedure for handling such a case may be similar, one apparent difference is over which side pays the fees and expenses of the arbitration. Under 43A.33 the State pays the entire fee whereas under 179A.25 the parties split those fees and expenses. The grievant’s counsel has acknowledged that this case is the latter. See page 10 of the grievant’s pre-arbitration brief.² Accordingly, this matter will be decided under the procedures outlined in Minn. Stat. 179A.25 set forth above.

² There was also an e-mail exchange on January 29, 2014 between the parties that further supported this conclusion and reflects an apparent agreement between the parties regarding the splitting of the cost. That agreement is consistent with the provisions of Minn. Stat 179A.25. That exchange was not part of the official hearing record but was consistent with these determinations.

WAS THE GRIEVANT OFFERED A POSITION IN THE SAME CLASS AS HER PRIOR PERMANENT POSITION IN MINNEAPOLIS?

One of the grievant's main assertions is that the position offered in Silver Bay was not appropriately placed in the same class and thus should not have been characterized as a vacancy under the Plan. As noted above, the Plan deals with situations where an employee who held a permanent position moves to another agency but fails to make probation – exactly the scenario presented here. The Plan provides that, the employee “shall be returned to a vacant position in the class and agency in which the employee served immediately prior to appointment in the new class and/or agency.”

Further, section 7 of the Plan provides that, “if there is no vacancy, the layoff provisions (including bumping rights) of the collective bargaining agreement or plan applicable to the former class and/or agency shall be applied.” The grievant asserted that the position in Silver Bay had far more job duties and responsibilities and thus was not truly in the same “class” as her position in Minneapolis. There was thus no “vacancy,” since the job was not in the same class and the layoff provisions should therefore apply. Compare, Job description of the MDVA job in Minneapolis in Joint exhibit 3, with Joint exhibit 5 page 1. A comparison of the duties shows that even though different, the jobs were still appropriately placed in the same class.

The position in Minneapolis required no travel; Silver Bay required travel but the evidence showed that this was in reality the requirement to travel to the Twin Cities once or twice per year for training. The job itself was based in Silver Bay. There are also more duties listed for the Silver Bay position even though both positions are classified as Personnel Officer Senior. The basis of the grievant's claim is that the greater number of job duties means the positions are not in the same class.

This argument though is contrary to the classification system in the State. Jobs do not need to be identical in every way to be classified in the same “class” for purposes of the Plan. The evidence showed, and the State's witnesses testified credibly, that there are many instances both inside and outside of this Agency of positions that may be in different locations and slightly different job duties but are appropriately classified in the same class.

Moreover, it should be noted that the job duties listed in both these descriptions are of the same general nature – i.e. human resources management, unemployment, workers compensation issues, benefits issues, advising staff as to compliance with labor agreements, policies and other provisions of applicable documents governing human resource management within State employment.

In addition, the pay range for both positions is the same and the qualifications necessary to perform the work are virtually identical.³ Further, the State’s witnesses testified credibly that there was a job audit done of these positions that showed they are appropriately placed in the same class. The arbitrator does not have the power under the Plan to simply alter such a determination.

There is nothing in the Plan addressing the location of such a vacancy nor is there a guarantee that the person in this situation be placed at any particular location. The term “vacancy” or vacant position” is used. That can mean any location within the Agency throughout the State. Thus, the fact that these positions are in different locations does not render Section 7 inapplicable. Accordingly, the Silver Bay vacancy was in the same class as her prior position in Minneapolis.

DID THE AGENCY ACT REASONABLY IN GIVING THE GRIEVANT TIME TO ACCEPT OR REJECT THE SILVER BAY JOB?

The grievant further argued that the Agency did not give her sufficient time to decide whether to accept or reject the Silver Bay job. Part and parcel of this is whether there is an implied term of reasonableness inherent in the Plan itself. Counsel cited *American Bridge v American District Steam*, 119 NW 783, 785 (Minn. 1909) for this proposition.

Elkouri discusses this very topic as follows:

“Standard contract jurisprudence holds that “every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement (citing Restatement of Contracts (Second) section 205. The duty has both prohibitory and mandatory components. A party must thus be under a duty to refrain from hindering or preventing the occurrence of conditions of the party’s own duty or the performance of the other party’s duty, but also to take affirmative steps to cooperate in achieving these goals.

³ In the Minneapolis job description there is a paragraph titled “what’s great about this job?” that does not appear in the Silver Bay description. That is quite obviously related to differences in where the jobs are – not in the duties and qualifications necessary to perform them.

The implied covenant of good faith and fair dealing is similar to the principle of reason and equity, and is deemed to be an inherent part of every collective bargaining agreement. Indeed, this implied covenant is sometimes referred to as the doctrine of reasonableness. The obligation prevents any party to a collective bargaining agreement from doing anything that will have the effect of destroying or injuring the right of the other party from receiving the fruits of the contract, and it applies equally to management and labor. The covenant does not arise out of the agreement of the parties but rather out of the operation of the law.

Arbitration and judicial decisions often cite the implied covenant of good faith and fair dealing in a number of other contexts, but the doctrine serves as little more than an interpretative tool to aid arbitrators and judges in their case-by-case determinations of breaches of collective bargaining agreements. ... Essentially the covenant of good faith and fair dealing serves as a springboard for a case-by-case determination of reasonableness. Thus the covenant serves as the basis for the proposition that managerial decisions must be exercised reasonably and discretionary decisions will be reviewed to determine if they were arbitrary, capricious or discriminatory.” Elkouri and Elkouri, *How Arbitration Works*, 7th Ed BNA Book at page 478-480.⁴

Elkouri however provides this cautionary note as follows:

“It should be noted that the implied covenant of good faith and fair dealing does not inject new obligations or duties into the labor agreement. The implied covenant governs only conduct in those areas that are controlled by the agreement and does not impose a duty to act in good faith in matters outside of the agreement. Consequently, while the implied covenant can serve as the basis for a claim of breach of a collective bargaining agreement, the claim must be coupled with some specific allegation of a violation of the collective bargaining agreement or the federal labor laws.” Id at 480.

There is thus some merit to the claim that the Plan carries with it an implied covenant of reasonableness and that the application of its terms must be reasonable. That term must depend on each case and whether the State acted reasonably in the context of each individual set of facts. Thus while there was the obligation to act reasonably the question is thus whether the State acted reasonably in the context of this case.

The grievant asserted that she was not given sufficient time to decide whether to take the Silver Bay job and that this constituted a material breach of the Plan entitling her to reinstatement to her former position or to any layoff and bumping rights she might have otherwise had under the Plan. Several things undercut this claim.

⁴ Elkouri is of course writing it the context of a traditional labor arbitration case as opposed to a Plan promulgated under State law and policy. Here though, the authority and the general concepts cited there make it clear that such a covenant is implied in any such contractual and quasi-contractual relationship and one is certainly inherent in the Plan as well.

First, the grievant claimed that she was given only 3 days to consider a move from her home in Inver Grove Heights Minnesota to Silver Bay Minnesota – some 200 miles away. The facts showed that she was notified on January 28, 2013 of the job in Silver Bay and was specifically advised that this position was her only option to exercise her rights under Section 7 of the Plan. It was the sole vacancy in the same class and agency and was offered to her. Moreover, even though the original letter gave her until February 1st to discuss it the evidence showed that she was given additional time and was eventually given until February 8, 2013 to decide whether or not to take the job and until February 13, 2013 to appear for work if she did eventually decide to accept that position. See Tr. at 43-44.

Second, there was little dispute on this record that she repeatedly said she would not take that job anyway. She indicated that she would not accept the Silver Bay job even after being told it was her only option and even after being given additional time to consider it and change her mind. On this record, there was little question that the grievant would not have taken the job irrespective of how much time she had to decide. What she was apparently waiting for was another vacancy to come open or to reinstatement to her former position. As discussed herein, there is no contractual basis for reinstatement to her old job under any circumstances and the evidence showed clearly that Silver Bay was the only vacancy available at the time.

Third, the grievant was given the opportunity to be treated as a travelling employee and be reimbursed for lodging, meals and other essential expenses as well as payment of mileage to and from the Twin Cities and Silver Bay once per week to return home. She could have continued to seek other positions in the State system, presumably ones that were closer to home, and thus preserve her rights to employment by accepting the job and seeking other options, albeit in a somewhat less than convenient way. Thus, her reticence about taking the Silver Bay position is understandable but the fact remains that the grievant was given a reasonable option yet chose not to accept it.

Under these circumstances it would be manifestly unfair to compel the State to grant the grievant's request and essentially create a result that goes above and beyond what the Plan calls for. Such a result would create inconsistency and unpredictability for the employees covered under the Plan but also flies in the face of the old adage that today's favors become tomorrow's demands.

Further, the record reveals that even under the implied covenant of good faith and fair dealing/reasonableness, there were no rights that were "destroyed or injured by State's action here." She had no "right" to a particular location or position – just to a vacancy within the agency in the same class. There was further no time limit prescribed in the Plan for deciding when to accept a job. The Plan does not say nor does it imply that a job must be kept open indefinitely while the person decides what to do about it.

Further, while the Plan is silent on the question of whether a "vacancy" still exists if it is filled during the time a person in the grievant's position decides whether to take it, the facts here do not support the claim that the vacancy was filled while she decided what to do. Here the facts showed that the position was still open even though the grievant stated clearly on several occasions that she would not take it. This is not a case where the grievant was given until a certain date to decide to accept or reject a job but the job got filled during that time frame. While that may have given rise to a different result here, the simple fact is that scenario is not what happened. The grievant turned the job down and was given a reasonable time within which to decide to take it and the job was eventually filled later.

Further, the evidence showed that the grievant was given the opportunity to take leave or vacation time to consider the offer. Not only did she flatly refuse the job, but neither she nor her attorneys requested leave time to consider the job. On this record, there was insufficient evidence to show that the State acted arbitrarily or unreasonably.

As Elkouri states, the implied covenants upon which much of the grievant's case is based do not create obligations that are not otherwise present in the Plan. The grievant clearly understood this and that she was not entitled to bumping rights if there was a vacancy within the Agency. It was also apparent that the grievant was aware that she was not entitled to her job in Minneapolis if there was no job vacancy there. The following exchange on cross-examination was instructive in this regard:

- Q. Here you are asking as a remedy for a position in Minneapolis, are you not?
- A. In Minneapolis, I'm requesting full reinstatement within the Department of Veterans Affairs in the location in Minneapolis.
- Q Right. But there was no vacancy in Minneapolis, was there?
- A None at the time, no.
- Q So you are asking for rights above and beyond what the Commissioner's Plan allows, are you not?
- A If there was no vacancy in Minneapolis, then there was no vacancy.
- Q (By Ms. Hargons) Right. That's correct. And then you go on to say that you want rights of the layoff provision, including bumping. But there was a vacancy in the agency, was there not?
- A Not in Minneapolis.
- Q There was a vacancy in the agency, was there not?
- A With the Department of Veterans Affairs, yes.
- Q Okay. And so therefore, the bumping rights and the layoff rights would not apply to you, would they?
- A No.
- Q Okay. You never gave any specific date to the Department of Veterans Affairs as to how much additional time you needed to make a decision on February 11; isn't that correct?
- A That's correct.
- Q Okay. Now, in this letter of February 11 your attorney is asserting that you only had three days to make a decision in regards to the position in Silver Bay; but that isn't right, is it?
- A Yes.
- Q Yes what?
- A That isn't right.

Further, as the State alleged, it was clear that the grievant did not request additional time to consider the Silver Bay job. Moreover, she was informed that she would have been eligible for traveling status if she had accepted the job in Silver Bay.

- Q Also in this very letter she's telling you that you would be eligible for relocation expenses, and telling you that you would be eligible for travel status, didn't she?
- A Yes.
- Q And she's telling you to contact her for further information regarding that?
- A Yes.
- Q You never contacted her regarding that, did you?
- A No.
- Q And would it surprise you to know that the Commissioner's Plan under which you are covered that you would be eligible for 90 days travel status? In other words, you would be eligible to be paid for your lodging for 30 days and you would be able to commute back and forth having your mileage paid for once per week so you had three months that you would be in travel status, wouldn't you?
- A Yes.
- Q But you never clarified that with Carol, did you?
- A No.
- Q Okay. And if we turn to tab -- excuse me, page 4 under this tab. Again, you're communicating that you are not resigning, and that you are contacting your attorney. There is nothing in this letter that is asking extension to make a decision, is there?
- A No.

The Plan does not call for reinstatement to the original position at MDVA and no such remedy can be ordered here even if there was a violation of the Plan. At best, what the Plan calls for is to place the grievant on the layoff list and gave her some form of bumping rights. As noted above though, there is no obligation to place the grievant on that list if there is an appropriate vacancy. Here there was, even though the "vacancy" was located 200 miles away. There is as the State urged, no location limit or other restriction placed on where the vacancy is as long as it is within the same class and agency. As determined above, there was no question that it was within the same agency and the evidence on this record supported the conclusion that the job was within the same class. Thus the final sentence of Section 7 does not apply according to its terms.

While the grievant argued that equity compels that a job that is 200 miles away is not a reasonable job offer therefore there was no true “vacancy” that piece cannot be read into the Plan. To do so would indeed be to improperly create an obligation that does not exist and a term that is not in the Plan itself. While one can certainly understand and empathize with the grievant’s situation here, the terms of the Plan govern this result.

VOLUNTARY RESIGNATION

The State took the position that the grievant had effectively voluntarily resigned based on her refusal to accept the job offer in Silver Bay. The grievant asserted that there is nothing in the Plan that calls for someone to be considered to have quit simply because they did not accept a job offer.

The Plan is indeed silent on this question and does not say either way whether someone in this situation is to be considered to have voluntarily quit or, as the grievant asserts, whether they should be held in a leave or other hold status pending the creation of another vacancy somewhere else in the system allowing them to essentially wait until another, presumably “better” job comes open at an undefined later date.

The document must be read as a whole to determine the answer. The Plan does not provide for a particular location (or any mile limitation) nor does it require that a job be left open for a stated period of time while the employee decides what to do about a job offer. Neither does the Plan require that the employee be placed on some sort of indefinite leave pending another vacancy coming open.

The difficulty administering such a system as the grievant posits here would be a daunting task indeed and create situations involving employees refusing a vacancy and then waiting for some undefined period of time until one more to their liking opened up. Keeping track of that would be difficult at best. While it is not appropriate to engage in conjecture about how such a system might work, the essential question is whether there is any support for that claim in the Plan. There is not.

Arbitrators tend not to interpret the terms of labor agreements, or in this case the Plan under Minn. Stat. 179A.25, in such a way as to create absurd or harsh results unless there is clear and unambiguous language compelling that result. Here the Plan is silent and there is no factual or contractual support for the grievant's apparent request that she be placed on layoff or other status until another vacancy occurs.

The Plan does not specifically call for the consequences for the outright refusal of a job under these circumstances but one need not be a rocket scientist to determine what the next step in under those circumstances, especially in this instance where the grievant was a personnel officer. Thus there is considerable merit to the State's argument made in its brief as follows: "The language [of the Plan] does not have spell out the obvious result of an employee's refusal to accept a vacant position. The language is clear. If there is a vacancy, the employee shall be placed in the vacancy. If there is no vacancy, the layoff provisions apply. There were no other options. [The grievant] could accept the only option available to her or leave it. She chose to leave her only option behind, thereby voluntarily ending employment." Further, there was ample evidence that the grievant was told repeatedly that her options were either to take the Silver Bay job or to voluntarily resign. That she did not like those options is insufficient grounds to change the language of the Plan or to amend its application to something more to the grievant's liking.

On this record, the State was left with little choice but to offer the position it had at the time and place a reasonable time frame within which to accept or reject it. It had no other obligation under the Plan or its terms and acted reasonably in concluding that once the grievant refused the offer she was considered to have voluntarily resigned. While that may seem unfortunate given these circumstances, the Plan grants little option to the State or the grievant, and therefore to a reviewing arbitrator, to create such an obligation where one does not exist under the clear terms of the Plan.

In conclusion, there was sufficient evidence to support the State's claim that the Silver Bay job was in the same class and agency. Thus the claim that there was no vacancy within the meaning of section 7 fails. Further, while there is an implied covenant of reasonableness inherent in the plan, this record demonstrates that the State acted reasonably in granting the grievant the time it did to accept or reject the Silver Bay position. Finally, while the Plan is silent as to the consequences of refusing a job offer under these circumstances, it is reasonable to conclude based on the record as a whole that the grievant in effect voluntarily resigned through her actions here. There was further no contractual basis to leave her in an unpaid leave or other status while another job vacancy became available while she waited for it for an undetermined period of time. On this record, the grievance must be denied.

AWARD

The grievance is DENIED.

Dated: March 3, 2014

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Jeffrey W. Jacobs, arbitrator