IN ARBITRATION BEFORE
MICHAEL E. CAVANAUGH, J.D.,
ARBITRATOR

WASHINGTON DEPARTMENT OF FISH & WILDLIFE,	:	
	:	ARBITRATOR'S
Employer,	:	DECISION AND AWARD
	:	
and	:	PERC Case No. 134845-P-22
	:	
WASHINGTON ASSOCIATION OF FISH & WILDLIFE PROFESSIONALS,	:	
	:	
Union.	:	
	:	
(John Hone Vaccine Mandate Arbitration)	:	

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I. INTRODUCTION

The Employer (sometimes" "Department," "Employer," or "Agency") discharged Grievant John Hone, a Wildlife Biologist II, for failure to meet the terms of Gov. Inslee's Emergency Proclamation requiring that all employees of the State become fully vaccinated against Covid-19. The Proclamation established exemptions from the mandate (and reasonable

accommodation), for certain employees, including those with bona fide religious beliefs against vaccination. Grievant applied for a religious exemption, and the Agency granted his application.

Initially, Employer representatives informed Grievant that his religious beliefs would be accommodated, if his supervisor approved, on the condition that he agree to mask and socially distance when his duties required in person interactions with other employees or the public. Grievant accepted those conditions and his supervisor, Mr. Winther, promptly informed HR that he had approved that accommodation. A few days later, however, the Department announced that it had refined its accommodation requirements, particularly for supervisors, and had decided that accommodation would be disallowed for jobs requiring collaboration, training, field work, and other interpersonal engagement as a major part of the essential functions. In the Department's updated view, those functions could successfully be conducted only in the physical presence of others, implicitly rejecting the masking and distancing accommodation previously approved for Grievant.[1]

The Association (sometimes "Union") contends that the Department violated the terms of an MOU between the parties (Exh. J-4) when it did not accommodate Grievant's religious beliefs and then terminated him for a nondisciplinary reason, i.e., that no reasonable accommodation could be provided. The Department asserts that it had no choice because of Grievant's inability to perform the essential functions of his job that required him, at times, to be in the physical presence of others. *See,* e.g., *Id.* ("your position must at times be done in the physical presence of others").

[1] *See*, Exh, E-9 (letter to Grievant from Kelly Cunningham, Fish Program Director, dated September 30, 2021). While Mr. Cunningham's decision letter did not specifically address masking/distancing, it did contend that "[t]here are no other accommodations for your position available which sufficiently mitigate or eliminate the risk associated with having an unvaccinated employee performing the essential functions of your position."

At a hearing held remotely on the Zoom platform on November 10, 2022, the parties had full opportunity to present evidence and argument, including the right to cross examine witnesses. Counsel chose oral closings, and with the completion of oral argument and my receipt of the transcript of the proceedings on November 29, 2022, the record closed.

On December 2, 2022, however, the Association filed a motion to reopen the record for the purpose of offering in evidence an arbitration decision arising from a similar matter between the parties, issued after the close of evidence in this case. After hearing the Department's objections, I granted the motion, and the Association promptly submitted an award by Arbiter Marr in the Ruthanna Shirley grievance. On December 7, 2022, at my request, the Department responded by email specifying differences between Grievant's case and Ms. Shirley's that, in its view, would require a different result here.[2]

Having now carefully considered the evidence and argument in its entirety, I am prepared to render the following Decision and Award.

II. STATEMENT OF THE ISSUES

> Did the State violate the parties' MOU regarding implementation of the COVID-19 vaccine mandate by failing to reasonably accommodate John Hone? If so, what is an appropriate remedy?

See, Tr. at 9.

III. FACTS

As part of its fish and wildlife management functions, the Department operates a salmon preservation program in the Columbia and Snake Rivers, funded through the Bonneville Power Administration, that pays members of the public to capture "pikeminnows," a species of fish that

[2] Although I have carefully reviewed Arbiter Marr's Award and find the fact pattern and legal/contractual issues to be strikingly similar, I have evaluated the case before me on its own facts and merits and did not find it necessary to rely on the final and binding nature of my colleague's award.

feeds on juvenile salmon. Under this program, anglers catch pikeminnows and turn them in to the Department to receive essentially a per-fish "bounty" (if the fish exceed a certain size). The Department stations DFW employees at boat ramps at designated times during the "on season" (six to seven months of the year, May through September and sometimes into October) to receive and pay for the predators the anglers have removed from the water.[3]

Mr. Hone supervised the employees who collected the pikeminnows from the public, although he testified that an experienced "lead" worker had molded the crew into a "well-oiled machine" that did not require much direct supervision or training from him, especially because there was little turnover on the crew. *See*, Tr. at 180-81 ("the crew lead had been there longer than me, so not a lot of supervision required . . . a new employee or two a season . . . the crew leader is who trained those people. I mean, he knows the job better than I"). During the rest of the year, Grievant has worked from home (a remote area in Eastern Washington) analyzing data and preparing reports. *See*, Tr. at 177 (Hone). During that time, he has interacted remotely with data-entry employees, one of whom has received an exemption from the vaccine mandate based on her "100% telework."[4]

On the Department's required Religious Accommodation Worksheet, Exh. E-8, Grievant described his working conditions as follows:

> Work in eastern Washington. Interact with people. Pasco office, everyone has a private office. Have been working from home. Will not be going back to the office. Can job well from home. Supervise 8 employees, 2 data people rarely see, other 6 are in the field daily. 6 months, supervise these 6. Most all the times outdoors at the station. Tight timeline, grab their keys at the office and go.

[3] This operation is entitled the Northern Pikeminnow Sport Award Fishery Program." *See*, e.g., Tr, at 13-14.

[4] It is undisputed that the data-entry employee is prohibited by the terms of *her* reasonable accommodation from meeting in person with Grievant, her supervisor. Tr. at 178 (Hone). I will analyze the importance of that fact, if any, in the Decision that follows.

> Everything else is done at boat ramps spread out over a large area, travel by vehicle, fisherfolks turn in fish.

Grievant also confirmed that he could telework, and that he could perform "essential functions while maintaining social distancing of six feet at all times during . . . work hours" because "[o]ur check stations, safety protocol, [form] a barrier around our vehicle with cones, so employees have [perimeter] greater than six feet." *Id*. (typos corrected). After a virtual interview with HR Consultant Joceile Moore, Moore informed Grievant that his accommodation, with his commitment to mask and socially distance in the physical presence of others, would be approved if his manager agreed. *Id*. There is no dispute that manager Winther promptly approved that accommodation. *See*, e.g., Exh. E-14 (October 11, 2021, letter from Winther to Director Cunningham after learning that he had denied the accommodation):

> HR must not have informed you that they had already sent me an accommodation agreement for John on 9/3/21 (which I agreed to via email the same day) and informed me that a memo confirming the agreement details would be forthcoming.

Despite this approval by a designated HR Consultant and Grievant's supervisor, Director Kelly Cunningham, the "appointing authority," had the final word according to the Department. Tr. at 118.

As noted, Director Cunningham disagreed with Mr. Winther's reasoning in support of an accommodation, i.e., that "[Grievant] only supervises folks a portion of the year, and therefore should have received an accommodation." Tr. at 120. That analysis apparently failed to convince Director Cunningham because, he testified, "the essential functions that are performed in the on season remain in effect during the off season." *Id*.[5] In any event, in describing the standards he

[5] I am not certain I understand Mr. Cunningham's intended meaning here. While the essential "on-season" functions remain in the job description, the evidence established that Mr. Hone had worked exclusively from home during the off-season without personal interaction with subordinates or others, at least during Covid. Perhaps Mr. Cunningham meant that Grievant *should have been* meeting in person to accomplish his supervision and training responsibilities, an argument I will consider as part of the Decision that follows.

utilized to evaluate potential accommodation to Mr. Hone's religious exemption, Director Cunningham focused on what he labeled "forward-facing duties" as reflected in a job description, testifying that because "a majority of the essential functions[6] were 'front-facing,' we made a determination that an accommodation could not be made." Tr. at 113.[7]

Cunningham conceded that as the Department made this decision, the program was about to enter the off-season during which Grievant would not have had to interact with the public or subordinate employees at the boat ramps, but "he would end up having to interact with the public again during the next season." Tr. at 115-16; Tr. at 120.[8] When asked during the hearing why masking and social distancing would not effectively mitigate the risks, Cunningham noted that he is not a medical professional, but he understood that prior to the vaccine mandate, "there were

[6] As I understand Mr. Cunningham's testimony, his "more than 50%" judgment referred to the number of discrete tasks in the description, not the accumulated time Grievant spent performing those tasks during the year. Perhaps that is not what he intended, but if so, I find that form of analysis problematic. It strikes me as illogical to rely on the *number of functions*, as opposed to the *percentage of work time required*, to judge what a "majority" of the position involves for purposes of analyzing a potential reasonable accommodation, e.g., whether a specific accommodation might present an "undue burden" within the meaning of anti-discrimination laws. *Cf.* Tr. at 89 (Hurst) (essentially speculating, based on a 2003 job description, that "at least 50%" of Grievant's essential functions require in-person performance because "a large portion of position is dedicated to supervising staff").

[7] As noted, the most recent formal job description for Grievant's position dated from 2003, although during DFW's consideration of the accommodation request, Employer representatives consulted with Supervisor Winther about updating the description. Winther testified that the Department never completed that process, and that he believed Grievant could appropriately perform many of the described duties through "telework" or other "remote" means. *See*, e.g., Tr. at 167 ("I realized that the telework component needed to be put in there if we were going to be allowed to modify John's position description . . . None of the telework options were put into that version. So that's why [the provisional updated job description is] not accurate").

[8] Other than this testimony from Mr. Cunningham, there is little or nothing in the record about whether a "provisional accommodation" could have been granted to Grievant for the off-season, which then could have been reviewed at the time his on-season duties resumed. Grievant had specifically requested that accommodation, *see* e.g., Exh. U-5 at 2:

> In May of 2022, I may very well come into contact with agency staff and the public just as I did that time of year in 2020 and 2021. So by wearing a face mask and social distancing (the accommodation you presented on September 3), why can I no longer complete the essential functions of my position? Better yet, lets pray the pandemic is gone by then and no one has to deal with it any longer.

outbreaks in various areas of the program even though masking/distancing had been employed." Tr. at 116-17.

On cross examination, however, and irrespective of the merits of the masking/distancing approach to accommodation, Cunningham clarified that he simply had *no authority* to grant a reasonable accommodation to Mr. Hone based on such mitigating approaches because that element of accommodation had been "taken off the table" by upper DFW management:

> . . . based on the direction that we received in terms of how the agency was going to implement the mandate. So given what I said earlier about masking and social distancing being *off the table* for those types of positions that I described [supervisors and field staff], then yes, masking and socially distancing was *not an option for those employees*.

Tr. at 124-25 (emphasis supplied). At the same time, however, he confirmed that the Department has allowed volunteers, students, temporary DFW contractors, and the public to be in proximity to DFW employees without being vaccinated, although they must follow Covid mitigation protocols such as masking when those are applicable. *See*, e.g., Tr. at 127-28; *see also*, Exh. U-12 (updated guidance dated 3/12/22 requiring volunteers to mask when dealing with the public "indoors"). In any event, because DFW believed it could not accommodate Grievant's religious exemption, he received a nondisciplinary discharge coinciding with the effective date of Gov. Inslee's vaccine mandate, i.e., October 18, 2021. Exh. J-1.

Additional facts will be developed and discussed as part of my reasoning in support of the Decision in the next section.

IV. DECISION

The crux of any religious accommodation analysis, after the Supreme Court's decision in *TWA v. Hardison*, is an individualized assessment of the nature and context of the performance of an employee's essential functions, including where and how they are performed (and in rare

cases, perhaps, by whom) and whether alterations in work locations, methods, or equipment (including PPE's), could enable safe and effective employee performance of those essential functions without imposing an undue hardship on the Employer. There is no dispute that this broad summary of the law applies to the dispute before me, arising under the parties' CBA and a specific MOU concerning implementation of Gov. Inslee's vaccine mandate in October 2021. Nor is there any dispute that the Department bears the burden of showing that no reasonable accommodation under these standards was available in the case of Mr. Hone.

After carefully considering what is a detailed and voluminous record containing proclamations, CDC guidelines, EEO regulations, job descriptions, reasonable accommodation guidelines under the EEOC Compliance Manual, and similar documents bearing on the issue before me (as well as the prior decision by Arbiter Marr)[9] I must find that the Department has failed to meet its burden.

A. Individualized Consideration

As previously noted, the crux of a reasonable accommodation process is an individualized examination of the context of an employee's workplace and the essential functions of the job for the purpose of determining whether alterations would enable an employee's safe performance without imposing an undue burden. When I asked during closing argument whether Grievant had received the individualized consideration required, counsel for the Department asserted that he had, pointing to HR representative Moore's meeting with Mr. Hone to go over his Reasonable Accommodation Worksheet, Exh. E-5. Tr. at 199[10] and Director

[9] Arbiter Marr's award also exhaustively considered this great volume of guidelines and recommendations in reaching his conclusion that the Department violated the MOU when it failed to adequately consider masking and distancing in denying Ms. Shirley a religious accommodation.

[10] Counsel described this meeting as "in person," *Id*., although Moore apparently conducted the meeting virtually. *See*, e.g., Tr. at 183 (Hone) ("they said I was going to have a Teams meeting with [Moore]."

Cunningham's consideration of the partially updated 2003 job description. I agree that Ms. Moore met with Grievant and evaluated his individual circumstances. I also note, however, that in applying the standards applicable at the time, especially the use of masking and distancing, she *granted* the accommodation, subject to the approval of Mr. Winther, Grievant's supervisor. Mr. Winther approved. Consequently, I agree that, at least to this point, Mr. Hone had received "individualized consideration."

But a week or so later, with no further attempt at an "interactive process" with Grievant (before or after its decision) the Department "rescinded" the reasonable accommodation the Agency had just granted.[11] That rescission was clearly not based on a consideration of Mr. Hone's individualized circumstances. To the contrary, as Mr. Cunningham testified, the details of how masking and social distancing might sufficiently mitigate the Department's safety concerns in Mr. Hone's specific circumstances *simply was not considered* because it had been "taken off the table" by upper DFW management. Nor, as previously described, did the Department evaluate whether Grievant could be accommodated, at least temporarily, i.e., during the upcoming off-season, with the option of reassessing the reasonableness of the accommodation as the following "on-season" approached.

Taken together, the Agency's process reflected in this record does not establish that Grievant received the kind of individualized consideration of reasonable accommodation possibilities that the law, and thus the MOU, required. Rather, the Department simply assumed, with little or no evidence (at least that has been put in the record before me) that *any* supervisor

[11] There was some colloquy between the parties during the hearing about whether the Department never actually approved Mr. Hone's accommodation, or whether it was approved and then revoked. Deputy Director Windrope, however, the official who made the decision, *herself* described the process as "rescinding" the reasonable accommodation that had previously been granted to Grievant and others. *See*, Exh. U-21 ("One of the hardest decisions I made was to rescind 13 reasonable accommodations that were approved").

would be required to meet with subordinates, that it was impossible for a supervisor to meet the training and supervision requirements of the position without in-person interaction, and that no mitigating measures, e.g. masking and distancing, could acceptably minimize the risks. The law and the MOU required more.

B. Masking and Distancing

To be sure, if the record established beyond question that the Department was correct in its judgment that it could not accommodate Grievant, e.g., through virtual meetings with subordinates and/or masking and distancing if in-person supervising and training became essential, then the importance of DFW's failure to follow the interactive process could perhaps be excused. At a minimum, the remedial equation might be significantly altered here. But after carefully considering the entire record, I cannot find that the Department has met its burden to establish that masking and distancing were simply out of the question as effective mitigating approaches. That is, the Department essentially contends that there is simply no conceivable circumstance under which masking and distancing could have served the Department's purposes, at least in total, without imposing an undue burden. Thus, says the Department in effect, no inquiry into an individual's work situation—beyond evaluating a job description—was necessary.

I disagree. I can accept the Department's judgment, within its rights as an employer, that some of a supervisor's duties may require in-person interactions with co-workers, with subordinates, and with the public, at least from time to time (although in this case, given the credible testimony of Messrs. Winther and Hone, perhaps not nearly as frequently as the Department suggests).[12] Nevertheless, the evidence, in my view, does not meet the Employer's

[12] To the extent the Department's denial of accommodation here was based on the "more than 50% of his job duties" standard, the evidence fails to establish that more than 50% of his work *time* required in-person interaction with

burden to show that the use of masking and distancing as mitigating techniques was so out of the question as to justify a blanket refusal to even consider them as part of the required individualized and interactive reasonable accommodation process.

1. Subordinate Employees at the Boat Ramps

For example, supervising and training of the fish-checkers at the boat ramps no doubt *could* involve some personal interactions, but Mr. Hone testified credibly that an experienced lead employee had created a "well-oiled machine" requiring little or no training or supervisory involvement from him. That testimony is undisputed, and in fact was confirmed by his supervisor, Mr. Winther.[13] Moreover, the job description in the record, Exh. J-8, such as it is, provides only that Grievant is "responsible" for recruiting, hiring, training, etc., not that he must perform that function himself—and in person—in every single respect. *Id.*[14]

The evidence established, however, that one essential function of Mr. Hone's supervisory position was to conduct spot checks at the boat ramps to ensure that the process was functioning properly. But Grievant and Mr. Winther confirmed that he could do so (and Joceile Moore from HR had agreed) if he masked and maintained distance from the public given traffic barriers DFW had supplied to erect a safety zone around Department vehicles. The terms of Grievant's

subordinates, co-workers, and the public. Nevertheless, if the Department's evidence established that a significant portion of the job required personal interaction, and that no reasonable accommodation could be made for those duties, the Employer might prevail here.

[13] As an aside, the Department's attempt to undercut Mr. Winther's testimony supporting Grievant fell flat with me. Yes, Winther testified that he had worked with Grievant for twenty years and considered him "a friend," and confirmed that he would not want him to lose his job. He immediately added, however, "I would not want any of my employees to lose their jobs, that's correct, yes." Tr. 158. Despite the Department's arguments to the contrary, nothing in that exchange, or in the remainder of Mr. Winther's testimony, gave me any reason to doubt his honesty or the accuracy of the information he provided.

[14] The Association has correctly pointed out that if effective "supervision" always requires in-person interaction, why would the Department stipulate as part of the religious accommodation afforded the data-entry employee Grievant supervised that she was not to meet with her supervisor in person?

originally approved accommodation, of course, required him to mask and maintain distance from employees, as well, at the boat ramps, a condition to which Mr. Hone had agreed.

In evaluating whether masking and distancing might be sufficient under these circumstances, I note that CDC has long recognized that Covid transmission in outdoor settings is much less likely. For example, in July 2021 CDC recommended that unvaccinated people wear masks outdoors, especially in crowded areas (which Mr. Hone had agreed to do, as well as maintaining distance), but that the vaccinated need not wear masks "in most outdoor situations without prolonged close contact." *See*, e.g., https://www.npr.org/sections/goatsandsoda/2021/07/26/1020799661/coronavirus-faq-im-vaccinated-i-thought-i-could-give-up-masks-but-should-i (last accessed December 10, 2022). It is safe to assume that virtually every *employee* Grievant was likely to encounter at the boat ramps would themselves be vaccinated because of the mandate,[15] and they were working outdoors and would not be in prolonged "close contact" with Grievant (because he had committed to maintain appropriate distancing). Thus, it appears Mr. Hone's co-employees would not have been in danger from him under those circumstances—or at the very least, no more danger than employees working in the vicinity of volunteers, students, and temporary contractors who *also* may not have been vaccinated because DFW policy did not require it.

In sum, the Department has not supplied enough evidence for me to find that the original accommodation was *per se* unreasonable or unduly burdensome in the context of spot checks at the boat ramps.

[15] *See*, e.g., Exh. U-16 at 1 (as of the date the mandate went into effect, 96.7% of the employees of the Department were fully vaccinated).

To the extent Mr. Hone might have been required to personally replace an absent fish checker (whereas he testified that his function would be simply to make calls to find another employee to substitute, noting that he has only had to personally step in for a fish checker "once or twice in 24 years," Tr. at 182), there has been no showing that the same sorts of mitigation approaches, i.e. masking and distancing, at least in an outdoor setting, would have been insufficient.

2 Supervising and Training

With respect to recruiting, supervising, training, etc. the Department asserts, but has made little effort to show, that these functions must be performed in person, even if only on occasion. Nor, as already noted, did the Department inquire into the specific work conditions applicable to Mr. Hone's position as the job had developed over the years since the 2003 job description. Mr. Winther, of course, who knew Grievant's job well as it existed in late 2021, assessed that in fact Mr. Hone could perform the job effectively with remote tools, and with masking and distancing on the limited occasions physical presence might be necessary. HR Consultant Moore had agreed after going over the accommodation worksheet with Grievant.

On this record, then, I cannot find that this is a case in which there is no conceivable way for Mr. Hone to perform his supervision and training functions remotely, e.g. by telephone or on the computer with tools like Zoom or MS Teams.[16] Moreover, if in-person meetings with

[16] The Department's implicit assertion that remote supervising and training are insufficient is curious given that Zoom and Teams were considered appropriate venues for several important aspects of this case requiring human interaction—including, as noted, the HR Consultant's interview with Mr. Hone to go over the accommodation worksheet, as well as the hearing itself in this matter. I gather that the hearing in the *Shirley* matter was also conducted remotely. *See*, Shirley Award at 2 ("The Shirley Grievance was heard before the Arbitrator on October 19, 2022 using the Zoom.com platform"). If remote platforms are appropriate for important matters such as consideration of an employee's application for religious exemption and potential reasonable accommodation, as well as for full grievance hearings over such matters when they are contested, it is hard for me to imagine why a supervisor could not effectively utilize them for most or all of the training, evaluation, and general supervision required during a pandemic.

subordinates became absolutely necessary for some reason, it is entirely conceivable that they could be conducted outdoors (for much of the year) with masking and distancing, or indoors (with masking and distancing) in an uncrowded, well-ventilated area such as a large shopping mall, or even in a large office or conference room with open windows. *See*, e.g., the NPR report of CDC guidance referenced earlier (indoors, open windows can provide ventilation, and "high ceilings are also a bonus . . . with "good potential for dilution").

Again, I find that DFW has failed to carry its burden to prove that it would have imposed an undue hardship to implement the original accommodation.

3. Sports Shows

One of Mr. Hone's Biologist II essential functions, however, is to attend angler shows on behalf of the Department, apparently to publicize the pikeminnow program and provide information to the public. Such shows were cancelled during the pandemic, but possibly resumed in 2022. Tr. at 194 (Hone). The Department argues persuasively that in-person attendance is necessary to perform this essential function, and although there is only generalized evidence in the record about where these shows are held, how often, in what kind(s) of facilities, how crowded they may be at times, etc.—all of which would be critical factors in evaluating whether the Department met its burden to establish that masking and distancing would be insufficient. The Department did not make such a showing.

Even if it had, however, the Department's argument might well fail in any event for a different reason. Specifically, even in the context of a limited, but sporadically reoccurring essential function to which an employee has a bona fide religious objection, employers must provide a reasonable accommodation—including, when necessary, shifting of essential functions. The EEOC has illustrated this principle by highlighting the case of a pharmacist with

sincere religious beliefs against contraception. A reasonable accommodation in that situation, says the EEOC, is for the pharmacist to turn the prescription over for filling to another pharmacist on duty (presumably then taking over the prescriptions the other pharmacist would have filled). *See,* EEOC Compliance Manual, Section 12-IV(A), Religious Accommodation, Example 44. Clearly, filling prescriptions for contraceptives is an essential function of a pharmacist's job, yet EEOC points out that if others may be assigned that function without imposing an undue burden on the employer, that accommodation is required.

As Example 44 illustrates, it is simply not the case that labeling a job duty an "essential function" constitutes a talisman that may be invoked to justify an employer's refusal to accommodate a religious objection in a specific case. Moreover, even when an accommodation might entail some "burden," e.g., "shift-swapping"[17] or other limited job reassignment which might result in some cost to the employer—an "infrequent" extra cost does not by itself justify an employer's refusal to assist in finding a substitute employee to perform that function, volunteer or otherwise, as a reasonable religious accommodation.[18]

It is not clear on this record, however, whether sending someone other than Mr. Hone to Sports Shows would have involved any added cost. Counsel could not say during closing argument, for example, whether a substitute would be salaried or hourly, Tr. at 229, although he asserted the cost would certainly be "greater than zero." *Id.* But even if the Department had to

[17] For example, a shift swap as an accommodation that might enable an employee to observe a sabbath or religious holiday.

[18] It is true, however, that the frequency of such added costs may be relevant to the undue burden analysis. *See*, EEOC Compliance Manual, *supra*, Undue Hardship, Section B(2) (Voluntary Substitutes and Shift Swaps). The Department has not even attempted that sort of analysis here, however.

occasionally send a substitute and that involved some overtime and/or travel expense,[19] "infrequent payment of overtime to employees who substitute is not considered an undue hardship." EEOC Compliance Manual, *supra*, Section C(2) (Voluntary Substitutes and Shift Swaps). I can see no valid reason to treat infrequent payment of travel time differently. In addition, "co-worker disgruntlement does not justify denying a religious accommodation"—assuming no one would be willing to voluntarily substitute for Mr. Hone. *See*, e.g. "*What You Should Know: Workplace Religious Accommodation*," ¶ 4, Technical Assistance Bulletin EEOC-NVTA-0000-20, issued March 6, 2014.

In sum, if the Department could show (as it has not done yet) that Mr. Hone could not safely attend angler shows, even while masking and maintaining distance, it might still have been required to afford him the accommodation of sending a suitable substitute. But the Agency refused even to entertain that possibility, nor has DFW met its burden to establish that it would have been an undue hardship to do so. Thus, the Department's argument about sports shows fails on the record before me.

V. CONCLUSION

For the foregoing reasons, I find that the Department failed to afford Grievant the individualized consideration of his religious accommodation request that is required by the law and by the parties' MOU. In addition, at least as applied to Mr. Hone, the Department's *per se* rule against masking and distancing as part of an appropriate religious accommodation violated the law and the MOU. Thus, the grievance of John Hone must be granted, and I will order that DFW promptly reinstate Mr. Hone, subject to the terms of the original accommodation that had

[19] I assume that substituting a salaried employee would not have entailed overtime expense to the Department, and any travel expense for a salaried employee would have to be compared to the expenses Mr. Hone would have incurred himself as part of the "undue burden" analysis.

been granted and which was wrongfully rescinded,[20] and that he be made whole for lost wages and benefits, including seniority.

AWARD

Having carefully considered the evidence and argument in its entirety, I hereby render the following AWARD:

1. The Employer violated the parties' MOU when it applied a *per se* rule refusing to consider masking and social distancing as part of a potential reasonable accommodation to Grievant's sincere religious belief against vaccination and also when it revoked, without an additional interactive process, an accommodation it had previously granted based in part on masking and distancing; therefore,

2. The grievance of John Hone must be GRANTED, and he shall be promptly reinstated without loss of seniority or benefits, subject to the reasonable accommodation previously granted as reflected in Exh. E-8, and he shall promptly be made whole for lost wages and benefits, subject to the customary offsets and deductions; and

3. The Arbitrator will retain jurisdiction to resolve any disputes over implementation of the remedy awarded that the parties are unable to resolve on their own; either party may invoke this reserved remedial jurisdiction by letter postmarked or email sent (original to the Arbitrator, copy to the other party) within 60 (sixty) days of the date of this AWARD or within such reasonable extensions as the parties may mutually agree (with prompt notice to the Arbitrator) or that the Arbitrator may order for good cause shown; and

4. Consistent with the terms of their Agreement, Article 27.3(F)(1), the parties shall bear the fees of the Arbitrator in equal proportion.

Dated this 19th day of December 2022.

Michael E. Cavanaugh, J.D.

[20] To be clear, I do not intend to prevent the Department from applying whatever reasonable standards it currently applies to religious accommodation requests—or as those standards may be reasonably amended from time to time—to Mr. Hone upon his reinstatement. Those standards must, however, be consistent with the law and with the parties' MOU.