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BEFORE ARBITRATOR MICHAEL ANTHONY MARR  
OLYMPIA, WASHINGTON

In the Matter of the Arbitration ) PERC NO. 134851-P-22  
 )  
 between the ) DECISION AND AWARD  
 )  
 STATE OF WASHINGTON ) HEARING DATE: OCTOBER 19, 2022  
 ASSOCIATION OF FISH AND )  
 WILDLIFE PROFESSIONALS, ) GRIEVANCE OF RUTHANNA SHIRLEY  
 )  
 Union, )  
 )  
 and the )  
 )  
 STATE OF WASHINGTON, )  
 DEPARTMENT OF FISH AND WILDLIFE, )  
 )  
 Employer. )  
 \_\_\_\_\_ )

DECISION AND AWARD

The Arbitrator was mutually selected by the parties to render a final and binding decision concerning the above-referenced grievance. Both parties were represented by professional and competent counsel at the arbitration hearing. The State of Washington, Association of Fish and Wildlife Professionals, hereinafter referred to as “Union” and the Grievant, Ruthanna Shirley, hereinafter referred to as “Grievant,” were represented by Rhonda Fenrich, Esq. The Grievant’s grievance shall be referred to as the “Shirley Grievance.” The State of Washington, Department of Fish and Wildlife, hereinafter referred to as “Agency,” “State” or “Employer” was represented by

Assistant Attorney General Carl J. Gaul, IV and Assistant Attorney General Elizabeth Delay Brown.

The Shirley Grievance was heard before the Arbitrator on October 19, 2022 using the Zoom.com platform. While the Arbitrator presided in Honolulu, Hawaii, counsels, the parties, and all witnesses appeared from various locations on the mainland United States.

The Agency called two (2) witnesses and the Union called two (2) witnesses. One of the witnesses called by the Union was the Grievant. Full opportunity was given to the parties to offer evidence, examine and cross-examine witnesses, and present oral argument. The parties agreed to oral argument after the presentation of evidence at the arbitration hearing in lieu of closing briefs.

The Arbitrator has reviewed the transcripts and evidence presented during the arbitration hearing. The Arbitrator, as a general rule, will not comment on matters that the Arbitrator believes are irrelevant, superfluous, redundant, or rendered moot by this decision and award. Nor does the Arbitrator feel compelled to address all of the numerous arguments and issues raised and asserted by these professional advocates. Rather, the Arbitrator has elected to address only those elements that have had a significant impact on his decision-making process.<sup>1</sup>

## **I. BACKGROUND.**

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<sup>1</sup> The proceeding was transcribed by court reporter Nicole Buldis of Buell Real Time Reporting. References to a statement made in the transcript of the proceedings shall sometimes be referred to as "Tr." or by a witness's last name or an attorney's last name (for context), may be followed by the transcript page number and line number(s) and shall be in italics. During the arbitration hearing, twenty-eight (28) exhibits were received into evidence from the Agency and twenty-five (25) exhibits were received into evidence from the Union. In addition, six (6) joint exhibits were received into evidence. Union exhibits shall be prefaced with the letter "U," State exhibits shall be prefaced with the letter "E," joint exhibits with the letter "J" and shall be in italics. Citations to Union, Agency, and joint exhibits shall sometimes include the exhibit number, bates or page number, and shall be in italics. *J-1* consists of the Collective Bargaining Agreement which governs the relationship between the parties, and shall hereinafter sometimes be referred to as "*CBA*" and shall be in italics. The parties executed a Memorandum of Understanding regarding the COVID-19 pandemic on September 7, 2021, hereinafter referred to as the "*MOU*" and shall be in italics.

The Arbitrator advised the parties that it was the Arbitrator's practice to receive all exhibits into evidence without the necessity of laying a foundation. The parties had no objections. *Fenrich at 5:23, Gaul at 5:24.*

The COVID-19 virus was first reported in China in 2019. COVID-19 quickly spread to other countries. The pandemic first appeared in the United States in February of 2020 in the State of Washington. COVID-19 quickly spread throughout the United States causing thousands of infections and deaths. The healthcare systems in many states and countries were overwhelmed. In response, Governor Inslee issued Proclamation 20-25. *J-5*. This Proclamation provides in relevant part as follows:

**PROCLAMATION BY THE GOVERNOR  
AMENDING PROCLAMATION 20-05**

**20-25**

**STAY HOME – STAY HEALTHY**

**WHEREAS**, on February 29, 2020, I issued Proclamation 20-05, proclaiming a State of Emergency for all counties throughout the state of Washington as a result of the coronavirus disease 2019 (COVID-19) outbreak in the United States and confirmed person-to-person spread of COVID-19 in Washington State; and

**WHEREAS**, as a result of the continued worldwide spread of COVID-19, its significant progression in Washington State, and the high risk it poses to our most vulnerable populations, I have subsequently issued amendatory Proclamations 20-06, 20-07, 20-08, 20-09, 20-10, 20-11, 20-12, 20-13, 20-14, 20-15, 20-16, 20-17, 20-18, 20-19, 20-20, 20-21, 20-22, 20-23, and 20-24, exercising my emergency powers under RCW 43.06.220 by prohibiting certain activities and waiving and suspending specified laws and regulations; and

**WHEREAS**, the COVID-19 disease, caused by a virus that spreads easily from person to person which may result in serious illness or death and has been classified by the World Health Organization as a worldwide pandemic, has broadly spread throughout Washington State, significantly increasing the threat of serious associated health risks statewide; and

**WHEREAS**, there are currently at least 2,221 cases of COVID-19 in Washington State and, tragically, 110 deaths of Washingtonians associated with COVID-19; and

**WHEREAS**, models predict that many hospitals in Washington State will reach capacity or become overwhelmed with COVID-19 patients within the next several weeks unless we substantially slow down the spread of COVID-19 throughout the state; and

**WHEREAS**, hospitalizations for COVID-19 like illnesses are significantly elevated in all adults, and a sharply increasing trend in COVID-19 like illness hospitalizations has been observed for the past three (3) weeks; and

**WHEREAS**, the worldwide COVID-19 pandemic and its progression in Washington State continues to threaten the life and health of our people as well as the economy of Washington State, and remains a public disaster affecting life, health, property or the public peace; and

**WHEREAS**, the Washington State Department of Health continues to maintain a Public Health Incident Management Team in coordination with the State Emergency Operations Center and other supporting state agencies to manage the public health aspects of the incident; and

**WHEREAS**, the Washington State Military Department Emergency Management Division, through the State Emergency Operations Center, continues coordinating resources across state government to support the Department of Health and local health officials in alleviating the impacts to people, property, and infrastructure, and continues coordinating with the Department of Health in assessing the impacts and long-term effects of the incident on Washington State and its people.

**NOW, THEREFORE**, I, Jay Inslee, Governor of the state of Washington, as a result of the above-noted situation, and under Chapters 38.08, 38.52 and 43.06 RCW, do hereby proclaim: that a State of Emergency continues to exist in all counties of Washington State; that Proclamation 20-05 and all amendments thereto remain in effect as otherwise amended; and that Proclamations 20-05, 20-07, 20-11, 20-13, and 20-14 are amended and superseded by this Proclamation to impose a Stay Home – Stay Healthy Order throughout Washington State by prohibiting all people in Washington State from leaving their homes or participating in social, spiritual and recreational gatherings of any kind regardless of the number of participants, and all non-essential businesses in Washington State from conducting business, within the limitations provided herein.

I again direct that the plans and procedures of the Washington State Comprehensive Emergency Management Plan be implemented throughout state government. State agencies and departments are directed to continue utilizing state resources and doing everything reasonably possible to support implementation of the Washington State Comprehensive Emergency Management Plan and to assist affected political subdivisions in an effort to respond to and recover from the COVID-19 pandemic.

I continue to order into active state service the organized militia of Washington State to include the National Guard and the State Guard, or such part thereof as may be necessary in the opinion of The Adjutant General to address the circumstances described above, to perform such duties as directed by competent authority of the Washington State Military Department in addressing the outbreak. Additionally, I continue to direct the Department of Health, the Washington State Military Department Emergency Management Division, and other agencies to identify and provide appropriate personnel for conducting necessary and ongoing incident related assessments.

**FURTHERMORE**, based on the above situation and under the provisions of RCW 43.06.220(1)(h), to help preserve and maintain life, health, property or the public peace, and to implement the Stay Home—Stay Healthy Order described above, I hereby impose the following necessary restrictions on participation by all people in Washington State by prohibiting each of the following activities by all people and businesses throughout Washington State, which prohibitions shall remain in effect until midnight on April 6, 2020, unless extended beyond that date:

**1. All people in Washington State shall immediately cease leaving their home or place of residence except: (1) to conduct or participate in essential activities, and/or (2) for employment in essential business services.** This prohibition shall remain in effect until midnight on

April 6, 2020, unless extended beyond that date.

**To implement this mandate, I hereby order** that all people in Washington State are immediately prohibited from leaving their home or place of residence except to conduct or participate in (1) essential activities, and/or (2) employment in providing essential business services:

- a. **Essential activities** permitted under this Proclamation are limited to the following:
    - **Obtaining necessary supplies and services** for family or household members and pets, such as groceries, food and supplies for household consumption and use, supplies and equipment needed to work from home, and products necessary to maintain safety, sanitation and essential maintenance of the home or residence.
    - **Engaging in activities essential for the health and safety** of family, household members and pets, including things such as seeking medical or behavioral health or emergency services and obtaining medical supplies or medication.
    - **Caring for** a family member, friend, or pet in another household or residence, and to transport a family member, friend or their pet for essential health and safety activities, and to obtain necessary supplies and services.
    - **Engaging in outdoor exercise activities**, such as walking, hiking, running or biking, but only if appropriate social distancing practices are used.
  - b. **Employment in essential business services** means an essential employee performing work for an essential business as identified in the [“Essential Critical Infrastructure Workers”](#) list, or carrying out minimum basic operations (as defined in Section 3(d) of this Order) for a non-essential business.
  - c. **This prohibition shall not apply to** individuals whose homes or residences are unsafe or become unsafe, such as victims of domestic violence. These individuals are permitted and urged to leave their homes or residences and stay at a safe alternate location.
  - d. **This prohibition also shall not apply to** individuals experiencing homelessness, but they are urged to obtain shelter, and governmental and other entities are strongly encouraged to make such shelter available as soon as possible and to the maximum extent practicable.
  - e. For purposes of this Proclamation, homes or residences include hotels, motels, shared rental units, shelters, and similar facilities.
2. **All people in Washington State shall immediately cease participating in all public and private gatherings and multi-person activities for social, spiritual and recreational purposes, regardless of the number of people involved, except as specifically identified herein.** Such activity includes, but is not limited to, community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities. This prohibition also applies to planned wedding and funeral events. This

prohibition shall remain in effect until midnight on April 6, 2020, unless extended beyond that date.

**To implement this mandate, I hereby order** that all people in Washington State are immediately prohibited from participating in public and private gatherings of any number of people for social, spiritual and recreational purposes. **This prohibition shall not apply** to activities and gatherings solely including those people who are part of a single household or residential living unit.

3. **Effective midnight on March 25, 2020, all non-essential businesses in Washington State shall cease operations except for performing basic minimum operations. All essential businesses are encouraged to remain open and maintain operations, but must establish and implement social distancing and sanitation measures established by the United States Department of Labor or the Washington State Department of Health Guidelines.** This prohibition shall remain in effect until midnight on April 8, 2020, unless extended beyond that date.

**To implement this mandate, I hereby order** that, effective midnight on March 25, 2020, all non-essential businesses in Washington State are prohibited from conducting all activities and operations except minimum basic operations.

- a. **Non-essential businesses** are strongly encouraged to immediately cease operations other than performance of basic minimum operations, but must do so no later than midnight on March 25, 2020.
- b. **Essential businesses** are prohibited from operating under this Proclamation unless they establish and implement social distancing and sanitation measures established by the United States Department of Labor's Guidance on Preparing Workplaces for COVID-19 at <https://www.osha.gov/Publications/OSHA3990.pdf> and the Washington State Department of Health Workplace and Employer Resources & Recommendations at <https://www.doh.wa.gov/Coronavirus/workplace>.
- c. **This prohibition does not apply to** businesses consisting exclusively of employees or contractors performing business activities at their home or residence, and who do not engage in in-person contact with clients.
- d. For purposes of this Proclamation, minimum basic operations are the minimum activities necessary to maintain the value of the business' inventory, preserve the condition of the business' physical plant and equipment, ensure security, process payroll and employee benefits, facilitate employees of the business being able to continue to work remotely from their residences, and related functions.

This Proclamation shall not be construed to prohibit working from home, operating a single owner business with no in-person, on-site public interaction, or restaurants and food services providing delivery or take-away services, so long as proper social distancing and sanitation measures are established and implemented.

No business pass or credentialing program applies to any activities or operations under this

Proclamation.

Violators of this of this order may be subject to criminal penalties pursuant to RCW 43.06.220(5). Signed and sealed with the official seal of the state of Washington on this 23<sup>rd</sup> day of March, A.D., Two Thousand and Twenty at Olympia, Washington.

By:

/S/ \_\_\_\_\_  
Jay Inslee, Governor

The United States worked feverishly with numerous drug manufactures to develop a COVID-19 vaccine. Vaccines became available for use in the United States during December of 2020.

Washingtonians were encouraged to be vaccinated. Governor Inslee issued two proclamations which mandated that the vaccines be administered to all State workers with few exceptions. The first was Proclamation 21-14.1, dated August 20, 2021. *J-1*. This Proclamation did not apply to the Agency. The second Proclamation, 21-14-22, dated September 27, 2021 applied to employees of the Agency. *J-2*. Governor Inslee recognized the importance of disability and religious accommodations to COVID-19 and provided these workers with an exemption and accommodation process. The significant parts of this Proclamation are as follows:

**NOW, THEREFORE,** I, Jay Inslee, Governor of the state of Washington, as a result of the above-noted situation, and under Chapters 38.08, 38.52 and 43.06 RCW, do hereby proclaim that a State of Emergency exists in all counties in the state of Washington, that Proclamation 20-05, as amended, remains in effect, and that, to help preserve and maintain life, health, property or public peace pursuant to RCW 43.06.220(1)(h), and (3), I hereby amend and supersede the prohibitions in 20-14 as set out below, subject to conditions, exceptions, and circumstances also set forth below, and for the following activities:<sup>2</sup>

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<sup>2</sup> RCW 38.08 and 43.06 concerns the governor's powers and duties. RCW 38.52 relates to emergency management. RCW 43.06.220(1)(h) and (3) address the governor's powers pursuant to proclamation in a state of emergency. The State of Washington Supreme Court has agreed to hear a challenge to Governor Inslee's emergency powers in the context of Washington's eviction moratorium. Oral argument is scheduled on February 23, 2023. See *Gonzales v. Inslee and the State of Washington*, 21 WashApp.2<sup>nd</sup> 110, 504 P.3d 890 (2022).

#### 4. Exemptions from Vaccine Requirement.

##### a. Disability and Religious Accommodations

- Workers for State Agencies, Workers for operators of Educational Settings, and Health Care Providers are not required to get vaccinated against COVID-19 under this Order if they are unable to do so because of a disability or if the requirement to do so conflicts with their sincerely held religious beliefs, practice, or observance. Workers for State Agencies, workers for operators of Educational Settings, and Health Care Providers are prohibited from claiming an exemption or accommodation on false, misleading, or dishonest grounds, including by providing false, misleading, or dishonest information to a State Agency, operator of an Educational Setting, or operator of a Health Care Setting when seeking an accommodation.
- In implementing the requirements of this Order, State Agencies, operators of Educational Settings, and operators of Health Care Settings:
  - Must provide any disability-related reasonable accommodations and sincerely held religious belief accommodations to the requirements of this Order that are required under the Americans with Disabilities Act of 1990 (ADA), the Rehabilitation Act of 1973 (Rehabilitation Act), Title VII of the Civil Rights Act of 1964 (Title VII), the Washington Law Against Discrimination (WLAD), and any other applicable law. As provided in the above-noted laws, State Agencies, operators of Educational Settings, and operators of Health Care Settings are not required to provide accommodations if they would cause undue hardship.
  - Must comply with the procedures required under the above-noted laws and any other applicable law when considering and deciding whether to provide accommodations;
  - Must, to the extent permitted by law, before providing a disability-related reasonable accommodation to the requirements of this order, obtain from the individual requesting the accommodation documentation from an appropriate health care or rehabilitation professional stating that the individual has a disability that necessitates an accommodation and the probable duration of the need for the accommodation;
  - Must, to the extent permitted by law, before providing a sincerely held religious belief accommodation to the requirements of this Order, document that the request for an accommodation has been made and include a statement in the document explaining the way in which the requirements of this order conflict with the sincerely held religious belief, practice, or observance of the individual;
  - Must, to the extent permitted by law, require an individual who receives an accommodation to take COVID-19 safety measures that are consistent with the recommendations of the state Department of Health for the setting in which the individual works; and
  - Are prohibited from providing accommodations:
    - That they know are based on false, misleading, or dishonest grounds or information;
    - That they know are based on the personal preference of the individual



and not on an inability to get vaccinated because of a disability or a conflict with a sincerely held religious belief, practice, or observance; or

- Without conducting an individualized assessment and determination of each individual's need and justification for an accommodation; i.e., "rubberstamping" accommodation requests.

Governor Inslee's Stay at Home Stay Safe Proclamation 20-25, dated March 23, 2021, *J-5*, and his Vaccine Proclamation 21-14-22, dated September 27, 2022, *J-2*, shall hereinafter be collectively referred to as the "Proclamations." He called upon Washingtonians called to commit to a JFK inaugural moment. As JFK expressed, "Ask not what your country can do for you. Ask what you and can do for your country." So many social, business, and economic sacrifices were, and still are, being made for the greater good of all Washingtonians, Americans, and people throughout the world.

#### **I.A THE GRIEVANT AND THE AGENCY.**

The Grievant testified she was employed as a Supervising Biologist 2. *Shirley at 143:17*. The Grievant noted that her total tenure with the Agency was approximately nine years and three months. *Id. at 143:24-144:1*. For approximately eight years prior to her separation, she was assigned to the Northern Pikeminnow Sport-Reward Fishery Program, hereinafter, referred to as "Program". *Id. at 143:19-21*.

The Grievant testified she was responsible for supervising field staff five months out of the year, from May 1<sup>st</sup> to September 30<sup>th</sup>. *Shirley at 151:9-14*. She explained that this was the on-season period of the Program. She explained that for the other seven months of the year, the off-season period for the Program, she supervised the PIT tag information that was collected throughout the entire State. She noted that her position during this time was data related. *Id. at 151:15-24*. There was no in-person supervision for this period of time. *U-10*.

The Grievant testified that from “day one” in her position, she supervised, hired, recruited and interviewed via the telephone because it was easier, more unbiased, and more efficient given the wide span of the river. *Shirley at 153:8-15*. She explained that she contacted and resolved technical issues by telephone and email. *Id. at 153:16-23*. She noted that if she had to meet a technician, it would be in the field where the technician was assigned and face to face contact was very limited. *Id. at 153:24-154:7*.

The Grievant explained that when COVID-19 arrived, not much changed with how she supervised. *Id. at 154:8-10, 12-22, 155:20*. She noted that during the off-season she could perform 100% of her work teleworking. *Id. at 155:24*. She acknowledged that for the on-season of five months, she could have completed her duties teleworking with a little accommodation. *Id. at 156:4-8*. The Grievant’s testimony was uncontroverted.

The Grievant applied for a religious exemption from the vaccine. The Grievant’s request was supported by her supervisor, Mr. Eric Winther. *Winther at 142:10-12*.<sup>3</sup>

The Grievant was interviewed by Joceile Moore, Human Resource Consultant 4 on September 3, 2021. *E-10, U-3*. Ms. Moore, who was also the Agency’s Reasonable Accommodation Specialist, used a “Religious Exemption Accommodation Request Worksheet” while she interviewed the Grievant.

### **Religious Exemption Accommodation Request Worksheet**

<b>NAME: Ruthanna Shirley</b>
Review Accommodation Process: Interactive process; supervisor input; accommodation agreement.

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<sup>3</sup> Prior to the availability of vaccines, the Grievant was awarded a “Leadership Through COVID” award for Region 5. *U-26*. There were no COVID-19 outbreaks in her work unit. *Shirley at 165:16, 19*.

1. What is your religion?
Christianity
2. Briefly, how does taking the vaccine violate your sincerely held religious belief?
My body is a Holy Temple
3. Briefly, what is your religious source for this belief?
Bible
4. How long have you held this belief:
15 years old
5. Have you ever received a vaccine or medicine from a health care provider as an adult:
<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
POSITION TITLE:
F&W Biologist 2
1. I have your job description in front of me. What duties do you perform involving any other people?
My job is to recruit and hire technicians, I have a crew, I sometimes communicate with the public. For the last 18 months, either remotely or outside. We were in the front lines from the beginning of COVID.
2. Can you do the essential functions while teleworking?
While doing office work.
3. Can you do the essential functions while wearing a mask at all times during your work hours?
Yes.
4. Can you do the essential functions while maintaining social distancing of six feet at all times during your work hours?
Yes.
5. If you are unable to be accommodated, what other positions do you believe you are qualified for at or below your current position that would you allow you to be accommodated?
Click or tap here to enter text.
NEXT STEPS: Review with employee

### Religious Exemption Accommodation Request Worksheet

<b>NAME: Ruthanna Shirley</b>
We will contact your supervisor to verify that an accommodation will work in the performance of your duties and meet your unit's business needs.
If your supervisor approves an accommodation, you will be notified of the accommodation in a memo outlining the agreement.
Your compliance with the agreement will be monitored by your supervisor
If you fail to comply with your accommodation, you may be subject to disciplinary action up to and including discharge OR otherwise discharged.
If you are unable to be accommodated in your current position, we will identify alternate vacant positions for which you are qualified at or below your current position and in which you can be accommodated.
If no appropriate vacancies are identified, you will be subject to discharge.
Do you have any questions?
No. I think you covered everything.

Interview by: Joice Moore  
Human Resource Consultant: 4  
Date: 9/3/2021

The Grievant testified that HR Assistant Joice Moore informed her that she qualified for an exemption because her position was “easily accommodatable.” *Shirley at 156:4-8*. The Grievant maintained that Ms. Moore advised her that she would receive an exemption if approved by her supervisor. *Id. at 156:13*. The Grievant explained that Ms. Moore advised her she would telework and mask and social distance if she “had to be around anyone.” *Id.* The Grievant’s testimony was uncontroverted.

The Grievant explained that received a letter agreeing to her accommodation request from Kelly Cunningham, Program Director, dated September 22, 2021. *U-5*. *U-5* was unsigned and provides in relevant part as follows:

TO: Ruthanna Shirley

FROM: Kelly Cunningham, Program

Director DATE: 9/22/2021

SUBJECT: Accommodation/Expectations

I, as your Program Director, am agreeing to the following accommodations based on your vaccine exemption request:

1. You will perform your duties while teleworking, **or**
2. You will wear a mask at all times during your workday around other people, **and**
3. You will maintain social distancing of six feet at all times during your work hours around other people.

Your compliance with this accommodation will be monitored by your supervisor. Non-compliance may subject you to disciplinary action up to and including discharge or otherwise discharged. This memo will remain in your supervisor file while in effect. Note that this accommodation agreement will be reassessed in 60 days and can be reviewed or changed at any time based on business needs as part of the ongoing interactive accommodation process.

If your exemption status changes, you must notify me or Joceile Moore, Reasonable Accommodation Specialist, at 360-463-1097 or by e-mail at [Joceile.Moore@dfw.wa.gov](mailto:Joceile.Moore@dfw.wa.gov). If you have questions, contact your supervisor or Joceile.

I have received a copy of this memo:

Employee's Name (Electronic Signature)	Date
cc: Craig Burley, Deputy Program Director Charlene Hurst, Columbia River Management Unit Lead Eric Winther, Supervisor/File Reasonable Accommodation Confidential File	

Mr. Cunningham denied initialing *U-5. Cunningham at 99:3-4*. However, it was undisputed that *U-5* was provided to employees who were granted an exemption, but later had their exemption rescinded. The Agency did not controvert the Grievant's assertion that she received *U-5*.

On September 30, 2021, the Grievant received a letter from Kelly Cunningham, Fish Program Director. *E-12, U-6*. The letter rescinded the Grievant's religious exemption. The letter acknowledged that the Grievant's religious exemption was approved, but concluded that since the

Agency was unable to identify a reasonable accommodation for her position, she was given one of two choices. The first choice was reassignment, although reassignment was only a possibility because opportunities were limited. The second choice was to be vaccinated no later than October 18, 2021, or be separated from employment. The letter provides in relevant part as follows:

September 30, 2021

Dear Ruthanna Shirley,

You filed a religious exemption request stating you were **prevented from being vaccinated against COVID-19** pursuant to the Governor's Proclamation 21-14.1 based upon a sincere and personally held religious belief. Upon further review and consideration while your religious exemption has been approved, we are unable to identify a reasonable accommodation that would allow you to continue to perform all of the essential functions of your job.

In considering your request for accommodation, the department has evaluated the essential functions of your position as well as business requirements for workplace safety. Performing the essential functions of your position unvaccinated poses a threat to the health and safety of others in the workplace.

After carefully reviewing your essential functions in your job description, working environment, and your management's feedback, it has been determined that no reasonable accommodation can be made in your current position. This determination was made because your position must at times be done in the physical presence of others. There are no other accommodations for your position available which sufficiently mitigate or eliminate the risk of being associated with having an unvaccinated employee performing the essential functions of your position.

Reassignment remains a possibility, although opportunities may be limited. If you would like to explore available reassignment options, please contact Joceile Moore, Reasonable Accommodation Specialist at [Joceile.Moore@wa.gov](mailto:Joceile.Moore@wa.gov) as soon as possible.

If you have additional information that supports your ability to be accommodated in your current position, please send that information to [Joceile.Moore@dfw.wa.gov](mailto:Joceile.Moore@dfw.wa.gov) as soon as possible. A follow up meeting may be scheduled.

Pursuant to Governor's Proclamation 21-14.1, verification of being fully vaccinated against COVID-19 is required to be shown no later than October 18, 2021 or you may be separated from employment. If you chose to proceed with vaccination, please show proof of vaccination to your supervisor. Please see HR Consultant for alternative schedules should you choose to be vaccinated.

We understand this may be a difficult time. We will do our best to support you during this time. The Employee Assistance Program (EAP) recognizes the ongoing need to provide support through counseling and referral services, management consultations and resources. We encourage you to review EAP's Well-Being Resource Guide.

In addition, we encourage you to review the Employee Benefits and Assistance Program Contact List to help you address questions pertaining (but not limited) to unemployment, retirement, medical insurance and the Social Security Administration.

Sincerely,

Kelly Cunningham  
Fish Program Director

The Grievant, by email dated October 6, 2021, wrote to Fish Program Director Kelly Cunningham and Reasonable Accommodation Specialist Joceile Moore and asked why the Agency changed positions. *U-10*. It provides in relevant part:

Good morning everyone,

Joceile, I understand your position has changed and that what was said during the interview is not what is taking place currently.

Kelly (or Craig) my reasonable accommodation request needs to be reviewed again. As the director of Fish Program I am sure you already know that Pikeminnow Sport Reward Season runs from May 1<sup>st</sup>-September 30<sup>th</sup> (with a rare one or two-week season extension). That being said from October thru the end of April I do not supervise staff! From October thru April my position will be focused on season conclusion, data analysis, report writing, season preparations for the up and coming season, etc. which will be fully done by teleworking without contact with staff.

Sincerely,  
Ruthanna Shirley

On October 8, 2021, Amy Windrope, the Deputy Director for the Agency, wrote to the Grievant. *E-16, UE-9*. The relevant portions of this letter are as follows:

October 08, 2021

Dear Ruthanna Shirley:

On 09/30/2021, you received notice that your religious exemption request was unable to be reasonably accommodated. Additionally, you were advised that you could explore reassignment possibilities by contacting Joceile Moore, Reasonable Accommodation Specialist at [Joceile.Moore@dfw.wa.gov](mailto:Joceile.Moore@dfw.wa.gov) as soon as possible.

This is a reminder that reassignment remains a possibility, although opportunities may be limited. However as of today, you have **not** notified Joceile that you are interested in exploring these possibilities. Consequently, you are being notified that you have until **October 13, 2021** to contact Joceile to initiate this process. If Joceile does not hear from you by October 13, 2021, your accommodation exemption request will be considered closed.

If after contacting Joceile, you wish to assist in this process you can go to [State of Washington Job Opportunities | Departments: Dept. of Fish and Wildlife | Sorted by Posting Date descending | Work that Matters \(governmentjobs.com\)](#) and look for positions that you are qualified for at or below your current position salary **and** where the duties and working conditions are identified as done via 100% telework and/or require no in-person contact. Note, these conditions are based on non-pandemic normal business circumstances. Supervisory positions do not fit this criteria, as it is a business expectation to meet with those supervised. If you identify a position that meets this criteria and you are interested in pursuing it, please contact Joceile to discuss next steps.

Additionally, if you have emergent information that was not included in your original request for accommodation which may impact the accommodation decision to grant you an accommodation, you must contact Joceile by **October 13, 2021**. If Joceile does not hear from you by October 13, 2021, your accommodation exemption request will be considered closed.

Failure to pursue either option, failure to notify your supervisor of initiating full vaccination, and remaining unvaccinated without an approved alternate will start your separation effective **October 18, 2021**. You will lose all access to your state resources such as email, phone access, and any agency equipment on close of business on October 18, 2021. For more information on vaccination options and timelines, please refer to your union memorandum of agreement.

### **Additional Support**

We understand this may be a difficult time. We will do our best to support you during this time. The Employee Assistance Program (EAP) recognizes the ongoing need to provide support through counseling and referral services, management consultations and resources. We encourage you to review EAP's [Well-Being Resource Guide](#).

In addition, we encourage you to review the [Employee Benefits and Assistance Program Contact List](#) to help you address questions pertaining (but not limited) to



[unemployment](#), [retirement](#), [medical insurance](#) and the [Social Security Administration](#).

Sincerely,

**Amy Windrope**  
Deputy Director

The Grievant applied for a reassignment. Thereafter, Kelly Cunningham, Fish Program Director, by letter to the Grievant, dated November 30, 2021, informed the Grievant she could not be reassigned. *U-17*. The letter provides in relevant part as follows:

November 30, 2021

Dear Ruthanna:

You have been engaging in the interactive accommodation process with Joceile Moore, WDFW's Reasonable Accommodation Specialist. As part of the accommodation process, you requested consideration for reassignment to other positions within WDFW.

Reassignment to vacant funded positions within the agency for which you meet the qualifications has been reviewed as an accommodation for your approved exemption from the vaccine mandate contained in the Governor's Proclamation 21.14. There are no qualifying positions within the agency that can be used for an accommodation for being exempted from the mandate mentioned above. Unfortunately, there are also no expectations for qualifying vacancies becoming available in the foreseeable future to be used as a reasonable accommodation.

Failure to provide proof of beginning the process of becoming fully vaccinated within ten (10) calendar days of this notice will result in non-disciplinary separation effective December 10, 2021. If you have accrued annual leave, you can notify your supervisor to request to use eight (8) hours of this leave for the month of December 2021. This will ensure your healthcare benefits continue to the end of the month in which you are separated. Contact information is attached for follow-up with potential benefit organizations.

For additional questions on this letter, you can contact Joceile Moore, WDFW Reasonable Accommodation Specialist at [Joceile.Moore@dfw.wa.gov](mailto:Joceile.Moore@dfw.wa.gov) and 360-463-1097.

Sincerely,

Kelly Cunningham

Fish Program Director

On October 13, 2021, the Union filed a grievance on behalf of the Grievant. *U18*. It provides in relevant part as follows:

Facts:

The State of Washington and WAFWP entered into negotiations concerning the impacts of Governor Inslee's Proclamation 21-14.1 which required all State employees to become fully vaccinated by October 18, 2021 or be terminated. The Proclamation provided for employees to seek religious and/or medical exemptions and to seek reasonable accommodation based upon their exemption.

On September 30, 2021 the Washington Department of Fish and Wildlife, through a letter from Deputy Director Amy Windrope, notified its employees who had received approval for exemption, and in many cases had been approved for an accommodation, that regardless of the exemption, unless the employee could telework 100% of the time the employee would be terminated on October 18, 2021.

Ruthanna Shirley applied for a religious exemption and was granted the exemption by the Agency. The Agency violated the parties' MOU on this matter and ignored the Governor's commitment to accommodate where possible. By making a blanket declaration that the only employees who would be accommodated are those who can work from home evidences bad faith bargaining by the State as well as a lack of individualized accommodation as required. Ms. Shirley can perform her essential duties through teleworking, yet her accommodation was denied. The Agency has not shown any undue hardship in attempting to accommodate Ms. Shirley.

Remedy:

Rescind the termination notice. Reinstatement Ms. Shirley to her prior position with the State and repay her for lost wages and benefits. Engage in a true individualized accommodation process. Any additional remedy deemed reasonable.

The Shirley Grievance proceeded through the step process. The parties were unable to settle the Shirley Grievance. It was eventually set for hearing before the Arbitrator.

**II. CONCISE STATEMENT OF FACTS  
AND POSITIONS ARGUED BY THE AGENCY.**

The Agency asserted several facts and positions to uphold the separation of the Grievant from employment with the Agency. The primary facts and positions are set forth below.

1. The Grievant has alleged that the Agency violated the MOU by failing to provide her with a reasonable accommodation for a religious exemption to a vaccine mandate. *Gaul at 13-20*. Executive orders and emergency powers are normally irrelevant to labor and employment law matters, but these are not normal times. *Id. at 13:21-24*. The State of Washington has been ravaged by COVID-19 since the pandemic began in March 2020. *Id. at 13:24-14:1*. The first COVID-19 case was detected in Washington followed by deaths shortly thereafter. *Id. at 14:1-4*. Governor Inslee declared a state of emergency and did his best to keep Washingtonians safe until a vaccine was developed. *Id. at 14:4-6*. In the months that followed, the sick and dying were overwhelming Washington's healthcare system. *Id. at 14:7-8*. The pandemic caused a massive disruption of government services, including those provided by the Agency. *Id. at 14:10-12*.
2. Vaccines became available in December of 2020. *Gaul at 14:13-14*. Data indicated that vaccines were safe and effective at reducing infections and serious disease. *Id. at 14:14-16*. Data also indicated that widespread vaccination was the best way to protect the healthcare system, avoid lockdowns, and put the pandemic behind us. *Id. at 14:14-20*. In addition, death rates and serious disease was disproportionately higher among the unvaccinated population. *Id. at 14:20-22*.
3. Governor Inslee, considering data from the Center for Disease Control and the Washington State Department of Health guidelines issued Proclamation 21-14 which prohibited workers from working for the State after October 18, 2021 if they were not vaccinated or accommodated. *Id. at 14:23-15:7*.
4. Proclamation 21-14 also provided an exemption and accommodation based upon a disability and/or religion. *Gaul at 15:16-19*. Workers who have sincerely-held religious beliefs, practices, or observances consistent with the Civil Rights Act of 1964 and Washington law against discrimination were not required to get vaccinated. *Id. at 15:11-15*.
5. Proclamation 21-14 further required agencies to provide workers with a reasonable accommodation if doing so was not an undue hardship. *Gaul at 15:16-19*. Accommodations must comply with COVID-19 safety measures that are consistent with the State Department of Health. *Id. at 15:15-22*. The assessment of any accommodation must be individualized. *Id. at 15:22-24*.
6. Implementation of the vaccine mandate began with a memorandum of understanding between the Agency and the Union. *Gaul at 15:1-16:4*. The MOU recognizes that vaccines are effective in reducing infections and serious disease. *Id. at 16:5-8*. The Union further recognized that vaccines are the primary way to avoid future lockdowns. *Id. at 16:8-10*.
7. The MOU, like the proclamation, requires workers to be vaccinated or be covered by an exemption and accommodation. *Gaul at 16:10-13*.

8. The Agency's first witness, Mr. Spikes, will testify about the implementation of the vaccine mandate, pre-existing policies that were followed, the accommodation process, the risk associated with unvaccinated workers, identifying which essential functions unvaccinated workers could perform without exposing themselves to others and risking death or serious illness from COVID-19, and the importance of remote work for workers who do not have vaccine protection. *Gaul at 16:14-17:1*. Mr. Spikes will also testify regarding his knowledge of the Grievant's request for an accommodation for the essential functions of her position which could not be performed remotely. *Id. at 17:2-5*. He shall also testify that the Agency attempted to accommodate the Grievant with a 100% telework position. *Id. at 17:6-8*.
9. The Agency's second witness, Kelly Cunningham will testify about his role in reviewing accommodation requests, the process for approving or denying requests, and the "forward-facing" essential functions of the Grievant's former position. *Gaul at 17:9-14*.
10. The Agency's third witness, Charlene Hurst, will testify about Grievant's job specific duties, frequency of in-person contact, including field work, indoor work, work in vehicles, and places where COVID-19 might spread. *Gaul at 17:15-19*.
11. The evidence will show that the Agency complied with all state and federal laws and internal policies when it approved her religious accommodation request. *Gaul at 17:21-23*. After considering her request for an accommodation the Agency discovered that it could not accommodate the Grievant or reassign her without an undue hardship. *Id. at 17:23-18;1*. Any attempt to keep the Grievant in her position would have ignored the essential functions of her position or constitute a violation of the law for failure to comply with the vaccine mandate. *Id. at 18:3-5*.
12. The Agency provided an individualized accommodation process for the Grievant and reasonably concluded that no accommodation was available for her in the position that she held. *Gaul at 189:20-24*. Key to this determination were the facts available to the agency, agency personnel, and the public at the time the decision was made. *Id. at 189:24-190:2*.
13. The Agency's actions and decisions were made around August and October 25 of 2021. *Gaul at 190:24:3-4*. At this time, the Delta variant of COVID-19 was spreading throughout the country. *Id. at 190:4-5*. It was twice as transmissible as the Alpha wave and caused widespread mortality. *Id. at 190:5-7*. It disrupted government operations on a massive scale. *Id. at 190:7-8*.
14. Agency guidance from the Department of Health, the Office of Financial Management, and federal guidance from the Center for Disease Control acknowledged that vaccines were the best way to prevent transmissions and death. *Gaul at 190:9-13*. In the *MOU, J-4*, the parties acknowledged that vaccines were effective in reducing transmissions, although the Union apparently denies this now. *Id. at 190:13-18*. The Union presented no evidence that vaccines do not reduce transmission of COVID-19. *Id. at 190:18-20*.

15. The position held by the Grievant was a supervisory position with essential functions divided into two categories, on-season and off-season. *Gaul at 190:21-23*. During off-season, the essential functions of her position involved less in-person contact. *Id. at 190:24-25*. During on-season, the position fills in for employees who cannot make it to their job site, provides training, interviews, and most importantly, supervises several employees. *Id. at 190:25-191:4*.
16. Before the pandemic, it was obvious that supervisors supervise. *Gaul at 191:5-6*. They were not merely a resource for subordinates to call for advice or questions. *Id. at 191:6-6*. As testified by Mr. Spikes and Mr. Cunningham, supervising is an in-person activity. *Id. at 191:8-10*. There is nothing in the law, CBA, or MOU, that requires the Agency to change its expectation that supervisors supervise in-person to supervisors supervising remotely. *Id. at 191:6-10*.
17. The Union would have essential job functions of the Grievant's position description modified so that it is no longer a supervisory position. *Gaul at 191:18-20*. If the Grievant's position was a 100% telework position, it would not be a supervisory position. *Id. at 191:20-21*. Rather, it would be a data entry or resource position. *Id. at 191:20-23*. The Agency is not required to modify, redistribute, or remove essential job functions such as supervision and training for this position. *Id. at 191:23-192:1*.
18. Mr. Winther testified that the Agency could have kept the Grievant on accommodation status by modifying the essential functions of her position. *Gaul at 192:2-5*. Such a modification is not required by law and the Agency has no obligation to do so. *Id. at 184:2-3*. Essential functions were temporarily modified during the Delta wave to keep employees safe. *Id. at 192:5-10*.
19. Mr. Winther also protested the denial of the Grievant's accommodation in Agency's Exhibit 14. *Gaul at 192:11-12*. He stated that the Grievant could have been accommodated, but stated this in regard to her off-season duties, not her on-season duties. *Id. at 192:14-16*. The Grievant could not be safely accommodated in her position with removing her essential functions during the on-season. *Id. at 192:16-19*.
20. Although Mr. Winther explained that some employees were allowed full-time telework before the pandemic began, the Union did not list a single supervisor who was allowed to telework full-time. *Gaul at 192:25-193:1*. This is because there is no such example. *Id. at 193:1-2*.
21. The Agency had no obligation to provide a telework accommodation during the off-season because it knew it could not provide a telework accommodation during the on-season. *Gaul. at 193:3-11*. The Agency is not obligated to engage in an inefficient distribution and redistribution of essential resources. *Id. at 193:9-11*.
22. The Grievant's position requires her to go into the field and she was expected to interact in-person. *Gaul at 193:12-13*. Unexpected in-person interaction adds to the reasons she

- could not be safely accommodated without a vaccine. *Id. at 193:14-16*. Nothing in the record indicates that it was unreasonable for Mr. Cunningham, the appointing authority, to conclude the Grievant could safely interact with her subordinates and perform her essential functions. *Id. at 193:16-20*.
23. The Agency concluded that it could not provide an accommodation to the Grievant entirely out of concern for the safety of staff and the public in September and October of 2021, during which time the Delta wave was spreading across the State. *Gaul at 193:21-194:1*. This variant was twice as transmittable than the Alpha variant and disrupted government operations on numerous occasions. *Id. at 194:1-4*.
  24. Given all the reasons expressed, the Arbitrator should conclude that the Agency provided an individualized accommodation process to the Grievant and complied with all applicable rules, regulations, and laws. *Gaul at 194:5-9*.
  25. It is unclear if the Grievant was ever granted a temporary accommodation, and if so, it is unclear if it ever went into effect. *Gaul at 215:11-15*. U-5 is not signed by Mr. Winther. *Id. at 215:19-21*. Mr. Cunningham testified he never approved one for the Grievant. *Id. at 217:2-3*.
  26. There has been argument that vaccines are not effective. *Gaul at 219:11-13*. The MOU provides that the parties agreed vaccines were effective in reducing infection and serious disease and widespread vaccination is the primary means of protection from COVID-19. *Id. at 219:13-18*.
  27. The Union's argument that the Agency wishes to get back to an ideal world is incorrect. *Gaul at 219:21-24*. Governor Inslee declared a State of Emergency ends on October 31, 2022 and everyone is going back to normal. *Id. at 219:24-220:1*.
  28. In regard to Hardship, removing essential functions is expensive and more than de minimis. *Gaul at 220:9-11*. Changing a supervisory position to something akin to a data entry position or a receptionist position would be costly and an undue hardship. *Id. at 220:12-17*.
  29. Historically, supervisors interact in-person. *Gaul at 220:18-19*. It has in-person essential functions. *Id. at 220:19-20*. Supervisors interact in-person with employees and the public. *Id. at 220:20-22*. Removing the supervision function is a hardship on the Agency. *Id. at 221:2-4*.

### **III. CONCISE STATEMENT OF FACTS AND POSITIONS ARGUED BY THE UNION.**

1. The arbitration is not about whether vaccines are appropriate or efficacious for COVID-19. *Fenrich at 18:18-20*. Nor is it about masking or other matters appropriate given COVID-19. *Id. at 18:20-22*.

2. It is important to remember the timeframe of the Shirley Grievance. *Fenrich at 18:23-24*. COVID hit Washington State in March 2020. *Id. at 18:25-19:1*. Eighteen months later the Agency decided to start terminating some of its employees who could not receive the vaccine, like the Grievant, for religious purposes. *Id. at 19:2-4*. The Agency chose to terminate the Grievant despite the fact that she was exceeding expectations for her duties in a safe and efficacious manner during this 18-month period. *Id. at 19:5-8*. The Grievant received the Director's award for safe and effective COVID-19 practices about one year prior to her termination. *Id. at 19:8-12*.
3. This arbitration is about the Agency's failure to properly implement the Governor vaccine mandate and the subsequent MOU that the State reached with all unions. *Fenrich at 19:13-17*.
4. On August 20, 2021, Governor Inslee issued a proclamation requiring all employees of cabinet agencies, healthcare workers, and certain contractors to be fully vaccinated against COVID-19 or receive an exemption from the vaccine because of religious or medical reasons. *Fenrich at 19:18-21*. An exemption would allow the employee to work through the reasonable accommodation process to determine if they could be accommodated due to the vaccine mandate. *Id. at 19:21-20:1*. The Proclamation did not apply to the Agency because it was not a cabinet agency. *Id. at 20:1-3*. Almost one month later the Governor revised the mandate to make it applicable to the Agency. (9/29/21) *Id. at 20:1-3*. The proclamation, J-2, provided the Grievant with an exemption process for a reasonable accommodation and the Grievant applied through this process. *Id. at 20:8-13*.
5. The Union is in arbitration because the Agency did not engage in an appropriate accommodation process that meets the statute, proclamation, and the MOU. *Fenrich at 20:14-19*. The Union represents over 900 bargaining unit members. *Id. at 20:20-23*. The Grievant was a member prior to her termination in 2021. *Id. at 20:23-25*. The Agency is attempting to frame the issue as if it were a nondisciplinary to follow reasonable accommodation guidelines, deciding instead to provide an exclusive accommodation for employees who could work 100% telework and if so, the employee would be accommodated. *Id. at 20:25-21:6*.
6. The Agency did not consider looking at individual jobs. *Fenrich at 21:7*. It did not consider if an accommodation would be an undue hardship to the Agency. *Id. at 21:7-9*. Rather than taking an individualized approach of accommodation to an employee, it initiated a global process, which in and of itself, is a prima facie violation of the accommodation process. *Id. at 21:9-13*. It was not an individualized review as noted by Mr. Gaul. *Id. at 21:21-22*.
7. The Agency viewed the situation in terms of how it viewed an ideal work environment and not the work environment at the time of the Grievant's separation. *Fenrich at 21:16-20*. A reasonable accommodation process requires a review of work at the time of the request, not at a time it is hoped an event would happen. *Id. at 21:20-22*.

8. In October of 2021, there were no requirements for employees to show up for work in-person. *Fenrich at 21:23-25*. Work was done via a virtual platform, meetings were held outdoors, and indoors, with social distancing, masks, and an attestation. *Id. at 21:25-22:4*. This was the work environment prior to its recent decisions regarding what the work environment will be. *Id. at 22:5-6*.
9. The Agency refused to modify position descriptions to reflect the work environment of the last 18 months.<sup>4</sup> *Fenrich at 22:7-9*. The State and the Agency have not gone back to 100% in-person although the mandate went into effect in October of 2021. *Id. at 22:14-17*. At present, employees need only come to work once a week, in-person or in the field. *Id. at 22:17-20*. The environment in which they viewed the Grievant's future work environment is fiction and not reality. *Id. at 22:20-22*.
10. Testimony will show that the Grievant's position required no in-person interaction for approximately one-half of the calendar year and during the other half, it was minimal. *Fenrich at 22:23-23:1*. Yet the Agency knew that from October of 2021 through April of 2022, the Grievant had no in-person obligations, but it still terminated her because she might have to go into the field or might have to be around someone. *Id. at 23:1-9*. The Grievant had safely performed her job for the 18 months prior to the vaccination mandate. *Id. at 23:9-10*.
11. The Grievant received a reasonable accommodation from the Agency on September 22, 2021. *Fenrich at 23:11-13*. The accommodation was for exactly the same type of work environment that she had for the prior 18 months after the pandemic began. *Id. at 23:13-15*. When she had to meet people in-person, she masked, maintained a safe distance of at least six feet, met outside when appropriate, and attested whether or not she had COVID-19 symptoms. *Id. at 23:15-19*.
12. On September 22, 2021, the Grievant was granted an accommodation. *Fenrich at 23:1-2*. Eight days later her accommodation was rescinded because her position was not one that would allow her to telework 100%. *Id. at 23:21-24*. Nothing changed between these dates, i.e., her work duties, COVID-19 status, or CDC recommendations. *Id. at 24:24-24:1*. Nothing changed except the Agency decided to move from an individualized accommodation to a global view that she had to be able to telework 100% or be unable to work for the Agency. *Id. at 24:1-6*.
13. It is the Union's hope that after the arbitration hearing is completed, the Arbitrator understands that the Agency did not fulfill its obligation to provide an individualized review of her work in regard to an accommodation, that the Agency elected to use a one-size-fits-all approach, which on its face violates reasonable accommodation

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<sup>4</sup> The parties sometimes framed a question, statement, or response in terms of an "18-month" period. This period of time is meant to include the time Governor Inslee issued his Proclamation in March of 2020 and the time the Grievant was separated from employment with the Agency in October of 2021. *Fenrich at 195:6-9*.



- requirements of both state and federal law, the proclamation, and the MOU. *Fenrich at 24:7-15.*
14. The Agency is claiming that it separated the Grievant due to an inability to accommodate her exemption to the COVID-19 vaccine mandate. *Fenrich at 194:18-21.* It is undisputed that the Agency reviewed and granted her an exemption from the vaccine mandate. *Id. at 194:21-22.* The Agency granted the Grievant a religious exemption because she had a valid religious exemption and demonstrated by U-3, which shows that she hasn't had a vaccine as an adult for 15-years prior the development of the COVID-19 vaccine. *Id. at 194:21-195:3.* Hence, the law and the MOU required the Agency to engage in a reasonable accommodation review and accommodate the Grievant unless the accommodation would result in an undue hardship. *Id. at 195:8.* The Agency continues to forget that the fact that they spoke to each individual does not constitute an individual review as to whether an accommodation can be made for their job. *Id. at 195:8-12.*
  15. The Employer changed positions after granting a reasonable accommodation to the Grievant as per Amy Windrope's email response to Eric Winther. U-16. Eight days later she stated that she felt bad about having to rescind 13 accommodations, including the one to the Grievant, because the Agency revisited the accommodations and decided supervisors would get one because they might have to interact with other people. *Id. at 195:9-22.*
  16. The Agency did not share how Joceile Moore, their accommodation expert, created an accommodation approving masks and social distancing and how it later became an undue hardship. *Fenrich at 195:3-196:7.*
  17. The Agency cannot just speak to someone, check a box, and conclude an individual assessment was done when the only conclusion is that supervisors are not entitled to an accommodation. *Fenrich at 196:8-13.* The Grievant could have continued to do what she had been doing when she met people in-person, by wearing a mask and being social distanced, while also teleworking. *Id. at 196:13-20.*
  18. Mr. Spikes testified that it was his assumption that all supervisors met with their employees. *Fenrich at 196:21-22.* To say that teleworking is allowed only for workers who don't supervise is disingenuous, when today, one-year after the Grievant's termination, supervisors are still teleworking, shows no undue hardship. *Id. at 196:23-197:5.*
  19. The Agency keeps talking about an ideal world that it wants to achieve. *Fenrich at 197:6-7.* The Agency hasn't had an ideal world for 3 years. *Id. at 197:4-5.* The Agency has to realize that it dealing with a different world and it has to adapt to it. *Id. at 197:7-9.* Workers are being penalized while the Agency tries to get to the ideal world. *Id. at 197:10-13.*

20. The Agency has violated Title VII. *Fenrich at 197:14-198:1*. The Grievant and her workgroup have been working with each other, wearing a mask, for 18 months until the vaccine mandate. *Id. at 197:2-5*. A reasonable accommodation is not a singular accommodation. *Id. at 198:8-9*. The ethereal is not an undue hardship. *Id. at 198:10-12*.
21. On September 22, 2021, the Grievant met with the Agency's reasonable accommodation expert and was informed that she would be accommodated. *Fenrich at 198:13-20*. However, it was rescinded without a single statutorily significant basis. *Id. at 198:20-21*.
22. Undue hardship is defined as causing more than a de minimis cost and according to EEOC guidelines, U-19 through 21, undue hardship means difficulty or expense. *Fenrich at 198:22-199:1*. In the case of the Grievant, she did not have to change her duties for 7 months of the year and only minimally for the remaining 5 months. *Id. at 199:1-5*. Her supervisor testified that he was okay with her meeting virtually, by phone, or text. *Id. at 199:4-6*.
23. The Grievant met with staff only twice a year. *Fenrich at 199:7-8*. There have been no complaints about the Grievant, including her ability to perform her work, communicate, or her willingness to support subordinates. *Id. at 199:10-17*. In addition, the Grievant received an award for leadership during COVID. *Id. at 10-11, U-25*. This same management decided she could no longer do so and summarily terminated her. *Id. at 199:13-17*.
24. The Grievant's supervisor testified he did not require in-person meetings during the pandemic. *Fenrich at 199:18-21*. People just looked at words on paper without talking to the Grievant. *Id. at 199:20-21*. Nobody went over her position description with her. *Id. at 199:23-24*. The Grievant was never asked how she managed to do her work because Mr. Winther testified she could do it. *Id. at 200:3-4*.
25. The Agency was unable to realize all the good work the Grievant did because it made the decision that there is only one accommodation for the Grievant. *Fenrich at 200:6-9*.
26. The Agency did not conduct an individualized, fact specific accommodation review and weigh the requested accommodation against any undue hardship it would create for coworkers or the Agency. *Fenrich at 200:8-19*.
27. The fact that the Agency met with the Grievant does not indicate that the meeting was based upon fact specific information, especially when a position description is not discussed. *Fenrich at 200:20-22*. This is not a fact specific situation. *Id. at 200:22-24*. It could not be fact specific because the Agency never asked the Grievant what she did. *Id. at 200:22-24*.
28. The Agency created a fictional moment in time to set forth a work standard it has not followed. *Fenrich at 201:1-2*. Workers did not begin to meet in-person until last summer and it was only once a week. *Id. at 201:2-4*.

29. The Grievant's position description does not require her to supervise in-person. *Fenrich at 201:6-7*. The Agency could not identify any resource that supports its proposition that supervision must be in-person and the Agency is terminating workers in a punitive manner. *Id. at 201:6-10*.
30. The Agency did not consider the 18 months in determining if an accommodation was reasonable. *Fenrich at 194:7-10*. It did not consider if the Grievant was performing her work in an efficient and professional manner, to determine if an accommodation could be made in terms of either a "sustainable" or "optimal" environment. *Id. at 205:3-12*.
31. A reasonable accommodation does not require the employee to fit into an optimal situation. *Fenrich at 205:13-15*. It requires the Agency to determine "can we still do our main duties?" It does not require the optimal. *Id. at 205:15-17*. However, the Agency's witnesses persisted on asserting that "what we want is to get back to," even after knowing a year into the Grievant's termination that it is not close to being there and might never be in an optimal environment. *Id. at 205:18-22*.
32. Mr. Winther, the Grievant's supervisor was not asked for the specifics of the Grievant's work in the reasonable accommodation process. *Fenrich at 205:23-25*. He was only asked if the Grievant "could telework for some of her duties?" *Id. at 205:25-1*. He was asked if she could wear a mask and social distance? *Id. at 206:1-7*. Those were the only questions he was asked about the Grievant's accommodation. *Id. at 206:6-7*. Joceile Moore asked Mr. Winther these questions supported by *U-4 and U-14*. *Id. at 206:1-7*.
33. The Agency did not go back to the accommodation process after it rescinded the Grievant's exemption, because it was not going to consider accommodations. *Fenrich at 206:17-200*. Although the Agency was not going to allow an exemption, it did not consider if there was a way for the Grievant to do her work teleworking or staying away from subordinates while she performed the essential functions of her duties. *Id. at 206:12-16*.
34. The Agency changed positions midstream on the Grievant's accommodation exemption and did not return to the individualized review process which is what it should have done. *Fenrich at 206:17-20*.
35. Fear of COVID-19 and the unvaccinated is the result of the Agency's decisions. *Fenrich at 206:20-21*. E-7 provides that the Agency will only accommodate supervisors if 100% of their work is done teleworking without contact with others. *Id. at 207:1-3*. The Agency also concluded that if supervisors have to have contact with others, the supervisors will have to be masked. *Id. at 207:3-5*. Approximately a week later, the Agency determines it is not going to allow masking. *Id. at 207:7-9*. The Agency went back to the position that that an accommodation is reasonable only if the employee is kept 100% away from other people. *Id. at 200:3-5*. The Agency never justified the change in positions. *Id. at 207:9-10*. That week, there was no change in the pandemic, no change in the Governor's proclamation which the Agency had for one month, and no

- change in the Grievant's duties. *Id. at 207:11-16*. Both the CDC and the EEOC have stated that it is a reasonable accommodation to require masking for the unvaccinated. *Id. at 207:19-21*. The Agency did not follow the CDC and EEOC guidelines it said it was following. *Id. at 207:21-22*. The Agency created its own guidelines without any support. *Id. at 207:23-24*.
36. The Agency's position contradicts OFM guidance. *Fenrich at 207:25-208:1-2*. The OFM SHR Vaccine Mandate, Proclamation 21-14 COVID-19 Vaccination Requirement," page 10, provides for an individualized accommodation in the determination of whether or not a person's position can be modified so they can work. *Id. at 208:2-5*. However, the Agency said no modifications. *Id. at 208:6*. The Agency decided to use the antithesis of looking at an individualized review and make a decision for an entire class of employees, specifically, supervisors. *Id. at 208:6-11*.
37. The EEOC and Title VII require an accommodation if it can be provided without undue hardship. *Fenrich at 208:12-14*. There is no undue hardship if an accommodation is not beyond de minimus cost. *Id. at 208:14-15*. The Agency never claimed a cost. *Id. at 208:15*. The Grievant asked the Agency to explain the undue hardship and the Agency responded by saying see your termination letter rather than "here's why it is an undue hardship." *Id. at 208:16-20*. The Agency never said there was an undue hardship from between 9/22 when it said she could work with an accommodation until 9/30 when it determined she could not. *Id. at 208:17-22*. Neither the State or the Agency has proven that somebody who is exempt from the vaccine requirement would increase the spread of COVID-19 and this position is a fallacy. *Id. at 209:1-6*.
38. The Agency keeps referring to the MOU which is a boiler plate agreement. *Fenrich at 209:7-8*. While the agreement refers to people contracting COVID-19 and spread of COVID-19, the agreement does not say that the unvaccinated caused either one. *Id. at 209:9-13*. The Grievant received a leadership award for the first 18 months of the pandemic, nobody in her work group contracted the virus, she did not contract the virus, and the accommodation that the Agency chose to ignore was clearly working. *Id. at 209:14-22*.
39. The Agency cannot show that the Grievant's chosen accommodation impaired workplace safety. *Fenrich at 209:23-24*. The Agency asserts that it could have but mere assertion is not sufficient to override the Grievant's right to an accommodation. *Id. at 208:24-200:1-5*. The spread of COVID-19 is still in the workplace although vaccination is a requirement. *Id. at 210:2-5*. Vaccination did not stop the spread. *Id. at 210:4-5*.
40. There was no undue burden for the Agency to terminate the Grievant before the beginning of the seven-month season. *Fenrich at 210:25-211:2*. The Grievant's job still has not been filled with a permanent employee. *Id. at 211:3-4*.
41. The EEOC guidelines of October of 2021 states that a reasonable accommodation for a person with a religious exemption is masking and social distancing. *Fenrich at 211:21*.

42. The Agency must show a direct threat of the unvaccinated to others in the workplace and no such proof was offered. *Fenrich at 211:22-24.*
43. The EEOC Guidelines in October 2021 clearly state that masking and social distancing was a reasonable accommodation for employees who have been granted a religious exemption and who must be around other employees. *Fenrich at 211:12-21.* See 29 CFR §1630.
44. When the Grievant was terminated, the Agency was still requiring employees to wear masks and social distance so guidelines were in place. *Fenrich at 212:8-23.* With these guidelines in place, the Grievant could have easily been accommodated. *Id. at 212:23-213:6.* The Grievant was not a threat to the workforce. *Id. at 213:10-11.* The Grievant had practically zero in-person interaction with coworkers. *Id. at 213:13-15.* There is no undue hardship. *Id. at 213:17-18.*
45. The Agency failed to meet its obligation to provide the Grievant with a reasonable accommodation. *Fenrich at 213:20-21.* The Union requests reinstatement and back pay with all benefits. *Id. at 213:21-24.*
46. In regard to *U-5*, the Grievants testimony is supported by the fact that Joceile Moore told her that her reasonable accommodation request would be granted and *U-16*, where Deputy Amy Windrope said she had to rescind the accommodations of several employees. *Fenrich at 218:1-6.*
47. There is no evidence that the Grievant supervised in-person. *Fenrich at 221:15-17.*
48. While the MOU states that vaccines are important, it also says that exemptions and reasonable accommodations will be provided. *Fenrich at 222:2-9.*
49. The question is, was there a reasonable accommodation to vaccination? *Fenrich at 222:10-11.* Joceile Moore, the reasonable accommodation expert for the Agency found that the Agency could accommodate the Grievant but the Agency decided not to follow her advice and therein is the unreasonableness of the Agency's decision. *Id. at 222:23-223:2*

#### **IV. STIPULATED ISSUES.**

1. The parties agreed that the Arbitrator has jurisdiction over the Shirley Grievance. *Fenrich at 11:10, Gaul at 11:11-12.*
2. The parties agreed that all steps in the grievance process were met or waived. *Fenrich at 11:10, Gaul at 11:11-12.*
3. The parties agreed that the Shirley Grievance was procedurally

and substantively arbitrable. *Fenrich at 11:25, Gaul at 11-24.*

4. The parties agreed that the issue would be framed as follows:

Was the State of Washington's termination of the grievant appropriate under Governor Inslee's proclamation regarding COVID-19, and if not, what is the appropriate remedy? In addition, the burden of proof shall shift to the Union on the issue of reasonable accommodation. *Fenrich at 12:12-13, Gaul at 12-22.*

**V. DID THE AGENCY APPROPRIATELY TERMINATE THE GRIEVANT?**

The Agency, to appropriately (properly) terminate (separate) the Grievant from employment, must have done so in a manner that is consistent with the Proclamations and Title VII. Otherwise, the separation is unlawful and must be set aside.<sup>5</sup>

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating "against any individual with respect to his/her compensation, terms, conditions, or privileges of employment" on the basis of the individual's religion. Hence, an employee who claims they cannot be vaccinated against COVID-19 because of a religious belief, practice, or observance may be exempt from the vaccination requirement.

An employee seeking relief under a failure to accommodate theory must establish a prima facie case of religious discrimination. The employee must prove that (1) he/she had a bona fide religious belief that conflicts with a condition of employment rule, policy, or requirement, (2) he/she informed his/her employer of this belief, and (3) he/she was discharged for failing to comply with the conflicting condition of employment. *See Complainant, v. Mayorkas, Sec'y, DHS (Citizenship and Immigration Serv.)*, 2020001712, 2021 EEOPUB LEXIS 2529, at \*41-42 (EEOC

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<sup>5</sup> The parties used the words "terminate" and "separate" interchangeably. Both of these words were used to describe the non-disciplinary discharge of the Grievant in relation to the Proclamations and Title VII.

2021). If an employee establishes a *prima facie* case, the employer must show that it made a good faith effort to reasonably accommodate the religious beliefs with a reasonable accommodation, and if such proof fails, the employer must show that the alternative means of accommodation proffered by the employee could not be granted without imposing an undue hardship on the employer's operations.

#### **V.A. PRIMA FACIE CASE.**

The record of the Shirley Grievance indicates that the Grievant has a religious belief that conflicts with being vaccinated with the COVID-19 vaccine, that she informed the Agency, and that she received a non-disciplinary separation for refusing to take the COVID-19 vaccine. The Grievant established a prima facie case. The Agency did not contest the Union's assertion that the Grievant had proven a prime facie case.

#### **V.B. REASONABLE ACCOMMODATION.**

Title VII requires employers to use good faith efforts to negotiate an employee's reasonable religious accommodation without incurring undue hardship. *Yott v. American Rockwell Corp.*, 602 F.2<sup>nd</sup> 904, 908 (9<sup>th</sup> Cir. 1979). The reasonableness of the accommodation is fact-sensitive and is determined on a case-by-case basis. *Id.*

The Grievant and the Agency worked together to determine if a reasonable accommodation for the Grievant existed. The Grievant and the Agency agreed to a reasonable accommodation as set forth in *U5*. The Agency decided to rescind the reasonable accommodation set forth in *U-5* because it revisited the exemption and accommodation process and determined that supervisors did not qualify for a religious exemption and accommodation. This was because unvaccinated supervisors could spread COVID-19 while meeting with coworkers and the public.

The Union maintained that the Agency improperly rescinded *U-5*. The Agency maintained it was an undue hardship. An employer is under an obligation to use good faith efforts to accommodate an employee's religious beliefs. *Heller v. EEB Auto Co.*, 8 F.3d 1433 (9th Cir. 1993).

If an attempt to accommodate is unsuccessful, the employer must show that it was not reasonably possible to accommodate the employee without an undue hardship. *EEOC v. Townly Engineering Mfg. Co.* 859 F.2d 610, 615 (9th Cir. 1998). If negotiations do not produce a proposal by the employer that would eliminate the religious conflict, the employer must either accept the employee's proposal or demonstrate that it would cause undue hardship. *Id.* Courts have allowed employers who do not attempt to provide a reasonable accommodation to move directly to proving that an accommodation would create an undue hardship. *Tooley v. Martin-Marietta Corp.*, 648 F.3d 1239 (9th Cir.) *cert denied*, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2nd 639 (1981). Absent an agreement by the parties, your Arbitrator must determine if *U-5* imposes an undue burden on the Agency.

#### **V.C. UNDUE HARDSHIP**

Title VII does not require an employer to provide a religious accommodation if it would pose an "undue hardship." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). The employer need offer only a reasonable accommodation. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986). Whether a proposed accommodation constitutes an undue hardship is determined by the "factual context of the case." *American Postal Workers Union v. Postmaster General*, 781 F.2d 772, 775 (9th Cir. 1986).

The Supreme Court defined "undue hardship" for religious discrimination cases as imposing "more than a de minimis cost." *Id. at 84*. An accommodation that imposes anything more than a *de minimis* cost on the employer causes an undue hardship. *Id. at 84*. However, only if the



employer can show that **no accommodation would be possible without undue hardship** is it excused from taking the necessary steps to accommodate the employee's religious beliefs. *Opuku-Boateng v. State of California*, 95 F.3d 1461, 1467 (9th Cir. 1996).

Both economic and non-economic costs matter. *Id.* at 83; *Webb v. City of Phila.*, 562 F.3d 256, 259-60 (3d Cir. 2009). Courts have recognized the following economic costs: lost efficiency; and payment of overtime.<sup>6</sup> *TWA*, 432 U.S. at 84. Courts have recognized the following non-economic costs:

- Violation of a collective bargaining agreement. *Fouche v. N.J. Transit*, 470 F. App'x 96, 96-97 (3d Cir. 2012).
- Increasing the difficulty or danger of work for other employees. *Smith v. Bethlehem Steel Corp.*, No.87-5340, 1989 U.S. Dist. LEXIS 1432, at \*13-25 (E.D. Pa Feb. 13, 1989).
- Compelling other employees to work additional undesirable weekend shifts. *Aron v. Quest Diagnostics, Inc.*, 2005 U.S. Dist. LEXIS 49245, at \*1 (D.N.J. June 30, 2005) *aff'd* 174 Fed. App'x 82, 83 (3d Cir. 2006). This is especially true where the employer has pre-existing staffing problems and the employee seeking the exclusion from weekend work as a part-time employee whose very job function is to provide relief. *Smith*, 1989 U.S. Dist. LEXIS 1432, at \*13-15.
- Requiring more senior employees to work. *Smith v. United Ref. Co.*, No. 77-71 Erie, 1980 U.S. Dist. LEXIS 9038, at \*25-26 (W.D. Pa. Jan. 30, 1980).
- Violates an employer's diversity and nondiscrimination policy. *Peterson v. Hewlett-Packard*, 358 F.3d 559 (9<sup>th</sup> Cir 2004).<sup>7</sup>

Hypothetical hardships do not constitute an undue hardship. Case law in the Ninth Circuit is

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<sup>6</sup> The record of the Shirley Grievance indicates the accommodation set forth in *U-5* is not an economic issue. In addition, the traditional non-economic issues with coworkers do not exist. For example, coworkers did not complain about the Grievant's accommodation set forth in *U-5* nor does the accommodation violate the CBA. In fact, as noted above, the Grievant's supervisor, Mr. Eric Winther, testified that he supported the Grievant's reasonable accommodation set forth in *U-5*. *Winther at 142:5*.

<sup>7</sup> It is significant to note that the United States Third Circuit Court of Appeals ruling in *Groff v. Dejoy*, No. 21-1900, filed on May 25, 2022. This case is before the United States Supreme Court. Extensions of time have been granted for the submission of briefs. Oral argument has yet to be set. Issues on appeal include (1) Whether the court should disapprove the more-than-de-minimis-cost test for refusing religious accommodations under Title VII of the Civil Rights Act of 1964 as set forth in *Trans World Airlines, Inc. v. Hardison*; and (2) whether an employer may demonstrate "undue hardship on the conduct of the employer's business" under Title VII merely by showing that the requested accommodation burdens the employee's coworkers rather than the business itself.

clear that:

“hypothetical moral problems are clearly insufficient to establish undue hardship. ‘Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship.’” *Opuku-Boateng*, 95 F.3d 1461, 1474 (9<sup>th</sup> Cir. 1996), citing *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (1978), *cert denied in International Ass’n of Machinists and Aerospace Workers AFL-CIO v. Anderson*, 442 U.S. 921, 99 S.Ct. 2848, 61 L.Ed.2d 290 (1979); *Burns v. Southern Pac. Trans. Co.*, 589 F.2d 403, 407 (9<sup>th</sup> Cir. 1978) *cert. denied*, 439 U.S. 1072, 99 S.Ct. 843, 59 L.Ed.2d 28 (1979).

“A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships; instead, it must be supported by proof of actual imposition of co-workers or disruption of the work routine.” *EEOC v. Townly Engineering Mfg. Co.* 859 F.2d 610, 615 (9<sup>th</sup> Cir. 1998).

#### **V.C.1 APPLICATION OF THE PROCLAMATIONS AND TITLE VII TO THE SHIRLEY GRIVEVANCE.**

The Agency’s blanket prohibition against supervisors receiving a religious accommodation is not per se a violation of Title VII. If the Agency’s conclusion is based upon a good faith attempt to accommodate employees without incurring undue hardship and it is supported by data and other evidence, rather than hypothetical hardships and conclusions unsupported by the evidence, the employer’s action is justified and does not violate the Proclamations and Title VII.

The Agency argued that it’s actions were justified under the management rights provision of the CBA (Article 12). The Union appeared to allude that the Grievant was terminated (separated) without just cause per the CBA (Article 26) and in violation of the MOU.

Proclamations have the full force and effect of law and supersede the CBA and MOU.<sup>8</sup> The parties may not agree to matters inconsistent with the Proclamations or other laws. The contract

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<sup>8</sup> RCW 38.08 and 43.06 concern the governor’s powers and duties. RCW 38.52 relates to emergency management. RCW 43.06.220(h)(1) and (3) address the governor’s powers pursuant to proclamation in a state of emergency. The State of Washington Supreme Court has agreed to hear a challenge to Governor Inslee’s emergency powers in the context of Washington’s eviction moratorium. One of the primary issues concerns contract rights in the context of a rent moratorium. Oral argument is scheduled on February 23, 2023. See *Gonzales v. Inslee and the State of Washington*, 21 WashApp.2<sup>nd</sup> 110, 504 P.3d 890 (2022).

rights of the parties have been limited by the Proclamations. The contract rights are valid to the extent they do not violate the Proclamations and Title VII. The Proclamations and Title VII control the CBA and MOU in the analysis of whether the Shirley Grievance should be granted or denied.

The Arbitrator has considered Title VII and the case law construing and interpreting how it should be applied, given the context of Shirley Grievance. The Arbitrator, after reviewing the exhibits and the testimony of the witnesses, is mandated to find that the Agency (1) did not make a good faith effort, under established case law, to find a reasonable accommodation before asserting an undue hardship, (2) did not establish undue hardship because its conclusions were unsupported by the evidence, and (3) violated the Proclamations and Title VII. These three conclusions are interrelated. Each of the sixteen (16) items below, standing alone, or collectively, support each of the Arbitrator's three (3) conclusions. The Arbitrator's conclusions are based upon the following totality of facts and circumstances:<sup>9</sup>

1. The Agency's position is contrary to the position taken by the EEOC experts who are responsible for enforcing Title VII accommodations. This is clear from a U.S. Equal Employment Opportunity Commission publication. *U-21*. As published: "**I Need a Modification of My Employer's COVID-19 Safety Requirements.** If you need a modification to your employer's safety requirements or equipment because of a medical condition or a **religious belief**, or observance, you might be able to get a reasonable accommodation. For example, you might be able to get a different mask as a reasonable accommodation. Or, if **you did not take a COVID-19 vaccination** because of your disability or religious belief, practice, or observance, you **might be able to get an exception to your employer's vaccination requirement, and instead, ask to use masks, social distancing**, schedule changes, or reassignment to stay safe at work." (Emphasis added).

- (a) On July 20, 2021 the CDC published guidance regarding masks and social distancing. *U-19*. It provides in relevant part as follows:

On July 27<sup>th</sup>, the CDC updated its guidance for fully vaccinated people, recommending that everyone wear a mask in public settings or in areas of

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<sup>9</sup> Some facts and finding may be mentioned more than once

substantial and high transmission, regardless of vaccination status. This decision was made **with the data and science available to the CDC** at the time, including a valuable public health partnership resulting in a rapid receipt and review of unpublished **data**. (Emphasis added).

- (b) The OFM provided the Agency with frequently asked questions and answers titled “OFM SHR Vaccine Mandate Guidance, Proclamation 21-14 COVID Vaccination Requirement.” *U-24*. Number 27 provides: Q. What are the requirements for receiving an accommodation for medical or religious reasons? A. An employee who has a sincerely held religious belief that prevents them from being vaccinated against COVID-19 may request an accommodation by notifying a supervisor in their chain of command or their human resource office. The employee must participate in the interactive accommodation process and provide all information reasonably needed to evaluate the request.

Please keep in mind that once an employer is put on notice of a request, it cannot require the employee to put the request in writing. The proclamation requires the employer to document the request for accommodation and the document must include a statement regarding the way in which the requirements of the order conflict with religious observance, practice or belief of the individual.

- (c) It is significant to note that the OFM did not determine if masks and social distancing would or would not constitute a reasonable accommodation. *U-24* is the only evidence the Arbitrator has in regard to the specific guidance the OFM provided to the Agency.
2. Despite item 1 above, the Agency evidently did not give consideration to masks and social distancing although both were recommended as possible accommodations to the vaccine requirement. Failing **to consider** available accommodations is extremely concerning. It is difficult for the Agency to establish good faith when EEOC and/or CDC guidance is ignored and not considered.

- (a) Consider the following exchange between Ms. Fenrich and Mr. Spikes.

(1) Q. In fact, the CDC said be vaccinated or be masked, correct? A. If that’s what the CDC states, I will trust them. *Tr. at 90:17-20*.

(2) Q. Okay. And did it also say be masked or at least be socially distant of six feet or more? A. That’s very well true. *Tr. at 90:21-23*.

(3) Q. The fact that she met with her subordinates outside, masked and socially distanced, would that have met the CDC recommendation for October of 2021 for unvaccinated individuals? A. Without having to look at it, I trust it probably did. *Tr. at 91:11-16*.

- (b) Consider the following exchange between Ms. Fenrich and Mr. Cunningham.

(1) Q. The CDC guidelines at the time were: Be masked and socially distanced, correct? A. I'll take your word for that. *Tr. 109:15-17.*

3. The Union introduced an article published by McGuire Woods titled "No Magic Words: EEOC Clarifies Guidance on Religious Accommodations to Vaccine Mandates." *U-20.* It provides in relevant part: "Overall, despite this more COVID-19 specific guidance, some important questions remain unanswered. For example, while referencing "direct monetary costs" as a potential basis for hardship, the guidance does not indicate whether the cost of testing as an alternative accommodation may be considered or passed on to the employee." (Emphasis added). There is nothing in the evidence to indicate the Agency considered testing or any alternative accommodation to vaccination.
4. On September 3, 2021, the Agency's reasonable accommodations specialist, Joceile Moore, meet with the Grievant, interviewed her, and informed her that she could be easily accommodated. *U-3* indicates the accommodation would be based upon wearing a mask and social distancing while interacting with coworkers and teleworking. *Shirley at 156:7.* The Grievant subsequently received an accommodation. *Id. at 156:11.* This is evident from the Grievant's testimony and *U-5.*
5. Mr. Kelly Cunningham, by letter to the Grievant, dated September 30, 2021, rescinded *U-5*, stating: "after carefully reviewing your essential functions in your job description, working environment, and your management's feedback, it has been determined that no reasonable accommodation can be made in your current position. This determination was made because your position must at times be done in the physical presence of others. There are no other accommodatons for your position available which sufficiently **mitigate or eliminate the risk associated with having an unvaccinated** employee performing the essential functions of your position." (Emphasis added). *E-12, U.-6.*
6. On October 8, 2021, the Grievant emailed Mr. Cunningham and Ms. Moore. The Grievant requested specific information to support the Agency's position. *U-7.* As stated in relevant part:

From this latest version of a "review" and denial letter, I am requesting further information for you all as my employer. Within the "review and denial" letter Kelly states that "it has been determined that no reasonable accommodation can be made in your position." This is my formal request for you to provide the following information: -**What accommodations were considered and what were the related costs and undue hardships identified? What measures were used to determine excess risk from me being unvaccinated and what are the numbers/statistics backing this up?**

As stated and approved of during my interview with Joceile on September 3<sup>rd</sup>, reasonable accommodations for myself could easily be met following our WDFW agency and OFM safety guidelines. As the interview notes should outline and as my direct supervisor agreed to, teleworking would be able to be performed and in the rare cases where in-person interactions could potentially

need to happen wearing a mask and social distancing would take place.  
(Emphasis added).

(a) The Grievant never received a response for information that would support Mr. Cunningham's conclusion. *Shirley at 144:6-7; Winther at 144:6-7*. The Agency never responded to the Grievant request for information. This of course included the opportunity to explain with specificity why masks and social distancing were no longer an acceptable as a religious accommodation. Consider *Heller v. EEB Auto Co.*, 8 F.3d 1433, 1440 (9th Cir. 1993), where the court stated: "At the very least, Title VII requires that once an employer gives an employee leave to attend a religious ceremony, the employer should provide a **good faith reason for rescinding that permission**. The employee whose employer gives and then takes it away is no better off, and is perhaps worse off, than one whose employer never gave permission at all. **Because it never gave any reason for Bowman's countermand order, EEB did not meet its Title VII burden.**" (Emphasis added).

7. Mr. Winther, the Grievant's supervisor, testified he disagreed with the Agency's decision not to accommodate the Grievant. *Winther at 142:10-12, U-14*. He informed the Agency that the Grievant could perform her essential functions teleworking, wear a mask during working hours while in proximity to other people, and social distance. *Winther at 138:9-12, 17, 24-25*. He sent Mr. Cunningham a letter, dated October 11, 2021. *U-16*. In the letter, he requested that the Agency reconsider its position.

8. Deputy Director Amy Windrope responded to Mr. Winther by email dated November 1, 2021. *U-16*. It provides in relevant part as follow:

Dear Eric,

Thank you so much for your heartfelt letter and the toll the vaccine mandate has taken on staff you supervise. It has been an incredibly challenging time and supervisors like you, who care so deeply about the people they work with, are bearing a heavy load.

I understand that you wish WDFW had implemented the mandate differently, or perhaps not at all. As I have mentioned throughout the process, our collective job was to act with integrity and accountability in implementation of the mandate. To me, that means sharing information as soon as I can, explaining my decisions and acting with empathy in recognition of the challenge each person is facing. I find your characterization of management bullying staff to be vaccinated to be offensive. We have consistently stated respect for every staff and their value. It is up to each staff to decide if they wish to be vaccinated and we have consistently said this in writing, at all staff meetings, at Fish Program meetings. The challenge is that there is a mandate that we are implementing and it requires us to act, that is fundamentally different than bullying.

**One of the hardest decisions I made was to rescind 13 reasonable accommodations that were approved. I rescinded these accommodations because they did not comport with the guidance that we developed to ensure a safe workplace.** As you know, we did the best we could to make decisions in as timely a fashion as possible, but sadly, we were too slow for those early approvals. I feel very badly for those few staff that had to suffer that whiplash and wish that I made those decisions more quickly. (Emphasis added).

(a) The Agency did not take this opportunity to explain, with specificity, why *U-5* was no longer not a reasonable religious accommodation. It did not explain why masks and social distancing was no longer a reasonable accommodation.

9. Prior to Step 2, on September 24, 2021, Deputy Director Amy Windrope sent a letter to WDFW Appointing authorities. The subject line was “Guidelines for Review of Reasonable Accommodations relative to the Governor’s Proclamation 20-05.” *E-7A*. She also sent an email regarding “Vaccine Mandate Update” on September 29, 2021. *E-8*. Both do not discuss masks and social distancing as a reasonable religious accommodation. Specific guidance from the OFM was not disclosed.

10. The Agency’s Step 2 response, dated November 3, 2021, from Deputy Director Amy Windrope, indicates that Ms. Fenrich raised the fact that the Grievant could wear a mask and social distance. *E-28*. However, Deputy Director Amy Windrope did not explain (1) with specifics why masks and social distancing was not an acceptable religious accommodation; (2) the specific guidance, if any, that she received from OFM regarding masks and social distancing; (3) why the Agency decided to ignore recommendations for the EEOC and CDC; (4) what the “Agency/cross program” was and the nature, objective, and definitiveness of what the response to RA requests was going to be; and (5) what constituted “limited exceptions” and why the Grievant did not fall into this group of protected employees. She appeared to echo the same position regarding masks and social distancing as Mr. Spikes and Mr. Cunningham. If the Agency is going to reject a suggested EEOC and CDC recommendation by way of rescission, it must be done with specificity. As Deputy Director Amy Windrope concluded at Step 2:

As I shared during the hearing, WDFW could have been clearer with the RA process, and that I recognize how very disappointed it was to staff that management rescinded the previously granted RAs. After issuing several RAs, we redefined our previous approach based on our continued understanding, OFM guidance, and determining a consistent Agency/cross program to all RA requests. We approached it as a publicly facing organization where most of our people work with people, driving together, working in teams, working with the public or with colleagues in other organizations. It is time for WDFW to move forward to return to normal business operations and restart the important partnership work you have done throughout your career. The standard for moving forward is not the same it has been for the last 20 months. However, on constant is that we are

maintaining a strong focus on workplace safety.

We did not have vaccinations available when COVID first started, and the safety protocols required of employees were different. By requiring vaccination, we are putting staff safety first so we can move back onto a more normal path to provide the kinds of services and work products that meet our mission as an agency while also doing our duty to protect the health and safety of employees. The post October 18<sup>th</sup> standard for a safe workplace is one where all workers are vaccinated, with limited exceptions, and where exposure to the virus and risk to others is minimal.

Given all of this information and how it relates to safety of our employees, I am unable to grant your requested remedy and your separation stands as issued.

- (a) It is worth mentioning again that the only OFM guidance in the record of evidence is *U-24* which does not address masks and social distancing as a religious accommodation.
- (b) The position taken by the Agency constituted a hypothetical hardship in violation of Title VII because it was conclusory and unsupported by data and other statistical evidence.

11. All of Agency's **exhibits and testimony** support the Agency's desire to return to a normal work environment similar to the one before the pandemic began. The Agency's assertion that since the Grievant was unvaccinated, she was a danger to others is true. However, everybody was and still is a danger to one another in regard to COVID-19, regardless of vaccination status. COVID-19 is with us as this decision and award is being written. There is nothing in the evidence to support an assertion that masks and social distancing would not be a reasonable religious accommodation. Nor is there any evidence that despite masks and social distancing, as a reasonable religious accommodation, would constitute an undue hardship to the Agency. In addition, if EEOC and CDC guidance is not followed, the reasons for not following the guidance must be supported with specific facts, not conclusory statements. Consider the conclusory testimony:

- (a) On direct examination, Mr. Spikes testified that based upon OFM and DOH guidance, some approved accommodations were rescinded. *Spikes at 46:8-9*. Mr. Spikes never explained what specific guidance he received.
- (b) On direct examination, Mr. Spikes testified that he relied upon "subject matter experts" regarding position descriptions. *Spikes at 51:19-52:5*. Mr. Spikes never stated what he was told. He never explained what area of expertise the "subject matter experts" possessed.
- (c) On cross-examination, Mr. Spikes explained that the OFM and CDC consistently informed the agency that it was at "great risk" from the unvaccinated. *Spikes at*



72:1-73:14. However, he never explained what these agencies informed him regarding whether masks and social distancing was an acceptable accommodation given the “great risk.”

- (d) On cross-examination, Mr. Spikes stated that he received guidance for making decisions from OFM, CDC and DOH. *Spikes at 90:2-3*. Again, he never stated what guidance he received.
  - (e) Mr. Kelly Cunningham, Fish Program Director, testified that he received advice and guidance from the OFM in terms of the Grievant not qualifying for an accommodation and that he relied upon the advice. *Cunningham at 90:3, 102:1-21*. Other than this conclusion, Mr. Cunningham did not explain the specifics of the advice and guidance he received from the OFM.
  - (f) The burden of proof is on the Agency to show undue hardship. It is worth noting again that without specifics, the Arbitrator cannot determine if some of the information favored a finding that a reasonable religious accommodation could be provided without undue hardship.
12. There is **nothing in the exhibits and testimony** to indicate what type of guidance the Agency received not just from the Office of Financial Management, but also the Center for Disease Control and the Department of Health. Again, without specifics as to what guidance was provided, it is difficult to determine if the accommodation provided in *U-5* is an undue hardship on the Agency. Given *U-21*, discussed in item 1 above, and *U-20*, discussed in item 3 above, it is worth noting once again that some guidance may have favored the Grievant and implementation of *U-5*. The necessity of providing specifics to support the Agency’s conclusions was critical to the Agency’s case.
13. Despite the fact that the Agency’s exhibits and testimony was conclusory, the Agency did not call any witnesses from the OFM, CDC, or the DOH, to support its conclusion that *U-5*, masks and social distancing could not be a reasonable religious accommodation because it would constitute an undue burden on the Agency.
14. The Agency has proven many things regarding COVID-19. It is proven that COVID-19 is dangerous and deadly; that we needed, received, and continue to need a vaccine; that the vaccine is working; that it has a duty to protect the health and safety of employees and to maintain a healthy and safe work environment; that the Proclamations mandate that all State employee be vaccinated, with few exceptions; that it has a strong desire to minimize viral exposure to the greatest extent possible; and that we are all “tired” and exhausted from living with COVID-19. However, it has not proven that masks and social distancing as set forth in *U-5* is an undue hardship on the Agency.
15. Two of primary goals of the Proclamations are to vaccinate Agency employees to protect the Agency’s workforce **and** to provide religious accommodations for employees who were unable to be vaccinated because of religious beliefs. The evidence strongly indicates that the Agency was concerned about vaccinating as many employees

as possible. The Agency was complying with the Proclamations. However, the Agency's exhibits "strongly suggest" that the Agency did not consider masks and social distancing as a religious accommodation, from the time it decided to rescind the Grievant's religious accommodation, *E-12; U-6*, to the time it issued the Step 2 decision, *E-28*. This is evident from the fact that the Agency's witnesses, Mr. Spikes and Mr. Cunningham, ignored the importance of the EEOC guidelines regarding masks, social distancing, or other possible accommodations such as testing. The testimony of these two witnesses moved the "strong suggestion" to proof by a preponderance of the evidence that the Agency did not follow the Title VII guidelines referred to in the Proclamations to determine the Grievant's eligibility for a religious accommodation.

16. Given items 1 through 15 above, the Arbitrator finds that the Agency's implementation of *U-5* to the Grievant would not be beyond de minimis and is not an undue hardship to the Agency. The Arbitrator further finds that the Agency violated the Proclamations, Title VII, the CBA, and the MOU, by failing to reasonably accommodate the Grievant with *U-5*.

## **VI. DECISION AND AWARD.**

The Shirley Grievance is granted. The Grievant is reinstated to the position she held prior to her separation from employment with the Agency. She shall be made whole, which of course includes lost wages and benefits.

The Agency shall reasonably accommodate the Grievant as set forth in *U-5*. The Arbitrator shall continue jurisdiction for thirty days from the date of this award to assist the parties with clarification of this decision and award, if clarification is necessary. If either party requests that jurisdiction continue within thirty calendar day period of this decision and award, jurisdiction shall continue until the issue(s) is resolved. <sup>10</sup>

Respectfully submitted to the Agency and the Union on this 28<sup>th</sup> day of November, 2022.

/S/  
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MICHAEL ANTHONY MARR  
Arbitrator & Mediator

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<sup>10</sup> The parties should know that this decision and award had several drafts. The first few were written in favor of the Agency. The issues in the Shirley Grievance appeared simple. Matters forth in Section VI.C.1 were not immediately apparent to the Arbitrator. The Arbitrator had difficulty justifying the Agency's position with each review of the drafts and evidence. Each review gave greater support for the Union's position and ultimately resulted in this decision and award.