BEFORE ARBITER BARBARA J. DIAMOND

Washington Association of Fish & Wildlife Professionals Union and State of Washington Department of Fish and Wildlife Department	)	PERC Case No. 134848-P-22 DECISION AND AWARD Tyler Kave Grievance

I. BACKGROUND

This arbitration arises pursuant to a collective bargaining agreement between the Washington Association of Fish & Wildlife Professionals (the Union) and the Washington Department of Fish and Wildlife (the Department). The undersigned neutral arbitrator was mutually selected by the parties from a list provided by the Washington State Public Employment Relations Commission to resolve this dispute. Both parties stipulated that the grievance was properly before me to render a final and binding decision.

A hearing was held via Zoom videoconference on October 25, 2022. All parties had a full opportunity to examine and cross-examine witnesses, to make arguments and to enter documents into the record. The parties submitted closing argument orally after the evidence was submitted. A transcribed record of the proceeding was received on or about November 8, 2022.

Appearances:

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II. THE ISSUE

Did the Department violate the vaccine Memorandum of Understanding by failing to reasonably

accommodate the Grievant? If so, what is the appropriate remedy?

III. RELEVANT PROVISIONS OF THE AGREEMENT

Memorandum of Understanding Between the State of Washington and Washington Association of Fish and Wildlife Professionals

COVID-19 continues as an ongoing and present threat in Washington State. The measures we have taken together as Washingtonians over the past 18 months have made a difference and altered the course of the pandemic in fundamental ways.

COVID-19 vaccines are effective in reducing infection and serious disease and widespread vaccination is the primary means we have as a state to protect everyone. Widespread vaccination is also the primary means we have as a state to protect our health care system, to avoid the return of stringent public health measures, and to put the pandemic behind us.

It is the duty of every employer to protect the health and safety of employees by establishing and maintaining a healthy and safe work environment and by requiring all employees to comply with health and safety measures. As a result of the above noted situation, to help preserve and maintain life, health, property or the public peace, all employees of the state of Washington are now required to become fully vaccinated or covered by an exemption in accordance with the Governor's proclamation 21-14 1.

In recognition of the above, the parties agree to the following:

1. All employees will take the necessary steps to be fully vaccinated by October 18, 2021, or be approved for an accommodation, unless otherwise authorized under this agreement. The definition of fully vaccinated may include FDA-approved booster shots. The parties agree to meet within thirty (30) days of any announcement that booster shots will become a requirement for continued employment and bargain the impacts in good faith to achieve the health and safety goal.

2. Employees who have difficulty accessing vaccinations due to their remote location or other circumstance, will inform their supervisors or HR representative as soon as possible. The Employer will assist in identifying vaccination sites with available appointments.

3. **Exemption process:**

a. Exemption instructions and materials will also be posted immediately to agency The Employer will provide employees instructions and a list of all necessary materials that need to be submitted to process an exemption within three (3) business days of request SharePoint systems or secured network drives with an email notice to all staff.

b. Employees will inform their supervisor or HR representative, either verbally or in writing, as soon as possible if they wish to request a medical or religious exemption. Employees are encouraged to submit the request no later than **Monday, September 13, 2021**. However, to the extent that requests are received after that date, agencies will continue with processing requests received up to October 18, 2021. Requests received after this date will not be subject to the provisions contained in Section 9b.

c. If the Employer requires a second medical opinion in the exemption process, the Employer will cover all associated costs. The medical appointment, including travel time, will be considered work time.

d. Employees whose exemption requests are not approved will secure a vaccination appointment and provide verification of being fully vaccinated by October 18, 2021, or be subject to non-disciplinary separation.

e. Only HR staff or staff who are bound to protect confidential and sensitive information will handle and process exemption documentation. All information disclosed to the Employer in the exemption process will be kept confidential. This information will only be accessed by the Employer on a need-to-know basis.

4. Accommodations for medical or religious exemptions

a. Employees who are approved for medical or religious exemptions will automatically proceed to the accommodation process. The Employer will conduct diligent review and search for possible accommodations within the agency. Employees requesting an accommodation must cooperate with the Employer in discussing the need for and possible form of any accommodation.

Consistent with current practice, all information disclosed to the Employer during the accommodation process will be kept confidential. This information will only be accessed by the Employer on a need-to-know basis.

b. Upon request, an employee will be provided a copy of their reasonable accommodation information that is maintained by the Employer.

c. The Employer will determine whether an employee is eligible for a reasonable accommodation and the final form of any accommodation to be provided. The Employer will attempt to accommodate the employee in their current position prior to looking at accommodations in alternative vacant positions.

d. In the event that an accommodation is not available for an employee with an approved medical or religious exemption, they will be subject to non-disciplinary separation as

stated in 3(d).

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9. **Conditions of Employment**

a. If an employee is not fully vaccinated by October 18, 2021 and has officially submitted retirement paperwork to DRS, the employee may use accrued vacation leave or leave without pay until their retirement date. This provision expires on December 31, 2021. The use of accrued leave shall be subject to the definitions and provisions contained in the Collective Bargaining Agreement.

b. If an employee has initiated their exemption request by September 13, 2021 and cooperates with the process and the exemption is still being reviewed on October 18, 2021, the employee will suffer no loss in pay until the exemption decision is provided. If an employee's exemption request has been approved but an accommodation has not been identified, the employee may use a combination of annual leave and leave without pay after October 18, 2021. If the exemption request is denied or an accommodation is not available, the employee may use a combination of annual leave and leave without pay for up to forty-five (45) days to become fully vaccinated. Failure to provide proof of beginning the process of becoming fully vaccinated within ten (10) calendar days of denial will result in non-disciplinary separation. Failure to provide proof of full vaccination within the forty-five (45) day period will result in non-disciplinary separation.

c. If an employee receives the first dose of the vaccination late and fails to become fully vaccinated by October 18, 2021, the employee may use leave without pay for up to thirty (30) calendar days to become fully vaccinated and retains the right to return to their previous position or a vacant position in the same job class at their work location provided the employee has become fully vaccinated and the Employer has not permanently filled their previous position. This provision expires on November 17, 2021.

d. If an employee has not initiated an exemption request and fails to provide proof of vaccination by October 18, 2021, the employee will be subject to non-disciplinary separation.

e. Employees who are subject to non-disciplinary separation shall be eligible for state employment upon becoming fully vaccinated.

IV. STATE AND FEDERAL LAW

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Section 2000e-2 (Section 703)

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

29 CFR § 1605.2 – Reasonable accommodation without undue hardship as required by section 701(j) of title VII of the Civil Rights Act of 1964

(a) Purple of this section. This section clarifies the obligation imposed by title VII of the Civil Rights Act of 1964, as amended, (sections 701(j), 703 and 717) to accommodate the religious practices of employees and prospective employees. This section does not address other obligations under title VII not to discriminate on grounds of religion, not other provisions of the title VII. This section is not intended to limit any additional obligations to accommodate religious practices which may exist pursuant to constitutional, or other statutory provisions; neither is it intended to provide guidance for statutes which require accommodation on bases other than religion such as section 503 of the Rehabilitation Act of 1973. The legal principles which have been developed with respect to discrimination prohibited by title V11 on the bases of race, color, sex, and national origin also apply to religious discrimination in all circumstances other than where an accommodation is required.

(b) Duty to accommodate

(1) Section 701(j) makes it an unlawful employment practice under section 701(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.[2]

[2] See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977)

(2) Section 701(j) in conjunction with section 703(c), imposes an obligation on a labor organization to Reasonably accommodate the religious practices of an employee or prospective employee, unless the labor organization demonstrates that accommodation would result in undue hardship.

(3) Section 1605.2 is primarily directed to obligations of employers or labor organizations, which are the entities covered by title VII that will most often be required to make an accommodation. However, the principles of § 1605.2 also apply when an accommodation can be required of other entities covered by title VII, such as employment agencies (section 703(b)) or joint labor-management committees controlling apprenticeship or other training or retraining (section 703(d)). (See, for example, § 1605.3(a) "Scheduling of Tests or Other Selection Procedures.")

(c) Reasonable accommodation.

(1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified

only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

(d) Alternatives for accommodating religious practices.

(1) Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules. The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge. These are not intended to be all-inclusive. There are often other alternatives which would reasonably accommodate an individual's religious practices when they conflict with a work schedule. There are also employment practices besides work scheduling which may conflict with religious practices and cause an individual to request an accommodation. See, for example, the Commission's finding number (3) from its Hearings on Religious Discrimination, in appendix A to §§ 1605.2 and 1605.3. The principles expressed in these Guidelines apply as well to such requests for accommodation.

(i) Voluntary Substitutes and “Swaps”.
Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

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(e) Undue hardship.

(1) Cost. An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require "more than a de minimis cost".[4] The Commission will determine what constitutes "more than a de minimis cost" with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the Hardison decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in Hardison, would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a de minimis cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

[4] Hardison, supra, 432 U.S. at 84.

(2) Seniority Rights. Undue hardship would also be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system. Hardison, supra, 432 U.S. at 80. Arrangements for voluntary substitutes and swaps (see paragraph (d)(1)(i) of this section) do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in the Statute or these Guidelines precludes an employer and a union from including arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement.

V. FACTS

Grievant held the position of Natural Resource Technician 2 and was a member of a prescribed burn team.[1] This job is primarily performed outdoors in the field with a prescribed burn team office located in Yakima, Washington. When the state's COVID vaccination mandates were issued, Grievant sought and obtained an exemption based upon his religious beliefs. He was separated from his employment on October 18, 2021, after the Department determined it could not provide an accommodation without undue hardship. The Union grieved the denial under a Memorandum of

[1] The team plans and implements controlled burns to remove fuel from the ground as part of the state's forest health strategy.

Understanding negotiated in response to the state's COVID vaccination requirements and this arbitration ensued.

Background

Lonnie Spikes is the human resources director for the Department where he has worked since July 2019. He testified that he was employed during the start of the COVID-19 pandemic and that an order was originally given sending employees home while the Department figured out how to reduce exposure to the disease. This included employees who work in fish hatcheries and in the field.[2] Eventually, field employees such as Grievant returned to work with masking and social distancing protocols, called the Safe Start Guides, which were under continuing revision in collaboration with the Department of Health. This helped reduce the spread of COVID in the workplace, although it was still an everyday occurrence for employees to call out sick.

Starting in August 2021, Washington Governor Jay Inslee issued proclamations eventually requiring all employees at state agencies to become fully vaccinated against COVID-19 or to receive an exemption to the requirement based upon disability or religious status. The proclamation was based upon public health and safety. The Union represents over 900 employees in the Department so in response to the proclamation, the parties engaged in mid-contract negotiations culminating in a fully executed memorandum of understanding (MOU). The MOU acknowledged the need for universal employee vaccinations as a public safety measure but echoed the requirement stated in the proclamation that the Department honor the requirements of Title VII and other federal laws by issuing necessary exemptions (accommodations) to individuals.

Spikes was required to provide guidance to the Department's Executive team to facilitate the exemption process under the MOU. At the time, the Department's existing policies prohibiting

[2] During the shutdown, the Department provided training opportunities for Department members via teleconference, and they were also able to do some planning duties.

discrimination were still in effect.[3] Under existing practices, the accommodation process involved an employee coming to the Department seeking an accommodation. The Department would engage in an interactive process to find a reasonable way the employee could do the essential functions of the job with some sort of accommodation in place. To implement the exemption process here, the Department sent an all-staff email concerning the proclamation and the Department's intent to comply with it. The communication informed those who believed they would fall under a religious or medical exemption of the paperwork needed for completion. The process would start when an employee filled out a worksheet listing what they thought they needed as an accommodation. The risk management team would then review the position description, verify its accuracy, and determine the essential functions of the position. Next, this information would be forwarded to management for discussion on what could be done to accommodate the individual employee.

The Department received approximately 100-120 requests for religious exemptions and attempted to accommodate everyone who received an exemption using guidance provided by Deputy Director Amy Windrope. In a memo dated September 24, 2021, Windrope wrote that "reasonable accommodations may be approved for non-supervisory employees able to perform ALL of the functions of their work 100% tele-working or in field settings and in either case, without interacting with any staff, the public or external partners." If a worker was given an accommodation and the "extremely unlikely event" occurred that they must report to the office, they were required to wear a face covering and continue to socially distance. In a subsequent email, Windrope clarified that accommodations would be granted only to individuals who did not interact with others:

> Given these key considerations, we have revised our approach to reasonable accommodations. Essentially, employees with an approved vaccine exemption who are

[3] Department Policy 3007, dated June 25, 2021, prohibits discrimination based upon religious affiliation/creed. Policy 3015 requires efforts toward diversity, equity, and inclusion. Policy 3005, dated March 26, 2021, detailed the role of supervisors and managers in supporting the agency's DEI mission. EX 3. Policy 4001 created a process for providing reasonable accommodations for employees with disabilities. EX 4. The record contains no separate process for affording religious accommodations.

> able to perform ALL of the functions of their work through 100% teleworking or in field settings, and in either case, without interacting with staff, the public, or external partners may be approved for reasonable accommodations. Due to the inherent expectation that supervisors meet in person with staff they manage and with their colleagues, supervisors are not able to perform 100% of their work through telework.

Spikes explained that this meant no accommodation would be given to an employee if an essential function of the job involved being able to work with others in person, to eliminate undue risk to the employee and persons with whom they interacted. Using this standard, the Department reviewed the position description for each employee seeking an accommodation and obtained input from supervisors, appointing authorities, and the individual employees. Individual input was obtained by sitting down one-on-one virtually with each applicant and hearing their case as far as what they could do to mitigate the vaccine requirement.

Spikes further testified that there would have been such an interview with Grievant; that there would have been worksheets and notes to document the interview; and that the entire process was followed with Grievant. Grievant's completed worksheet is dated September 27, 2021.[4] It includes his answers to the questions concerning his work as a Natural Resources Technician, including that he performed duties involving other people in "meetings on some days, working in the bay, driving to our unit, we will be 2 people in rig usually. We do not have to be first aid/cpr certified." The form notes that Grievant responded to the mask question affirmatively, stating, "Yeah, when we are on the fire line it is kind of hard. We wear masks close to fires anyways." He answered the question about whether he could maintain social distancing as follows: "Yeah we have a big office, we are usually more than 6 feet when we go out. When we are fully staffed we will be take 2 people in a vehicle. If we put someone in a drivers seat and then someone diagnolly [sic] then we should be able to, its [sic] like 5 feet." EX 14.

Spikes explained that Grievant's estimate that they could remain five feet apart in the vehicle did not meet the requirement of social distancing, which required that people maintain a six-to-eight-

[4] The form states that the interview was by "Justin Spruiell" and lists the HR consultant as Marnie West.

foot distance, so the "spray" from speaking did not reach the other person. Because a vehicle is an enclosed space, and the crew can be in vehicles for over an hour driving to a work location, Spikes testified that traveling was a "pretty big part of their job." The Department offered the accommodation of reassignment to employees who could not be accommodated. He was unclear about whether Grievant requested a reassignment. In either case, Grievant did not meet the deadline of being either vaccinated or accommodated by October 18, 2021. The Department sent him notice that he was therefore facing separation for non-disciplinary reasons.[5]

Spikes further testified that in the reasonable accommodation process, the Department allows for job modification. With respect to Grievant, Spikes was not personally involved in the process, but was confident that the risk management team would have considered job modifications. As far as outcomes, the Department did not allow any modifications which permitted an unvaccinated employee to interact with other in person. The only accommodations offered in the Department were cases where employees could 100 percent telework and not be around others at any time. No supervisors were accommodated because the Department required them to meet in person with their subordinates.

In Grievant's case, Spikes did not know whether the team considered allowing Grievant to drive to work sites using his personal vehicle. He did not see any records showing that the team specifically addressed the issue. He doubted this would be allowed in an area where fires are being set. He would have expected Grievant's supervisors, who are subject matter experts, to be able to consider this sort of question. Grievant would have had the opportunity to raise the use of his personal vehicle during the interactive process. Spikes did not believe Grievant raised that possibility but stated he would have to check the records to be sure. He did not know whether there was a rule prohibiting employees from

[5] A non-disciplinary separation meant that the employee did not meet the conditions of employment but was free to reapply for their former position. In disciplinary situations, employees are not permitted to do so. In a non-disciplinary separation, the employee might receive a positive reference depending upon their work history, whereas in a disciplinary separation, the employee would likely receive a negative reference.

taking their vehicles into the field. The only accommodations other than 100 percent telework were for employees who could do their jobs without interacting with anyone else, including coworkers, supervisors, members of the public, and so on. For example, there were a few employees in HR who came into the back office in the dark hours of the morning who were permitted to work in the building. He acknowledged that the accommodation process is meant to create exceptions to how things are normally done, but without removing any essential functions.

Eric Gardner is the wildlife program director for the Department, where he has worked for ten years. Previously, he held the positions of deputy director and wildlife diversity division manager. His role in the implementation of the vaccine mandate was to evaluate requests for reasonable accommodation. Specifically, he ensured that staff worked with appropriate HR personnel to review position descriptions with a focus on the essential functions of the job, in order to assess the ability to provide accommodations. His role included gaining input from first line supervisors who had firsthand knowledge of the positions in question.

Throughout the pandemic, members of the burn teams were required to mask and socially distance. As the Department looked to reopen for business, it was determined that mere masking and social distancing were not sufficient to gain the full functionality of the job. In Grievant's case, his position description stated that a natural resource tech 2 works both independently and within a crew. It is a career seasonal position primarily hired to be on the ground performing forest management prescribed fire work as part of a team. While most of the job is prescribed fire work, there is also associated work related to the operation and maintenance of equipment. Other duties, such as forest thinning, is similar work without fire and a different way to manage forests.

Gardner explained that Grievant's position required frequent travel into the field in order to conduct the burns so that forests are well managed and do not present a fire hazard to communities. The team travels to various locations, including traveling within large areas within the work site itself.

These locations are not near a post of duty. The job requires making sure that all gear is loaded and then driving on back country, forest roads to the location where the burn will be implemented. Crews are not generally expected to travel alone. Crew vehicles must be capable of functioning in back road environments where roads might not be well maintained.

The expectation is that the team shows up with their gear using state equipment rather than using solo vehicles. Using a state vehicle for a single employee would not be a reasonable use of state resources. There is a limited motor pool and vehicles which are shared. The Department can access other vehicles as needed. Gardner never heard the possibility of Grievant using a personal vehicle to access field sites. The use of personal vehicles would need to be approved by a supervisor, because it incurs a mileage fee and additive cost to the program. He has never been asked if Grievant could drive a personal vehicle to these sites. In addition, the work is performed in a team environment, working in proximity, and gathering for briefings face to face in the field. Team members need to be there to assist and help each other, albeit outside. These functions could not be accommodated.[6]

In Grievant's case, the chain of command created an overarching document describing the different roles and functions at each level within the burn team. After this, they generated a recommendation in the form of a draft letter which concluded that no accommodation could be provided to Grievant. Gardner reviewed it and agreed that under the governor's mandate and provided guidance, no accommodation could be granted. He signed the letter and sent it back to the chain of command and HR to deliver. Throughout the process, Gardner followed Department policies and guidance.

[6] Gardner testified that in the 20 months prior to Grievant's separation, there were no COVID outbreaks on his team of which Gardner was aware. During that time, the crew used masking and social distancing whenever possible. However, these practices were not considered sufficient in light of the development of the vaccine and the Department's responsibility to provide a safe working environment. No reasonable accommodations were granted to any field staff member of the wildlife program. Social distancing in the field could impede team members' ability to ensure each other's safety.

Paul Dahmer is the land stewardship and operations section manager for the Department, where he has worked for over 33 years. He supervises natural resource technicians including those on the prescribed fire team and reviews their position descriptions. He has been out in the field observing the activities of the teams. A typical workday for the team could be preparing for a prescribed fire. The team would come to the office and head out in trucks to the site of the prescribed fire plan. There is a prescribed fire team office in Yakima with a shop, bay, and office space. The crew gathers at that location in the morning and then heads out to work. The bay is a big, open garage with large garage doors where crew members work on equipment and vehicles may be stored.

The crew travels together in the large pickup trucks, which have been outfitted as engines and have two rows of seating. Typically, two or more crew members ride in the vehicle depending upon the nature of the job task. The farthest apart they could sit would be four or five feet, with a driver at the wheel and a passenger in the backseat on the opposite side. If the crew is preparing for burns, they will meet at the site and plan what they are doing for the day, such as digging fire lines in the soil to prevent fire crossing from one area to another. If a burn is to be done, the crew works in a line lighting fire throughout a designated area. The crew normally returns to the office at the end of the day, although if that is not practical, they may camp in the area or get a hotel, so they are closer to the work site the following day.[7]

Work was performed in this manner during the 18 months prior to the vaccination mandate, with workers wearing masks and maintaining six feet or more distance, when possible. Because the work is very arduous, with crews often carrying heavy packs and doing hard physical work, wearing a mask the entire time was not practical. The understanding was they could physically distance in the field. If they could keep that distance, they were not required to wear masks. There is always a risk of

[7] He was not aware if there was a prohibition on Department employees taking their own vehicle in an accommodation setting as opposed to riding in a vehicle with others.

injury in the field and crew members need to be able to assist each other if someone gets injured.

Sheila Smith is a scientific technician 4 with the Department, where she has worked for over 31 years, and is also the Union president. She has been on the Union executive committee for around 10 years and president for at least seven to eight years. The Union represents the vast majority of Department employees, including biologists and technicians, who are the "boots on the ground." She was involved in the negotiation of the MOU related to the implementation of the Governor's vaccine requirements. The Union was given a draft MOU and they were able to negotiate some of the processes through it. The Union did not agree at the table that the only way to control COVID-19 was for every single employee to be vaccinated. The Union did agree that vaccines were effective in reducing infection and serious disease and that widespread vaccination was the primary means the state was using to protect everyone.

In bargaining the reasonable accommodation process, the Department never told the Union that the only accommodations available would be either 100% telework or occupying a position with no human contact. The Department did not state that masking and social distancing would be insufficient as an accommodation, or that field employees would not be accommodated. Because field staff make up three-quarters of the bargaining unit, the Union would have approached negotiations differently if they knew that no field staff would be able to receive accommodations.

Testimony of the Grievant

Grievant began working for the Department as a forest technician 2 on March 1, 2021 and was employed until October 18, 2021. He was hired during the pandemic and was required to wear masks and social distance by staying 6 feet apart from coworkers. Grievant applied for a religious exemption to the vaccine mandate but was separated after the Department failed to grant him an accommodation.

Grievant sent his request for a religious exemption based upon his Christian faith. A few days later, he had an interview with Justin Spruiell from HR and went over why he filed for an exemption. The

person from HR asked him if there were ways to improve the work area or get around. He told them that he could provide his own N95 mask, which was better than a cloth mask. The main issue Spruiell asked him about was travel, which Grievant explained. In the beginning, when he was first hired, they had seven trucks. Three were checked out of the Ellensburg office so each crew member could travel in a separate vehicle. When burn season began, the crew lost two members, so they were down to a crew of five. Each member still had their own vehicle and drove separately. When the HR person asked what they could do better, he said that next year, when there were more than five people, they could travel two people to a truck, which is what he put on the form. This would be in March 2022.

He was also asked if he was willing to continue wearing a mask, and he said yes. He said everything they had been doing was following procedures in the burn plans and maintaining office safety. Ninety-five percent of his work was in the field or out in the bay where they were masked and stayed at least six feet apart. In the field, the crews do not work side by side. They are not meant to be close to each other. If they are digging line or on the hand line monitoring the burn, trees come down. In those situations, two people do not stand close together because that would endanger two people. They are always at least six feet apart when working on a fire. In pre-burn situations, they do not work closer than six feet in proximity. Even if fire jumped the line, crew members would stay at least six feet apart to avoid swinging a tool and hitting someone. Typically, they stay approximately ten feet apart. In other words, they distance from each other as part of their normal work, not because of COVID.

Grievant was willing to maintain these procedures. Since the start of COVID, they had no outbreaks within his work unit. When he discussed getting an accommodation with his supervisors, they had no problem with it. It was a surprise to everyone that nobody was accommodated. His program manager might have been the person who had a problem with it, but no one else. His work duties and essential functions would not have to be changed for him to safely perform his job. He was not aware of any situation that would have made people unsafe, as they could still do burns as they had been doing,

still maintain equipment, and still dig fire lines. The breakout meetings could still occur outside while socially distanced. When the crew stays overnight at a burn location, they are each in their own tents. They stay 50-100 feet apart, so they do not have to hear each other snore. Burn areas are very large so there is no problem doing this. He recalled telling the Spruiell that they were each driving in their own separate trucks and that he was willing to continue do so, or even drive his own vehicle.

VI. POSITIONS OF THE PARTIES BRIEFLY SUMMARIZED

Position of the Union

1. The Department failed to call the person from HR who discussed accommodations with Grievant. There was no evidence that the Department considered anything about the workplace and his actual working conditions, as the state did not call any witnesses who were involved firsthand in the process. No supervisors who worked with Grievant testified.

2. With respect to travel, Grievant had his own vehicle to himself for the entire time he worked for the State. The State did not show that they lacked enough vehicles or that he had to ride with other people. Grievant testified he did not.

3. The Department did not follow its own accommodation process because they only allowed accommodations if a person could 100 percent telework or never be around other people. A reasonable accommodation can include restructuring of the job process, such as allowing Grievant to travel by himself. The Department did not look at that. Essentially the State would only provide accommodations for individuals who never interact with others. Here, Grievant could remain masked if he had to be around people.

4. The case of *Garvey v. City of New York* stands for the idea that the vaccine mandate imposed there was arbitrary and capricious, because unvaccinated workers were not put on leave immediately nor was there a City-wide vaccination mandate for residents. The same is true here. Members of the public were permitted to come into Department facilities even if unvaccinated as could contractors. This discrimination shows that it would not have been an undue hardship to allow Grievant to work under the same guidelines as the public or contractors who came onto job sites.

5. Undue hardship is defined as more than a de minimis cost. Grievant did not ask for anything more than to continue what he was already doing: driving an agency vehicle by himself. He was also willing to drive his own vehicle. The state claims they never heard this, but no one who actually spoke to Grievant testified. The state did not claim they lacked enough vehicles for Grievant to continue to drive his own truck. There would be no additional cost. Due to safety reasons, in a wildland burn situation, the crew is always more than six feet apart for safety reasons.

6. The Department failed to conduct an individualized, fact specific inquiry and weigh the accommodation against undue hardship. CDC guidelines found masking and social distancing to be a reasonable accommodation. The Department essentially excluded an entire classification (field workers) from accessing any accommodations, which was inherently unreasonable.

Position of the Department

1. The Department conducted an individualized accommodation process for Grievant and determined that no reasonable accommodation could adequately mitigate the risks associated with having an unvaccinated person in the position of Natural Resources Technician 2.

2. State and federal guidance acknowledged that vaccines were the best way to prevent transmission and death from COVID-19. The Department had a duty to protect Grievant and members of his team from risk.

3. In his interview, Grievant admitted that one of the essential functions of his job was traveling to and from work sites, which could not be done while maintaining social distancing. Although the team traveled in separate vehicles for a time, this was only because they were understaffed. Even if he could have been provided a temporary accommodation pending new hires, this is at odds with the requested remedy of return to his former employment.

4. The only relevant information is what was available to the Department at the time. This did not include information about separate rigs or anticipation that he could have continued driving to burn sites. Grievant's testimony is contradicted by hard evidence, especially in the worksheet. Nobody had ever heard the idea of Grievant using his own vehicle to reach work sites until the hearing. That testimony relied upon assumptions that the vehicle was fit to travel on back roads, carry gear, and continue working through rough conditions. It was not part of the interactive process per the evidence that was presented.

5. Undue hardship exists if an accommodation has more than minimal cost or burden on the Department. Adding an additional state vehicle to the caravan of employees to go to work sites would be more than a de minimis cost.

6. Under all applicable laws, including Title VII, Grievant could not be accommodated in his position and should not be returned unvaccinated to his position or granted back pay.

VII. DISCUSSION

Merits

The parties' MOU establishes the process for employees seeking religious exemptions from the state's vaccine mandate, including timelines that both applicants and the Department must meet. The Department is responsible for notifying employees about their rights to seek religious or medical exemptions and for providing them with the proper forms. If the employee timely commences the process, Section 4(a) states that "the Employer will conduct a diligent review and search for possible

accommodations within the agency."[8] Employees seeking accommodation are required to "cooperate with the Employer in discussing the need for and possible form of any accommodation." Once this process is complete, "the Employer will determine whether an employee is eligible for a reasonable accommodation and the final form of any accommodation to be provided. The Employer will attempt to accommodate the employee in their current position prior to looking at accommodation in alternative vacant positions." In other words, the Department makes the final determination of whether the accommodation can be met.

To carry out these requirements, the Department developed additional procedures to implement the MOU. Department witnesses testified that after a request for accommodation paperwork is received, the Department's risk management team reviews the applicant's position description, verifies its accuracy, and determines the essential functions of the position. This information is forwarded to management for discussion as to what they could do to accommodate the individual. Management then solicits input from supervisors who are closer to the work and have firsthand knowledge of the positions in question. With that information, management determines whether an exemption is available. Department witnesses testified that this process was followed here.

For his part, Grievant fulfilled his duties set out in the MOU. Specifically, he filled out a request for religious accommodation, returned it in a timely manner, and attended a meeting shortly thereafter with Jason Spruiell from HR. Grievant testified that in this meeting, the discussion focused on whether he could be accommodated in traveling from the Yakima office to various work locations. Such travel occurs routinely and involves the use of state-owned trucks, which transport firefighting equipment on backroads to remote areas where prescribed burns take place. Grievant testified that he shared with Spruiell that the crew was down to five members and had been driving separate trucks since he started

[8] In the on-line version of the Merriam-Webster dictionary, the term "diligent" is defined as " characterized by steady, earnest, and energetic effort **: PAINSTAKING** a *diligent* worker.

with the Department. He testified that he told Spruiell that in the spring, when the crew was staffed up to seven, he expected that they could drive two to a vehicle and distance about 4 feet, but that he would also be willing to drive his own vehicle at that time.

The Department contested that Grievant shared this information during the interview. Gardner further testified that using a state vehicle for a single employee would not be a reasonable use of state resources. However, it was not clear that Gardner knew that this was the existing practice under COVID, even if crews normally traveled together. Ultimately, the Department denied the accommodation on the basis that the farthest apart crew members could sit in a state truck would be four or five feet, with a driver at the wheel and a passenger in the backseat on the opposite side. Because this distance was deemed insufficient to keep crew members safe, Grievant's accommodation was denied.

As to this outcome-determinative issue, the Department claims Grievant did not share that he was already driving a separate vehicle nor that he would be willing to deploy his own vehicle. As a result, these potential accommodations were not considered by the chain of command. Grievant testified that he did bring up these issues. To resolve this dispute, the Union argues strongly that the Department's failure to call Spruiell to testify should result in a ruling in Grievant's favor. On this point, arbitrators do take the failure to call witnesses with direct knowledge of the facts as a significant factor in the fact-finding process. As stated in *Elkouri & Elkouri*:

> The failure of a party to call as a witness a person who is available to it and who should be in a position to contribute informed testimony may permit the arbitrator to infer that had the witness been called, the testimony adduced would have been adverse to the position of that party.

Elkouri & Elkouri, How Arbitration Works, at 8-51.

Under this well-accepted standard, the Department's failure to call Spruiell to rebut Grievant's testimony must be given significant weight. Grievant testified credibly that he shared the current transportation practice and options for what might occur in the spring. In response, the State did not produce the notes from the interview to support its position that Grievant did not raise these solutions.

There was no information in the record that Spruiell was unavailable or an explanation of why his notes from the meeting were not produced. As a result, Grievant's version of what occurred in the interview will be given more weight than the testimony of management, which was not first-hand information. In light of these factors, I conclude that Grievant did bring up that he was currently driving a truck alone and that he was willing to continue to do so in the spring, whether in a state or personal vehicle.

In light of this finding, it follows that the accommodation process did not occur in the manner the Department managers testified was the normal process. The managers who testified did not have the information that Grievant had been traveling to work sites by himself for his entire career with the Department. They did not know Grievant brought up the idea of traveling in his own vehicle. As a result, the Department did not conduct a "diligent" review of the possible accommodations which could have been provided to Grievant that would have avoided the termination at the time it occurred. The Union has thus proven at least a prima facie case that the MOU was violated when Grievant was separated from his employment.

The Department's Defenses

Next, the question is whether any of the Department's defenses mitigate against a finding that the MOU was violated. Here, the Department argues that allowing Grievant to drive a separate state vehicle would have been an undue hardship due to the cost, as anything over a *de minimis* cost is not required by Title VII. By counter, the Union points out that Grievant did not ask for anything more than to continue what he was already doing: driving an agency vehicle by himself.

On this question, there are several important evidentiary considerations. First, the record does not establish that the Department evaluated the cost of one additional truck or if actual staffing levels in the spring would have permitted one crew member to drive alone. Because crew members were transporting equipment, it is possible that an additional vehicle would have been part of the normal complement of trucks. Second, Grievant had been driving a separate truck for the entire 5 months he

was employed, despite the Department's contention that this practice would be unduly costly. Accordingly, Grievant could have been accommodated without undue hardship at the time he was terminated, because doing so involved no additional cost above the status quo. Thus, I must conclude that the Department's failure to fully evaluate the options presented by Grievant at the time of his separation cannot be excused based upon the argument that they constituted at undue hardship at that time.

Second, the Department argues that Grievant admitted he could only distance from his team members "90 to 95 percent of the time." To the Department, this testimony was an admission that at least 5-10 percent of the time, Grievant would be in direct contact with others, creating a safety issue which would justify denying the accommodation request. The Department's argument must be carefully reviewed. If Grievant was not able to mask and distance even for short periods, this would overcome the Union's argument that he could safely continue in his job without being vaccinated.

However, a close reading of the record does not support that Grievant's duties required being near other workers even some of the time. Grievant testified credibly that crew meetings occurred outdoors while distanced; that the crew already maintained 6-10 feet or more social distance while cutting fire lines to avoid injury; that the maintenance and repair work done while masked in the large open "bay" allowed significant distancing; and that when the crew members stay overnight on location, they are in individual tents and are dispersed in the forest setting. Notably, Grievant's supervisors were not called to testify that the crews routinely, or even occasionally, were together in enclosed office spaces or other environments which would have posed a safety risk due to COVID.

On this record, Grievant's work did not involve going into a typical office environment with others even for short periods. Therefore, there was no reasonable basis to conclude that there were times that Grievant could not maintain social distancing and masking, either outdoors or in the bay at the time he was terminated. Although Grievant's testimony might have permitted that inference, there

was nothing more in the record to make that admission a solid basis for denying an accommodation.

Thirdly, the Department asserted that situations might arise when Grievant might need to provide aid to an injured coworker, which would not be possible while maintaining social distance. Certainly, if Grievant were expected to provide such aid, the Department would have the right to protect all workers from possible exposure to disease by requiring every crew member to be vaccinated. However, the record presented did not support the Department's contention. The accommodations worksheet reflects that Grievant told Spruiell that he "did not need to be first aid/cpr certified." Although Grievant's position description lists "First-aid/CPR certification or similar certification such as first responder" as a *desired* qualification, it was not listed as a *requirement.* Therefore, providing aid to coworkers was not an *essential function* of the job. Accordingly, the accommodation process would not permit the Department to rely on the need to provide first aid as a basis for denying an exemption to Grievant.

For these reasons, the Department's failure to consider Grievant's proposed accommodations, i.e., continuing to travel in a separate state vehicle or his own vehicle, violated the MOU. Because my review focuses on accommodations available at the time of the termination, the only accommodation Grievant requested was to maintain the status quo. Because this would have resulted in no additional expenditures, the undue hardship claim was not ripe for consideration and cannot justify the separation from employment. The defenses presented by the Department are therefore insufficient to overcome the conclusion that the Department violated the MOU by its failure to complete its duty to diligently consider all potential accommodations.

Remedy

It is blackletter law that the role of the Arbitrator in granting a remedy is to restore the parties to the position they would have been in had their agreement not been violated. The Union has proven that Grievant was terminated in violation of the MOU. In the grievance, the Union sought the following

relief: 1) Rescind the termination notice. 2) reinstate Grievant to his prior position with the State; 3) repay him for all lost wages and benefits; 4) engage in a true individualized accommodation process; and 5) award any additional remedy deemed reasonable.

The Department opposes the award of reinstatement and back pay, asserting that even if Grievant could have been provided a temporary accommodation pending new hires, this would be at odds with the requested remedy of return to his former employment. The Department's position makes logical sense. If Grievant would have been separated in the spring of 2022, his reinstatement cannot include back pay from that time or allow reinstatement now. However, the burden was on the Department to establish that Grievant would have been separated in the spring of 2022 due to the Department's inability to offer him a separate vehicle.

Here, the Department possessed information concerning its inventory of trucks in the spring of 2022 and the size of its Yakima crew. If the Department wished to establish that there was no available truck for Grievant to drive separately in the spring of 2022, or that cost would have been an undue hardship, it had a duty to establish this defense by evidence. There was no evidence from the spring of 2022 presented. Accordingly, the Department failed to prove that events in the spring of 2022 would have resulted in Grievant's being terminated for lack of a reasonable accommodation at that time. For these reasons, Grievant will be reinstated with back pay, subject to the conditions set out herein.

Finally, the Union requested in the grievance that the Department be ordered to complete the accommodation process. The award shall include that obligation. In conducting the accommodation process on remand, the parties must abide by the terms of the MOU to engage in an individualized process. The Department cannot rely upon the assumption that field workers who are crew members can never be provided accommodations, as some field workers may have highly unusual working conditions including the benefit of working outdoors, where there are lowered risks of COVID transmission. In the process on remand, the Department retains the right under the MOU to assess the

accommodation sought by Grievant and to determine whether it constitutes an undue hardship under the facts and circumstances present on remand. It is anticipated that the parties will work diligently to determine whether Grievant can be maintained in his position in a manner which is safe and does not present an undue hardship to the Department.

In reaching my conclusions I addressed only those matters I deemed necessary for a proper resolution, but did consider all the arguments of the parties, including the evidence on which they relied, even if not specifically addressed in this opinion.

AWARD

Based upon careful consideration of the evidence and arguments of the parties, the undersigned awards the following AWARD:

1. The Grievance is sustained. The State violated the MOU by failing to complete the reasonable accommodation process as required by that agreement.

2. Grievant shall be reinstated with full back pay and benefits, including seniority and applicable pension contributions.

3. As requested by the Union, the parties shall complete the requested accommodation process within 60 days of the date of this opinion.

4. If the parties are unable to reach agreement concerning the remedy, I retain jurisdiction solely for the purpose of resolving such disputes.

5. As provided in agreement, the fees of the arbitrator shall be borne equally between the parties.

Respectfully submitted,

Barbara J. Diamond, Arbiter
Portland, Oregon

December 5, 2022