

Before Arbitrator Emily Hall

TEAMSTERS LOCAL UNION 117)	
)	
Union,)	
)	Grievant: Amanda Westphal
v.)	FMCS Case No. 220225-03779
)	
WASHINGTON STATE DEPARMENT)	
OF CORRECTIONS)	
)	
Employer.)	

For the Employer:

Shawn Horlacher, Assistant Attorney General
Darcey J. Elliott, Assistant Attorney General
Attorney General of Washington, Labor & Personnel Division

For the Union:

Eamon McCleery, Senior Staff Attorney
Teamsters Local Union No. 117

Hearing Date: February 7 and 8, 2023

Hearing Location: Online, Zoom Platform

Close of Record: March 31, 2023

INTRODUCTION

The Washington State Department of Corrections (“DOC,” “Department,” or “Employer”) and the Teamsters Local Union 117 (“Union”) are parties to a Collective Bargaining Agreement (“Agreement”). A grievance was filed regarding Amanda Westphal (“Grievant”), in which the Union protested the failure of the Department to provide a reasonable medical accommodation to Grievant. The parties were unable to resolve the matter through the grievance resolution process of the Agreement. The matter was advanced to arbitration. The hearing was held on February 7 and 8, 2023, via the Zoom platform.

During the hearing, the parties presented opening statements, evidence, and testimony. Following the hearing, both sides submitted post-hearing briefs. The hearing was transcribed.

FACTS

A summary of the relevant evidence and testimony follows.

Grievant worked for DOC in an on-call status in food services from 2002-2004, when she was laid off. Grievant was hired again by DOC on August 25, 2011, as a Cook at Coyote Ridge Corrections Center (CRCC). On October 1, 2012, Grievant took a voluntary demotion to an Office Assistant 3 (OA3) position at CRCC, which was later reallocated to a Mail Processing Driver position effective April 8, 2014. Grievant was appointed to a Correctional Industries Supervisor Assistant position (CISA) effective December 26, 2016, with Correctional Industries (CI).

The COVID-19 pandemic began in early 2020. Between March 17, 2020, and September 15, 2021, Grievant took 517.2 hours of “COVID-19 related leave.” On August 9, 2021, the governor of the state of Washington issued Proclamation 21-14, “COVID-19 Vaccination Requirement.” The Proclamation required all employees, on-site independent contractors, volunteers, goods and services providers, and appointees to be fully vaccinated against COVID-19 on or before October 18, 2021. The Proclamation prohibited:

...Any Worker from engaging in work for a State Agency after October 18, 2021 if the Worker has not been fully vaccinated against COVID-19...Any State Agency from permitting any Worker to engage in work for the agency after October 18, 2021 if the Worker has not been fully vaccinated against COVID-19 and provided proof thereof to the agency...

The Proclamation also provided for exemptions from the vaccine requirement for “a disability-related reasonable accommodation or a sincerely held religious belief accommodation.” Grievant was granted a medical exemption from the vaccine pursuant to the Proclamation, and remained in a CISA position until she was separated effective November 15, 2021.

Jamison Roberts is the Chief of Emergency Operations in Turnwater, Washington, and has been employed by Washington DOC for 20 years. Prior to his current position, Mr. Roberts has been employed at various correctional facilities throughout Washington in security and emergency management roles. Mr. Roberts testified he stood up an incident command response team and emergency operations center to manage the DOC response to COVID-19. According to Mr. Roberts, the team was responsible for determining mitigation strategies for both the correctional centers and reentry centers.

Mr. Roberts described CRCC, in Connell, Washington, as a facility in a rural farming community with minimal infrastructure. The facility includes a minimum security “camp” section, a medium security section, and a unit referred to as the “Sage Unit” housing the medically vulnerable and elderly prison population. The vulnerability of the inmates housed in the Sage Unit, including many with underlying health conditions, caused DOC to consider moving the unit because providing additional medical care would be difficult. DOC determined it would be extremely expensive to move the unit. Mr. Roberts testified:

...we took additional precautions and mitigation strategies to protect the population to include requiring different testing strategies for staff that worked in there, for limiting the custody and nurse -- and nursing staff that were assigned there, limiting their ability to work in other areas of the facility, and then also created some donning and doffing stations where staff had to put on and takeoff extra personal protective equipment.

Meals, food, laundry, those things going in and out of that unit, there was extra sanitation strategies that were implemented, again, in order to protect that population from contracting, you know, Covid, or being exposed to Covid.

Mr. Roberts testified DOC considered certain areas of correctional facilities to be critical areas which must be maintained “no matter what.” DOC must always provide for sanitation, laundry, and feeding incarcerated individuals. Mr. Roberts described both the screening processes implemented by DOC, and the opening of regional care facilities to treat COVID-positive cases to lessen the burden on community hospitals. CRCC had the first major outbreak in the state on June 11, 2020. Mr. Roberts testified there were multiple risks facing a congregate setting like CRCC, and the primary risk for introducing COVID-19 into the prison setting would come from outside contact. DOC attempted to both prevent the introduction of COVID-19 into the facilities and minimize the impact on operations and staff members.

Mr. Roberts described multiple strategies implemented by the team and adjustments as the state of Washington and DOC learned more about spreading of the virus. Employees were restricted to specific assigned units to minimize cross-contamination between units, and “mainline” meals were stopped. The incarcerated received “grab and go” meals to consume in their cell instead of eating in a congregate dining hall. All visitors, volunteers and contractors were stopped from entering the facility. Later, volunteers and contractors were required to be vaccinated. Mr. Roberts testified once visitation was permitted again at correctional facilities, visitors were (and are still) required to take Rapid Tests prior to entry.

Dr. Teresa Everson, currently employed by Multnomah County Health Department as a Deputy Health Officer, previously worked for Washington State Department of Corrections from February to December 2021 as Medical Director for the Occupational Health and Wellness Unit. She described her duties as providing clinical oversight of a team of nurses that did the day-to-day work for Occupational Health and Wellness, including reviewing policies to keep staff safe. Her day-to-day work was “almost exclusively focused on Covid response,” including review and development of policies, coordination with physicians overseeing health of the incarcerated, and determining action needed when outbreaks occurred.

Dr. Everson testified there were a number of measures taken to optimize safety at the beginning of the pandemic, including strict quarantine and measures put in place for staff “to try to make sure we weren’t introducing COVID into the prison population.” Dr.

Everson is in favor of Governor Inslee's vaccination requirement for settings like correction facilities, "given the struggle that we had...to maintain safety with all the other measures in place." Other protocols included suspending visitation.

Until we could determine that there was a safe way to do that with things like plexiglass and requirements for safety for the folks visiting, regular testing of staff, strict rules around quarantine for folks who may have been exposed, travel recommendations for safety after travel. So there were a number of measures in place before. But we still struggled with cases.

Even with mask protocols, social distancing protocols, and other measures, there were still outbreaks in the facilities. Dr. Everson did several line-of-duty death determinations for staff members who died of complications due to COVID-19. Dr. Everson testified there were limitations to testing as well:

...Covid tests are known to not be one hundred percent sensitive, which means you may have someone who has Covid but the test still results negative. So it's not a perfect test...The other limitation of testing is that it's not done every day. It's done, you know, weekly or at most, twice weekly, depending on the setting. So you only know for that point in time that they're negative. And it wasn't feasible for us to require daily testing in staff. So for most folks, I believe we were testing once weekly, so there were six other days that week that they may have been working that they could have had Covid.

Dr. Everson testified the mandatory vaccine requirement would "absolutely" reduce the risk to staff and incarcerated individuals. Although the efficacy of the vaccine changes, according to Dr. Everson, the vaccines were even more effective in Fall 2021 at reducing the risk of infection than with later variants. She testified she regularly checked the CDC for updates on guidance for correction settings and communicated daily with on-site staff concerning current case counts and patterns. When a staff member was infected, there would be an investigation to determine if other staff members needed to quarantine. She described areas of higher concern for transmission of the virus as anywhere staff members worked directly with incarcerated individuals, especially for a prolonged period. The kitchen was an area of high concern because staff members and the incarcerated worked in close proximity with each other.

On cross-examination, Dr. Everson testified mask wearing is "fairly effective" in preventing spread and infection, but even combined with social distancing, it was "not enough." She admitted a fully vaccinated individual could still possibly introduce COVID-

19 into a congregate environment, but it was “less likely.” When asked about the efficacy of vaccination on reducing the spread of the Delta variant, specifically in October 2021, Dr. Everson testified:

Better effectiveness than we have now. The vaccines that we have now, we know are really effective at reducing hospitalization and death. They still do prevent infection. But back then, the vaccines were not only effective at preventing hospitalization and death, but they were much more effective at just preventing infection in general.

On redirect, Dr. Everson testified there was still risk present when working in an office environment, and even if masking in an N-95 mask, over a prolonged period there might be “significant enough exposure.”

Jamie Dolan is the director of Correctional Industries, and previously was a food service administrator with oversight of statewide food services and food manufacturing operations. Ms. Dolan explained a Correctional Industries Supervisor Assistant, or CISA, is the “first line supervisor” of incarcerated workers. A CISA like Grievant would be ineligible for telework because the primary duties of the position are supervising and training incarcerated individuals. She described a CISA as providing “side by side” training to incarcerated individuals in a food service environment with “daily conversation and knowledge transfer.” Ms. Dolan testified concerning the spread of COVID-19 in the kitchen:

...it happens quickly despite all of our best efforts to monitor and do symptom checks and temperature checks and those kinds of things. So yeah, any one positive staff member giving it to any one person, let alone a couple of people working that shift, could lead to a serious problem...Food Services...has a high causal factor. And food service is not a function that could stop. So if something like inclement weather is called, food services staff remain in the kitchen because of the critical function that it serves...

Ms. Dolan testified all food service CISAs are considered critical because they perform “critical functions [for] the agency.” She described what would occur if there was a COVID outbreak in the kitchen and no incarcerated workers were able to work in the kitchen:

...throughout Covid, sometimes we did shut down other areas of Correctional industries to support food services. We may have called upon the institution to bring in additional staff to support food services...just to ensure that the daily meals went out in order to feed the population.

Ms. Dolan explained the differences between the two kitchens at CRCC. At the smaller “camp kitchen,” anywhere from 10 to 26 incarcerated workers would be on a shift. At the larger main kitchen, upwards of 60 incarcerated workers would be on shift. She described close working conditions in the kitchens and the small office shared by all CISAs. According to Ms. Dolan, a CISA “would be in very close contact all day with the incarcerated population.” CRCC took multiple precautions, including creating “cohorts” of incarcerated workers to limit cross-contamination between correctional units. If one cohort was infected, then CRCC would still have a secondary unit of available workers.

Sarah Sytsma is a senior administrator with the DOC. She previously worked as Correctional Industries Director and held the position at the time Grievant worked at CRCC. Ms. Sytsma was the appointing authority for the disability separation of Grievant. She testified there are no teleworking position for CISAs, and the position cannot be done remotely. Ms. Sytsma read Grievant her disability separation letter, and Grievant asked her no questions. She was aware Grievant was working with HR, but was not aware of any positions offered to Grievant after Grievant requested reasonable accommodation.

Cynthia Benton is the Employee Relations Manager for DOC. She has worked for DOC for fifteen years, and previously worked as an HR Consultant and HR manager at Coyote Ridge. Currently, she provides labor relations consultation to health services at DOC. In 2021, Ms. Benton reviewed medical exemption and reasonable accommodation requests related to the vaccination requirement for state employees. She did not review reasonable accommodation requests for religious exemptions. She testified she reviewed each medical request individually, including Grievant’s request.

Ms. Benton testified Grievant signed her medical exemption request on September 2, 2021. Grievant’s proposed accommodation was to waive the vaccine requirement because she was unable to receive the mandatory COVID-19 vaccine. Ms. Benton performed a complete assessment and review of each request to see if accommodation might be available to the employee. The first determination was whether the medical information demonstrated the employee met the exemption requirement. Ms. Benton explained there were short-term, long-term, and lifetime conditions which could form a basis for an accommodation request. For example, some individuals needed accommodation for a short period of time to become compliant with the vaccination

requirement because they had to wait 90 days following a COVID infection to begin the vaccination process. If the individual worked in a congregate setting, they could be accommodated via leave. If the individual had mainly “computer-type” work, they could be accommodated via telework. If the individual had a lifelong condition, and worked in a congregate setting, then the employer would look at reassignment as a potential option.

Ms. Benton testified Grievant had a lifelong, “unending” condition preventing her from being vaccinated. On September 10, 2021, Grievant provided medical certification from her doctor that she had a lifelong medical condition, and the doctor indicated a leave of absence would not help with the accommodation. Ms. Benton stated the goal of DOC was to have the least impact possible on an employee. DOC would first try to accommodate the employee in their current position. She looked at the position description to identify the essential functions and to identify how that “interacted with the current Covid and vaccine requirement we had to meet.”

An essential function is a duty or task that must be accomplished by that position. It's part of the reason why it exists...Sometimes it's just a very specialized task that only this one individual can do, but it's also the reason why this position exists. This is the purpose of the position. Without them doing the job duties, there's no need for that position.

Ms. Benton testified when she is looking at reasonable accommodation or possibilities for reasonable accommodation, she considers whether the particular employee can fulfill all their essential functions with or without an accommodation. For Grievant, Ms. Benton was unable to identify reasonable accommodations other than reassignment.

...the functions of her job primarily required her to be within that congregate setting. I believe the position description when you pulled it up said 50 percent supervising the incarcerated. So that would be very difficult for – based on the mandate, for her to be able to come into the facility at that time and continue doing that essential function...Because of the safety concern in the congregate setting, even partially coming into the facility wouldn't have been an option for her at that time to prevent the spread of the Covid virus, and even with masking guidelines being in place, we were still experiencing outbreaks. So it was for her safety and the safety of the incarcerated population to not allow that type of contact.

Ms. Benton explained the Department policy on disability separation and accommodation. The policy states that when reasonable accommodation cannot be made

within an employee's current position, then they will review funded vacancies. She explained a funded vacancy is a position "that actually has money tied to it...Vacant means there is no other permanent incumbent for the position." When looking for positions that are available for reassignment, the Department is limited to funded vacant positions. The Department is also limited to positions "for which the employee qualifies." The employee must have the required qualifications, skills and abilities of the vacant position. The position also must be "in the same, similar, or lower classification." Ms. Benton explained job classifications are based on pay ranges, and the vacant position cannot be higher than the employee's current pay range.

Ms. Benton testified the Department did not have enough funded vacant positions to accommodate all of the employee requests for reassignment. She recalled "well over" one hundred employees requested reassignment. If an employee requested reassignment, and received the option of consideration for reassignment in their accommodation letter, then the employee would need to submit a copy of their resume.

Ms. Benton stated because of the "mass amount of requests for reassignment and the little bit of positions we had," reassignment was based on seniority order. Emails between Ms. Benton and other Human Resources personnel show employees listed by seniority dates for reassignment consideration. HR personnel began with the most senior personnel and "worked their way down." Ms. Benton testified the Department was able to accommodate some employees in their current positions, but these were employees whose essential functions "enabled them to do the work remotely." The Department allowed some workers to telework on a trial basis, reviewing their status every sixty days, because they had little experience with teleworking prior to the pandemic. According to Ms. Benton, Todd Dowler, who was Director of Human Resources at the time, made the final determination. Mr. Dowler determined whether the Department could grant a medical exemption and any accommodation for Grievant. Following his determination, another HR employee took over the reassignment review.

On cross-examination, Ms. Benton was asked about the decision to grant Grievant a medical exemption. She testified she reviewed the facts and information with Mr. Dowler, and the Department determined Grievant had a qualifying condition that prevented her from being vaccinated against COVID-19. The letter informing Grievant of

her medical exemption and the instructions on how to request reassignment was sent on October 13, 2021. The letter also informed Grievant the Department had determined no other accommodations were available for Grievant other than the possibility of reassignment. Ms. Benton testified she did not talk with Grievant or her supervisor to see what her duties were, and if they met the description on the position description. Ms. Benton reviewed Grievant's position description along with the current guidance for a congregate setting. Further, she reviewed "whether or not she could do those essential functions in a congregate setting." Working with, training, and supervising the incarcerated are all functions that must take place on site in a congregate setting. Ms. Benton stated they did not take a "blanket approach" to evaluating whether a position was eligible for telework or needed to be on site, but looked at each position description and its essential functions. They evaluated how the individual might function in a congregate setting on a case-by-case basis. The Department did not have a specific "checklist for COVID-19," but did follow the policy on disability accommodation and separation.

Todd Dowler has been Assistant Secretary for the Department of Corrections since December 2022, and oversees the employee and business services support team. Mr. Dowler was the Director of Human Resources from May 2020 until his promotion, and has worked for the Department since 2004. There are approximately 8,300 employees in the DOC.

Mr. Dowler discussed the various proclamations issued by the Governor implementing a vaccination requirement for state employees. He testified just over 100 employees received medical exemptions and 553 received religious exemptions from the vaccine. October 18, 2021 was the deadline for state employees to be fully vaccinated. Mr. Dowler stated the Department was working hard to process all the requests for accommodation prior to the October 18 deadline. DOC was able to complete the process for most of the affected employees by the deadline. He explained the guidance he received at the time from physicians in the agency about the risks of allowing unvaccinated people to work in congregate settings:

...the guidance at the time was that -- that the agency had done -- the agency, its employees, its leadership had made extraordinary efforts to maintain a safe and healthy workplace through testing, through masking, through social distancing, and those efforts were just not enough. And to allow --

that there was no way we could safely mitigate their risk by allowing an unvaccinated person to perform those duties.

Mr. Dowler testified he determined the Department could not accommodate Grievant in her current position, because the majority of her duties were working with incarcerated people in a congregate setting. He looked at the risks to her and the risks she could present to others in the work setting. He provided her notice of this determination in a letter which also informed her she could seek reassignment to a different position as an accommodation. He recalled meeting with Grievant shortly before October 18, 2021. He recalled her frustration with the process and that she had not received an answer on reassignment at the time of the meeting.

During the “eleventh hour,” a handful of positions became available that had not been available before, as various employees chose to become vaccinated rather than be transferred into a vacant position. Mr. Dowler extended the date of disability separation for unvaccinated employees past the October 18, 2021 deadline. When evaluating those persons for reassignment, the Department used seniority while attempting to find positions.

We started with the most senior person and tried to match positions. And as we were working down the list, we just ran out of positions that we could offer to people because they were taken at that point...also, the jobs that we were looking at, you know, was this a job that was higher than her current job? If it was, that would not have been considered an option. It was also looking at her skills and abilities. But in this case, I believe that what the situation was...there were more senior people in higher level positions that were vacant, so she didn't qualify or she couldn't be reassigned to that.

He discussed the Department policy on separation for medical disability when a person cannot be accommodated in their current position, or cannot perform their essential duties either with or without accommodation. He also testified the Department offered paid leave for employees who could not come to work due to possible exposure. Grievant took 517.2 hours between mid-March 2020 through mid-September 2021 of paid leave related to COVID exposure.

On cross-examination, Mr. Dowler testified visitation at the correctional centers was “on and off” during the pandemic. He testified he did not have a list of vacant positions when he met with Grievant, because the point of the meeting was to answer her

questions and give her an opportunity to “understand his perspective.” Amy Bean, an HR professional in DOC, worked with Grievant to identify any reassignment options. Mr. Dowler acknowledged an email sent by Amy Bean on November 3, 2021, identifying Grievant as an individual with no reassignment options. When an employee has a medical condition that prohibits them from performing their duties, they are allowed to use sick leave or other forms of leave. According to Mr. Dowler, paid administrative leave would not be appropriate under DOC Policy or the Agreement.

On re-direct, Mr. Dowler testified Employer Policy 800.140, Section D.1 explains options for employees “during the process of evaluating accommodation options.” Mr. Dowler testified Grievant was in the situation of being unable to perform the essential functions of her job without accommodation. She therefore had the option to use her accrued leave, which could be annual or sick leave, shared leave, or authorized leave without pay. He clarified disability separation is not a disciplinary action. “Just cause” is not related to accommodation or disability separation. Article 28.3 of the of the Agreement specifically states disability separation is not a disciplinary action, and an employee can grieve an involuntary separation due to a disability under the Article 9 grievance procedures.

Mr. Dowler also testified on re-direct concerning his decision to allow employees to remain with the Department past the October 18, 2021 deadline of the Proclamation. He explained the goal of the Department was to accommodate as many employees as possible, and since multiple vacancies arose at the “eleventh hour,” he allowed employees to continue their employment into November:

And because we had vacancies that arose at the 11th hour, primarily due to people changing their mind about the reassignment option they took, we did not want to have people be without employment without at least trying to match a person in need with a job. And so when -- that's why we decided we weren't going to separate, we were going to allow them to continue their employment into, you know -- in this case in November, allow them to, you know, qualify for benefits had they wanted to use their leave, and until we could tell -- until we could feel that we had done everything within our ability to make sure that every possible job we had available at that time was matched by someone who was in the need of a reassignment. So that took us past the 18th, but I felt that that was our obligation as an employer to people who needed to be accommodated.

The State rested following the testimony of Mr. Dowler.

The Union began its case with the testimony of Cheryl Miller, the Union Representative for Teamsters Local 117. Ms. Miller represents staff at CRCC and Airway Heights Corrections Center. She is responsible for filing grievances and assists members during investigations and disability separations. Prior to being a union representative, she was a classifications counselor for 19 years at the Airway Heights Corrections Center.

While representing staff at CRCC, Ms. Miller visited the facility weekly for three years. According to Ms. Miller, Grievant had to “chase down” a response to her request for accommodation. Once Grievant received her medical exemption, Ms. Miller met with Grievant and Mr. Dowler. During the meeting, Mr. Dowler was apologetic and allegedly told her she was not going to lose her job, but “the next thing we knew, she got a letter of separation.” Grievant came up with “some great ideas” for reassignment “based on prior experience and offered those up to Mr. Dowler.” Grievant had prior clerical experience and had also worked in the mailroom on the encrypted J-Pay system. Grievant offered to do clerical telework from home.

Ms. Miller never saw a list of available positions. She testified corrections officers could not telework because they supervised incarcerated individuals, but some health services workers were able to telework, such as patient service representatives and “psych associates.” Ms. Miller testified the CRCC was a “newer facility” with the office staff working in cubicles or in an office with a door. Clerical workers and mailroom workers were “pretty isolated.”

On cross-examination, Ms. Miller admitted seniority was one of the criteria used by the Department during the reassignment process. She testified even though she understood J-Pay was an encrypted system that must be performed in a DOC facility, she thought it could be done in an isolated location.

The Union next called Grievant. She testified she was employed by DOC at CRCC in food service, specifically in Correctional Industries. She worked for DOC from 2002 until 2004 in food services, when she was laid off. She returned to DOC in 2011. In the interim, Grievant testified she worked in other jobs such as daycare and at a gas station. While working for the Department, Grievant held a variety of positions, including in the

mailroom, where she worked with the encrypted J-Pays program, processed packages, and also did recordkeeping. She explained J-Pays is an inmate email service, and she reviewed all emails for information on contraband and inappropriate behavior. Grievant then worked in the dog program at the Sage Unit, which is “basically a nursing home for the aging offenders.” She later transferred back to food services when it became part of Correctional Industries and worked in the “food factory.” In addition to her duties supervising food production, she taught inmates job skills and anger management through a program called “Making it Work.” Grievant testified her work was rewarding, and she found great meaning in helping the incarcerated change their lives.

Grievant testified production at the food factory went up following the Covid outbreak at CRCC. They were preparing “ready to eat” meals as part of the social distancing strategy. Grievant stated she “constantly enforced” the masking rule. The initial “big outbreak” of COVID-19 at CRCC was from the food factory. Eventually the food factory was permanently closed.

Grievant testified in 2016 she had a severe reaction to a flu vaccine. She was told she could “never travel out of the country ... anywhere that would require me to get any antibiotics or special shots. I could never get another vaccine again.” Grievant and her husband, who also works at CRCC but is vaccinated, both had COVID-19 in February 2021. He was sick for two days, and she was sick for “about a week,” but “we were both fine.”

Grievant “panicked” when she learned of the vaccine mandate. She called Ms. Miller and began to try to find out the exemption process. When she learned from HR how the process worked, Grievant sent in paperwork explaining her medical condition but listed the wrong doctor. She sent in the corrected paperwork the same day, September 2, 2021, but “it took days” for HR to correct it. Grievant received the corrected paperwork from HR on September 10, 2021. She had seven days to return a questionnaire to HR, which she testified she returned “that same day.” On September 18, 2021, Grievant resent the paperwork, because she had not received a response. On September 22, 2021, Grievant received a response from HR confirming they had her paperwork.

Grievant testified she later learned HR had only uploaded her signed consent on September 13, and did not upload the remainder of her paperwork until September 22, 2021. On Friday, October 13, 2021, Grievant described herself as being in “panic mode.” The deadline was Monday, October 18, 2021, and she did not know what was going to happen. On October 13, 2021, Grievant received an email advising her she would receive a letter later that day. The letter informed her the medical exemption had been granted, and the only possible accommodation for her was reassignment. Grievant took the next day off work to update her resume and gather paperwork demonstrating her work experience. She submitted several letters of recommendation and records of her training, including food service and preparation, as well as an award for “2019 Team of the Year” for CRCC Food Factory . On October 18, 2021, Grievant was placed in a leave without pay status.

Grievant testified she met with Mr. Dowler, who was “apologetic.” She testified there was no discussion with Mr. Dowler about specific vacant positions that might be available to her. She was contacted once by HR and was asked if she had a degree in accounting, because “there was a fiscal analyst job.” She did not receive a final response on her accommodation by the October 18, 2021 deadline, and at that point she began using leave “just to keep my insurance going, but I was in leave without pay.” She made multiple calls to Todd Dowler because she was frustrated that she hadn’t heard from Amy Bean in HR about reassignment. She received a call on October 25th asking if she was still interested in reassignment. On October 29th, she received an email informing her the time to review reassignment options was being extended until November 12, 2021. The next phone call from HR was on November 8, 2021:

Yeah, that was the phone conference where they just read me my letter that they were separating me. And I was really bugged by this because there’s another email you’ve got that says they were supposed to extend the job search until the 12th.

The letter of separation stated termination was effective on November 15, 2021:

After carefully reviewing your job description, classification, essential functions, and working environment, we determined there are no accommodations for your position available which sufficiently mitigate the risk associated with having an unvaccinated employee performing the

essential functions of your position. We were unable to identify [a] vacant position to accommodate you within, for which you qualified for.

Grievant testified she would have taken any reassignment offered by DOC.

On cross-examination, Grievant testified she did not know if anyone was teleworking from the mailroom. She admitted to having over 500 hours of paid leave due to being “screened out for Covid,” including a period in which her husband was hospitalized with pneumonia. She denied ever being exposed to COVID-19. Grievant clarified she only heard that she would be “safe” and “have a job” from Cheryl Miller. Ms. Miller told Grievant she heard it “from somebody else and from Todd Dowler.” Grievant admitted the notice of separation was “effective” on November 15, 2021, but DOC had to provide her the notice on November 8, 2021, because of requirements in the Agreement.

Grievant testified on redirect concerning how an employee might get “screened out of work for Covid,” including close contact with an inmate, or in her case, because her husband had close contact with an inmate or had been ill.

The Arbitrator questioned Grievant about her seniority date, which was based on her return to DOC in 2011. Grievant testified she had a second, adjusted date based on her time at DOC from 2002 through 2004 which was used for calculating leave. On re-cross, Grievant clarified her two different seniority dates are based partially on her membership with the Union. Grievant has a seniority date for accumulation of time off, and the other date, based on her membership with the Teamsters, is used for bidding on jobs. On redirect, Grievant testified she received a bid award for the position she currently held, but with different days off. The Union rested following the testimony of Grievant.

The Department put on a case in rebuttal, and recalled Mr. Dowler to testify. He explained the bid Grievant received for her current position with different days off made no difference in terms of DOC’s ability to keep her in food services. DOC had to comply with the Governor’s mandate. He testified DOC looked for positions statewide they could accommodate people in, not just CRCC or Airway Heights. Mr. Dowler stated Grievant could have reapplied for a teleworking position with DOC after the deadline. DOC still requires current food service employees to be vaccinated against COVID-19.

The arbitrator asked Mr. Dowler to explain how the seniority process worked in light of Grievant's different seniority dates, as well as her testimony concerning a delay in uploading her paperwork during the accommodation process. Mr. Dowler clarified DOC was "looking at their seniority with the state, their overall seniority with the state." He also explained DOC delayed filling positions with employees seeking accommodation so DOC would have a full picture of all the persons seeking either religious or medical accommodation.

And so what we were worried about, if we did it on a first come, first served basis, the people who had medical needs reassignments would be disadvantaged. And so we held, towards the very end, all of our reassignments. And then we started going down in order of seniority, to make them. And we just—we did it as it came by seniority. So if it works, is it medical versus religious, we would do it ... by seniority. So I don't think there was any disadvantage to Ms. Westphal by her—her being granted the ... medical accommodation and we can't accommodate and reassign her. Because of her seniority, I think we would have—there was no disadvantage to her because of that.

The Department rested, and the hearing concluded.

ISSUE

The parties stipulated to the following issues: Did the Employer violate Articles 1, 8 and/or 28 of the Collective Bargaining Agreement when it placed Grievant on unpaid administrative leave from October 18 to November 15, 2021, and when it did not provide a reasonable accommodation to Grievant for her medical condition?

RELEVANT POLICIES AND CONTRACT PROVISIONS

State of Washington Department of Corrections Policy DOC 840.100, Disability Accommodation and Separation

Collective Bargaining Agreement between the State of Washington and Teamsters Local Union 117, effective July 1, 2019 through June 30, 2021

Article 1 Nondiscrimination

Article 8 Discipline

Article 9 Grievance Procedure

Article 28 Fitness for Duty and Disability Separation

POSITIONS OF THE PARTIES

The Union

The Union argues the Employer violated the contract when it put Grievant into an unpaid leave status pending final determination of accommodation, and when the Employer determined no accommodation was available and separated her from employment. The Union does not challenge the validity or the content of the Governor's proclamation, or the requirements in the proclamation. They do not challenge vaccination against COVID-19 as a condition of employment for DOC, or prohibiting any worker from engaging in work for a state agency after October 18, 2021, if they are not vaccinated. The Union does not dispute that Grievant had a medical condition preventing her from receiving the COVID-19 vaccination. However, according to the Union, the process used by the Employer to review Grievant's request for accommodation was "not sufficiently interactive and did not consider" Grievant's "individualized circumstances." They argue the process used by the Employer violated the Agreement:

...the Employer has failed to demonstrate that accommodating Grievant in her position or, in the alternative, reassigning her to a different position would pose an undue burden.

The Union also argues that the Agreement required the Department "keep grievant in pay status until it concluded the interactive process."

The Employer Failed to Engage in a "Bona Fide" Individualized Interactive Accommodation Process, and Failed to Conduct an Individualized Direct Threat Assessment for Grievant

The Union quotes the Governor's Proclamation regarding exemptions from the vaccine requirement:

[w]orkers for State Agencies are not required to get vaccinated against COVID-19 if they are entitled under the Americans With Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 (Title VII), the Washington Law Against Discrimination (WLAD), or any other applicable law to a disability-related reasonable accommodation or a sincerely held religious belief accommodation to the requirements of this order.

The Union states the Governor's Proclamations "comport with various Federal and State laws, including the ADA and the Rehabilitation Act," Title VII of the Civil Rights Act, and the Washington Law Against Discrimination (WLAD). The Union points out Article 1 of the Agreement mirrors ADA and WLAD language, and the Agreement incorporates ADA and WLAD reasonable accommodation requirements. The problem is not the Governor's Proclamations, but the failure of the Employer to engage in the interactive individualized accommodation process with Grievant before separating her.

According to the Union, Washington state courts have found WLAD has an accommodation requirement. Failure to reasonably accommodate an employee with a disability constitutes discrimination. The parties' Agreement incorporates the reasonable accommodation requirements of the ADA and the WLAD. The Union argues, therefore, the Governor's proclamation, the ADA, the WLAD, and the Agreement all require the Employer to provide Grievant an individualized interactive accommodation process prior to separation.

The Union acknowledges an employer is not required to provide an accommodation which creates an undue hardship for the employer, or poses a direct threat to employer safety. According to the Union, the Employer bears the burden of proving a direct threat exists, and cites 29 CFR 1630.2 for the definition of "direct threat." The Union cites guidance from the EEOC addressing COVID-19 vaccinations and vaccination requirements, as well as how an employer might determine if an unvaccinated employee poses a "direct threat" in the workplace:

...an employer first must make an individualized assessment of the employee's present ability to safely perform the essential functions of the job. The factors that make up this assessment are: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. The determination that a particular employee poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19.

The EEOC guidance goes on to discuss what employers should do if an unvaccinated employee cannot enter the workplace:

Even if there is no reasonable accommodation that will allow the unvaccinated employee to be physically present to perform the employee's

current job without posing a direct threat, the employer must consider if telework is an option for that particular job as an accommodation and, as a last resort, whether reassignment to another position is possible. The ADA requires that employers offer an available accommodation if one exists that does not pose an undue hardship, meaning a significant difficulty or expense.

The Union argues the law is clear that the Employer bears the burden to show accommodation would pose a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” 29 CFR 1630.2. The Union contends the Employer failed to perform the required “individualized” direct threat assessment. The Union argues the Employer failed to properly consider the number of partially or fully vaccinated individuals in the workplace as a factor in their risk analysis. According to the Union, the Employer also only, or primarily, considered 100 percent teleworking options, instead of “other possible mitigation measures” such as reassignment with partial teleworking or outside of a congregate setting.

The Union acknowledges the testimony of Dr. Everson provided evidence concerning COVID mitigation and infection, and risk in the congregate setting. The Union argues her testimony fails to provide specific risks posed by accommodating Grievant in her CISA position or “via reassignment to a non-congregate setting.” The lack of specificity, according to the Union, gives nothing to the arbitrator on which to base a determination that a reasonable accommodation could or could not be provided. The failure of the Employer to conduct a proper risk assessment violates the Agreement.

The Employer was Required to Keep Grievant in Pay Status While Making its Final Accommodation Decision

The Union argues that while the Governor’s Proclamation prohibited employees who were not fully vaccinated from “engaging in work for a State Agency after October 18, 2021,” nothing in the proclamation required the Employer to place Grievant into a leave without pay status. The Employer could have assigned her to home, not allowed her to perform any work, and kept her in a pay status. The Union points out Article 21 of the Agreement allows the Employer to separate an employee only after they have determined the employee cannot perform the essential functions of their job, and their medical condition cannot be reasonably accommodated, including by reassignment. According to

the Union, nothing in that section allows the Employer to reassign Grievant to home on an unpaid status.

The Union also argues the Employer made no attempt to temporarily reassign Grievant to another position or find her work she could do at home until the final determination was made. Article 19 of the Agreement, which discusses the “bid” system, permits these options. Grievant suggested she could work on J-Pays or other administrative work remotely, but the Employer did not attempt to implement those options or mitigate the impact on Grievant.

The Employer

The Employer argues the heart of the case is whether Grievant’s “request that DOC allow her to continue working unvaccinated in her position was reasonable if she wore a mask and had periodic testing for the COVID-19 virus.” DOC considered many factors in making its decision, including its obligations under the Governor’s Proclamation, the effect of Grievant’s preferred accommodation on DOC’s ability to maintain efficient operations, and the risk of harm to Grievant and others “that was causing sometimes severe illness and death.” When DOC decided it could not reasonably accommodate Grievant in her preferred accommodation, to stay in her current position, DOC searched for a position for reassignment. No other position was available.

DOC engaged in an individualized interactive accommodation process

The Employer explained the Correctional Industries Supervisor Assistant (CISA) position held by Grievant is in food services, and DOC considers food service operations a critical function that must continue even during emergencies. A CISA like Grievant provides training and supervision, in person and side-by-side with incarcerated workers. The majority of the essential functions of the position is “hands-on” work, and DOC determined these duties must be performed in person, and not via telework.

The Employer offered testimony from several witnesses involved in the accommodation process, including Mr. Dowler, who oversaw DOC’s compliance with the Proclamation’s requirements for vaccination. Approximately 100 employees requested medical accommodation and 550 requested religious accommodation. The majority of these accommodations were processed by the October 18, 2021, deadline. Ms. Benton,

HR Consultant, reviewed all medical accommodation requests individually, and assessed whether the Department could provide a reasonable accommodation that would allow the employee to perform all the essential functions of their position. Ms. Benton discussed her assessment of each position with Mr. Dowler, and if Mr. Dowler granted an exemption from the vaccine mandate, they discussed potential reasonable accommodations. While DOC attempted to accommodate employees in their current positions, because this had less impact on the employee than reassignment, this was not always possible. Mr. Dowler and Ms. Benton determined DOC could not reasonably accommodate Grievant in her current position.

DOC points to DOC Policy 800.140, which states that reassignment positions must be vacant funded positions for which the employee is qualified. According to DOC, “funded” means there is funding in place, and “vacant” means no permanent incumbent for the position. DOC considered hybrid teleworking positions for employees with lifelong medical conditions, but generally favored reassignments with full-time telework.

DOC did not have enough vacant funded positions to accommodate all of the employees who submitted their resumes ... To make the process as fair as possible, DOC offered reassignments based on seniority.

DOC reassigned all available reassignment positions to employees who had higher seniority than Grievant.

DOC argues its determination that it could not reasonably accommodate Grievant was “appropriate and in compliance with Articles 1, 8, and 28” of the Agreement. Grievant was allowed to take leave pursuant to the Disability Accommodation and Separation Policy. An accommodation is not reasonable if it “imposes an undue hardship on the employer.” DOC also argues an employer may require an employee not pose a direct threat, a “significant risk of substantial harm,” to the health and safety of the individual or others in the workplace.

Grievant’s preferred accommodations, masking and testing while working in her CISA position, were not reasonable, according to DOC:

...considering that she was unvaccinated against a sometimes deadly virus, that she was required to work in-person with others in a congregate setting, and that masking and testing already proved insufficient to stem the spread

of the virus at DOC facilities. This imposed a direct threat of harm to herself and others and caused undue hardship for DOC.

DOC argues Grievant presented no evidence that DOC discriminated against her on the basis of a protected class listed in Article 1. DOC argues the evidence shows it was unable to reasonably accommodate Grievant for “entirely nondiscriminatory reasons.”

Grievant posed a direct threat of harm to herself and others that could not be reduced or eliminated with reasonable accommodation

DOC argues an employer is not required to place an otherwise qualified individual with a disability in a position which poses an inherent risk of injury to the employee herself, co-workers, the public, and in this case, the incarcerated. In the summer and fall of 2021, “the Delta variant...was especially virulent, causing illness and death among” DOC staff and incarcerated individuals. DOC points out Grievant’s essential duties required her to interact with the incarcerated and staff. DOC required masking, testing, and social distancing, “but the virus still entered and spread at DOC facilities.” In the fall of 2021, DOC argues it was unknown how long the COVID-19 virus would remain infectious, and the “nature of the virus at the time was enigmatic and dynamic.” It was “especially challenging” in a congregate setting:

Even one person infecting someone else in a facility could cause a serious problem for DOC because the virus spread quickly before vaccines are available, DOC found that using masking testing and social distancing was somewhat helpful in reducing illness. However, these measures were not as effective as vaccination ... DOC considered limiting the spread of the virus at their facilities of paramount importance because infection potentially could lead to death ... DOC experienced this devastating result firsthand when four employees died in the line of duty and 17 incarcerated individuals also died from COVID-19. DOC believed that even a small percentage of employees and incarcerated individuals dying from COVID-19 was too many.

DOC argues that even with masking, social distancing, and weekly testing measures in place, employees and incarcerated individuals continued to become infected with COVID-19. Testing was inefficient and not always accurate, as employees could become infected on days they were not tested. DOC argues it relied on guidance from health professionals, and determined:

...masking, social distancing, and testing were not *reasonable* accommodations for Ms. Westphal because they could not reduce or eliminate the threat of harm to a level DOC believed was safe.

According to DOC, a reasonable accommodation for Grievant was reassignment to a position where she could telework full-time. However, there were a limited number of reassignment positions available, and all available positions went to employees senior to Grievant. DOC argues accommodating Grievant in her CISA position would cause undue hardship and no reasonable accommodation was available. DOC determined no reasonable accommodation was available to Grievant in her original position for reasons of not only safety, but also operational reasons, including efficiency and sustainability. Had Grievant continued working in her position unvaccinated, she could have infected others, including incarcerated, individuals and fellow staff members, with the virus. This would lead to significant difficulty and expense for DOC to continue efficient operations. DOC argues this is especially true in food services.

DOC contends it properly conducted an interactive reasonable accommodation process with Grievant and considered all available accommodations. DOC argues the ADA does not require they provide the “best accommodation possible” or the accommodation requested by the employee. The employer has the discretion to choose the “most effective accommodation.” The Governor’s Proclamation provided only two months for DOC to process accommodation requests, and a large number of employees requested accommodation. EEOC guidance permitted, according to DOC, the employer to “forgo or shorten the exchange of information...known as the ‘interactive process.’” DOC reviewed Grievant’s request individually as well as the other over 600 requests for accommodation. The interactive process used with Grievant permitted her to “present her preferences and recommendations and ask questions.” DOC argues no evidence was presented that DOC ignored reassignment positions available at that time, or that more meetings with Grievant would have resulted in a different outcome.

To the contrary, the reassignment positions that were available were offered to employees based upon a fair standard of seniority, and all available reassignment positions were taken by more senior employees than Ms. Westphal. Considering the time pressure DOC was under to process over 600 requests for accommodation, DOC’s actions in this case were well within the EEOC’s view of an adequate interactive process during the pandemic.

DOC argues Grievant's suggestions for accommodation were not reasonable because they did not "provide sufficient protection from the virus's potential impacts on the health of others." Grievant's essential functions as a CISA in food service include training incarcerated individuals on safe food handling, progressive cooking, and quality control, and conducting inventory. All of these functions must be performed in person. Although Grievant offered to wear a face shield and be regularly tested, DOC argues it determined these measures were "insufficient to remove the unacceptably high risk of infection and possible illness and death to others." DOC argues masking and testing had proven ineffective to stop the spread of the virus, and DOC was struggling to maintain sufficient staffing levels to continue core operations. DOC could incur a significant economic burden should they need to pay contract workers in addition to wages for employees out ill or in quarantine.

DOC also argues Grievant was separated for legitimate, non-disciplinary reasons, citing Article 28 of the Agreement and DOC's Disability Accommodation and Separation Policy. The "plain language of Article 28.3 contradicts any argument" by Grievant that DOC had to show "just cause for her non-disciplinary separation." Article 8 also does not apply in this case because its requirements relate only to disciplinary separation, not disability separation. DOC contends every action it took was directed toward keeping incarcerated individuals, employees and the public safe during the pandemic, including Grievant, and that it complied with the Agreement throughout the process. The grievance should be denied.

DOC had no obligation to offer Grievant paid administrative leave

The Employer argues DOC is not required to offer paid administrative leave during the accommodation process. Grievant had other options, such as using accrued leave, shared leave if applicable, or authorized leave without pay. Article 8.4 of the Agreement places employees on paid administrative leave when they are assigned to home during a disciplinary investigation. This provision does not apply in this case, as Grievant was not disciplined, and there was no disciplinary investigation. DOC also argues it was generous with paid leave during the pandemic, as it offered paid leave to employees who had to remain off work following possible exposure to the virus. DOC points out Grievant

testified she took 517.2 hours of paid leave for this reason. In addition, Article 28 does not address leave, and DOC argues Grievant's allegation that DOC violated Article 28 is misplaced.

ANALYSIS

In a grievance alleging a violation of a collective bargaining agreement, the burden is on the Union to establish the violation. Here, the Union argues the State violated Articles 1, 8 and/or 28 of the Collective Bargaining Agreement when it placed Grievant on unpaid administrative leave from October 18 to November 15, 2021, and when it did not provide a reasonable accommodation to Grievant for her medical condition. The Union argues the State bears the burden to show accommodation of Grievant would pose a significant risk of substantial harm to the health or safety of Grievant or others which cannot be eliminated or reduced by reasonable accommodation.

Following the Governor's Proclamation, DOC attempted to accommodate or reassign over 600 employees who had been granted either religious or medical exemptions from the vaccine mandate. The Union takes pains to note they do not contest the validity of the mandate or the Proclamation. However, the evidence did not show DOC violated Articles 1, 8, or 28 of the Agreement, or any DOC policy, during the accommodation process. The Union has not presented evidence that shows DOC violated the Agreement, DOC policies or the Proclamation when it placed Grievant on unpaid administrative leave during the process itself. The evidence shows DOC took great care to conduct an individualized interactive accommodation process with affected employees, including Grievant, who testified she had the opportunity to speak with Mr. Dowler and other personnel throughout the process. While Grievant had many good ideas on how she could continue to be usefully employed at DOC, and expressed willingness to do anything, even sweeping floors, the DOC does not have the ability to create new positions in order to reassign employees who cannot safely perform the essential functions of their position with or without reasonable accommodation.

The evidence shows DOC conducted an individualized interactive accommodation process with Grievant. Accommodating Grievant in her position as a CISA would pose a direct threat to the health and safety of Grievant, fellow DOC staff, and the incarcerated

individuals she supervised. DOC attempted to find a position to which they could reassign Grievant. However, all funded, vacant positions were awarded in order of seniority to employees seeking reassignment. All available positions were assigned to employees senior to Grievant, and as DOC could not create a new position for Grievant as a form of reasonable accommodation, separation was appropriate. Finally, nothing in the Agreement, DOC Policies or the Proclamation required DOC to keep Grievant in a paid status from October 18 to November 15, 2021, while DOC completed the reasonable accommodation process.

Did the Employer violate Articles 1, 8 and/or 28 of the Collective Bargaining Agreement when it did not provide a reasonable accommodation to Grievant for her medical condition?

The Union makes several arguments concerning the failure of DOC to provide a reasonable accommodation to Grievant, including alleged discrimination against Grievant by failure to provide an accommodation, and failure of DOC to engage in a bona fide, individualized process of accommodation. They also argue DOC failed to show accommodation of Grievant would pose a significant risk of substantial harm to the health or safety of either Grievant, other staff or incarcerated individuals that could not be eliminated or reduced by reasonable accommodation

Did the Employer violate Article 1 by discriminating against Grievant when it failed to provide her a reasonable accommodation?

Article 1 of the Agreement states neither party will discriminate against employees on the basis of several factors, including “any real or perceived ... physical disability.” Employees who file a grievance and an Internal Discrimination Complaint within the agency will have their grievance process suspended until the IDC investigation has been completed. No evidence was offered that Grievant filed an IDC, or that she filed a complaint prior to or subsequent to filing the grievance with the Human Rights Commission or the Equal Employment Opportunity Commission. Had she filed a separate complaint with the HRC or EEOC after filing her complaint, the grievance would be considered withdrawn.

The Union has not presented any evidence to show Grievant was discriminated against by the State on the basis of her physical disability. The evidence shows the Department did not discriminate against Grievant in any way during the process of

granting her medical exemption, while attempting to accommodate her disability, or when she was medically separated. Mr. Dowler testified the Department delayed reassignment decisions to allow additional time for employees waiting on medical exemption decisions to be included in the process. The Department went to great lengths to avoid discriminating against any employees with medical exemptions during the accommodation process. Nothing in the Agreement states DOC must create a new position for an employee as a reasonable accommodation. All the vacant, funded positions available for reassignment went to employees with more seniority than Grievant. There is no evidence of violation by the State of Article 1 of the Agreement.

Did the Employer violate Articles 8 and 28 by failing to engage in a bona fide "Individualized Interactive Accommodation Process?"

Article 28 of the Agreement allows DOC to separate an employee when there is medical documentation demonstrating the employee is unable to perform the essential functions of their position due to physical disability which cannot be reasonably accommodated, and when there is no other available position which an employee can perform with or without a reasonable accommodation. DOC Policy 840.100, Disability Accommodation and Separation, states in Paragraph IV, "Denials":

A. The Appointing Authority may deny an accommodation request if:

1. The request does not involve a reasonable accommodation issue involving the Department.
2. The disability poses a direct threat to the health/safety of anyone.
3. The accommodation would cause an undue hardship (e.g. costly, extensive, substantial/disruptive, alters nature/operation of the Department)...

B. When reasonable accommodation cannot be made within the employee's current position, the Human Resource Consultant will review funded vacancies within the facility/office for which the employee qualifies in the same, similar, or lower classifications and notify the employee of their options. The employee is expected to fully cooperate in the interactive reasonable accommodation process.

1. If reasonable accommodation cannot be made within the employee's current facility/office, the Human Resource Consultant may refer the employee to other areas of interest.

2. If no reasonable accommodation can be made that will enable the employee to perform the essential functions of their job classification, and no funded vacant positions for which the employee is qualified are available, the Human Resource Consultant will consult with the Appointing Authority regarding a disability separation per WAC 357-26 or the applicable collective bargaining agreement.

The evidence shows DOC engaged in an individualized process with Grievant when determining whether she could be reasonably accommodated as a CISA in food services. Mr. Dowler and Ms. Benton evaluated her essential functions, and determined the position of CISA in food services required the employee to be in person. DOC demonstrated, through the testimony of Mr. Dowler, Dr. Everson, and Ms. Benton, among others, the information DOC had at the time was that Grievant's inability to be vaccinated was a lifelong medical condition. This permitted her a medical exemption from the COVID-19 vaccine mandate for state employees. There is no dispute that Grievant has a lifelong medical condition, appropriately characterized as a disability.

There is no dispute that food services are a core and critical function in DOC. The evidence shows DOC reasonably believed Grievant's disability posed a direct threat to not only her health and safety, but that of fellow staff and incarcerated individuals. The evidence shows the essential duties of a CISA do not permit telework. At the time of the decision, it would have been an undue hardship for DOC to accommodate Grievant as a CISA in food services through "masking and testing." The evidence shows multiple reasons, including cost, disruption, and health and safety reasons, which made it an undue hardship upon DOC to reasonably accommodate Grievant in her position. Dr. Everson testified to the limitations of masking, social distancing, and periodic COVID testing in preventing outbreaks, as well as to the dangers posed by the spread of infection. She testified at length concerning the comparative benefits of vaccination in October 2021. Multiple witnesses testified concerning the critical nature of food services and potential financial, health and safety impacts of an outbreak in food services to DOC.

The Agreement and DOC policies allow reassignment to "funded vacancies within the facility/office for which the employee qualifies in the same, similar, or lower classifications." Following the decision of DOC to attempt to reassign Grievant, the evidence shows that for both Grievant and other employees seeking reassignment, DOC

conducted an appropriate review of available funded, vacant positions as well as employee qualifications. DOC assigned employees in order of seniority. The Union has not presented evidence which shows Grievant was wrongfully denied reassignment to a funded, vacant position for which she was qualified. The evidence shows available funded, vacant positions were filled by more senior employees.

There was no position available for Grievant, despite DOC efforts to find reasonable accommodation for as many employees as possible, including delaying the date of separation to November 15, 2021 to allow for a longer search. Grievant was contacted about a funded, vacant position as a fiscal analyst, but she did not have the requisite qualifications. Neither the Agreement nor DOC policies permit DOC to create a position for Grievant as a reasonable accommodation.

Although there was a delay between September 18 and 22, 2021, in uploading the paperwork for her exemption request, this was not unreasonable considering the volume of exemption requests being processed. In addition, September 18 and 19, 2021 fell on a weekend. On October 13, 2021, Grievant was granted her medical exemption and told reassignment was the only possible accommodation. Grievant submitted her resume and other documents to be considered for reassignment. On November 8, 2021, Grievant was informed that DOC could not accommodate her in her current position and was unable to identify a vacant position for which she was qualified. Her disability separation was effective November 15, 2021. The entire period in which DOC reviewed Grievant's request for medical exemption and processed her request for reasonable accommodation was reasonable, especially considering the over 600 exemptions being processed by DOC at that time.

The Union points to EEOC guidance concerning reasonable accommodation and reassignment:

Even if there is no reasonable accommodation that will allow the unvaccinated employee to be physically present to perform the employee's current job without posing a direct threat, the employer must consider if telework is an option for that particular job as an accommodation and, as a last resort, whether reassignment to another position is possible. The ADA requires that employers offer an available accommodation if one exists that does not pose an undue hardship, meaning a significant difficulty or expense.

The EEOC provides guidance but the Agreement, DOC Policies, and the Governor's Proclamation govern the decision in this case. The evidence shows there was no reasonable accommodation permitting Grievant to be physically present to perform her job that was not an undue hardship for DOC. DOC considered and appropriately rejected teleworking as an option for a CISA in food services. DOC sought to reassign Grievant, but the uncontroverted evidence shows employees with more seniority than Grievant were reassigned to available funded vacant positions. DOC followed EEOC guidance, as well as the Proclamation, the Agreement and DOC policies, during the accommodation process. It is unfortunate that a funded vacant position could not be found for Grievant, who was a valued and hardworking employee.

DOC did not deny grievant a bona fide interactive reasonable accommodation process, nor did DOC violate Articles 1, 8 or 28 when it did not provide a reasonable accommodation to Grievant for her medical condition.

Was the Employer required to keep Grievant in a pay status while making the final accommodation determination?

Article 8 of the Agreement, "Discipline," outlines forms of discipline and states the Employer will not discipline any permanent employee without just cause. Article 28 of the Agreement, "Fitness for Duty and Disability Separation," states in paragraph 28.3, "Grievance Process":

Disability separation is not a disciplinary action. An employee who has been involuntarily separated due to disability may grieve their disability separation in accordance with Article 9, Grievance Procedure.

The evidence shows Grievant was separated due to a disability based on her medical condition. This grievance was filed based on her involuntary separation due to disability in accordance with the Agreement. No evidence was presented that Grievant was subject to any disciplinary action. While Article 8.4 of the Agreement states employees will be placed on paid administrative leave when they are assigned to home during a disciplinary investigation, that provision does not apply in this case. There is no evidence of violation by the State of Article 8 of the Agreement by placing Grievant in an unpaid administrative leave status.

Article 28.1, "Disability Separation," states:

The Agency may separate an employee if the employee requests separation due to disability, or when the Agency has medical documentation demonstrating that the employee is unable to perform the essential functions of the employee's position due to a mental, sensory or physical disability which cannot be reasonably accommodated and when there is no other available position that the employee can perform with or without a reasonable accommodation. The disability separation will be conducted consistent with Agency policy.

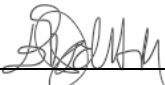
DOC Policy 840.100, "Disability Accommodation and Separation," states in Paragraph D and D.1:

During the process of evaluating accommodation options, if the employee is unable to perform the essential functions of their job class without accommodation, the employee may use accrued leave, shared leave if applicable, or authorized leave without pay.

Article 26.3 of the Agreement, "Permissive Leave without Pay," states leave without pay may be granted for several reasons, including, "Leave necessary to reasonably accommodate a disability as required by State or Federal Law." Nothing in the Agreement requires the State to keep Grievant in a paid status until it finishes the interactive process. The evidence shows that between October 18 to November 15, 2021, DOC did not violate any provisions of the Agreement when it placed Grievant on unpaid administrative leave.

CONCLUSION

Grievance denied. The Union did not present evidence demonstrating DOC violated any part of the Agreement when it placed Grievant on unpaid administrative leave from October 18 to November 15, 2021, and when it did not provide a reasonable accommodation to Grievant for her medical condition.



Emily Hall, Arbitrator
May 25, 2023