IN THE MATTER OF THE ARBITRATION BETWEEN

TEAMSTERS LOCAL UNION NO.117

UNION

AND

WASHINGTON STATE DEPARTMENT OF CORRECTIONS

EMPLOYER

OPINION AND AWARD

DOROTHY C. FOLEY, ARBITRATOR

FMCS Case No. 220316-04379

APPEARANCES:

For Teamsters Local Union No.117

Eamon McCleery, Esq.
Senior Staff Attorney
Teamsters Local Union No.117
14675 Interurban Ave. S., Suite 307
Tukwila, WA 98168
Eamon.McCleery@teamsters117.org

For Washington State DOC

Susan Sackett Danpullo, Esq.
Darcey J. Elliott, Esq.
Assistant Attorneys General
Office of Atty. General of Washington
7141 Clearwater Dr. SW, PO Box 40145
Olympia, WA 98604-0145
Susan.DanPullo@atg.wa.gov
Darcey.elliot@atg.wa.gov

JURISDICTION

The undersigned arbitrator was notified by the parties on May 6, 2022 that she had been selected to hear a grievance filed on behalf of Rosie Brister. Grievant had requested a religious exemption from the vaccine mandate applicable to all Washington state employees and an ensuing accommodation for that exemption. Grievant further asserted that she should have been allowed to remain in paid status while the employer determined if accommodation was feasible. The arbitration was conducted by Zoom on August 2 and 3, 2023 pursuant to the parties' collective bargaining

agreement, effective from July 1, 2019 through June 30, 2021. The record consists of testamentary and documentary evidence[1] in addition to the parties' post-hearing briefs.[2]

ISSUE

The parties agreed to the following statement of the issues:

Did the Department properly execute the CBA requirement and EEOC accommodation guidelines applicable to Ms. Brister's request for religious accommodation to not be vaccinated against Covid-19 in determining she could not be reasonable accommodated and separating her as part of the accommodation process. If not, what is the remedy?

AWARD

The grievance is denied. As delineated in detail ***infra,*** I find that the Union has failed to sustain its burden of proof that the Employer did not meet its obligations under the collective bargaining agreement and/or EEOC accommodation guidelines in denying grievant a reasonable accommodation and/or not allowing her to remain in paid status while making that determination. Rather, the Employer engaged in an individualized and interactive examination of the grievant's job duties, work area and available accommodations, ultimately concluding that none could be provided. As grievant's separation did not result from a disciplinary action there was no requirement under the collective bargaining agreement or EEOC guidelines that she be kept in paid status pending its resolution. Based on my denial of the grievance there is no need for me to retain jurisdiction after issuance of this award.

BACKGROUND

When the Covid 19 virus enveloped the workplace both management and employees scrambled, initially to understand it and secondly to respond to it. Not since the misnamed Spanish flu of 1918 had the world community been besieged by such a phenomenon. The State of Washington reported the first confirmed covid case in the United States on January 21, 2020, soon to be followed by many other states and many other numbers. What was apparent from the get go was that this virus could be deadly and could spread rapidly. Less apparent was a means of containment. By February 29,

[1] The 455-page transcript includes the testimony of Employer witnesses: Dianne Ashlock; Tina Burgess; Jessica Marcoe; and Todd Dowler; as well as Union witnesses Sarena Davis and Rosie Brister. The Employer entered approximately 37 exhibits and the Union entered 10 exhibits. In addition, the parties submitted nine joint exhibits.
[2] Briefs were initially due on September 15, 2023. The parties requested three subsequent extensions in the hopes of settlement. When those efforts proved fruitless the parties agreed to submit their briefs on January 5, 2024, thereby closing the record.

2020 Washington State Governor Jay Inslee declared a state of emergency and issued a proclamation[3] announcing that the Washington State Department of Health had instituted a Public Health Management Team to manage the public heath aspects of the covid crisis.

The employer, the Washington State Department of Corrections (DOC), has approximately 8,500 employees spread over 12 prisons containing 18,000 incarcerated individuals. Both pre and post covid contact between employees and incarcerated individuals appears to be on a routine basis and most employees were and are in regular contact with each other. As the virus spread, normal routines changed. The Employer began to effectuate whatever means the public health community was advocating to combat it. Initial steps were regular screening tests, personal protective equipment and social distancing. As those methods proved less viable than hoped, the Governor issued guidelines that included "stay home, stay safe," allowing as many employees as feasible to telework. But the demands of the department's mission soon required a return to the workplace for many.

Grievant Rosie Brister began working as an Office Assistant at the Stafford Creek facility in March of 2014. She advanced to a Medical Assistant Specialist 3 in 2015 and moved on to an Office Assistant 3 position at the Washington Correctional Center (WCC), a receiving center for all male incarcerated individuals. Grievant then advanced to a Correctional Records Technician (CRT) position working on the release side. WCC has a different assignment system from other DOC facilities. In most of the other facilities CRT's are assigned a specific caseload of incarcerated individuals. At WCC some CRT's are assigned to intake, others, like grievant, to release. In November 2020 grievant was promoted to a CRT Lead position. Her desk was located in an unpartitioned open area, within proximity of several other employees. One of her essential duties was to complete final audits of incarcerated individuals' files prior to their release.[4] The final audit is the last in a line of several audits conducted throughout an incarceration term. The auditing process begins with a minimal one-page sentence structure audit to review the sentence structure that was entered into the on-line system by the CRT's. Next, the CRT's do a top initial audit when incarcerated individuals are 120 days from their release date. Then a 60-day audit is performed by CRT's somewhere between 60 and 90 days of the scheduled release date. The release audit is followed by a final audit conducted by the Lead CRTs to ensure that all the paperwork matches what is in the on-line system, there are no errors to be fixed or adjustments to be made and is sent on to the releasing CRT. In conducting these audits CRT's are required to review court sentencing documents as well as jail credits, earned release credits and any documents from administrative hearings that add or subtract time from an individual's sentence in order to calculate a correct release date. To complete audits, CRT's need to access various sources, particularly an online data base called OnBase which holds many of the documents, and the central file that contains hard copies of all necessary documents that may or may not be in OnBase. The central file is maintained in a locked filing cabinet to prevent it from being removed from the facility,

Once grievant had been promoted to the lead position, she was tasked with supervising two Office Assistant 3's. She was expected to be available to these Office Assistant 3's to ensure that all appropriate procedures were being followed, including safety protocols. She was at times asked to step into other roles such as checking fingerprints, obtaining signatures and scanning documents, tasks

[3] Proclamation 20-05

[4] Approximately 1,800 releases are processed across the correctional system each year.

normally performed by OA 3's. Grievant was well versed in the functions of the release side, having tried to learn as many tasks as possible to enhance her chances of promotion.

Grievant had more flexibility as a CRT Lead to telework than many other records staff. In March of 2020 Dianne Ashlock, the Statewide Records Director and grievant's Appointing Authority[5], sent out an e-mail to all records staff addressing the ability to telework[6]. "Because the central file must stay in the facility, that greatly limits the telework options for auditing files and preparing for releases. However, there are other audits that could be completed if the staff have access to the DOC Network. Such as auditing OnBase documents to ensure duplicate document copies are deleted and documents are correctly indexed. Portions of the time calculation audits can be completed during telework, but the audit cannot be finalized until a review of the central file is completed."

Other schedule adjustments were also possible as both employer and employees sought to stay safe while fulfilling the department's mission. In May of 2020 grievant was able to secure a flexible schedule to oversee her children's academic progress. The schedule she worked out with Tina Burgess, her second level supervisor, allowed grievant to work non-regular hours, including 6 hours on Saturdays, to be able to complete a 40-hour work week. When school resumed in September grievant again sought a flexible work schedule. Her immediate supervisor, Gladys Hedges, approved it, allowing grievant to work from noon to 8:00pm four days a week and from 6:00am to 4:30pm on Friday. Seemingly this approval was for a 60-day period. When Burgess checked in with grievant to ascertain how this schedule was working grievant said she had found it "overwhelming" and had returned to her prior 7:30-4:00pm hours. Grievant noted another reason to return to her regular schedule was that she "…wanted to be more available to the team because immediates, and where we are, I felt like the team was overwhelmed when I came in late. It just seemed to hectic to jump in."[7] Burgess asked if it would help if grievant was allowed to telework a couple of days a week. Grievant replied that it would but she only had a laptop for home use and would need monitors as well as some additional equipment to effectively telework. Monitors were made available by the employer and grievant purchased other additional equipment at her own expense to facilitate working between office and home. Prior to the onslaught of Covid-19 virtually no records personnel teleworked.

Covid numbers waxed and waned, giving rise to hope and heartbreak. In late 2020 in response to rising covid cases, grievant requested that she be allowed to telework "indefinitely and/or put leave in for the days she would be required to be in the office."[8] Grievant cited the fact that she was a prime caretaker for her seriously ill mother-in-law who was at the end stage of life and for one of her children who was experiencing mental health issues. Were she not able to alter her schedule accordingly she would have to bear the expense of hotel living since she couldn't risk bringing the virus into her home. The employer granted her request rather than impose on grievant the additional expense of hotel bills. As at all points during this pandemic no one knew when or if life would return to normal. Grievant worked remotely from December of 2020 to mid-March 2021. During that period some of grievant's job duties had to be distributed to other employees who were in the office. Most importantly was supervising and training OA's and checking the central file to ensure that paper copies of all documents

[5] Appointing Authorities appear to have continued oversight over appointees.
[6] Er. EX. 6
[7] Er. EX. 8
[8] Er. EX. 9

were in the file. An accurate release date based on those documents is essential before incarcerated individuals are sent back into society. When she returned to the office grievant alternated her schedule with another person who had similar duties to ensure the continuity and integrity of the release system.

As Covid-19 progressed so did research into and formulation of effective vaccines. By the end of 2020 there were three vaccines developed, tested, approved and ready for market: Pfizer-BioNTech and Moderna, each requiring two injections given two weeks apart and Johnson & Johnson that required a single injection. Those vaccines were fully effective two weeks after completing the process. When the vaccines became available many people chose to go through the rigorous process of getting them, enduring confusing processes, inconvenient locations and long waits. Others were not so inclined. Covid-19 was mutating as public health management teams worked to contain it and by late summer 2021 the "Delta" variant, seemingly more contagious than its earlier version, was running rampant. By August 9, 2021 Governor Inslee issued another proclamation continuing the state of emergency and requiring all Washington State employees be vaccinated against the virus. In relevant part it provided:[9]

> WHEREAS, to further our individual and collective duty to reduce the spread of Covid-19 in our communities, I am requiring all employees, on-site independent contractors, volunteers, goods and services providers, and appointees of designated state agencies to be fully vaccinated against Covid 19 on or before October 18, 2021; and…

The order also contained the following:

1. Prohibitions. This order prohibits the following:

    a. 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.

    b. 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….

2. Exemptions from Vaccine Requirement.

    a. Health Care Providers and Workers 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

[9] Proclamation 20-14, entitled Covid-19 Vaccination Requirement, issued on August 9, 2021.

to a disability-related reasonable accommodation or a sincerely held religious belief accommodation to the requirements of this order as required by the laws noted above. As provided in the ADA, Title VII and the WLAD, individuals or entities for which Health Care Providers work as employees, contractors, or volunteers and State Agencies are not required to provide such accommodations if they would cause undue hardship….

b. (not relevant).

c. To the extent permitted by law, before providing a sincerely held religious belief accommodation to the requirements of this Order, individuals or entities for which Health Care Providers work as employees, contractors, or volunteers and State Agencies must document that the request for an accommodation has been made and the document must include a statement regarding the way in which the requirements of this order conflict with the religious observance, practice, or belief of the individual.

To clarify the Governor's proclamation, Human Resources Director Todd Dowler e-mailed all DOC employees, distinguishing between exemptions and accommodations that may be sought for either medical or religious reasons.[10] It stated than when an employee requests an exemption that request will be followed by an interactive process to determine if it meets the requirements outlined in the proclamation. If the exemption request is approved, the employee will continue the interactive process with Human Resources (HR) to determine if reasonable accommodation is available. A reasonable accommodation is one that allows the employee to perform essential job junctions while meeting the requirements for workplace safety.

A significant number of employees pushed back against the vaccine mandate. Human Resources received approximately 598 religious and 100-200 medical exemption requests. To cope with the numerous requests and ensuing tasks Dowler formed a team of HR professionals at DOC to conduct initial screenings and oversee the process, but the ultimate decision on exemptions and accommodations was Dowler's. Pre-Covid-19 religious exemption and/or accommodation requests were a rarity. HR developed a form for use for religious exemptions but employees weren't limited to it. Requests could be made by form, e-mail, or other written notice as long as it contained the basis for the exemption. Grievant completed such a form, noting that "vaccinations without consent are not congruent with my traditional indigenous spiritual values." [11] Grievant's religious exemption request was one of 553 granted. Of the religious exemptions granted, 58 employees were able to be accommodated.

Once a religious exemption is granted the employer "then reviews an employee's job classification, essential job functions, working environment, risk to the employee and others of performing job duties unvaccinated, DOC's business requirements for workplace safety, and considers

[10] Er. Ex. 11.

[11] Er. Ex. While grievant notes her indigenous heritage, the discrimination claim does not allege any ethnic or racial basis.

the agency's needs to determine whether a reasonable accommodation can be made for an employee in their current position without imposing an undue burden on the agency."[12] After initial review of grievant's job description Dowler determined that grievant couldn't be accommodated in her current position. The only other possibility was to find a vacant funded position to which grievant could be reassigned. There were 598 employees seeking accommodation based on religious exemptions. Fifty-eight received them. Those who could not be accommodated in their current positions had to be reassigned, vaccinated or separated from service. Reassignments were made based on seniority and ability to perform in open positions. When informed of his decision grievant asked to meet with Dowler, which she did twice. She reviewed her job description with him, noting that some tasks listed were not hers at all, others were not hers to perform routinely and her position was eligible for telework. Rather, she suggested several means of accommodation in her current position: full time telework as she had been able to do for significant periods of time in the past; partial telework combined with working on site during non-peak hours using personal protective equipment and social distancing; or isolating her on site with other unvaccinated employees. Dowler took this information into consideration, discussed it with local human resources personnel and grievant's Appointing Authority and determined that none of these suggestions were workable. The basis of his decision: aspects of grievant's position required that she be in the office to complete them; personal protective equipment and social distancing in the office were ineffective and sequestering her with other unvaccinated personal on site would endanger her and the other employees. Dowler then looked for positions to which grievant might be reassigned. But with only six and one half years of seniority all the positions available for reassignment were filled by more senior employees.

Grievant was notified[13] by letter of October 15, 2021 that she would be separated from service effective October, 19, 2021. The letter makes reference to an appeal right of this "discipline."[14] Grievant's separation from service was not based on discipline. Prior to Covid-19 there was no process to appeal a lack of religious accommodation. Dowler entwined some aspects of the disciplinary procedure with some aspects of the disability procedure and fashioned a process that allowed unaccommodated employees who were separated from service a right to reapply when/if the vaccine requirement was relaxed. Dowler's formula provided for an "investigative period" for religious accommodation requests. It was not intended to provide paid leave while the employer sought reassignment for the employee, a benefit employees facing discipline are permitted during an investigation period. The October date was extended as Dowler searched for open, funded positions that might have been newly vacated. Grievant used accrued annual leave to remain in paid status as the employer continued its search. No suitable position could be found and grievant was separated from service effective November 12, 2021.

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[12] Er. EX 24.

[13] Er. EX5,

[14] CBA, Article 8. In relevant part Article 8 provides:

8.4 **Home Assignment**

Any employee assigned to home as a result of a disciplinary investigation, and who would otherwise be available to work, will be placed and maintained on paid leave for the duration of the home assignment. Home assignment shall only be used when management determines the alleged misconduct is so serious In nature as to warrant the removal of the employee from work. The Appointing Authority shall state in Writing the nature of the alleged misconduct supporting the Home Assignment.

THE PARTIES POSITIONS

A. Union's Position

Two issues are presented for decision. The first is whether the Employer violated applicable laws and by inference the contract when it determined that there was no accommodation available and separated grievant from her employment. The second is whether the contract required the employer to place grievant on leave from October 18, 2021 until it terminated her employment on November 12, 2021. Underpinning the first issue is the union's assertion that the employer's process to find a suitable accommodation was not interactive enough and thus discriminatory. Underpinning the second issue is the claim that the failure to retain grievant in pay status was not mandated by the Governor's proclamation nor permissible under any contractual language.

The Grievant was separated from service because she wasn't willing to be vaccinated against Covid-19. When seeking an exemption from the requirement that all state employees be vaccinated she informed the employer that "vaccinations without consent are not congruent with my traditional indigenous spiritual values."[15] The employer accepted the *bona fides* of her religious beliefs and granted her an exemption. The second step in the employer's process was to provide her with reasonable accommodation, something it failed to do. As a result of that failure the employer violated Title VII of the Civil Rights Act of 1967 that makes it unlawful to "discharge any individual …because of such individual's religion." 42 U.S.C. Sec. 2000e-2(a)(1). It also violated the Washington Law Against Discrimination that makes it unlawful for an employer to "discharge or bar any person from employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, citizenship or immigration status. Honorably discharge veterans or military status, or the presence of any sensory, mental or physical disability in the use of a trained guide dog or service animal by a person with a disability." In violating these laws the employer violated the contractual language as those strictures are incorporated by inference. [16]

The union acknowledged its initial burden to present evidence of discrimination. It cited the employer's failure to provide reasonable accommodation without sufficient evidence of effort and/or hardship to support its claim. The burden then shifted to the employer to show that it had engaged in an interactive process with the grievant. Here is where the employer failed. It didn't conduct a properly individualized assessment to determine that any accommodation that it could provide would be unsuccessful or pose an undue hardship. The employer, through HR Director Dowler, didn't seem to

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[16] Article I Non-Discrimination

1.1 Policy Statement

Under this Agreement, neither party will discriminate against employees on the basis of age, sex, marital status, status as an honorable discharged veteran, disabled veteran or Vietnam era veteran, military status, race, sexual orientation, gender expression, gender identity, religious or political affiliation, creed, color, national origin, genetic information, or any real or perceived sensory, mental or physical disability. Bona fide occupational qualifications based on the above traits do not violate this section. The parties agree that sexual harassment will not be tolerated within the workplace,

understand that grievant's position description didn't reflect her actual job duties and labored under the false impression that grievant was still a CRT, not a CRT lead, when she was previously accommodated with full time telework. Nor did he consult her immediate supervisors as to the likelihood that she could again perform all the functions of her job under current circumstances. Moreover, he didn't respond specifically to her suggested accommodations or proffer any of his own.

Placing the grievant in non-pay status is not supported by contractual language that provides just the opposite, i.e., employees assigned to home but are otherwise available to work should remain in paid status. The grievant should not be responsible for being unavailable to work as it was the employer's choice to relieve her of all tasks, as some, if not all, could have been performed from home. Further, until there is a determination made that the employee cannot be accommodated she is available for work and should remain in paid status.

B. Employer's Position

The union bears the burden of proof in the instant proceeding to establish by a preponderance of the evidence that the employer discriminated against grievant. It hasn't and can't meet that burden. The Department of Correction did not fail to engage in an interactive process with grievant. It violated no provisions of the contract, EEOC regulations or the Washington Law Against Discrimination. Rather, it crafted an organized process involving several layers of professionals, from medical, to human resources, to Appointing Authorities to review each of the hundreds of requests for religious exemptions from the vaccine mandate and ensuing accommodation requests. It didn't limit employees to a simple one and done answer, instead allowing for repeated interaction with Human Resources Director Todd Dowler in an attempt to find an appropriate accommodation. Grievant was a recipient of that carefully crafted process.

Dowler reviewed grievant's request for a religious exemption from the vaccine mandate and granted it. Upon receiving her request for an accommodation he began with a review of her position description. He was aware that functions had changed significantly since the onset of the virus. He discussed her position with the human resources team and they concluded that she could not be accommodated in her current job. Grievant was informed of their decision. She was also told that her best hope of continued employment was with a reassignment. Upon hearing that she asked to meet with Dowler, which she did on two occasions. She told him that her position description was inaccurate in that it listed some tasks she didn't do and some she did on an infrequent basis. She noted her position description confirmed that it was telework eligible. She suggested accommodations to him that she felt were manageable: full time telework; part time telework with the remaining hours in the office at off peak times and with personal protective equipment; sequestration with other unvaccinated personnel. Grievant made Dowler aware of the fact that she had two extended periods in which she was allowed to telework full time. Dowler took these proposed accommodations back to the human resources team and discussed them specifically as well as with grievant's Appointing Authority Dianne Ashcroft. After consideration and discussion it was determined that none of grievant's proposed accommodations would work. Although grievant had been allowed significant periods of telework in the past that was when there were more people in the office available to cover the tasks she could not. Supervising the

OA 3's assigned to her and completing final audits with the requisite check of the central file were just two of the tasks that had to be covered by others in her absence. The fact that she was unvaccinated presented a threat to her and to the other employees that would be present in the workplace if she was allowed to work on site, even with personal protective equipment. The employer followed EEOC guidance when making its religious accommodation decisions, including those affecting grievant.[17]

Grievant was asked if she would accept reassignment. She agreed and available jobs were considered. An initial search revealed that either those jobs were in an area outside her expertise or they were filled by people more senior to her. Nonetheless, Dowler continued his search for a suitable reassignment. Although grievant had been informed that her last day would be October 19, she was allowed to use leave to remain in paid status while Dowler continued his search. But the numbers proved overwhelming, with only 58 employees of the 598 who had requested religious exemption and accommodation being allowed to remain in their current or placed in other funded positions. Grievant was informed that her last day in paid status was November 12, 2021. She used annual leave for the period between October 19 and November 12, 2021.

The employer had no contractual obligation to provide grievant with paid administrative leave during the period it searched for accommodation and/or reassignment for her. The claim that the grievant should be entitled to the same administrative leave accorded employees who are subject to disciplinary remands to home is without merit. Discipline as reflected in the contract is not the same as unavailability to do the job. In providing for an investigative process the employer tried to fashion an effective means to allow employees due process and not separate them from service while it sorted through the numerous requests for accommodation. It did not intend, and did not engage in, any collective action to create a new contractual entitlement to administrative leave.

DISCUSSION

The grievant was separated from service when the employer couldn't find reasonable accommodation for her. The union claims the employer didn't try hard enough, thus violating the contract as well as state and federal laws. The evidence shows otherwise. When it became apparent that Covid-19 was virulent and fleet both Washington State and the Department of Corrections formed health care teams to advise on maintaining personal and public safety. Initial suggestions like wearing personal protective equipment and social distancing proved ineffective. Newly developed vaccines were

[17] Er. Ex. 37. If an employer demonstrates that it is unable to reasonably accommodate an employee's religious belief, practice or observance without an "undue hardship" on its operations then Title VII does not require the employer to provide the accommodation. 42 U.S.C. Sec.2000e(j). The Supreme Court has held that requiring an employer to bear more than a "de minimis" or a minimal cost to accommodate an employee's religious belief is an undue hardship. Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer's business – including, in this instance, the risk of the spread of Covid-19 to other employees or to the public.

Courts have found Title VII undue hardship where, for example, the religious accommodation would violate federal law, impair workplace safety, diminish efficiency in other jobs, or cause co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work.

deemed the most effective means of protection and strongly endorsed by the health care teams. Based on that medical/scientific assessment Washington State Governor Jay Inslee mandated that all state employees be vaccinated unless exempted on medical or religious grounds. Employees sought exemptions in overwhelming numbers. There were approximately 600 requests for religious exemptions and between 100-200 for medical exemptions, to be resolved between August 9 and October 18, 2021. Religious exemptions were routinely granted based on employee statements. Accommodations were much more difficult to find.

Todd Dowler, Department of Corrections Human Resources Director, set about assembling a team of about 20-25 individuals to review these requests. Team were composed of both department and local level human resources personnel, Appointing Authorities and managers. They sorted through exemption requests, examined job descriptions and locations, made recommendations and passed them on to Dowler who made the final decision. Grievant was granted an exemption on religious grounds. She then requested accommodation. When Dowler reviewed her request, including her job description, location and the team's recommendations, he concluded he could not accommodate her in her current position. Grievant asked to meet with Dowler, which she did twice. They discussed her position description. She told him it wasn't accurate, that it included tasks that were not hers, and some that she only performed occasionally but that it was deemed telework eligible. She discussed with him her prior telework experience, noting that she had successfully completed all the functions listed in her position description while teleworking. Dowler reviewed this information with the accommodation team and again determined that she could not be accommodated in her current position. Grievant suggested several accommodations: full time telework; part time telework coupled with on-site work wearing personal protective equipment; and on-site sequestration with other unvaccinated employees. Dowler again consulted with the team and found none of those suggestions to be feasible.

This was no one and done process. Grievant had ample opportunity to discuss her position and proposed accommodations with the employer. The fact that the employer did not accept her proposals and was not able to provide others, including reassignment, does not establish discrimination. Having examined the grievant's suggestions it is apparent they're inadequate for the following reasons.

A. <u>Eligibility Doesn't Establish Entitlement</u>

The union argues that the grievant's position description states it's telework eligible, that she previously teleworked for substantial periods of time and that no deficiency was found in her work product. Assumedly then she should be granted full time telework. What is omitted in this argument is that when she teleworked full time several of her essential tasks were assumed by other employees. Supervising the OA3's on a daily basis was overseen by others. Physically checking the central file was done by others. That was possible pre-vaccine mandate when there was a nearly normal number of employees in the office. After the vaccine mandate there were not. Yet, even with coverage by other employees there were concerns. Grievant returned to the office earlier than intended from a telework grant because she realized her team was having difficulty functioning without her. Apparently covering co-workers were not able to do both her job and theirs adequately. There is nothing in state or federal

law that requires the employer to accommodate an employee by reassigning his/her tasks to another if it creates undue hardship for the employer. Guidance provided by the Equal Employment Opportunity Commission speaks to this issue of undue hardship:[18]

> Courts have found Title VII undue hardship where, for example, the religious accommodation would violate federal law, impair workplace safety, diminish efficiency in other jobs, or cause coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work.

Grievant claimed to have developed a method where she could cross check other sources of information to make sure that the on-line information correlated with the paper documents in the central file, obviating the need to do so physically. That may or may not be accurate. What is apparent is that the employer has a process that it felt assured accuracy. There is nothing in the contract that gives grievant license to substitute her own process for the employer's. In fact, the contract's management's rights clause reserves that function to the employer, stating among other rights:

> To determine, the employer's mission, strategic plan, policies and procedures;…plan, direct, control and determine the operations or services to be conducted by employees;…determine the size, composition and direct the workforce; …hire, assign, reassign, evaluate, transfer, promote or retain employees;…implement new or improved methods, equipment or facilities;…determine reasonable performance requirements, including quantity and quality of work;…take any and all actions as may be necessary to carry out the mission of the Department in emergency situations;…determine the method, technological means, number of resources and types of personnel by which work is performed by the Department; and establish, allocate, reallocate or abolish positions and determine the skills and abilities necessary to perform the duties of such positions.

B. <u>Personal Protective Equipment Is Insufficient to Assure Safety</u>

If full-time telework was not available Grievant suggested that she could be accommodated with part time telework coupled with on site work wearing personal protective equipment. A third option she suggested was sequestration with other unvaccinated employees wearing personal protective equipment. The union has asserted that the employer failed to do a direct threat assessment in determining this was not a viable accommodation. The employer took note of the grievant's workspace, an open area with several other employees seated at desks in close proximity to hers and to each other. It considered the medical and scientific advice it was receiving from the public health management teams. By the summer of 2021 the Delta version of the virus was rampant and it was clear that personal protective equipment and social distancing were not sufficient to slow, much less contain, it. Based on

[18] Er.EX 37.

these considerations Dowler made a decision that allowing grievant to work on site while unvaccinated would be a danger to herself and pose a direct threat to others.

> Direct threat means 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. The determination that an individual poses a direct threat shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job… In determining whether an individual would pose a direct threat the factors to be considered include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential will occur; and (4) the imminence of the potential harm. [19]

Grievant was allowed to use personal leave for the period of October 19 through November 12, 2021 while the employer continued its search for a fully funded position. Unfortunately, any open positions were awarded to employees with more seniority than grievant. The union claims that she should have been placed on administrative leave, pursuant to Article 8 of the contract. That article provides for administrative leave while an employee is awaiting the results of a disciplinary investigation. Here, there was no disciplinary action. The process fashioned by Dowler borrowed an investigative action that provided both a right to reapply when the vaccine mandate was lifted and the ability to remain in paid status while awaiting the results of the investigation. Nothing in the contract requires the employer to pay the grievant for time not worked.

CONCLUSION

The union has presented no evidence of discrimination against the grievant or that any provision of the contract or state or federal law was violated by the employer's inability to provide an accommodation. Therefore, the grievance is denied.

Dorothy C. Foley
Arbitrator

February 6, 2024

[19] Jt. Ex.9