

BEFORE STEPHEN DOUGLAS BONNEY, ARBITRATOR

In the Matter of the Arbitration Between

STATE OF WASHINGTON,
DEPARTMENT OF CORRECTIONS,

Employer,

and

TEAMSTERS LOCAL UNION No. 117,

Union.

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FMCS Case No. 220323-04584
(Reasonable Accommodation)

Appearances:

For the Agency: Darcey J. Elliott, Assistant Attorney General

For the Union: Eamon McCleery, Senior Staff Attorney

OPINION & AWARD

I. Introduction

This case involves a dispute over whether the Washington Department of Corrections (DOC or Department) acted in compliance with the collective bargaining agreement (CBA) and the law when it granted Michelle Edwards' (grievant) request for an exemption from the Governor's COVID-19 vaccine mandate and transferred her to a job in another bargaining unit.

At the parties' election, I heard this case by videoconference on February 21, 2023.¹ At the hearing, the parties had a full and fair opportunity to introduce evidence and to call, examine, and cross-examine witnesses. Following the hearing, the parties submitted written briefs by email. I received the briefs on May 8, 2023, thus closing the hearing record in this case.

II. Stipulated Issue

Did the Department violate Articles 1, 8, and 28 when processing Grievant's request for reasonable accommodation due to her medical condition and when reassigning her as accommodation? If so, what is the remedy?

¹ The parties scheduled two days for the hearing, February 21 and 22, but, because the parties' experienced lawyers presented their cases efficiently, we completed the hearing in one day.

III. Findings of Fact

The DOC operates the correctional system in the State of Washington. Specifically, the DOC manages the State's prisons and its community corrections systems. Teamsters Local Union No. 117 (Teamsters or Union) represents a bargaining unit consisting of various classifications of DOC employees, and the Union and the DOC are parties to a CBA. At least one other union – specifically the Washington Federation of State Employees – represents other DOC employees in a separate bargaining unit.

In late 2019, a novel coronavirus known as SARS-CoV-2 began infecting people around the world. The disease caused by the virus is known as COVID-19. On January 21, 2020, Washington State reported the first confirmed case of COVID-19 in the United States. In late February 2020, Washington Governor Jay Inslee declared a state of emergency. Eventually, the World Health Organization along with federal and state public health authorities in the United States recognized that we were in the beginning stages of a global pandemic. By mid-March 2020, schools, sporting events, offices, restaurants, and many other workplaces and businesses throughout the United States began shutting down in response to the directives of public health authorities. Workers who were able to do so started working from home. But essential workers bravely remained at work exposed to the virus and at risk of infection, illness, and at worst death.

Because the virus is easily transmissible through respiratory fluids, prisons and other congregate settings are particularly vulnerable to outbreaks of COVID-19. In May 2020, the first DOC correctional officer and the first DOC inmate died of the virus. Through the date of the hearing in this case, four DOC employees and seventeen inmates have died of COVID-19.

Over the course of the pandemic, the DOC implemented a wide range of measures designed to slow the spread of the disease and protect employees and inmates alike. For instance, in October 2020, DOC implemented a serial testing program for all employees and inmates. The

DOC also implemented a mask mandate, installed plastic barriers, cut off visitation, and imposed many other measures.

Vaccines first became available to health care workers in December 2020, and vaccines became widely available for all members of the public by spring or summer 2021. In the spring and early summer of 2021, as vaccination rates picked up and the infection rate seemed to subside, a period of relief set in. In July 2021, however, the Delta variant began spreading widely, raising infection rates, hospitalizations, and deaths above the rates seen in the early days of the pandemic.

In light of the Delta surge, Governor Inslee issued his vaccination mandate on August 9, 2021, which required all state employees to be vaccinated unless they obtain a medical or religious exemption. The mandate prohibits unvaccinated state agency employees, among others, from working after October 18, 2021. On August 10, 2021, the DOC issued a memorandum to all staff announcing the mandate and describing the process for requesting a religious or medical exemption.

At the time Governor Inslee issued the vaccine mandate, the grievant worked for Correctional Industries at the Monroe Correctional Complex (MCC) in Monroe, Washington, as a Correctional Industries Supervisor Assistant (CISA). In that job, the grievant assisted inmates with job training opportunities to prepare them for reentry into the workforce upon release. Specifically, the grievant worked in the commissary and the optical shop at MCC. The optical shop makes glasses for the Washington Department of Health & Human Services, and the grievant worked closely with inmates who were learning their jobs and also performed administrative tasks in support of the optical shop. In late August or early September, the MCC

optical shop shut down and the grievant moved back to the commissary, which distributes food, toiletries, and other goods to inmates throughout the DOC system.

The grievant has a history of anaphylactic reactions to vaccinations. Thus, on August 12, 2021, she visited her doctor and obtained a letter in support of her need for a medical exemption from the vaccine mandate. The grievant submitted her exemption request on August 16, 2021. The grievant received no response to her exemption request. So, on September 16, 2021, she resubmitted the request and inquired about its status.

On September 17, the grievant received a letter granting her request for a medical exemption. After advising the grievant that her request for an exemption from the vaccination requirement was granted, the letter explained that the grievant could not work in her past job:

In considering your request for exemption, DOC HR evaluated the essential functions of your position as well as business requirements for workplace safety. Performing the essential functions of your position unvaccinated poses a threat to the health or safety of yourself and others in the workplace.

The Center for Disease Control (CDC) and the Washington State Department of Health (DOH) have determined that COVID-19 is highly contagious and potentially fatal, especially to those who are unvaccinated. In recent months DOH reports COVID-19 cases and hospital admissions continue to rise due to the Delta variant and vaccination is critical to manage disease transmission. On August 24, 2021, a CDC study found that unvaccinated people were nearly five times more likely to be infected with Covid than vaccinated people.

These facts manifestly support a finding that a significant risk of substantial harm is posed by having someone present in the workplace who may be infected with COVID-19, with or without symptoms.

Un. Ex. 6.1. With respect to the DOC's duty to provide the grievant with a reasonable accommodation, the letter stated as follows:

After carefully reviewing your job classification, essential functions, and working environment, we have determined the only reasonable accommodation we can offer is the possibility of a reassignment. There are no other accommodations for your position available which sufficiently mitigate or eliminate the risk associated with having an unvaccinated employee performing the essential functions of your position.

The DOC made this decision without talking to the grievant and without considering her individualized job duties or needs. In fact, the DOC made the decision based on the faulty assumption that the grievant was still working in the optical shop. The grievant brought that mistake to the attention of the DOC in an email, but she never received a response.

In the letter dated September 17, 2021, the DOC also requested a copy of the grievant's current resume, which the grievant sent as requested. In a letter dated October 15, 2021, the DOC offered the grievant a full-time telework option as a Correctional Records Technician. Because funding for that position was dependent on DOC caseloads, the letter further advised that the position was temporary and subject to review at least every sixty days. The grievant accepted the reassignment offer and worked in that job until it was eliminated on May 31, 2022. At that point, the DOC separated the grievant from employment. The CRT position was in a bargaining unit represented by the Washington Federation of State Employees rather than the Teamsters.

IV. Positions of the Parties

Union: The Union's overarching theory of the case is that the DOC violated the CBA, the Americans with Disabilities Act (ADA), and the Washington Law Against Discrimination (WLAD) by improperly assessing whether the grievant posed a direct threat and by failing to provide the grievant an individualized interactive accommodation process. The Union brief contains the following succinct summary of its argument:

In sum, the evidence shows that the Employer failed to engage the grievant in a legitimate interactive process. It provided no opportunity for her to present her own ideas for potential reasonable accommodations. It provided no evidence to explain what reassignment position it was considering or why other positions were rejected. It never provided grievant with an opportunity to suggest other possible reassignments, even though the record indicates that positions in non-congregate settings were available.

As a result of these violations, the Union argues that "the Arbitrator should award full reinstatement along with an award of back pay, benefits, and interest."

Employer: The Employer's primary argument is that "DOC acted within its authority and in compliance with the CBA throughout the accommodation process." The Employer further argues that "DOC reasonably accommodated Ms. Edwards with reassignment to another position, which eliminates the need for DOC to prove undue hardship in this case." Specifically, the DOC maintains that it "completed a proper accommodation process, ultimately determining that reassignment to a vacant, funded position was the only reasonable accommodation available for Ms. Edwards." According to the employer, such a reassignment was proper because "DOC determined that if Ms. Edwards continued working in her CISA position unvaccinated, she could infect others with the virus, leading to significant difficulty or expense for DOC to continue efficient operations within the prison system." The DOC also contends that neither Article 8 (Discipline) nor Article 28 (Disability Separation) applies to this case. First, the DOC never disciplined the grievant. Second, the grievant's separation from employment occurred on May 31, 2022, long after the grievant transferred out of the Teamsters' bargaining unit. For those reasons, the "DOC respectfully requests that the Arbitrator deny Ms. Edwards' grievance."

V. Discussion & Analysis

The Union bears the burden of proving, by a preponderance of the evidence, that the Employer violated the CBA or the law. Under that test, the party that advances the more convincing evidence and arguments prevails.

Although the Union never really argues that the DOC violated either Article 8 or Article 28 of the CBA, I must address those articles because they appear in the stipulated issue. The DOC did not discipline the grievant. Thus, the DOC did not violate Article 8. Moreover, the grievant was not separated from employment until May 31, 2022, long after she transferred out of the Teamsters' bargaining unit and into the Washington Federation of State Employees' bargaining unit. Thus, there was no violation of Article 28.

This case hinges on Article 1 of the parties' CBA. Article 1, § 1.1 provides, in pertinent part, that "[u]nder this Agreement, neither party will discriminate against employees on the basis of . . . any real or perceived sensory, mental or physical disability." Governor Inslee's vaccine mandate proclamation specifically referenced the reasonable accommodation requirements of the ADA and the WLAD. Jt. Ex. 107, p. 4. Thus, I find that the CBA's anti-discrimination provision requires the DOC to abide by the ADA and the WLAD in terms of granting exemptions from the vaccine mandate and granting reasonable accommodations.

In 2021, the EEOC issued technical guidance regarding "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws." It updated that guidance in 2022. With respect to mandatory vaccination programs like the one ordered by Governor Inslee, this guidance provides as follows:

Under the ADA, an employer may require an individual with a disability to meet a qualification standard applied to all employees, such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity as applied to that employee. . . . If a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a "direct threat" to the health or safety of the employee or others while performing their job. A "direct threat" is a "significant risk of substantial harm" that cannot be eliminated or reduced by reasonable accommodation.

To determine if an employee who is not vaccinated due to a disability 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. Such medical knowledge may include, for example, the level of community spread at the time of the assessment. Statements from the CDC provide an important source of current medical knowledge about COVID-19, and the employee's health care provider, with the employee's consent, also may provide useful information about the employee. Additionally, the assessment of direct threat should take account of the type of work environment, such as: whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with

other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.

If the assessment demonstrates that an employee with a disability who is not vaccinated would pose a direct threat to self or others, the employer must consider whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate that threat. Potential reasonable accommodations could include requiring the employee to wear a mask, work a staggered shift, making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees), permitting telework if feasible, or reassigning the employee to a vacant position in a different workspace.

As a best practice, an employer introducing a COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees that the employer will consider requests for reasonable accommodation based on disability on an individualized basis.

The DOC never conducted the required individualized assessment of whether the grievant posed a direct threat in the workplace or her present ability to safely perform the essential functions of her job. Instead, in the letter granting the grievant's request for an exemption from the vaccine requirement, the DOC admitted that it had made a generalized determination that "Performing the essential functions of your position unvaccinated poses a threat to the health or safety of yourself and others in the workplace." Even that generalized determination was flawed because the record shows that the DOC mistakenly believed that the grievant was still working in the optical shop in mid-September when, in fact, she had moved to a job in the commissary office that involved very limited contact with other people.

The DOC also failed to engage in the required interactive process in considering possible reasonable accommodations. Instead of engaging in such an interactive process, the DOC simply concluded that reassignment was the only available accommodation for the grievant's unvaccinated status.

The EEOC guidance provides that "[w]hen an employee asks for a reasonable accommodation, whether the employee is fully vaccinated or not, the employer should engage in

an interactive process to determine if there is a disability-related need for reasonable accommodation.” As noted above, moreover, the EEOC guidance lists a wide variety of possible reasonable accommodations, including “requiring the employee to wear a mask, work a staggered shift, making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees), permitting telework if feasible, or reassigning the employee to a vacant position in a different workspace.”

The DOC’s conclusions about the threat posed by unvaccinated employees and possible accommodations were based on the following:

The Center for Disease Control (CDC) and the Washington State Department of Health (DOH) have determined that COVID-19 is highly contagious and potentially fatal, especially to those who are unvaccinated. In recent months DOH reports COVID-19 cases and hospital admissions continue to rise due to the Delta variant and vaccination is critical to manage disease transmission. On August 24, 2021, a CDC study found that unvaccinated people were nearly five times more likely to be infected with Covid than vaccinated people.

Un. Ex. 6.1, September 17, 2021, letter. Although the Employer’s determination of direct threat and reasonable accommodations must be evaluated based on the medical knowledge available in the fall of 2021 and not based on current understandings of the virus, the DOC still failed to comply with the requirements of the ADA. Specifically, it failed to make an individualized assessment of the threat posed by the grievant’s performance of her job and it failed to engage in the required interactive process in determining the possible reasonable accommodations of the grievant’s disability (being unable to be vaccinated due to a medical condition).

As noted in the Union’s brief, other arbitrators considering the State’s generalized approach to accommodating employees who qualified for a medical or religious exemption from the vaccination mandate have also found violations of the State’s contractual and legal obligations. *See Washington Dept. of Fish & Wildlife*, PERC Case No. 134845-P-22 (Cavanaugh 2022); *Washington Dept. of Fish & Wildlife*, PERC Case No. 134851-P-22 (Marr 2022);

Washington Dept. of Fish & Wildlife, PERC Case No. 134848-P-22 (Diamond 2022). I find, similarly to Arbitrator Cavanaugh, that the Employer improperly applied a *per se* rule when it concluded unvaccinated employees would pose a direct threat in the workplace and when it decided that reassignment was the only possible reasonable accommodation for unvaccinated employees.

Having found a contractual violation, I must next consider the appropriate remedy. Because transferring the grievant to a job outside the bargaining unit without an individualized assessment of direct threat and without engaging in an interactive process regarding possible accommodations violated the CBA and the law, the Employer must make the grievant whole for all losses in her wages and benefits from the date of her transfer until the date on which the Employer complies with the requirements of the law to evaluate the issue of direct threat properly and to engage in an interactive process regarding possible reasonable accommodations. The Employer is ordered to begin that process immediately.² If the process results in a determination that the grievant does not pose a direct threat or that her unvaccinated status can be reasonably accommodated through masking, frequent testing, or other measures, including transfer to a currently available position, the Employer must reinstate the grievant to a job available in the Teamsters' bargaining unit.

AWARD

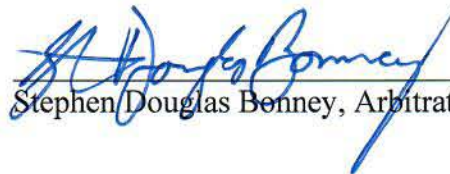
For the reasons set forth in the foregoing opinion, the grievance is sustained. As a remedy, the Employer shall:

² In the process of evaluating the direct threat question, the DOC must apply current medical and public health knowledge about the effects of vaccination on infections and disease spread. For instance, since the fall of 2021, it has become clear that vaccinations are not particularly effective in preventing the spread of disease because the vaccines do not provide life-long sterilizing immunity as does the measles vaccine, for instance. Instead, the immunity provided by the current COVID-19 vaccines wanes fairly quickly, although the vaccines continue to provide robust longer-term protection against serious disease and death. See <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/how-they-work.html>.

1. make the grievant whole for lost wages and benefits from the date of her transfer until the date on which the Employer complies with the requirements of the law to evaluate properly the issue of direct threat and to engage in an interactive process regarding possible reasonable accommodations;
2. immediately begin the process of evaluating the direct threat issue and the reasonable accommodation issue;
3. reinstate the grievant to a job available in the Teamsters' bargaining unit if that process results in a determination that the grievant does not pose a direct threat or that her unvaccinated status can be reasonably accommodated through masking, frequent testing, or other measures; and
4. restore the grievant's full seniority upon reinstatement.

I will retain jurisdiction until July 11, 2023, for the sole purpose of hearing and resolving any disputes the parties may have regarding the interpretation and implementation of this award.

Dated: May 12, 2023
Kansas City, Missouri


Stephen Douglas Bonney, Arbitrator