

**IN THE MATTER OF
GRIEVANCE ARBITRATION
BETWEEN**

NEPBA LOCAL 200, DOC CAPTAIN'S UNION

-AND-

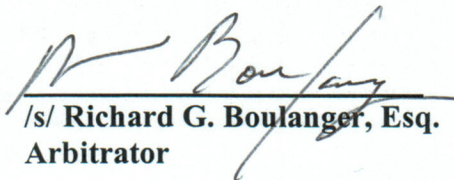
**MASSACHUSETTS DEPARTMENT OF
CORRECTION**

**AMERICAN ARBITRATION ASSOCIATION
CASE NO: 01-24-0005-9243**

AWARD

The Employer did not have just cause to suspend the grievant for five (5) and ten (10) days without pay, nor did it have just cause to terminate the grievant's employment. The grievant shall be forthwith reinstated to his position as Shift Commander at MCI Concord. The grievant shall also be forthwith made whole as to his seniority, years of service computation, all benefits, including health insurance benefits, and all compensation, including lost wages, less any interim earnings. Notice of the grievant's suspensions and his discharge, and documents related thereto shall be forthwith expunged from his personnel file. The arbitrator retains jurisdiction of the case for remedial implementation purposes only for a period of thirty (30) calendar days from the Award date.

Dated: 6/30/25


**/s/ Richard G. Boulanger, Esq.
Arbitrator**

**IN THE MATTER OF
GRIEVANCE ARBITRATION
BETWEEN**

NEPBA LOCAL 200, DOC CAPTAIN'S UNION

-AND-

**MASSACHUSETTS DEPARTMENT OF
CORRECTION**

**AMERICAN ARBITRATION ASSOCIATION
CASE NO: 01-24-0005-9243**

The grievance was heard virtually by Arbitrator Richard G. Boulanger, Esq. on January 28, 2025.

Massachusetts Department of Correction (DOC or Employer) was represented by Ms. Melinda Willis, Esq., Mr. Michael Rodriguez; Mr. Jeffrey Fisher; and Ms. Kristine Cavicchi were called as witnesses by the Employer.

NEPBA, Local 220, DOC Captains Union (Union) was represented by Mr. Thomas Horgan, Esq., Mr. Kenneth Whippen (grievant) was called as a witness by the Union.

Witnesses were sworn

The parties were given full opportunity to present evidence and make arguments.

The issue is as follows:

Did DOC have just cause to terminate Mr. Kenneth Whippen (grievant)?
If not, what shall be the remedy? (See **Findings and Opinion**)

I. COLLECTIVE BARGAINING AGREEMENT

- A. **ARTICLE 2:** **MANAGERIAL RIGHTS/PRODUCTIVITY**
- B. **ARTICLE 6:** **ANTI-DISCRIMINATION AND AFFIRMATIVE ACTION**
- C. **ARTICLE 14:** **PROMOTION AND TRANSFERS**
- D. **ARTICLE 19:** **SAFETY AND HEALTH**
- E. **ARTICLE 20:** **REASSIGNMENTS**
- F. **ARTICLE 22:** **ARBITRATION OF DISCIPLINARY ACTION**
- G. **ARTICLE 23:** **GRIEVANCE PROCEDURE**
- H. **ARTICLE 31:** **CONTAGIOUS DISEASE**

II. SUMMARY OF THE CASE

The grievant, a Captain, was suspended, and then terminated on December 28, 2021 for failure to be vaccinated against COVID 19, a requirement of the Governor's Executive Order 595.

DOC contends that it had just cause to suspend and terminate the grievant's employment for his failure to comply with Executive Order 595, as he had not received a religious exemption from the requirements of Executive Order 595.

The Union argues that DOC arbitrarily and capriciously denied the grievant's request for a religious exemption from Executive Order 595, and thereby discriminated against the grievant based on his religious beliefs, violating the collective bargaining agreement's Article 6 (**Anti-Discrimination and Affirmative Action**). Therefore, it did not have just cause to suspend, then terminate the grievant's employment.

The arbitrator ruled that the Employer wrongfully denied the grievant's request for a religious exemption from the COVID-19 vaccine, and his need for a reasonable accommodation, and thereby terminated the grievant without just cause.

III. FACTUAL BACKGROUND

The grievant has been employed by DOC for over thirty (30) years. He had obtained the rank of Captain, serving as the Shift Commander at MCI Concord before his termination. (See Joint Exhibits #10-#12.) On August 19, 2021, then Governor Charles Baker issued Executive Order 595, during the COVID 19 pandemic, requiring all Executive Office employees of the Commonwealth, including DOC employees, to “be vaccinated and maintain full COVID 19 vaccination as a condition of continued employment.” (See Joint Exhibit #14.) DOC as an agency, is included within the Executive Office Of Public Safety and Security (EOPSS), an Executive Office of the Commonwealth of Massachusetts. In connection with Executive Order 595, the Commonwealth’s Human Resources Division (HRD) issued a COVID 19 Vaccination Verification Policy to Department Agencies, including DOC, on October 15, 2021, and thereafter issued Compliance Guidance. (See Joint Exhibits #15-#17.) It required Executive Department employees to be vaccinated, or exempt based on medical or religious grounds. (See Joint Exhibit #15.)

On September 30, 2021, the grievant completed a DOC COVID 19 Vaccination Religious Exemption Request Form. (See Joint Exhibit #1.) On October 13, 2021, the grievant was interviewed by a COVID 19 Interactive Panel comprised of Ms. Kristine Cavicchi, Mr. Jeffrey Fisher, and Mr. Lawrence Macchione. The panelists asked the grievant pre-selected questions regarding his request for a religious exemption, and employment accommodations. (See Employer Exhibit #1.) The panel took notes of the grievant’s answers. (See Employer Exhibit #2.) The panel did not make any findings or recommendations for granting or denying the grievant’s religious exemption request. Ms. Cavicchi assembled the COVID-19 Panel’s

notes, and provided them to an EOPSS Team. On November 29, 2021, the grievant's religious exemption request was denied by the "EOPSS/DOC COVID 19 Team." (See Joint Exhibit #2.) Consequently, the grievant was advised that he must show proof of vaccination by December 2, 2021. (See Joint Exhibit #2.) The grievant failed to do so, and was suspended for five (5) days without pay on December 3, 2021. (See Joint Exhibit #3.) On December 10, 2021, a pre-disciplinary hearing was held per MGL c.31 §41 to ascertain whether the grievant was in compliance with Executive Order 595, and the Vaccine Verification Policy. (See Joint Exhibit #4.) As a result of the hearing, it was determined that the grievant was not in compliance with Executive Order 595, and the Vaccine Verification Policy. Therefore, the grievant was suspended for ten (10) working days without pay. (See Joint Exhibit #5.) As part of the ten (10) day suspension order, the grievant was warned that if he did not comply with Executive Order 595, he would be terminated on December 24, 2021. (See Joint Exhibit #5.) On December 13, 2021, the grievant submitted his retirement paperwork. (See Union Exhibit #1.) On December 28, 2021, the grievant was terminated for failing to comply with Executive Order 595. (See Joint Exhibit #6.)

The Union grieved the five (5) and ten (10) day suspensions, and the grievant's termination. (See Joint Exhibit #7.) DOC denied the grievance. (See Joint Exhibit #9.) The grievance was not resolved during the course of the parties' grievance procedure, and it was appealed to arbitration.

IV. SUMMARIES OF THE PARTIES' ARGUMENTS

A. EMPLOYER:

The Employer argues that it had just cause to terminate the grievant's employment as it properly and reasonably rejected the grievant's request for a religious exemption from the COVID-19 vaccination mandate. Moreover, the Union did not uphold its burden of demonstrating that the grievant could have been reasonably accommodated by the Employer. It is a non-delegable right of the Employer to determine whether or not it could reasonably accommodate an employee. The grievant was on notice of the Employer's policy regarding the COVID-19 vaccination mandate, vaccination mandate exemption policies, and resulting discipline if an exemption was not granted. Termination was consistent with the disciplinary notice in the policy that the grievant received, his discharge complied with the Employer's impact bargaining with the Union, and it is not subject to review.

The Union failed to uphold its burden of demonstrating that the Employer suspended or terminated the grievant based on his religious beliefs. In the instant case, the Union cannot establish the prima facie elements of discrimination. Although the grievant objected to taking the COVID-19 vaccine due to his belief that its development was based on fetal cell lines, he had previously taken Lisinopril, a medication developed using fetal cell lines undermining the sincerity of his beliefs. Furthermore, the Union cannot prove disparate treatment.

If it is determined that the grievant satisfied his burden as to his sincerely held religious beliefs, which he did not, the Union did not demonstrate that the Employer failed to reasonably accommodate the grievant's religious beliefs. As an unvaccinated individual, the grievant posed a direct threat of transmission of the COVID-19 virus to incarcerated individuals, and to his colleagues. As the grievant refused to take the COVID-19 vaccine, and his request for an

exemption was reasonably denied, the Employer had just cause to discipline him, including his termination from employment. Moreover, the grievant is not entitled to any make whole relief because by retiring, he voluntarily removed himself from the workplace, failing to mitigate any damages he had incurred as a result of his termination. As the Employer had just cause to terminate the grievant's employment, the grievance should be denied for all of the reasons specified above.

B. UNION:

The Employer failed to engage in the mandatory interactive process with the grievant and the Union concerning his exemption request, and it was unable to establish an undue burden if it granted the exemption. The Employer's three (3) member panel that interviewed the grievant by phone relative to his request for an exemption did not make any findings regarding the sincerity of the grievant's religious beliefs, or if there was a reasonable accommodation that could have been made by the Employer. The phone call interview did not satisfy a good faith interactive process required by law.

The Union contends that the grievant was constructively discharged even though he had submitted retirement documents prior to the effective notice of his actual termination because he was forced to retire when the Employer refused to grant a religious exemption to him from the COVID-19 vaccination mandate. When the Employer terminated the grievant, it breached Article 6 of the parties' collective bargaining agreement, Title VII and M.G.L. c.151B. The Employer breached Article 6 because it discriminated against the grievant on the basis of his Christian religion which prevented him from receiving the COVID-19 vaccination due to its use of fetal cell lines in the development and testing of the vaccine. The Employer also violated M.G.L. c. 151B by discriminating against the grievant because of his religious beliefs. The

Employer transgressed Title VII because it failed to accommodate the grievant's sincerely held religious beliefs. The Employer could have reasonably accommodated the grievant's religious beliefs without an undue hardship. The Employer presented no evidence of undue hardship to itself.

The grievance should be upheld for all of the reasons specified above. The grievant should be made whole including reinstatement to his former position, full restoration of seniority, benefits, service and back pay, and any other relief deemed proper.

V. FINDINGS AND OPINION

A. ISSUE

The Employer submitted the following issue:

Did the Department of Correction have just cause to suspend and terminate the grievant?

The following proposed issues were advanced by the Union:

Issue #1:

1. Did the Employer violate Article 6 of the CBA when they denied the Grievant's request for a religious exemption from the COVID-19 vaccination on November 19, 2021?
2. If so, what shall the remedy be?

Issue #2:

1. Did the Employer have just cause to suspend the Grievant for 15 days without pay and issue him a termination letter on December 28, 2021?
2. If not, what shall be the remedy?

Based on the record evidence and the arguments of the parties, including those related to the issue, the following statement of the dispute captures the essence of the parties' disagreement:

1. Did the Department of Correction have just cause to issue five (5) day, and ten (10) day unpaid suspensions to the grievant, followed by termination of the grievant's employment?
2. If not, what shall be the remedy?

B. MERITS

1. JUST CAUSE STANDARD

The grievant refused to be vaccinated against COVID-19, and received five (5) and ten (10) day unpaid suspensions, and then he was terminated. (See Joint Exhibits #3-#6.) The just cause standard must be applied to DOC's allegations against the grievant that led to his discipline based upon the parties' proposed issues, and the following terms of Article 22

(Arbitration of Disciplinary Action) which provide as follows:

Section 1

No employee who has been employed by the Commonwealth for nine (9) consecutive months or more shall be discharged, suspended, or demoted for disciplinary reasons without just cause. An employee who severs his/her employment with an Agency must serve an additional probationary period upon re-employment whether in the same or a different job title or the same or different agency. (See Joint Exhibit #8.)

On December 28, 2021, the grievant was **terminated** for the following reasons:

On August 19, 2021, Governor Baker issued Executive Order 595 requiring all Executive Department employees to provide proof of COVID-19 vaccination on or before October 17 2021 as a condition of continuing employment. This action was taken to promote and ensure the health and safety of Massachusetts workers and residents. As you know, employees who fail to comply with Executive Order 595 and the Vaccination Verification Policy are subject to progressive discipline, up to and including termination.

On December 3, 2021, you were served with a five-day suspension for failing to be in compliance with Executive Order 595 and informed of the consequences of continued non-compliance. On December 10, 2021, a pre-disciplinary hearing for all contemplated discipline for non-compliance was held and, as a result, a ten-day suspension was issued on December 10, 2021. In this letter you were informed that if you failed to provide documentation of compliance by the end of your suspension, you would be subject to termination. Since you have failed to provide that documentation, your employment is terminated effective **December 24, 2021**.

Please be advised that you must make arrangements with your Superintendent's or Division Head's office to return all state-issued property. Retention of such property is unauthorized and may be a violation of state laws.

Pursuant to Mass. Gen. Laws c. 31, §§ 41-45, you may appeal this employment termination action to the Civil Service Commission within ten (10) days of the receipt of this notice. Please consult the Commission's website at www.mass.gov/csc for further information about the appeals process.

Enclosed you will find information regarding unemployment compensation benefits through the Massachusetts Department of Unemployment Assistance. All decisions regarding eligibility for benefits are made by that agency. You can expect a separate benefits status letter that will outline the status of your benefits upon termination. The letter will include information about your eligibility for Consolidated Omnibus Budget Reconciliation Act (COBRA) continuation of

group health coverage. (See Joint Exhibit #6.)

Therefore, pursuant to the just cause standard, the Employer must prove by a preponderance of the evidence that the grievant refused to be vaccinated against COVID-19, that his request for a religious exemption therefrom was not unreasonably denied, and that there was no reasonable accommodation for the grievant in light of his unvaccinated status. If the Employer satisfies its threshold burden, then it must establish that termination was that level of discipline commensurate with the grievant's alleged misconduct.

The Employer relies on the terms of Article 2 (**Managerial Rights/Productivity**) for the proposition that it has the authority to promulgate and implement reasonable policies, as here, to protect the safety and health of its employees and incarcerated individuals. Article 2 includes the following terms:

Section 1

Except as otherwise limited by an express provision of this Agreement, the Employer shall have the right to exercise complete control and discretion over its organization and technology including but not limited to the determination of the standards of services to be provided and standards of productivity and performance of its employees; establish and/or revise personnel evaluation programs; the determination of the methods, means and personnel by which its operations are to be conducted; the determination of the content of job classifications; the appointment, promotion, assignment, direction and transfer of personnel; the suspension, demotion, discharge or any other appropriate action against its employees; the relief from duty of its employees because of lack of work or for other legitimate reasons; the establishment of reasonable work rules; and the taking of all necessary actions to carry out its mission in emergencies.

Section 2

Delivery of services to the public in the most efficient, effective, and productive manner is of paramount importance to the Department and the Union. Such achievement is recognized to be a goal of both parties as they perform their respective roles and meet their responsibilities.

Section 3

It is acknowledged that during the negotiations which resulted in this Agreement, the Union had the unlimited right and opportunity to make demands and proposals

with respect to all proper subjects of collective bargaining. Therefore, for the life of this Agreement, this Agreement shall constitute the total agreement between the parties, and the Union agrees that the Employer shall not be obligated to any additional collective bargaining.

Section 4

Any prior agreement covering employees in this bargaining unit shall be terminated upon the effective date of this Agreement and shall be superseded by this Agreement. (See Joint Exhibit #8.)

While the Employer has the right to promulgate reasonable work rules, its rights are subject to other contract provisions.

According to the Employer, pursuant to the provisions of Article 19 (**Safety and Health**), it is required to provide a safe and wholesome working environment, requiring vaccination of employees against COVID-19. In pertinent part, Article 19 includes the following terms:

Section 1

A. The Employer agrees to provide a safe, clean wholesome surrounding in all places of employment.

B. Each Department Head shall issue instructions to all supervisory personnel to carry out the provisions of this Article.

C. When an employee reports any condition which he/she believes to be injurious to his/her health to the administrative head of a work location, the administrative head shall correct the situation if within his/her authority, or shall report said complaint to his/her supervisor.

D. A copy of the provisions of this Article shall be conspicuously posted in each work location.

E. In all new places of employment, where the Union alleges that the air quality is inferior, the person in charge of the location will make reasonable efforts to have air quality checked. If the air quality is found to be sub-standard, the person in charge of the location shall make reasonable efforts to improve it.

F. Whenever temperature inside any work location is unusually hot or cold, the person in charge of such work location shall immediately contact the person responsible for the building to determine the cause and probable length of time necessary to correct the problem.

G. The Employer will make every reasonable effort to abate asbestos containing materials as recommended by the Division of Occupational Hygiene. Where such clean-up is not possible, the Employer will make every effort to avoid making work assignments which will unduly expose employees to known hazardous materials.

H. Pregnant employees who work in conditions/situations deemed hazardous or dangerous to the pregnancy by the attending physician may request a temporary reassignment within their job description or a comparable position, and may be reassigned within two (2) weeks of notification for the duration of the pregnancy. Upon request by management, the employee will provide medical evidence. Such work assignments shall be determined by the Appointing Authority or her/his designee. This request must be made in writing to the Department.

I. Grievances involving the interpretation or application of the provisions of this Article may be processed through Step III of the grievance procedure set forth in Article 23, but may not be the subject of arbitration. (See Joint Exhibit #8.)

While the Employer agreed to provide and maintain a sanitary work environment, it must satisfy that obligation without running afoul of other contract terms.

When it refused the grievant's request for a COVID-19 vaccination exemption, the Union contends that the Employer violated the following provisions of Article 6 (**Anti-Discrimination and Affirmative Action**):

Section 1

The Employer and the Union agree not to discriminate in any way against employees covered by this Agreement on account of race, religion, creed, color, national origin, gender, sex, sexual orientation, age, ethnicity, mental or physical disability, union activity, gender identity, military or veteran status.

Section 2

The Union and the Employer agree that when the effects of employment practices, regardless of their intent, discriminate against any group of people on the basis of race, religion, creed, color, age, sex, national origin, or mental or physical disability, gender identity, military, or being a Vietnam Era Veteran, specific positive and aggressive measures must be taken to redress the effects of past discrimination, to eliminate present and future discrimination, and to ensure equal opportunity in the areas of hiring, upgrading, demotion or transfer, recruitment, layoff or termination, rate of compensation and in-service or apprenticeship training programs. Therefore the parties acknowledge the need for

positive and aggressive affirmative action. (See Joint Exhibit #8.)

The parties also acknowledge that M.G.L. c. 151B and Title VII of the Civil Rights Act prohibit discrimination including religious discrimination.

2. EXECUTIVE ORDER 595

On August 19, 2021, then Governor Charles Baker issued Executive Order 595 **(Implementing a Requirement for Covid-19 Vaccination for the Commonwealth's Executive Department Employees)** which included the following provisions:

WHEREAS, vaccination is the most effective tool for combating the 2019 novel Coronavirus ("COVID-19") and the executive department of the Commonwealth, as the largest employer in the State, can lead in promoting policies to ensure the health and safety of all Massachusetts workers and residents;

WHEREAS, widespread vaccination is the only means the Commonwealth has over the long-term to ensure protection from COVID-19 in all its variations and to end the many negative consequences COVID-19 produces in our daily lives;

WHEREAS, COVID-19 vaccines are safe and effective, as evidenced by the fact that COVID-19 vaccines have satisfied the U.S. Food and Drug Administration's rigorous scientific standards for safety, effectiveness, and manufacturing quality needed to permit widespread use and distribution, and to date, more than 357 million doses of COVID-19 vaccines have been safely administered in the United States, with more than 9 million safely administered in the Commonwealth, and negative side effects have proven exceedingly rare;

WHEREAS, the Commonwealth leads the nation in nearly every measure of progress in vaccinating its residents, with over 64 percent of the Commonwealth's population fully vaccinated and over 74 percent of persons 18 and older fully vaccinated, both as reported by the Centers for Disease Control;

WHEREAS, the COVID-19 vaccine is a proven measure at preventing hospitalization and severe disease;

WHEREAS, achieving full vaccination among the executive department workforce is necessary to ensure that the executive department can provide the full measure of public services due to the residents of the Commonwealth;

NOW, THEREFORE, I, Charles D. Baker, Governor of the Commonwealth of Massachusetts, by virtue of the authority vested in me by the Constitution, Part 2, c. 2, § 1, Art. 1, do hereby order as follows:

Section 1. It is the policy of the Commonwealth that all executive department employees shall be required to demonstrate that they have received COVID-19 vaccination and maintain full COVID-19 vaccination as a condition of continuing employment.

For the purposes of this executive order, the executive department includes the office of the Governor, any executive office of the Commonwealth, as defined by section 2 of chapter 6A of the General Laws, and any agency, bureau, department, office, or division of the Commonwealth within or reporting to such an executive office of the commonwealth.

For the purposes of this executive order, the definition of employee shall mean any person who performs services for a Commonwealth executive department agency, bureau, department, office, or division of the Commonwealth for wage, remuneration, or other compensation, including full-time, part-time, seasonal, intermittent, temporary, post-retiree and contract employees, and interns.

Section 2. The Human Resources Division ("HRD") shall within 60 days of this order establish and issue a written policy for all executive department employees to require proof of COVID-19 vaccination, and the heads of all executive department agencies, bureaus, departments, offices, and divisions shall then implement the terms of the HRD policy. The HRD policy shall include the elements listed below:

1. a requirement that all executive department employees demonstrate no later than October 17, 2021 to their employing agency, bureau, department, office, or division that they have received COVID-19 vaccination and, going forward, that they demonstrate they are maintaining full COVID-19 vaccination;
2. a procedure to allow limited exemptions from the vaccination requirement where a reasonable accommodation can be reached for any employee who is unable to receive COVID-19 vaccination due to medical disability or who is unwilling to receive COVID-19 vaccination due to a sincerely held religious belief;
3. a method for documenting and verifying vaccination status among executive department employees that ensures all information will be maintained confidentially and separately from any employee's personnel files;

4. appropriate allowance for use of Commonwealth-provided sick leave or other time off for employees in order to obtain COVID-19 vaccination; and
5. appropriate enforcement measures to ensure compliance, which shall include progressive discipline up to and including termination for non-compliance and termination for any misrepresentation by an employee regarding vaccination status.

Section 3. Independent agencies and authorities, public institutions of higher education, elected officials, other constitutional offices, the Legislature, and the Judiciary are encouraged to adopt policies consistent with this Executive Order.

Section 4. This Executive Order shall continue in effect until amended, superseded, or revoked by subsequent Executive Order. (See Joint Exhibit #14.)

Executive Order 595 required vaccination of Executive Department employees, of which DOC is such a department, as a condition of continued employment with the Commonwealth. The Order also required HRD to develop and issue a policy for all Executive Department employees to mandate proof of vaccination by October 17, 2021. It also provided for “limited exemptions” from the vaccination obligation for medical reasons and sincerely held religious beliefs. (See Joint Exhibit #14.)

On October 15, 2021, HRD issued its policy requiring proof of vaccination by October 17, 2021, and continued vaccination as required. (See Joint Exhibit #15.) It specified the process of proving vaccination status. (See Joint Exhibit #15.) In pertinent part, the policy also described the manner in which a medical or religious exemption may be sought:

6. Employees maybe approved for exemption from the requirement to provide documentation confirming COVID-19 vaccination under the following circumstances:
 - a. Employees who verify and document that the vaccine is medically contraindicated, which means administration of the COVID-19 vaccine to that individual would likely be detrimental to the individual's health, provided any such employee is able to perform their essential job

functions with a reasonable accommodation that is not an undue burden on the agency. Documentation must be provided from an employee's medical/health care provider to support the request.

- b. Employees who object to vaccination due to a sincerely held religious belief, provided that any such employee is able to perform their essential job functions with a reasonable accommodation that is not an undue burden on the agency. (See Joint Exhibit #15.)

The policy also provides at paragraph #9 that employees who fail to comply with it, and are not exempt for medical or religious reasons per paragraph #6, or are not on an approved continuous leave “will be subject to progressive discipline, up to and including termination.” (See Joint Exhibit #15.) In connection with the HRD Policy, HRD and Union officials representing Executive Department employees, including the DOC, engaged in impact bargaining. Per the resulting Compliance Guidelines, an employee refusing to be vaccinated, and without an exemption, could voluntarily resign, or not resign and be subject to the progressive discipline of a five (5) day suspension, followed by a ten (10) day suspension, and finally termination if not vaccine compliant. (See Joint Exhibits #16 and #17.) I agree with Employer’s argument that the vaccination notification policy was a reasonable work rule in connection with Governor’s Baker’s Executive Order 595. However, as explained in more detail below, it was the Employer’s failure to properly address the grievant’s religious exemption request as well as his reasonable accommodation request that leads to a conclusion that the Employer engaged in religious discrimination against the grievant in violation of Article 6, c. 151B, and Title VII. Therefore, the Employer did not have just cause to terminate the grievant’s employment.

3. RELIGIOUS EXEMPTION REQUEST

On September 30, 2021, the grievant timely filed the following religious exemption request:

To obtain a RELIGIOUS EXEMPTION, please describe the religious principles that guide your objection to immunization. Indicate how your sincerely held religious belief conflicts with the COVID-19 vaccine mandate. Documentation may be required to support the request.

I was born and raised as a member of the Catholic Church. Although as I matured into adulthood and was able to question aspects of the Catholic doctrine, It did not at all diminish my faith as a Christian and the beliefs which I hold as sacred. My belief in God the Father, Jesus Christ, and the Holy Spirit has never faltered. There are several aspects of this vaccine mandate which would make it impossible to remain true to my faith if I were to concede and accept these vaccines.

First, as a Christian, it is the belief of my faith that life begins at conception and abortion is an absolute mortal sin. As such, benefiting or participating in any activity or product which has any connection to an aborted child, would clearly place my mortal soul in jeopardy. It is well known that all of the vaccines currently available, were developed or tested or both using cell lines which were originally obtained from aborted fetal tissues.

Another objection, is the way these vaccines actually work. The two types of vaccines available, mRNA (by Pfizer/Moderna) and adenoviral vector (J&J), do not work in the manner of traditional vaccines. These are genetic coding instruction which cause your body to produce a spike protein which is not normal to our own genetic coding. I strongly believe that such a modification would compromise the fundamental structure of a body created by God in his own image.

I also believe that as a survivor of covid 19, in spite of the fact that as a 62 year old male who is overweight, has high blood pressure and several other underlying health issues, that it was my strong religious conviction and faith In the almighty Father that was directly responsible for my survival. Upon being diagnosed as positive for SARS Cov 2, I was offered no medication, no treatment plan or any other medical assistance. I was basically sent home to isolate and wait to either die or survive depending on how the disease progressed. To tell you that I prayed a lot during this ten day period of isolation would be an understatement. It is my strong belief that the minimal symptoms which I had during this time, regardless of my "less than stellar" overall health condition and lack of any kind of medical treatment or medication, strengthend (*sic*) my conviction and beliefs. Because of the unique understanding I have of God's message to me during my time of need, and his answering my prayers, I believe that accepting a vaccine in spite of the issues above, would be a demonstration of a complete lack of faith on my part. Of all the possible sins of my religion, a lack of faith in the Father, the Son, and the Holy Spirit would be the worse possible sin I could commit. For these reasons, I respectfully request an exemption based on my religious beliefs.

Please describe the accommodation you are seeking.

As I am requesting an exemption based on my religious beliefs, I would request an accommodation in which I would be willing to be tested at a frequency required by the department as well as wearing a mask or other PPE while in the workplace as well as temperature checks prior to entering the facility.

Please provide any additional information you believe may be of assistance while we review your request for a RELIGIOUS EXEMPTION from the COVID-19 Vaccination requirement.

As an employee approaching 30 years of service in the department, I feel that my religious convictions and Christian values have made me much more effective at my job and a much better employee and hopefully a better human being as well. I have always worked hard to model my actions in the way Jesus has taught us to, through kindness, understanding, and forgiveness. Although I am not without sin, these Christian values are always with me guiding me towards acceptance into the kingdom of God. (See Joint Exhibit #1.)

The substance of the grievant's request for a religious exemption clearly expressed the sincerity of religious beliefs. In his request, the grievant explained how his religious beliefs conflicted with the COVID-19 vaccine mandate. At the core of his exemption request was his sincerely held religious belief that the COVID-19 vaccine was connected to an aborted child and that taking of the vaccine "would clearly place my mortal soul in jeopardy." In the second paragraph of his request, the grievant wrote, "First, as a Christian, it is the belief of my faith that life begins at conception and abortion is an absolute mortal sin." The grievant consistently and forcefully explained that the COVID-19 vaccines currently in use were developed utilizing cell lines of aborted fetuses, underscoring the sincerity of his sincerely held religious beliefs. Therefore, the grievant's request for an exemption from the COVID-19 vaccine was based on his sincere religious belief that vaccines were developed and tested using cell lines which were obtained from aborted fetal tissue. (See Joint Exhibit #1.) The grievant also specified a second objection to taking the COVID-19 vaccine. He strongly believed that the COVID-19 vaccine

results in the modification of “our own genetic coding...” conflicting with “the fundamental structure of a body created by God in his own image.” The grievant suggested that his religious convictions make him a better human being, and DOC employee, underscoring his religious beliefs. The grievant described the accommodations that he sought such as his willingness “to be tested at a frequency required by the department, as well as wearing a mask or other PPE while in the workplace as well as temperature checks prior to entering the facility.” (See Joint Exhibit #1.) Of course, in considering a reasonable accommodation for the grievant, the Employer was not limited to the suggestions proposed by the grievant as revealed by the hearing testimony.

4. INTERACTIVE PROCESS

a. DOC COVID-19 TEAM

The process for reviewing the grievant’s religious exemption request was described as follows on the Exemption Request Form:

The Diversity Officer will engage in an interactive process with you to determine whether you are eligible for an exemption/accommodation and if so, will determine what reasonable accommodation can be provided that will enable you to perform the essential functions of your position. A request for accommodation will not be granted if it is unreasonable, if it poses a direct threat to the health and/or safety of others in the workplace and/or to you, the employee, or if it creates an undue hardship. (See Joint Exhibit #1.)

The interactive process requires an individualized and thorough dialogue between the Diversity Officer and the grievant concerning the grievant’s request for his religious exemption, and a reasonable accommodation request related thereto.

The Employer determined that the covid interactive process was comprised of the pre-determined questions to be posed to the grievant by a three (3) member DOC COVID-19 panel comprised of Mr. Jeffrey Fisher, Associate Deputy Commissioner for Clinical Services, Ms. Kristine Cavicchi, Chief Business Officer in the Office of the Chief Medical Examiner, and Mr.

Lawrence Macchione. They asked the following questions of the grievant during a remote telephone call on October 13, 2021:

1. Please explain how a COVID-19 vaccine conflicts with your asserted sincerely held religious beliefs? Explore the origin of the statement provided by the employee (if applicable)?
2. Did they draft it themselves? If not, what was the source?
3. How long have you held these religious beliefs?
4. Do your religious beliefs include objections to other vaccines and/or other medicines?
 - a. If yes, please explain.
 - b. Have you requested or been granted a religious accommodation in the past?
 - c. Have you ever received a vaccination in the past? If so, under what circumstances?
 - d. If your religious tenets do not include objections to all vaccines, please explain why the COVID-19 vaccine is objectionable based upon your religious beliefs while at least some others are not
 - e. What other medications or products have you objected to because they were tested on fetal cell lines? When did that occur?
 - f. In your current role what is your level of exposure to public or others?
 - g. If exemption granted, what is the accommodation that you are seeking? (See Employer Exhibit #1.)

As gleaned from Mr. Fisher's handwritten notes, the grievant's responses were similar to his statement on his Religious Exemption application form. (See Joint Exhibit #1 and Employer Exhibit #2.) Mr. Fisher noted that the grievant indicated to the DOC COVID-19 panel that he was "not going to give up my religious beliefs for this," supporting the sincerity of his religious beliefs vis á vis the COVID-19 vaccine. (See Employer Exhibit #2.)

Mr. Fisher testified without contradiction that the Team did not receive any training regarding the religious exemption process. Mr. Fisher testified that during their DOC COVID-19 panel interactive process with the grievant, the grievant's religious exemption form was in their possession. (See Joint Exhibit #1.) The Team asked the questions provided to it. Mr. Fisher stated that the grievant answered the DOC COVID-19 Team's questions. He testified that the

Team did not review the grievant's job description, and did not engage in any discussion with MCI Concord, as to its ability to provide a reasonable accommodation to the grievant. Mr. Fisher stated that after questioning the grievant, team members were required to reach a consensus as to the nature of the grievant's answers. Mr. Fisher stated that the notes taken by the Team do not comprise a recommendation as to whether or not to grant the grievant's religious exemption or his reasonable accommodation request. Those answers were then submitted to the EOPSS Team. It is clear from the notes taken by the DOC COVID-19 Team that the Team did not engage in a comprehensive interactive process regarding all aspects of the grievant's religious exemption request, or a reasonable accommodation related thereto. (See Joint Exhibit #1 and Employer Exhibit #2.)

Ms. Cavicchi's responsibilities include IT, HR, and she also functions as an ADA Coordinator and Diversity Officer. She testified that she has received training as an ADA Coordinator, and in her role as a Diversity Officer regarding religious exemption requests. She testified that she delivered her notes of the DOC COVID 19 Team to the EOPSS Team that was also reviewing the grievant's religious exemption request and his reasonable accommodation request, but she was not aware if it received notes from the other COVID-19 panelists. (See Employer Exhibit #2.) Ms. Cavicchi stated that once she delivered the notes to the EOPSS Team, her participation in the grievant's religious exemption request, and reasonable accommodation process ended. Ms. Cavicchi testified that the EOPSS Team was ultimately responsible for allowing or denying the grievant's religious exemption request, but the EOPSS Team had no contact with her DOC COVID-19 panel prior to making its decision.

While the DOC/COVID-19 Team posed the above-cited questions to the grievant, and reduced his responses to writing, it is clear from the testimony of Mr. Fisher and Ms. Cavicchi

that the COVID-19 Team did not make findings or recommendations as to the sincerity of his religious beliefs, or to his proposed accommodations, which undercuts the interactive process because it was the only DOC entity that engaged the grievant in a dialogue, albeit quite limited.

b. EOPSS TEAM

i. PROCEDURAL FLAWS

On November 29, 2021, the grievant received the following rejection of his religious exemption request from the EOPSS and DOC COVID-19 Teams:

After careful consideration of your request and the responses provided in the interactive process, we have denied your request for religious exemption.

You represented that your objection was based on fetal cells being used in the production of the vaccine. The Pfizer and Moderna vaccines did not use fetal cells in their production and therefore their use would not be consistent with your stated religious belief. As a result you have not established that taking the vaccine would conflict with your stated religious beliefs, practices, or observances.

For the reasons stated above, your request for an exemption has been denied.

Notwithstanding the denial of your exemption, the Department would be unable to provide you an accommodation. The Department's obligation to protect the safety of your colleagues, prisoners, and members of the public during this ongoing and serious global pandemic, would require finding you a new position within the Department. This would be an undue hardship on the ability of the Department of Correction to manage its operations, as well as its ability to comply with its collective bargaining agreement with NEBPA. (See Joint Exhibit #2.)

It is clear from the testimony of Mr. Fisher and Ms. Cavicchi that the EOPSS Team ultimately decided whether the grievant's requests for a religious exemption, and a reasonable accommodation would be granted. The EOPSS Team never engaged the grievant in a discussion of his basis for his religious beliefs, or his request for a religious exemption from the COVID-19 vaccine. The grievant also testified without contradiction that he did not engage in any discussions with the EOPSS Team regarding his religious exemption request, or his reasonable

accommodation request supporting the finding that the EOPSS Team did not engage in an interactive process with the grievant. Similarly, it had no discussion with the grievant relative to his reasonable accommodation request. Therefore, the EOPSS Team, the ultimate decision-maker in the grievant's religious exemption and accommodation request, did not engage the grievant in an interactive process regarding the sincerity of his religious beliefs, or his reasonable accommodation request. As the "final word" on the grievant's request for a religious exemption and reasonable accommodation, the EOPSS Team itself was required to engage in an interactive process with the grievant. Therefore, by virtue of the EOPSS Team's failure to follow its own interactive process, it discriminated against the grievant for his religious beliefs in violation of Article 6, Title VII, and c. 151B.

ii. **SUBSTANTIVE DEFICIENCIES; RELIGIOUS BELIEFS**

In part, c.151B(4) provides as follows:

It shall be an unlawful practice:

1.

For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation... to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

1A.

It shall be unlawful discriminatory practice for an employer to impose upon an individual as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such individual to violate, or forego the practice of, his creed or religion as required by that creed or religion...

In its determination that the grievant did not hold sincere religious beliefs to oppose the vaccine, the EOPSS Team indicated that the Pfizer and Moderna vaccines "did not use fetal cells in their production." (See Joint Exhibit #2.) The EOPSS Team did not address the grievant's

concern that the vaccines “were developed or tested, or both, using cell lines which were obtained from aborted fetal tissue.” The EOPSS Team also failed to consider the grievant’s objection to the vaccine as it caused a modification of the human genetic code, “the fundamental structure of a body created by God in his own image.” (See Joint Exhibits #1 and #2.) Therefore, by failing to address the grievant’s religious concerns regarding the COVID-19 vaccine, the Employer, by adopting the EOPSS Team’s findings, and conclusion, discriminated against the grievant on the basis of his religion violating Article 6 of the collective bargaining agreement, Title VII, and c.151B.

The Employer contends that the grievant’s objection to the COVID-19 vaccine are personal and philosophical in nature rather than religiously-held as he had taken Lisinopril in the past which had been developed using fetal cell lines, according to the Employer. However, the evidence does not support a finding that the grievant was aware that Lisinopril was developed using fetal cell lines. Therefore, that he may have taken Lisinopril in the past without objection does not result in a finding that his objection to taking the COVID-19 vaccine was not based on his sincere religious beliefs because he aware of the use of fetal cell lines used in the testing and development of the COVID-19 vaccine. The grievant sincerely and reasonably believed that the COVID-19 vaccines were tested and developed using fetal cell lines from aborted fetuses. The grievant’s objection to the COVID-19 vaccine was rooted in his Christian faith which widely believes that abortion is immoral. Therefore, the Employer’s argument is not supported by the evidence.

c. REASONABLE ACCOMMODATIONS

Although the Employer rejected the grievant’s request for a religious exemption, it also indicated that it would be “unable to provide you an accommodation.” (See Joint Exhibit #2.) A

reasonable accommodation is described in c. 151B(4) §1a as follows:

“Reasonable Accommodation”, as used in this subsection shall mean such accommodation to an employee's or prospective employee's religious observance or practice as shall not cause undue hardship in the conduct of the employer's business. The employee shall have the burden of proof as to the required practice of his creed or religion. As used in this subsection, the words “creed or religion” mean any sincerely held religious beliefs, without regard to whether such beliefs are approved, espoused, prescribed or required by an established church or other religious institution or organization.

Undue hardship, as used herein, shall include the inability of an employer to provide services which are required by and in compliance with all federal and state laws, including regulations or tariffs promulgated or required by any regulatory agency having jurisdiction over such services or where the health or safety of the public would be unduly compromised by the absence of such employee or employees, or where the employee's presence is indispensable to the orderly transaction of business and his or her work cannot be performed by another employee of substantially similar qualifications during the period of absence, or where the employee's presence is needed to alleviate an emergency situation. The employer shall have the burden of proof to show undue hardship.

According to Title VII, employers are obligated to reasonably accommodate seriously held religious beliefs of employees unless such an accommodation would impose an undue hardship on the Employer. Section 42 U.S.C. §2000 e-2(a) indicates that an undue hardship is shown when a burden is substantial in the overall context of the Employer's business. Groff v. DeJoy 600 US 447 (2023) In rejecting the more than de minimus cost test of undue hardship of Transworld Airlines, Inc. vs. Hardison, 432 U.S. 63, 84 (1977), the DeJoy court held:

...We think it is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business. Hardison, 432 U. S., at 83, n. 14. Id.@468.

What matters more than a favored synonym for "undue hardship" (which is the actual text) is that courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, "size and operating cost of [an] employer." Brief for United States 40 (internal quotation marks omitted).Id.@470-471.

In the instant case, the Employer failed to explore any reasonable accommodation for the grievant. Ms. Monica Munoz-Perkins, EOPSS Deputy Chief of Human Resources, testified that the EOPSS Team members are no longer employed by DOC. Ms. Munoz-Perkins also testified that the EOPSS Team had no discussion with MCI Concord regarding the grievant's reasonable accommodation request, supporting the finding that the EOPSS Team did not consider any specific accommodations that could have potentially applied to the grievant. She also testified that the EOPSS Team did not consider a facility other than MCI for the grievant. Consequently, it never determined whether or not any specific accommodation would result in an undue hardship for the Employer's operation.

Per c. 151B and Title VII, the Employer has the burden of establishing an undue hardship defense to a proposed reasonable accommodation. Here, the failure to consider specific potential or proposed accommodations, and by authoring a blanket, generalized rejection of any accommodation, the Employer did not uphold its undue hardship obligations. Consequently, the Employer transgressed Article 6, Title VII and c. 151B by discharging the grievant from his employment based on his religious creed and beliefs. The Employer engaged in an unlawful discriminatory practice by requiring the grievant, as a condition of his continued DOC employment, "to forgo the practice of his creed or religion as required by that creed or religion..." by accepting the COVID-19 vaccine, without due regard of a reasonable accommodation. (See c. 151B.)

i. **SHIFT COMMANDER, ADMINISTRATIVE CAPTAIN, AND RELIEF CAPTAIN DUTIES**

The Employer concluded that to accommodate the grievant's non-vaccination status, it would be required to find the grievant a new position within the DOC, and that search would

pose an “undue hardship on the ability of the Department of Correction to manage its operations, as well as its ability to comply with its collective bargaining agreement with NEBPA.” (See Joint Exhibit #2.) The Employer did not cite a provision of the collective bargaining agreement which would impede its ability to reasonably accommodate the grievant. At MCI Concord, a Captain, such as the grievant can be assigned as a Shift Commander, an Administrative Captain, or as a Relief Captain. (See Employer Exhibit #4 and Joint Exhibit #12.) **General Captain** tasks are as follows:

Responsible for the supervision of all custody staff and may be responsible for all personnel charged with daily operation for an assigned work shift or period of time in assigned institution/division.

Responsible for institutional security and operation during tour of duty and for well-being of staff and Inmates. Direct supervisory responsibilities for all custodial staff and inmates during the assigned tour of duty.

Maintains proper institution-wide security procedures and compliance with all rules, regulations and policies through periodic inspections.

Makes all post assignments, review orientation to posts for all new officers, oversees special assignments.

Supervises inmate counts; prepare reports, provides thorough debriefing to incoming Shift Commander.

Responsible for on-going evaluations of staff performance, overseeing employee evaluations, schedule adherence, etc.

Other duties, responsibilities and projects as assigned. (See Joint Exhibit #10.)

The 3-11 **Shift Commander** duties are as follows:

POST SUMMARY DESCRIPTION

In the absence of the Superintendent, Deputy of Operations, Deputy of Treatment and Classification and Director of Security, the on duty Shift Commander shall be the senior ranking officer on site. They shall be responsible for the safe and secure operation of the institution and the enforcement of institution orders and D.O.C. policy. Shall be responsible for the care and custody of all inmates within MCI

Concord.

He/She shall be responsible for the effective performance of all staff assigned to the shift during his/her tour of duty. He/She shall ensure at all times that all officers assigned to these shifts are adequately trained and supervised to carry out all duties assigned to them. The Shift Commander shall always conduct himself/herself in a manner that will command the respect and confidence of all subordinates.

Site Specific Emergency Response: During any/all Emergency Responses at Correctional Center, the Shift Commander shall report to Control and direct the Emergency Response. At no time shall the Shift Commander place themselves in a position to compromise their ability to give clear direction. All times are approximate and can be changed to accommodate job duties

The **Shift Commander's 3-11 shift** duties are as follows:

- 2:50 pm Report to work in proper uniform and receive any pertinent information from Shift Commander being relieved. Take attendance of the shift and assign shift staff to their posts. Chit out keys and security equipment as needed
Approve time off in the time off book. Make all applicable changes to the shift roster and mark time cards. Review email, Intranet, and IMS notifications for new notices/memos.
- 4:45 pm Conduct the major count
- 5:30 pm Supper meal.
- 5:15 pm Make rounds of all posts
Institutional Activities.
Make a security and cleanliness check of all the buildings and grounds. Ensure that inmate activities and programs are monitored properly
Ensure Accountability Counts are completed at varied times. Conduct Emergency Response drills, as assigned, completing all IMS reports and Drill sheets; complete all applicable paperwork and IMS reports.
- 9:45 pm Major count.
- 10:15 pm Ensure that security inspections have been completed.
Review all activities that occurred during shift, by utilizing the "Notification" screen in IMS, to ensure that all Disciplinary and Incident Reports are completed and signed
- 10:50 pm Brief relieving Shift Commander of any significant events or occurrences.

There are additional duties listed in Post Order #75 Section IV. (See Joint Exhibit #12.)

The grievant credibly testified that as to his second shift, Shift Commander duties, seventy-five percent (75%) of his tasks are performed from the Captain's Office.

The following **Administrative Captain** duties are delineated in Post Order #76 as follows:

POST SUMMARY DESCRIPTION

Responsible for daily operations of the facility. Shall ensure that daily rosters, time off, disorder management, vacation/training picks, management of the non contact visit list, use of force packages, and other assignments as assigned are properly completed.

Site Specific Emergency Response: Not a designated responder
All times are approximate and can be changed to accommodate job duties

Administrative Captain

- 6:50 am Report in full uniform of the day, and receive any pertinent information given. Pick up keys in Outer Control.
- 7:00 am Disseminate the daily package and review all reports and rosters from previous day.
- 7:10 am Review all databases and rosters. Perform all other activities, reports, projects assigned to you.
- 2:50 pm Return all keys to Outer Control ending your tour of duty. (See Employer Exhibit #4.)

There was considerable testimony at the hearing regarding the position of Administrative Captain and Relief Captain at MCI Concord. Those potential accommodations were never cited by the EOPSS Team, or included in its conclusion that it could not provide the grievant with an accommodation. Not all Captains are Shift Commanders with the degree of interaction with staff and inmates as the Shift Commander. It is clear from the evidence that Administrative Captains perform largely administrative duties with far less physical contact with staff and inmates, albeit an Administrative Captain can substitute for an absent Shift Commander. The Administrative Captain's responsibilities are also performed from the office or off-site, according to the grievant. Consequently, the EOPSS/DOC COVID-19 Teams and the Employer itself should have considered the Administrative Captain and the Relief Captain assignments for the grievant as a reasonable accommodation. The EOPSS/DOC COVID-19 Teams and Employer's failure to do

so undermines its conclusion that there was no reasonable accommodation for the grievant without an undue hardship as part of a blanket, generalized denial.

At the hearing, there was also considerable testimony concerning the position of the Relief Captain who was assigned to the grievant's second shift on Tuesday, Wednesday, and Thursday at MCI Concord. The grievant testified that if the Shift Commander is unavailable, either the Administrative Captain or the Relief Captain will substitute and perform the Shift Commander's duties. It is also clear from the evidence that the Relief Captain, assigned to the second shift three (3) nights per week, has less contact with staff and inmates than the Shift Commander. A potential accommodation of a Relief Captain replacing the grievant as Shift Commander on those three (3) shifts was never mentioned by the EOPSS Team nor cited in the rejection of the grievant's reasonable accommodation request, undermining the EOPSS Team and Employer's conclusion that it would be required to locate a new position for the grievant which it alleged imposed an undue hardship on DOC. It is noteworthy that neither the DOC COVID-19 Team nor the EOPSS Team ever consulted the grievant's supervisors at MCI Concord or evaluated job duties there to determine whether or not any accommodations were feasible at the time it rejected the grievant's religious exemption and reasonable accommodation requests. There is no evidence that the EOPSS Team even evaluated the Administrative Captain or Relief Captain as a potential reasonable accommodation for the grievant. Clearly then, the Administrative Captain and the Relief Captain roles should have been considered together with the grievant's Shift Commander duties and responsibilities as a potential reasonable accommodation by the EOPSS Team and/or the Employer.

The hearing testimony of Mr. Michael Rodriguez, a long term DOC employee and current Assistant Deputy Commissioner (ADC), revealed that he commands considerable

knowledge of DOC operations including the Captain's positions in various facilities. Mr. Rodriguez testified that he and the grievant worked together at MCI Concord and MCI Souza-Baranowski. Mr. Rodriguez is currently the ADC of the DOC's Southern Region. Between 2020 and 2021, he held that same position in the Northern Region which included MCI Concord. As the Assistant Deputy Commissioner in both the Southern and Northern DOC Regions, Mr. Rodriguez has supervised all of the Superintendents of correctional facilities in Massachusetts. Notably, he was not consulted prior to the Employer's rejection of the grievant's request for a reasonable accommodation. Mr. Rodriguez testified that he was not involved in the religious exemption/reasonable accommodation review process. Mr. Rodriguez testified that in September, 2021 while serving as the Assistant Deputy Commissioner of the DOC's Northern Region, the MCI Concord Superintendent reported to him. Although being in a unique position to ascertain whether or not the grievant could be reasonably accommodated, he was never consulted by the DOC COVID-19 Team, the EOPSS Team, or the DOC in general before the grievant was terminated.

Although called as an Employer witness at the hearing, Mr. Rodriguez testified that he was not consulted by HRD concerning an Administrative Captain position as a reasonable accommodation for the grievant. He testified that the Administrative Captain has less contact with staff than a Captain assigned as a Shift Commander, another reason the Employer should have considered that position as a potential reasonable accommodation for the grievant. The gravamen of the Employer's offense was not that it concluded it could not reasonably accommodate the grievant without undue hardship, but its failure to even consider specific reasonable accommodations at the time when the grievant applied for a religious exemption, and before he was twice suspended and thereafter terminated. The Employer's blanket denial of a

reasonable accommodation request without any analysis as to the specifics of an accommodation in determining an undue hardship is violative of its contractual (Article 6) and legal (Title VII and c. 151B) obligations to consider the specifics of the grievant's job description, available positions, and other potential accommodations.

Similarly, despite the grievant's reasonable accommodation request on his religious exemption request form, the EOPSS Team did not address his request to be COVID-19 tested at a frequency determined by DOC, as well as wearing a mask, or other PPE while in the workplace and/or temperature checks prior to entering the facility either independently or in combination with the Shift Commander, Administrative Captain or Relief Captain duties. (See Joint Exhibit #1.)

i. **RELEVANT CONTRACT PROVISIONS**

Ironically, the parties negotiated over contagious disease testing and memorialized their agreement in Article 31 (**Contagious Disease**) which provides as follows:

This Article shall operate in conjunction with Article 20, Section 1(C), "Safety and Health", of this Agreement. It shall provide the operational framework and clarity to the Department's handling of instances at Institutions and/or facilities where the outbreak of a contagious disease has occurred. Due to privacy laws testing for the AIDS virus shall not be part of this Agreement. It shall be agreed by the parties to the following:

1. Where the Department of Correction, in conjunction with the Department of Public Health, has determined that a contagious disease outbreak has occurred at a Department Institution or facility through the existence of credible medical evidence, the Department shall implement an education and testing program at such site. All employees and inmates at the site must be tested for the contagious disease.
2. Such testing will be done by medical personnel from the Department of Correction and with medical personnel from the Department of Public Health except as provided in #4 below.
3. If the contagion is tuberculosis, the actual tuberculosis testing will be

conducted by the medical personnel from the Department of Public Health with assistance provided from medical personnel from the Department of Correction. Nothing herein shall prevent an employee from insisting that he/she be tested by personnel from DPH. Each employee at each facility shall be tested in an administrative area (e.g. conference room) or other areas where inmates are not present. Such testing will be done during the employee's shift or tour of duty.

4. Employees may decline to be tested at their work sites; however, any such employee so declining must be tested by utilizing one of the following two alternatives:
 - a. the employee, on his/her own time, may be tested by his/her own physician. If this alternative is chosen the Department will give the employee a letter to bring to his/her physician and the physician will report the results to the Department of Public Health on a form provided to him/ her subject to the confidentiality requirements set forth below; or
 - b. the employee may, on his/her own time, be tested at any of the Department of Public Health clinics located within the Commonwealth.
5. All test results, regardless of where the employee opts to be tested, shall remain strictly confidential and maintained only for database purposes by the Director of Health Services. No test results shall be placed in an employee's personnel file either at the Central Office or at the work site (Superintendent's Office).

The EOPSS Team did not address the grievant's testing suggestion in its denial of his religious exemption request. There was no evidence that the testing accommodations specified by the grievant in his religious exemption request or, in combination with the Administrative Captain slot, or Relief Captain assignment was ever independently considered by the EOPSS Team, further undermining its rejection of the grievant's religious exemption accommodation.

There was also no evidence of a consideration of the grievant's reassignment to another DOC facility, or any shift modifications to accommodate him. It is not as if the Employer was unfamiliar with the need to transfer or reassign employees. The parties negotiated the following

Article 14 (**Promotions and Transfer**) terms:

Section 2 Transfer/Reassignment

- A. Involuntary transfers may be made in accordance with Departmental needs for the good of the Department. However, involuntary transfers will not be made for the purpose of harassing employees. No transfer or reassignment shall impose unreasonable hardship on the affected employee as determined by Civil Service Law.
- B. Except in cases of staffing shortage or emergency, when the employer desires to transfer/reassign employees due to operational needs, the employer may directly contact employees to solicit volunteers from among the group of potentially affected employees, and may select from among volunteers.
- C. The employer shall, whenever practicable, give an employee who is being transferred or reassigned twenty (20) working days written notice; or, in the case of voluntary transfers, ten (10) working days' notice unless mutually waived.

Section 3

All employees covered by this Agreement whose employment in a particular facility is being phased out and who are being transferred or reassigned to another facility, shall bring to that facility, all seniority rights they hold at the time of said transfer or reassignment.

Similarly, the parties bargained the Article 20 (**Reassignments**) provision addressing “geographical reassignments:”

Geographical reassignments may be made in accordance with departmental needs. Prior to a reassignment, an employee who is adversely affected by the reassignment may request a discussion of said reassignment with the Appointing Authority or his/her designee. In the discussion, the Employer shall take into consideration the family lifestyle of the employee, the distance of the reassignment, the availability of car pools and/or public transportation and/or any other employee hardship.

There was no evidence that the EOPSS Team considered a reassignment to another facility or a shift modification at MCI Concord to accommodate the grievant. In sum, there was no individualized good faith analysis to find a reasonable accommodation for the grievant by EOPSS/DOC-COVID-19 Teams or the Employer. Rather, the EOPSS Team and Employer relied

on generalized hypothetical concerns in rejecting the grievant's request for a reasonable accommodation. Furthermore, the Employer engaged in no costing analysis of a reasonable accommodation as required by DeJoy, **Id.**

C. CONCLUSION

It is clear that the neither EOPSS Team not the Employer engaged in the interactive process with the grievant, its contractual and legal obligation. It failed to consider the nature and scope of the grievant's religious exemption request. Similarly, the Employer ran afoul of its obligation of evaluating a reasonable accommodation of the grievant's religious beliefs by its blanket denial of his religious exemption request. There was no evidence that at the time of its denial of the grievant's religious exemption request, it considered reasonable accommodation possibilities such as the Administrative Captain assignment or utilization of three (3) shifts per week that the Relief Captain worked to rearrange the grievant's Shift Commander assignments.

The Employer's failure to consider the specifics of the grievant's religious exemption request, and similarly its failure to evaluate specific reasonable accommodations for the grievant had significant adverse consequences for the grievant's DOC career. The grievant was notified by the Employer that he would be terminated after the imposition of the five (5) and ten (10) day unpaid suspensions. As a result, the grievant sought retirement benefits prior to the date that he planned to retire. The grievant testified that he retired one and a half (1.5) years earlier than his intention to do so. The Employer terminated the grievant after he applied for retirement benefits.

The Employer did not have just cause to suspend the grievant for five (5) and ten (10) days without pay, nor did it have just cause to terminate the grievant's employment. The grievant shall be forthwith reinstated to his position as Shift Commander at MCI Concord. The grievant shall also be forthwith made whole as to his seniority, years of service computation, all benefits,

including health insurance benefits, and all compensation, including lost wages, less any interim earnings. Notice of the grievant's suspensions and his discharge, and documents related thereto shall be forthwith expunged from his personnel file.