
IN THE MATTER OF ARBITRATION BETWEEN
MASSACHUSETTTS DEPARTMENT OF STATE POLICE
AND
STATE POLICE ASSOCIATION OF MASSACHUSETTS
AAA# 01-22-0001-5905
CLASS ACTION: DENIAL OF RELIGIOUS EXEMPTION REQUESTS

OPINION AND AWARD

The Massachusetts Department of State Police (Department or DSP) and the State Police Association of Massachusetts (Union or SPAM) are parties to a January 1, 2015 through December 31, 2017 collective bargaining agreement (Agreement). Under Article 22 – Grievance Procedure unresolved grievances are submitted to arbitration. The parties met before Arbitrator Bonnie J. McSpirtt regarding the grievance on November 3, 2022, December 21, 2022, January 31, 2023, and March 7, 2023. Massachusetts Human Resources Division, Deputy General Counsel Melinda Willis represented the Department and Attorney Leah Barrault of Barrault and Associates, LLC represented the Union. Evidence was submitted, witnesses were sworn, and the parties had the opportunity to examine and cross examine witnesses. The hearing was closed upon receipt of the parties’ briefs.

ISSUE

The parties each proposed issues, but they were unable to agree and requested that I formulate the issue. I framed the issues as follows:

Is the grievance substantively arbitrable?

Did the Department of State Police violate Article 7 – Anti-Discrimination and Affirmative Action, Sections 1 and 2 when they denied the religious exemption requests of the State Police Association of Massachusetts members?

If so, what shall the remedy be?

PERTINENT CONTRACT LANGUAGE

ARTICLE 2 - MANAGERIAL RIGHTS/PRODUCTIVITY

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; the establishment and/or revision of 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 with just cause; 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 Employer and the Association. Such achievement is recognized to be a goal of both parties as they perform their respective roles and meet their responsibilities.

...

ARTICLE 7 – ANTI-DISCRIMINATION AND AFFIRMATIVE ACTION

Section 1.

The Employer and the Association agree not to discriminate in any way against employees covered by this Agreement on account of race, religion, creed, color, national origin, gender, age, or lawful union related concerted activities.

Section 2.

The Association 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, age, gender, or national origin, 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 appointments, promotions, demotions or transfers, recruitment, lay-offs or terminations, rate of compensation, and in-service training programs. Therefore, the parties acknowledge the need for positive and aggressive affirmative action.

...

ARTICLE 22 - GRIEVANCE PROCEDURE

Section 1.

The term "grievance" shall mean any dispute concerning the application or interpretation of the terms of this Collective Bargaining Agreement.

Section 2.

The grievance procedure shall be as follows:

...

Step III: In the event the employee or the Association wish to appeal an unsatisfactory decision at Step II, the appeal must be presented, in writing, to the Colonel. . . Notwithstanding the foregoing, grievances of a general nature, and/or affecting a large portion of the unit, can be instituted, at the Association's discretion, at Step III of the grievance procedure. The Colonel shall meet with the employee and/or the grievance committee of the Association. . . for review of the grievance and shall issue a written reply to the employee and/or the Association.

...

Step IV: In the event the employee or the Association wishes to appeal an unsatisfactory decision at Step III, the appeal must be presented to the Human Resource Division, Office of Employee Relations (OER). . .

Step V: Grievances unresolved at Step IV may be brought to arbitration solely by the Association by filing with the Director of OER. . .

Section 3.

The arbitrator, who shall be selected by the parties, shall have no power to add to, subtract from, or modify any provision of this Agreement or to issue any decision or award inconsistent with applicable law. . . The decision or award of the arbitrator shall be final and binding in accordance with Massachusetts General Laws Chapter 150C.

...

BACKGROUND

The Massachusetts State Police serves as the statewide law enforcement agency and maintains investigative, tactical, and support units throughout the Commonwealth¹ to protect public safety. Pursuant to Article 1 of the Agreement the collective bargaining unit consists of regular full time sworn officers holding the titles of State Police Trooper, State Police Trooper First Class and State Police Sergeant. The parties' dispute occurred during the time when the COVID-19 virus (COVID-19) continued to be a major public health issue in the Commonwealth, vaccinations were available and considered the most effective tool for combating the virus.

Accordingly, on August 19, 2021, Governor Baker issued Executive Order No. 595 – Implementing a Requirement for COVID-19 Vaccination for the Commonwealth's Executive Department Employees. (EO 595) (JX3) In pertinent part EO 595 stated:

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:

. . .

NOW, THEREFORE, I, Charles D. Baker, Governor of the Commonwealth of Massachusetts, . . . 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 employment.

. . .

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

¹ www.mass.gov/orgs/massachusetts-state-police (June 19, 2023)

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 . . . department . . . 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 when 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.
...
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 the vaccination status.
...

On the same date, the State's Human Resources Division (HRD) sent an email to all Executive Department Employees - COVID-19 Vaccination Mandate for State Employees. (JX7) The email restated what EO 595 required for all Executive Department employees. On September 10, 2021, HRD provided all Executive Department Employees with a procedure document and instructions for employees seeking medical or religious exemptions. (JX4) Via a link embedded in the email, DSP employees who sought medical or religious exemptions were provided COVID-19 Vaccination Exemption Request Forms (Exemption Request Forms) to complete and submit to DSP's Diversity Officer (DO) or American with Disabilities Act Coordinator (ADA Coordinator) by October 8, 2021.

On September 16, 2021, the Department's COVID-19 Response Team, led by Lieutenant Colonel John Pinkham, also made the Exemption Request Forms available to all employees. (SX4) On September 22, 2021, DSP's Colonel/Superintendent

Christopher Mason (Colonel Mason or Colonel) sent Superintendent's Memo No. 21-SM-14 to all employees regarding COVID-19 Vaccination. (SX5) The Memo restated the contents of the Governor's EO 595 and laid out the Department's administrative procedures to implement the order. The Memo stated in relevant part that all employees:

. . . shall submit proof of COVID-19 vaccination, by self-attestation, to the Commonwealth's Human Resources Division *or* receive an Approved medical or religious exemption with reasonable accommodations no later than Sunday, October 17, 2021.

. . .

Non-compliance with Executive Order #595 will result in progressive discipline, up to and including termination. . .

On October 15, 2021, HRD issued COVID-19 Vaccination Verification Policy (HRD Vaccination Policy) for Executive Department Agencies (JX5) which discussed the process for employees to identify that they have been vaccinated through self-attestation and that employees may be approved for an exemption from taking the vaccination. Section IV – Procedures and Instruction stated in relevant part:

. . . 6. Employees may be 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 such employee is able to perform their essential job functions with a reasonable accommodation that is not an undue burden on the agency.

. . .

9. Employees who fail to comply with this policy and are not otherwise subject to paragraph 6 . . . will be subject to progressive discipline, up to and including termination.

Under the policy, DSP was responsible to ensure that requests for medical and religious exemption were received and that it engaged in an interactive interview process with employees and issued timely approvals or denials of accommodation requests.

DSP's Medical And Religious Exemption Interactive Process

Employees started submitting medical and religious Exempt Requests Forms soon after HRD (JX4) and DSP (SX4) made the forms available. The Department's Exemption Team (Exemption Team or Team) consisted of DO Stephen Gabriel (DO Gabriel or Captain Gabriel) and ADA Coordinator Patricia Lavin (ADA Coordinator Lavin or Ms. Lavin), Captain Angel Larriu, and Special Counsels to the Colonel, Attorneys Michael Halpin and Douglas Levin. The Exemption Requests Forms indicated that DO Gabriel and the ADA Coordinator Lavin:

. . . 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 safety of others in the workplace and/or to you, the employee, or if it creates an undue hardship. (SX4)

The Department received approximately 163 religious and 25 medical exemption requests from SPAM members. (JX6)² Regarding the religious requests, DO Gabriel

² I understood that JX6 was the list of sworn Troopers/SPAM members that requested religious or medical exemptions. JX6 listed 163 religious requests that were denied and 25 medical requests that were temporarily/permanently approved or denied. These totals are different then what the parties referenced in their presentations. However, the totals I referenced above are not intended to alter what the parties agree are the correct totals.

testified he was trained by HRD to determine if an employee had an sincerely held religious belief (SHRB) through virtual trainings, a power point presentation (SX10), and documents received by HRD on or about September 14, 2021 before the interactive interview process began. The documents were: FAQ – Diversity Officer and ADA Coordinator Exemption Training dated September 14, 2021(SX11) and Fetal Cell Line Religious Exemption Guidance (SX12).³

Captain Gabriel stated that he scheduled interviews with each employee and two members of the Exemption Team. He explained that the meeting was an opportunity for employees to speak with team members in an interactive manner and demonstrate they had an SHRB that conflicted with receiving the vaccination. The employees could submit documentation to support their SHRB, e.g. letters from their pastors, online letters, documentation regarding the makeup of the vaccine, etc. In addition, there were questions regarding reasonable accommodation if their exemption request was approved.

After the interview, the Team reviewed the Exemption Request Form, the interview notes and any documentation to determine if the employee had an SHRB. Once the Team made their decisions they met with the Executive Officer of Public Safety, Deputy Chief of Human Resources Monica-Munoz-Perkins (Deputy Chief Munoz-Perkins), who reviewed their decisions and ensured that the Exemption Team was following the interactive interview process consistently. In addition, Deputy Chief

³ SX12 was entered into the record over the objection of the Union.

Munoz-Perkins looked at whether the employee's belief was genuine and applicable to all aspects of their life and not solely in opposition to the vaccination.

DO Gabriel stated the process was the same for every employee who requested a religious exemption and the notes and documentation taken at the interview were retained and submitted at arbitration. (JT8) If the religious exemption request was denied, Captain Gabriel and ADA Coordinator Lavin emailed the Trooper a COVID-19 Vaccination Religious Exemption Response Form (Response Form) to inform him or her that their request was denied, and the Department's Division of Standards and Training sent a followed-up email explaining the next steps.

If a Trooper were found to have an SHRB then a determination needed to be made whether reasonable accommodation could be granted. Out of the 163 religious requests, the Exemption Team found that eight SPAM members⁴ held an SHRB. The accommodation determination was not made by the Exemption Team but decided by Lieutenant Colonel John Pinkham, who had been promoted to Division Commander of the Division of Standards and Training,⁵ and Colonel Mason. When a request for reasonable accommodation was denied, DO Gabriel and Ms. Lavin emailed a

⁴ Troopers Paul Aten, Jessie Barbosa, Christopher Dolan, David Hanafin, Joseph Hanafin, Patrick Irwin and Lance Reed. Union witness, Trooper First Class and SPAM Vice President Luke Bonin (Trooper Bonin or VP Bonin) also was found to have an SHRB, and he was not granted an accommodation. Eventually he received a vaccination and returned to his position at the State Police Detective Unit, Homicide Squad working in the Bristol County District Attorney's Office. The Department did not dispute that Trooper Bonin was part of the group covered by the March 30, 2022 Injunction, therefore, he will be included in the remedy, if any, and from this point forward I will refer to eight Troopers instead of seven.

⁵ Hereafter Lieutenant Colonel Pinkham or Division Commander Pinkham.

Response Form to notify the Troopers of the denial and the Division of Standards and Training sent a follow-up email explaining the next steps.

DO Gabriel testified that the medical exemption process was similar to the religious exemption process regarding the Exemption Request Form, but employees were required to sign and submit a Release of Information by Physician Form. In addition, employees were required to provide a letter from their treating physician indicating the medical condition which precluded them from getting a vaccine, a recommendation from treating physician that the employee not be vaccinated, and a proposed reasonable accommodation for the employee to perform the essential functions of their job. The Exemption Team met with the employees requesting medical exemptions as they did with employees requesting religious exemption requests. DO Gabriel stated when they interviewed the employees instead of asking a series of questions, the employee and the Team members reviewed and discussed specific documents that the employees provided, and the Exemption Team documented the information they received. After the meetings, the Team met and reviewed the information and then either Captain Gabriel or ADA Coordinator Lavin called each employee to let them know if the medical request was approved or denied.

DSP's Reasonable Accommodations Process For Employees Determined To Hold AN SHRB.

As referenced above, Lieutenant Colonel Pinkham and Colonel Mason rendered the reasonable accommodation determination. Division Commander Pinkham testified that the standards that cover the conduct and duties of employees are contained in M.G.L. c. 22C and DSP's Rules and Regulations. (JX9) Lieutenant Colonel Pinkham

confirmed that the discipline of employees falls under M.G.L. c. 22c and the Department's Rules and Regulations, Article 6 – Regulations Establishing Disciplinary Procedures and Temporary Relief From Duty. Employees may appeal discipline decisions to the Civil Service Commission. Division Commander Pinkham stated that the parties' collective bargaining agreement does not address the procedure for discipline and discharge.

The Department received both EO 595 (JX3) and HRD's COVID-19 Verification Policy (JX5) and informed all employees about the vaccination mandate and the exemption process (SX4, SX5). Lieutenant Colonel Pinkham testified that he knew that Troopers and Sergeants were offered the opportunity to file for an exemption because he received email notifications when the Exemption Team approved or denied exemption requests. Division Commander Pinkham stated that he was familiar with the ADA guidance on whether accommodation would present an undue hardship. Using this information he and Colonel Mason discussed whether the Department had the ability to accommodate employees or if accommodation was an undue hardship. Out of the 17 Troopers and Commissioned Officers, who were determined to have an SHRB, the Department was unable to provide any accommodation based on undue hardship.

Lieutenant Colonel Pinkham testified this determination was made after Colonel Mason talked with him and others about the Troopers, their job duties and the requirements placed on Troopers regarding public safety. Division Commander Pinkham said he and the Colonel considered the Department's ability to respond to the public and maintain the public trust while internally controlling the pandemic and any

negative effects from it. He stated at the time the vaccination mandate was put in place, the belief was that vaccinations would control COVID-19.

Lieutenant Colonel Pinkham stated that DSP was concerned that there were immune-compromised people who were being vigilant at not being exposed to COVID-19 and that the Department also had to provide for their safety. He said because Troopers interact with the public, DSP must respect the safety of the public and the Department cannot abrogate that responsibility. If the public were extra vigilant about COVID-19, they may be hesitant to interact with Troopers. Division Commander Pinkham explained that the public would have to perform a cost-benefit analysis because they might be exposed to a Trooper who is not vaccinated or is positive for COVID-19. Lieutenant Colonel Pinkham concluded stating that the DSP did not pre-determine that they would deny all religious exemption requests.

Troopers Who Were Found To Hold AN SHRB But Were Denied Reasonable Accommodation⁶

The eight Troopers⁷ are all SPAM members who established that becoming vaccinated would conflict with an SHRB but were denied a reasonable accommodation

⁶ Trooper First Class Luke Bonin and Troopers Jessie Barbosa, Christopher Dolan and David Hanafin testified at the arbitration hearing. Troopers Paul Aten, Joseph Hanafin, Patrick Irwin and Lance Reed did not testify and the information regarding them came from SPAM VP Luke Bonin, Lt Colonel Pinkham, the Troopers' Exemption Request Forms, including any submitted documentation, and the notes from the Troopers' Interactive Process Dialogue Interviews.

All seven Troopers and Trooper Bonin filed individual grievances under the Agreement, the grievances were not heard, and the Troopers did not receive a response from the Department. (UX10) Five of the Troopers and Trooper Bonin filed Unlawful Harassment, Sexual Harassment and Discrimination Complaint Forms (Harassment Complaint Form) with DSP but no one from the Department met with them to discuss their complaint. Troopers Barbosa and did not file Harassment Complaint Forms.

⁷ The seven Troopers in the March 30, 2022 Injunction and Trooper Bonin.

because it would cause undue hardship on DSP. Each of the Exemption Response

Forms stated:

Notwithstanding the finding that the vaccine would offend your sincerely held religious beliefs, the Department is unable to provide you with a reasonable accommodation. An accommodation would cause undue hardship because there is no accommodation that would still allow the Department to protect the safety of your colleagues and the public without sustaining a significant adverse impact on the operations and undermining the public trust in the State Police to keep them safe. Accordingly, your request for an exemption from Executive Order 595 is DENIED.

Paul Aten

Trooper Paul Aten (Trooper Aten), who did not testify, was assigned to the Commercial Motor Vehicle Enforcement Section (Truck Team), and he enforced both state and federal laws regarding commercial vehicles on the roadway. VP Bonin and Lieutenant Colonel Pinkham stated that Troopers in these positions are on the road and work from their cruisers, they operate outdoors at weigh stations, and they perform roadside stops of commercial vehicles to inspect for proper mechanical functions and safe operations. In addition, Truck Team Troopers are called to assist in vehicle crashes that involve motor vehicles and commercial vehicles, and they respond to hazmat-related chemical spills. Trooper Aten would interact with other Troopers and local police departments if there was a vehicle crash involving a commercial vehicle. He would interact with the public by dealing with truck drivers during a roadside stop or if drivers were involved in a crash.

Trooper Aten filed an Exemption Request on or about September 24, 2021 and was interviewed. As an accommodation he requested that he be exempted from taking the COVID-19 vaccination and that he would use PPE as needed and follow current

CDC guidelines for testing. VP Bonin testified that Trooper Aten was not offered to transfer out of his unit. On or about December 10, 2021, he was notified that he was found to have an SHRB but his request for accommodation was denied because it presented an undue burden on the Department.

Jessie Barbosa

Union witness, Trooper Jessie Barbosa (Trooper Barbosa) was hired by the Department on January 1, 2019, she had not been disciplined and all her performance evaluations were exemplary. Upon employment, she was assigned a marked cruiser and performed the duties of a Roadside Trooper by conducting motor vehicle stops, assisting local police departments and responding to calls. In February 2021, Trooper Barbosa joined the Community Action Team (CAT Team) as a Community Liaison Officer assigned to the D Troop Barracks.

Trooper Barbosa testified that she conducted public events via Zoom. e.g. reading to children in schools, participating in Zoom meetings on community drug task forces and other non-drug task forces, etc. During the summer she organized outside events, e.g. a touch-a-truck, distribution and training on car seat safety, etc. She stated that the decision whether a community event would be held indoor or outdoor was left up to each community to decide.

Trooper Barbosa said that she was aware of EO 595, a vaccine was available to her, but she did not take it and she filed a religious Exemption Request Form on or about October 6, 2021. She told the Exemption Team that she was not seeking accommodation, but she would accommodate the Department in any way they thought

was appropriate. She stated that she was willing to transfer to fleet services, supply, or anywhere the Department felt was proper and would keep staff and the public safe.

Trooper Barbosa was willing to wear a mask, maintain social distancing and get tested when symptomatic, if the test were paid for by the Department. She said that no one from the Exemption Team talked to her about any alternative accommodations besides what was listed on the interview sheet.

During the hearing, Trooper Barbosa reviewed the medical Exemption Response Form #M9-01. (SX6) This document listed the accommodations permanently granted to a Sergeant in the Gang Unit. Trooper Barbosa stated that the accommodations listed were not offered to her, but she believed if they had been she could perform her job functions, other than emergency situations where she helped the CAT Team with motor vehicle stops, active shooter events and other emergencies. She clarified the exception above stating that at times she assisted the CAT Team when they were short staffed giving the example that in a motor stop, she would not be the primary Trooper conducting the stop but would make her presence known standing outside the vehicle. She also discussed an active shooter situation that involved local and state police and that she was directed to stand in a particular place to secure the individual.

Trooper Barbosa received an email on or about November 26, 2021 stating it was determined that she had an SHRB but her request for accommodation was denied because it presented an undue burden to the Department. In addition, she received another email discussing the consequences if she did not get vaccinated. When she received the emails, she was still working on the CAT Team and her job duties had not

changed. On December 2, 2021 she attended a status hearing and was placed on suspension. She attended three other hearings and was found guilty of insubordination and failure to obey an order pursuant to EO 595. Based on being found guilty, Trooper Barbosa would have been dishonorably discharged if she were not covered under the March 2022 injunction. (UX14)⁸ On December 9, 2021, Trooper Barbosa filed an appeal with the Massachusetts Commission against Discrimination. (MCAD) On or about October 24, 2022, Trooper Barbosa was notified that her MCAD appeal was dismissed based on a lack of probable cause that she was discriminated against based on religion and that she had the right to appeal the decision to the MCAD within 10 days from receipt of notice. (SX7) Trooper Barbosa stated that she did file an appeal.

Christopher Dolan

Union witness, Trooper Christopher Dolan (Trooper Dolan) was hired by DSP in 1995 as a civilian working in the Crime Scene Services in Springfield (CSSS) In 2002 he was hired as Trooper located at the Cheshire Barracks. Several years later he returned to CSSS. Trooper Dolan had no discipline history. His duties were to respond to crime scenes, document the scenes with digital and/or video photography and process forensic evidence. Back in the lab, he would document and examine physical evidence for various crimes. The time spent at the crime scene or in the laboratory was about 50/50. Trooper Dolan testified that when he was at a crime scene, he had contact with local law enforcement officers, Chief Medical Examiners and victims of property crimes but overall his contact with the public was limited. In addition, when he

⁸ UX14 was entered into the record over the objection of the Department.

was in the laboratory he worked with civilians, e.g. chemists, technicians, etc. and other Troopers.

Trooper Dolan testified that he was aware of EO 595, a vaccine was available to him, but he did not take it and he filed a religious exemption request on or about October 7, 2021. The Exemption Team interviewed him, he told them that he was not seeking an accommodation, but he would wear a mask, maintain social distancing and submit to testing when symptomatic. Trooper Dolan said that no one from the Exemption Team talked to him about any alternative accommodation besides what was listed on the interview sheet. He received an email on or about November 26, 2021 stating he was found to have SHRB but his request for accommodation was denied because it presented an undue burden on the Department. Trooper Dolan did not receive further communication from the Department, and he was not apprised of an appeal process. He continued to perform the same duties in CSSS from November 26, 2021 until December 2, 2021 when he was suspended.

Trooper Dolan was aware that two Troopers Sarah Thompson and EK, who performed the same duties as he did in CSSS, had requested medical exemptions and were approved for temporary accommodation. When he was suspended both Troopers still worked in CSSS and on the first day of arbitration, November 3, 2022, Trooper EK still worked in CSSS and Trooper Thompson had been transferred. He did not know the vaccination status of Trooper EK.

Trooper Dolan reviewed the accommodation permanently granted to the Sergeant in the Gang Unit #M9-01. He stated that the accommodations listed were not

offered to him, and he believed that he could have performed his duties in CSSS with accommodations far less stringent than those listed. Trooper Dolan also reviewed Trooper Thompson's medical Exemption Response Form #M10-13-19 which listed her accommodations (UX18,Q). He stated that none of the accommodations listed were offered to him, but he believed if they had been he could perform his job functions.

Trooper Dolan testified that he had responded to emergencies in the past, e.g. homicides and the Boston Marathon Bombing to process two vehicles and a bus that were part of the crime scene. During these times he interacted with non-Department personnel, e.g. Watertown Police, FBI, Boston Police, etc. He has also responded to non-crime scene emergencies, e.g. when he was on the POP Platoon and he would respond to riots, etc. In addition, he interacted with the public when covering roadside emergencies but that happened on rare occasions.

David Hanafin

Union witness, Trooper David Hanafin (Trooper D. Hanafin) started at the Academy in October 2015, and he had no discipline history. Upon graduating from the Academy, he worked out of the Andover Barrack and moved to the Special Tactical Operations Team (STOP Team). His duties included responding to critical incidents such as high-risk search warrants, arrest warrants, active shooters situations, a barricaded subject, hostage rescue, civil unrest and riots. The STOP TEAM also worked with the Violent Fugitive Apprehension Unit, the Drug Unit, the Gang Unit or any event that a regular patrol was neither equipped for nor could assist with. He

acknowledged that the STOP Team may be in contact with local law enforcement when attending briefings prior to and after an incident.

Prior to being suspended because of EO 595, Trooper D. Hanafin was on call 24/7 but his regular shift was Monday through Friday with holidays and weekends off. When the STOP Team was not actively dealing with a critical incident the Team was training for future events. Trooper D. Hanafin stated he was aware of the Department's Rules and Regulations and that Troopers are required to respond to emergencies that they might encounter, which could result in their being in contact with the public. He also agreed that in times of civil unrest or riots, he could be in contact with the public.

During training days, he did not interact with the public very much, but he did interact with other STOP Team Members, DSP instructors and/or instructors hired from outside agencies. When they were responding to an incident there was minimal contact with the public except for the individual who was being seized, someone in the household or people who were in the vicinity of an incident. Trooper D. Hanafin testified that there were positions that a STOP Team member would have no contact with others, e.g. a vehicle driver, or parameter/sniper positions. He stated that he was not a sniper, and that the driver may get pulled from that position, but it is unlikely.

Trooper D. Hanafin testified that he was aware of EO 595, a vaccine was available to him, but he did not take it and he filed a religious Exemption Request Form on or about September 27, 2021. He met with the Exemption Team virtually and told them he was not seeking any accommodation, but he would accommodate the job by wearing a mask when social distancing could not occur and submitting to testing when

he was symptomatic. Trooper D. Hanafin testified that he would have considered a transfer if he had been asked.

He received an email on or about November 24, 2021 stating he was found to have an SHRB but his request for accommodation was denied because it presented an undue burden on the Department. Trooper D. Hanafin did not receive further communication from the Department, and he was not apprised of an appeal process. He continued to perform the same duties on the STOP Team from November 24, 2021 until December 2, 2021 when he was suspended. Trooper D. Hanafin attended three separate disciplinary hearings and would have been dishonorably discharged for insubordination and failure to obey an order pursuant to EO 595 if he were not covered under the March 2022 Injunction.

Joseph Hanafin

Trooper Joseph Hanafin (Trooper J. Hanafin), who did not testify, was assigned to the Mounted Unit performing his duties on a horse instead of a cruiser. VP Bonin stated that Trooper J. Hanafin patrolled Salisbury Beach, state parks and recreational areas during the summer and attended outdoor events, e.g. Patriot games, public disturbances, crowd control, search and rescues, etc. Lieutenant Colonel Pinkham said that the Mounted Unit has a public relations aspect to it because people are naturally drawn to approach the horses. Trooper J. Hanafin would patrol for fights, domestic disputes, intoxication, etc. He could be involved with medical emergencies and would have Narcan, quick clot, tourniquets, etc. available if needed. VP Bonin said that

Trooper J. Hanafin did have contact with the public but being on horseback was natural social distancing and face to face contact was not as common.

Trooper J. Hanafin stated on his Exemption Request Form filed on or about September 27, 2021 that he would wear . . . a mask where CDC social guidelines cannot be met, testing when symptomatic, antibody test due to already having contracted and recovered from COVID-19 which has been documented by the State Police”.⁹ VP Bonin testified that Trooper J. Hanafin was not offered to transfer out of his unit or any other accommodations. On or about November 24, 2021, he received an email stating he was found to have an SHRB but his request for accommodation was denied because it presented an undue burden on the Department.

Patrick Irwin

Trooper Patrick Irwin (Trooper Irwin), who did not testify, was assigned to the Academy as a Defensive Tactics Instructor. VP Bonin knew Trooper Irwin personally and that he lived close to the Academy, which is not a working barracks and situated in the rural Town of New Braintree. Trooper Irwin drove an unmarked cruiser, therefore, VP Bonin believed that Trooper Irwin’s interaction with the public was limited when he was commuting to work. In addition, instructors do not instruct civilian employees so Trooper Irwin’s interaction would also be limited in that regard.

Lieutenant Colonel Pinkham stated that the training performed by a Defensive Tactics Instructor is not lecture based instruction but hands on and physical. Trooper Irwin would be involved in hand-to-hand combat, grappling and strike techniques with

⁹ UX19, R9-77.

other Troopers. The training also includes how Troopers control their own equipment, e.g. how not to be disarmed, how to use mace/baton/taser/handcuffs, etc. In addition, civilians worked at the Academy, the Academy hosts classes for outside organizations and allows the public to use the gym.

Trooper Irwin filed an Exemption Request Form dated on or about September 13, 2021 and was interviewed. He stated on his form that he:

. . . will not get this vaccine under any circumstances. I will make all other reasonable accommodations, to include testing, masking, and social distancing. I will provide evidence of infection. I currently work at the Academy where my public interactions are minimal and we have a medical unit with the capacity to test on-site., Most of my interactions are with vaccinated Department employees. Should the Department find these accommodations unacceptable, I will offer my resignation. (UX19 #R9-04)

VP Bonin testified that Trooper Irwin was not offered to transfer out of his unit.

On or about October 23, 2021, Trooper Irwin received an email stating he was found to have an SHRB, but his request was denied because it presented an undue burden on the Department. Despite this finding, VP Bonin testified that the Department placed Trooper Irwin on a series of five administrative leave with pay orders. DSP's action allowed Trooper Irwin to receive pay up until the time that the Department denied all the religious exemption requests and he was placed on suspension without pay.

Lance Reed

Trooper Lance Reed (Trooper Reed), who did not testify, was assigned to the Framingham H2 Barracks as a uniformed roadside trooper, and he drove a marked cruiser. Lieutenant Colonel Pinkham stated that his job duties centered around road enforcement, e.g. making motor vehicle stops, investigating traffic accidents, dealing with drivers operating under the influence, etc. and his interaction with the public was

face to face. A roadside trooper could deal with both civil and criminal violations and be called to deal with any situation when they stop a vehicle from finding a dead body, narcotics, domestic violence, etc. VP Bonin believed that social distancing from the public could be accomplished.

Trooper Reed filed an Exemption Request Form on or about October 8, 2021 and was interviewed. He stated on his form that he was “. . . willing to do what I have been doing throughout the pandemic. I will social [sic] distance and wear a mask when appropriate. When I have symptoms, I willing [sic] to take covid test”. (UX19 #R10-8-174) VP Bonin testified that Trooper Reed was not offered the opportunity to transfer out of his unit or any other accommodations. On or about November 26, 2021, he received an email stating he was found to have an SHRB, but his request was denied because it presented an undue burden on the Department.

Luke Bonin

Trooper First Class Luke Bonin (Trooper Bonin) was hired by the Department in December 2013 where he started in field services. Currently, he is with the State Police Detective Unit, Homicide Squad working in the Bristol County District Attorney Office. Trooper Bonin has no discipline history. His job duties included investigating all unattended deaths, e.g. suicide, overdoses, homicide, etc. He worked an administrative day shift, but he was on-call 3 to 4 days/month for 24 hours and he was the responding Trooper for any unattended deaths that occurred during that period. When he worked an administrative shift, his duties included following up on his caseload, typing reports, analyzing evidence or records and assisting other Troopers on their caseloads. Trooper

Bonin's interaction with the public during administrative shifts was minimal because he worked in a separate office with other Troopers and Bristol County Sheriff Officers.

Trooper Bonin testified that he was aware of EO 595, a vaccine was available to him, but he did not take it and he filed a Religious Exemption Form on or about September 10, 2021. When he filed the request there was a masking and social distancing requirement. In addition, there was a testing requirement based on exposure. The Exemption Team interviewed him, but he was not allowed to record the interview. Trooper Bonin informed the Team for accommodations that he would wear a mask, social distancing when possible and he was willing to test on a regular basis, or exposure based, or a combination of the two. Trooper Bonin stated that he was asked if he were willing to transfer and he told them that he would not decline a transfer but preferred to stay where he was. The notes from the Exemption Team indicated that he did not want to be reassigned and Bonin testified that he was not offered a reassignment.

On or about November 24, 2021, Trooper Bonin received an email stating he was found to have a SHRB but his request for accommodations was denied because it presented an undue burden on the Department. On or about November 25, 2021, he received an email from the Department regarding information relative to his exemption denial. The email did not include an appeal process. Trooper Bonin said that when he received the denial, even though the October 17, 2021 vaccination deadline had expired he continued to perform his same duties, both administratively and on-call. The only difference was that he was required to wear a mask and socially distance when able to

do so. He was not required to test regularly, only on an exposure basis. Trooper Bonin did not get vaccinated after he received the denial, he attended the duty status hearing, and he was suspended for 56 days. At that point, Trooper Bonin decided to get vaccinated, and he returned to his duty assignment at the Bristol County Assistant District Attorney Office.

The Grievance and the March 30, 2022 Injunction.

On October 25, 2021, SPAM filed a grievance at Step III alleging that Article 7, Section 1 and 2 of the Agreement had been violated. The grievance stated:

On October 22, 2021, the Department began to issue responses to the members who applied for Religious exemptions per EO 595. Regardless of the intimate conversations and evidence, the Department has thus far denied all requests for accommodations. As to those responses in which the Department approved, or would have approved a religious exemption, the Department then stated that it would be “unable to provide . . . a reasonable accommodation” . . .

Under Article 7, Section 1, of the CBA, “The Employer . . . agree not to discriminate in any way against employees covered by the Agreement on account of . . . religion. . . The CBA continues to state under Article 7, Section 2, that “. . . [t]he Employer agree that when the effects of employment practices, regardless of their intent, discriminate against a group of people . . . positive and aggressive measures must be taken . . . to ensure equal opportunity in the areas . . . of lay-offs or termination. . .” Id. Therefore, it is the Association’s positions [sic] that the categorical denial of all accommodations for those who applied for religious and medical exemptions is discriminatory and should be remedied immediately.

The grievant in this case are all members who have applied for Religious Exemption and have not been afforded a reasonable accommodation, both individually and as a group.

DSP denied the grievance at Step III and the State’s Office of Employee Relations denied it at IV. The Union timely filed for arbitration at Step V.

On March 3, 2022, SPAM filed a Motion for Injunctive Relief in Superior Court requesting that the Court issue an injunction:

. . . preventing [the Department] from terminating seven (7) of its members for failing to comply with Governor Charlie Baker's Executive Order 595 requiring them get vaccinated for Covid-19 where [the Department] have discriminated against such members based on their religion and have denied such employees' requests for a religious exemption from compliance with Order 595 without due process and in a categorical manner that was disparate from how [the Department] treated employees seeking a medical exemption from compliance with the same order and with similar accommodations. (UX14)

On March 30, 2022, Superior Court Justice Roach allowed the Union's Motion for Injunctive Relief by enjoining DSP from terminating the seven SPAM members identified in the Complaint from being dishonorably discharged for insubordination for not following EO 595's vaccination mandate.

Executive Order No. 607 – Rescinding Executive Order No. 595

On March 15, 2023 Governor Maura Healy (Governor Healy) in Executive Order No. 607¹⁰ rescinded EO 595 effective May 11, 2023. The Executive Order stated in relevant part:

WHEREAS, On August 19, 2021, Governor Charles D. Baker issued Executive Order No. 595, which implemented a requirement for vaccination against the 2019 novel Coronavirus ("COVID-19") for the Commonwealth's executive department employees;

. . .
WHEREAS, on January 30, 2023, the President of the United States announced that the nationwide public health emergency for COVID-19, . . will end on May 11, 2023;

. . .
NOW, THEREFORE, I, Maura T. Healy, Governor of the Commonwealth of Massachusetts . . . do hereby order as follows:

Executive Order No. 595 is rescinded, effective May 11, 2023. The Human Resources Division shall take all necessary administrative actions necessary and appropriate to carry out this directive. . .

¹⁰ [No. 607: Rescinding Executive Order No. 595 | Mass.gov](#) (July 18, 2023)

POSITIONS OF THE PARTIES

The parties presented extensive arguments regarding the substantive arbitrability issue and the merits to supplement the evidence presented during the four days of hearing. The parties' positions have been considered fully in determining the issues place herein and discussed in the Opinion below. Please find below a brief synopsis of the parties' positions for each issue.

Is the grievance substantively arbitrable?

Department

DSP argued that the Union did not demonstrate a violation of Article 7, Sections 1 and 2, as the reasonable accommodation process is not arbitrable under the Agreement, and the Colonel has the non-delegable authority in M.G.L. c. 22C to determine appropriate staffing and transfer of employees, which is integral to the undue hardship analysis.

- Executive Order 595 constitutes a non-delegable right vested in the Governor. EO 595 is not arbitrable because it is outside the Agreement and does not fall under the definition of grievance contained in Article 22 – Grievance Procedure, Section 1. In addition, Article 22, Section 3 prevents an arbitrator to add to, subtract from or modify any provision of the Agreement or to issue an award that is inconsistent with applicable law.
- The Department's reasonable accommodation process is not subject to arbitral review. State and Federal Laws provide an accommodation process, and the Agreement does not, therefore, Article 7 does not give SPAM the right to review DSP's accommodation process. According to the law, if an employee demonstrated a sincerely held religious belief and requests reasonable accommodation, DSP must grant the request for accommodation unless doing so would pose an undue hardship that is more than a "de minimis" cost. The cost could be monetary or a burden on the Department's operations. Colonel Mason and Lieutenant Colonel Pinkham considered the reasonable accommodations in conjunction with the operational impacts of providing public safety and properly determined that the accommodations posed an undue hardship on DSP.

Based on the above, the Department of State Police respectfully requests that the Arbitrator finds that the Union's grievance is not substantively arbitrable and that the merits are not reached.

Union

The Union argued that the grievance is substantively arbitrable, and the merits should be reached. The Agreement, combined with the strong policy favoring arbitration when parties have agreed to it, puts the dispute on solid ground in favor of arbitrability.

- The dispute between the parties is that Troopers have been discriminated against based on their religion. Article 22, Section 1 defines a grievance as any dispute concerning the application or interpretation of the terms of this collective bargaining agreement, therefore the grievance is proper. SPAM argued that well established arbitration principles hold that disputes are to be arbitrated unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. In addition, the fact that the arbitrator must look at external law to render a decision is irrelevant since arbitrators routinely look at external source of law in rendering awards.
- The arbitrability of EO 595 does not render the parties' dispute not arbitrable. The Union is not challenging the validity or enforceability of the mandate. The dispute concerns DSP's action that they did not reasonable accommodate Troopers who applied for a religious exemption based on an SHRB that conflicts with taking the vaccine.
- The reasonable accommodation process is subject to arbitration because it is inherently part of the religious discrimination analysis. This argument was supported by Justice Roach in the March 20, 2022 Injunction by rejecting the Department's position and finding that Article 7 and ". . . the State's internal anti-discrimination policy, necessarily incorporate the standards to Massachusetts and federal anti-discrimination law with respect to reasonable accommodation".¹¹ DSP did not establish that the parties agreed to waive grievances based on the interactive process and whether it occurred in good faith or pursuant to state and federal law.

¹¹ Union Brief, p. 50.

- The Department's argument that because the arbitrator cannot reinstate the Troopers is irrelevant as to whether the grievance is substantively arbitrable. The grievance is not an appeal of discipline imposed but seeks a determination whether DSP discriminated against the Troopers based on religion in violation of the Agreement.

OPINION

Having reviewed the language of the Agreement, the evidence, and the parties' positions, I find the grievance is substantively arbitrable. The parties have mutually agreed to give me the authority to determine arbitrability by placing the issue before me before presenting it to the courts. Article 22 – Grievance Procedure, Section 1 defines grievance “. . . shall mean *any dispute concerning the application or interpretation of the terms of this Collective Bargaining Agreement*”. (Emphasis added) The issue before me regards a dispute over the application or interpretation of Article 7 – Anti-Discrimination and Affirmative Action, Sections 1 and 2. Section 1 unambiguously states that the “Employer and the Association agree *not to discriminate in any way employees covered by this Agreement on account of . . . religion. . .*” (Emphasis added) Section 2 clearly states:

The Association and the Employer agree that when the *effects of employment practices*, regardless of their intent, *discriminate* against any group *on the basis of . . . religion. . . specific, positive and aggressive measures must be taken . . . to eliminate present and future discrimination . . .*” (Emphasis added)

Article 22, Section 3 defines the responsibilities of the arbitrator stating that “[T]he arbitrator. . . shall have no power *to issue any decision or award inconsistent with applicable law*”. (Emphasis added) The parties agree that in discrimination disputes the applicable federal law is Title VII of the Civil Rights Act of 1964 (Title VII) and state law

is M.G.L. c. 151B. Based on the plain language in Section 3, the parties have given me the authority to consider the applicable discrimination law, which is external to the Agreement and includes reasonable accommodation.

Finally, the three criteria that determine if an issue is substantively arbitrable under AT&T Technologies, Inc. v. Communication Workers of America (475 U.S. 643, 106 S. Ct. 1415, 89 L. Ed. 2d 648, 121 L.R.R.M. (BNA) 3329 (1986) support that the grievance is arbitrable. One, the parties have agreed to arbitrate, two, the subject of the grievance, discrimination based on religion, is not specifically excluded, and three, there is no forceful evidence that the parties did not intend that the subject would be arbitrated. All three criteria are present here, the grievance is substantively arbitrable, and the merits are reached.

Did the Department of State Police violate Article 7 – Anti-Discrimination and Affirmative Action, Sections 1 and 2 when they denied the religious exemption requests of the State Police Association of Massachusetts members?

POSITIONS OF THE PARTIES

Department

The Union did not demonstrate that the Agreement was violated by following State and Federal Law or that doing so was arbitrary, capricious or would constitute harassment.

- The Department fairly reviewed all the religious exemption requests and made proper determinations in accordance with applicable law. The Exemption Team members were trained by HRD, and the Team met with the Troopers and held interactive interviews. SPAM did not provide any evidence of animus by the Exemption Team. Before rendering a decision whether a Trooper had an SHRB they reviewed the Exemption Request Form, the statements made during the interview, including any documentation provided, and their decision was

reviewed by the Deputy Chief of Human Resources at the Executive Office of Public Safety, who also had been trained by HRD. Deputy Chief Munoz-Perkins found that the Exemption Team's process was consistent, and she reviewed their decisions whether Troopers had an SHRB that were applicable to all aspects of their lives.

- DSP reasonably applied applicable laws to the determination of whether requests for religious exemptions presented undue hardship. Lieutenant Colonel Pinkham testified after the seven Troopers were found to have SHRB that he and the Colonel reviewed the requests to determine whether the Department could offer an accommodation without posing an undue hardship that was more than a "de minimis" cost. The Department argued that ". . . offering an accommodation to seven, 17 or 156 employees that requested a religious exemption (regardless of whether they were determined to have a sincerely held religious belief) would increase health and safety risks to the public, as well as to other staff and law enforcement officers, and thus, present an undue hardship to the Department".¹² Division Commander Pinkham individually explained how the seven Troopers interacted with the public and why allowing them to remain in their positions with accommodations would present health risks and compromise the Department's overall ability to mobilize Troopers in response to public safety needs. Furthermore, the Union did not establish that DSP erred or that an arbitrator can substitute their judgement for Colonel Mason in determining the minimum level of operational difficulty or safety risks the Department must bear.
- Lieutenant Colonel Pinkham stated that removing the medical exemption Troopers were also an undue burden because one, the core functions of the Troopers were public facing, two, their responsibilities were shifted to other uniformed personnel to bear, and, three, there were a limited number of non-public facing, administrative functions that Troopers could transfer into. Division Commander Pinkham testified to the differences between medical and religious accommodations based on legal standards and believed the Department was required to bear that burden for medical exemptions based on the Equal Employment Opportunity Commission's guidelines.
- The Union's remaining arguments that the process violated the Agreement are meritless. There are no legal requirements to offer internal appeals. Individual Troopers harassment complaints should not be considered because SPAM knew from impact bargaining there were no internal appeals. In addition, if the Union seeks a remedy for Troopers who have sought relief for the same underlying facts in other forums, relief should not be available to those Troopers who have claims pending and have received consideration of those claims. Regarding whether Troopers' supervisors should have been contacted to explore

¹² State Brief, p. 43.

accommodations, Lieutenant Colonel Pinkham and the Colonel knew the duties of the positions and did not need to confer with supervisors. In addition, the Colonel manages the Department's operations, and the Agreement does not conflict with his authority to do so.

Based on the above, DSP respectfully requests that the arbitrator finds that the Union failed to establish that the Department's denial of religious exemptions requests for any unvaccinated Troopers in accordance with applicable law was arbitrary, capricious, or otherwise violated Article 7, sections 1 and 2.

Union

SPAM maintains that DSP's denial of all members' request was religious discrimination and violated Article 7, Section 1 and 2. The Department's action of rejecting all religious requests for accommodation and granting three medical requests has been found by the courts to be proof of discrimination.

- DSP conducted the interactive interviews prior to receiving HRD's Vaccination Policy, therefore the interviews were not in conformance with the Policy.
- The Department's interactive interview process was not sincere, authentic or honest. DO Gabriel was inexperienced at conducting an interactive process and relied heavily on the HRD training. Initially Captain Gabriel and ADA Lavin asked Troopers one set of questions and later added questions to the list, therefore the questions for all the Troopers were inconsistent. In addition, the Exemption Team would not allow Troopers to record the interviews and then later allowed recordings to occur. The Team only asked one question regarding accommodations, and they did not suggest any accommodations. The Exemption Team and Lieutenant Pinkham did not contact supervisors to discuss job assignments and accommodations. There was no appeal process and if Troopers filed in other forums, e.g. grievances or Department harassment complaints, no one from DSP met with them.
- The Department relied upon an inherently flawed religious exemption guidance and analysis. SPAM contends ". . . the evidence in this case, as it relates to the Department's process to gauge the sincerity of an employee's belief, can leave no doubt . . . that the Department's goal was to make it impossible for an

employee to prove their belief, and easier for the Department to deny their claim and move on to terminate them from their job”.¹³

- DSP did not offer any individual evidence to support their decision that granting any one of the 156 members’ religious exemption requests would cause undue hardship pursuant to M.G.L. c 151B, 4(1A). As a result, the Union asserted that the Department discriminated against the 156 Troopers based on religion.
- The Department’s denial of the Troopers’ requests for an exemption from getting the COVID-19 vaccine, whom DSP found had SHRB that conflicted with such, was religious discrimination and violated Article 7, Sections 1 and 2. The Troopers made a prima facie case that bona fide religious practice conflicts with employment requirement and was the reason for the adverse action. When this happens the burden shifts to DSP to show it offered reasonable accommodation to the Troopers unless the accommodation would be an undue hardship of more than a “de minimis” cost to the Department. DSP failed to prove an undue hardship because the interactive interview focused on determining an SHRB and not accommodations. In addition, the Department did not provide a further review of the religious requests despite changes in COVID-19 and the public health crisis over time.
- The Department approved medical exemption requests, three were permanent, and denied the eight religious exemption requests. DSP’s argument that the state and federal standards for medical are more stringent than religious is meritless. The MCAD in Lule Said, Complainant v. Northeast Security, Inc., Respondent, 2000 WL 33665354 (2000), discussed the importance of protecting an employee’s religious beliefs in the workplace. MCAD’s decision was supported further when the Massachusetts Legislature amended M.G.L. c. 151B to include a lengthy detailed analysis that employers are required to undertake if they want to deny an employee a reasonable accommodation based on their beliefs. The Union contends that Lieutenant Pinkham and Colonel Mason denied the requests without exploring all conceivable accommodation and without going through the extensive analysis to prove the undue hardship required by the Department under M.G.L. c. 151B.
- DSP’s position that no review by any forum, including arbitration, is without merit and leads to a nonsensical result. The Colonel authority under M.G.L. c. 22C, section 10 is unfounded and would strip employees of their rights under M.G.L. c. 151B. The Department made the same argument in the March 20, 2022 Injunction and it was rejected. In addition, the Union argued that DSP’s decision does not fall within the permissible discretionary spectrum of state and federal law.

¹³ Ibid. p. 55.

Based on the above, the Union respectfully requests that the arbitrator determine the Department's denial of the Troopers' religious exemption requests, including the eight Troopers who were found to have an SHRB, was religious discrimination under state and federal law that has been incorporated into the Agreement in Article 7, sections 1 and 2. If DSP's actions are found to be discriminatory, SPAM requests that the Department be ordered to cease and desist from further violation, comply with state and federal law, and make the Troopers whole.

OPINION

Before I begin analyzing the evidence, it cannot be overstated that the COVID-19 pandemic over the last three years wreaked havoc on how normally we all lived. I can still remember the day Governor Baker, back in March 2020, declared the State of Emergency and thinking okay so we shut everything down for a couple of weeks, get control over the virus and open everything back up. I never in my wildest dreams imagined that the State of Emergency would go on for months and remain in effect for over a year when the COVID-19 vaccinations became available. It goes without saying that State Troopers, who work directly with the public, bore the brunt of the pandemic while they continued to protect themselves from getting the virus and provided public safety statewide. I commend the Troopers, the Department, and the Union for doing the best they could do to serve and protect the public during this unprecedented time.

In contract interpretation disputes, the Union has the burden to prove that the Agreement has been violated. To establish this SPAM must demonstrate that the Department discriminated against the members who hold certain religious beliefs in two ways. First, that DSP discriminated against 156 Troopers when it denied their requests that they had sincerely held religious beliefs and therefore should have been exempted from the vaccine mandate by being accommodated. Second, that the Department discriminated against the eight Troopers¹⁴, who DSP found had an SHRB, but were denied reasonable accommodations and not exempted from the vaccine mandate.

Looking at the Department's exemption request process first, I find that the process to determine whether a Trooper had an SHRB was consistent, reasonable and in conformance with HRD's Vaccination Policy and training guidelines. DSP provided HRD's Exemption Request Forms to all employees and any submitted forms were received by the Diversity Officer and ADA Coordinator. The Department created an Exemption Team to interview the Troopers and the Team was trained by HRD. Interactive interviews with members of the Exemption Team took place with all the Troopers who submitted medical and religious Exemption Request Forms. Regarding the medical exemption, employees had the opportunity to provide documentation to

¹⁴ Troopers Paul Aten, Jessie Barbosa, Christopher Dolan, David Hanafin, Joseph Hanafin, Patrick Irwin, and Lance Reed. Union witness, Trooper First Class and SPAM Vice President Luke Bonin (Trooper Bonin or VP Bonin) also was found to have an SHRB, and he was not granted an accommodation and was placed on suspension without pay. Eventually he received a vaccination and returned to his position at the State Police Detective Unit, Homicide Squad working in the Bristol County District Attorney's Office. The Department did not dispute that Trooper Bonin was part of the group covered by the March 30, 2022 Injunction, therefore, he will be included in the remedy, if any, and from this point forward I will refer to eight Troopers instead of seven.

explain why the vaccine was medically contraindicated to their health and the Team reviewed the documentation with the Troopers. For the religious exemption, employees had the opportunity to provide documentation and they were asked questions to explain why their objection to taking the vaccination was due to an SHRB. The Exemption Team documented the employee's responses on the Interactive Process Dialogue Form.

After the interactive interview for religious requests were completed the Exemption Team reviewed the Exemption Request Forms, including any documentation provided, and the Interactive Process Dialogue Forms and determined whether the employee held an SHRB. The Team's decisions received a second review when the Exemption Team met with Deputy Chief Munoz-Perkins at the Executive Office of Public Safety. Deputy Chief Munoz-Perkins discussed the Team's decision with them to ensure that the exemption process was consistent, and that the Troopers either held or did not hold an SHRB that was applicable to all aspects of their lives. Whether or not the Trooper was found to have an SHRB, DO Gabriel and ADA Coordinator Lavin informed every Trooper by emailing them a Response Form.

If the Exemption Team found that an employee did have an SHRB, the Team did not decide whether the Trooper could be accommodated. Instead, the Department's process was that Lieutenant Colonel Pinkham and Colonel Mason reviewed the religious exemption requests and determined if the Troopers were able to perform their essential job functions with a reasonable accommodation that was not an undue burden

on DSP. The accommodation portion of the process will be discussed in more detail below.

The Union's argument that the religious interviews to determine an SHRB were faulty and not in conformance with HRD's COVID-19 Vaccination Policy because the Department's interviews occurred prior to the issuance of HRD's Policy is unfounded. When the Exemption Team started their interviews, the Exemption Response Forms had been issued by HRD and DSP and the Team and Deputy Chief Munoz-Perkins had attended HRD's training. In addition, many of the interview questions relating to SHRB came from HRD's training materials.

SPAM's contention that the interactive interview process was not sincere, authentic or honest because DO Gabriel was inexperienced at conducting an interactive process and relied too much on the HRD training is meritless. Although it was Captain Gabriel's first time conducting an interactive interview of this magnitude, he had previous experience conducting interviews, which are intended to extract pertinent information from applicants. In addition, he was one of a five-member Exemption Team, and no evidence was provided to question the whole Team's ability to conduct interactive interviews or that relying on HRD's training material was improper. Furthermore, DO Gabriel was part of the Team that interviewed seven out of the eight Troopers and determined that they had an SHRB.

SPAM argued that the Department's religious interactive interviews were a sham and were not conducted in good faith. I considered the Union's concerns that the interview questions were inconsistent because the Exemption Team changed them and

that initially Troopers were not allowed to record the interviews. Looking at the change in questions first, DO Gabriel stated that the Exemption Team realized during the first couple of weeks of interviews they were asking follow up questions that were not on the Interactive Process Dialogue form. The Team decided to revise the form and add the follow up questions to be consistent from that point on.

A review of the Exemption Request Forms (JT8) confirmed Captain Gabriel's testimony and I found that the majority of the Troopers were asked the same questions even before they were added to the Interactive Dialogue form. In addition, there was no evidence that those Troopers who were not asked all the questions initially were disadvantaged after the additional questions were added to the form. With regards to the ability to record the interview, approximately five Troopers out of the 163 that were interviewed¹⁵ were not allowed to record and there was no evidence that those Troopers were adversely impacted. Based on the above, I conclude that the concerns did not change the fact that the exemption request process used was proper to determine whether a Trooper had an SHRB.

SPAM maintained that the Exemption Team only asked one question about reasonable accommodation and the Team did not offer any suggestions for accommodations is unproven. The religious Exemption Request Forms that the Troopers initially submitted to start the interactive interview process asked them to describe the accommodation they were seeking. The final reasonable accommodation section on the Interactive Process Dialogue form also had more than one question to

¹⁵ The number includes the Troopers found to hold an SHRB.

solicit and discuss accommodations. Did the Trooper work with sworn, civilian and/or the public? What was their physical work environment like? Did that physical environment change when they worked overtime? In addition, the final question listed various examples of accommodations which included standard accommodations, e.g. mask, social distance, frequent testing, but also explored whether the Troopers were willing to change their shift, be reassigned, and have physical barriers. The answers to all these questions would assist in a determination if there was an appropriate accommodation to allow the employee to perform the essential functions of their job without taking the vaccination.

Regarding the fact that neither the Exemption Team nor Lieutenant Colonel Pinkham spoke to the Troopers' supervisors to discuss if there was reasonable accommodation to keep the Troopers in their jobs is irrelevant. There is no requirement that supervisors must be conferred with. The Exemption Team did not participate in the reasonable accommodations determination and that fact was undisputed. In addition, there was no evidence that Lieutenant Colonel Pinkham and Colonel Mason were unfamiliar with Trooper duties and not in a position to decide if reasonable accommodations could be made without speaking with supervisors.

Having found that the Department's exemption request process regarding the SHRB was proper and could be used to determine if a Trooper had an SHRB, I reviewed the evidence that DO Gabriel erred in not finding Trooper #R9-96 had an SHRB based on his belief regarding fetal cells and their use in the production of the COVID-19 vaccination. I found the evidence was insufficient to prove that the

Department discriminated against him on account of religion. First, it is not the obligation of the Department to prove why they did not find Trooper #R9-96 had an SHRB; it is the Union's/Trooper's burden to prove he had an SHRB, and Trooper #R9-96 did not testify.

Second, DO Gabriel testified that he remembered interviewing the individual and it was how the Trooper presented himself during the interview that caused him to doubt his sincerity. When Trooper #R9-96 was asked if he would take a COVID-19 vaccination without the use of fetal cell line, Captain Gabriel's notes indicated he responded that "... he would have to see the side effects, if he doesn't involve MRNA, he would take it – vax now are tainted". DO Gabriel stated Trooper #R9-96's response made him believe it was not just about the manufacturing of the vaccine but more personal. Captain Gabriel also said that he believed Trooper #R9-96 was averse to the COVID-19 vaccination and not all vaccines that were made with fetal stem cells. After reviewing the extensive examination of DO Gabriel, I concluded that his belief that Trooper #R9-96 did not have an SHRB was credible and because the Trooper did not testify there was no evidence to prove otherwise.

Third, Captain Gabriel did not make the decision to deny Trooper #R9-96's alone but in conjunction with ADA Coordinator Lavin. Therefore her input was part of the decision-making process, and there was no evidence that her reasons for denying the Trooper's request were discriminatory. Finally, Deputy Chief Munoz-Perkins reviewed the Exemption Team's denial of Trooper #R9-96 request for consistency and to ensure

individual Troopers either held or did not hold an SHRB and the Team's decision remained unchanged.

Having made this determination, I considered the Union's blanket assertion that because the Department discriminated against Trooper #R9-96 proves that DSP discriminated against all the Troopers because most of them had an SHRB regarding fetal cells and their use in production of the COVID-19. While I understand that having 155¹⁶ Troopers testify at the hearing would have been long and tedious, it is each employee's burden to prove that he or she had an SHRB; without their testimony there was insufficient proof that DSP's Exemption Team discriminated against them during the interactive interview process. Absent direct evidence that any of the 155 Troopers and Trooper #R9-96 had an SHRB, I conclude that the Department is not required to consider accommodation and/or exempt them from EO 595's vaccine mandate.

SPAM maintained that DSP's decision to make blanket denials to the 156 Troopers, including Trooper #R9-96, was similar to Doster v. Kendall, 54 F.4th 398 (6th Cir. 2022) (Doster) where the Court found that because the Air Force had granted few religious exemptions and thousands of medical and administrative exemptions there was significant proof of discrimination. The Union also cited MBTA v. MCAD, 450 Mass. 327 to support their argument that because the Department did not offer any individual evidence to establish that any one of the 156 Trooper religious requests would cause an undue hardship they discriminated against the Troopers. These two cases may be relevant to the Troopers who were found to have an SHRB and denied

¹⁶ 156 Troopers minus Trooper #R9-96.

reasonable accommodations, but they are irrelevant to the 156 Troopers because they did not testify and without proof of an SHRB, the Department was not obliged to consider accommodation.

The Union also contended that the DSP's reliance on the Fetal Cell Line Religious Exemption Guidance document (SX12) was improper given that the Troopers needed to know the buzzword "proof of concept" and be aware of the differences between the use of fetal cells in general production, testing and inclusion in the vaccines. I find that this argument is irrelevant because the Troopers did not testify to what their understandings were regarding the use of fetal cells and how it related to their SHRB.

Based on the above, I find that the Department did not violate Article 7 – Anti-Discrimination and Affirmative Action, Sections 1 and 2 when it denied the religious exemption request of the 156 State Police Association of Massachusetts members.

Turning to the Troopers who were found to have an SHRB but were denied reasonable accommodations based on undue hardship, it is the Department's burden to prove that the Troopers' request for accommodation were denied based on that factor. DSP's proof came through the testimony of Lieutenant Colonel Pinkham, who with Colonel Mason, reviewed the eight Troopers' requests and determined whether reasonable accommodation could be made. I reviewed Division Commander Pinkham's testimony and although he explained why accommodating the eight Troopers was an undue burden, the evidence established when the accommodation determinations were

made back in October, November and December 2021, he and the Colonel did not individually look at the job duties of the eight Troopers. Instead, they looked at the total number of religious requests, and based on the sheer number, whether that was 7, 17 or 156, concluded that they could not accommodate any of the religious requests.

I acknowledge that Division Commander Pinkham discussed the job duties of the eight positions individually and explained why the accommodation was an undue burden during the hearing, which was more than a year after the determinations were made. However, when I reviewed his entire testimony, it was clear that when he and the Colonel were making their accommodation decisions, they were not concentrating on the individual job duties of the eight Troopers, they were focused on the “universal conditions” that impact all Troopers. According to Division Commander Pinkham those universal conditions included Troopers must be able to perform all their duties, and if they were exempted from performing certain duties, then the Department could not reassign them for a public safety response when needed.

Lieutenant Colonel was asked why the medical accommodation that were given to a Sergeant in the Gang Unit, i.e. wearing a mask, social distancing, not wearing a uniform, driving an unmarked cruiser and removing the Trooper from regular and/or overtime duties that involved interaction with the public, could not be given to Troopers with religious exemption request. He responded that the impact on the Department for the 17 Troopers and commissioned officers who had an SHRB, that the accommodation would limit collaboration, the need to work in proximity of others, the inability to perform details and road trooper overtime, or provide immediate public safety. In addition, if the

17 Troopers and commissioned officers were not performing certain duties, the duties would still need to be performed, which becomes a time burden for those covering their duties. He also discussed what the impact would have been in terms of 156 Troopers, even though there were only eight Troopers who had an SHRB, if they were given the accommodations, stating because of the unpredictable nature of the job there would be a separate and distinct class of Troopers who could not be tasked with certain assignments and duties. As a result, the Department's ability to move and assign the Troopers would be limited.

Division Commander Pinkham stated early in his testimony that he could not find other duties for the eight Troopers to do besides their own duties. Later he was asked why, and he responded, "We talked about them as a class, an aggregate – to accommodate 17 people there are not that many administrative tasks". Based on his response, it became clearer that the eight Troopers were considered part of the larger group and not as individuals, which is a requirement under M.G.L. c. 151B, 4.1E (c) and Title VII. EEOC Compliance Manual on Religious Discrimination (EEOC Manual)¹⁷ regarding undue hardship states "If the employee's proposed accommodation would pose an undue hardship, the employer should *explore alternative accommodations*". (Emphasis added) The EEOC Manual discusses a case-by-case determination, stating in pertinent part:

The determination of whether a particular proposed accommodation imposes an undue hardship "*must be made by considering the particular factual context of each case.*" *Relevant factors* may include the type of workplace, the nature of the

¹⁷ [Section 12: Religious Discrimination | U.S. Equal Employment Opportunity Commission \(eoc.gov\)](#) (July 12, 2023)

employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation. (Emphasis added – footnotes not cited)

DSP is also required to perform an undue hardship analysis under Title VII and M.G.L. c. 15B, Section 4.1A and Section 4.1E (b) because the Department cannot just contend, it must prove that it could not individually accommodate each of the eight Troopers. The EEOC Manual states in relevant part:

To prove undue hardship, *the employer will need to demonstrate* how much cost or disruption the employee's proposed accommodation would involve. *An employer cannot rely on hypothetical hardship* when faced with an employee's religious obligation that conflicts with scheduled work, but rather *should rely on objective information*. *A mere assumption that many more people with the same religious practices as the individual being accommodated may also seek accommodation is not evidence of undue hardship*. (Emphasis added – footnotes not cited)

No evidence was submitted that the Department conducted this type of analysis when the determination was made in 2021 and to perform that analysis over a year later at an arbitration hearing does not prove it was done in 2021. Lieutenant Pinkham stated several times that there were not enough administrative positions to accommodate the Troopers, but he did not identify any positions or explain why any of the individual Troopers could not be reassigned to them.

Division Commander Pinkham did not go through the analysis for accommodation back in 2021 because he believed that there was a differentiation between medical and religious exemptions based on a legal standard under the law; the evidence established however, that his belief was unfounded. Lieutenant Pinkham was asked on direct examination if the legal standard for undue hardship of a medical accommodation is the same as a religious accommodation. He responded, "I am told

that” but no evidence was submitted on what part of the law established the legal standard, who told him that there was such a legal standard or why he believed and/or understood there to be a legal standard.

Furthermore, Division Commander Pinkham explained that making a medical accommodation for Trooper Thompson was an undue burden for the Department, but it was made because she requested a medical exemption request and that distinguished her from the religious exemption requests. He was asked to explain what the distinguishing factor was, and he responded, “That’s more of a legal argument”. He was then asked, “If [Troopers] Sarah Thompson and Chris Dolan made accommodation requests, you prioritized the medical over the religious, but COVID is COVID – both Troopers are unvaccinated, both pose the same risk no matter where they are assigned”. Lieutenant Colonel Pinkham replied:

[Trooper Thompson] cannot perform tasks that will put her in contact in situations where she would be exposed to COVID and that’s the burden to the Department. She is a burden to the Department, and we are obligated to bear that burden because of my understanding of the legal differentiation between medical and religious. Where we have to bear the burden of her inability to perform certain tasks. But with religious people we are not under the same obligation to bear that burden – to carry them despite their inability to perform all functions.

He was then asked if his determination was based on his belief that there was a legal distinction between the two accommodations. Division Commander Pinkham responded, “That is what we were told as far as where our line was drawn that there was a distinction between how much the Department had to accommodate”. Again, no evidence was submitted identifying who informed him of the distinction nor was there proof that the differentiation or distinction existed.

Based upon the above, I conclude DSP did not properly administer the reasonable accommodation portion of the religious exemption request process and the eight Troopers found to have an SHRB should have been afforded the opportunity to see whether individually they could be accommodated. The Department's failure to provide this opportunity violated Article 7 – Anti-Discrimination and Affirmative Action, Sections 1 and 2.

Having found a violation of the Agreement, I turned to the remedy portion of the grievance. As stated in the Background section above, Governor Healy's issuance of Executive Order No. 607 rescinded EO 595 effective May 11, 2023. Absent a vaccine mandate there is no bar to Troopers Paul Aten, Jessie Barbosa, Christopher Dolan, David Hanafin, Joseph Hanafin, Patrick Irwin and Lance Reed returning to work from suspension without pay.

Therefore, DSP shall contact the seven Troopers¹⁸ in writing within seven calendar days from receiving the Award and offer them to return to work in their previous positions. The seven Troopers shall have two weeks from when the Department contacts them to accept or decline the offer in writing. Any Trooper who accepts the offer shall receive full back pay retroactive from the date they were placed on suspension without pay to a date when DSP determines they are eligible to return to work after receiving any necessary training to perform their previous duties. Any of the Troopers who decline the offer shall receive full back pay retroactive from the date they

¹⁸ The Department shall contact Troopers Aten, Barbosa, Dolan, D. Hanafin, J. Hanafin, Irwin and Reed. Trooper First Class Bonin is currently working; therefore, DSP does not have to contact him and offer him to return to work in his previous position. Trooper Bonin's remedy will be dealt with separately.

were placed on suspension without pay to the date they received the Department's offer to return. The full back pay award shall include compensation, seniority rights and all benefits minus any interim earnings and/or unemployment compensation.

Regarding Trooper First Class Bonin who had previously returned to work, he shall receive full back pay as set forth above retroactive to the date he was placed on suspension without pay to the date he returned to work. I shall retain jurisdiction over any disputes arising out of the implementation of this award for 90 calendar days. Either party may invoke my jurisdiction within that 90-calendar day period.

AWARD

The grievance is substantively arbitrable.

The Department of State Police did not violate Article 7- Anti-Discrimination and Affirmative Action, Sections 1 and 2 when it denied the religious exemption requests of the 156 State Police Association of Massachusetts members. That portion of the grievance is denied.

The Department of State Police did violate Article 7- Anti-Discrimination and Affirmative Action, Sections 1 and 2 when it denied the religious exemption requests of the eight State Police Association of Massachusetts members who DSP determined had an SHRB, but then asserted it could not accommodate them because of undue hardship. That portion of the grievance is sustained.

The eight Troopers are Paul Aten, Jessie Barbosa, Christopher Dolan, David Hanafin, Joseph Hanafin, Patrick Irwin and Lance Reed and Trooper First Class Luke Bonin.

The remedy shall be as follows:

- The Department shall contact the seven Troopers, excluding Trooper First Class Bonin, in writing within seven calendar days from receiving the Award and offer them to return to work in their previous positions.

- The seven Troopers shall have two weeks from when the Department contacts them to accept or decline the offer in writing.
- Any Trooper who accepts the offer shall receive full back pay retroactive from the date they were placed on suspension without pay to a date when DSP determines they are eligible to return to work after receiving any necessary training to perform their previous duties.
- Any of the Troopers who decline the offer shall receive full back pay retroactive from the date they were placed on suspension without pay to the date they received the Department's offer to return. The full back pay award shall include compensation, seniority rights and all benefits minus any interim earnings and/or unemployment compensation.
- Regarding Trooper First Class Bonin who had previously returned to work, he shall receive full back pay retroactive to the date he was placed on suspension without pay to the date he returned to work. The full back pay award shall include compensation, seniority rights and all benefits minus any interim earnings and/or unemployment compensation.

I shall retain jurisdiction over any disputes arising out of the implementation of this award for 90 calendar days. Either party may invoke my jurisdiction within that 90-calendar day period.



Bonnie J. McSpirtt, Arbitrator

August 4, 2023

Date