STATE OF NEW YORK
AMERICAN ARBITRATION ASSOCIATION

In Arbitration Proceedings Between:	)	PERB Case. No. A-[redacted]
	)	
[redacted], Inc. Local [redacted], AFSCME AFL-CIO (on behalf of [redacted])	)	AAA Case # [redacted]
	)	ARBITRATION OPINION AND
and	)	
	)	AWARD
	)	
	)	Thomas Kruglinski, Arbitrator[1]
[redacted] County	)	
		DATE:
Re: Termination of [redacted]		June 27, 2022

APPEARANCES

[redacted] LLP (for [redacted] County)

And

[redacted], Esq. of [redacted] Local [redacted], AFSCME, AFL-CIO

INTRODUCTION

Pursuant Articles 15 (Probation and Discipline) and Article 28 (Grievance Procedure) between the CSEA, Local [redacted] (hereinafter "Union") and [redacted] County, New York (hereinafter "Employer" or "County"), the undersigned was selected as an arbitrator in the instant matter involving the employment termination of a County employee, [redacted] (hereinafter,

[1]**Disclaimer**: Please note that this Opinion and Award is for the purposes of training and development of the Arbitrator, Thomas Kruglinski. It is to be considered a practice exercise and a demonstration of the arbitrator's abilities in writing awards. The case is a real one and the actual arbitrator was John T. Trela, who is acting as an National Academy of Arbitrators mentor to Arbitrator Kruglinski and who wrote the actual opinion and award in this case. As such, this document should be considered a MOCK AWARD.

Grievant). An in-person hearing was held on April 27, 2022, in the administrative offices of the Employer. At that time, the parties were given the opportunity to present their respective cases: proofs, witnesses, and arguments. At the hearing, the parties stipulated to eleven (11) joint exhibits and presented witnesses to support their arguments. Final closing arguments were presented in the form of closing briefs on May 31, 2022.

BACKGROUND FACTS

The facts in this case are not in dispute and the procedural history is important.

[redacted] was employed by [redacted] County since her initial appointment in November 2016 as Medical Receptionist in the County Public Health/Family Planning office. Her title changed in 2019 to Principal Account Clerk/Typist, after she took and passed the civil service exam. In this permanent role she testified that, among other duties, she worked with county budgets, wrote grants, made deposits, copays, and assisted staff with time allocations. Her position was administrative, not clinical. Her job performance throughout her tenure at the County was rated consistently at or exceeding objectives.

In the midst of the COVID-19 pandemic, the New York State Department of Health, which oversees county departments of health, issued a directive, Section 2.61 – Prevention of COVID-19 (hereinafter, "Section 2.61") transmission by covered entities, effective August 26, 2021. Section 2.61 required covered entities, such as the [redacted] County Department of Health, to ensure that "all persons employed or affiliated with a covered entity…who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease" to be vaccinated against the disease

(J-2 at page 3). Section 2.61 allowed and set forth the requirements for medical exemptions. On September 9, 2021, [redacted] County Administrator [redacted] issued a memorandum to all County Public Health Staff communicating the state mandate and directing all employees of the department, and any other employees who regularly enter the department, to receive their first vaccine by October 7, 2021 (J-2, page 1) or present a medical exemption prior to that date.

Grievant, who at the time was approximately 32 weeks pregnant, testified that she consulted with the Union regarding her concerns about the effects of the vaccine on her unborn child and inquired at her doctor's office about obtaining a medical exemption. She was told that her OB/Gyn practice was not issuing any medical exemptions for the vaccine.

The County, in a letter from County Administrator [redacted] dated September 30, 2021, (J-3) communicated to Grievant that, should she fail to receive her first vaccine dose by October 7, 2021, she would be terminated "pursuant to Article 15.2 of… [the CBA]." That article is the CBA's provision for "Discipline for Just Cause," (J-1 at page 17). The County Administrator again communicated to Grievant, on October 7, 2021, that, since she had not received her first dose of the COVID-19 vaccine as of that date, she was being put on unpaid administrative leave. Further, it imposed a deadline of October 13, 2021, to submit proof of vaccination or her voluntary resignation, or her employment with the County would be terminated effective the following day (J-4). Not receiving the required proof of vaccination or a resignation letter, the County so terminated Grievant on October 14 (J-5).

On October 21 the Union requested of the County a Disciplinary Appeal Meeting (J-6 at page 1) and on November 3 the county responded that it would be willing to hold a "Notice of

Opportunity to be Heard (AKA mini due process)" meeting on November 10. That meeting did not take place, as Grievant was recovering from giving birth on October 21 (testimony of Ms. [redacted]). The meeting did finally take place on December 17, 2021, and on December 21, the County notified the Union that the termination "will remain in effect" due to "lack of qualifications" (J-8).

The Union, on January 3, 2022, issued a Demand for Arbitration to the NYS Public Employment Relations Board on the grounds that Grievant "was terminated without being afforded her Due Process Rights as provided in Art. 15 of the CBA, e.g., not appropriately served with a proper Notice of Discipline, [and] not provided her Art. 15 Disciplinary Appeal Rights" (J-9 at page 3). The County's counsel responded to the Union on January 11, 2022, indicating that "it has been and continues to be [redacted] County's position that Grievant does not have a qualification that is mandatory for her position" that the case was not subject to arbitration, and the County would raise arbitrability as a threshold issue in any arbitration (J-10 at page 1).

THE ISSUES

The issues in this case, as substantially agreed to by the parties, are the following:

1) Is the matter in PERB case number [redacted] arbitrable?
2) If so, did the county have just cause to discipline?
3) And if so, what shall be the appropriate penalty/remedy?

EMPLOYER'S ARGUMENT

[redacted] County maintains that, although the undersigned has authority to determine arbitrability, the case is, by law, not arbitrable. It cites a two-part test articulated in two NYS Appellate cases, *Matter of City of Johnstown v. Johnstown PBA, 99 NY 2d 273, 278 (2002*) and *Arbitration between City of Troy and Troy Uniformed Firefighters*, namely, (1) whether there is any statutory, constitutional, or public policy prohibition against arbitration of the matter. The County argues that, because the termination of Grievant stems from emergency regulations promulgated by the NYS Department of Health under NY Public Health Law, §225 (J-2, pages 3 and 4) to prevent the spread of COVID-19 in conditions of a world-wide public health emergency, there is a public policy prohibition against arbitration of the matter.

The County also cites an "Impact Statement" that accompanied Section 2.61 that expressly states, "Covered entities may terminate personnel who are not fully vaccinated and do not have a valid medical exemption" (County brief, page 8) to justify their summary dismissal of Grievant. It should be noted that despite the County's citation of the Impact Statement and their indicating that it was attached to the County's brief (*Id*.), the undersigned could locate no such document in the materials submitted but could access it online.

The County argues further that the mandatory nature of Section 2.61 in the context of the pandemic, "created a new condition and qualification for employment for the personnel of the Public Health Department of the County" (*Id.* page 9). Further, the County maintains that like a residency requirement (upheld as legal and constitutional in court cases it cited), it has the right to legally determine the qualifications required for a particular position and vaccination against the COVID-19 virus is such a new qualification. This qualification is the legal, proper, and necessary result, the County argues, of the requirements imposed on the County Public Health Department by the State DOH under public health law.

Should the arbitrator determine that this case is—contrary to the Employer's argument above—arbitrable, and that the CBA's Article 15 controls, the County maintains that it had just cause to terminate Grievant's employment. Though the job description for Grievant's position did, and continues to, not include the vaccine requirement, the County argues that the emergent and extraordinary nature of the pandemic made the qualification proper and that new candidates for positions in the County Department of Health are all informed of the requirement before being granted an interview. Human Resources did not include it expressly in amended job descriptions because those descriptions cover other departments and not all departments are subject to the vaccine mandate (testimony of [redacted]).

The County argues that termination of Grievant's employment satisfied the contractual and legal requirements of just cause because grievant knew or should have known about the need mandated by the State, that she received adequate notice on multiple occasions of the mandate and the consequences for non-compliance (J-2 through J-4), and still refused (and

refuses to this day) to become vaccinated or present a valid medical exemption. The termination by the County of Grievant's employment was, thus, for just cause.

UNION ARGUMENT

The Union argues that the County's case for a public policy basis for denying arbitrability is flawed because: 1) the case law cited by the county concerns applications to stay arbitration, not to preclude it altogether; 2) the case law states that even such "stay" cases call for judicial restraint under public policy, particularly in public sector cases; 3) the County has not proved that the mandate imposed by Section 2.61 applies to Grievant, a non- clinical employee, in her own office (with a door that closed) within the Health Department. Further, covered Health Department employees shared stairwells and elevators with other County employees not covered by the mandate (i.e., so she is no different from other County employees outside of the County DOH). Moreover, the County has not proved that the Health Department is a legitimate "covered entity" under the terms of Section 2.61. 4); Grievant's administrative work is no different than the work of other non-covered County employees; and 5) the mandate does not preclude arbitration, and in any event, termination was not a requirement of the 2.61 directive from the state.

The Union rejects the County's claim that the vaccine mandate establishes a new qualification for employment within the County DOH because in cases where courts allowed termination of a public employee due to lack of qualifications, those qualifications were in place prior to employment, whereas the vaccine requirement does not appear in any version (either in the original job description for Grievant's position, or in subsequent versions issues since

Grievant's termination). As the vaccine requirement was not so "expressly stated" it is not proper for the County to bypass protections afforded by Civil Service law or a collective bargaining agreement and summarily terminate an employee (Union Brief, page 6, paragraph 3).

The Union argues that case law and precedent establish a requirement for the County to arbitrate this matter if there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA. Arbitrability should be determined by the arbitrator. Further, since the CBA "provides that no employee with a permanent position shall be disciplined except for just cause. Just cause requires reasonable notice of discipline and proof that the employee committed an offense that violated the rule warranting discipline (Union Brief, page 7). In all, the County's behavior regarding the notice and termination of Grievant is consistent with the type of situation to be dealt with under Section 15 of the CBA.

The County did not have just cause to discipline Grievant because it did so without "written notice of the action and its reason" (Union Brief, page 8), and affording Grievant the opportunity to appeal if she disagreed. Because the County ignored the disciplinary procedure, it cannot be enforced. Moreover, the Union argues, since the County did not prove that Section 2.61 applies to Grievant, she cannot be held accountable for not complying with the mandate.

Finally, the Union argues that the penalty for the alleged rule infraction should not have been termination. Grievant should be reassigned to work in an office within the County building that does not require unnecessary contact with staff whose duties require vaccination. Alternatively, the undersigned should fashion some lesser penalty to resolve this dispute (Union Brief, page 8).

DISCUSSION AND OPINION

This case involves the dismissal of a five-year permanent County employee (and Union member) possessing a more-than-satisfactory work record as the result of her noncompliance with a mandate to be vaccinated against the COVID19 virus. As such, should the case be arbitrable, the burden of proof rests on the County to demonstrate that it dismissed said employee for just cause. Thus, any analysis must involve an initial discussion and ruling on the arbitrability issue, including evaluating the Employer's contention that a pressing public policy reason justified its actions in acting outside of discipline procedure outlined in the CBA and whether the County's argument that a missing qualification for Grievant's position is sufficient grounds in this situation for termination of her employment.

As noted by the Supreme Court *in United Steelworkers of America v. Enterprise Wheel & Car Corp*., 363 U.S. 593, 597 (1960):

> *When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem.... Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.*

Accordingly, in order to reach a fair resolution of the issues that is rooted in the contract, we must look to the CBA for guidance in all analyses. Relevant portions of the CBA are as follows:

> *Article 3 MANAGEMENT RIGHTS*
>
> ***Except as expressly limited by other provision of this Agreement, all of the authority, rights and responsibilities possessed by the Employer are retained by it, including, but not limited to****, the right to determine the mission, purposes, objectives and policies of the Employer; to determine the facilities, methods, means and number of personnel required for the conduct of County*

programs, to administer the Civil Service System, including examination selection, recruitment, hiring, appraisal, training, retention, promotion, assignment or transfer of employees pursuant to law, to establish specifications for each class of positions and to classify or reclassify and to ***allocate and reallocate new or existing positions in accordance with law; and to discipline or discharge employees in accordance with law and the provisions of the Agreement****.* (emphasis added to relevant portions*).*

Article 15 PROBATION AND DISCIPLINE

…

Article 15.2 Discipline for Just Cause: No employee with a permanent appointment shall be disciplined except for just cause. Such employee shall be served with a written notice of the action and the reason for it. Simultaneously, a copy of the notice shall be sent to the President of the [redacted] County Unit [redacted] of the [redacted] County Local #[redacted].

Article 15.3 Appeal of Disciplinary Action

15.3.1 If CSEA disagrees with the disciplinary action, the President of the [redacted] County Unit [redacted] of the [redacted] County Local #[redacted] may appeal the matter, in writing, to the County Administrator or designee. The appeal must be submitted, in writing, within ten (10) work days from receiving the notice of discipline. Failure to submit the appeal within said ten (10) days shall make the matter ineligible for further appeal under this Article or any other procedure.

15.3.2 Within fifteen (15) work days after receiving the appeal, the County Administrator or designee shall meet with the disciplined employee and the designated representative of CSEA. Within fifteen (15) work days after said meeting, the County Administrator or designee shall issue a written response. Said response shall be given to the President of Unit [redacted].

15.3.3 If CSEA is not satisfied with the response of the County Administrator or designee, the President of the [redacted] County Unit [redacted] of the [redacted] County Local #[redacted] may elect to submit the matter to arbitration by filing a demand for arbitration with the New York State Public Employment Relations Board in accordance with its rules and regulations. The demand for arbitration must be filed within ten (10) work days from receiving the response from the County Administrator or designee or when the response should have been received. Failure to file the demand within said ten (10) days shall make the matter ineligible for arbitration or any other appeal and the case will be deemed to be closed.

15.3.4 All decisions rendered in such arbitration shall be final and binding upon both parties.

Arbitrability

The County raises the issue of arbitrability as a threshold in this case. If the instant dispute is decided by the undersigned to be not arbitrable, in accordance with the County's argument, all other analysis effectively stops, as the Union, in such case, did not get beyond the initial threshold.

The County's argument that Section 2.61, an emergency order of the New York State Department of Health promulgated to help effectively deal with the public health emergency of the COVID pandemic constitutes legitimate law that not only justifies the County Administrator's directive to require that all County DOH employees be vaccinated, but also bars arbitration based on a public policy necessity. The undersigned agrees with the first clause of the preceding sentence but disagrees with the second, i.e., there ***is*** a justifiable public policy imperative to promulgate a vaccine mandate to apply to, in the terminology of Section 2.61, "persons employed or affiliated with a covered entity…who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease." In this case, the blanket mandate applied to the entire County Department of Health and others, including maintenance workers who come into frequent contact with DOH employees. The second argument, that the public policy imperative bars arbitration of disputes arising from said mandate, is rejected for three reasons.

First, the County argues that the 2-part test for arbitrability articulated in the New York Court of Appeals (in, e.g., *Matter of City of Johnstown v. Johnstown PBA, 99 NY 2d 273, 278*

(2002)), i.e., whether there is any statutory, constitutional, or public policy prohibition against arbitration applies here and therefore the case is not arbitrable. It argues that the undersigned has no authority to reinstate the grievant. The undersigned disagrees. The public health imperative of protecting the public from transmission of the easily transmissible COVID-19 virus is clear and undisputed. However, an arbitrator has wide latitude to reinstate an employee if he or she finds that the employee's rights under the CBA have been violated and reinstatement is warranted. Without addressing, at this point, the merits of this specific Grievant's case, one can envision in similar circumstances an award where reinstatement is an appropriate remedy, i.e., under conditions that do not pose a threat of viral spread (such as telework, or reinstatement after the pandemic threat recedes, or reinstatement in another County Department as an equivalent position becomes available), and do not materially threaten the efficient operations of the department. Consequently, the argument that the case is not arbitrable because the arbitrator is barred from ordering any form of reinstatement is rejected.

Second, the County notes—as part of its public policy reasoning against arbitrability—that the Impact Statement accompanying Section 2.61 states that:

> *"Covered entities **may** terminate personnel who are not fully vaccinated and do not have a valid medical exemption and are unable to otherwise ensure individuals are not engaged in patient/resident care or expose other covered personnel.* (emphasis added).

Two things are of note here 1) the use of the word "may" instead of "shall" implies room for the use of management discretion based upon the circumstances, and 2) the Impact Statement presumably applies to both *employment-at-will* situations as well as workplaces that are subject to collective bargaining agreements where the employer's right to fire is limited, as it

is in this case, to situations where just cause is shown. The language in the Impact Statement is written to be applicable in either case, implying the need for a judgement as to applicability of termination as an appropriate consequence. In short, the County **could have** chosen not to terminate if it judged such an action warranted.

Third, on September 30, 2021, after initial invocation of the CBA's Article 15 (Probation and Discipline) as a reason for termination of the Grievant (J-3, paragraph 3), the County does an about-face, and a week later, on October 7, states its new "lack-of-qualifications" basis for termination of employees not meeting the vaccine requirement (J-4, paragraph 2). The County argues that it is well within its authority under Public Health Law §225 to "prescribe the qualifications" of county public health employees and officials.

The County, however, never included, even in updated qualifications documents drafted in 2022, during the effective period of the Section 2.61, any vaccine mandate for the position that the Grievant held until her termination. The qualification argument appears to be an attempt at an "end-run" around the legitimately bargained discipline process in the CBA. The undersigned finds that the CBA—as initially envisioned by the County in J-3—is the appropriate vehicle for any termination proceeding involving the Grievant.

Consequently, this case is both arbitrable and subject to the "just cause" discipline requirements of Article 15 of the CBA. Any termination process for the Grievant must be considered due to a charge of insubordination for the Grievant's refusal (to this day) to be vaccinated against the COVID-19 virus as required by Section 2.61.

Was Grievant's Termination for Just Cause?

Having found the case arbitrable and subject to the discipline procedure as outlined in Article 15 of the CBA, the undersigned must evaluate whether the Grievant's dismissal by the County was for just cause. Though the County, relying primarily on its qualification argument, does not specifically indicate that the Grievant was dismissed on a charge of insubordination, it does argue that the termination was for just cause. Accordingly, it is reasonable to infer that insubordination—in refusing to comply with Section 2.61—is the just cause the Employer maintains.

The concept of just cause for imposition of discipline can be seen as either simple or complicated. The simple notion of just cause is whether the employer treated the employee fairly.

> *"If, after considering the facts, the arbitrator concludes that the employer failed to treat the employee fairly, he or she will find that there was no just cause for discipline. Conversely, if the arbitrator concludes that the employer treated the employee fairly, he or she will find that there was no just cause for the discipline. Because individual notions of fairness vary and the specific facts that lead to discipline are often unique, it can be difficult to extract the principle that led this arbitrator to his or her conclusion. Over many arbitrators and many cases, however, some principles of just cause emerge." (Brand and Biren, Discipline and Discharge in Arbitration, 3ed, Bloomberg BNA, 2015 at §2-5)*

A more complicated set of principles regarding just cause was articulated in 1964 by Arbitrator Carroll Daugherty into *"The Seven Tests"* (see, e.g., Brand and Biren, Discipline and Discharge in Arbitration, 3ed, Bloomberg BNA, 2015 at §2-5), which have often been cited as an accepted standard in both arbitrators' and managers' toolkits when evaluating disciplinary measures and whether just cause exists. If the answer to any of the seven questions is "No,"

then just cause has not been satisfied. It is useful to consider, in the instant case, whether the *Seven Tests* have been satisfied.

1. *Did the Grievant receive fair notice that the action would result in a consequence or is there a policy prohibiting such conduct?* The Grievant received notice on September 9, 2021 (J-2 and testimony in the record) of the New York State Department of Health's vaccine mandate contained in Section 2.61 and that the County had determined that the Department of Health was a covered entity and that she was determined to be covered by the requirement. She was given just under one month to comply and failed to do so or submit a medical exemption and she failed to do so. The undersigned has determined that she had fair notice.

2. *Was the rule violated reasonable?* At the time Section 2.61 was issued, the more virulent Delta Variant of the COVID-19 virus was rampant and claiming thousands of lives nationwide daily. Moreover, the rule was imposed by the State of New York on all staff, "who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients, or residents to the disease" (J-2, paragraph 1). The Union argues that the County has not proved that it was necessary to require all non-clinical employees to be vaccinated. It is not up to the undersigned to vet the appropriateness of the County's response to the statewide order or whether the County was indeed a "covered entity." More importantly for this analysis, Article 3 (Management Rights) of the CBA states in relevant part, *"Except as expressly limited by other provision of this Agreement, all of the authority, rights and responsibilities possessed by the Employer are retained by it, including, but not limited to… allocate and reallocate*

new or existing positions in accordance with law; and to discipline or discharge employees in accordance with law and the provisions of the Agreement." It is determined that the County, in accordance with the State vaccine mandate contained in Section 2.61, took what it saw as reasonable steps to enforce a reasonable rule imposed by the State of New York to respond to an urgent public health crisis.

3. *Was there an investigation to determine that conduct was worthy of corrective action?* The Grievant testified openly that she did not (and, as of the hearing date, still had not) received the required vaccination. No further investigation is necessary.

4. *Was the investigation conducted in a fair and objective manner and free from discrimination*? Again, it was a simple binary question: did she get the vaccination or not and she admitted she did not.

5. *Proof*: *Did the employer collect sufficient proof?* Same as above. She did not, by her own admission get the required vaccine. No matter what standard of proof is used, that fact is beyond dispute.

6. *Consistency*: *Were the rules applied evenly to everyone in the department?* The mandate was applicable to all employees of the County Health Department. H.R. Director [redacted] testified that four other employees were notified initially that their continued noncompliance with the vaccine mandate would risk termination. One other employee, aside from the Grievant, was terminated as a result of noncompliance. The rules were applied evenly and consistently.

7. *Was the degree of discipline appropriate to the offense*? This is a key question. Was termination the appropriate consequence of non-compliance with the order? The Union argues that others in the building, who share elevators and stairwells with Health Department employees, were not subject to the mandate, indicating that the Employer could have assigned the Grievant to work in another location where she would not be subject to the vaccination requirement, which would make her termination unnecessary. Again, we must refer to Article 3 of the CBA outlining Management Rights. It is not for the undersigned or for the Union to determine how the County should comply with a lawful requirement under Section 2.61. Consequently, I find that the County was within its rights to determine whether there was a workable alternative for the Grievant short of termination. The County rightfully determined that there was none and rightfully took the action they did. It is therefore determined the degree of discipline was appropriate to the offense.

While it has been determined that the actions of the County in dismissing the Grievant passed "The Seven Tests," there are other questions to consider including some arguments raised by the Union. The Union raises the very real concern that because the County relied on its late-in-the-day reasoning that the Grievant failed to meet a valid job qualification of being vaccinated, it denied their member due process which, in the public sector, carries added weight due to the property right of this permanent employee to her job. It is indeed true that the County, because of its reliance on the qualifications argument, did not follow the disciplinary process outlined in Article 15 of the CBA. The record reveals, however, that whether or not the County followed the letter of the CBA, it followed the process in its essence.

Article 15.2 of the CBA requires a written notice of a disciplinary action accompanied by a reason. Grievant was notified on September 9 that the mandate applied to her and instructed to comply or get a waiver by October 7 (J-2). On September 30, she was given written warning (J-3) of possible termination if she did not prove in the next week that she had received the required first dose. On October 8, she was given another letter (J-4) from the County that her noncompliance had resulted in her being put on unpaid administrative leave and given another three work days to get her first dose of the vaccine. On October 14 she was terminated. On October 21, the Union, noting a "Notice of Discipline/Termination dated October 7," requested a Disciplinary Appeal Meeting. On November 3, 2021, the County, while not acknowledging it as a Disciplinary Appeal Meeting, offered a "Notice and Opportunity to be Heard (AKA "mini due process) meeting a week later, on November 10. That meeting did not take place due to the Grievant's need for time to recover from childbirth. Grievant was able to attend a meeting on December 17 and the "mini-due process" meeting was held then. Five days later, the County notified the Union that the decision to terminate the Grievant was sustained. The Union filed its Demand for Arbitration with the NYS Public Relations Board on January 3, 2022.

One can overlay the dates, warnings, and notices detailed above with the requirements of Articles 15.2, 15.3.1, 15.3.2, and 15.3.3 in the contract between the parties. Regardless of what argument the County was pursuing at the time (i.e., the qualifications requirement), the record shows that the essential steps of the discipline process were followed. The Grievant received due process as required by the CBA.

Finally, any analysis of just cause should include an evaluation of whether there are extenuating circumstances that warrant consideration of a lesser penalty. There are two salient

facts here that bear analysis. The first is that the Grievant was a good employee. Her personnel record from the time of her initial appointment until the date of her placement on unpaid leave indicated that she performed consistently at or above the performance goal. *Is her refusal to comply with the mandate mitigated by this fact?*

The second possible mitigating circumstance was revealed in Grievant's testimony that she was approximately 36 weeks pregnant at the time of the mandate and the communications that followed and was worried about the possible effects of the vaccine on her unborn child. *Was this concern a sufficient mitigating factor to warrant either a finding of no just cause or a reduced penalty for noncompliance?*

The undersigned finds that neither of these factors warrant any significant reconsideration of whether the just cause standard has been met or whether the penalty of termination was too harsh.

Much has been written about the severity of the pandemic caused by the COVID-19 virus. To date it has taken more than one million lives in the United States. This once-in-a generation trauma forced wide-ranging shutdowns of businesses, government agencies, schools, and a complete re-thinking of work and the delivery of products and services worldwide. There is no need for a wider discussion of that here. However, context is key. How a governmental entity copes with such a rare and catastrophic set of circumstances, how it chooses to interpret orders from higher-up governmental entities can certainly be questioned after the fact. But in the moment (and we are still in that moment) government organizations are bound to take actions in response to the crisis that it would not take under normal circumstances. Such is the case here

and I am forced to conclude that termination of otherwise good employees, to set an appropriate example and/or to protect other Department of Health employees and the clients/patients they serve during a public health emergency, will sometimes happen. Given the context, the County was within its management rights, as agreed to by the Union in Article 3 of the CBA, to impose termination as the appropriate consequence for Grievant's refusal to be vaccinated.

Regarding the Grievant's worries about the possible harm to her unborn child of the vaccine, the undersigned finds that these do not mitigate her refusal to be vaccinated. The state mandate in Section 2.61 and the County's communications with Grievant informed her that there were provisions in the order for medical exemptions and she testified that she was given the paperwork for a such an exemption. However, she also testified that, when she inquired with her doctor's office about an exemption, she was informed that the medical practice was not giving patients in her circumstances medical exemptions. We can presume a valid medical reason for the doctors' no-exemption policy. The Grievant continued (and continued at least through the date of the hearing) to not be vaccinated. This behavior is deemed to not significantly mitigate the negative consequences she experienced in her employment situation as the result of her insubordination.

AWARD

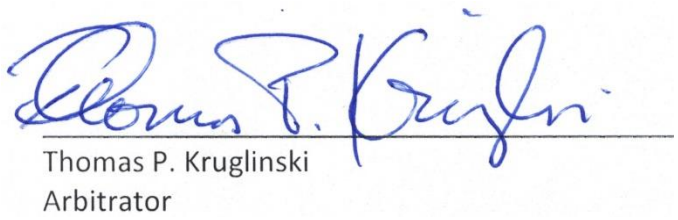
Accordingly, I find the County's termination of the Grievant is for just cause and the termination is upheld.

State of New York

County of Greene

I, Thomas P. Kruglinski do affirm my oath as an Arbitrator that I am the individual described herein and who executed the instrument, which is my Award.

Signed and dated this 9th Day of July at Gardiner, New York



Thomas P. Kruglinski
Arbitrator