In the Matter of Arbitration Between:	)	
	)	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, Local 2338)	)	
	)	
Union,	)	
	)	
and	)	**FMCS No: 200327-05154**
	)	
DEPARTMENT OF VETERANS AFFAIRS, JOHN J. PERSHING VA MEDICAL CENTER, Poplar Bluff, Missouri	)	
	)	
Agency.	)	
	)	

OPINION AND AWARD

BACKGROUND

This arbitration was held by Zoom, June 11, June 12, August 17, August 18, November 4, November 5, and November 23, 2020, before Arbitrator Ann Breen-Greco. The Union filed a grievance asserting that the Employer violated the contract. The parties filed timely briefs, which, based on the two extensions that were agreed upon, were due and filed by email May 2, 2021. Both parties did excellent work on behalf of their respective clients.

APPEARANCES

For the Employer:

Dane Roper, Attorney
Ryan Wells, Agency Staff
Brenda Norden, VA Laboratory Supervisor
Ashley Leopold, VA Chief of Environment Care and Safety for Industrial Hygiene
Michelle Brightwell**, VA** Program Analyst
Robert Jurgiel, Industrial Hygienist
Scottie Rawls, VA ERLR Resource Specialist

Thomas Humble, VA High Reliability Specialist
Desmond McMullan, VA Medical Center Director, Beckley
Jennifer Hanks, VA Employee Relations Specialist
Joan Bowan, VA VISN 23 Industrial Hygienist, GEM Program Manager

For the Union:

Judge Robert Smith (ret.), Attorney
Kevin Ellis, Union Representative
Scott White, Grievant
Richard Yoebstl, (former) VA Industrial Electronic Controls Mechanic and Union Safety Officer
Lee Ann White, Grievant's Spouse

Arbitrability

The Union filed a third-step grievance in this case on March 11, 2020. Jt 2. In the grievance, the Union contended that the Agency denied the Grievant a safe work environment, the Grievant has disabilities related to mold, the Agency offered him a Versiflo Hood to assist with the unsafe work environment, and the Agency denied him workers' compensation. The Grievant sought to be made whole and also compensation for pain, suffering and humiliation.

The Agency asserts that: the current grievance was previously filed under another number, the Union failed to select an arbitrator during the ten-day time period and then filed the same grievance with a different case number. Accordingly, the grievance is non arbitrable. The Union contends that it has been past practice for the parties not to adhere to the ten-day timeframe.

Dismissing a grievance on procedural grounds effectively deprives a grievant of the opportunity to be heard on the matter raised in the grievance. The seriousness of such dismissal and the policy favoring arbitrability places the burden on the challenging party to overcome the presumption that disputes should be resolved on their merits. In this case, the Agency must demonstrate the procedural grounds that have been violated to the extent that the Agency was deprived of the opportunity to properly investigate and address the allegations and that the intent of the parties as expressed in the contract have been disregarded.

In the light of the gravity of denying a grievant an opportunity to be heard on the merits of the case, dismissing a grievance can be done only in the most limited of

circumstances. "The Court directed that doubts concerning the arbitrability of a dispute should be resolved in favor of arbitration…." *United Steelworkers v. Warrior & Gulf Navigation Company*, 363, U.S. 574 (1960).

The Arbitrator determines that the Agency has not overcome the presumption that disputes should be resolved on the merits. The evidence can be interpreted as finding that the Union followed past practice in which both parties did not select an arbitrator within the ten-day time frame. Additionally, the Agency has not demonstrated it was deprived of the opportunity to investigate and address the allegations and that the intent of the parties as expressed in the contract was disregarded. The Arbitrator finds that the grievance should be resolved on its merits.

Issue

The parties did not agree on an issue. Both parties submitted their own issues – Agency brief, pp 2,3; Union brief p 5. Pursuant to the Master Agreement (Jt 1), when the parties do not agree on the issue, the Arbitrator determines the issue or issues. Jt 1, Art 44, Section F.

Whether the Agency violated the Master Agreement, applicable laws, rules, and regulations by failing to provide a safe workplace, failing to offer the Grievant a reasonable accommodation; failing to offer an interim reasonable accommodation after the Grievant made known his health issues, failing to assist the Grievant with completing the necessary Office Workers Compensation Program, and causing the Grievant to suffer needlessly and suffer a loss of wages, benefits and insurance because of his disability.

Contract/Master Agreement is the Controlling Document

The Arbitrator has ruled on the matter of arbitrability of this matter, thereby establishing the record for proceeding with the arbitration. The issues framed in the grievance are appropriate for arbitration. The Master Agreement is, therefore, the proper authority for regulatory and procedural application of the law in this hearing.

Despite the Agency assertion in opening statement that "mold is just not that scary", the parties included a section on mold in the Master Agreement, Jt 1, as follows:

ARTICLE 29 - SAFETY, HEALTH, AND ENVIRONMENT, Section 15 - Mold

A. The Department shall conduct an inspection in each facility to determine the existence of mold. Qualified inspectors will inspect the facility for mold under EPA standards for Hazardous Air Pollutants regulation.
B. The Department will review all construction and/or space modification contracts and/or work orders to determine if mold is present and, if so, how to proceed with appropriate removal or containment.
C. The Department will notify the local union prior to initiating procedures for mold removal.
D. Where it has been determined that mold exists in a facility, the department will conduct periodic surface and air sampling as appropriate.
E. If surface or air sampling indicates that airborne concentrations of mold exceeds the levels in the control sample, exposed employees will be notified in writing of the exposure within five days after discovery of the excess of mold concentration. The department will assist affected employees in filling out and filing the appropriate OWCP forms.
F. If the airborne or surface mold concentration amounts are exceeded, the department will ensure abatement of the mold hazard.
G. Once significant airborne or surface small particles are detected, the department will conduct sampling at intervals of no greater than three months to monitor employee exposure levels.
H. Union health and safety representatives will be given training on mold removal and permitted to monitor removal procedures.
I. Union health and safety representatives will be given a copy of all test Monitoring mold levels.
J. Mold abatement plans may include a discontinuance of work or the shifting of employee work location. Notice of such abatement action will be provided to the local union in advance except in an emergency situation in which the local union will be notified as soon as possible. The department will meet its labor obligations in both instances.
K. The department will ensure that all external surfaces within the unrestricted work environment in any facility shall be maintained free of accumulation of mold.

This Section is specifically noted here because of its importance to the case. However, many Sections of the contract are particularly relevant as cited in the decision.

Exhibits

Numerous exhibits were taken under advisement based on objection. All the exhibits are admitted. It can be seen from the decision which exhibits were given most weight.

Exhibits are designated Jt for Joint; A for Agency; U for Union

Exhibits are Jt 1-12, 14; U 1-139; A 1-79, with A Exhibits skipped: 12, 22, 24, 25, 28, 29, 30, 32, 36, 37, 38, 39, 41, 43, 46, 47, 58, 59, 60, 62, 65, 70, 74, 76.

Parties' Contentions

The Union contends that: the Agency did not provide a safe working environment for the Grievant; he is a qualified individual with a disability for purposes of being offered a reasonable accommodation; he was offered what the Agency states was a reasonable accommodation but which the Grievant found unusable; the Agency did not provide the Grievant appropriate support in his attempts to obtain workers' compensation; and the Grievant suffered needlessly and sustained a loss of wages, benefits and insurance because of his disability.

The Agency asserts that it has provided a safe working environment, the Grievant is not a qualified individual with a disability for purposes of being offered a reasonable accommodation, and the Grievant was offered a reasonable accommodation which he refused.

Determinations on Agency Concessions

In offering a reasonable accommodation to the Grievant, the Agency concedes, despite its denial, that there was need for such accommodation because it was not a safe working environment for the Grievant and this negates its assertion that the Grievant is not a qualified individual with a disability entitled to a reasonable accommodation. The Agency also made statements acknowledging the Grievant's

medical issues. Nonetheless, the evidence is analyzed to ensure that the facts and record on this matter are established.

Safe Work Environment

To prove that the workplace is not a safe environment, it must be established that it did not accord with the requirements of the Agreement, specifically ARTICLE **29, SAFETY, HEALTH, AND ENVIRONMENT, Section 15 – Mold**. (U brief, p 166).

To begin its case, the Agency states in opening argument that, "If I were to sum up this case in one sentence, it would be that mold is just not this scary." T pp 25-26. A review of the Master Agreement, VA Handbook, and relevant laws, in addition to medical information on how mold can affect persons differently, from mild to severe, highlights how that opening sentence attempts to minimize the issue of mold to negate the Agency's responsibility for a safe working environment.

Beginning in 2012, prior to the Grievant raising concerns regarding the work environment, the supervisor and others filed a series of work orders regarding conditions in the lab pertaining to temperatures fluctuating from hot to cold, moisture, condensation and mold. Testimony confirms that these are conditions that support mold growth. The Agency asserts it has addressed the issue of mold. In April 2018 when mold was discovered, an engineering team used antimicrobial paint on the area to address the issue of mold. However, mold returned. Three Agency witnesses, Brenda Norden, Michelle Brightman, and the independent Industrial Hygienist, Robert Jurgiel, testified that if the source of mold was not corrected it would return.

Particularly noted are ongoing concerns regarding condensation and moisture. The Agency relies on the fact that it had an industrial hygienist firm do testing for mold and then contracted with a private entity to do the remediation. No evidence has been offered that the source of mold was eliminated after the work was done subsequent to the Jurgiel testing. There is no evidence that a post remediation report was done. Jurgiel testified he did not do a report. The Agency asserted it was not required to do one.

Most significantly there are three major concerns in the Jurgiel report:

(1) The report stated **"because of the limited scope and the limited accessibility during this survey, the unknown conditions prior to the survey, the unknown duration of these water/moisture intrusions, the potential for those water/moisture intrusions to have affected inaccessible portions of this building, the potential for additional unidentified water/moisture intrusion, and a potential for hidden mold growth, additional mold growth remains a possibility. If additional suspected mold growths are encountered during remediation, additional inspection and/or mold remediation activities may be necessary." Jurgiel report, page 2, Jt 5.** Highlight added.

(2)The report cautions that occupants of the building should monitor their health and consult a doctor with regard to the total mold spores levels as well as the individual molds detected.

(3)The follow up Jurgiel report, sent in an email to Agency personnel, which was concealed from the Union, states, "as discussed, additional investigation should be conducted by a mechanical engineer for the HVAC system that supports the hematology and chemistry labs to ensure that it is working properly to control the relative humidity levels in the spaces, and not lead to condensation issues and potential future mold growth during warm outdoor months."

No evidence has been admitted to show that the Agency relayed a caution to employees regarding their health or that the additional investigation for the HVAC system was done.

Brenda Norden testified that she is the laboratory supervisor. T 1073. She has allergy or mold related issues for which she sees a doctor. They only become more severe in the field. T 1074. She was approached by the Union about joining in a complaint about mold in the lab and she declined. She reported mold in the lab April 2018 and January 2019. When employees reported issues with mold, she would tell them to contact employee health or file an E comp, a report of having issues related to the work area. She is aware of complaints of mold in the environment in the lab from the Grievant and Kevin Ellis. T 1075.

In April 2018 in the hematology area of the lab there were little gray spots on the back wall and on part of the air conditioning vent. Engineering painted it with anti-microbial paint and did some cleaning and it did not return in that area. In an incident in January 2019 mold was reported and Ashley Leopold came to the lab. T 1076. The engineering people came and "did something up in the vents." T 1077.

Ashley Leopold testified she is the Chief of Environment Care and Safety for Industrial Hygiene, Emergency Management, Occupational Safety and Health, Safe Patient Handling and Infection Prevention. She was the facility's infection prevention nurse for about five years and previously she was in infection prevention in the private sector. T 765, 766. She is not a trained industrial hygienist. T1281, 1282 (Michelle Brightman testimony).

In January 2019 Leopold was notified by lab staff about mold. T 766. When contacted regarding the mold situation, Leopold, who was new, reached out to Michelle Brightman. She went to the site to do a walk-through. She gathered "additional people to review the areas such as facilities management." T 767. They reached out to the HVAC mechanic who is also the Union safety representative, Richard Yoebstl. T 767. To attempt to remedy the situation, the flex duct (part of the HVAC) was taken down and replaced. T 769. The mold abated but Leopold then was contacted by the Grievant that the mold returned. The Agency then reached out to the industrial hygienist firm, Jurgiel & Associates, for indoor air quality testing. T 770.

Although the Agency asserts that Leopold is qualified to inspect for mold (Agency brief, citing Leopold testimony, T 858) that is not established. She testified that she "believes" she has had the classes and the experience to meet the intent of the Contract (Jt 1), page 152, paragraph D, citing CFR 29 1960.25A. T 858.

Norden submitted two mold related work orders. T 1096. Mold can wreak havoc in the lab. T 1096,1097. Remediation was done in the lab at the end of April 2019. T 1097. Hard surfaces were cleaned, and porous ceiling tiles were replaced. T 1097. She testified she did not see any particulates in the blood bank although it was reported to her that there was some mold above the ceiling tile in one area of the blood bank that was discovered during the deep cleaning. T 1098.

Both OSHA and 0MI inspected the lab. T1102. There were no findings in April and May 2020 requiring the Agency to have to do something different. T 1103.

Norden acknowledged that moisture is a contributing factor in causing mold to form. T 1118. If accumulation of moisture continues, if mold is present, mold will grow. T 1118. There was a report in 2018 and 2019 about mold. T 1118. She testified there may have been instances of moisture forming in the workplace in 2013, 2014, 2015. T 1120. Employees may have been putting in work orders on this in those years. T 1120. She submitted work orders in 2018 and 2019. T

1120. Some work orders may have been submitted noting that on occasion it would be too cold in the lab. T 1130.

She contacted the environmental management people, Ashley Leopold and Shane Minton. T1121. The mold was stopped from growing in the area but not from coming into it. T 1122. She does not recall notifying the Union about it. The employees were present and were aware there was mold. T 1123. To her knowledge no air sampling was done. The issue was referred to the subject matter expert. She does not recall an email indicating a broken belt might be the problem. T 1125.

She acknowledged a cleaning with regard to mold in April 2018 and then October or November of the same year another deep cleaning related to the HVAC system. T 1141. (It is noted that there had to be deep cleaning in April and then in October or November related to the HVAC system. T 1141. This was prior to the survey done by Jurgiel in February 2019 in which he recommended further investigation of the HVAC system.)

Norden did not order testing because the issue in April was reported appropriately and dealt with appropriately and the issue appeared to be addressed. T 1143. She testified, "So, it's not like it was continuously high moisture, high mold growth area. So, we are talking separate events, not continuous." T 1142. (It is noted that her contention that it was not continuous high moisture, high mold growth is not accurate. A few months in between reporting of these same issues, despite the allegation (later disproven) that the second occurrence might be from a broken belt, did not mean there was not an ongoing problem.) She acknowledged intermittent issues with mold. T 1143. She again acknowledged high humidity causes moisture. T 1145. There are dehumidifiers in the office but they not running because there is no need. T 1145. A temperature track is used to monitor the humidity to determine the need. But she acknowledged that does not determine whether or not mold is growing. T 1145. She does not know if a certified mold company did mold remediation. T 1147, 1148. To her knowledge, sampling has not been done every 90 days. T 1149.

She acknowledged Union 118 is a work order she entered, dated September 10, 2012, page 46, in the comments section, "High temps make it uncomfortable to work for prolonged periods wearing PPE. Cited as a deficiency in CAP inspection September 7, 2012." T 1151. CAP is the College of American Pathologists which does site visits every two years. In a September 10, 2012, work order, the task description states, "Relative humidity is too high" and the same matter stated in the

September 4, 2014, order on page 50, noting in the comment section, “Needs checked out as soon as possible as condensation is visible on floors, countertops, analyzers, etc." T 1152.

For the order of October 9, 2014, she put in test description, “Turn down the heat” and in the comment section, “The temperature is way too warm in the main laboratory and chemistry area. Please make it cooler.” U 54. In the order of November 13, 2018, the test description states, “Temps too hot for testing limits.” T 1153. Page 55 of the order reads, in task description, to “increase room temperature” with comments that “the room (the blood bank) is too cold.” That was May 7, 2019, after the mold had been reported twice. T 1154. On the order dated April 9, 2018, page 59, the task description states, “Moisture on wall causing mold to grow." T 1155. Comment section states, “The back wall adjacent to the elevator shaft has moisture and grew mold. The wall has been painted with antimicrobial paint per industrial hygienist, **but the source of moisture has not been identified. If not identified and corrected, mold will return**.” (Highlight added) T 1155.

Norden testified that if the source of mold is not corrected it will return. Still by May 7, 2019, after the Jurgiel report of February 2019, after mold had been reported twice, there was an order that the temperature was too cold. There was an ongoing pattern of orders from 2012, including references to moisture and acknowledgement that moisture will cause mold to grow. Despite that clear pattern, Norden retained her position that incidents were “intermittent.” Although the Agency and Norden herself attempted to portray her as just someone who “reports” the issue, she was attempting to minimize the hazard in the lab. Even after the Jurgiel report recommended additional investigation, not just cleaning, she still testified that incidents were “intermittent.”

Mold did eventually return even after the wall was painted with antimicrobial paint. according to her testimony. T 1156. In an order dated December 14, 2015, the task description stated, “Bugs in lab again." T 1157. She does not know how the bugs were getting into the area. A January 2, 2019, order, page 61, has the task description “black mold growing on wall/ceiling" and comment section, “Being invaded by the orange lady bug type critters again.” T 1157.

On the January 2, 2019, order, the task description states, “Black mold growing on walls and ceiling.” T 1157. The comment section stated, “Black mold growing on walls/ceiling area and hematology, left back corner of main lab.” T 1158. Norden attempted to deny that these were two different areas in the lab where mold was

growing. She testified one was identified in 2018 and it "was not the same area as identified in 2019." T 1158. This is an admission of mold growth in two different areas--despite her denial.

A January 6, 2012, work order states, "musky odor" and to "check air flow and/ or ceiling tile." T 1159. On questioning, she would not acknowledge a pattern from 2012 to 2019 regarding musty odor, condensation forming, mold in two different areas, but again stated there were intermittent environmental issues in the area that had been reported and dealt with appropriately at the time. T 1159.

In an order regarding the blood bank, December 10, 2019, the comments are, "Room is very warm and humid." In October or November 2018, a deep cleaning was not done in the full lab. T 1160. Norden acknowledged a deep cleaning had been done in April or May 2019. T 1160. Again, she states high moisture and high humidity will encourage mold growth. T 1161. She acknowledged she is a Medical Technologist. T 1161. She was shown Mold Course Chapter 2 from the EPA (U 128) that shows why and where mold grows, referencing humidity and ventilation problems. T 1162. It also shows structural integrity and mold growth. T 1163.

She testified that with respect to the HVAC system temperatures have not been a real issue; "I know they are also working on some upgrades. I don't know where they're at on it." T 1164. (The Jurgiel report calls for investigation of the HVAC system). The document also states some humidity or dampness can cause enough moisture for mold growth. T1163. She acknowledged a deep cleaning in April 2019 before the work order of December 2019 and after the mold testing was done in February 2019. T 1164. But then she testified she does not know if there has been any approved environmental testing done in her area from 1994 up to January 2019. T 1165. Nonetheless, she testified that OSHA did testing, and she knows this, "Because I am the lab supervisor and I was here and OSHA came and they did testing." T 1166. Dehumidifiers were brought to her area, but she does not know if they were recommended by engineering. T 1167.

There was a work stoppage for deep cleaning for mold for two days and then workers returned. T 1170.

Norden reiterated that moisture and humidity will encourage mold growth. T 1184. The HVAC system causes moisture and other issues "intermittently" over the years. T 1185. She does not recall if she was told by Jurgiel or anyone at the Agency that she was required to investigate and correct the HVAC system over

and beyond putting in dehumidifiers. T 1186. This would reflect that the Agency did not follow the recommendation in the Jurgiel report regarding the HVA system.

Michelle Brightwell, like Brenda Norden, testified that if the source of mold is not corrected it will return**.** Brightwell is a program analyst but previously was an industrial hygienist. T 1231. An industrial hygienist "protects employees from hazards they cannot see and is responsible to manage respiratory protection, asbestos, ergonomics, radiation, and chemical hazards." T 1232.

She is familiar with the Jurgiel report of February 11, 2019 and was involved with the mold situation before then. In January 2019, Ashley Leopold, who was fairly new, contacted her about the mold situation and informed her that mold had been found in a lab behind a wall and that the staff were very concerned. T 1233. She told Leopold it needed to be addressed, remediated, cleaned up. T 1239.

When asked if she recommended that the Agency do testing, she responded, "**I never recommend testing. There is no OSHA threshold for most mold exposure. It is very person specific. The example I always give is that my husband and my daughter are very sensitive to mold. They both take daily allergy pills; they both have sinus problems. It is very troubling and concerning for them, but there is life outside and they are allergic to it. I and my son don't have those same issues, but because of that difference between people, there is no way to establish a safe threshold for mold exposure**. (Highlight added) And because of that, the sampling doesn't really accomplish anything because sampling doesn't tell you what the legal level of exposure is. The only time sampling is really even necessary is if you have a significant group of people who are complaining. In that case, you still need to remediate the mold, so sampling doesn't accomplish anything. It's just time intensive and costly. When we have an issue where we have physical mold intrusion, we need to correct it." T1241.This testimony reflects that she knows mold exposure is "person specific" but yet refused to acknowledge that the mold could affect the Grievant.

"Mold is ubiquitous. It's in all environments…. Indoor amplification is where you have a situation inside a building where due to the humidity levels or the HVAC, which is the heating/air conditioning ventilation system, it allows that …extra mold to come in through the building and be amplified." T 1242.

Brightwell's testimony regarding HVAC is notable because that it is exactly what

the Jurgiel report states about the HVAC system. It recommended the need to have additional investigation. Brightwell's testimony is remarkable in that she voluntarily describes differences in sensitivity to mold among her family members. However, apparently, she does not recognize a similarity to differences in sensitivities between the Grievant and his co-workers.

She denied that indoor amplification ever happened in the lab. T 1242. She testifies that mold cannot be completely alleviated because if she could she would do that for her daughter. T 1243. She did testify, however, that there were areas in the hospital, i.e., the pharmacy compounding room where there are specific HVAC criteria needed. That, however, is just for limited, specific use. That cannot be done throughout the hospitals. There are no mold regulations from OSHA. T1244. She testified that all the HVAC units are zones, not feeding single rooms.

HEPA (high efficiency particulate air) filters are very good but do not provide an allergen free environment. T 1246. Even with HEPA filters throughout the facility, there would still be mold circulating throughout the building. T 1247.

She does not think that the Grievant could achieve zero mold in his home with a HEPA filter. T 1248. She testified there was no indoor amplification found in the Jurgiel report. T 1253. She testified that mold testing is problematic because "…it's a snapshot in time and mold … count changes every single day." T1253, 1254.

She also testified that the only way "…you know you have a problem with internal amplification is if you have numerous people who are experiencing symptoms and it is better to go with an actual indoor air quality assessment to determine if multiple people in the same geographic area on the same air handler are having symptoms. Then you need to get to the root cause of that and remediate it." T 1254

It is noteworthy that again she testified to the need to have multiple people having symptoms. Yet she herself voluntarily testified that her daughter and husband experience more severe symptoms than she and her son. This would undermine the theory that, if multiple people are not having the symptoms, there is no mold issue for one individual.

In response to Agency questioning, she testified that if the indoor environment consistently tested lower than outdoors there is no persistent mold growth in the facility. She acknowledged that there was another location where there was

significant remediation because of indoor amplification. "Our HVAC units, for the most part, provide good, filtered air." T 1255.

This testimony does not align with the Jurgiel recommendation to the Agency that it should do additional investigation by a mechanical engineer of the HVAC system. The Jurgiel recommendation was made after Jurgiel's review and testing.

She further testified that the Powered Air Purifying Respirator (PAPR) has long been used for employees who are unable to be fitted a tight-fitting respirator. T 1255, 1256. PAPRs are generally used to protect employees from infectious patients, primarily tuberculosis, but now are used for COVID. She testified that the PAPR is like a box (6 inches by 2 inches deep by 4 inches) which is battery powered. The powered battery has a HEPA filter and is worn on the lower back with a tube coming up and a shroud going over the head. T 1256.

She denied that mold is in the category of "immediately dangerous to life and health." T 1257. She further testified that "…you cannot use a PAPR for chemical exposures unless you had the proper filter. It is important to match the filter to whatever you're trying to protect your employees from." T 1257. She said she can use a particulate filter for mold and there is no reason that it could not be used with the PAPR to prevent mold from getting into respiration. PAPR would have a filter that filters out grass (when lawn mowing) but for some employees it is uncomfortable, "like they have allergies." T 1258. PAPR is under the voluntary standard for OSHA. Employees can get involved in what is called a voluntary use for trade section program. T 1258.

Brightwell testified mold is not immediately dangerous to life or health. T1259. She said the only way that it could occur was if there was an allergic reaction that resulted in an anaphylaxis and she has never heard of that from mold. T 1259, 1260. She did testify "I've heard of that with peanuts and, you know, other allergens."

This testimony calls into question Brightwell's perspective, experience, and knowledge. She refers to an allergic reaction to peanuts that might be dangerous to life. However, even though she has previously testified voluntarily that her husband and daughter have more severe allergies than she and her son, she does not make any connection with her peanut analogy or her husband's and daughter's more severe allergies to the Grievant's allergies being life-threatening even though his co-workers may not experience the same reaction, despite her having testified that mold is person specific. Even though she made medical statements, it is

noteworthy that the Agency did not have her review the Grievant's medical records.

With respect to the Master Agreement, Article 29, Section 15, she testified they would move forward with those mold procedures when employees either went to their supervisor and expressed concerns or to occupational health or when it was inherently obvious like a plumbing issue. T 1261. When questioned about a situation where she had to relocate people at another location, she testified that she does not recommend sampling, so that was not done for indoor amplification. In that situation where people were relocated, it was because they were complaining of mold related symptoms. Remediation of the mold was done, and people were able to be relocated back. T 1262. She testified that she reviewed the findings and the suggestions of the Jurgiel report. When asked if the Agency "went over and above", she testified that it did. T 1263.

In response to the question about the point of trying to get to the sources that might be causing mold she testified, "because it will just come back." "Like if you have an HVAC that is sitting in a tray and the tray is leaking you know, like, if you replace the ceiling tiles, the same ceiling tiles that does have a really good growth medium for mold if you replace the same ceiling tiles it will just continue to leak and you will grow more mold." She testified she did not know if there were any further mold instances in the lab. T1264.

This testimony supports the Jurgiel findings and recommendations regarding further investigation of the HVAC. When the Agency attorney asked her "and if nobody was complaining about the mold, you would consider that a victory for the remediation?", she testified, "Yes that is a primary indicator if the problem persists." T 1265. This again is contradicted by her testimony regarding different allergy sensitivities in different people, as in her family, but apparently not with respect to the Grievant's sensitivities. Mold may not be seen but felt.

She began her testimony saying, "An industrial hygienist protects employees from hazards they cannot see and is responsible to manage respiratory protection, asbestos, ergonomics, radiation, and chemical hazards" but based on her testimony this "protection" and "responsibility" does not extend to the Grievant.

Although the mold complained about in January 2019 abated, Leopold was contacted by the Grievant about the mold returning. The Agency then reached out to the industrial hygienist firm, Jurgiel & Associates, for the indoor air quality testing.

Robert Jurgiel testified that he performed testing for the Agency on January 29, 2019. JT 5 Jurgiel Report (February 11, 2019). He is an industrial hygienist. An industrial hygienist does performance evaluation of work places for potential exposure and hazards that need to be addressed or controlled. The company consults for asbestos, lead, and mold as part of the remediation project.

Jurgiel sent an email to the Agency February 6, 2019, (U125, 025, 026), which was not given to the Union. The Union had to use a FOIA request to obtain it. The email notes the following: "**Based on these results, no indoor amplifications of airborne mold spores were detected in the affected areas. However, mold growths were confirmed in two of the tape-lift results (VAPB1-T1 and VAPBL-T2) that should be cleaned-up and addressed. It should also be noted that Cladosporium and Alternaria are considered common outdoor mold spore types. The presence of Hypal Fragments identified in the results is indicative of mold growth, as opposed to only settled spores from the outdoors**." (Highlight added). "Please review and let me know if you have any initial questions or comments. A letter report will be issued later this week with remediation recommendation." U125, p 025.

On February 11, 2019, an email was sent to Agency personnel and signed by Robert Jurgiel. U125, p 024. This email also was not given to the Union, which had to use a FOIA request to obtain it. The email states: "Attached is our report for the above referenced IAQ survey. **As discussed, additional investigations should be conducted by a mechanical engineer for the HVAC system that supports the hematology and chemistry labs to ensure that it is working properly to control the relative humidity levels in the spaces, and not lead to condensation issues and potential future mold growth during warm outdoor months**. (Highlight added).

When the Union attempted to introduce this email during the arbitration, the Agency objected on the grounds of relevancy. The objection was overruled.

The following HVAC issues were reported:
-since the space is designed for Merv 7 and Merv 14 filters but currently has only one bank of Merv 11 filters that is less efficient and may affect airflow volumes.
-since this space is designed for 1-pass air the supply and exhaust should be properly balanced with the proper amount of airflow. It should be noted that indoor relative humidity levels are more difficult to control with this type of system due to the high amount of a relative humidity in the outdoor air during warmer months.

Unbalanced airflow could lead to extraneous infiltration of controlled outdoor air flow into the space.
-There were reports of moisture carry over past the cooling elements that should be investigated and corrected. This effect will also increase humidity levels and contribute to potential mold growth on downstream services that may be dirty.
-Temperature and relative humidity levels should be monitored during these warm month periods to ensure proper operation. **The use of dehumidifiers and/or supplemental cooling may be temporarily required to properly control the space until the HVAC system can be corrected**. Highlight added. U15, p 024.

The Jurgiel Report (Jt 5) sent to the Agency on February 11, 2019, states, "Based on these results (of their testing), no indoor amplifications of airborne mold spores were detected in the affected areas. As previously noted, there were no specific acceptable or unacceptable levels of total mold spores established by the Environmental Protection Agency (EPA) or the Occupational Safety and Health Administration (OSHA) at the time of the survey. **The occupants of this building should be reminded to monitor their own health, and to consult with their doctors to determine the appropriate course of action with regards to these total mold spore levels, as well as the individual molds detected. (**Highlight added**)** Jt 5, p 3.

These documents, Jt 5 and U125 (pp 024, 025, 026), are critical to the determination in this matter. Although asserting no indoor amplification is found, the report states mold growths were found, as opposed to only settled spores from the outdoors. They highlight the dangers to which employees were exposed and recommended the Agency have employees monitor their health. They define that more investigation is needed of the HVAC system and point out specific problems of the HVAC system.

The Jurgiel Report also provided General Mold Information as follows:

Airborne mold spores and other bioaerosols can result in a wide variety of symptoms but are most commonly associated with upper respiratory allergy-type symptoms including sinus and pulmonary congestion, as well as eye irritation. Mold spores, the most common bioaerosol, are generally present in all indoor locations, with levels typically below outdoor levels. Where mold amplification sources are present (such as contaminated HVAC equipment, stagnant water sources, wetted building materials, etc.) elevated spore production and distribution may result in these symptoms.

Individual sensitivities to mold spores vary widely across the population, from no response, to allergy-type responses, to life-threatening diseases and infections...Allergy-type symptoms include runny nose, eye and throat irritation, cough, congestion, and the aggravation of asthma. (Highlight added.) (These are symptoms the Grievant complained of and discussed with medical personnel.). Some persons are at risk of developing Organic Dust Toxic Syndrome (ODTS) or Hypersensitivity Pneumonitis (HP). ODTS can result from a single exposure to elevated dust and fungal spore levels and produces "flu-like" symptoms. HP may occur after repeated exposures to an allergen and can result in permanent lung damage. Jt. 5, p 3.

The spores of some mold species can produce potent mycotoxins, which are fungal metabolites, and have been identified as toxic agents. Stachybotrys spores can produce such potent mycotoxins. Stachybotrys mold has also been linked to a variety of serious respiratory effects, including pulmonary hemorrhage/ hemosiderosis in immuno-compromised individuals. The Stachybotrys mold spores may also aggravate other respiratory conditions brought on by other environmental contaminants.

Other mold species capable of producing potent mycotoxins include Penicillium, Aspergillus, Fusarium and Trichoderma species. Penicillium mold spores are also a strong allergen and can aggravate asthma conditions. (Highlight added - It is noted the Grievant has been diagnosed with asthma). Several Aspergillus species have been associated with infectious diseases, such as Aspergillosis, in which the mold begins to grow inside the lungs of susceptible individuals. Jt 5, p 4.

All visible mold growths and other areas identified with mold growth should be treated as potentially containing toxic mold spores. Disturbing these growths can result in the release of millions of spores into the air. Proper cleanup methods should be used to minimize the potential for spore release and should generally include wet methods. Jt 5, p 4.

The report reflects the effect on individuals of the mold growth, including **"life-threatening diseases and infections**", (highlight added) even while asserting no indoor amplification is found. This refutes Michelle Brightman's testimony that mold is not in the category of "immediately dangerous to life and health" and reflects that she is not qualified to make such determinations.

The only reference to Union Exhibit 125 in the Agency's closing brief is in a footnote characterizing the Union as using it for recruitment. "What is evident from Union Exhibit 125 is that Jurgiel noted a few issues but didn't suggest changing the entire system or surmise that the current HVAC system couldn't keep functioning safely." Agency brief, p 9, footnote 18. However, in fact, the February 11 Jurgiel email which was not provided to the Union specifically recommends that additional investigation should be conducted by a mechanical engineer for the HVAC system to prevent potential future mold growth during warm outdoor months.

The Agency contracted with Guarantee Interiors "to remediate/deep clean the laboratory (T p 786/117, 16-22), noting that the subcontractor (PART, Inc) was a certified mold removal company. (TR 872/203, 3-4)." No post-remediation testing and lab report are in existence because, according to the Agency, none is required, "particularly where there was never any indoor amplification," further noting that if there had been indoor amplification, follow-up testing would have been completed. Agency brief, p 10.

The Agency does not address the portion of the Jurgiel report that states mold growths were confirmed in two of the tape-lift results, noting the presence of Hypal Fragments identified in the results which is indicative of mold growths, as opposed to only settled spores from the outdoors. U 125 p 026. The Agency also disregarded the follow up email from Jurgiel which was withheld from the Union email (U125) stating: "**As discussed additional investigations should be conducted by a mechanical engineer for the HVAC system that supports the hematology and chemistry labs to ensure that it is working properly to control the relative humidity levels in the spaces, and not lead to condensation issues and potential future mold growth during warm outdoor months.**" (Highlight added).

Instead the Agency relies on having done a cleaning and a contention that since there was no indoor amplification no post remediation testing was required. However, that does not explain why the Agency ignored the recommendation from Jurgiel that additional investigation should be done for the HVAC system to avoid potential future mold growth. Accordingly, the Agency disregards the advice of the industrial hygienist firm it retained and gives no satisfactory explanation for this. The Jurgiel report states there were mold growths and the Jurgiel follow up email recommended investigation of the HVAC system to avoid potential future mold growth.

Nonetheless, the Agency maintains a reliance on the outdoor versus indoor mold levels to identify amplification. This assertion is unavailing in light of the fact that the Agency's contracted industrial hygienist found mold growths, not just settled spores from outdoors.

The Agency also notes, relying on the Jurgiel report, there are no current occupational exposure guidelines or regulations regarding airborne mold spores. Nonetheless, the Jurgiel report itself urges the Agency to have employees monitor their health.

No evidence has been presented that the Agency did in fact follow this Jurgiel recommendation and remind employees to monitor their own health and consult with their doctors. On the contrary, when the Grievant obtained a number of medical assessments from medical personnel the Agency did not treat them seriously.

Robert Jurgiel testified that he performed testing for the Agency on January 29, 2019. If mold is suspected they need to take a tape lift sample for putting on a slide. Two outdoor control samples are taken on either side of the building because mold spores vary on a day-to-day basis. T 1355. There are no recommended guidelines for airborne mold spores, but industry standards define indoor amplification as higher levels of mold spores inside compared to the outside. If there is indoor amplification, the mold is coming from within the building or within the spaces where the samples are collected as opposed to coming from outside. T 1356. No indoor amplification was found T1357.

He recommended that the "accumulations of large mold growths that were on various surfaces in the hematology lab" be HEPA vacuumed and wet wiped with an antimicrobial solution. He recommended HEPA vacuuming and removing and replacing a ceiling tile with small amounts of suspect mold growth, in order to avoid reoccurring water leaks that could eventually cause mold (T 1358) in the blood bank.

He reviewed A 53A and found that the Agency had done more work then he recommended. T 1359. The work was subcontracted to PART by Guaranteed Interiors. T 1361. **Mold sightings reflect there is a reason why it's growing there. It should be identified and corrected. If it is not it will likely grow**. (Highlight added.) T1363. Generally, there is not a way to make a completely mold free environment. T 1365. With respect to U 92 or tape lift samples as opposed to airborne results, Jurgiel testified that he, "didn't believe I saw any significant

indoor amplification in this." T 1371. He testified that he thinks it is a realistic goal to say that "you do not want to have any indoor mold growth in the lab space. But you will have airborne mold spores." T 1373. In response to the question as to whether testing showed no indoor amplification, he responded "found nothing significant." T 1376. **In response to questioning about getting rid of mold completely he testified "it is very difficult…. (T 1378) and you want to prevent new growths from occurring**. **T 1378. The best way to do that is to control moisture and humidity and water leaks. T 1378. If moisture condenses mold growth can occur.** (Highlight added). T 1378.

With respect to a post remediation report, he testified it is not required by regulatory guidelines "so it depends." T 1379. He did not do a post remediation report for his survey. The purpose of a post remediation report would be to confirm the extent of the remediation and to confirm it has been completed by a third-party. It is the client who either requests or does not. T 1384. He did not recommend a remediation report for this inspection, but he did on the West Plains project. The Arbitrator finds no evidence that the Agency requested a post remediation report, and the Agency contends it was not required.

The tape lift samples collected show black particulate on the different instruments and counter tops that was Cladosporium mold growth. T 1388. That is not airborne. **In response to the question as to how they got there he testified that it was reported to him they were blown out of the HVAC system and settled on the surfaces below. T 1389. Hyphal fragments are the structure of mold growth that is there**. (Highlight added.) T 1389. Samples were taken of the particulates which came through the HVAC system because that would not be normal to have those on lab equipment and counters. T1392. U 21H identifies them as black mold particulates. He recommended the particulates be cleaned up. Despite being asked a number of times (T 1394, 1395, 1396) the witness refused to answer whether or not the mold he saw was significant.

He was not aware of a moisture problem with HVAC (T 1400) going back to 2013. He testified that if there is high humidity in the air and it gets cold there is potential for condensation on the cold surface and it can lead to mold growth. This is with reference to a work order July 2019. He testified that the remediation did not necessarily review the HVAC system. T1403. In response to the question "so if the HVAC system was at fault, then another remediation was worthless?", he answered it depends on if the conditions repeat themselves. T1404. He testified **"To solve the mold issue, you have to keep an eye on it and try and address it.**

One way to do that potentially is evaluate the HVAC system. (Highlight added). T 1406.

He did not know about a complaint that the blood bank room was warm and humid with a strange smell coming out of the vent December 10, 2019. T1407. He testified that the email marked as U 125, page 24, (T 1410) "looked like what he probably submitted with the report." It was sent to Ashley Leopold and Timothy Lowe. T 1415. **Jurgiel then read from the email of February 11, 2019, that "an initial investigation should be conducted by a mechanical engineer for the HVAC system to see if it's working properly to control relative humidity in the space and not lead to condensation and potential future mold growth during warm outdoor months**." (T 1415). **If the Agency did not follow his recommendation it potentially could lead to recurring problems if there was an issue**. T1416. (Highlight added).

He read from the email indicating problems with HVAC (T1417) relating to moisture, humidity, and possibly contributing to potential mold growth. The difference between surface particulates and airborne mold spores is that the surface particulates settled onto the surface below. Airborne is in the air. T 1420. He testified that OSHA only used one testing location outside even though he had done two (T 1428) because there is variability in outdoor levels. T 1429. He identified the particular mold spore types in U 32 which comprised the black material on the ledge. If samples were taken off that ledge that ledge would have had mold on it. In response to a question on standards, he testified that OSHA can address things under the general duty clause. If there is anything that is considered a recognized hazard for an employee, the general duty clause can be used to address a particular exposure. T1433.

Based on the Jurgiel 2019 survey conducted by the Agency's retained industrial hygienist, in response to complaints about mold in the building containing the Lab where the Grievant worked, Jurgiel found mold growths as distinguished from settled mold spores from the outside. In his February 2019 report, Jurgiel recommended that, **"The occupants of this building should be reminded to monitor their own health, and to consult with their doctors to determine the appropriate course of action with regards to these total mold spore levels, as well as the individual molds detected**." Jurgiel Report, Jt 6

The Jurgiel report notes that there are "…mold growths confirmed in two of the tape-lift results (VAPB1-T1 and VAPBL-T2) that should be cleaned-up and addressed. It should also be noted that Cladosporium and Alternaria are considered common outdoor mold spore types. The presence of Hypal Fragments identified in the results is indicative of mold growths, as opposed to only settled spores from the outdoors. Please review and let me know if you have any initial questions or comments. A letter report will be issued later this week with remediation recommendation." The report was signed by Robert A. Jurgiel.

The Agency does not address the Jurgiel report that states mold growths were confirmed in two of the tape-lift results. It noted that the presence of Hypal Fragments identified in the results is indicative of mold growths, as opposed to only settled spores from the outdoors. U 125 p 026. The Agency also disregarded the follow up email from Jurgiel, which was withheld from the Union (U125), stating that additional investigations should be conducted by a mechanical engineer for the HVAC system.

The Jurgiel report states there were mold growths. The Jurgiel follow up email which was sent to Agency personnel and not provided to the Union recommended investigating the HVAC system. Accordingly, the Agency disregarded the advice of the industrial hygienist firm it retained and gave no satisfactory explanation for this. The recommendation from Jurgiel regarding additional investigation of the HVAC system disputes the Agency assertion that it went above and beyond with the cleaning. There is no evidence submitted by the Agency that cleaning alone, while it might remove mold, prevents its growth.

Other information on mold is contained in the CDC fact sheet and the OSHA Fact sheet.

The OSHA Fact Sheet on Mold states:
Mold can cause mild to severe health problems in sensitive individuals when a sufficient number of airborne spores are inhaled. Some individuals are far more sensitive than others. People at greatest risk include those with underlying health conditions who may be more sensitive to mold: individuals with allergies or existing respiratory conditions including asthma, sinusitis, or other lung diseases. U4. The OSHA Fact Sheet does not quantify mold in terms of what amount would produce a risk nor does it refer to or use the term "substantial."

"The key to mold prevention is moisture control. Mold will not grow if moisture is absent." U4. Although it offers general cleanup tips, the OSHA Fact sheet does not refer to or describe any kind of cleaning which would prevent mold growth.

The CDC Fact Sheet on Mold designates the most common indoor molds as Cladosporium, Penicillium, and Aspergillus. U 1, Union Brief 39, T 131. Similarly to the OSHA Fact Sheet, the CDC notes that mold will grow in places with a lot of moisture. It offers cleaning tips but states, **"The best practice is to remove the mold and work to prevent future growth**." (Highlight added). It does not state that cleaning will prevent the mold. The CDC like OSHA states mold may cause a variety of health effects or none. "**Some people are sensitive to molds. For these people, exposure to molds can lead to symptoms such as stuffy nose, wheezing, and red or itchy eyes or skin. Some people, such as those with allergies to molds or with asthma, may have more intense reactions**." Highlight added. While the CDE fact sheet states "**Severe reactions may occur among workers exposed to large amounts of molds in occupational settings**…," (highlight added) it does not quantify the amount.

Both OSHA and CDC contain information also provided in the Jurgiel report, particularly about moisture facilitating mold growth and differences in sensitivities to molds.

The Agency states that the Grievant wants to rely on speculation about a future occurrence. This statement is refuted by the Jurgiel report and follow up email that further investigation should be done. Nonetheless, the Agency maintains a reliance on the outdoor versus indoor mold levels to identify indoor amplification, asserting that where there is no indoor amplification there is no mold growth. This response is unavailing in light of the fact that the Agency's contracted industrial hygienist found mold growths, not just settled spores from outdoors, and recommended further investigation. The Agency's over reliance on the matter of "indoor amplification" cannot be used to deny the existence of the mold findings by Jurgiel. The Agency presented no evidence that it considered doing the additional investigations that Jurgiel recommended for the HVAC system. Yet, the Agency claimed that it went "above and beyond" the recommendations.

The Agency ignored the recommendation for additional investigations. This, combined with the report noting limitations in the firm's ability to conduct a survey, further bolsters the Grievant's assertion regarding an unsafe work place. The Jurgiel report specifically noted that, if additional suspected mold growths are

encountered during remediation, additional inspection and remediation may be necessary.

The Agency cannot escape its responsibility and then blame the Grievant for not returning to work when the Agency offered no assurance that it had conducted both cleaning/remediation and the HVAC inspection required to prevent return of mold. It was not the responsibility of the Grievant to be in a workplace that was exacerbating his health issues. The Grievant's options were to continue to try to sustain his health or subject himself again to the conditions which exacerbated his health, with no acknowledgement that the Agency was meeting the Master Agreement requirements of a safe working environment. This was not a "choice" for the Grievant.

The Agency asserts that only the Grievant developed the symptoms. It is clearly recognized in governing law that some individuals will react differently to environmental issues. The fact that coworkers may not have experienced his medical problems does not invalidate the Grievant's condition. The Agency in February 2019 had the opportunity to pursue further investigation to prevent mold growths and chose not to do so. In this case, it is the Agency which had a choice, not the Grievant. The Agency chose not to follow the Jurgiel recommendation of further investigation. The Agency chose not to accept its responsibility to provide a safe working environment.

The Agency also notes, relying on the Jurgiel report, that there are no current occupational exposure guidelines or regulations regarding airborne mold spores. Nonetheless, the Jurgiel report urges the Agency to have employees monitor their health. Jt 5, p 3.

In the arbitration the Union asked Jurgiel if the findings show significant mold. Jurgiel questioned what he was being asked. The Agency objected and wanted the Union to define what significant meant. Despite being asked a number of times, Jurgiel would not or could not define significant. T 1393-1398. The Agency contends that the designation of whether the mold was significant is a requirement of the contract. The Union disputes this, noting the definition in the contract does not require a designation of significant for "surface" mold. The contract uses the term "significant" as follows: "Once significant airborne or surface mold particles are detected, the department will conduct sampling at intervals of no greater than three months to monitor employee exposure levels." Article 29, Section 15, G, Mold.

Neither the CDC nor OSHA Fact Sheets on mold have a requirement of "significant" nor "substantial" mold.

The fact that the Agency makes the assertion about the requirement that the mold be significant and the fact that the Agency's retained hygienist who conducted the survey to determine what needed to be done could not define significant is problematic. The Agency is asserting the mold was not significant pursuant to the Master Agreement requirements. Yet the Agency in the arbitration attempted to prevent Jurgiel from answering the question and instead wanted the Union to define significant.

The Agency relies on the statement of no specific acceptable or unacceptable levels of total mold spores established by the Environmental Protection Agency (EPA) or the Occupational Safety and Health Administration (OSHA) at the time of the survey. This assessment regarding no specified unacceptable levels of total mold spores does not provide the Agency with an excuse for not meeting its obligations for a safe work environment. No evidence has been offered by the Agency that it followed the recommendations of Jurgiel regarding additional investigation for mold prevention.

No evidence has been presented that the Agency did in fact follow the recommendation and remind employees to monitor their own health and consult with their doctors. On the contrary, when the Grievant obtained a number of medical assessments from medical personnel the Agency did not treat them seriously. Had the Agency reason to disagree with the Grievant's medical recommendations, it could have explained the reason. The Agency instead asserts that the medical personnel were relying on representations that the Grievant made about his symptoms. That, of course, is true in any communication between a patient and medical personnel. The Grievant also presented test results regarding his symptoms. Additionally, the Grievant is receiving disability payments based on his military service.

The Agency's contracted hygienist not only identified mold growth as opposed to only mold spore levels, the hygienist recommended that "The occupants of this building should be reminded to monitor their own health, and to consult with their doctors to determine the appropriate course of action with regard to these total mold spore levels, as well as the individual molds detected." If the Agency's contracted hygienist did not consider the mold significant, there would be no reason for the hygienist to recommend that the Agency "remind" employees to monitor their health and consult with doctors to determine the appropriate course

of action with regards to these total mold spore levels, as well as the individual molds detected. This was contained in the report itself which was provided to the Union. However, the hygienist sent a separate email to the Agency which the Agency did not provide to the Union. The Union had to obtain it through FOIA. In that separate email, the hygienist raised further concerns and made specific recommendations: "As discussed, additional investigations should be conducted by a mechanical engineer for the HVAC system that supports the Hematology and Chemistry labs to ensure that it is working properly to control the relative humidity levels in the spaces, and not lead to condensation issues and potential future mold growth during warm outdoor months."

It is noted that the hygienist used the word, "should", regarding additional investigations to be conducted for the HVAC system. In its closing brief the Agency only referenced this additional concern of Jurgiel and the directive regarding additional investigation in a footnote, dismissing its importance, just as it attempted to diminish the mold issue in opening by stating "mold is just not that scary."

The Contract does not identify significant. The Agency does not offer a satisfactory interpretation. The Union asserts the language of the contract does not require the mold be significant with respect to surface mold. That interpretation is plausible based on wording in the contract. Mold was included in the contract, and agreed to by the parties, for a reason and that is significant of itself. As noted, neither the CDC nor OSHA Fact Sheets on mold have a requirement of either "significant" or "substantial" mold.

Whether mold is harmful is not meant to be a quantitative determination but rather a qualitative assessment. The issue of whether mold can affect one individual should rely on the medical personnel's assessment of the individual's symptoms when exposed and the effect on that individual. Recognizing the effect of mold in this manner comports with federal law. The Agency chose not to recognize the effect of mold on the Grievant's health despite medical assessment.

Based on the following, the Arbitrator finds that the Agency did not maintain a safe working environment as required by the Master Agreement:

-the testimony of Robert Jurgiel, Senior Consultant, Industrial Hygienist firm, Jurgiel & Associates
-the February 6, 2019, email of Robert Jurgiel
-the Jurgiel report

-the follow up email Jurgiel sent to the Agency, on February 11, 2019, which was not shared with the Union and which the Union had to obtain through a FOIA request along with the February 6 email
-the concerns regarding the limitations on the testing, moisture intrusion, and possible additional mold growth as expressed in the Jurgiel report
-there was mold growth in the lab;
-if mold growth is not corrected/prevented it will return
-the lack of follow up investigation as recommended by Jurgiel in order to ensure mold would not return through the HVAC system.
-the concern raised about the need for employees to monitor their health and consult their doctors in relationship to mold exposure
-the testimony of two key Agency witnesses, Brenda Norden and Michelle Brightwell
-the documents reflecting work orders regarding conditions in the lab.

Qualified Person with a Disability

Brenda Norden testified that the Grievant joined the lab in 2014 as a medical technologist. T1077. She testified as to some issues with his performance. The Grievant made a labeling error. T1082. He was put on a Performance Improvement Plan (PIP) in November or December 2014. T 1127. She kept a copy of the Grievant's PIP but does not know if he knew she had a copy. T 1130,1131. She was shown the Master Agreement. T 1131. She read from the contract that, "Individual's files on each employee not approved by the department as an official system of records will not be kept by department officials at any level. Subject to paragraph C of this section, if a supervisor makes a personal decision to keep notes on an employee, the notes or files must be absolutely uncirculated and cannot be reviewed by anyone else." T 1133. The PIP is an official document. T 1188. She testified, however, that PIP is not under the records control schedule. T 1194. (There was no testimony that she informed the Grievant she retained a copy of the PIP.) She notified the Grievant when he successfully completed the PIP. T 1135.

The Grievant at the time made claims about a hostile work environment. T1080. She does not recall the Grievant in his first year of working there tell her about being dizzy and not being able to see clearly. T 1127.

He expressed to her he was having some health issues and asked if she thought he should retire, and she told him she could not advise him on that. T 1083. He went to employee health and returned to work but after that he reported sick. T 1084. She received a series of doctors' notes. She received a request from him for leave without pay (LWOP). T 1085-1086, A78. Norden sent him an outline of what leave was available. His AWOL was changed for several months to LWOP. T 1168. Norden testified that if an employee does not have access to a computer to enter their leave request a request by proxy leave can be entered. T 1095. She instructed the laboratory information manager to disable his access. T 1086. He had no need to access patient information because he was not working.

She recalled the Grievant sent her an email saying his doctors advised him that he should not wear a PAPR. T 1174. The Grievant was offered a PAPR at a June 5, 2019, meeting. T 1175. She issued the Grievant a return to duty order in June 2019 and June 2020. T 1175. When asked why she would issue a return to duty order in violation of the medical doctor's recommendations, she testified, "Because, to my knowledge, any air sampling reports that have come back or investigations performed showed that the laboratory is a safe environment for staff work." T 1175. (No document was offered to verify this.)

The Grievant sent her a medical record which she forwarded to Human Resources. T 1088. At this point the Union objected and wanted to see email proof of that record being sent. T1090. The Union objected to the medical record coming in as evidence, asserting that would be a HIPAA violation. The Arbitrator sustained the Union's objection. T 1091-1094.

During Norden's testimony, the Agency Representative stated: "**We would agree that any – whatever asthma or, you know, any diagnosis that he may have was caused by his working conditions**." Highlight added. T 1183.

The Grievant testified as to his medical history, a copy of his VA record dated October 29, 2014, which was just a few months after being employed at the VA. U 11. T157. His chief complaint is shown as joint pains, rashes, headache.

The medical visit October 29, 2014, shows the Grievant reporting rash, hair loss, abdominal discomfort, nausea, shortness of breath, feeling weak and faint, for approximately six to eight months. The note reports that the Grievant is afraid because he feels sick and "just wants to know what is wrong."

The Grievant visited a dermatologist because of the rashes. U 12. His skin testing showed allergies to mold and trees. T 160. The Grievant testified on seeing his doctor he complained of itching, shortness of breath, swelling, headaches, blurred vision and joint pain for the past six to eight months. U 13. The testing was done on November 28, 2014, with a diagnosis of allergic rhinitis. T 161.

The note dated November 25, 2014, is a primary care clinic progress note signed by Melissa Keith indicating Grievant is following up with intermittent episodes of urticaria/pruritis, with joint pain, G.I. distress. Symptoms improved but returned. Grievant reports itching, blurred vision, and joint pain, taking a number of medications. U 13. A November 28, 2014, note signed by Robert Haldeman, Junior, RN, indicates the Grievant was examined by Ginger Potts and new medication was ordered. He was instructed to return to urgent care if his condition worsened.

A CT scan was done December 2, 2014, shortly after he was hired showing he did not have any sinusitis problems at that time. U 14. The symptoms started about six months later. The Grievant had his first pulmonary function test because he was having difficulty breathing. A pulmonary consult for December 3, 2014, showing PFT results indicates mild obstructive/restrictive function and seems associated with episodes with rash and other symptoms. T 163. U 15. Another note dated December 17, 2014, signed by Melissa Keith, family nurse practitioner, lists new onset headaches, dizziness, memory loss and other symptoms like allergy type reactions with rash and eating.

His symptoms were continuing to get worse throughout his time working in the lab. He had been seen by Dr. Yeoman, for allergies, and had testing completed July 22, 2015. U 16. Allergy testing showed allergies to trees and mold. T 164. He testified his symptoms continue to get worse. T 164.

A note dated July 22, 2015, shows Melissa Keith as a cosigner. He is having allergy shots and will have sinus surgery with Dr. Potter. Some small amount of dry rash was noted on the foot. A report on an MRI of the brain conducted because of headaches and dizziness states impression is mild cerebellar and cerebral atrophy. U 14.

The Grievant experienced shortness of breath starting in 2018. He suffered headaches, blurred vision, difficulty breathing and memory loss, which effected his ability to perform. T pp 124-135 (U B 39). The Grievant had been diagnosed with asthma since March 2019. T 131,132. The Grievant has just recently started

receiving disability benefits from the military. The Grievant gave the Jurgiel Report to his doctors, as was recommended in the Jurgiel Report. Jt 5, p 3.

The OSHA Fact Sheet on Mold lists the symptoms that the Grievant has experienced: sneezing, running nose, eye irritation, cough, congestion, aggravation of asthma and skin rashes. U4.

He testified as to emails dating back from 2017 about mold particles coming out of the vents in the MRI building and employees there asking for the Agency to test them. T 192. U 30. When he walked into the building to get his MRI done (January 2019), he was shown mold particles coming out of the vent "shooting out of the vent just like in the laboratory." "And the common factor between the laboratory and the MRI building is both of those buildings do not have HEPA filters." T 193.

On January 14, 2019, the Grievant went to urgent care. U 23. T 190. He went back to urgent care on January 15 because he still had problems. The doctors noticed tachycardia. VA doctors, through employee health, sent him home because of his high heart rate. Grievant then testified that was the same day he had observed black specks in the lab. U 23. T 191. He made a request for reasonable accommodation on January 18, 2019. U 24. T192.

Employees in MRI told the Agency that veterans are also getting exposed to those small particles "but yet they just went in there and cleaned up the mold particles and replaced the flex hoses. And then after replacing the flex hoses, the mold particles came back because Richard Yoebstl continuously went in there cleaning up the mold particles and that's all contained in this email." T 193. Mold particles accounts were sent to Mold Armor, similar to the laboratory. T 194. The Grievant was asked by Laura Lansfeld to test them because it was known he worked in the lab and they sought the Grievant's help. T194. Landsfeld noted pieces of mold coming out of the vent. Tracie Eudaley saw black particles coming out of the vent, as did Laura Jackson. T 194. The Grievant testified that was three witnesses who saw the particles. After the Grievant had his MRI done it showed inflammation in his sinuses and a deep white matter change showing a brain problem reflecting memory issues. His previous MRI, approximately five years earlier, showed no issues with his brain. T 195.

U 16, a My Healthy Vet personal information report dated January 17, 2019, reflects that on January 14, 2019, the Grievant came into urgent care requesting a steroid shot due to allergic reaction, complaining of swelling of his face and some

shortness of breath. He has a history of allergies and sees several specialists. He was given medication. Allergies listed are to mold and trees. He was examined by a doctor and new medication was ordered. U 21L. The assessment of history of mold allergy shows he was given an excuse/note from work for a week, and if tachycardia persists an EKG would be scheduled. U 23. The Grievant was seen in VA urgent care by Dr. Hung, stating he can return to work January 25, 2019. U25.

A medical record dated January 18, 2019, notes Grievant is seeking a work excuse. The assessment is history of mold allergy. The note, also by Dr. Hung, states a complaint of shortness of breath and headache. The Grievant came to urgent care with symptoms after he was exposed to mold while he was having an MRI done the previous day. On examination, there was occasional wheezing heard in both lung fields. It was noted as allergic reaction to mold. U 37.

A note dated January 23, 2019, signed by Nancy Tompkins, nurse practitioner, (U 28) indicated he was filing a Workmen's Compensation claim because of his allergy to mold after having been exposed at his workplace since 2014. He began having rashes November 2014. Over the last five years he has had ER visits due to dyspnea and had steroids and steroid injections by Dr. Yeoman as well as Melissa Keith. He stopped the allergy injections because they did not help, as he was exposed to a large amount of mold. He has had headaches, rashes, nasal and sinus congestion, cough, burning eyes, chronic fatigue, memory problems, headaches, diarrhea. He reported he had been off work for the last week and his headaches and nausea improved but he still has short term memory loss and confusion. Past patient history was reviewed noting congestion, rhinorrhea, shortness of breath, wheezing, rash.

The assessment lists allergy to mold, allergic dermatitis, non-seasonal allergic rhinitis due to fungal spores. The note was cosigned by Dr. Stephen Nagy, January 23, 2019. A follow up note by Nancy Tompkins, Nurse Practitioner, on January 30, 2019, states the Grievant is there to discuss work compensation claim regarding mold exposure. The mold that was coming out of the air vents at his work tested positive for aspergillus. He tested his home and it is negative for mold. Since he has been off work for two weeks, his symptoms have resolved other than problems with memory. He has been diagnosed with allergy to fungal spores. Over the course of the last five years he has had instances of rashes, sudden difficulty breathing, nausea, headaches, nasal and sinus congestion, cough, burning eyes. Nurse Practitioner Tompkins reported she believed his recurrent symptoms were likely related to the exposure to aspergillus at work. His severe allergy to fungal spores (aspergillus) caused the symptoms as evidenced by near resolution of the

symptoms away from work and worsening of his symptoms at his place of work. She noted that, in her opinion, his symptoms have been made worse by the exposure to aspergillus found in his work environment. The report was signed by Dr. Nagy (page 3).

The next note is dated March 9, 2019, stating allergies to mold and trees. He was given anti-inflammatory medication. U 36.

According to a note dated March 21, 2019, co-signed by Dr. Stephen Nagy and Nancy Tompkins, the Grievant was there for continued wheezing and cough after having an MRI. His PFG shows asthma. U 39. A report on a visit to Southeast Bernie clinic, dated March 28, 2019, was sent to office workers compensation program (OWCP), noting Grievant is a patient of Cara Dillinger, works in the laboratory as a medical technologist, and he has health issues affected by mold. During the performance of work duties, he came into direct contact with mold, identified as Cladosporium and Alternaria. The note states the Grievant has asthma and direct contact and exposure has contributed to upper respiratory tract infections, recurrent sinusitis, and asthma exacerbation. Due to repeated exposure to high mold counts affecting his health, he has missed several work days.

A Department of Veterans Affairs' request for medical documentation dated April 9, 2019, (U 44) indicates that the Grievant has requested an accommodation based on mold/allergen free work environment because of asthma and allergies. The form was signed by Melissa Keith. With respect to the request, regarding nature, severity, and duration of the impairment, she notes "as long as I've been seeing him, so at least since 2014, he has had symptoms, rashes, aches, when symptomatic has wheezing, cough, dyspnea, general malaise, fatigue, rash." The extent of what the impairment limits and activity "varies from mild to extremely debilitating at times." The reason the individual requires an accommodation is "the work environment has been found to have mold which exacerbates his allergies/asthma symptoms. I noted that mold remediation was being done in the lab today and hopefully will be successful in improving air quality and working conditions."

The VA made another request for medical documentation. The reply is from Cara Dillinger signed in April 2019. U45. She notes asthma, allergic rhinitis, moderate, chronic in nature. For the activity where there is an impairment "…notes it is a frequent/recurrent asthma exacerbation…." The Grievant would need additional accommodation to reduce asthma and allergy symptoms and improve asthma control. The accommodation would assist the individual by reducing sick

time/leave.

June 23, 2019, notes on a page called VA problem list, indicates health problem adjustment disorder, impaired memory, major depression, attention deficit hyperactivity disorder adult, polyp of colon, exposure to mold, allergic rhinitis, March 14, 2019, February 6, 2019, and August 17, 2016. U 64. The Grievant states the vital signs chart shows he received no treatment for mold exposure related illness between January 18, 2019, and March 18, 2019. February 6, 2019, was for a regular checkup. U 65.

A July 1, 2019 note states evidence of small airway obstructive defect, which pattern is seen in patients with asthma. U 15.

A medical note, dated July 25, 2019, from the pulmonary department, with the provider noted as Mohanadal Faqih, M.D. is a follow up for asthma. It states the patient left his old office on January 18, 2019, and did not have any more episodes until March 2019. According to the patient, there was mold in the MRI area and on that day, March 8, 2019, he went to urgent care due to shortness of breath and wheezing. His symptoms of shortness of breath and wheezing started seven months after starting his job at the VA hospital. At this time, he has no cough, wheezing, chest tightness, fever, chills. He is using an inhaler. The doctor reviewed the Jurgiel report which showed evidence of high levels of Cladosporium. Patient noted improvement when he was away from work. Patient has underlying asthma. Doctor recommended continuing inhaler and avoiding exposure to allergens that might exacerbate underlying asthma. U 56

In a visit on October 22, 2019, with the provider listed as Dr. Alexandros Georgolios, the Grievant reported difficulty hearing. Doctor reviewed the allergy testing which was negative except for mold and yeast. U 82.

A LabCorp note refers to the presence of antibodies due to the offending dust or antigen which confirms exposure but the Grievant is not diagnosed with hypersensitivity pneumonitis; however, upon repeated or prolonged exposure, high levels of precipitating IGG antibodies are typically observed. U 83. On a medical note with the provider listed as LFAQH, dated November 7, 2019, it states Grievant informed the doctor he was feeling better. The doctor notes that since the Grievant was moved to an office that tested negative for aspergillus, according to the papers he presented today, his symptoms have improved. The doctor recommends continued avoidance of allergen exposure. U 87.

On a note of the Department of Veterans Affairs Veterans Benefits Administration in the regional office with the Grievant's name on it, it is stated he is represented by Disabled American Veterans. U 96.

On Department of Veterans Affairs John J Pershing Medical Center letterhead dated August 7, 2020, regarding the Grievant, Melissa Keith writes that she is a board-certified family nurse and reviews his condition going back to 2000 in the electronic medical record and his active duty service records regarding chronic allergies and chronic fatigue. He has been her patient since 2014 and she continues to treat him. He has undergone testing and found to be particularly sensitive to environmental molds causing severe allergy symptoms manifested in respiratory symptoms, headaches, gastrointestinal symptoms, muscle aches, migrating joint pain, weakness and fatigue that lasts for days. The symptoms have led to loss of productivity both personally and professionally. Despite medication, he continues to suffer symptoms regularly. She wrote that, "It is my professional opinion that his chronic fatigue is as likely as not a direct result of his allergic/asthma condition." U 121.

Melissa Keith wrote on September 23, 2020, that she has been asked to provide a letter in regard to a Workmen's Compensation claim for the Grievant. She stated it is her medical opinion that his claims regarding mold exposure as noted above are substantiated. His documented sensitivity/allergy to mold has had a significant negative impact on his health and well-being. U127

Addressing the argument that OSHA and OMI also conducted surveys and did not make findings of a violation of the Union contract, the Arbitrator notes that it is unclear as to what conditions the entities were able to inspect and the parameters of the inspection. Their findings notwithstanding, the Agency had contracted Jurgiel to do testing and the Agency was to follow up with its recommendations. As noted, the Agency had cleaning done but did not follow up on the recommendation that an additional investigation should be done of the HVAC system and that the Agency notify employees of the Jurgiel caution that they should monitor their health, which the Grievant did. Most significantly, the Jurgiel Report noted its limitations for conducting testing. OSHA and OMI may have had similar limitations.

The Grievant's allergy to mold is confirmed in his medical providers' records: U11, 12, 13, 14, 15, 16, 21L, 25, 26, 27, 28, 36, 37, 39, 40, 44, 45, 46, 56, 64, 65, 81, 82, 83, 87, 96 (Navy Disability), 117, 121, 122. These exhibits also support his need to be in a medical surveillance program, pursuant to the Master Agreement, Article 29, Sec. 37, Paragraph B. (Union Brief 156). The Agreement states the Agency and Union will identify employees who occupy positions that carry potential risks to their health. The parties will establish and maintain procedures for medical surveillance of such employees." Art. 29. Union Brief 156. As noted above, the Agency's retained private industrial hygienist also recommended that employees monitor their health and seek medical advice if necessary, which the Grievant did, including providing the Jurgiel report to his medical personnel. Union Brief 156.

The Agency contends that Grievant is not a qualified person with a disability for the purposes of providing him a reasonable accommodation. As noted, the Agency has conceded this issue by offering what it claimed was a reasonable accommodation. Nonetheless, to ensure that this issue is resolved, the evidence and relevant law are reviewed.

There was no examination in the Agency's brief of all the medical information offered by the Grievant. There was no indication as to why the Agency determined he was never a qualified person with a disability.

The Agency also asserts that the Grievant never gave a satisfactory personal reason why he could not wear a PAPR. However, in fact, the Grievant has offered evidence in the form of a doctor's note that the PAPR would not be safe for him. Additionally, the Grievant has testified that since his job involves answering the telephone and taking orders over the phone the PAPR would actually prevent him from carrying out his job responsibilities because it would cover his face and preclude him from talking.

Although it did not review the Grievant's medical documentation in its brief, the Agency in its brief states "…**however, assuming arguendo that we take the medical documentation at face value**, (highlight added) the Grievant's case still fails for the reasons stated above, Grievant was not a qualified individual with a disability." Agency brief 45, 46. However, there is no rationale stated. During the Union's cross examination of Brenda Norden, she was asked to read a Centers for Disease Control and Prevention document, "What causes work related asthma? Work related asthma is associated with exposure to work site irritants, allergens and physical conditions called triggers." In raising an objection during her

testimony, the Agency Representative stated, "**Work related asthma is kind of a term of art here. And we would agree that any – whatever asthma or, you know, any diagnosis that he may have was caused by his working conditions**." T 1183

If in fact the Agency takes "the medical documentation at face value" as indicated above and fails to cite any provision of the Rehabilitation Act or any other law or the VA handbook which describes a person with a disability, it can only be concluded that the Agency has no justification for determining the Grievant as not a qualified person with a disability. This is so particularly in light of the statement that the Agency would agree that "asthma" or "any diagnosis that he (the Grievant) may have" was caused by his working conditions.

The Agency seeks support for its position by citing a case regarding an employee who was determined not to be a qualified individual with a disability because his severe allergies to foods, cleaners and latex prevented him from performing the essential functions of his position. Accordingly, the employee was unable to take part in food preparation in the food preparation area or anywhere else. *Earnest G. v. Department of the Army* at p 4, 116 L.R.P. 419976 (2016). In that case the employee's specific duties required him to work with food and cleaners and he could not do so due to allergies. That case is distinguished from the Grievant's circumstances because the Grievant is capable of performing the job duties of lab technician—talking on the phone, taking orders, etc. It is not those duties which cause the problem or exacerbate his allergies. It is the mold which the Agency's contracted expert Robert Jurgiel stated existed and could return if not addressed properly, i.e., investigating the HVAC. The Agency chose not to follow that recommendation.

The Agency had every opportunity over seven days of arbitration to provide witnesses and exhibits asserting that the Grievant was not a qualified person with a disability. Nothing in the Agency brief substantiates such a conclusion or statement. No witness offered by the Agency was qualified to make the determination that he was not a person with a disability. Michelle Brightwell made health-related statements which she was not qualified to make. Additionally, her testimony reflects that she understood there are differences among people regarding sensitivities and allergies relating to her family but yet she refused to extend that understanding to the Grievant. Ashley Leopold had a background in infection prevention, but she was not qualified to make a medical determination about the Grievant. Brenda Norden is a supervisor of the lab and also not qualified to make any medical determination. The determination of a qualified person with

a disability is critical to this matter and yet the Agency chooses not to offer any proof of its conclusory statements denying the Grievant is a qualified person with a disability.

The Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) defines "individual with a disability" as "any person who has a disability" as defined in section 12102 of Title 42: "a physical or mental impairment that substantially limits one or more of major life activities." "Major life activities include breathing, learning, concentrating, thinking, communicating and working." 42 USC Section 12102(2)(A). The VA Handbook, with respect to a person with a disability, states, "For example, a person who has asthma can have trouble breathing, and is covered under the Rehabilitation Act as an individual with a disability." Jt 7, p 7, (f) Individual with a Disability.

The EEOC's regulations provide that the term "substantially limits…shall be construed broadly in favor of extensive coverage, to the maximum extent permitted by the terms of the ADAAA." "Substantially limits…is not meant to be a demanding standard." 29 CFR Section 1630. (J)(1)(I). "An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment did not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Accordingly, the threshold issue of whether an impairment 'substantially limits' a major life activity should not demand extensive analysis." 29 CFR section 1630.2(j)(1)(I). "The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis." 29 CFR section 1630.2((j)(1)(v). "An impairment that is episodic or in remission is a disability if it substantially limited major life activity when active." 42 US C12102(4)(D).

A qualified individual, in part, is "an individual who has the requisite skills and other job-related requirements of the position…, who, with or without reasonable accommodation can perform the essential functions of the employment position that such individual holds or desires." Jt 7, VA Handbook, para. K, p 8.

Based on the following, the Arbitrator finds that the Grievant is a qualified individual with a disability, as supported by: medical assessments of Melissa Keith and numerous other medical providers, test results, differences in

symptoms when no longer working in an environment with mold, and significant changes in some physical characteristics and memory loss of the Grievant.

Reasonable Accommodation

Despite its contention that the Grievant is not a qualified person with a disability for the purposes of providing him a reasonable accommodation (Agency Brief p 34), the Agency also asserted it offered a reasonable accommodation: the PAPR. Accordingly, as noted above, the Agency has conceded the issue regarding the Grievant not being a qualified person with a disability for the purposes of providing him a reasonable accommodation. However, the issue of the reasonable accommodation is reviewed with respect to the evidence and the law in order to ensure the matter is clearly resolved for the record.

The term "reasonable accommodation" means, "a change in the work environment or in work processes that enables an individual with a disability to enjoy equal employment opportunities." Jt 7, VA Handbook, para L, p 8. It may include job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations training materials, or policies, the provision of qualified readers or interpreter, and other similar accommodations for individuals with disabilities. 42 USC section 12111 (9) (B); 29CFR section 1630.2(o)(2) (ii

As in the *Paris* case, (*Paris v. Department of the Treasury*, 106 LRP 72762, 104 MSPR 331 (MSPB 2006); 29 CFR 1630.2 (o)(3)) , the Grievant's testimony and medical evidence establish he was a qualified individual with a disability that substantially limited his ability to work in an environment with mold and that he requested a reasonable accommodation for his disability that would allow him to fully perform the essential functions of his lab technician position. The accommodation needed by the Grievant (portable air filter with HEPA filter to work in the lab or, in the alternative, an LPN position) are far less burdensome than some cited above, i.e., provision of qualified readers or interpreters.

By issuing a return to work order, during the same period of time that the Grievant was requesting a reasonable accommodation, the Agency committed disability discrimination by failing to provide such accommodation to a qualified individual

with a disability in violation of 42 USC section 12112 (a)(B)(5)(A). The Agency demanded a return to work without the reasonable accommodation of a portable device with a HEPA filter or an assignment to an LPN position for which he was qualified. The Agency now asserts that there were no available LPN positions. However, the evidence shows this is inaccurate. The Agency was advertising for people to fill such positions during the time the Grievant was requesting a reasonable accommodation. U 98.

The Grievant has presented numerous requests for a reasonable accommodation, including the form for the Department of Veterans Affairs by Melissa Keith (U 44) and the Cara Dillinger note regarding accommodation. U 45. The Grievant requests a portable HEPA air purifier as a reasonable accommodation. The Agency provides no plausible reason for not accepting these medical notes which include test results.

The Agency Director testified that in offering a reasonable accommodation to the Grievant it was not the Agency's intention to designate the Grievant as a person with a disability. The Director's testimony provides no support for the Agency's position on this matter. Both "reasonable accommodation" and "a person with a disability" are legal designations that cannot be changed by the Agency or any entity to avoid the responsibility of their actions. As described above, reasonable accommodation is a set of circumstances provided to a person with a disability to enable that person to perform their job duties.

The Agency asserts through witnesses that other individuals besides the Grievant were offered the PAPR. It was offered to those individuals like the Grievant with facial hair. Norden testified that two individuals (one of whom was the Grievant) were offered a PAPR because they had facial hair and would not be able to wear an N95 respirator because of their facial hair. T 1171. The Grievant had not requested an N95 nor has any evidence been offered that it would alleviate the Grievant's issues, which is why the Agency offered the PAPR. Nonetheless, the Agency would argue that offering the PAPR was not acknowledgement of an unsafe working environment. However, the Grievant requested a reasonable accommodation and the PAPR is what the Agency offered in response to that request. The Agency cannot both claim that it offered a reasonable accommodation but yet deny that the Grievant was a qualified person with a

disability and that the Agency had not offered a safe working environment in accord with the contract.

The PAPR, as testimony and exhibits reflect, is a large head covering that encloses the face. The Grievant's job involves talking on the telephone, with medical providers, something which could not be done while wearing a PAPR. Thus, the Agency has offered something completely unusable, which would hinder rather than facilitate the Grievant's ability to do his job. The Agency asserts that the Grievant never gave a satisfactory personal reason why he could not wear a PAPR. However, in fact, the Grievant has offered evidence in the form of a doctor's note that the PAPR would not be safe for him. U 47A. T 254-255. The Grievant had already suffered a reduction of 11% of his breathing capacity, according to medical testing. U 51, U Brief, 171. Michelle Brightwell testified that the Grievant would have to be enrolled in a special OSHA program to utilize the PAPR hood. T 1258. U Brief 171.

The Agency also asserts that there were no qualifying open positions to offer as a reassignment and the reasonable accommodation case was closed as the interactive process was complete. However, the Agency provided no proof or evidence to substantiate this assertion. A 75, A Brief p 25. The Union offered a notice that shows the Agency seeking LPNs at the time the Grievant sought an LPN position as a reasonable accommodation. U 98. In fact, at the time he sought reasonable accommodations and met with Agency personnel (U 22), the Agency did provide such at the West Plains office (U 54, U 80). Then, the Agency, through the Grievant's supervisor, Brenda Norden, issued a return to work order June 4, 2019. Another order was issued in June 2020 while the Grievant still sought a reasonable accommodation since August 2019, (U67, U84) when the Grievant met with Denise Smith, a Reasonable Accommodation Officer. The Grievant requested a reasonable accommodation six times.

An email dated June 27, 2019, addressed to the Grievant states the reasonable accommodation is being worked on. A 40, T p 331-334. However, the Grievant testified that he continued to get no response for his accommodation and as of the date of his testimony he has not received a response to his August 26, 2019, email. T 335. Scotty Rawls testified for the Agency about the Grievant's reasonable accommodation requests and the Agency offer of a PAPR. A27, 26. T 972-974. U brief 170, 171, 172.

The Agency notes, "as stated above, Grievant's reasonable accommodation case should've been closed when he presented an impossible goal to the Agency and thus was never a qualified person with a disability." Agency Brief 44. The law, however, requires that the employer is required to provide a reasonable accommodation. It is not the burden of the employee to precisely define what that accommodation should be.

The goal of the Rehabilitation Act and provisions of the Master Agreement, other relevant laws, rules or regulations covering Reasonable Accommodation, require that extra efforts should go into approving, not obstructing, reasonable accommodation,. The Union cited *Speaks v. Department of Defense*, 102 FEOR 1030, EEOC No. 01971634 (EEOC OFO 2001) where it was found that that "…the agency continued to request further documentation to the point that one physician characterized its requests as harassment." U Brief 171.

The intent of the reasonable accommodation is to enable an individual with a disability to enjoy equal employment opportunities, to facilitate having people with disabilities be able to meaningfully participate in work, to utilize their skills and abilities, and most importantly to provide individuals with disabilities the opportunity to engage in a major life activity, working, as do those without disabilities. The benefit to society of equal opportunity to all ensures that those who are "differently abled" can provide the society in which they function the benefit of their skills and abilities. This is especially critical for veterans, many of whom have suffered injuries that prevent them from working in the way they were able to do before the injury. Veterans and all individuals with disabilities should be able to work in a different way – with reasonable accommodations. The broad definition of "reasonable accommodation" confirms the intent to ensure the ability to work for those with disabilities.

In not providing an appropriate reasonable accommodation, the Agency discriminated against the Grievant on the basis of his disability, in violation of the Rehabilitation Act of 1973. The Act prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment and in the employment practices of federal contractors. "The standards for determining employment discrimination under the Rehab Act are the same as those used in Title I of the ADA; it protects 'qualified individuals with disabilities.' An 'individual with a disability' is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment or is regarded as having such an impairment. 'Qualified' means the person satisfies the job-related requirements of the

position he or she holds (or is applying for) and can perform its essential functions, with or without a reasonable accommodation."

The Union, in support of the Grievant, cites the *Crutch* case, *Crutch v. U.S. Postal Service,* 113 LRP 22099, 119 MSPR 460 (MSPB 2013). Similarly to the Grievant in this case, the employee in that case was not given the appropriate reasonable accommodation and was subjected to continued requests for medical excuses. In that case it was determined that, although absence was initially voluntary, it became involuntary and the agency constructively suspended him without due process and the agency discriminated against him based on his disability. In the Grievant's case, he was issued two return to work letters, without being offered an appropriate reasonable accommodation.

Also cited is *Complainant v. Tennessee Valley Authority*, 0120093256, 0120111968, 115 LRP 13038 (EEOC OFO 2015). As in the *Complainant* case, the Grievant is found to be eligible for a reasonable accommodation, has requested it, and the Agency has denied it.

There are direct similarities between the Grievant's case and the *Speaks* case, cited above. The complainant in *Speaks* provided multiple medical notes and made a request for a reasonable accommodation which was denied. The EEOC found in favor of the complainant and determined that the agency committed disability discrimination.

Based on the following, the Arbitrator finds the Agency did not provide a reasonable accommodation:
-the Grievant is a qualified individual with a disability
-the Grievant was entitled to and requested appropriate reasonable accommodations--portable air filter with HEPA filter to work in the lab or in the alternative an LPN position-- that would allow him to utilize his skills and abilities.

Workers Compensation

The Agency did not provide appropriate assistance to the Grievant when he sought Workers Compensation but rather obstructed and denied him the right to such assistance.

The Grievant 's Suffering and Loss of Wages and Benfits

The evidence supports a finding that the Grievant was caused to suffer needlessly and sustain a loss of wages, benefits and insurance because of his disability.

Conclusions

The Arbitrator concludes that the Union has proven that the matter is arbitrable based on past practice and a USSC decision expressing a need for a matter to be heard on its merits.

The Arbitrator concludes that the Union has proven that:
- there is no evidence to validate the Agency's denial that the working environment was unsafe due to mold
- the Grievant is a qualified person with a disability
- a reasonable accommodation was required
- the Agency's action constituted disability discrimination
- the Agency obstructed the Grievant's attempts to seek workers compensation
- the Grievant has suffered loss of health and mental anguish, loss of ability to live a normal life, adverse effect on his family life with his wife and children, and injury to credit standing.

The Arbitrator concludes that the Agency's actions did not accord with the contract, the VA Handbook, the Rehabilitation Act and other applicable federal statutes.

Requested Remedies

The Master Agreement states: "the arbitrator has full authority to award appropriate remedies including reasonable legal fees pursuant to the provisions of Section 702 of the Civil Service Reform Act (Backpay Act) in any case in which it is warranted." Jt 1, Art. 44 – Arbitration, p 234, Sec 2H. The Arbitrator also has authority under the Rehabilitation Act pursuant to the Master Agreement, Jt 1, Art. 2 - Governing Laws and Regulations, Sec. 1, Relationship to Law and Regulations:

in the administration of all matters covered by disagreement, officials and employees shall be governed by applicable federal statues; they will also be governed by government wide regulations in existence at the time this agreement was approved. Highlight added.

The Agency is bound by the VA Handbook, Jt 7:
5975.1- Processing request for reasonable accommodation from employees and applicants with disabilities: 9. Interactive Process (a)when the individual makes an oral or written request for reasonable accommodation manager should ordinarily begin to engage in the interactive process with the individual after receiving notice of the request. "An individual assessment will be conducted to review essential and marginal job functions, the employee's limitations, and possible accommodations. The interactive process may require more than one discussion." P 21.

The Agency in essence offered the Grievant a PAPR that would prevent him from performing his job functions as a lab technician. Remedies for failure in this process are found in Sec. 508 of the Rehabilitation Act, 42 USC Sec. 12201–12204: discrimination. Subject to the provisions of this sub chapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or will be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. In addition to remedies, attorney fees may also be awarded

An award of backpay is authorized when (1) the aggrieved employee was affected by an unjustified and unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or reduction of the employee's pay, allowance, or differentials. The Union has proven that the two criteria have been met. This Arbitrator has determined that the backpay is authorized. The Agency failed to provide a safe work environment, the Grievant is a qualified person with a disability, the Agency did not provide him with a reasonable accommodation, and the Agency failed to provide him with workers' compensation. Accordingly, the provisions of the Backpay Act apply along with other federal statutes.

In determining the remedy power of arbitrators, the United States Supreme Court noted that the arbitrator is to use informed judgement to reach a fair solution, while confined to interpretation and application of the agreement. *Steelworkers v. Enterprise Wheel & Car Corp*, 363 U.S. 593, 46 LRRM 24233 (1960).

In accord with the contract and applicable federal law, the Arbitrator makes determinations regarding the requested remedies.

The Grievant must immediately be returned to work, as requested, as an LPN, with full benefits. He must be provided with a safe work environment with the necessary reasonable accommodation—a portable HEPA air purifier. He must be placed in a medical surveillance program.

The charges of AWOL and LWOP will be rescinded immediately and, if necessary, any negative inferences contained in his record with respect to those charges or any occurrences during the time from when he was last paid to the time of his return to work will be removed.

The Grievant is entitled to back pay pursuant to the Back Pay Act based on a determination that he was affected by an unjustified and unwarranted personnel action and this action resulted in the withdrawal of his pay. He is to receive back pay from January 18, 2019, or the date for which he last received payment, whichever is later, to his date of restatement. The back pay is to include pay increases and interest. The Grievant is to be made whole for any other benefits he was denied during the time he was away from work to ensure he is in the same position as he would have been if he was not forced to leave work, including but not limited to, retaining seniority, eligibility for advancement opportunities, health benefits, insurance, retirement funding. The Agency will also pay compensation for the adverse tax consequences of receiving back pay as a lump sum.

Reasonable attorney's fees are also included in the award, with the Arbitrator retaining jurisdiction for this matter.

Grievant also seeks compensatory damages in the form of pecuniary and nonpecuniary damages due to loss of health.

In *Emiko*, the Equal Employment Opportunity Commission (EEOC) ruled that the agency failed to reasonably accommodate an employee and she was entitled to non-pecuniary damages. The agency's denial of a reasonable accommodation caused emotional distress for an extended period of time. She was awarded $60,000 in nonpecuniary damages as an appropriate remedy for the Agency's denial of a reasonable accommodation. *Emiko v. Department of Transportation,* 115 LRP 13679 (February 2015)

In *Augustine*, the EEOC determined that the agency subjected an employee to discrimination based on disability entitling him to non-pecuniary damages,

attorney's fees, costs, and backpay, based on the emotional and physical distress he suffered as a result of a decade long failure by the agency to engage in any meaningful interactive process or provide reasonable accommodation for his disability. Complainant was awarded $250,000 in non-pecuniary damages for emotional and physical harm for over a decade. The Complainant was unable to return to work. *Augustine v. Department of Homeland Security*, 115 LRP 54114.

In *Scott,* an EEOC AJ was upheld in awarding non-pecuniary damages and pecuniary damages to the employee. The AJ determined that the complainant was a victim of sexual harassment and retaliatory termination. The AJ found the agency did not exercise reasonable care to prevent and correct the sexual harassment. Based on the testimony of the complainant and her family members, it was determined that the AJ's award was supported by substantial evidence and consistent with amounts awarded in similar cases, for stress related issues, depression, impaired relationship with spouse, headaches, sleep difficulties, embarrassment.. The complainant was awarded $40,000 in non-pecuniary damages and $5,855 in pecuniary damages related to foreclosure and job search expenses. *Scott v. Department of Energy,* 107 LRP 24329 (April 2007)

In *McNabb,* the EEOC upheld the complainant's non-pecuniary compensatory damages of $40,000 and a lost earning capacity award that could not exceed $260,000. The complainant alleged the agency discriminated against him on the basis of disability when it subjected him to a hostile work environment and failed to accommodate his disability. *McNabb v. Postal Service,* 104 LRP 18871 (2004)

The Grievant seeks $250,000 for nonpecuniary damages, referring to U 46, a VA request for medical documentation to determine if he is covered by the Rehabilitation Act, which notes among other things anxiety, depression, mild cognitive disorder. T pp 395-402.

For pecuniary damages the Grievant asked for $100,000, (T392) testifying to costs for medications which he will have to pay for 40 years (but not providing any specifics), his wife's glasses, and mold testing results. U 107, T pp 389-394, Union Brief p 182. For pecuniary damages in the closing brief, no amount is cited in the Pecuniary Damages section. Union Brief p 182. In the Non-Pecuniary Damages section, the Grievant asks for $250,000. Union Brief p 182. However, the Grievant asks for the $250,000 for non-pecuniary damages and pecuniary damages as the requested remedy. Union Brief p 183.

The Union contends a discussion of damages for past pecuniary losses are those applicable in *Scott*. In *Scott* complainant was awarded $5,855 in pecuniary damages related to foreclosure and job search expense and was awarded $40,000 in non-pecuniary compensatory damages based on testimony regarding the emotional impact of harassment and non-renewal of her contract.

In a number of cases cited, different amounts than requested were determined by the ruling authority, including in some cases raising the amount and in some decreasing it.

The Union cites *Emiko* and *Augustine* for the requested $250,000 in nonpecuniary damages. The Arbitrator determines the Grievant is entitled to nonpecuniary damages pursuant to federal law, specifically the Rehabilitation Act. The Grievant does not provide a specific formula for requesting $250,000 but testified to, among other things, mental anguish and suffering, loss of ability to live a normal life, effect on his family life with his wife and children, injury to credit standing, and loss of health. In *Emiko* it is noted the non-pecuniary damages award was $60,000 as compared to the complainant's request for $300,000. The $60,000 was determined not be excessive or punitive.

It is difficult to fairly determine damages for the loss of health and other issues. In this matter, noting the reasoning in *Emiko* and the absence of a formula used by Grievant for the amount of his request, the Arbitrator determines the Grievant is entitled to $90,000 in non-pecuniary damages. This amount is not excessive or punitive.

With reference to pecuniary damagers, in *McNabb* complainant was awarded $260,000 for future pecuniary damages because his physical condition impacted his future ability to earn a salary comparable with what he had earned previously. The EEOC found no evidence he was physically able to return to his former position. In this case the Grievant wants to return to work.

The Grievant specified $100,00 for pecuniary damages. The Arbitrator based on the record awards $219.57 for mold testing and $443.35 for the Grievant's wife's glasses. Although nothing specific is stated with respect to medications, the Arbitrator awards $1,000. The total award for pecuniary damages is $1,661.92.

The Union also contends that based on the Agency's violations of the agreement and its rules, including applicable statutory provisions, the Agency should be required to pay for the costs of this arbitration, including the costs of transcripts. The Union cites nothing that would give the Arbitrator this authority. Although the Arbitrator understands the Union's position in this matter, this request is not granted.

It is recommended that the Agency review its policies and procedures with staff regarding treatment of employees with respect to unsafe work environment, medical issues, requests for reasonable accommodations, and workers compensation.

AWARD

The Grievance is sustained.

The Agency is directed to:
-immediately return the Grievant to work, as requested, as an LPN, with full benefits
-provide him with a safe work environment with the necessary reasonable accommodation—a portable HEPA air purifier and place him in a medical surveillance program
-rescind immediately all charges of AWOL and LWOP
-if necessary, any negative inferences contained in his record with respect to those charges or any occurrences during the time from when he was last paid to the time of his return to work will be removed within 60 days of receipt of this decision
-the Grievant is to receive back pay from January 18, 2019, or the date for which he last received payment, whichever is later, to his date of reinstatement, to be paid within 60 days of the receipt of this decision
-the Agency will also pay compensation for the adverse tax consequences of receiving back pay as a lump sum within 60 days of receipt of this decision
-the Grievant is to be made whole for any other benefits he was denied during the time he was away from work to ensure he is in the same position as he would have

been was he not forced to leave work including, but not limited to, retaining seniority, eligibility for advancement opportunities, health benefits, insurance, retirement funding.
-reasonable attorney's fees are to be determined and paid to cover the Grievant/Union payment of such fees, within 60 days of receipt of this decision
-the Grievant is to receive in compensatory damages, non-pecuniary, the amount of $90,000, within 60 days of receipt of this decision
- the Grievant is to receive in compensatory damages, pecuniary, the amount of $1,661.92, within 60 days of receipt of this decision

The immediate return of the Grievant to work may not be delayed by any other components of this decision.

The request that the Agency pay for the costs of the arbitration is denied.

The Arbitrator will retain jurisdiction on the matter of attorneys' fees.

Date: August 9, 2021

/s/ Ann Breen-Greco

Ann Breen-Greco, Arbitrator