



Challenging Mandatory Vaccination Policies in Ontario: Arbitrators Take a First Look and Reach Differing Conclusions

Written by Madison Stemmler, David Cassin and Sara Parchello

There are now three recent Ontario arbitration decisions that address whether an employer may require its unionized employees to be vaccinated. While directly relevant to unionized employers, given the lack of case law considering the issue, these decisions may have further-reaching impacts on all employers in Ontario.

Mandatory vaccination policies were upheld in Arbitrator Fred von Veh's November 9, 2021, decision titled *United Food and Commercial Workers Union, Canada Local 333 v Paragon Protection Ltd.* and Arbitrator John Murray's November 12, 2021, decision titled *Ontario Power Generation v The Power Workers Union*. Conversely, Arbitrator John Stout found in his November 11, 2021, decision *Electrical Safety Authority v Power Workers Union* that the employer's mandatory vaccination policy was unreasonable and unenforceable.

While the decisions all deal directly with the enforceability of vaccination policies in the workplace, they are all highly fact and context-specific.

United Food and Commercial Workers Union, Canada Local 333 v Paragon Protection Ltd.

Background

Paragon Protection Ltd. employs approximately 4400 security guards, operating at more than 450 third-party sites across Ontario. A majority of these worksites have mandatory vaccination policies.

The Collective Agreement between the employer and union contains an article stating that if a security guard is stationed at a third-



party site with a mandatory vaccination requirement the guard must agree to be vaccinated or reassigned to another site. Notably, the article in question was part of the Collective Agreement prior to the onset of the COVID-19 pandemic.

On September 3, 2021, Paragon unilaterally implemented a mandatory vaccination policy that was designed to ensure that all of its employees were fully vaccinated against COVID-19 by October 31, 2021, whether or not the third-party worksites required mandatory COVID vaccinations. The Union grieved the introduction of the vaccination policy, arguing that it was not reasonable.

Decision

Arbitrator von Veh held that Paragon's policy was reasonable, enforceable and compliant with the *Occupational Health and Safety Act* (Ontario) (*OHSA*) and the *Human Rights Code* (Ontario). He found that Paragon had an obligation under the OHSA to "take every precaution reasonable in the circumstances for the protection of its workers" and that the "personal subjective perceptions of employees to be exempted from vaccinations cannot override and displace the available scientific considerations."

The arbitrator also found the vaccination policy aligned with the vaccination article that was already present in the Collective Agreement, as well as the vaccination requirements of many third-party worksites to which the security guards were assigned. As such, Arbitrator von Veh found that Paragon's unilateral introduction of the vaccination policy was a permissible exercise of its management rights pursuant to the Collective Agreement.

Ontario Power Generation v The Power Workers Union

Background

Ontario Power Generation has gyms on-site that can be used by employees. Certain employees are subject to a "Mid-Term Agreement" that entitles them to one hour of exercise per shift and allows them to use the onsite gyms during working hours as they are subject to physical testing requirements.

The gyms were closed at the start of the pandemic for all employees. In September of 2021, Ontario Power re-opened the gyms with the requirement that any unvaccinated employee who wished to use the gyms had to provide proof of a negative COVID-19 test within 48 hours of usage. In October of 2021, this policy was amended to prohibit unvaccinated employees from using the gyms.

This case is distinguishable from the other two discussed in this blog in that no mandatory vaccination policy was put in place as a requirement of employment. Instead mandatory vaccination was only required for the use of the gym facilities.

Decision

Arbitrator Murray upheld Ontario Power's mandatory vaccination requirement for gym access. He stated that it is a matter of public record that gyms are high risk areas for transmission of COVID-19 due to (i) high touch surfaces, (ii) increased potential for close contact and (iii) the greater range of respiratory droplets due to heavy breathing. Furthermore, the Ontario government has currently mandated that public gyms are required to have their patrons vaccinated in order to be granted gym access.

He stated that the OHSA requirement to take every precaution reasonable to protect the worker trumped the Mid-Term Agreement that



allows for gym access. Although the gyms are not public, the same logic that has informed the Ontario government in relation to public gyms should be applied to Ontario Power's private gyms. Requiring employees who use to the gyms to be vaccinated is therefore reasonable.

Moreover, employees covered by the Mid-Term Agreement would still be entitled to their one hour of exercise. That exercise would simply have to take place at a location other than the gyms, including at home or outdoors.

Electrical Safety Authority v Power Workers Union

Background

Prior to the introduction of its mandatory vaccination policy on October 5, 2021, the Electrical Safety Authority had a voluntary vaccination disclosure policy, which included a requirement that employees who were unvaccinated (or refused to disclose their vaccination status) submit to regular COVID-19 testing. Field staff were to be tested at least twice a week and office employees had to be tested no more than 48 hours before appearing for an in-person meeting or attending at an ESA office.

Decision

Contrary to the above decisions, Arbitrator Stout found that the Safety Authority's mandatory vaccination policy was unreasonable and could not be justified in the circumstances. Of note, many of the Safety Authority's employees still work from home (as is their right under the Collective Agreement) and therefore caused no significant risk of transmission to fellow workers, even if unvaccinated.

In distinguishing his decision from *Paragon*, Arbitrator Stout noted the importance of context when assessing the reasonableness of a workplace rule or policy. Where the risk to health and safety is great, an employer may encroach upon individual employee rights with a carefully tailored rule. In high-risk workplace settings with vulnerable populations, a mandatory vaccination policy may not only be reasonable but may also be necessary.

Ultimately, the Safety Authority was unable to demonstrate why it required a mandatory vaccination policy as opposed to the less intrusive voluntary disclosure and testing policy that had previously been in place.

Arbitrator Stout found that (i) there had been no outbreaks of COVID-19 in the workplace; (ii) the Safety Authority did not face any difficulty in protecting the workplace using the previous policy; and (iii) there was no evidence that the previous policy led to a substantial interference with its business.

Despite his findings, Arbitrator Stout acknowledged that it may be reasonable to have a policy requiring unvaccinated employees to be placed on an unpaid administrative leave if upon physically returning employees to the workplace, health and safety problems arise.

Arbitrator Stout also distinguished the case from *Paragon* on the basis that in *Paragon*, the Collective Agreement already contained a vaccination term, and the employer's business interests would have been significantly negatively affected because of the mandatory vaccination policies in effect at the third-party worksites. Decisions relating to the reasonableness of mandatory vaccination policies are highly fact-specific and contextualized. There is no "one size fits all" solution for all workplaces.



Takeaways

The *Paragon*, *Ontario Power* and *Power Workers Union* decisions further demonstrate the need for employers to consider their vaccination policies in the context of their workplace (and the specific dangers it presents) along with any applicable collective agreement, legislation and governmental guidance.

Employers will need to demonstrate why their policy is necessary in the workplace and why a less onerous policy will not suffice. To do so, employers may seek to rely on the following factors:

- a history of COVID-19 outbreaks in the workplace;
- regular employee contact with vulnerable populations such as the elderly, the immunocompromised or children;
- increased danger of COVID-19 transmission due to the type of activity that takes place in the workplace; and/or
- evidence that the employer's business is being substantially interfered with because its employees are not fully vaccinated.

As these are the first three decisions dealing with workplace-mandated vaccinations in Ontario, we expect further consideration of the issue and application of the principles from these decisions in the future. We will continue to monitor these issues as they unfold.

If you have any questions about the effect of these decisions and the enforceability of your vaccination policy, please contact the Bennett Jones Employment Services group to discuss.

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This update is not intended to provide legal advice, but to high-light matters of interest in this area of law. If you have questions or comments, please call one of the contacts listed.

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IN THE MATTER OF AN ARBITRATION

BETWEEN:

BUNGE HAMILTON CANADA, HAMILTON, ONTARIO

(the “Employer”)

-AND-

UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 175

(the “Unions”)

**AND IN THE MATTER OF A POLICY GRIEVANCE OBJECTING TO A
MANDATORY VACCINE POLICY**

ARBITRATOR

ROBERT J. HERMAN

APPEARANCES

FOR THE UNION

**MATTHEW JAGODITS
NAVIDAD TALBOT
DENNIS PACKHAM
ROB SCHROCK**

FOR THE EMPLOYER

**PATRICK GROOM
MICHELLE GAFFNEY
RENE LEMAY
RODNEY ADKINSON
SYLVIA SWEENEY
STEPHANIE LAMPE**

**A ZOOM VIDEOCONFERENCE HEARING IN THIS MATTER WAS HELD ON
DECEMBER 13, 2021**

AWARD

1. The Union, United Food and Commercial Workers Canada, Local 175, filed a policy grievance alleging that the new COVID-19 vaccination policy issued by the Employer, Bunge Hamilton Canada, Hamilton, Ontario (“Bunge”), “violates employee personal privacy/personal information and employee privacy rights”.
2. The parties filed the following Agreed Statement of Facts (“ASF”):

AGREED STATEMENT OF FACT

1. The Union filed Grievance No. R6-21-1062 on November 10, 2021 (“**the Grievance**”) and alleged that the new COVID-19 vaccination policy issued by the Company on November 10, 2021 “violates employee personal privacy / personal information and employee privacy rights”. A copy of the Grievance is attached at Appendix “**A**”.
2. The Company and the Union are party to a Collective Agreement effective on its face from November 2, 2019 to November 1, 2022. A copy of the Collective Agreement is attached at Appendix “**B**”.
3. The Company operates an oilseed Crush/Refine processing facility in Hamilton, Ontario. The primary operations of the facility are located at 515 Victoria Avenue North (the “**North Property**”) and secondary operations of the facility are located at 400 Burlington Street East (“**the South Property**”). The two properties are located across from each other and are bifurcated by Burlington Street. A map of the area, including the Company’s facility, is attached at Appendix “**C**”.
4. The North Property is located on land leased from the Hamilton Oshawa Port Authority (“**HOPA**”), which a federally-regulated organization. The South Property is owned by Bunge

5. The Company's primary operations are located on the North Property. The primary operations on the North Property include, but are not limited to, the following:

- a. Office, administration, and training building;
- b. Canola seed & soybean receiving via truck, rail, and ship;
- c. Railyards for storage of rail cars used to deliver canola seed or soybeans;
- d. Canola seed & soybean storage, including the Shed which is located next to a pier from which canola seed & soybean deliveries are unloaded from ships or truck;
- e. All canola seed & soybean transferring equipment to move seeds and beans from storage to the crush facility;
- f. The crush facility where canola seed & soybeans are processed into meal for animal feed and vegetable oil;
- g. Processing facility to refine and bleach vegetable oil products, some of which is pumped back from the South Property;
- h. Processing facility for meal products;
- i. Shipping facility for meal, sold as animal feed;
- j. Pumps, piping, and related equipment for transporting vegetable oil from the North property to the South Property, across Burlington Street through the pipe bridge;
- k. Boilers to produce steam to run both the North and South properties

6. The secondary operations of the facility are located on the South Property. The secondary operations on the South Property are referred to the "Edible Oils Facility" ("**the EOF**") and include, but are not limited to, the following:

- a. Deodorizing edible oils including operation of a Geka boiler;
- b. Bleaching of imported oils
- c. Edible oil storage tanks;
- d. Pumps, piping, and related equipment for transporting edible oil from storage tanks to tanker trucks;
- e. Shipping facility for loading/unloading tanker trucks and railcars to shipfinished edible oils and liquid byproducts;

7. Employees are regularly scheduled to perform jobs that are located on one side or the other, but employees may be reassigned to any jobs on either side of the Company's operations at any time as the Company may deem necessary.

8. All employee safety training is performed in the administration building on the North Property, other than Ammonia related training.

9. On or about **June 22nd, 2021** the Company issued the "Bunge Canada COVID-19 Vaccination Policy" ("**the Old Policy**"). A copy of the Old Policy is attached at Appendix "**D**".

10. On November 2, 2021, Eva MacPhee, the Leasing Administrator for HOPA, emailed all parties who lease land from HOPA and/or have operations located on HOPA properties to inform them of the new HOPA vaccination policy issued pursuant to new Transport Canada directions. A copy of the Cover Letter explaining HOPA's role in implementing the Federal vaccination mandate is attached at Appendix "E". A copy of the HOPA "COVID-19 Vaccination Policy: HOPA Contractors and Port Tenants" ("**the HOPA Policy**") is attached at Appendix "F".

11. In its Cover Letter dated November 1, 2021, HOPA writes "all employees of companies located at the port are required to be fully vaccinated by January 24, 2022. Attestation of vaccination must be provided by each employee via HOPA's website: <https://www.hopaports.ca/covid-19/>".

12. The "Purpose" of the HOPA Policy states "that all **HOPA contractors and tenants operating on HOPA property** must attest that they are fully vaccinated against COVID-19 on or before January 24, 2022. HOPA will make exceptions for those that are unable to get vaccinated based on a Certified Medical Contraindication" [emphasis in original].

13. Under "Specific Responsibilities" the HOPA Policy states:

1. "As of January 24, 2022, **all HOPA contractor employees and tenant employees** operating on HOPA property must be Fully Vaccinated except those exempted as outlined below.

2. HOPA contractors and tenants covered by this Policy must prove they are Fully Vaccinated through the submission of a formal attestation to HOPA in the form prescribed at Schedule "A." This form may be submitted in secure digital format at <https://www.hopaports.ca/covid-19/> [emphasis in original].

14. Under "Consequences for Non-Compliance" the HOPA Policy States:

1. "HOPA contractor and tenant employees who do not attest that they are Fully Vaccinated by January 24, 2022 and in accordance with this policy will not be permitted on HOPA property until such time as they can attest that they are Fully Vaccinated.

2. HOPA contractor and tenant employees who make false attestations related to vaccination status will be subject to a six (6) month trespass period from HOPA Property".

15. The Section 7.0(c) of the Company's lease agreement with HOPA requires the Company to follow all HOPA policies and procedures. A copy of this lease is attached at Appendix "G".

16. On November 9, 2021 the company issued an updated “Bunge Canada COVID-19 Vaccination Policy – Hamilton, Ontario” (“**the Vaccine Policy**”) to meet the requirements set out in the HOPA Policy. A copy of the Vaccine Policy is attached at Appendix “**H**”.

17. In addition to issuing the Vaccine Policy, the Company also issued a “New Bunge Hamilton Vaccine Policy Frequently Asked Questions” (“**the FAQ**”) on November 9, 2021. A copy of the FAQ is attached at Appendix “**I**”.

3. The parties agreed on these additional facts:

Total bargaining unit employees regularly scheduled to work on North/South side.

North = 63

South = 19

+ 1 Millwright and +1 Electrician (“Mechanics”) that rotate between the 2 sites as needed

Total Employees (including non-union) Regularly Scheduled to Work on North / South side:

North = 93

South = 32

On South Site:

6 Power Engineers (stationary engineers) who require college education, apprenticeship training, and certification

Training times:

South Side:

Support operator – 8 weeks

Oil Loadout operator – 8 weeks

North Side:

Extraction 12 weeks

Refining & Bleaching – 8 weeks

Meal room – 8 weeks

Other roles – meal load out, receiver, spare – tend to be 3 weeks.

All 6 COVID-19 positive cases at Bunge Hamilton were employees who are regularly scheduled to work on South side.

On June 18, 2021 the UFCW filed a policy grievance challenging the first version of the Company's Vaccination Policy as issued on June 4, 2021

There has been no evidence of COVID-19 transmission in the workplace since June 4, 2021

4. The Old Policy (ASF, paragraph 9) that was issued on or about June 22, 2021 was entitled "Bunge Canada Vaccination Status Request Policy". Its stated purpose was to verify vaccination rates at the Bunge facilities to help the company better determine and gauge the need for employee vaccination clinics, incentives for being vaccinated, the risk of facility closure, ability to meet customer demands, appropriate safety protocols for employees, and impacts on employee travel. The Old Policy did not require employees to disclose their vaccine status, and there was no adverse employment action if employees declined to disclose their status or were unvaccinated. Although the Union's grievance against the Old Policy remains outstanding, at the hearing the Union advised that it intended to withdraw that grievance.

5. Pursuant to Transport Canada's requirement that all employees of companies located at the port be fully vaccinated by January 24, 2022, HOPA issued the HOPA Policy (ASF, paragraph 10), which reads:

**COVID-19 VACCINATION POLICY: HOPA CONTRACTORS and
PORT TENANTS**

Effective: October 31, 2021

PURPOSE

This policy establishes that all **HOPA contractors and tenants operating on HOPA property** must attest that they are fully vaccinated against COVID-19 on or before January 24, 2022. HOPA will make exceptions for those that are unable to get vaccinated based on a Certified Medical Contraindication.

OBJECTIVE

The objective of this policy is:

1. To protect the health and safety of HOPA stakeholders by taking all reasonable measures to prevent the spread of COVID-19; and
2. To comply with the request of the Canadian Government to require all stakeholders operating on Federally Regulated Port Properties to be vaccinated subject to limited exemptions.

APPLICATION

This policy is applicable to all HOPA contractors and tenants operating on HOPA property and their employees.

DEFINITIONS

1. “Certified Medical Contraindication” means a medical condition that prevents an individual from safely obtaining a COVID-19 vaccine as evidenced by a letter from a physician who is licensed to practice medicine and who is a member of the College of Physicians and Surgeons of Ontario (or equivalent body from another Canadian province) clearly stating why an individual should be exempt from receiving a COVID-19 vaccine.

2. “HOPA Contractors” means any individual or employees of an organization hired by HOPA to perform work on HOPA properties on a contractual basis.

3. “Tenants” mean a business, organization or corporation that leases any HOPA property or real estate for a period of time and where there is a contractual obligation between the two parties, and employees thereof.

4. “Fully Vaccinated” refers to:

- a) having received both doses of a Health Canada authorized vaccine that requires 2 doses to complete the vaccination;
- b) having received all doses of a mixed dose Vaccine series that aligns with NACI Recommendations on the use of COVID-19 vaccines; or
- c) having received 1 dose of a Vaccine that only requires 1 dose to complete the vaccination series;

at least 14 days prior to submitting this attestation.

5. “NACI” means the National Advisory Committee on Immunization.

6. “Partially Vaccinated” refers to having received only one dose required for a COVID-19 vaccine(s) approved by Health Canada that requires two doses (e.g., one dose of a two-dose vaccine).
7. “Privacy Act” means the Privacy Act (R.S.C., 1985, c. P-21).
8. “HOPA” means the Hamilton-Oshawa Port Authority.
9. “Vaccine” means a COVID-19 vaccine approved by Health Canada.

SPECIFIC RESPONSIBILITIES

1. **As of January 24, 2022, all HOPA contractor employees and tenant employees operating on HOPA property must be Fully Vaccinated except those exempted as outlined below.**
2. **HOPA contractors and tenants covered by this Policy must prove they are Fully Vaccinated through the submission of a formal attestation to HOPA in the form prescribed at Schedule “A.”** This form may be submitted in secure digital format at <https://www.hopaports.ca/covid-19/>.

CONSEQUENCES FOR NON-COMPLIANCE

1. **HOPA contractor and tenant employees who do not attest that they are Fully Vaccinated by January 24, 2022 and in accordance with this policy will not be permitted on HOPA property until such time as they can attest that they are Fully Vaccinated.**
2. **HOPA contractor and tenant employees who make false attestations related to vaccination status will be subject to a six (6) month trespass period from HOPA Property.**

EXEMPTIONS

HOPA will exempt individuals from the requirement to be Fully Vaccinated against COVID-19, if an individual cannot be vaccinated due to a Certified Medical Contraindication. Individuals must complete Part 2 of Schedule “A” and provide required documentation as set out in this Policy by January 24, 2022.

PREVENTION OF HARASSMENT, BULLYING OR DISCRIMINATION

HOPA contractors and tenants are responsible for ensuring there is a respectful, productive, inclusive, and equitable environment. HOPA contractors and tenants, or their employees therefore shall not conduct any acts of harassment or

other prohibited conduct toward any individual for any reason, including based on vaccination status.

PROTECTION OF PRIVACY

Personal information will only be collected, retained, used and disclosed by HOPA in a manner that respects the provisions of the Privacy Act and other applicable legislation.

(emphasis added)

6. The Vaccine Policy being challenged here issued on November 9, 2021 and reads:

BUNGE CANADA COVID-19 VACCINATION POLICY – HAMILTON, ONTARIO

Issue Date: November 9, 2021

Effective Date: November 9, 2021

Next Review Date: No later than January 1, 2023

IV. Purpose

The Government of Canada (Transport Canada) has announced that it is requiring employers in the federally-regulated air, rail and marine transportation sectors to establish mandatory vaccination policies ensuring that all employees are vaccinated against COVID-19. **As a result of Transport Canada’s announcement, Bunge Canada’s (“Bunge”) landlord, the Hamilton-Oshawa Port Authority (“HOPA”), has advised that all employees of companies located at the HOPA port will be required to be fully vaccinated by January 24, 2022. As a HOPA tenant, Bunge Canada is required to comply with this mandate.**

The purpose of this policy is to comply with federal requirements and HOPA’s mandate, and to also provide for a safe work environment during the COVID-19 pandemic and safeguard the health and safety of employees, contractors, visitors and vendors.

This policy is intended to comply with all federal, provincial, and local laws and is based upon guidance provided by Transport Canada, Health Canada, the Ontario Ministry of Health and the advice, recommendations and instructions of local public health officials (including Hamilton’s Medical Officer of Health).

II. Scope

This policy applies to all employees who work at the Hamilton, ON facility and any Bunge (including any of its affiliates) employees who visit the facility subject to the accommodations and exemptions process detailed below.

III. Policy Requirements

Proof of Vaccination

Bunge requires all employees to whom this policy applies to provide proof of fully-vaccinated status, with vaccines approved by Health Canada, no later than January 24, 2022. Employees will provide proof of vaccination to the Facility Manager or Human Resources representative supporting the Hamilton, ON facility. The employee will then be asked to fill out a HOPA attestation form that will be submitted to HOPA as proof of vaccination. An employee is considered fully-vaccinated if they have completed the required regime for a COVID-19 vaccine and 14 days have passed since their final dose which means employees should receive their final shot no later than January 9, 2022.

Employees who do not provide proof of fully-vaccinated status by January 24, 2022 will not be allowed on-site. If employees are in the process of becoming fully vaccinated, i.e., waiting to receive the second dose, they will be placed on an unpaid leave of absence until they provide proof of fully vaccinated status. Employees may use accrued but unused vacation time in lieu of an unpaid leave of absence subject to management's approval. **Employees who are not fully vaccinated and/or do not intend to provide proof of fully vaccinated status by January 24, 2022, will not be allowed on the site and put on unpaid leave pending a final determination on their employment status (up to and including termination of employment).**

All new hires as of January 24, 2022 must be fully vaccinated.

Employees who believe they may need an exemption or accommodation to this policy due to disability or sincerely and deeply held religious beliefs/creed should request an accommodation as detailed below.

Medical and Religion/Creed Exemption Requests

Bunge will engage in an interactive process to determine if a reasonable accommodation can be provided without imposing an undue hardship on Bunge or creating a direct threat to the health or safety of the employee or others in the workplace.

To request an accommodation for one of the above reasons, an individual must complete a *Medical Accommodation Request Form* or a *Religious/Creed Accommodation Request Form* (available from Human Resources). Once Bunge receives the accommodation request form, it will engage in an interactive process to identify potential accommodations on a case-by-case basis. Individuals must cooperate and participate in this interactive process honestly and in good faith, and persons may be asked to provide additional information in support of the accommodation request. Even if a disability or sincerely and deeply held religious belief is established, the request may be denied due the seriousness of the COVID-19 pandemic and the resulting undue hardship and/or direct threat posed by the lack of vaccination, depending on the circumstances. When requesting an accommodation, please note that personal preferences and/or singular beliefs do not amount to a religion/creed and will not be accommodated.

If the Company received medical and disability-related information during the interactive process to discuss an accommodation, then all information pertaining to the underlying medical conditions, as well as the accommodation process and discussions, will also be kept confidential to the greatest extent possible and in accordance with applicable law or regulation.

Confidentiality

Bunge will take steps to protect the confidentiality of all information submitted pursuant to this policy, including individuals' vaccination status and underlying medical condition(s), in accordance with applicable law or regulation. In providing proof of vaccination, individuals should not disclose any other medical information, disability-related information, or genetic information. Anonymized, aggregated vaccination status data for the facility may be shared with facility management to help assess facility risk for COVID-19 spread, to help ensure a safe work environment and to otherwise further the purposes of this policy. Only those employees with a business need to know a person's vaccination status will have access to this information. Persons who do not verify their vaccination status with the Company will be considered unvaccinated for the purpose of this policy.

If the Company elects to store proof of vaccination, it will be stored in a confidential medical file which is separate and apart from the employee's or other person's personnel file and will be kept secured and confidential. Vaccination status information will be destroyed when the pandemic is declared

over by public health officials or when vaccine verification measures are determined not to be a necessary, effective or proportionate response to address the public health purposes.

Vaccination status may be shared where required or permitted by law, including with governmental or regulatory authorities, to obtain advice from our professional advisors, or in the event of an emergency. Internally, vaccination status will only be shared on a need to know basis.

Some individuals may have the right to access and/or rectify their personal information, including their vaccination status, subject to certain limitations and restrictions pursuant to applicable laws. Questions or complaints regarding the collection, use or disclosure of personal information pursuant to this policy, including information regarding vaccination status, may be directed to the Facility Manager or Human Resources Representative.

Non-Discrimination / Non-Retaliation

As stated in its other policies, the Company does not discriminate against its employees or other persons with regard to race, ancestry, place of origin, colour, ethnic origin, citizenship, religion/creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status, disability, or any other characteristic protected by applicable human rights law. The Company also accommodates disabilities and sincerely and firmly held religious beliefs to the extent required by law and prohibits retaliation for any conduct protected by applicable law. Although an accommodation request may be denied (or an alternative, modified accommodation will be offered) if it poses an undue burden on the Company and/or presents a direct threat to the health and safety of the employee or others, the Company will not retaliate against anyone merely for requesting an accommodation.

If you believe you have been treated in a manner not in accordance with this policy, please notify Human Resources immediately.

IV. Interpretation and Enforcement

The Human Resources Department owns this Policy and any questions regarding this Policy or the administration of the Policy should be directed to your HR representative

If an employee fails to comply with this policy or falsifies reports of his/her vaccination status the employee may be subject to appropriate disciplinary action, up to and including termination of employment or service relationship. Anyone falsifying the vaccination or exemption documentation

may also be barred from HOPA property for six (6) months and face fines of up to \$250,000/day per offence from Transport Canada.

Bunge reserves the right to amend, modify, revise, suspend or cancel this Policy at any time, with or without notice, at its sole discretion as the status of the pandemic changes, legislation or public health advice changes and/or HOPA's mandate changes.

(emphasis added)

7. In the FAQ issued by the Employer (ASF, paragraph 17), it states:

6.) What are the important dates to be aware of?

The vaccine mandate comes into effect on January 24th , 2022 but to meet the requirement at a minimum you need to have your first vaccine by December 12th (Pfizer or Moderna) which will allow for a second vaccine by Jan 9th or a shot of Johnson & Johnson by January 9th. Then the 2 week required [sic] to be considered fully vaccinated by January 24th. **If you begin later than that you are at risk of being not allowed on site, put on unpaid leave pending termination of employment**

...

13.) What is the consequence if I choose not to get vaccinated and/ or disclose my vaccination status?

The consequence for choosing not to get vaccinated, not disclosing your vaccination status and not having an accepted religious or medical exemption will be not being allowed on site, being put on unpaid leave as your employment status is reviewed. **If you are not able to work you are not leaving the company many choices.**

(emphasis added)

Submissions

8. The Union acknowledges that COVID-19 represents a serious danger to the health and welfare of the employees and the public. Nevertheless, it asserts, the

Vaccine Policy is an unreasonable exercise of management rights, in requiring employees to disclose their personal health information, and because it is unreasonable to place unvaccinated employees on unpaid leaves of absence, or to discipline or terminate them for a failure to become fully vaccinated. The Union submits that the Vaccine Policy infringes upon employees' rights to keep their confidential medical information private through the requirement that employees disclose their vaccination status, which it asserts is in breach of the *Personal Health Information Protection Act, 2004* ("PHIPA"), specifically section 19. The Union submits that the HOPA Policy only applies to the North Property, as it is only that property that is leased from HOPA, so the Employer cannot justify the application of the Policy to the South Property on the basis that HOPA requires that it do so.

9. It is also premature to impose a blanket requirement that employees must be fully vaccinated, asserts the Union, as the actual numbers of unvaccinated employees is unknown and unpredictable, and as there is no evidence as yet of any transmission since the introduction of the Old Policy in June 2021. It argues that the Employer has not established that the potentially small number of unvaccinated employees could not be accommodated by scheduling them to work only on the South Property, or otherwise separate them from vaccinated employees wherever possible, nor has it demonstrated that its ability to operate the North and South facilities would be seriously impaired without the Vaccine Policy. Nor has it justified, the Union submits, the lack of alternative measures such as testing, instead of unpaid leaves of absence, discipline, and termination. As remedial relief, the Union asks for a declaration that the Vaccine

Policy is an unreasonable exercise of management rights, and that it be nullified, and that the Employer be required to reinstitute the Old Policy. Alternatively, it requests that employees not be required to disclose their vaccine status, that mandatory testing be included as an option as part of the Vaccine Policy, and that unpaid leaves, suspensions, or terminations not be allowed as part of the Vaccine Policy.

10. The Employer responds that the disclosure of vaccine status is not information protected by *PHIPA*, relying upon Section 4 (4) of that Act, and in the circumstances of the pandemic and the HOPA Policy, it is reasonable to demand this information of employees. The Employer submits that it is premature to consider the Union's objection to unpaid leaves, discipline and termination, as no employee has yet been put on unpaid leave, been disciplined, or been terminated. It may be that all employees comply with the Vaccine Policy, or that no employee is disciplined or terminated, for the Employer notes that discipline and/or termination are not mandated under the Vaccine Policy, as the Policy states only that discipline or termination **may** result from a failure to comply. The consequences for an individual employee of non-compliance with the Vaccine Policy therefore remain unknown, submits the Employer, and until or if the Employer concludes that discipline or termination is warranted in a particular case, it is premature to address whether the particular discipline or termination was justified. To the extent that any of the FAQ's may be interpreted as indicating that discipline or termination will in fact be imposed for non-compliance, the Employer submits that the policy is as set out the Vaccine Policy document, and not in the FAQ's.

11. The Employer argues that the HOPA Policy does apply to both North and South

Properties, and in any event, it would be impractical to distinguish between the two locations, as they are integrated in operation. It submits that isolating unvaccinated employees to work only in the South Property would require the Employer to revamp and relocate its training facilities and operation, and would materially interfere with the production of its product. Further, if unvaccinated employees were all to be moved to the South Property, the Employer asserts that employees would have to be transferred to jobs or positions in a manner that would be in breach of the seniority and job posting provisions of the Collective Agreement. The Employer submits that where a third-party landlord or owner imposes restrictions upon tenants or users of its property consistent with the lease, as has happened here, it is required of the tenant or property user that it comply with those conditions, and the Vaccine Policy that complies with the HOPA Policy is therefore a reasonable policy.

12. With respect to the request by the Union to return to the Old Policy, the Employer notes that the Old Policy is no longer in effect and does not exist, so it cannot be reinstated, and in any event, asserts the Employer, the Old Policy would not be consistent with the requirements of the HOPA Policy and the Employer's lease with HOPA. The Employer notes as well that the Union still has an outstanding grievance challenging the Old Policy, so it cannot ask as remedial relief that the Old Policy be reinstated.

13. The parties referred to the following decisions: *Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. (1965)*, 16 L.A.C. 73 (Robinson) ("KVP Award"), *Electrical Safety Authority and Power Workers' Union (ESA-P-24)*, Re 2021

CarswellOnt 18219 (Stout)(“*ESA Award*”); *United Food and Commercial Workers International Union, Local 333 v Paragon Protection Ltd* 2017 CanLII 26156 (ON LA)(Von Veh)(“*Paragon Award*”); *Veridian Corp. and IBEW, Local 636 (Raininger)*, 2014 CarswellOnt 12334, [2014] O.L.A.A. No. 324, 120 C.L.A.S. 91 (Slotnick); *NAV Canada v. C.A.T.C.A.*, 1998 CarswellNat 3089, [1998] L.V.I. 2951-5, [1998] C.L.A.D. No. 401, 53 C.L.A.S. 247, 74 L.A.C. (4th) 163 (Swan); *U.E., Local 512 v. Tung-Sol of Canada Ltd.*, 1964 CarswellOnt 520, [1964] O.L.A.A. No. 9, 15 L.A.C. 161 (Reville), *York BRT Services LLP and ATU, Local 113 (Suttar)*, 2013 CarswellOnt 7277, [2013] O.L.A.A. No. 180, 114 C.L.A.S. 319 (Herman).

Decision

14. An employer can generally issue policies affecting employees, provided they are not inconsistent with the collective agreement provisions and as long as they are reasonable. Employees have to comply with such policies or can face negative consequences, which can include discipline; see, for example, *Lumber & Sawmill Workers’ Union, Local 2537, and KVP Co. (1965)*(above). In assessing whether a policy is reasonable, context and the circumstances in play at the time are critical.

15. The continued presence of COVID-19 presents a serious risk and danger to the health and welfare of the public, to the economy and the education system, and to everyone’s ability to fully enjoy life. Public health and safety measures have not as yet been able to fully control the spread of the virus or its potentially terrible ramifications, and while data about the recently discovered Omicron variant remains limited at this point, the emergence of Omicron may increase the challenges COVID-19 presents for us

all.

16. On November 2, 2021, HOPA notified all parties that leased land from it and/or have operations located on HOPA properties of its new vaccine policy, the HOPA Policy, and that it was issuing the new policy because of new Transport Canada requirements. HOPA advised that “**all employees of companies located at the port are required to be vaccinated**” on or before January 24, 2022, and that “**HOPA contractors and tenants operating on HOPA property**” must attest that their employees are fully vaccinated against COVID-19 by that date. If employees do not attest that they are fully vaccinated by January 24, 2022, the HOPA Policy states, then they “will not be permitted on HOPA property until such time as they can attest that they are Fully Vaccinated”. The only exception in the HOPA Policy was for employees who qualified for a medical exemption.

17. The primary operation of Bunge’s business in Hamilton takes place at the North Property, a facility located on lands leased from HOPA, and Bunge’s lease with HOPA requires that it follow all HOPA policies and procedures. The adjacent facility, the South Property, is not leased from HOPA. The Employer asserts that the HOPA Policy applies to both facilities, as Bunge is a company “located at the port” and is a “tenant” on HOPA property.

18. It appears clear that HOPA intended that the HOPA Policy apply to both the North and South Properties, but what is less clear on the material before me is whether HOPA has control over property not leased from it, or whether HOPA has any

jurisdiction over the South Property. However, because of the findings below, it is unnecessary to decide this issue, and I have accordingly assumed, for purposes of this decision, that the HOPA Policy does not apply to the South Property, and that it does not, therefore, require Bunge to apply its terms to employees who enter upon that property.

19. The two properties are located directly across the street from each other, and are integrated in terms of the company operations. The Employer's administrative offices are located on the North Property, as is its facility for receiving and processing product. The edible oils processed on the North Property are then moved across the street to the South Property, where they are further processed, and/or stored, and then shipped out from that facility. The work force usually working at the North Property is significantly larger in numbers, and employees are regularly scheduled to perform jobs located on one location or the other. Employees may also have to go between the two locations; for example, when performing overtime work and when they are reassigned to the other location as deemed necessary by the Employer. The majority of training for all employees (except for Ammonia-related training), regardless of which location they ordinarily work at, takes place at the North Property. Training can regularly take some time, in many cases lasting from 8 to 12 weeks, both for new employees and existing employees posting into new positions. Were the Employer to move all unvaccinated employees to work exclusively at the South Property, its operation would have to be changed in some material respects, such as no longer being able to reassign employees between locations, and it would incur significant additional operating costs, since

unvaccinated employees could not enter the North Property after January 24, 2022. It would also likely have to establish an additional, separate training infrastructure that operated solely out of the South Property, in order to train employees located at that property.

20. Further, transfers of unvaccinated employees to the South Property would likely require consequential transfer of vaccinated employees to the North Property, as any intermingling of employees between sites would place all employees at greater risk of infection from COVID-19, and to the extent any South Property unvaccinated employees entered the North Property, would be in breach of the HOPA Policy. In effect, treating the two facilities as distinct and geographically separate parts of the business would preclude interaction of employees between sites and would impede the existing integration of operation between the two sites. Transfers of employees to either location, in order to maintain the North Property for vaccinated employees and the South Property for unvaccinated employees, would also appear to be in breach of Collective Agreement provisions concerning job postings, transfers, and seniority rights.

21. Even assuming that the HOPA Policy does not require that it be applied to the South Property, given the significant disruption to the ability of the Employer to conduct its business if different vaccine policies or practices applied to the two locations, it is reasonable for the Vaccine Policy to apply to all employees regardless of their work location.

22. With respect to the attestation component of the Vaccine Policy, the HOPA

Policy requires that employees attest as to their fully vaccinated status by January 24, 2022, or they will be barred from entry on HOPA property until such time as they can attest that they are fully vaccinated. In turn, the company's Vaccine Policy stipulates that all employees to whom the policy applies must provide proof of fully vaccinated status to the Facility Manager by January 24, 2022, and must fill out a HOPA attestation form to be submitted to HOPA. The HOPA attestation form asks employees to attest to whether they have been fully vaccinated, or whether they have been unable to obtain a vaccination due to a medical contraindication. The only other information requested of employees is information that identifies the employee and that provides contact information, and a question asking whether the employee has a Port Security Access Card. Exceptions to the requirement to be fully vaccinated in the company's Vaccine Policy are not limited to medical reasons, and also include exceptions for religious grounds or reasons of creed, with requests for such exemptions to be considered on an individual basis.

23. For a number of reasons, I find that the requirement to disclose vaccine status is reasonable.

24. First, it is not clear that *PHIPA* would prevent the disclosure of an individual's vaccination status in the circumstances at hand. The specific section of that Act referred to by the Union, section 19, deals with the withdrawal of consent to the disclosure or collection of personal health information, and not the initial disclosure of such information. How *PHIPA* would apply in the circumstances is not clear.

Second, the Vaccine Policy was introduced because the HOPA Policy required that

company employees attest to their vaccine status and the Employer is bound to comply with that Policy. In this respect, see, for example, *York BRT Services LLP and ATU, Local 113 (Suttar)*(Herman)(cited above). Third, management can generally establish rules that require the production of employees' medical information if necessary in order to protect the health and welfare of other employees, which would be the case here. Similar information is sometimes required of individuals in many contexts, such as crossing borders, taking flights, entering restaurants, arenas, or concert halls. It is not unusual for disclosure of such information to be necessary for the protection of the health of members of the public. Vaccinated employees working at the two facilities, and others who enter those facilities from time to time, are entitled to be aware of whether unvaccinated persons are working on site and within their vicinity. Similar conclusions were reached in the *Paragon Award* and the *ESA Award* (cited above). Fourth, the intrusion upon an individual's privacy with respect to the disclosure of personal health information is relatively minimal. Employees are only being asked to reveal their vaccine status, and nothing more concerning their personal health. Indeed, the Vaccine Policy expressly advises employees not to disclose other medical information. Fifth, since I find the requirement to be fully vaccinated in order to enter upon either property reasonable, as discussed below, employees will in any event likely be aware of which employees are vaccinated shortly after January 24, 2022, since after that date, only vaccinated employees will be allowed on site. Sixth, the Vaccine Policy provides a reasonable period of time for employees to attest to their status, for they are given from November 10, 2021 until January 24, 2022 to do so. Seventh, the information is only disclosed to the Facility Manager and then to HOPA. The

attestation information will be stored in a secured and confidential manner, and only disclosed where required by or permitted by law, and internally only on a “need to know” basis.

25. Any privacy rights in this context are considerably outweighed by the minimal intrusion on such rights and the enormous public health and safety interests at issue. In the result, I am satisfied that the attestation requirement in the Vaccine Policy is reasonable.

26. I turn now to consider whether the requirement to be fully vaccinated (i.e. one dose of a single dose vaccine or two doses of a two-dose vaccine) by January 24, 2022 or to be put on unpaid leave is reasonable.

27. The Vaccine Policy requires all employees to be fully vaccinated, and to provide proof of that status, by January 24, 2022, or they “will not be allowed on site and put on unpaid leave pending a final determination of their employment status (up to and including termination of employment)”. The Vaccine Policy does not stipulate that employees who do not meet these requirements by January 24, 2022 will be suspended (i.e. receive a disciplinary suspension) or will be terminated, only that a final determination will subsequently be made as to their employment status, and that may include discipline or termination. The Vaccine Policy issued by Bunge complies with the requirements of the HOPA Policy, although it also provides for additional exemptions to the mandatory vaccination requirement for reasons of religious belief or creed.

28. The HOPA Policy required that the Employer ensure that employees working at its North Property be fully vaccinated, and for reasons set out previously, it was reasonable for the Vaccine Policy to be made applicable to all employees, regardless of which property was their customary location for working. If the Employer had not implemented the HOPA Policy through its own Vaccine Policy, it does not appear that the Employer would be able to properly operate its business out of the North and South Properties. In these circumstances, and given the public safety and health risks unvaccinated persons create for both vaccinated and unvaccinated persons who come in contact with them, the Vaccine Policy issued by the Employer is reasonable in its requirement that a condition of working at either facility and coming on site after January 24, 2022 is that employees have to be fully vaccinated, and if they are not, they will be placed on unpaid leave.

29. The Union argues that there have been no cases of transmission in the workplace since the Old Policy was issued and therefore no need for the new Vaccine Policy. However, the HOPA Policy requires attestation and full vaccination status, employees cannot work remotely, and operationally the Employer could not function properly without compliance with the HOPA Policy. The nature of COVID-19 and the risks of exposure and the potential consequences of becoming infected, particularly for unvaccinated persons, are significant, and this remains true even if no employee working at either location has become infected through workplace transmission since the issuance of the Old Policy. The lack of recent confirmed cases does not render unreasonable what is otherwise a reasonable policy.

30. With respect to the references in the Vaccine Policy to discipline and termination, as the Vaccine Policy states, at this stage discipline or termination are only possibilities. It is reasonable, if not required, for an employer to put employees on notice of potential consequences of non-compliance with a rule or policy, and the Vaccine Policy does this. When or if discipline is meted out or an employee is discharged, a grievance can be filed. Any resulting arbitration would provide opportunity to consider whether the Employer can establish just cause for the suspension or termination, as the case may be, and that determination is likely to involve consideration of the circumstances at hand at the time of the suspension or termination, circumstances that cannot be known at the present time.

31. It is therefore reasonable for the Vaccine Policy to include a statement that employees who are not fully vaccinated by January 24, 2022 “will not be allowed on the site and put on unpaid leave pending a final determination on their employment status (up to and including termination of employment)”.

32. With respect to concerns that certain answers to the FAQ’s issued by the company suggest that discipline or termination will necessarily be the consequence for non-compliance with the Vaccine Policy (cf. paragraph 7 above), the FAQ’s are not part of the Vaccine Policy, and to the extent the FAQ responses suggest that a non-complying employee will automatically be disciplined or terminated, those responses are inconsistent with the Vaccine Policy, and cannot stand.

33. The Union argues that testing is a reasonable alternative to unpaid leaves,

suspensions, or terminations. The issue before me, however, is not whether testing or other alternatives exist that would be reasonable components of a COVID-19 policy, but whether the Vaccine Policy issued by the Employer is reasonable. While the absence of a testing alternative is relevant to consideration of this issue, for the reasons expressed above I am satisfied that the Vaccine Policy is reasonable without a testing requirement or a testing alternative. Here, using testing as an alternative to a mandatory vaccination requirement would put the Employer in breach of its lease obligations with HOPA, and therefore render the continued operation of its business potentially unfeasible, since it would then be barred from access to the North Property. In any event, there is no evidence before me that suggests a testing alternative would provide sufficient protection for employees and others entering upon either property.

34. A vaccine policy similar in some respects was considered in the *ESA Award*. In that decision, the arbitrator concluded that at some point in the future a vaccine policy might be reasonable where it placed non-compliant employees on unpaid leaves, but it was unreasonable at the time in doing so and in stating that they might be subject to discipline, up to and including discharge. In that case, however, the prohibitions by some third-party site owners against unvaccinated employees coming on their properties were limited in impact and did not appear to create significant problems for the operation of the business. That case accordingly arose in a context meaningfully different than the present context. As well, in concluding that unpaid leave, and possible discipline and termination, were not appropriate employer responses to non-compliance, the arbitrator expressly noted that the continued failure to be vaccinated

might result in consequences at a later date that would include being placed on unpaid leave. Here, however, it is not premature to require that employees be fully vaccinated in order to come on site. The arbitrator also concluded that the absence of a testing alternative in the policy before him rendered that policy unreasonable, but here, a testing alternative without also putting employees on unpaid leave as of January 25, 2022 would not meet the requirements of the HOPA Policy, would place the Employer in breach of its lease obligations with HOPA, and would jeopardize its ability to properly function. For all these reasons, the *ESA Award* is distinguishable.

35. In the result, I conclude that the Vaccine Policy is a reasonable policy in the circumstances, and is a reasonable exercise of management's right to issue workplace policies. The grievance is accordingly dismissed.

Dated at Toronto this 4th day of January, 2022



Robert J. Herman - Arbitrator