

IN ARBITRATION PROCEEDINGS BEFORE
HON. JOHN M. TRUE (RET.)
ARBITRATOR

SAN JOSE POLICE OFFICERS
ASSOCIATION, et al.,

Appellants,

and

CITY OF SAN JOSE,

Respondent.

OPINION AND AWARD

INTRODUCTION

This dispute was heard on November 28 and 29, 2023 at San Jose City Hall, 200 E. Santa Clara Street, 15th Floor, San Jose, California.

A. Appearances

The Appellants are the San Jose Police Officers Association (POA) and thirty two sworn employees of the City of San Jose Police Department, all named below. (*See also*, JX 1.)¹

Appellants are represented by [REDACTED] and [REDACTED], Esqs. of [REDACTED], LLP.

Respondent is the City of San Jose (City), including its Police Department (SJPD). Respondent is represented by [REDACTED] by [REDACTED].

B. Jurisdiction

The City and the SJPOA are parties to a Memorandum of Agreement (MOA) effective July 1, 2022 through June 30, 2025. Section 25 of the MOA establishes a multi-step grievance procedure which culminates in arbitration. (*See*, JX 2, §§ 25.8 through 25.11 (“Disciplinary

¹ Exhibits received into the record will be referred to as follows: Joint Exhibits: “JX __;” Respondent’s Exhibits: “RX __;” and Union Exhibits: “UX –.” Transcript references will be designated, “Tr. __.”

Grievances”) at pp. SJ003604-3613.)

On or about June 27, 2023, and pursuant to Section 25.10 of the MOA, I accepted appointment as arbitrator herein. These proceedings followed.

C. Evidence and Argument

During the two-day hearing, I heard the sworn, in-person testimony of 11 witnesses. The testimony of seven further witnesses was submitted by declaration (JX 11-13 and UX 1-3.) The parties submitted post-hearing briefs on March 15, 2024 on which date the matter was deemed submitted.

ISSUE

Were the ten-hour (1 shift) suspensions of the 32 members of the SJPD named in this proceeding for just cause, and, if not, what shall the remedy be?

RELEVANT PROVISIONS OF THE SAN JOSE MUNICIPAL CODE

3.04.1360 - Disciplinary action - Authorized when.

In conformity with this Part 11, disciplinary action may be taken against any officer or employee, except as otherwise provided by the Charter, for any cause for discipline specified in this part.

3.04.1370 - Causes for discipline.

Each of the following constitutes cause for discipline of an employee or person whose name appears on any employment list:

- E. Failure to observe applicable rules and regulations;
- S. Willful disobedience;

(JX 3; SJ003647-48.)

FINDINGS OF FACT

A. Stipulated Facts

On November 21, 2023, the parties entered into a written, binding stipulation that the facts set forth immediately below are true for the purposes of this arbitration proceeding and need

no further proof. These stipulated facts are:

1. Parties

1. Respondent City of San Jose is a charter city located in the County of Santa Clara, State of California. As a charter city, Respondent has the power to make and enforce all laws and regulations in respect to municipal affairs, subject only to such restrictions and limitations as may be provided in its Charter and in the Constitution of the State of California.
2. Respondent operates under a “Council-Manager” form of government. The City Manager is the chief administrative officer of the City. Subject to the Civil Service provisions of the City Charter and except as otherwise provided in the Charter, the City Manager is the appointing authority for all officers and employees of the City and may suspend without pay, demote, discharge, remove or discipline any City officer or employee who under the Charter is appointed by the City Manager.
3. The City Manager delegates to the Director of Employee Relations the responsibility to review and approve formal disciplinary actions for City employees under the City Manager’s appointing authority.
4. At all relevant times, Appellants were and are sworn employees of the San Jose Police Department and Public Safety Officers as defined by Government Code Section 3301 and Penal Code Section 830.1.

2. Memorandum of Agreement

5. SJPOA and the City of San Jose entered into a Memorandum of Agreement (“SJPOA MOA”) on or about December 13, 2022, which was effective from July 1, 2022 - June 30, 2025. Joint Exhibit 2 is a true and accurate copy of the relevant excerpts of the SJPOA MOA. (JX 2, pp. SJ003604-SJ003613.)

3. San Jose Municipal Code

6. Appellants are civil service employees of the City of San Jose and subject to the Personnel Regulations contained in Title 3 of the San Jose Municipal Code (“SJMC”). Joint Exhibit 3 is a true and accurate copy of the relevant excerpts of the SJMC. (JX 3, pp. SJ003647-SJ003653.)

7. Pursuant to San Jose Municipal Code Section 3.04.1370, a City of San Jose employee is subject to discipline for any of the following: (E) Failure to observe applicable rules and regulations; and (S) Willful Disobedience. (JX 3, pp. SJ003647-SJ003653.)

4. San Jose Administrative Policy Manual (“CPM”)

8. The City’s Discipline Policy is contained in the San Jose City Administrative Policy Manual (“CPM”) Section 2.1.3. (JX 4, p. SJ002569-SJ002575.) This policy includes an explanation of disciplinary procedures, the authorities under which disciplinary action is taken, definitions of informal and formal disciplines, and a summary of the rights of employees who are subject to disciplinary action. (*Id.*, p. SJ002569.) This Discipline Policy applies to all permanent City employees in classified service, including all Appellants. *Id.*

5. SJPD Duty Manual

9. SJPD members are responsible for adhering to all provisions contained in the SJPD Duty Manual. Sections C 1700 – C 1745 of the Duty Manual relate to Allegations, Complaints, Non-Misconduct Concerns and Supervisory Referrals. (JX 5, pp. SJ002736- SJ002757) Sections C 1800 – C 1814 of the Duty Manual relate to discipline. (JX 5, pp. SJ002758-SJ002762.)

6. Mandatory Vaccination and Testing Policy

10. On August 20, 2021, the City of San Jose added section 1.3.12, “COVID-19 Mandatory Vaccination and Testing Policy” to the CPM. (JX 6, pp. SJ000003-4.)

11. On December 28, 2021, the County of Santa Clara issued a Public Health Order (hereinafter “the Health Order”) in which governmental entities were urged to “immediately implement mandatory vaccination requirements for all personnel that require Up-to-Date vaccination as quickly as possible[.]” (JX 7, pp. SJ000026.)

12. The Health Order defined “Up-to-Date” as follows: “‘Up-to-Date’ means that an individual is not only ‘fully vaccinated’ but has also obtained any booster doses of a COVID-19 vaccination for which they are eligible as authorized by the federal Food and Drug Administration, within 15 days of first becoming eligible.” (*Id.*, pp. SJ000023-24.)

7. Booster Policy

13. On January 3, 2022, an email was sent to all City employees to notify them of the recommendations included in the Health Order and City Departments were instructed to begin collecting booster records from employees. (JX 7, pp. SJ000034-35.)
14. On January 18, 2022, an email was sent to all City employees, notifying them that, absent an approved medical or religious exemption, the City would be requiring that employees are “up-to-date” with regards to the COVID-19 vaccine, consistent with the Health Order and that the City’s COVID-19 Mandatory Vaccination Policy would be updated to reflect this change. (JX 7, pp. SJ000042-44.)
15. The email stated that eligible employees “must obtain a booster shot to be up-to date by February 11, 2022.” The email further advised that those employees not yet eligible, would be required to get a booster shot within 15 days of becoming eligible. The email stated: “Failure to comply with the City’s Mandatory Vaccination Policy may result in disciplinary action.” (JX 7, p. SJ000042.)
16. The City’s COVID-19 Mandatory Vaccination Policy (City Policy Manual 1.3.12) was revised on January 20, 2022, to reflect the updated policy. It stated that employees must show proof of vaccination (inclusive of boosters) and that failure to provide proof of vaccination absent an approved medical or religious exemption “will result in formal disciplinary action, up to and including termination.” The policy further stated that as a first step in the disciplinary process Civil Service employees that “remain vaccinated without a booster dose, if eligible and do not have an approved medical or religious exemption will be issued a Notice of Intended Discipline (NOID) for a forty (40) hour suspension without pay.” (JX 7, pp. SJ000037-38.)
17. On February 3, 2022, an email was sent to all City employees with the subject “REMINDER: Mandatory Vaccination Policy – Booster Requirement”. This email again advised of the requirement to be “up-to-date” with a booster shot by February 11, 2022 and stated: “Failure to comply with the City’s Mandatory Vaccination Policy may result in disciplinary action.” (JX 7, p. SJ000046.)
18. On February 10, 2022, an email was sent to all City employees with the subject: “FINAL

REMINDER: Mandatory Vaccination Policy – Booster Requirement”. The email restated the deadline of February 11, 2022 and warned employees that failure to comply with the City’s Mandatory Vaccination Policy may result in disciplinary action. (JX 2, p. SJ000049.)

19. On February 15, 2022, an email was sent to all City employees with the subject: “UPDATE: Mandatory Vaccination Policy – Booster Requirement.” The email advised that the City would be extending the deadline to February 25, 2022 to allow for additional time for employees to be “up-to-date” with their COVID-19 vaccination. Employees who were not eligible to receive their booster by February 25, 2022 were required to obtain it within 15 days of becoming eligible. (JX 7, p. SJ000051.)
20. On February 24, 2022, an email was sent to all City employees with the subject: “Message from the City Manager – February 24, 2022.” The email reminded employees that the City was requiring that employees be “up-to-date” with the COVID-19 vaccination by February 25, 2022. The email also provided information about a free Booster Clinic for City Employees at the City Hall Rotunda that day. (JX 7, pp. SJ000072-73.)
21. The City’s COVID-19 Mandatory Vaccination Policy was revised on March 2, 2022 to reflect the extension of the deadline to comply with booster shot requirements to February 25, 2022. Additionally, the March 2, 2022 revised policy stated that Civil Service employees that “remain vaccinated without a booster dose, if eligible and do not have an approved medical or religious exemption will be issued a Notice of Intended Discipline (NOID) for a one (1) day suspension without pay (the number of hours will be dependent on the employee’s regular work schedule).” The policy further stated that if an employee requests a *Skelly* hearing, they will be afforded a period of up to seven (7) days following the *Skelly* hearing as a final opportunity to comply with the vaccine requirement in this Policy prior to the City issuing a Notice of Discipline (NOD). (JX 7, pp. SJ000039-40.)

8. Code of Ethics Policy

22. The City’s Code of Ethics Policy states: “City officials and employees are obligated to uphold the Constitution of the United States and the Constitution of the State of

Category 4: ██████████, ██████████, ██████████ and ██████████.

11. Revised Vaccination Policy

29. On or about October 13, 2022, the City revised the COVID-19 Mandatory Vaccination Policy, and discontinued the policy requiring all City employees to receive a COVID-19 booster. (JX 10, pp. SJ002565-SJ002566.)
30. There were ten employees represented by the SJPOA who received a NOID, but for whom a final decision had not yet been made before the booster policy was changed on October 4, 2022. These ten employees were not disciplined.

B. Additional Findings of Fact

1. Public Health Crisis

31. The parties do not dispute that the City's vaccine and booster mandates which underlie this dispute arose in the context of an unprecedented public health crisis caused by the introduction and rapid spread of the COVID-19 virus starting in or around March 2020.
32. Employees of the City, including its peace officers, were called upon to provide essential services to the public while also protecting themselves and the public from the spread of the highly contagious disease.

2. The Initial Vaccine Mandate Exemption Request Process

33. In 2021, when safe and effective vaccines became available, the City and its unions, including the SJPOA, negotiated procedures for ensuring compliance with governmental mandates requiring vaccination against the COVID-19 virus. (JX 6; Tr. 29-30; UX 4.)
34. These procedures established, among other things, the manner in which City workers could apply for and obtain exemption from the mandated vaccine policy for medical concerns or because of sincerely held religious beliefs. The City and the POA negotiated a "Side Letter" on the issue which states in part:
 6. All applications submitted by bargaining unit members for a religious and/or medical exemption from the testing and/or vaccination requirements under the Policy will be subject to the City's existing procedures for the interactive process, including undergoing the City's interactive process for reasonable accommodations. If the City proposes to change its procedures for determining medical and/or religious exemptions, it will provide the POA with advance notice and an opportunity to meet and confer in good faith to

the extent the POA identifies any impacts of said changes.

(UX 4, “Side Letter Agreement Between The City of San Jose And The San Jose Police Officers Association (POA),” dated September 30, 2021 (hereafter, “Side Letter”) at ¶ 6.)

35. The parties agreed that the negotiated procedures needed to be uniform and applied across the board to all City employees, including Departmental employees. (Tr. 31.)
36. The Side Letter set forth the level of discipline for any who failed to comply with the policy:

11. The parties agree that effective October 4, 2021, members who remain unvaccinated and who do not have medical and religious exemptions will be required to submit to COVID-19 testing twice (2) weekly on their own time and at the employee’s expense, and will not be entitled to use any paid leave or take the test during their regularly assigned work schedule. If an employee does not comply with the testing requirements, they may be subject to disciplinary action, up to and including termination.

12. In addition to the terms set forth in number 11 above, in lieu of termination, sometime after October 1, 2021, as a first step in the disciplinary process, members who remain unvaccinated and who do not have an approved medical and/or religious exemption, will be issued a Notice of Intended Discipline (NOID) for a forty (40) hour suspension without pay. If someone is actively engaged in the interactive process related to an exemption, they will also not be subject to this provision until and unless the exemption has been denied. The City agrees it will follow the due process requirements set forth in the parties’ Memorandum of Agreement and City Policy Manual Section 2.1.3. The timing of the issuance of the NOIDs will be staggered in order to avoid any service impacts with the goal of serving all NOIDs by October 31, 2021. The POA agrees not to contest the City actions as described in this section (12).

(UX 4 at ¶¶ 11, 12; Tr. 26.)

37. With only one exception, all Department employees, including the 32 employees named in this arbitration proceeding, complied with the City’s original vaccine mandate by either receiving an approved vaccine or requesting and receiving an exemption from doing so. (Tr. 394.)

3. The Booster Mandate Exemption Request Process

38. While the City and the POA agreed in the Side Letter on the penalty for violating the

original vaccination policy, no formal agreement was reached with respect to the booster mandate. (Tr. 388-89.)

39. The Union President and the City's Director of HR/Employee Relations discussed the penalty issue, but were unable to reach a written "side letter" agreement. (Tr. 395-6.)
40. Accordingly, in or around January 2022, the City implemented the booster policy described above in Findings 14 through 22.
41. On April 19, 2022, the POA filed a grievance over the implementation of the booster mandate policy. (*See*, RX D at p. 1.) According to the City, the POA asserted in the grievance that (1) the proposed penalty was "unduly punitive," (2) the City was requiring boosters "at the same time that public mandates for boosters are ending in other parts of the City (*e.g.*, the public) and the broader world," and (3) the City has "unilaterally changed" who attends a *Skelly* hearing. (*Id.*)²
42. On May 11, 2022, the POA unilaterally withdrew the grievance, and the booster policy described above was implemented. (*See*, RX E.)
43. The City process for requesting an exemption from compliance with the booster mandate is similar to the one used for the original vaccination: a template was developed for investigating and validating exemption claims which could be modified to fit individual cases. (Tr. 102; JX 8.)

a. Medical Exemptions

44. A medical exemption from the booster mandate required an employee to obtain a certification from his or her health care provider stating that "there is a medical reason not to receive the vaccine." (*See*, JX 6 at p. SJ00004.)

b. Religious Exemptions

45. An application for a religious exemption required the initial use of a form similar to that used for medical exemption applications, but designed to allow the employee to describe his or her sincerely held religious beliefs which precluded being boosted. (*See*, JX 6 at p. SJ00004; Tr. 67.)

² Neither party made the grievance itself part of the record in this case.

46. Those officers who had received a religion-based exemption from the original COVID vaccine mandate were not required to reapply.
47. A total of 115 officers who had *not* originally applied for or received a religion exemption sought one for the booster. (Tr. 394.)
48. The religious exemption application contemplated an interactive process structured to establish what might have changed with respect to the employee's religious beliefs since being vaccinated. (*Id.*) Employees were asked:
- a. What information did you discover [since you were vaccinated] related to your sincerely held religious belief that precludes you from receiving the Covid-19 booster vaccination?
 - b. When did you discover information related to your sincerely held religious belief that precludes you from receiving the Covid-19 booster vaccination?
 - c. How did you discover information related to your sincerely held religious belief that precludes you from receiving the Covid-19 booster vaccination?
 - d. Where did the information related to your sincerely held religious belief that precludes you from receiving the Covid-19 booster vaccination come from?
 - e. What actions, if any, did you take after discovering that your receipt of the COVID-19 vaccine conflicted with your sincerely held religious belief?
 - f. To the extent possible, would you be able to provide a written and signed statement, affidavit, or other documents from a religious leader or other person describing the actions you took following your receipt of the COVID-19 vaccine? If so, please feel free to include any such documents in your response.

(*See, e.g.*, RX A, "City Correspondence With Dalia Castenada" at p. SJ003654.)

c. Review of Requests for Exemption

49. Employee exemption requests were sent to [REDACTED], [REDACTED], [REDACTED] OER, whose job title is also [REDACTED] [REDACTED] [REDACTED]" (Tr. 62.) [REDACTED] [REDACTED] reviewed all of the requests for exemption from the booster mandate. (*Id.*)
50. Employees who obtained the health care provider certification were exempted in virtually all booster mandate cases; those who did get one were not exempted. (Tr. 67.)

51. Of those who applied, nine officers were granted medical exemptions from the booster mandate. (Tr. 394-5.)
52. ██████████ handled applications for exemption on religious grounds on a “case by case basis.” (*Id.*) She is vested with the authority to grant or deny religion-based exemption applications “at my discretion in consultation with the attorney's office if I needed to get another opinion or internal discussions as well.” (Tr. 74.)
53. In the exercise of this discretion, ██████████ took into consideration the evidence provided during the interactive process, along with the applicant’s overall credibility, in determining whether the religious objection being asserted was sincerely held. She did not make any determinations based on a particular religion identified by an applicant. (Tr. 91.)
54. According to ██████████, the “vast majority” of claims to be exempted from the booster mandate on religious grounds were granted. (Tr. 88.)
55. The applications of those officers in Categories 2 and 3 were denied. (JX 1.) Employees in Categories 1 and 4 did not make claims for exemption. (*Id.*)

4. Investigations of Non-Compliance

56. The failure of each of the 32 Appellants to comply with the booster mandate was investigated by the City.
57. Each investigation is summarized in a confidential memorandum entitled “Personnel Investigation” drafted by ██████████, ██████████ at OER, and forwarded to ██████████, the City’s ██████████ at ██████████ Employee Relations. The memo is divided into eight sections:
 - a. Background
 - b. Employment History
 - c. Summary of Issues
 - d. Applicable Policies
 - e. Attachments³

³ Documents attached were: (1) County of Santa Clara’s Public Health Order Issued on December 28, 2021; (2) Citywide Email dated January 3, 2022; (3) COVID-19 Mandatory Vaccination

- f. Analysis, and
 - g. Recommendation
58. Each of these virtually identical confidential reports sets out the applicable vaccine mandate policies as well as the particular facts with respect to the employee's lack of compliance.
59. In each, the "analysis" of the public health and Departmental goals served by the vaccine and booster mandates ends with an identically worded conclusion. As an example, the memorandum recommending discipline for ██████████ states:

Despite being eligible to receive the COVID- booster, being made aware of the City's COVID-19 Mandatory Vaccination Policy to be "up to date" on their COVID-19 vaccinations on multiple occasions as noted above, and having an obligation under the City's Code of Ethics Policy to adhere to all City policies, ██████████ failed to provide proof of obtaining a COVID-19 booster by February 25, 2022. Additionally, on March 21, 2022, the Police Department confirmed that Sergeant ██████████ did not furnish proof of obtaining the mandatory COVID-19 booster. Furthermore, the City does not have any record of ██████████ having obtained an approved medical and/or religious exemption from receiving the COVID-19 booster. As such, it can be concluded that ██████████, failed to adhere to City policy and willfully disregarded the mandate that the City issued related to being "up-to-date" on COVID-19 vaccinations.

(See, JX 8; SJ000081-84.)

60. In each case, the investigator found that the employee had "fail[ed] to obtain a mandatory COVID-19 vaccination by February 25, 2022 in violation of the City's COVID-19 Mandatory Vaccination Policy and the City's Code of Ethics Policy," (*id.*) and in each case it was "recommended that appropriate action be taken based on the findings." (*Id.*)
61. Respondents were thereupon issued NOIDs. The NOID received by each Appellant is included in the record herein as Joint Exhibit 8.

Policy (City Policy Manual Section 1.3.12); (4) Citywide Email dated January 18, 2022; (5) Citywide Email dated February 3, 2022; (6) Citywide Email dated February 10, 2022; (7) Citywide Email dated February 15, 2022; (8) Department of Justice Opinion; (9) Email from City Manager to All City Employees dated February 24, 2022; and (10) Code of Ethics Policy (City Policy Manual Section 1.2.1).

5. Skelly Hearings and Appeals

62. The NOID issued to each affected employee recited that “before the proposed discipline is implemented, you have the right to request a pre-disciplinary *Skelly* conference, which provides you an opportunity to respond and provide relevant information.” (*Id.*)
63. The POA provided assistance to officers in preparing to testify at the *Skelly* conferences. Specifically, [REDACTED] and [REDACTED], both SJPOA Board Members, counseled each of the 32 Appellants in this matter on how to approach their *Skelly* hearings (Tr. 200-01, 299.)
64. *Skelly* conferences were scheduled on Zoom by [REDACTED] in consultation with the officers involved. They appear to have lasted between 10 and 12 minutes each, although there was no time limit imposed by the City. (*See, e.g.*, JX 11 ([REDACTED]); JX 12 [REDACTED]; JX 13 [REDACTED]; and UX 2 ([REDACTED]))
65. Nothing in the record suggests that those who elected to appear at a *Skelly* hearing were limited or otherwise impeded in presenting their positions to the hearing officer. (*See, id.*)
66. [REDACTED] from OER appeared at all of the *Skelly* conferences, as did a union representative for the officer involved. Neither the Chief of Police nor any other representative of the Department command staff appeared. (Tr. 196, 304.)
67. The *Skelly* officer was OER [REDACTED], designated by the Chief of Police “as his delagee for the *Skelly* conferences related to the booster.” (Tr. 137.)
68. Even after the conclusion of their *Skelly* conferences, employees retained the right either to comply with the mandate and avoid discipline, or to provide further information in support of their claim for an exemption for consideration by the City. (Tr. 70.)
69. Some employees took advantage of this opportunity and were granted exemptions. (*Id.*)

6. Discipline

70. As noted above in Finding No. 27, each of the Appellants herein received a Notice of Discipline on varying dates in May, June and July 2022. (*See also*, JX 9.)
71. Also, as also noted in Findings 29 and 30, ten POA-represented employees who received NOIDs were *not* disciplined because the City had changed its policy in October 2022. (*See*, Findings 29 and 30 above; JX 10.)

1. Category 1 (Exemption Requested But No Skelly Request)

77. Pursuant to stipulation, ██████████ testified at the hearing via her Declaration. (U. Exh 1.)
78. The correspondence between ██████████ and ██████████ (RX A), along with the ██████████ Declaration (UX 1), establish the following relevant facts:
- a. ██████████ applied for an exemption from the initial vaccine mandate based on religious belief, but her request lapsed because she had gotten vaccinated and presented proof to the City that she had done so;
 - b. She decided to get vaccinated “under duress” and because she had “no clear guidance from the City.” (UX 1 at ¶ 8.);
 - c. She felt that the application process was “awful,” and “invasive and judgmental” because she was asked to justify her religious beliefs and was then “told they were insufficient.” (*Id.* at ¶ 7.);
 - d. She applied for an exemption from the booster requirement by email on February 6, 2022 and received what she considered a “cut and paste” response the next day. (*Id.* at ¶ 10.);
 - e. She believes she was “being held to a higher standard” with respect to her booster application, even though “my personally held spiritual beliefs have not changed since my initial request, and by the Grace of god even if one commits a sin, it is not held against us after full repentance.” (*Id.* at ¶ 11.)
 - f. Her exemption request was denied on February 9, 2022. She responded to the City on February 11, 2022 as follows:

I would greatly appreciate if you considered how uncomfortable and stressful it has been to have to justify my Faith. Under no life circumstances have I ever had to do such a thing.

I was born into a Faith-based family, baptized as a baby, and chose to baptize again as an adult because it was a way of me re-declaring my commitment to my Faith for my own spiritual purposes and beliefs. That is how important it is to me.

My spiritual beliefs are the single most principle and valuable aspects

of my life. I have been member of my current church for almost 15 years. I am able to submit a letter from my Pastor if asked do so.

This entire process has caused me and my family more stress our lives than my own father passing away just a month ago. I haven't even been able to grieve in peace.

I am desperately and sincerely not only requesting but pleading that you consider all I am providing to you and approve my religious exemption. (*Id.*)

- g. ██████████ testified that she responded by email on February 18, 2022, “with additional questions so that I could continue to engage her in the interactive process, and she did not respond. So, absent the additional information, she was not provided with an exemption.” (Tr. 68.)
- h. The record contains no evidence that ██████████ sought or obtained a letter from her pastor or any other “religious leader or other person describing the actions [she] took following [her] receipt of the COVID-19 vaccine.” (*See*, RX A.)
- i. From that point, ██████████ says, “the process seemed circular and cold.” ((UX 1.)
- j. She did not request a *Skelly* hearing because she felt that doing so would be “futile” and that “the City had already made up its mind and did not care what I had to say.) (*Id.* at ¶¶ 19-21.)
- k. Another reason for not pursuing her *Skelly* rights was that when she asked a lieutenant (not identified) what the hearing would be like and explained her reasons for not wanting to be boosted (adding that she was concerned about possible effects on her ability to bear children), “he sat stone cold.” (*Id.*) She “felt humiliated by his cold demeanor and by the City’s uncaring approach,” (*Id.*)

2. Category 2 (No Exemption Requested; No Skelly Request)

- 79. Category 2 consists of 12 employees who neither requested an exemption nor requested a *Skelly* hearing. (JX 1; fn 4, above.) ██████████ and ██████████ were designated by the POA to testify as representatives of this group, but only ██████████ was called as a witness.

80. The testimony of ██████████ establishes the following relevant facts:
- a. ██████████ has served the Department for over 14 years and is currently part of its ██████████. (Tr. 275-6.)
 - b. He received the initial COVID vaccination, and he also fell victim to the virus. From this, he asserts that he has developed an allergy to eggs and egg products. (Tr. 278-9.) He has not been told by a physician that his allergy is related to COVID or to the vaccine. (Tr. 280.)
 - c. He did not request an exemption from the booster mandate because “I had heard that they weren't listening to anybody and they were just telling them or they were just kind of blowing them off and that any information that you had was not relevant. So I felt that it wasn't going to be any reason to go.” (Tr. 281.)
 - d. This was his reason for not requesting a *Skelly* hearing as well. (*Id.*)
 - e. He feels very strongly that “at the end of the day . . . that it was kind of a big deal for a government to regulate and tell me what vaccine to put in my body. And it's not even a political situation or anything like that but it's just I needed more information.” (Tr. 280.)
 - f. He also feels that, in refusing to be boosted, he did not engage in “willful disobedience.” (Tr. 291.)

3. Category 3 (Exemption Requested; Skelly Held)

81. In the third stipulated category are the four officers who requested but were denied religious exemptions from the booster mandate, and also had *Skelly* hearings. (JX 1; fn. 5, above.) ██████████ and ██████████ are the designated representatives of this group.

a. ██████████

82. Although ██████████ was not called as a witness, a review of the record including his correspondence with ██████████ (RX B) and the video record of his *Skelly* hearing (JX 11) establish the following circumstances relevant to his religious exemption claim:

- a. ██████████ applied for as religious exemption from the booster mandate by email to ██████████ dated February 7, 2022. He stated that:

The Catholic Church believes that vaccines are not morally obligatory in principal and therefore must be voluntary and not forced as in this situation. As stated in the Catholic teachings I should be free to exercise my right to reject medical intervention if it is against my conscience. I have serious objections and concerns to this vaccine and those concerns should be respected by society, my employer and the government. I do not feel that I should be forced into a vaccination that is contrary to my conscience. (RX B, p. SJ003667-68.)

- b. The following day, ██████████ responded, asking ██████████ to elaborate per the established interactive process by explaining how his religious beliefs allowed for him to receive the initial vaccine but not the booster. (RX B, p SJ003666.)
 - c. ██████████ responded that, in essence, he had always been “morally and ethically opposed to the vaccine” from the very beginning, and that he had only gotten the original dose to protect his family and save his job. (*Id.*) He also claimed that he had been “misled into believing that the City was not allowing employees to file for a religious exemption prior to being initially vaccinated.” (*Id.*)
 - d. The video recording of ██████████ Skelly hearing (JX 11) reflects that it commenced on April 26, 2022 at 10:00 am and lasted for just over 11 minutes. ██████████ gave a brief history of his lengthy and unblemished service record and explained his religious objection to being boosted in much the same terms as he had done previously to ██████████. He stated that he would “take a suspension,” but felt that he did not deserve discipline that would permanently cloud his police department record.
 - e. ██████████, ██████████ POA representative spoke up at some length, adding details about ██████████ record, his contributions to the Department and his sincerity as a person. (*Id.*)
 - f. ██████████ ended the hearing by adding that he was disappointed, felt that he was “not wanted” and intended to retire on the day he is eligible to do so. (*Id.*)
- b. ██████████

83. ██████████ testified at the arbitration hearing. In addition, documentation of

his interactive dialogue with the City is part of the record as Respondent's Exhibit C. The following facts are established therefrom:

1. Documentation of Interactive Process

- a. On February 11, 2022, ██████████ applied for an exemption. He stated that he has a sincerely held religious belief that, as a Muslim, he is forbidden to be vaccinated:

I know your records will show that I took the initial vaccine, but I was never informed the vaccines used aborted fetal cells during the testing process. If I had known that a life was taken for the vaccine to be created, I would have asked for the exemption the first time. Allah (SWT) stated in the Qur'an that no soul shall be killed that Allah (swt) protects. I have been a Muslim since I was born and continue to be one to this day until the day of judgement is upon me. (RX C at p. SJ003680.)

- b. That same day, he received a response from ██████████ asking for clarification and posing the same six questions asked of all other applicants. (See, Finding No. 50, above.) ██████████ responded right away, commenting: "It appears that you did not read what I wrote and sent a blanket response. If you take the time to read my email your questions will be answered." (*Id.* at p. SJ003678.)

- c. On February 17, 2022, ██████████ was informed that his request for an exemption had been denied. (*Id.*) He promptly asked for an explanation of the basis for the denial as was told that

the denial is based on our review of the information you provided in your exemption request. You are able to submit additional information that you believe is relevant for us to consider related to your request; however, we cannot tell you what information to provide, as that is dependent on your assessment of what information is relevant to your exemption request that we should be made aware of and review. (*Id.* at p. SJ003677.)

- d. On February 25, 2022, ██████████ responded to the suggestion that he could submit additional information as follows:

I am kind of at a loss for words that my religious beliefs are being questioned at this point. I have never been made to feel less than as an employee of the city of San Jose.

Truly it is heartbreaking to have to go through this. If you notice that I got my

vaccine towards the requirement because internally I battled with my decision to get this vaccine.

I did my research on the vaccine and when I got the vaccine there was no information regarding fetal cell lines being used in the testing process of these vaccines. It wasn't until after I received the vaccine that project veritas exposed emailed documenting the use of fetal cell lines in the testing the process of these vaccines.

As a Muslim who follows the teachings of the holy Quran it broke me internally knowing the sin I have just committed. The internal struggle was beyond comparison.

As I explained in my original letter, I survived a war that was started to kill Muslim people in Bosnia. The genocide that occurred in Bosnia was the second worst recorded to the holocaust.

Now seeing Russia invade Ukraine and the destruction there has only brought back more memories from back home. The memories of Bosnian Muslims being beheaded and have there genitals cut off and stuffed in the cut off heads is a memory I cannot forget.

To have my religion questioned, to have my beliefs questioned is something I never would have imagined in a progressive city as San Jose.

The pain and the disappointment is something that I will work on through prayer.

I have Ccd the City Manager in this email in hopes of having fresh eyes on this matter. (*Id.* at p. SJ003676.)

- e. [REDACTED] transmitted a second request for clarifying information on February 28, 2022 (asking the same six questions as before). [REDACTED] wrote back the same day:

I did my research on the vaccine and when I got the vaccine there was no information regarding fetal cell lines being used in the testing process of these vaccines. It wasn't until after I received the vaccine that project veritas exposed emailed documenting the use of fetal cell lines in the testing the process of these vaccines.

As a Muslim who follows the teachings of the holy Quran it broke me internally knowing the sin I have just committed. The internal struggle was

beyond comparison.

As I've already stated in my previous email, this is a protected classification. I urge you to reconsider this decision, as I have no intention of following through with the mandate; I've already stated I cannot do so because it goes against my religious beliefs. Allah (swt) and Allah (swt) alone is the only entity who has control over my body, Beyond this, I have already explained to you my beliefs and reasoning behind why I cannot receive any subsequent vaccinations in previous emails. But, in regard to legalities, here it is again: I am qualified for protection under Title VII, which, as described in Section 12 of the EEOC Compliance Manual, explains that:

"Under Title VII, an employer is prohibited from discriminating because of religion in hiring, promotion, discharge, compensation, or other 'terms, conditions or privileges' of employment, and also cannot 'limit, segregate, or classify' applicants or employees based on religion 'in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his/her status as an employee.'"

As a municipal and governmental body, you are required to provide religious accommodations to those who seek them, just as if I were to require them for religious wear. I will be filing a formal complaint with the DFEH if this decision is not turned around. (*Id.* at p. SJ003674.)

- f. On March 3, 2022, ██████████ acknowledged receipt of ██████████'s February 28 letter and notified him that his request remained denied.

2. Skelly Conference

- g. Upon receipt of an NOID (JX 8, pp. SJ001557-62), ██████████ requested and attended a *Skelly* hearing.⁷ After the hearing, he received an email dated June 2, 2022 from ██████████ entitled "Follow Up – Religious Exemption denied. ██████".

██████████ wrote in part:

During your *Skelly* conference, you mentioned that you applied for and were denied a religious exemption from receiving a COVID-19 booster dose. Before making a final determination with respect to level of discipline, we would like to give another opportunity to provide additional information for the City to review and consider regarding your request for a religious

⁷ A video record of this *Skelly* hearing has not been made part of the record.

exemption.

If you wish to reply to this email, please help to clarify our understanding of why your sincerely held religious beliefs allowed for you to receive the initial COVID-19 vaccination dose(s) but do not allow for you to receive the “booster” vaccination dose. Please note, this question is not about whether you are religious, but rather is seeking to understand what changed with respect to your sincerely held religious beliefs between the time that you were initially vaccinated and the time that the City’s COVID-19 Mandatory Vaccine Policy required you to become boosted. If your reasoning is based on a lack of knowledge at the time you received the initial vaccine, please provide a detailed explanation as to when you became aware of any information that is in conflict with your sincerely held religious beliefs and what precluded you from ascertaining this information prior to receiving the initial vaccine dose(s). (*Id.* at pp. SJ003670-71.)

h. On June 8, 2022, ██████████ responded as follows:

Thank you for allowing me to explain the informational change that occurred between my initial vaccination and the booster. When I was vaccinated the information pertaining to the creation of the Sars-Cov2 vaccine was limited. In October of 2021, news started circulating that fetal cell lines were used in the testing phases of the vaccines.

As I mentioned in my hearing when I learned of this news I was conflicted and devastated. The only thing I could do was to ask Allah (SWT) for forgiveness. I have two children and one of them had medical complications during the pregnancy. The lack of compassion from that initial Doctor when she bluntly stated to abort my daughter is a thought that can never leave my head. I know there is controversy around abortions, but if you have children, they are the greatest gift. Now my daughter is a healthy 5-year-old child.

Now if you conduct a google search there is plenty of information discussing the use of aborted fetal cell lines in the testing process.

If the information was available prior to me taking the initial vaccine I would have attempted to get a religious exemption for the vaccination.

The City of San Jose and the Police Department have already recognized my sincerely held religious belief in the past by granting me an exemption to the grooming standard policy. (*Id.* at pp. SJ003670-71.)

i. On July 7, 2022, ██████████ was notified that his application for religious

exemption had been denied “based on a review of the totality of the circumstances.” (*Id.* at p. SJ003669.)

3. Hearing Testimony

- j. ██████████ hearing testimony was consistent with his interactions with the Department.
 - k. He and his family fled from Bosnia and Herzegovina in the 90s to escape persecution as Muslims. Members of his family have been killed, his mother-in-law raped and his father imprisoned. (Tr. 144-45.) These experiences, he testified, informed his deeply held religious beliefs.
 - l. He has been employed by the Department for five years. He currently works with the ██████████. (*Id.*)
 - m. ██████████ obtained an exemption from Department grooming standards so that, as a Muslim, he could wear a beard.
 - n. He testified that he learned through an organization by the name of Project Veritas that stem cell lines from aborted fetuses are used in the manufacture of the vaccines used to combat COVID-19. This information prompted him to conclude that it would be a betrayal of his Muslim faith to be boosted. (Tr. 148.)
 - o. He had reluctantly agreed to be vaccinated out of fear for his job and because he did not know at the time about the origin of the material used in the vaccine. When he found this out, he testified, “It broke me.” (Tr. 150-51.)
 - p. ██████████ testified that he is an actively practicing Muslim who attends a Bosnian mosque in the San Jose area. He has sought guidance on the vaccine issue from the *imam* at his mosque. (Tr. 173.)
 - q. ██████████ believes that his *imam* would provide him with a letter attesting to the sincerity of his beliefs, but he felt that the Department’s request that he do so was “the ultimate slap in the face.” (*Id.*)
84. ██████████a testified that she denied ██████████ request for a booster exemption because she “did not find his contentions to be credible.” (Tr. 84, 94.) In particular, she didn’t believe his assertion that he had found out about the stem cell issue after he had

been vaccinated but before the booster requirement was announced:

██████████ was vaccinated on August 26, 2021, based on this record. As you, I think, were alluding to, there was a lot of information already available at that time about the development of the COVID vaccines in addition to much of the information from religious leaders and other entities who spoke to how the vaccines were developed, tested and all of those things.

That was all already publicly available through various media outlets and publications at the time that he voluntarily chose to receive the original COVID vaccine. And so I did not feel that ██████████ explained how he was able to receive that original COVID vaccine, given that all that information was already readily available. We had already publicized that there would be an exemption process available for those who wished to seek a religious exemption. And he chose not to avail himself of that exemption process for the original vaccine mandate and he did not explain how he held a sincerely religious belief or tenet that now precluded him from receiving the booster.

(Tr. 81-82; *see also*, Tr. 93-94.)

85. ██████████ also an observant Muslim, agreed (“under pressure”) to get vaccinated initially, but applied for a religious exemption from being boosted. (Tr. 182-83.)

86. He claimed in his exemption request that he believed he was forbidden as an observant Muslim from getting the booster, just as ██████████ did. He told ██████████ that he had a religion-based concern that the manufacture of COVID-19 vaccines is not consistent with *halal* practices required of Muslims by their faith. Though he did not provide anything in writing from a religious leader, his request was approved by ██████████. (Tr. 187-88.)

4. Category 4 (No Exemption Requested; Skelly Held)

87. The final category of employees includes those who did not request exemptions, received NOIDs but who requested and attended a *Skelly* hearing. (JX 1; fn. 6, above.) Designated by the POA to represent these employees at the hearing were ██████████ b and ██████████ i. The testimony of ██████████ z was also presented via his sworn declaration.

a. ██████████ e ██████████ o

88. ██████████ testified at the arbitration hearing, and a video record of her

Skelly conference is in the record as Joint Exhibit 12. The following facts are established therefrom:

- a. [REDACTED] has been with the Department six years. (Tr. 236.)
- b. She got vaccinated, but declined to get boosted based on concerns she had about side effects she noticed when originally vaccinated. She did not apply for a medical exemption. (Tr. 244.)
- c. She requested and attended a *Skelly* hearing at which she did not “feel heard.” (Tr. 245-6; JX 11.)
- d. [REDACTED] feels that her personal circumstances were not taken into account during the disciplinary process (including at her *Skelly* hearing). (Tr. 265.)
- e. Just as various provisions of the Department’s Duty Manual (JX 5) can apply differently to, say, officers of various heights and weights, so the booster requirement should take into account different personal circumstances. (*Id.*)
- f. For this reason, she states that she should not be found to have engaged in willful disobedience. (Tr. 246.).

b. [REDACTED]

89. [REDACTED] testified at the arbitration hearing. The video recording of his *Skelly* hearing is part of the record as Joint Exhibit 13. Based on this evidence, the following facts are found:

- a. Officer [REDACTED] has been employed by the Department for eight years and currently works in a [REDACTED].
- b. He did receive the COVID-19 vaccine and experienced reactions to it, including chest pain and respiratory problems, which concerned him. (Tr. 352.)
- c. For these reasons, he declined to get the immunization booster. He was also concerned about the effect it might have on his immune system. (Tr. 355.)
- d. He considered applying for a medical exemption, but “couldn’t get an appointment [with a doctor] in time” to do so. (Tr. 356.)
- e. He requested and attended a *Skelly* hearing after having received a NOID, but felt “like it was just someone just listening and then kind of disregarded it. It was like

just -- I felt like I wasn't really -- well, I felt like I wasn't really being listened to. I felt like I was just telling a story and that was that.” (Tr.358; *see also*, JX 13.)

f. ██████████ admitted that he was notified that he could apply for a medical exemption with a medical certificate, that his *Skelly* hearing was some five months after this notification, that, even after the hearing he could have applied for a medical exemption, but that he never saw a doctor about his concerns. (Tr. 362–65.)

c. ██████████

90. The POA offered the testimony of ██████████ through his declaration which states that if he were called as a witness, he would testify consistently with the information presented during his *Skelly* conference. (UX 2.) Review of the *Skelly* video record reveals the following”

a. ██████████ has been employed by the Department since 2019 and has no disciplinary record.

b. He did receive the COVID-19 vaccine, but contracted the virus nonetheless.

c. He suffers after-effects, including heart palpitations and “flu-like symptoms” and declined to be boosted on that basis.

d. At the April 29, 2022 *Skelly* hearing, ██████████ explained these circumstances to the *Skelly* officer, ██████████. His POA representative, ██████████ also spoke on his behalf. The hearing lasted just over ten minutes.

e. ██████████ was told that he could still apply for a medical exemption, but that he would need an indication from a medical health professional to the effect that, based on his or her professional judgment, training and experience, it would be “inadvisable to receive the booster.” (UX 2.)

f. There is no evidence that ██████████ followed through in this regard.

5. Non-Compliant Employees Who Were Not Disciplined

91. As noted above in Findings 29 and 30, ten POA-represented officers failed to comply with the booster mandate, received NOIDs but were not suspended.

92. These officers had asked for and were given “more time to get medical and religious exemptions, and so we couldn't discipline them without having finished that process.” (Tr. 57-8.) [REDACTED] testified that these officers “were engaged in the interactive process. They had indicated that they were going to get the booster and so we were giving them some time to do that.” (Tr. 110.)
93. Prior to the completion of the interactive process in these cases, the City of San Jose rescinded its mandate, and it was concluded that there would be no basis on which to impose discipline on these employees. (*Id.*)

POSITIONS OF THE PARTIES

A. Appellants

The grievance should be granted, in whole or in part, for several reasons.

First, the disciplinary actions violated substantive fairness. Every grievant received a 10-hour suspension, but 10 other officers also committed the same underlying misconduct but received no discipline because their Skelly Hearing had not taken place by the time the City rescinded the booster mandate.

Second, the disciplinary process followed by the City was procedurally flawed and inherently unfair. From the lack of investigation, the predetermination of the 10-hour suspension, the exclusion of the Police Department from the process, and the failure to consider each employee's record of performance and service to the community, the disciplinary process violated minimum standards of fairness and even the City's own disciplinary policies. Having decided to discipline employees, the City was not free to dispense with a fair discipline process simply for administrative convenience.

Third, the discipline should be rescinded based on the City's violation of its collective bargaining obligations which required the City to meet and confer in good faith with the Union prior to implementing any changes to working conditions. The City unilaterally changed its rule that alleged workplace violations by police officers be investigated by the Police Department and penalties determined through the involvement of their chain-of-command.

Fourth, the standards the City used for religious and medical exemptions were suspect

and led to inconsistent and irrational results.

Fifth, the finding of willful disobedience was not sustained or justified. In a paramilitary organization such as a police department, such a finding carries heightened peril for an officer. Under recent changes to California law, it also subjects each of these officers to potential loss of their license to be a police officer.

The City's decision to rescind the booster mandate and withdraw discipline actions against some officers, while maintaining the discipline imposed on grievants beggars belief. The City should have done what the US Military did when it rescinded the vaccine mandate: it also rescinded all adverse actions associated with refusal to receive the vaccine.

<https://media.defense.gov/2023/Jan/10/2003143118/-1/-1/1/SECRETARY-OF-DEFENSE-MEMO-ON-RESCISSION-OF-CORONAVIRUS-DISEASE-2019-VACCINATION-REQUIREMENTS-FOR-MEMBERS-OF-THE-ARMED-FORCES.PDF>

The Arbitrator should grant the grievance in whole and rescind the discipline in its entirety for all or some of the four categories of officers.

B. Respondent

The facts are undisputed. Appellants admit that each of 32 employees did not secure the booster by the specified deadline. This is failure to observe applicable rules and regulations. They knew the policy and they knowingly violated the policy. This is willful disobedience. Nevertheless, Appellants argue that they should not be disciplined for their refusal to follow the Booster Policy, or, in the alternative, that the level of discipline should be reduced to a written reprimand. Based on the stipulated facts, the testimony presented at hearing and the evidence admitted into the record, the City's decision to impose the discipline is supported by just cause. The City requests that the arbitrator uphold the discipline.

DISCUSSION

A. Burden of Proof

Respondent bears the burden of proving by a preponderance of the evidence that it had just cause to impose the disputed discipline on Appellants.

B. Background

The vaccination/booster orders that underlie this dispute arose in the context of a significant public health emergency caused by the rapid and largely unchecked spread of the deadly COVID-19 virus across the United States. Beginning in March 2020, employers throughout the country were required to enact measures to protect their employees and the public in a wide variety of ways: from imposing testing and masking requirements and requiring “social distancing,” to outright closure of premises and suspension of services.

Emergency determinations about how to provide “essential” goods and services were made at all levels of government and commerce. As effective vaccines became available, regulations were quickly enacted at the national, state and local level mandating their use. The vaccines were considered by medical and public health professionals to be effective and crucially necessary tools for combating the fast-spreading virus. They were welcomed by most, but they were not without controversy. Employers, both private and public, found it necessary to establish procedures for mandating the life-saving inoculations while also protecting the rights of those with legitimate reasons for declining their use. The City of San Jose was no exception.

C. Just Cause

Appellants challenge their ten-hour suspensions for alleged violations of San Jose Municipal Code Section 3.04.1370 (E) (failure to observe applicable rules and regulations) and 3.04.1370 (S) (willful disobedience) on the ground that the discipline lacks just cause. I address the issue by applying the traditional, frequently used seven-factor test.⁸

1. Notice

The parties have stipulated to facts establishing that notice of the vaccine and booster requirements was given on multiple occasions to all Department employees, including Appellants. (*See*, Findings 13 - 21, above.) The notices given explain the basis for the imposition of the rule and inform employees in clear, unequivocal language how to comply with it. There is no evidence that any of the Appellants were unaware of the booster mandate due to lack of proper notice of it. In any event, the POA does not contest this issue.

⁸ *Enterprise Wire Co.*, 46 LA 359 (Daugherty, 1966).

2. Reasonable Rule

Nor does the POA dispute that the City is possessed of the Constitutional and statutory authority to require vaccination and to discipline non-exempt, noncompliant employees, including Appellants. Indeed, the Union has stipulated as much. (*See*, Findings 1 - 3.) The parties also stipulated to facts which establish that the Department's vaccine mandate and its updates were reasonable promulgations of public policy. (*See*, Findings 10 - 12, 22 and 29.) The City Council enacted the booster mandate in the exercise of its authority to maintain the health and safety of those within its jurisdiction. Moreover, the POA negotiated a Side Letter with the City which set out the details of how the original vaccine mandate would be carried out, including the level of penalty to be imposed on those who failed to comply. (UX 4.)

The POA also negotiated with the City over the booster requirement, including, once again, the penalty to imposed for non-compliance. No side letter was reached as to the booster mandate, however, and the Union filed a grievance over the City's unilateral implementation of it. I don't have first-hand evidence of the content of the grievance because it was not offered by either party as a hearing exhibit. The City's April 21, 2022 response to it, however, makes clear what the grievance was about and disputes each of the claims or "theories" the POA apparently put forward. (RX D; *see also*, Finding No. 41, above.)

In general, the City took the position that "[n]one of the issues you raised in your letter are subject to the grievance procedure in the City's Memorandum of Agreement (MOA) with the San Jose Police Officers Association (POA)." (*Id.*) Specifically, the City pointed out that the complaints in the grievance about (1) the proposed level of discipline, (2) the timing of the disciplinary action and (3) the alleged unilateral change in the *Skelly* process found no support in the MOA. (*Id.*) Shortly thereafter, the grievance was withdrawn, apparently without prejudice to raising it in this proceeding. (RX E.)

For the reasons stated in [REDACTED]'s April 21, 2022 letter to counsel for the POA, I decline to find that the imposition of the booster mandate violated the MOA as a unilateral imposition of terms and/or conditions of employment.

Based on the evidence in this record, I conclude that the "rule" represented by the booster

mandate is, under all of the circumstances, a reasonable one.⁹

3. Adequate Investigation

The POA vigorously disputes that the investigation conducted by the City was sufficient for the purposes of this aspect of the “just cause” test. Among other things, it is claimed that the “cookie cutter” investigatory process took place entirely via the exchange of emails, that the uniform penalty was decided in advance of any individual inquiry, that the investigations provided no opportunity for non-compliers to “add context and perspective,” that the *Skelly* hearings were “shams” and that the City improperly excluded the Department, particularly its Internal Affairs unit, from the entire investigative and disciplinary process.

The record does not support these contentions.

It is certainly true that the City developed a uniform, written process for making claims for exemption on medical or religious grounds from the vaccine and booster requirements. As noted, the POA played a role in developing this process, at least as far as the initial vaccine requirement is concerned. It agreed with the City that a uniform, standardized framework for the process would be required to ensure fairness and coherence in making decisions about exemptions. Moreover, it appears that the same methodology used to investigate and validate claims to be exempted from the initial vaccination (which had been agreed to by the POA) was employed for the booster. In each, a medical exemption claim turns largely on a certification from a doctor that there is “a medical reason not to receive the vaccine.” Religious exemption requests were, necessarily, handled case by case both originally and for the booster.

Notably, method used to investigate claims to be exempt from the booster mandate because of “a sincerely held religious belief” features an “interactive process” through which each employee is prompted to describe individual facts and circumstances warranting an exemption. Employees are prompted to explain:

What information did you discover [since you were vaccinated] related to your sincerely held religious belief that precludes you from receiving the Covid-19 booster vaccination?

⁹ I am mindful that most of the Appellants who testified take issue with the “reasonableness” of mandate and its application to them individually and as a group. These concerns are also addressed further on.

When did you discover information related to your sincerely held religious belief that precludes you from receiving the Covid-19 booster vaccination?

How did you discover information related to your sincerely held religious belief that precludes you from receiving the Covid-19 booster vaccination?

Where did the information related to your sincerely held religious belief that precludes you from receiving the Covid-19 booster vaccination come from?

What actions, if any, did you take after discovering that your receipt of the COVID-19 vaccine conflicted with your sincerely held religious belief?

To the extent possible, would you be able to *provide a written and signed statement*, affidavit, or other documents from a religious leader or other person describing the actions you took following your receipt of the COVID-19 vaccine? If so, please feel free to include any such documents in your response.

(See, Finding No. 50, above.) These questions, asked of each applicant for a religious exemption, were clearly designed to permit the employee: (1) to explain in as much detail as necessary *what changed* between his or her receipt of the initial COVID-19 vaccination and the request for exemption from the booster, (2) to demonstrate the depth and sincerity of the belief(s) on which a request for a religious exemption is based, and (3) to supplement his or her request as needed.

The questions on the application are indeed uniform, but employees are free to make use of the form as each sees appropriate. Indeed, employees were free in this case to augment their exemption claims at any time during the investigation, again at their *Skelly* conferences and again after that. Information thus added to the file was considered by the Department and, in some cases, served as the basis for a decision to grant requests.

Some of the Appellants availed themselves of this interactive process (Groups 1 and 3); others elected not to (Groups 2 and 4). There is no evidence that any were obstructed or prevented from fully engaging in the process, and there *is* evidence that many – if not most – who did engage in it were granted exemptions. This record does not support a conclusion that the investigations underlying the NOIDs in this case were in any way inadequate.

4. Due Process

For the reasons that follow, I conclude that the City's investigation and discipline of the Appellants was fair and objective.

a. Implementation

The POA renews its complaint contained in its April 19, 2022 grievance that the procedure for enforcing the booster mandate was unilaterally – and therefore wrongly – implemented. The record, however, reflects otherwise. Nothing in the MOA has been shown to preclude the City from imposing on Respondents an obligation to be boosted.

Moreover, there is no dispute that the provisions of the San Jose Municipal Code (Findings Nos. 6 and 7, above), the San Jose Administrative Policy Manual (Finding No. 8), the Police Department Duty Manual (Finding No. 9), the COVID-19 Vaccination and Testing Policy as modified over time (Findings Nos. 10 - 21), and the City’s Code of Ethics Policy (Finding No. 22) were all lawfully promulgated regulations which fully govern the conduct of Department employees. Respondent were and are bound to obey these rules.

b. Application Review Process

The process for determining which employees are entitled to an exemption from the booster rule – and which are not – is fully consistent with due process. The POA points out that all of Appellants’ applications were reviewed by one person, who is not a Department employee and who is vested with pretty much complete discretion to accept or reject an employee’s request. [REDACTED], the [REDACTED], [REDACTED], is described as the “judge, jury and executioner” whose arbitrary decisions deprived Appellants of due process.

As “Exhibit A” in support of this argument, the POA points to two employees who applied for religion-based exemptions: [REDACTED] and [REDACTED]. Both claim to be observant Muslims whose faith precluded receiving a vaccine manufactured with the use of cells derived from fetuses. Neither provided any documentation (such as a letter from a religious leader at their respective mosques) to back up their professions of religious belief. In what the POA claims was a “flawed” process, [REDACTED] was granted an exemption by [REDACTED], and [REDACTED] was not.

The decision process as to these two employees does not represent a failure of due process. Rather, it appears from the record to be a wholly rational one, entirely consistent with the essence of the due process right: an opportunity be heard by an impartial decision maker.

In [REDACTED] lengthy, detailed interaction with [REDACTED], he claimed at first

to have “never been informed the vaccines used aborted fetal cells during the testing process.” If he had known about this, he stated, “he would have asked for an exemption the first time.” (See, Finding 83, above.) When ██████████ pointed out that this information had in fact been widely available at the time of the original vaccine mandate, ██████████ further responses became angry and defensive. He insisted that he had no such information and that “it wasn’t until I received the vaccine that Project Veritas exposed emails documenting the use of fetal cell lines in the testing process of these vaccines. (*Id.*)¹⁰ He claimed that he “already had been given” a religious exemption because he is allowed to wear a beard. He described himself as “insulted” by the suggestion that a letter from his *imam* could be helpful in getting an exemption from being boosted.

██████████ didn’t find ██████████ responses to be believable. (Finding No. 84, above.) She did credit ██████████. In allowing one claim but not the other, ██████████ was properly exercising the discretion given her: to winnow out claims based on sincere religious beliefs from those which arose from political or personal – but not religious – convictions. Having reviewed the record, and having heard the testimony of both ██████████ and ██████████, I reach the same conclusion as ██████████ did. In any event, there is no evidence of a lack of due process arising from her denial of ██████████ request.¹¹

c. Notices of Intended Discipline

As noted above, the NOIDs adequately informed Appellants of the violations alleged against them and of their opportunity to be heard in that regard. It is worth noting here, however, that even after the NOIDs were issued, Appellants still had the opportunity to avoid discipline by either complying with the booster mandate or perfecting their application for an exemption.

d. Skelly Conferences

Appellants propose two related reasons why the *Skelly* hearings offered to those who

¹⁰ Project Veritas does not purport to be a religious authority. Its website states, “[w]e are journalists exposing corruption in government, media, big tech, politics, education, and beyond through undercover video.”

¹¹ I am no more persuaded than was ██████████ by ██████████ claim that the Department’s waiver of its grooming rules so that he could wear a beard constitutes a permanent exemption on religious grounds from any and all regulation, including the vaccine and booster mandates.

received NOIDs fell short of the due process standard. First, they were short, conducted remotely and therefore next to meaningless. Second, the *Skelly* officer was not the Police Chief, his Deputy or anyone else in the leadership of the Department. Rather, [REDACTED] of Employee Relations [REDACTED] was the designated *Skelly* officer. This circumstance deprived Appellants, the POA claims, of the opportunity to interact personally with a ranking official in their own Department so as to provide essential “context and perspective” as to their alleged wrongdoing.

Neither argument has merit.

The relative brevity of the *Skelly* proceedings has nothing to do with whether those Appellants who elected to participate in them were deprived of due process. The record is clear that the opportunity was available to all of the Appellants to appear at a hearing before a responsible official with the power to maintain or modify the proposed discipline. While the hearings were brief, there is no evidence that any Appellant was limited in any way as to the length or content of any presentation he or she might have wished to make. A POA representative appeared at each hearing and spoke up on behalf of the officers facing discipline. Appellants typically explained the circumstances under which they had declined to be boosted and presented their justifications for refusing. The record reflects that Appellants took advantage of this opportunity by describing their exemplary work records and commenting on their loyalty to the Department, their love of their jobs as police officers, their objections to getting the booster shot, and, finally, how their thinking had changed, if it had, since receiving the original vaccine. Each one was offered the opportunity to augment his or her application for exemption with further information even after the close of the *Skelly* hearing.

Nothing in the MOA, the Peace Officers Bill of Rights or any other regulation mandates that the *Skelly* officer in these circumstances had to be a member of the Police Department. The NOIDs did not arise from individual allegations of officer misconduct or poor performance. Appellants do not dispute that they failed to comply with the booster mandate. There clearly was no reason for the Department’s Internal Affairs unit to be involved.

[REDACTED] and [REDACTED] each testified at some length to the effect that, in discipline cases, it is important for the accused officer to be able to articulate individual professional or

personal circumstances to a Departmental *Skelly* officer who would be familiar with how such facts might shed light on the offense. While I can understand the importance of such a concept in Departmental discipline cases, it has no application here. In these cases, the City established a process for addressing the mandates imposed on it requiring its employees to be vaccinated and boosted absent exemption. The process included investigation of non-compliance, notice of proposed discipline and review by an objective party prior to imposing discipline. It was obviously important the entire process be even-handed and applicable across the board, while retaining the flexibility to ensure that those not in compliance could be heard.

Finally, it must be noted that the POA and the City negotiated and ultimately stipulated to the detailed structure for presenting the claims of the 32 Appellants in this arbitration proceeding. For this reason, and based on the entire record, I conclude that Appellants have been treated in accordance with due process of law.

5. Adequate Proof

a. Section 3.04.1370 (E)

The San Jose Municipal Code provides that “cause for discipline” exists for employees who fail “to observe applicable rules and regulations.” (San Jose Mun. Code § 3.04.1370 (E).) Appellants all admit – and the record clearly establishes – that they failed or refused to take the booster vaccination when ordered to do so. A violation of Section 3.04.1370 (E) is thereby established.

b. Section 3.04.1370 (S)

Section 3.04.1370 (S) of the Municipal Code proscribes “willful disobedience.” (*Id.*) While some who testified more or less conceded that they “would take the suspension” for refusing to get the booster, all of the representative witnesses felt that they were *not* willfully disobedient in doing so. In its post-hearing brief, the POA asserts that “under no circumstances should the Arbitrator allow the willfulness allegation to stand. Such a finding by the City is unnecessary, vindictive and prejudicial in the future.” (*San Jose Police Officers’ Association Post-Hearing Closing Arbitration Brief* at p. 46.)

To begin with, there is no doubt that Appellants’ refusal to obey the booster requirement was *intentional*. None of the Appellants forgot to get boosted. Each was clearly informed of the

booster obligation, and each was provided with the reasons for it. Every Appellant was given more than an adequate opportunity to comply by getting the shot or applying for an exemption. They were all informed of the consequences of refusal. Any found to be exempt were relieved of the obligation to be boosted. Those who needed more time to complete applications for exemptions were accommodated. Careful review of the testimony of each of those chosen by the POA to represent the Appellants compels the conclusion that their decisions to decline the booster shot were deliberate. Some contested the requirement vigorously and at length; others simply refused to get boosted and gave little or no explanation. But all acted intentionally.

The POA argues that willfulness means more than mere intentionality. Discipline for willful disobedience, it asserts, requires examination of an individual's underlying reasons for disobeying a directive. An officer told to engage in an unsafe or unlawful act, for instance, may object and refuse the order without being held to have acted willfully, even though the refusal was intentional. Accordingly, says the POA, Appellants' conduct does not warrant a finding on their service records of a violation of Section 3.04.1370 (S).

I do not agree. Appellants' reasons for declining to get boosted varied, but all were essentially based on disagreement that the policy should apply to them. ██████████, for instance, expressed concern that the booster would exacerbate an alleged allergy to eggs and egg products, but he never obtained a medical certification to this effect though he had months to do so. (Finding No. 79, above.) The same appears to be the case for ██████████ ("side effects" – Finding No. 88), ██████████ ("immune system" – Finding No. 89), and ██████████ ("flu-like symptoms" – Finding No. 90.) Each of these employees proffered a reason for non-compliance, but each appears to have simply decided to disobey the rule rather than go through the available steps to obtain an exemption. None claimed that the policy was unintelligible or applied invidiously.

A significant number of the Appellants tried to get exempted and disagreed with the reasons they were given for being turned down. ██████████, for instance, asserted that her Catholic faith precluded vaccination, but never followed through when asked by ██████████ for more information. (Finding No. 78, above.) The same is true for ██████████. (Finding N. 82.) ██████████ claimed exemption as an observant Muslim,

but bristled and refused when asked to provide further support for his religion-based application. (Finding No. 83.) None of these employees has been shown to have been found ineligible for a medical or religion-based exemption wrongfully. So the question really boils down to: “Is a refusal to follow an order because one disagrees with it ‘willful disobedience’?”

The answer in this case is yes.

Comparison to disobedience of an order because it would be unsafe to comply are unhelpful where, as here, is undisputed that the Covid-19 vaccines are indisputably safe and where a medical exemption is available to any whose personal health circumstances might indicate otherwise. The same conclusion would apply to any claim that the vaccine mandate might be unlawful, entitling an employee to disobey it. The parties agree that the vaccination requirement was, at the time it was imposed, a lawful exercise of the City’s power. To conclude that individual employees who disobey the mandate because of little more than personal disagreements with it would be to improperly undermine the City’s right and obligation to protect the health and safety of its residents.

The City has shown that Appellants violated Section 3.04.1370 (S).

6. Equal Protection

Just cause requires, among other things, that like disciplinary situations be treated alike. The suspensions in this case are alleged to fail this aspect of the just cause test on two grounds.

One arises from the differential treatment of ██████████ and ██████████ which I have discussed above. For the same reasons that I find no due process violation in the grant of a religious exemption to one but not the other, I see no equal protection problem, either. The decision maker, ██████████, made a rational, evidence- and credibility-based distinction between the two employees, and my own review of the record provides no basis on which to disagree with it.

The second potential equal protection issue arises from the fact that the vaccine/booster mandate ended on or about October 4, 2022, and the City changed its policy accordingly. (Finding No. 30.) The change meant that City employees were no longer required to get the COVID-19 booster. When that happened, there were still ten police officers engaged in the exemption process (or on leave or otherwise unable to comply with the mandate). None of these

individuals was disciplined, and the POA contends that this circumstance requires that *all* discipline for booster noncompliance be rescinded.

The City was well within its rights – indeed likely obliged to – discontinue the disciplinary process as to those ten employees who had received NOIDs but whose discipline had not yet been imposed. The POA does not argue otherwise. But that does not compel the City to reach back and rescind the suspensions of those on whom the penalty had already been imposed appropriately. Nothing in the MOA requires this, and the concept of equal protection cannot be stretched so far. Indeed, it is apparent that the ten who had not yet been disciplined were in significantly different situations than the Appellants. There is no evidence that the City was responsible for any delay in these ten employees either getting boosted or completing their applications for exemptions. Finally, no external legal roll-back requirement exists.¹²

The City’s election to discontinue disciplinary proceedings against those still pursuing exemptions was based on sound policy. It did not constitute a violation of just cause.

7. Penalty

The POA did not agree to the ten-hour suspensions in these cases, but the record is clear that it had been consulted with in this regard. In any event, the penalty is appropriate. The same discipline was imposed on all who failed to comply, without regard to the duration of their service or to their (usually stellar) employment records and achievements. The City’s legitimate goal of the even-handed imposition of consequences was accomplished thereby.

CONCLUSION

For the reasons summarized above, I conclude that the City has shown that it had just cause to impose a ten-hour disciplinary suspension on each of the Appellants for violating San Jose Municipal Code Section 3.04.1370 (E) and (S).

¹² The POA cites a US Department of Defense announcement dated January 10, 2023 rescinding the DOD’s vaccine mandate and declaring that “[n]o individuals currently serving in the Armed Forces shall be separated solely on the basis of their refusal to receive the COVID-19 vaccination *if they sought an accommodation on religious, administrative, or medical grounds.*” (Emphasis mine.) Even if such a policy were to have been applied in this case, it would not affect most of the Appellants (those in Groups 2 and 4) who sought no “accommodation” through the exemption process provided them.

AWARD

The grievance is DENIED.

DATED: April 8, 2024



Hon. John M. True, III (Ret.)
Arbitrator