

VOLUNTARY LABOR ARBITRATION TRIBUNAL
Before George T. Roumell, Jr., Arbitrator

*In the Matter of the
Arbitration Between:*

CITY OF CHICAGO
-and-

Covid-19 Vaccination Policy Grievances

COALITION OF UNIONIZED
PUBLIC EMPLOYEES (COUPE), LIUNA
LOCAL 1001, UNIT 2 (IBEW LOCAL 21)
and SEIU LOCAL 73, TEAMSTERS
LOCAL 700 (SPCO), TEAMSTERS LOCAL
700 (SSSCC) and AFSCME COUNCIL 31

ARBITRATOR'S OPINION AND AWARD

APPEARANCES:

FOR CITY OF CHICAGO:

David A. Johnson, Special Asst. Corp. Counsel
Jennifer A. Dunn, Attorney
Cicely J. Porter-Adams, Chief Labor Negotiator

FOR THE UNIONS:

Steven Yokich, Attorney, AFSCME Council
George Luscombe III, Attorney, COUPE,
SEIU Local 73, IBEW Local 21,
Teamsters Local 700
Mike Newman, AFSCME Council 31
Joe Healy, LIUNA Local 1092
Bob Chianelli, LIUNA Local 1001
Jerry Rankins, IBEW Local 21

Background

On August 25, 2021, the Mayor of the City of Chicago announced that all City employees were to be fully vaccinated against Covid-19 by October 15, 2021. Effective October 8, 2021, the City advised all employees, including CFD employees, of the City's Covid-19 Policy which in part provided:

IV. Policy

- A. Effective October 15, 2021, City employees, as a condition of employment, and personnel of contractors and vendors as outlined in Section II, must either be fully vaccinated against COVID-19 or undergo COVID-19 testing as set forth in Section IV.B. You are considered fully vaccinated 14 days after receiving the final dose of a two-shot vaccine (Moderna or Pfizer) or a dose of a one-shot vaccine (Johnson & Johnson). All City employees who are fully vaccinated by October 15, 2021 shall receive one (1) personal day that must be used by June 30, 2022. The personal day granted by this Policy shall not count toward the carryover day limit contained in an employee's applicable collective bargaining agreement.
- B. Employees, volunteers, and contractors who are covered by this policy who are not vaccinated, for reasons including but not limited to verified medical conditions or restrictions or sincerely held religious beliefs (as discussed in Section VI), must undergo COVID-19 testing on a twice weekly basis with tests separated by 3-4 days. Employees shall be responsible for obtaining tests on their own time and at no cost to the City and reporting those results in the manner described by Section VII below. This testing option will sunset on December 31, 2021. Thereafter, employees, volunteers, and contractors covered by this policy must be fully vaccinated as a condition of employment unless they have received an accommodation as described in Section VI below.
- C. Employees who are not fully vaccinated by December 31, 2021, unless they have received an approved exemption as described in Section VI will be placed in a non-disciplinary no-pay status until they have become fully vaccinated.
- D. Employees, volunteers, and contractors covered by this Policy with a medical condition or other medical restrictions that affects their eligibility for a vaccine, as verified by their medical provider, or those employees with a sincerely held religious belief that prohibits them from receiving a vaccine, may request a reasonable accommodation as described in Section VI below.
- E. Violations of this policy, including but not limited to, non-

compliance with this Section; or providing false or misleading information about vaccination status, test results, or the need for an accommodation; or the failure to test as applicable as discussed in Section VII, will result in disciplinary action up to and including discharge.

V. Proof of Vaccination

* * *

- F. Employees who have not reported their vaccination status by October 15, 2021 will be placed in a non-disciplinary no-pay status until they have reported their vaccination status.

* * *

The Policy defined fully vaccinated, provided for a testing regimen until the employee was fully vaccinated and provided that the testing option was no longer available after December 31, 2021. This meant that employees had to be fully vaccinated by December 31, 2021 as, after that date, the testing option was not available. Further, if an employee did not report their vaccinated status by October 15, 2021, the employee would be put on no pay status.

The Policy also provided that employees could apply for a medical exemption or a religious exemption on a form provided by the Department of Human Resources, whose personnel would decide the validity of such a claimed exemption.

The Unions each filed grievances challenging implementation of the City's Covid-19 Vaccination Policy. The grievances were denied and the parties selected the undersigned to arbitrate the dispute represented by the grievances pursuant to the respective CBAs.

On November 5, 2021, Counsel for the Unions filed a motion in the Circuit Court for Cook County for a temporary order/injunction and aid of arbitration, including restraining the City from enforcing the announced December 31, 2021 deadline for employees to be fully

vaccinated.

On November 24, 2021, Circuit Judge Neil H. Cohen denied the Plaintiff Unions' emergency motion for temporary restraining order and preliminary injunction and aid of arbitration.

Likewise, on the same day, November 24, 2021, Counsel for Fire Fighters Local No. 2 filed a Verified Complaint in the Circuit Court of Cook County seeking an injunction and aid of arbitration, namely, to "compel the defendant to proceed with arbitration prior to mandating the vaccination". The matter was heard by Circuit Judge Caroline Kate Mooreland who denied the motion and in doing so pointed out in her opinion that mandating of vaccination policies by state and local governments are constitutional. *Jacobson v. Massachusetts*, 197 US 11 (1905); *Zucht v King*, 260 US 174, 176 (1922). *Also see, Klasassen v. Trustees of Indiana Univ.*, 7 F 4th 592 (7th Cir. 2021).

Before Judge Cohen the City presented the affidavit of Dr. Arwady, a Yale trained physician, who had previously worked for the U.S. Center for Disease Control and Prevention (CDC) as an Epidemic Intelligence Service Officer. Dr. Arwady signed her affidavit on November 16, 2021, stating in part:

* * *

7. As of November 10, 2021, CDPH has recorded 6130 Chicago resident deaths from COVID-19 disease. 6031 of these deaths (98.4%) were in people who were not fully vaccinated. Since the beginning of the pandemic, Chicago has seen, on average, more than 10 residents dying every day from COVID – far more than die every day in our city from violence, drug overdoses, suicide, or car crashes.

8. Since a vaccine has been available, whether a Chicagoan has been vaccinated has been, by far, the most important predictor of whether they will be diagnosed with,

hospitalized, or die from COVID-19. Compared to fully-vaccinated Chicagoans, unvaccinated Chicagoans remain twice as likely to be infected with COVID-19, five times as likely to be hospitalized with COVID-19, and seven times as likely to die from COVID-19.

9. Over half (53.6%) of the world's population has now received a COVID-19 vaccine, and more than three-quarters (76.3%) of Chicagoans ages 12 and over have now received at least one dose of a COVID-19 vaccine. More than 7.5 billion COVID-19 vaccines have been administered worldwide and more than 3.5 million have been administered in Chicago.

10. We know from experience with the millions of people who have been vaccinated to date around the world that the COVID-19 vaccines are extremely safe. Incidents of serious side effects are exceedingly rare. The benefits of vaccination in reducing the risk of infection, serious illness, hospitalization, and death from COVID-19 vastly outweigh the risk of side-effects.

11. City of Chicago "civilian" employees outside of the police and fire departments have been more likely to be infected with COVID-19 than Chicago working-age residents as a whole.

12. Because many city employees frequently interact with members of the public, whose vaccination status may be unknown or uncertain, they are at greater risk than members of the general population both for being exposed to the COVID-19 virus and for passing the infection on to other employees.

13. The City has determined that those City employees who are not yet vaccinated should be tested twice weekly until fully vaccinated. As compared to testing once per week, twice-weekly testing provides greater detection of asymptomatic COVID-19 infection and enhances the ability to limit the spread of COVID-19.

14. However, testing is not a substitute for vaccination. Testing does not protect an individual from infection – it merely affords an opportunity to limit the potential for an already-infected individual to further spread the virus to others. Testing only provides a snapshot of whether someone has COVID-19 at the time of test administration. An individual may get infected after getting tested. It is also possible for an infected person to have a "false

negative” test result if tested at an early point after becoming infected.

15. Prior infection also is not a substitute for vaccination. Individuals who were previously infected with COVID-19 can be infected again. Current data suggests that vaccination offers more reliable protection from COVID-19 infection and serious illness than immunity from a prior infection. For example, a recent CDC Mortality and Morbidity Weekly Report found that vaccine-induced immunity was more protective than infection-induced immunity. Accordingly, the CDC continues to recommend that all eligible individuals receive the COVID-19 vaccine as soon as possible, including people who were previously infected with COVID-19.

16. As of November 18, 2021, the number of new COVID-19 cases increased 18% as compared to the prior week. Test positivity and deaths are also increasing.

17. Although the overall vaccination rate for City “civilian” employees outside of the police and fire departments is at approximately 85%, it is imperative that all employees be vaccinated due to the higher risk of exposure as essential workers and the current ongoing rise in COVID-19 cases across the city.

18. Additionally, it is expected that Chicago will see higher levels of influenza activity this winter season than it did last year, potentially stressing hospital bed capacity. Adding vaccine-preventable COVID-19 hospitalizations risks stressing the hospital system to a point where the ability to provide appropriate and timely care for both COVID-19 patients and other patients could be impaired and further contribute to unnecessary deaths.

19. The City Vaccination Policy requires that all employees who have not been granted a religious or medical exemption must be fully vaccinated by December 31, 2021. Each day that any City employee delays getting vaccinated is an extra day that they are at higher risk for infection, illness, hospitalization, and death from COVID-19, and for passing the COVID-19 virus on to coworkers and members of the public.

20. In summary, success in overcoming the COVID-19 pandemic is dependent upon ensuring that enough people have immunity before another variant even more virulent than Delta

surfaces. Delaying full implementation of the City's COVID-19 vaccination requirement is highly likely to unnecessarily increase illness, hospitalization, and deaths in Chicago due to COVID-19.

As pointed out in her Affidavit, Dr. Arwady stated that as of November 10, 2020 over 6,000 Chicago residents have died from Covid-19 who were not fully vaccinated; that an on average daily death rate from Covid-19 is 10 Chicago inhabitants; that unvaccinated Chicagoans are twice as likely to be infected, five times likely to be hospitalized and seven times likely to die due to being infected by Covid-19. Dr. Arwady stated that based upon experience the Covid-19 vaccines are extremely safe. Dr. Arwady observed that the City's civilian employees are twice as likely to be infected with Covid-19 than other working age residents.

Dr. Arwady's Affidavit is undisputed medical evidence on this record. It is consistent with the media reports of the views of leading medical experts in the United States urging vaccination as the best defense against Covid-19.

This Arbitrator recognizes that Counsel for the Civilian Unions did introduce papers and studies concerning methods other than vaccination that can be invoked in addressing the Covid-19 pandemic, including the use of masks and distancing. However, among the papers introduced was Union Ex. 46 entitled "Protecting Workers: Guidance on Mitigating and Preventing the Spread of Covid-19 in the Workplace". This document contained the following language: "Vaccination is the key element in a multi-layered approach to protecting workers". The document contained the language: "You should get a Covid-19 vaccine as soon as you can", noting that this is a CDC recommended guideline. These statements support Dr. Arwady's expert opinion.

The record reveals that in a survey of 31,153 civilian employees, 74.52% are vaccinated;

that in some departments involving multi-employees, the rate of vaccination has approached between 85% and 94%. (Employer Ex. 9).

Discussion

This Arbitrator has examined the CBAs of the various Unions that were presented on the record. All have Management Rights articles which recognize inherent rights of management subject to specific provisions of the agreement. The language in the contracts of management rights varies. But the general description just noted applies to the management rights articles in the various agreements. Two examples illustrate the point. Article 2, “Management Rights”, set forth in the Teamsters Local 700 CBA, among other rights of management recognizes, is the following statement:

* * *

n. to add to, delete or alter policies, procedures, rules and regulations.

Inherent managerial functions, prerogatives and rights, whether listed above or not, which the Employer has not expressly restricted by a specific provision of this Agreement are not in any way, directly or indirectly, subject to review, provided that none of these rights is exercised contrary to or inconsistent with other terms of this Agreement or law.

The AFSCME Council 31 CBA in Article 2, “Management Rights”, provides that “The Union recognizes that certain rights, powers and responsibilities belong solely to and are exclusively vested in the Employer except only as they may be subject to a specific and express obligation of this Agreement. Included in the rights noted is the right “to enforce reasonable rules and regulations”. It is true that Section 2.3 references changes or additions to rules of conduct and the need to advise the Union of such changes. The requirement of being fit for duty by having a Covid-19 vaccine arguably is not a rule of conduct but of qualifications. Even if it

was a rule of conduct, the Affidavit of Cicely Porter-Adams indicates that the announced Policy had been discussed with the Union Coalition.

None of the CBAs have any language prohibiting the City from mandating a pandemic Covid-19 vaccination policy based upon medical advice. For this reason, this Arbitrator concludes that the mandate addressing a pandemic affecting the civilian employees of the City of Chicago, as well as the inhabitants of the City, does not violate the respective civilian CBAs.

This conclusion is consistent with the arbitration decision of Arbitrator Feuille in *AFSCME No. 92-06-10531* (1994) who concluded that the implementation of a no smoking policy did not violate the collective bargaining agreement of AFSCME Council 31.

The City has announced that employees who do not become vaccinated pursuant to the Policy will be put on no-pay status. The failure to be vaccinated is akin to being deemed unfit for duty. Again, there is precedent in an arbitration decision decided by Arbitrator Goldstein between the City and AFSCME in *Gr. No. 470007* (1990). Based upon this precedent, if the issue involved being placed on no-pay status because of the failure to meet the vaccination deadlines, then this Arbitrator would not find that the City or Department had violated the respective CBAs because the no-pay status is non-disciplinary and comes about because the employee is no longer fit for duty.

There is, however, a problematical issue concerning placing employees on a no-pay status for failure to report vaccination status in the City's Vaccination Portal and perhaps for other reasons other than failing to be vaccinated by a date certain. This issue requires briefing and evidence necessitating a separate, detailed hearing before this Arbitrator prior to the issuance of a decision on the issue, namely, the placement on no-pay status for failure to report vaccination

status in the City's Vaccination Portal and perhaps other reasons other than failing to be vaccinated by a date certain. On this narrow issue, Counsel are to consult with this Arbitrator to establish a hearing date. Counsel, prior to the hearing, are to submit a short brief or letter addressing the precise issue that this Arbitrator has raised. Any affected employees through Counsel seeking relief are to submit prior to any hearing an individual written statement as to the reason for their failure to report. This Arbitrator, upon reviewing the submitted statements in consultation jointly with Counsel, will decide which employees may testify if necessary. It is this Arbitrator's intent that the respective Counsel jointly consult with this Arbitrator concerning implementation of the above procedure, including recommending any additions or modifications of this resolution procedure concerning this issue. In setting forth the above procedure, the record is not clear as to whether any civilian employee, for failure to notify, has been put on no-pay status. However, this Arbitrator has set forth the above procedure to address the issue if it is an issue as to any civilian employee.

This Arbitrator was presented with the opinion and award of Arbitrator Steven Bierig issued on September 10, 2021 involving *Amalgamated Transit Union Locals 241 and 308 and the Chicago Transit Authority* where he denied the grievance challenging the Authority's mandated Covid-19 vaccination policy and, in doing so, set forth certain provisions. The Bierig opinion and award offers concrete guidance to this Arbitrator as there is now an arbitration award involving a significant number of public employees in the City of Chicago who are under a mandated Covid-19 vaccination policy. With such precedent in the City of Chicago, there is no reason for this Arbitrator not to follow the Bierig lead and extend the vaccination deadlines with some modification and a possible safety valve so that the unvaccinated employees now will have

a definitive direction as to what is required of them in complying with the City's Covid-19 mandated vaccination protocol. Likewise, the approach taken by Arbitrator Bierig as to the medical and religious exceptions has merit.

The Bierig opinion and award was issued on September 10, 2021 addressing a requirement that all employees be fully vaccinated for Covid-19 by October 25, 2021. The Moderna and Pfizer vaccines require two shots – 28 days apart in the case of Moderna and 21 days in the case of Pfizer. The Johnson & Johnson vaccine requires one shot. Both under the CTA and City's mandate, employees were not considered fully vaccinated until two weeks after the last shot. Arbitrator Bierig extended the October 25, 2021 deadline to be fully vaccinated by one week to November 1, 2021.

This discussion of the Bierig opinion and award is the backdrop to understanding this Arbitrator's award. This Arbitrator's award extends the time for civilian employees to obtain the first shot of the Moderna or Pfizer shots and the Johnson & Johnson shot to December 31, 2021 and to obtain the second shot of the Moderna or Pfizer shot by January 31, 2022. So long as the employees obtain the shots by the deadlines set forth, they will be in compliance with the Award as the Award is based on obtaining the shots.

This Arbitrator appreciates that his Opinion and Award is being issued on December 15, 2021, leaving 16 days, including holidays, for employees to meet the December 31, 2021 deadline. However, vaccines are being administered at most drugstores as well as clinics operated by the Chicago Health Department whereby the vaccines can be obtained. This Arbitrator recognizes that appointments may be needed to obtain the vaccine. If the employee establishes that he or she has made a good faith attempt to obtain an appointment to be

vaccinated prior to December 31, 2021, but was unable to obtain such an appointment and be vaccinated until after December 31, 2021, then the employee's applicable City department involved, on a case-by-case basis, depending on the facts, is to extend the deadlines to comply for a reasonable short period for that employee only. Disputes as to whether the individual employee acted in good faith or the reasonableness of the time extension as well as any remedy are to be resolved by this Arbitrator in an expedited procedure as determined by this Arbitrator.

Employees who have submitted all required documentation for either a medical or religious exemption by December 8, 2021 to the City's Human Resources Department shall be exempt from the requirement to be vaccinated. However, if a request is denied, the employee shall have six weeks from the date of receipt of the denial to comply with the vaccination requirements.

The Award also provides for a bargaining component whereby the parties are directed by this Arbitrator to engage in at least one bargaining session by December 27, 2021 to resolve and to address issues that have been raised between the parties or as the result of this Opinion and Award, including any modifications that the parties mutually agree to. In addition, the City is directed to notify, upon receipt of this Opinion and Award, all civilian employees through the channels used by the City in making notification to said employees of the provisions of the Award.

AWARD

1. The grievances are denied.
2. The City civilian employees are to obtain the first shot of the Moderna or Pfizer

shots and the Johnson & Johnson shot by December 31, 2021 and to obtain the second shot of the Moderna or Pfizer shot by January 31, 2022. So long as the employees obtain the shots by the deadlines set forth, they will be in compliance with this Award which is based on obtaining the shots.

3. If the employee establishes that he or she has made a good faith attempt to obtain an appointment to be vaccinated prior to December 31, 2021, but was unable to obtain such an appointment and be vaccinated until after December 31, 2021, then the employee's applicable City department involved, on a case-by-case basis, depending on the facts, is to extend the deadlines to comply for a reasonable short period for that employee only. Disputes as to whether the individual employee acted in good faith or the reasonableness of the time extension as well as any remedy are to be resolved by this Arbitrator in an expedited procedure as determined by this Arbitrator.

4. Employees who have submitted all required documentation for either a medical or religious exemption by December 8, 2021 to the City's Human Resources Department shall be exempt from the requirement to be vaccinated. However, if a request is denied, the employee shall have six weeks from the date of receipt of the denial to comply with the vaccination requirements.

5. Employees who receive a vaccine and are unable to report to work due to an adverse reaction shall not be charged with a sick leave violation and will be entitled to the same sick leave benefits for adverse vaccine reactions as they received for any other ailment.

6. The parties are to engage in at least one bargaining session by December 27, 2021 to resolve any issues that have been raised between the parties or as a result of this Opinion and

Award, including any modifications that the parties mutually agree to.

7. The City shall notify employees of this Award as discussed in the Opinion which is incorporated as part of this Award as if set forth in full herein.

8. The discussion and direction set forth in the Opinion addressing no-pay status for failure to report vaccination status is hereby incorporated as part of this Award as if set forth in full herein.

9. This Arbitrator shall continue jurisdiction to resolve any issues raised by the parties concerning this Opinion or Award or the subject matter of this dispute and hereby reserves jurisdiction to modify or amend the Award at this Arbitrator's discretion.

10. Because of the nature of this Award, this Arbitrator's fees and expenses shall be split between the Unions jointly being responsible for fifty (50%) percent and the City responsible for fifty (50%) percent.

George T. Roumell, Jr.
GEORGE T. ROUMELL, JR.
Arbitrator

December 15, 2021