

VOLUNTARY LABOR ARBITRATION TRIBUNAL

BEFORE

IMPARTIAL ARBITRATOR KENNETH A. PEREA

In the Matter of Arbitration)	
)	
Between)	
)	
LOS ANGELES CITY)	IMPARTIAL ARBITRATOR’S
FIRE DEPARTMENT)	
)	FINDINGS
And)	
)	AND
UNITED FIREFIGHTERS OF)	
LOS ANGELES CITY, LOCAL)	AWARD
NO. 112, IAFF, AFL-CIO-CLC)	
)	
Re: Class Grievance of)	ERB Case No. ARB 4035
Firefighter Brownell, et al.)	
_____)	

The above-entitled matter is conducted pursuant to the provisions of Memorandum of Understanding No. 23 (“MOU No. 23”) effective 12:01 a.m. on July 1, 2019, and terminating 11:59 p.m. on June 29, 2024, by and between The City of Los Angeles (“City”) and United Firefighters of Los Angeles City, Local No. 112, IAFF, AFL-CIO-CLC (“UFLAC”). The parties agree the matters at issue are properly submitted before Impartial Arbitrator Kenneth A. Perea for final and binding adjudication.

I. THE HEARING

This dispute was heard at the offices of Bush Gottlieb, a Law Corporation, 801 North Brand Boulevard, Suite 950, Glendale, CA 91203-1260, on June 27, 2023. Throughout the course of the hearing, both parties were afforded full opportunity to present sworn testimony, cross-examine witnesses and introduce documentary evidence into the record. A verbatim transcript of the proceedings was thereafter prepared by Tracy M. Fox, CSR, Express Deposition Services. The matter was thereafter submitted upon receipt of post-hearing briefs.

II. THE APPEARANCES OF COUNSEL

UFLAC was represented at the hearing by Dana S. Martinez (with Dexter Rappleye on the post-hearing brief), Attorneys at Law, Bush Gottlieb, 801 North Brand Boulevard, Suite 950, Glendale, CA 91203-1260. The appearance on behalf of the City and Los Angeles City Fire Department (“LAFD”) was made by Erika Lynn Johnson-Brooks and Travis T. Hall, Deputy City Attorneys, City of Los Angeles, Office of the City Attorney, 200 North Main Street, 800 City Hall East, Los Angeles, CA 90012-4131.

III. THE MATTERS AT ISSUE

The issues presented for adjudication in the above-entitled matter may be stated in the following terms:

1. Did City willfully violate its rules and regulations when it served notices of leave without pay on employees deemed non-compliant with its vaccine Ordinance No. 187134 by email rather than by personal service or registered mail pursuant to LAFD Rule No. 17?
2. If the answer to Issue No. 1 above is in the affirmative, what shall be the remedy?
3. Did City violate a past practice when placing employees on unpaid leaves before establishment of their Board of Rights panel pursuant to Los Angeles City Charter Section 1060?
3. If the answer to Issue No. 3 above is in the affirmative, what shall be the remedy?

IV. THE FINDINGS OF FACT

A. *Background to the Dispute*

Pursuant to City’s Employee Relations Ordinance,¹ UFLAC has served for over half a century as the exclusive bargaining agent for a bargaining unit composed of all Firefighters and

¹ City of Los Angeles Administrative Code Division 4, Chapter 8, effective February 1971 (as amended through April 14, 2014).

Captains employed by LAFD. UFLAC and the City are parties to MOU No. 23, upon which this contractual dispute is focused, effective from July 1, 2019 through June 29, 2024.

When LAFD receives a complaint or is otherwise informed of alleged misconduct by a member of its personnel, it commences an internal investigation by assigning an investigator to review the allegation. The assigned investigator then gathers evidence, interviews witnesses including the employee who is the subject of the complaint and prepares a written report which is submitted to LAFD's Fire Chief, Professional Standards Division ("PSD"). PSD then reviews the prepared investigative report and makes a decision whether to commence discipline based upon the written findings and recommendations set forth therein.

If PSD concludes corrective disciplinary action is warranted, a "*Skelly* packet,"² including (1) evidence gathered by the investigator supporting discipline, (2) the specific disciplinary action that is proposed be taken, and (3) all supporting documentation is prepared and served upon the subject employee. Following service of the *Skelly* packet, the subject employee is thereafter provided an opportunity to present "his side of the story", with UFLAC representation, by responding to the accusations and supporting evidence.³ Following consideration of the employee's response to the charges, LAFD advises the employee whether it will revoke, reduce or sustain the proposed disciplinary action.

If, after meeting to consider the employee's "side of the story" pursuant *Skelly, infra*, LAFD concludes that discipline *greater than a reprimand* is required under the circumstances presented, pursuant to City Charter Section 1060, the subject employee is then permitted to request "a Board of Rights," a panel composed of three LAFD Battalion Chiefs, to conduct an administrative hearing to review the matter and determine what, if any, discipline is warranted

²"*Skelly*" refers to the California Supreme Court's seminal decision in *Skelly v. State Personnel Board*, 15 Cal 3d 194 (1975).

³ *Skelly, supra*.

under the circumstances. The right to administrative review before a Board of Rights is codified at City Charter Section 1060, Rights and Due Process Procedures, and provides in relevant part:

...

- (a) . . . No member of the Fire Department shall be suspended, removed, or otherwise separated from the service of the Fire Department (other than by resignation), except for good and sufficient cause shown upon a finding of guilty of the specific charge or charges assigned as cause or causes after a full, fair and impartial hearing before a Board of Rights except as provided in subsection (b) and (h) of this section.

...

Furthermore, City Charter Section 1060 (b) permits, but does not require, LAFD to “temporarily relieve from duty any member pending a hearing before and decision by a Board of Rights” The latter City Charter provision is ambiguous, however, as to whether an employee’s temporary relief from duty should be with or without pay.

In cases where LAFD has proposed discipline of less than 30-days suspension, City Charter Section 1060 provides the employee with the option to request a Board of Rights hearing to contest the proposed discipline. In such cases, however, LAFD’s consistent practice is to allow the subject employee to remain on duty with pay throughout the Board of Rights process, both before and after a Board of Rights panel has been composed.

When LAFD proposes discipline greater than 30-days suspension, pursuant to City Charter Section 1060 a Board of Rights hearing is mandatory. In such instances, LAFD’s standard practice is for the subject employee to either remain on duty with pay or be “detailed to the Professional Standards Division,” where they remain in paid status until a Board of Rights panel has been established, following which the employee is then placed on leave without pay.

Based upon the foregoing undisputed evidence, it is found that during at least the previous 15 years, never before the events giving rise to the subject grievance have employees been placed on unpaid leave prior to composition of a Board of Rights which will consider their

proposed discipline. Uncontested testimony presented in arbitration thus establishes LAFD's consistent past practice pursuant to City Charter Section 1060 (b), as quoted above, is that when employees are temporarily relieved from duty pending composition of their Board of Rights thereunder, they remain in paid status until receipt of notification their Board of Rights' panels have been established and the dates scheduled for administrative review thereby are confirmed.⁴

City Personnel Policy 33.1 provides the Department [LAFD] may depart from normal disciplinary procedures in certain instances when "genuine emergency situations" arise. More specifically, City Personnel Policy 33.1 C. permits the Department [LAFD] to "remove [an] employee from [a] work situation" when "management believes there is a significant risk in allowing the employee to remain on the job." In such instances, however, City Personnel Policy 33.1 C. specifically provides the subject employee posing an immediate threat will be placed "off work with pay."

Once a Board of Rights is composed, and a bargaining unit member is placed on unpaid leave, LAFD issues the employee a Form F-502 notice. LAFD's standard practice is to serve the Form F-502 notice at the same time as a Form F-503 notice is served advising the bargaining unit member their Board of Rights panel members have been selected, listing the Battalion Chiefs who will be serving on the Board of Rights and the date calendared for its administrative proceedings. The foregoing practice has been followed in every disciplinary case administered by LAFD since at least 2008.

B. Ordinance No. 187134, Mandating Employees, Including LAFD's Firefighters and Captains, Undergo COVID-19 Vaccination

In August 2021, Los Angeles City Council ("City Counsel") promulgated Ordinance No. 187134 ("Ordinance") requiring all City employees verify they have received vaccination against COVID-19. The Ordinance furthermore exempts employees who can demonstrate a religious or

⁴ In certain cases, LAFD permits bargaining unit members who are facing discipline to remain on duty with pay while awaiting composition of their Board of Rights.

medical basis for not becoming vaccinated. The Ordinance, however, did not prescribe specific consequences for those City employees who failed to comply with the foregoing vaccination requirements.

When UFLAC was advised of the terms of the City's proposed Ordinance, it immediately demanded to bargain regarding what the effects of its terms would be on non-compliant employees, including any potential disciplinary action therefor. UFLAC, with the other labor organizations representing City employees, then engaged in "effects bargaining" with the City. Captain Chuong Ho ("Captain Ho") and LAFD Apparatus Operator Adam Walker ("AO Walker") served on UFLAC's bargaining team during effects bargaining with the City concerning the Ordinance. In turn, LAFD Battalion Chief Eric Talamantes ("Chief Talamantes") was among the members of the City's negotiating team regarding the effects of the Ordinance.

After attempting to negotiate the effects of the Ordinance without achieving agreement, the City declared impasse, ceased further effects negotiations and issued UFLAC (and the other labor organizations at the bargaining table) its Last, Best, and Final Offer ("LBFO"). The City's LBFO included "procedures" for "corrective action for violations of Ordinance No. 187134," clarifying that employees may be "terminated for non-compliance with the City's COVID-19 vaccination requirement," and allows such terminated employees to reapply for their positions with the City once becoming compliant.

The City's LBFO also provided that "[i]f an employee does not show proof of full compliance by the close of business on December 18, 2021, the employee will be subject to corrective action." The City's LBFO furthermore clarified that, "[f]or sworn employees employed by [LAFD] who proceed to a Board of Rights, the City will abide by all applicable Charter and other legal requirements." During effects negotiations, UFLAC requested the City clarify the intended definition of "corrective action." In response, the City's Chief Negotiator from the Office of the City Administrative Office explained that "corrective action" meant

discipline and signifying that “if members didn’t comply with the [C]ity[’s] ordinance, the discipline could lead to termination [from employment].”

When UFLAC, among others, declined to accept the City’s LBFO, City Council passed Resolution No. 187134 entitled “Resolution Implementing Consequences for Non-Compliance with the Requirements of Ordinance No. 187134” expressing intent to implement the City’s LBFO. According to Ordinance No. 187132, effective immediately the City’s Mayor, through the appointing authorities, “shall implement the terms and conditions set forth in the City’s October 14, 2021 LBFO regarding consequences for non-compliance with the Mandatory Reporting and Vaccine conditions of employment.”

Following City Council’s passage of Resolution No. 187134, LAFD began suspending certain members of the bargaining unit represented by UFLAC for non-compliance with the Ordinance. Pursuant to the terms of Resolution No. 187134, some employees applied for exemption on religious or medical grounds and were permitted to continue working while LAFD evaluated their claimed exemptions from mandatory vaccination requirements. For those employees (a) whose exemption requests were untimely, (b) whose exemption requests were denied, or (c) who failed to timely prove they received required vaccinations against COVID-19, the City provided 48 hours’ notice before issuing them notification they would be removed from duty without pay. Specifically, both LAFD’s emails to non-compliant employees and attached letters stated the employees were “hereby placed off duty without pay until further notice pending disciplinary review for non-compliance with the City’s Ordinance and Vaccine Policy, and for failure to meet a condition of employment.” The foregoing notices were issued to all non-compliant LAFD employees including Firefighters Aaron Brownell, Nicholas Watkins, Jeff Ochoa and other bargaining unit members included in the subject UFLAC class grievance.

LAFD’s Rule 17(f) of its Rules and Regulations specifically requires as follows:

The services of any notice, order, or process required by reason of disciplinary action shall be made either by handing the member a

copy thereof personally or by forwarding such copy by registered mail to his or her last known address of Department record.

Moreover, LAFD's standard practice in matters of discipline is to serve all notices thereof either by personal service to the bargaining unit member or U.S. mail delivery thereto. In this instance, however, all notices to bargaining unit members found non-compliant with the Ordinance by LAFD were sent by email only.

Each employee placed on unpaid leave due to alleged failure to comply with the Ordinance was also provided a *Skelly* notice and allowed to request a Board of Rights hearing pursuant to City Charter Section 1060. At the time of being provided notice they were being placed on unpaid leave, however, the subject bargaining unit members had not yet been provided an opportunity to request a Board of Rights hearing and no such Board of Rights panels had yet been established.

UFLAC timely initiated the subject "class" grievance in ERB Case No. ARB 4035 pursuant to MOU Article 2.1 Section V contesting LAFD's placement of bargaining unit members on unpaid leave while awaiting establishment of their Board of Rights panels. LAFD, in turn, denied the grievance asserting its placement of bargaining unit members on unpaid leave while awaiting notification of their Board of Rights panels' compositions was not "disciplinary" in nature and alternatively was done due to bargaining unit members' failures to "meet a condition of employment" by receiving vaccinations against COVID-19.

Absent resolution of UFLAC's class grievance and following exhaustion of the grievance procedure of MOU No. 23, the matter was referred for final and binding adjudication before Impartial Arbitrator Kenneth A. Perea.

**V. RELEVANT CITY CHARTER, PERSONNEL POLICY, ORDINANCE
AND MOU No. 23 PROVISIONS**

City Charter Section 1060. Rights and Due Process Procedures.

(a) Applicability: Rights. For purposes of this section, the term “member” refers to all officers and firefighters of the Fire Department. This section shall not apply to any member of the department who has not completed the period of probation in his or her entry position as provided in Section 1011(a). Members not covered by this section who are otherwise entitled by law to a hearing or appeal with regard to proposed or imposed discipline shall be provided a hearing or appeal under rules promulgated by the Fire Chief.

The right of a member of the Fire Department, except the Fire Chief and any other member in a position exempt from civil service, to hold his or her office or position and to receive compensation attached to the office or position is hereby declared to be a substantial property right of which the holder shall not be deprived arbitrarily or summarily, nor other than as provided in this section. No member of the Fire Department shall be suspended, removed, or otherwise separated from the service of the Fire Department (other than by resignation), except for good and sufficient cause shown upon a finding of guilty of the specific charge or charges assigned as cause or causes after a full, fair and impartial hearing before a Board of Rights except as provided in subsection (b) and (h) of this section. The charged must be filed within one year of the department’s discovery of the act committed or omitted by a member and in no event later than two years from the date of the act or omission. No case of suspension with loss of pay shall be for a period exceeding six months.

(b) Temporary Relief from Duty: Suspension. After following predisciplinary procedures otherwise required by law, the Fire Chief may:

- (1) temporarily relieve from duty any member pending a hearing before a decision by a Board of Rights on any charge or charges pending against the member; or
- (2) suspend the member for a total period not to exceed 30 days with loss of pay and with or without reprimand, subject to the right of the member to a hearing before a Board of Rights. In the event the member files an application for a hearing before a Board of Rights as provided in this section, the suspension shall automatically become a temporary relief from duty pending hearing and decision by the Board of Rights. In the event that the member fails to apply for a hearing within the period

prescribed, he or she shall be deemed to have waived the hearing and the suspension shall remain effective, unless the Fire Chief requires that a hearing be held.

- (3) cancel such temporary relief from duty, or following such relief from duty, restore the member to duty with or without restrictions pending a hearing before a Board of Rights.

...

BOOK 3 RULES AND REGULATIONS

Section 17

Discipline:

...

f. The services of any notice, or, or process required by reason of disciplinary action shall be made either by handing the member a copy thereof personally or by forwarding such copy by registered mail to his or her last known address of Department record.

...

POLICIES OF THE PERSONNEL DEPARTMENT CITY OF LOS ANGELES

Section 33

Disciplinary Action: Policy and Procedures (Revised 6/23/05)

33.1

...

C. Conducting the Investigation – Emergency Circumstances

Administrative Leave Policy:

Circumstances may occur where it is necessary to remove the employee from the work situation before final decisions can be reached regarding any disciplinary action to be taken. Removal of the employee should take place only when management believes there is a significant risk in allowing the employee to remain on the job.

In such cases, the supervisor should immediately notify the next level supervisor, as well as the employing department's personnel office or other designated office concerning this action. If the next

level supervisor or personnel office are not available, or it is impractical to contact them, the supervisor should take the following actions:

- Call 9-1-1- emergency when a weapon is involved or when there is an immediate and direct threat to employees or the public. If the danger is not to this level but assistance is needed, call General Services Security at (213) 978-4670.
- Direct the employee to leave the worksite immediately. Place the employee who posed the immediate threat off work with pay.
- If possible, have another, higher level supervisor present when directing the employee's removal.

...

VI. THE PARTIES' CONTENTIONS

A. The Union's Contentions

This case arises from LAFD's implementation of City's August 2021 Ordinance No. 187134, passed in August of 2021, which required City employees obtain vaccinations against COVID-19. However, this case does not involve any challenge to the Ordinance itself or City's/LAFD'S decision to remove employees from duty who fail to comply with the vaccination requirements. Rather, this "class" grievance challenges only LAFD's refusal to pay employees while off duty during the initial stages of the disciplinary process, consistent with LAFD's practice in all other disciplinary cases, including cases where employees are accused of far more egregious misconduct. When the Ordinance passed in 2021, UFLAC demanded to bargain over the effects the City and LAFD would impose on employees who did not comply with the Ordinance's vaccination requirements. The City quickly ended the negotiations by declaring impasse and presenting UFLAC with its LBFO, which provides that employees who do not demonstrate compliance with the vaccine Ordinance by a particular date will be subject to "corrective action" up to and including termination from employment.

City Council then formally adopted the provisions of the LBFO. When LAFD began implementing the LBFO and taking corrective actions, UFLAC fully expected LAFD would generally follow its procedures for disciplinary cases, including notifying employees they were being placed on leave due to failing to comply with the requirements of the Ordinance and LBFO, and providing these employees with both *Skelly* and “Board of Rights” hearings, which are required in disciplinary cases pursuant to City Charter Section 1060. The City, however, failed to follow its normal procedures in two important respects: (1) it placed all employees found non-compliant with the vaccine Ordinance on immediate leave without pay, whereas in all other cases employees facing disciplinary action continue to receive their normal compensation until they select the panelists for their Board of Rights hearing; and (2) it served all notices of non-compliance with the vaccine Ordinance, and corrective action including immediate unpaid leave, via email, whereas LAFD’s rules and regulations require such notices be served either personally or by certified mail.

The evidence at hearing established the violations alleged in the grievance. Two witnesses with years of experience handling disciplinary cases within LAFD testified there is an unambiguous and long-established past practice of continuing to pay employees facing disciplinary charges until their Board of Rights panel has been selected. Notably, LAFD did not submit any evidence to the contrary.

LAFD’s primary defense is that the corrective action taken against employees found non-compliant with the vaccine Ordinance is actually “not discipline” but is merely a penalty for failure to comply with “a condition of employment.” But LAFD did not submit any testimony indicating that this distinction has ever been recognized by either party, or any other evidence showing a basis for the distinction. Moreover, both the language of City’s LBFO, and statements from City’s negotiating representatives at the bargaining table, confirm that “corrective action” means discipline. Finally, LAFD has been following discipline procedures, including providing

for Board of Rights, which only apply to cases where LAFD seeks to take disciplinary action against an employee.

LAFD's other argument mentioned during the hearing is that the COVID-19 emergency excused them from ignoring past practice and applicable Rules and Regulations, which specifically allowed for the immediate removal of non-compliant employees from duty. However, the subject grievance is not challenging LAFD's removal of officers from service, only LAFD's refusal to pay employees while on leave until their Board of Rights are selected. LAFD has not presented any evidence suggesting the COVID-19 pandemic made it impossible for them to continue paying employees while on leave consistent with the established past practice, or that the pandemic had any impact on their finances and ability to pay. Finally, the remedy for LAFD's violations must include, at minimum, payment to all affected employees in the amount they would have earned had they remained in paid status until their Board of Rights panel was selected, or will be selected.

B. The City's Contentions

UFLAC challenges City's consequences for all City employees who failed to comply with Ordinance No. 187134 mandating all City employees be vaccinated against the COVID-19 virus. ("Vaccine Mandate"). Specifically, during the emergency COVID-19 pandemic, after providing time to comply with the Vaccine Mandate, City removed unvaccinated/non-compliant employees from the workplace during the health emergency and placed them on leave without pay in order to protect the health and safety of other City employees and the public they serve. Indeed, it is uncontroverted that removing unvaccinated firefighters from duty during the height of the pandemic was particularly exigent given that firefighters are first responders who regularly interact with the public, including its most vulnerable members and are housed together in LAFD firehouses during active working hours. UFLAC argues, however, that this removal from the workplace during a once-in-a-lifetime pandemic should have been governed

the exact same way as if it were disciplinary action against a member for misconduct on the job. UFLAC is mistaken.

Rather, the removal of a member for failing to comply with the Vaccine Mandate is due to the employee's failure to meet a condition of employment, similar to a situation where a member fails to maintain a proper driver's license and can no longer operate a fire engine. In both instances, the member has time to come into compliance and meet the condition of employment. However, once a member is found to have failed to meet the condition of employment, only then does LAFD move to terminate the non-compliant employee through the disciplinary process.⁵ This distinction is critical because an action taken by LAFD for a member's failure to meet a condition of employment versus an action taken as part of the disciplinary process governs when the appropriate LAFD rules and regulations apply. These actions are indisputably not the same. Here, the two issues before the Impartial Arbitrator are as follows: (1) Did LAFD willfully violate its rules and regulations when it served UFLAC members who were non-compliant with the Vaccine Mandate notice of leave without pay by email (during a pandemic emergency); and (2) Did LAFD violate past practice when it placed UFLAC members who were non-compliant with the Vaccine Mandate on leave without pay before the members were afforded an opportunity to select a Board of Rights? Both issues must be answered in the negative.

As to the first issue, UFLAC argues City allegedly violated Rule 17(f) of the LAFD Rules and Regulations requiring City to provide notice to the member either by hand-service or by registered mail when LAFD intends to terminate one of its members and initiate the Board of Rights process. This argument lacks merit because, as discussed in detail below, LAFD Rule 17(f) only applies in the context of discipline, not when a member is initially placed off duty for

⁵ The disciplinary process is controlled by the member's right to a Board of Rights under City Charter Section 1060, which may result in a finding of "not guilty" where the member is returned to work, or a finding of "guilty" where the member may face a suspension or termination by a panel of three chief officers chosen by the member.

failure to meet a condition of employment. Accordingly, LAFD Rule 17(f) does not apply in this context and LAFD did not violate this Rule by serving the pertinent notices by email.

Second, UFLAC contends that under past practice LAFD has continued to pay its members their full salary even when members are placed on leave pending composition of a Board of Rights. Essentially, UFLAC argues a purported *Skelly* violation under the guise of alleging LAFD's decision to place non-compliant members on unpaid leave pending their Board of Rights hearing violates past practice. However, the legal issue of whether LAFD can place non-compliant members on unpaid leave prior to receiving a *Skelly* hearing/Board of Rights hearing has been upheld both in court and in arbitration. In both forums, the City's decision was upheld, finding that in the context of an ongoing emergency, the City was justified in removing unvaccinated employees from the workplace prior to a formal *Skelly* hearing in order to protect the health and safety of other City employees and the public they serve and that no erroneous deprivation of due process rights occurred. Moreover, City Personnel Policy Section 33.1 specifically recognizes that in emergency circumstances, management may postpone the normal pre-disciplinary due process procedures when there is a significant risk in allowing the employee to remain on the job. City's procedure for removing unvaccinated employees swiftly from the workplace prior to receiving a formal *Skelly* hearing thus complies with Personnel Policy Section 33.1 where, as here, there were emergency circumstances present that justified employees' immediate removal. As such, there was no violation of past practice under the circumstances.

Accordingly, LAFD respectfully requests the Impartial Arbitrator find the evidence and applicable law demonstrate LAFD has not violated any of its rules and procedures in this emergency context by swiftly serving UFLAC members with notice of leave without pay via email for failing to meet a condition of employment and by placing those members on unpaid leave pending their Board of Rights hearings. LAFD therefore respectfully requests that UFLAC's grievance be denied in its entirety.

VII. DISCUSSION AND CONCLUSIONS

A. Introduction

The above-entitled matter concerns UFLAC's "class" grievance on behalf of LAFD's Officers and Firefighters who were placed off duty without pay pending composition of their Board of Rights for purposes of contesting discipline due to alleged non-compliance with Ordinance No. 187134's requirement that all City employees be vaccinated against COVID-19 unless exempted for medical or religious reasons. UFLAC's grievance asserts, pursuant to the parties' past practice, that its bargaining unit members must first be placed on paid leaves until their respective Board of Rights have been composed and a date set for administrative proceedings for purposes of adjudicating whether "good and sufficient cause" exists for discipline.

The City, in turn, argues that placement of such bargaining unit members on unpaid leave pending composition of their Board of Rights consisting of three LAFD Battalion Chiefs, was not discipline but rather was due to the affected bargaining unit members' failure to "meet a condition of employment" by becoming vaccinated against COVID-19.

There is no dispute LAFD properly exercised its managerial authority pursuant to MOU No. 23 to remove Officers and Firefighters from the workplace who were non-compliant with Ordinance No. 187134's vaccination requirements for the health and safety of the public they serve as well as fellow bargaining unit members. The question presented, however, is whether LAFD's action in removing non-compliant Officers and Firefighters *without pay* before either (a) their Board of Rights had been composed and (b) dates had been set for Board of Rights administrative proceedings, was in accordance with the parties' MOU No. 23, Article 2.0.

B. The Nexus Between MOU No. 23's Article 2.0 and City Charter Section 1060

As noted above, MOU No. 23, Article 2.0 provides an agreed upon system for adjudication of disputes, including proposals for discipline. A grievance under the foregoing dispute resolution system is broadly defined as:

. . . any dispute concerning the . . . application of this MOU, the Manual of Operations, departmental rules and regulations, bulletins, personnel practices, other rules, conditions of employment, or working conditions. . . .

It is therefore clear City Personnel Policy 33.1, governing “genuine emergency situations,” as well as City Charter Section 1060, applicable to disciplinary procedures for LAFD’s Officers and Firefighters, are encompassed within MOU No. 23, Article 2.0’s broad phrase, “personnel practices, other rules, conditions of employment, or working conditions.”

It is furthermore undisputed that during negotiations, the City advised UFLAC’s bargaining team that pursuant to the City’s LBFO, “[f]or sworn employees employed by [LAFD] who proceed to a Board of Rights, the City will abide by all applicable Charter and other legal requirements.”

Finally, it is noted MOU No. 23, Article 2.1, Section IV, entitled “Procedure Following a Board of Rights,” provides:

Notwithstanding LAAC Section 4.865, a grievance filed following a decision by a Board of Rights may be submitted for arbitration. The request for arbitration must be filed within fifteen (15) calendar days following the decision of the Board of Rights. Failure of the grievant to serve such written notice within such time period shall constitute waiver of the grievance.

The foregoing provisions, when read harmoniously, are indicative of the parties’ mutual intent to integrate the above-quoted provisions of City Charter Section 1060, City Personnel Policy Section 33.1 and MOU No. 23, Article 2.0 in order to provide an orderly and effective system for the adjudication of disputes concerning proposed discipline of LAFD’s Officers and Firefighters.

The Impartial Arbitrator must therefore construe the foregoing provisions of City Charter Section 1060 to the question presented of whether, once removed from duty, LAFD's Officers and Firefighters choosing to proceed before Board of Rights must remain in paid status pending composition thereof and confirmation of those proceedings.

C. The Parties' Past Practice Pursuant to City Charter Section 1060

The provisions of City Charter Section 1060 are ambiguous on the question of whether an employee who is suspended pending Board of Rights administrative proceedings should be placed on unpaid or paid leave status. Due to the foregoing ambiguity, it becomes imperative for the Impartial Arbitrator to consider whether a past practice of the parties, pursuant to City Charter Section 1060, sheds light on its intent.⁶

It is well-established arbitral precedent that in order to find that a past practice exists, as an aid to contractual interpretation of ambiguous terms such a practice must be "(1) unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties." (*Celanese Corp. of Am.*, 24 LA 168, 172 (Justin, 1954).)

As found above, based upon the undisputed evidence presented, during at least the past 15 years, LAFD employees against whom disciplinary charges have been alleged have consistently remained in *paid* leave status pending composition of their Board of Rights, and have never before within that time been placed on *unpaid* leave prior to both the selection of their Board of Rights and confirmation of administrative proceedings before them.

⁶ ". . . custom and past practice of the parties constitutes one of the most significant evidentiary considerations in labor-management arbitration." (Elkouri & Elkouri, *How Arbitration Works*, Chapter 12, Kenneth May Ed., BNA 2016 8th Edition, p. 12-1.)

D. The City’s Argument Non-Compliant Bargaining Unit Members Were Not “Disciplined” But Were Removed From Service Without Pay Due to Their Failure to Meet a Condition of Employment

As noted above, the City argues that following City Council’s passage of the Ordinance, non-compliant LAFD employees were removed from service without pay due to their “failure to meet a condition of employment” by receiving vaccinations against COVID-19 and were therefore not “disciplined.” According to the City, Charter Section 1060 and City Personnel Policy 33.1 were intended to apply only in cases involving “discipline” and thus are inapplicable to the present circumstance.

Following the Impartial Arbitrator’s careful deliberations, however, the foregoing arguments of the City must respectfully be found unconvincing for the following reasons.

(1) The Terms the City’s LBFO

The Ordinance at Section 4.701 provides:

- (a) To protect the City’s workforce and the public it serves, all employees must be fully vaccinated for COVID-19, or request an exemption, and report their vaccination status in accordance with the City’s Workplace Safety, Standards, no later than October 19, 2021.

...

The City’s LBFO implementing the foregoing Ordinance provisions (a) included “procedures” for “*corrective action* for violations of Ordinance No. 187134,” (b) clarified that employees may be “*terminated* for non-compliance with the City’s COVID-19 vaccination requirement,” and (c) allows such *terminated* employees to reapply for their positions once they become compliant with the Ordinance. (Emphasis added.)

Also, the City’s LBFO stated:

... [i]f an employee does not show proof of full compliance by the close of business on December 18, 2021, the employee will be subject to *corrective action*. (Emphasis added.)

The City's LBFO furthermore added:

[f]or sworn employees employed by [LAFD] who proceed to a Board of Rights, the City will abide by all applicable Charter and other legal requirements.

In addressing the City's contentions, it is first noted "discipline," as generally understood in the labor-management community, refers to an employer's actions in response to alleged misconduct by an employee, such as a failure to follow its directives. Discipline may include progressive steps such as warnings, letters of reprimand, suspensions without pay and ultimately termination from employment. Such measures are intended to progressively discipline and thereby modify employee workplace behavior in order to deter future infractions of an employer's rules.

In this instance, the City's actions in suspending non-compliant Officers and Firefighters were implemented to modify future workplace behavior of non-compliant Officers and Firefighters by indefinitely suspending them *without pay* until such time as they complied with the Ordinance's mandatory vaccination requirements. Just as with any form of progressive discipline, City's action in suspending *without pay* was therefore intended to modify the behavior of non-compliant Officers and Firefighters and was disciplinary in its purpose and intent as unequivocally expressed by the City to UFLAC at the bargaining table.

A "condition of employment," on the other hand, is a specification within a job classification which an employer deems necessary for an employee's satisfactory performance of a position's duties. That portion of the Ordinance which required employees must undergo mandatory vaccination against COVID-19 was therefore a valid condition of employment necessary in order to remain on duty.

But the City's expressed intent in its LBFO before implementing the Ordinance did more than simply require non-compliant bargaining unit members be removed from the workplace. It furthermore indefinitely *suspended without pay* all LAFD Officers and Firefighters who failed

to comply with its terms by becoming vaccinated. As found above, this latter action was a matter of discipline intended to prospectively correct the behavior of those Officers and Firefighters who refused to undergo vaccination against COVID-19. Due to its expressed intended purpose of behavior modification by suspending non-compliant employees without pay until they became vaccinated against COVID-19, the City's LBFO implementing the Ordinance went beyond a condition of employment and was disciplinary in its intent and purpose.

The provisions of City Charter Section 1060 and City Personnel Policy 33.1, intended by the parties as found above to be integrated into MOU No. 23, thus became applicable to City's suspensions without pay of LAFD's Officers and Firefighters who were alleged to be non-compliant with the Ordinance.

(2) The City's Oral Expressions to UFLAC at the Bargaining Table

Second, during effects bargaining, including presentation of City's LBFO, non-compliance with the Ordinance was discussed. At that time, UFLAC's bargaining team was advised by the City that employees would be subject to "discipline" up to and including termination from employment should they fail to comply with its terms. Also, during discussions at the bargaining table, the term "termination" was often used by the City. "Termination" in the context of an employment relationship is commonly understood in the labor-management community to mean the most serious form of discipline available to an employer by removing an employee from its workforce.

It is a well-accepted tenant of contractual interpretation that parties' expressions across the bargaining table negotiations should have the same meaning as the resulting terms ultimately adopted.⁷

⁷*Schnucks Mkts.*, 107 LA 739 (Cipolla, 1996); *Copper & Brass Sales*, 105 LA 730 (Nelson, 1995).

(3) The Issues Addressed Before a City Charter Section 1060 Board of Rights

Third, it is undisputed that bargaining unit members represented by UFLAC who were removed from duty without pay due to their non-compliance with the Ordinance have the right to seek redress through procedures of City Charter Section 1060, which includes a hearing before a Board of Rights, a system indisputably designed to adjudicate questions of whether an employee has been *disciplined* “for good and sufficient cause.”

For the foregoing reasons, it is concluded that by suspending without pay non-compliant LAFD Officers and Firefighters, the City was implementing a form of discipline and not a condition of employment.⁸

E. The City’s Argument Its Actions Must be Excused Due to an “Emergency”

Finally, the City argues it acted due to an “emergency” created by the COVID-19 Pandemic and its actions must accordingly be excused.

As explained above, while LAFD’s removals from service of UFLAC bargaining unit members who were non-compliant with the Ordinance was in accordance with its managerial authority under MOU No. 23, City Charter Section 1060 and City Personnel Rule 33.1, the latter provision, while clearly permitting removals from service due to an “emergency” due to an immediate and direct threat to employees or the public, furthermore requires the employee be placed “off work *with pay*.” (Emphasis added.)

Furthermore, no showing has been presented establishing that removal of non-compliant Officers and Firefighters from service while remaining in paid status would have created an “emergency” in this instance.

⁸ Because it has also been found in Subsection D. above that the City’s placement of non-compliant LAFD Officers and Firefighters off duty without pay constituted “disciplinary action,” the City furthermore violated LAFD’s unambiguous Rule 17(f) when failing to serve notice thereof by personal service or USPS registered mail. City shall accordingly be ordered to cease and desist from future violations of LAFD Rule 17(f).

F. The City's Argument It Complied with Applicable Precedent

The City furthermore argues that precedent between the parties pursuant to both Superior Court litigation as well as arbitration proceedings has established that it did not deprive bargaining unit members of the procedural due process rights by removing them from service without pay prior to composition of their Board of Rights and notices of those hearings.

The City's cited precedent, however, is clearly inapplicable to the present contractual dispute which does not concern the issue of whether pre-disciplinary due process safeguards pursuant to *Skelly, infra*, were violated. The present dispute presents a question of whether the City violated MOU No. 23 (including City Charter Section 1060 and City Personnel Rule 33.1 as integrated therein), upon suspending bargaining unit members without pay who failed to be vaccinated against COVID-19.

G. Conclusions

For the reasons explained above, it has been concluded the City violated MOU No. 23 upon removing LAFD's Officers and Firefighter *without pay* due to their alleged non-compliance with the Ordinance.

The matter shall be remanded to the parties for mutual formulation of an appropriate remedy. The Impartial Arbitrator retains jurisdiction regarding the remedy for the contractual violation found above.

AWARD

1. City willfully violated its rules and regulations when it served notice of leave without pay on LAFD Officers and Firefighters whom it deemed to be non-compliant with its vaccine mandate in Ordinance No. 187134 by email rather than by personal service or USPS registered mail pursuant to LAFD Rule No. 17(f).

2. For the contractual violation found in Paragraph No. 1 above, the City shall CEASE AND DESIST from future violations of LAFD Rule No. 17(f) due to service of notices of disciplinary action by email rather than by personal service or USPS registered mail.
3. The City violated an established past practice under MOU No. 23 when it placed certain LAFD Officers and Firefighters on unpaid leaves who were alleged to be in violation of Ordinance No. 187134 before establishment of their Board of Rights and confirmed dates of administrative proceedings thereof pursuant to Los Angeles City Charter Section 1060.
4. For the contractual violation found in Paragraph No. 3 above, the matter is hereby remanded to the parties for purposes of their mutual determination of the appropriate remedy with the Impartial Arbitrator retaining jurisdiction regarding the remedy for the contractual violation found.
5. The Impartial Arbitrator hereby retains jurisdiction to resolve any disputes between the parties concerning the remedy awarded in Paragraph No. 4 above to be exercised upon the written email request of either party.

Dated: November 21, 2023
Del Mar, California

Kenneth A. Perea

**KENNETH A. PEREA
IMPARTIAL ARBITRATOR**