POLICE DEPARTMENT
DENVER PUBLIC SAFETY

October 29, 2021

Re: Union Grievance re: Overtime Compensability for COVID-19 Testing Accommodation

Dear Denver Police Protective Association:

This letter is in response to the grievance you filed dated October 11, 2021 and received October 12, 2021.

As communicated to you at our Step 1 grievance meeting, held on October 20, 2021, your grievance is denied for several reasons.

First, your grievance is untimely as to your named aggrieved member, Richard Ziegler. The CBA states that the grievant "must reduce the grievance to writing and present the written grievance to the Deputy Chief within thirty (30) calendar days after the grievant knew or should have known of the facts which gave rise to the grievance." *See* CBA Article 30.4.

Officer Ziegler was provided the attached notice on August 27, 2021. The notice states that PCR tests are required every 5 days and "must be taken outside of your regular working hours . . ." Accordingly, Officer Ziegler knew by August 27, 2021 he would be required to get a PCR test every five days while off-duty. As such, this grievance, as it relates to Officer Ziegler, or any member who received the attached notice about testing as an accommodation for those granted religious or medical exemptions before September 11, 2021, would be deemed untimely.

Second, even if your grievance had been timely filed with respect to all those aggrieved, it would still be denied because COVID-19 testing is not compensable work under either the CBA or the Fair Labor Standards Act.

The grievance you filed alleges the Department violated Article 16.2 of the CBA. This section states:

> Except as noted in Section 16.3 below all officers up to and including the rank of lieutenant shall be paid at the overtime rate for **all hours worked** in excess of their normal daily work shift or for all hours actually worked in excess of one hundred seventy-one (171) hours in the work period. . . all overtime worked, other than off-duty overtime specified in Section 16.3 below, shall be compensated in either money or time off pursuant to this

agreement, unless external funding sources dictate otherwise. (emphasis added).

Your grievance alleges that the City is requiring officers to receive COVID-19 tests and that the time spent getting tested is "integral and indispensable" to their work, so it is compensable under the Fair Labor Standards Act. In support of this argument, your grievance cites the Department of Labor FAQ, *Scott v. Raudin McCormick*, Case No. 08-4045, 2009 WL 3561301 (D. Kan. Oct. 30, 2009), and *Sehie v. City of Aurora*, 432 F.3d 749, 751-52 (7th Cir. 2005).

You are correct in stating that the FLSA and the Portal-to-Portal Act require employers to compensate employees for activities that are "an integral and indispensable part of the principal activities" of the employees' job. *See e.g. Integrity Staffing Solutions, Inc. v. Busk*, 135 St. Ct. 513, 519 (2014) (holding that security screenings were not "integral and indispensable" to warehouse workers' primary activity of retrieving and packaging boxes for shipment.). However, as the U.S. Supreme Court held in *Busk*, "if the test could be satisfied merely by the fact that the employer required an activity, it would sweep into 'principal activities' the very activities that the Portal-to-Portal Act was designed to address. *Id.* (also holding that a test that turns on whether the activity is for the benefit of the employer is similarly overbroad.)

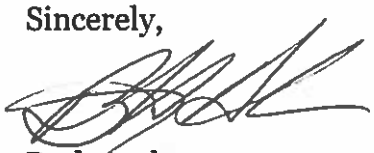
COVID-19 testing is clearly not "integral and indispensable" to the job of a DPD officer, as it does not even meet the minimal threshold of being "required." What the City required is that all City employees become fully vaccinated. Only the small percentage of employees who sought and were granted religious or medical exemptions must get tested for COVID-19 every five days, and only because testing is part of the accommodations the City provided to exempted employees. Those accommodations are provided for the benefit of the exempted employee, not the City. Thus, neither *Scott* nor *Sehie* apply here, as both cases involve mandatory activities (drug testing and counseling, respectively). They did not involve medical or religious accommodations granted to employees in lieu of other requirements. Likewise, the DOL FAQ, implemented in April 2021, and before most employees in the United States had the opportunity to become vaccinated, specifically addresses "mandatory" COVID-19 testing, not testing as part of a medical or religious accommodation. Lastly, COVID-19 testing cannot be considered "integral and indispensable" to a police officer's ability to perform his or her job safely when it can be "dispensed" with easily: by getting vaccinated.

Third, a grievance is not the proper forum in which to resolve wage and hour issues governed by the FLSA. You have implicitly acknowledged this by previously filing a complaint with the U.S. Department of Labor raising these same allegations. While we disagree with the allegations contained in the complaint to the DOL, wage and hour compensability issues are more appropriate for the DOL to determine, not an arbitrator.

Lastly, note that the majority of exemptions granted – included those to Officers Stark and Ryan – were based on religious grounds. Employers are only required to grant religious accommodations if the burden to the employer is *de minimus*. If the Department was required to allow on-duty testing or pay for off-duty testing for over several hundred

officers for an indefinite period of time, it would have no choice but to reconsider all of the previously approved exemptions in light of those costs and potentially rescind approvals.

Sincerely,



Barb Archer
Deputy Chief