POLICE DEPARTMENT
DENVER PUBLIC SAFETY

November 19, 2021

Re: Step 2 Union Grievance re: Overtime Compensability for COVID-19 Testing Accommodation

Dear Denver Police Protective Association:

This letter is in response to your Step 2 Grievance Letter submitted on November 3, 2021. 2021.

As communicated to you at our Step 2 grievance meeting, held on November 5, 2021, your grievance is denied for several reasons.

First, as set forth in our response to your Step 1 Grievance letter, 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. The notice given to Officer Ziegler on August 27, 2021, specifically states that PCR tests "must be taken outside of your regular working hours." Thus, contrary to your assertion, Officer Ziegler knew or should have known on August 27, 2021, that he would not receive compensation for the time spent taking COVID tests, well before the first time he was denied overtime. Moreover, the "continuing violation" theory does not apply here because the plain language of the collective bargaining agreement sets for the time limit for filing grievances. *See e.g. National Postal Mail Handlers Union v. American Postal Workers Union*, 589 F.3d 437, 442 (D.C. Cir. 2009)(arbitrator erred in applying continuing violation theory to find grievance arbitrable despite clear contract language to the contrary).

Second, as set forth in detail in response to your Step 1 Grievance letter, COVID tests are neither required nor "integral and indispensable" to a police officer's ability to perform his or her jobs. They are part of an accommodation given as a benefit to the officer.

Third, your November 3, 2021 Step 2 Grievance letter ignores the fact that by previously filing a complaint with the U.S. Department of Labor raising these same allegations, you have implicitly acknowledged that the DOL is the proper forum for resolving wage and hour issues. Whether COVID tests offered as a part of an accommodation in lieu of vaccination is compensable time under the FLSA is a legal issue that an arbitrator lacks jurisdiction to address.

Fourth, your allegation of retaliation is meritless. Religious accommodations are not granted in perpetuity; they may always be rescinded if circumstances around the COVID-19 virus change or if the accommodations subject the City to more than a *de minimus* burden. The EEOC has specifically stated that an employer has the right to discontinue a previously granted religious accommodation if it is no longer utilized for religious purposes, or if a provided accommodation subsequently poses an undue hardship on the employer's operations due to changed circumstances. If the City is forced to compensate every employee with a religious accommodation for the time spent for every COVID test they receive – whether this results from an arbitration decision, grievance, DOL regulation, caselaw, or otherwise – it would constitute more than a *de minimus* burden. Pointing out the obvious ramifications of your grievance, should it succeed, is not a threat or act of retaliation.

Sincerely,

Deputy Chief Barb Archer