

1 E. EICHENHOLTZ

2 A. Yes. Again, the understanding that
3 we're talking about an area of the law that
4 turns on very specific and individualized
5 facts and circumstances, right, so yes, but
6 I'm trying to also make space for the fact
7 that we are -- you know, this is not your
8 run-of-the-mill, nonemergent EEO reasonable
9 accommodation request. So I just wanted to
10 make that distinction. That's one of the
11 reasons the EEOC issued specific and detailed
12 guidance on this topic.

13 Q. In what percentage of the cases that
14 have been decided to date by the Citywide
15 Panel have you acted as one of the voters?

16 A. I do not have those numbers.

17 Q. In about how many cases have you
18 acted as a voter?

19 A. I don't have that -- we don't break
20 it down -- I don't have access to numbers --
21 direct access to numbers to break it down by
22 voter. So I can't say that Eric Eichenholtz
23 voted on X number of appeals thus far. I
24 could tell you how many the Law Department
25 voted on, but how many of those Law Department

1 E. EICHENHOLTZ

2 votes are mine personally, I could not tell
3 you.

4 Q. But you are a voter, of course?

5 A. Yes.

6 Q. And you've voted on some cases that
7 are involved in NYFRL obviously, we know that?

8 A. Yes, of course.

9 Q. So my question about your
10 involvement in the Kane/Kyle litigation
11 relates to the question of conflict of
12 interest. You know, very similar issues are
13 raised in both matters, and so, you know,
14 we're really entitled to know whether or not
15 you've been involved in the City's defense in
16 that litigation.

17 I ask the question again: Have you
18 been involved or participated in any way in
19 the Kane and Kyle cases?

20 DI MR. HAIDER: Objection. At this
21 stage of limited discovery and the order
22 that provided for this 30(b)(6) witness,
23 Mr. Eichenholtz's potential conflict that
24 you are articulating for how many votes he
25 has done, whether it's in this litigation,

1 E. EICHENHOLTZ

2 the Kane and Kyle litigation, or all
3 Citywide Panel, is not subject to this
4 30(b)(6) witness testimony here today, and
5 I'm instructing my witness to not answer
6 that question.

7 Q. Do the DCAS or DOHMH or CCR agencies
8 have any firewall policies relating to
9 participation of their employees in the
10 Citywide Appeals Panel process?

11 MR. HAIDER: Objection.

12 A. Yes. The City Commission on Human
13 Rights does not involve its Law Enforcement
14 Bureau in the Citywide Appeals Panel process
15 because the Law Enforcement Bureau of the City
16 Commission on Human Rights is charged with
17 reviewing and potentially prosecuting charges
18 of discrimination that could involve denials
19 of reasonable accommodations from City
20 employees or otherwise. The Department of
21 Citywide Administrative Services -- oh, and
22 also, CCHR similarly does not involve its
23 in-house EEO officer and their staff on these
24 matters.

25 The Department of Citywide

1 E. EICHENHOLTZ

2 Administrative Services, again, their panel
3 members are citywide policy -- Citywide Equity
4 & Inclusion and general counsel office policy
5 makers, not members of their EEO office, who
6 would be asked in the first instance to review
7 these request for reasonable accommodations so
8 that you don't have the issue of someone whose
9 been involved in these cases below, to use
10 your word, Mr. Nelson, are then voting on
11 these cases on appeal.

12 Q. Just to clarify, this is not a
13 question, but below has no qualitative or, you
14 know, there's no disparagement in saying that
15 a person in this context is someone who is --

16 A. As someone who has practiced my
17 entire legal career in terms of litigation in
18 trial courts, I can tell you that below does
19 not have any negative connotations.

20 Q. Right. We'll agree on that.

21 So in this context of the formation
22 of the Citywide Panel, was there ever any
23 discussion of the Kane and Kyle case?

24 A. No.

25 Q. And in subsequent communications

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

among the Citywide Panel, has there been any discussion of developments in the Kane/Kyle case?

DI MR. HAIDER: Objection. Again, I'm going to instruct the witness not to answer.

This question does not touch on the Citywide Panel's process nor the standard that the Citywide Panel applies.

MR. NELSON: But it does go to the question of the panel, since one of the major issues involved in Kane/Kyle was the unconstitutionality of the standards that are being applied by the Department of Education. So I would ask you to waive your objection and permit the client -- the witness to answer.

DI MR. HAIDER: I will at this point direct him not to answer.

However, I am open if the question is rephrased in a manner that is on point as more similar to the way you just phrased it to me.

Q. So Mr. Eichenholtz, was the decision

1 E. EICHENHOLTZ

2 of the second circuit or the question of
3 standards applied in the Kane/Kyle case ever
4 discussed among members of the Citywide Panel,
5 to your knowledge?

6 A. In the context of when we received
7 the DOE cases that we were receiving, the
8 background of the decision and the fact that
9 we were to be applying the legal standards we
10 had been applying to City cases were
11 discussed. Certainly the 14 plaintiffs, there
12 was a discussion of the fact that we were
13 being court ordered to do so, so the panel was
14 aware of why we were -- you know, we would
15 sort of go through cases in the order we
16 received them, we were given a short time
17 frame there, so we had to discuss the time
18 frame and things like that. So those sorts of
19 discussions were had with the panel.

20 Q. And what about the nature of the
21 standards that had been used at Kane and Kyle
22 for the agency adjudications?

23 A. Other than the standard -- we
24 discussed the standards we were going to be
25 using based on what the Court had told us we

1 E. EICHENHOLTZ

2 were going to be using, which was essentially
3 what we had been using, so -- you know, I
4 don't think there was a discussion of, well,
5 there was this arbitration award that applied
6 this standard, and we're not going to use this
7 standard because, you know, when it was being
8 discussed, you wouldn't muddy the issue in
9 that way. The important thing was what we
10 were getting, when we had to decide, and what
11 standard we, the Citywide Appeal Panel, needed
12 to decide. It didn't matter what happened
13 before the arbitration, other than we were
14 going to disregard that and apply the
15 standards that we were applying.

16 Q. So, just to clarify and follow up,
17 the Second Circuit's decision sending cases to
18 the panel also severely criticized certain
19 standards that had been applied to those
20 decisions -- the agency decisions in the Kane
21 and Kyle cases. And are you saying, then,
22 that the panel members were never instructed
23 to stay away from the standards and methods of
24 decision-making that were criticized by the
25 Second Circuit Panel?

1 E. EICHENHOLTZ

2 MR. HAIDER: Objection.

3 A. We were never using, nor would we
4 use those standards and methods of
5 decision-making that the Second Circuit
6 criticized in that case. We were applying the
7 legal standards, the guidance provided, and
8 that has been, at least in my understanding,
9 consistently affirmed in subsequent cases and
10 litigation. So we wanted to do what we were
11 doing because the judicial feedback, the legal
12 research we were doing, we were doing the
13 right thing. So we're not going to start
14 discussing other standards and saying, well,
15 there's other standard used in this other
16 circumstance and that's wrong. We were
17 talking about the standards we were using and
18 how we were applying it in our work.

19 MR. HAIDER: Mr. Nelson, I would
20 request another ten-minute break.

21 MR. NELSON: That's fine. We're
22 almost up to noon. Would you like to
23 break now for 45 minutes to have lunch?

24 THE WITNESS: It's --

25 MR. HAIDER: It's a little on the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

early side.

THE WITNESS: I don't know how much more you have to go, but, you know, if we're going to go deep into the afternoon, I'd rather go a little further, personally.

MR. NELSON: That's fine. Let's take ten minutes, then.

THE WITNESS: Okay.

THE VIDEOGRAPHER: We're now going off the record. The time is 11:41.

(Recess was taken.)

THE VIDEOGRAPHER: We are now back on. The time is 11:53.

MR. NELSON: Very good.

BY MR. NELSON:

Q. Do you recall the last question that I asked you, Mr. Eichenholtz?

A. Not at all, Mr. Nelson, I apologize.

Q. Oh, okay.

MR. NELSON: I'll ask the court reporter to read back the last question, please.

(Record read.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

Q. Okay. So my follow-up question, Mr. Eichenholtz, is: Can you give a yes or no answer to that question?

A. The answer's yes. Oh, wait, and I apologize, because there was a double negative. I need to -- the answer is -- let me just phrase it.

They were instructed not to apply that standard when they were instructed to apply the Title VII standard.

Q. Were they given the negative instruction not to use the standards that were used in the Kane and Kyle adjudications?

A. Yes.

Q. So they were told, these were the standards that were used in Kane and Kyle, they are the wrong standards, you are not to use these, or words to that effect?

A. I don't know if it was words to that effect, but they were told that the arbitrators utilized this standard, that we were to disregard that, and to apply the standards we've been applying in our cases.

Q. And were they told what the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

standards were that they were not to apply?

A. I don't recall if we -- I -- like I said, certainly we did not go into detail as to what that arbitration award standard was, no.

Q. So you didn't go into detail as to the specific standards that they were not to apply that had been applied by the arbitrators; is that correct?

MR. HAIDER: Objection.

A. I don't recall the extent to which those standards were referenced. The important information that was conveyed to the panel was the standards they were to apply.

Q. How were the members of the agencies that were making the decisions below, the decisions that were being reviewed by the Citywide Appeals Panel, how were the decision-makers in those agencies trained with respect to the applications of law or standards to religious accommodation requests?

DI MR. HAIDER: Objection. I would instruct my witness not to answer.

That question is outside the scope

1 E. EICHENHOLTZ

2 of the 30(b)(6) witness. The topics are
3 the Citywide Panel's process and
4 standards; not the agencies below or, you
5 know, any other City agency's process or
6 standard. So I'm going to instruct my
7 witness not to answer.

8 Q. How were the Citywide Appeals Panel
9 members trained with respect to the standards
10 that they were to apply to religious
11 accommodation requests?

12 A. So I think I've addressed this a few
13 times now. They were -- most of the members
14 of the panel came to us with significant EEO
15 and reasonable accommodation employment
16 discrimination experience and were very
17 familiar with how a reasonable accommodation
18 process works. We provided the EEOC Guidance.
19 We discussed generally as we went along any
20 big-picture issues at our check-in. Obviously
21 if there were legal developments, we -- the
22 legal developments were shared with all the
23 panel members. And so, the panel members were
24 kept abreast of the standard, but they came in
25 with a base of knowledge regarding the work

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

that they were doing.

Q. Do you know how these individual panel members were trained with respect to the application of standards to religious accommodation claims?

DI MR. HAIDER: Objection. Again, I'm going to instruct the witness not to answer.

You know, the training is certainly not a topic here. Again, the two topics are the Citywide Panel's process of reviewing and the standards used by the Citywide Panel in its review. Although we allowed some questions about the formation, the formation and training of the Citywide Panel is not subject to this 30(b)(6).

MR. NELSON: Well, it is, because the testimony has been so far that the reason why these persons are members of the panel in the first place is that they have experience and are familiar and they have -- you know, that they've done this before. You know, and so presumably the

1 E. EICHENHOLTZ

2 people are relying upon that experience
3 and their familiarity with rules in making
4 their decisions on the panel, which are
5 not reviewed in substance at the
6 quality-control level. So the entire
7 framework of this depends upon the
8 training and the understanding that these
9 people had before they became members of
10 the panel because they never got it on the
11 panel.

12 MR. HAIDER: You know, whether or
13 not their training of the panel members is
14 relevant, I'm not really going to argue at
15 this point. The only thing I will point
16 to is that the training of the Citywide
17 Panel is not a topic here.

18 MR. NELSON: It goes strictly to the
19 standards.

20 DI MR. HAIDER: Yeah, Mr. Eichenholtz
21 can testify to the standards that the
22 Citywide Panel was asked to apply, which
23 he has done numerous times. You know, the
24 panel members' history, you know, prior to
25 this being put on the panel is actually

1 E. EICHENHOLTZ

2 not relevant. Admittedly, we allowed some
3 of these questions for foundational
4 purposes so as to, you know, allow the
5 depositions to go smoothly to provide some
6 context. However, training or, you know,
7 experience is not -- the panel members'
8 experience is not subject to this 30(b)(6)
9 witness.

10 And so I'm instructing the witness
11 not to answer.

12 MR. NELSON: Well, you know, we know
13 from the information we've been given
14 about the structure of the panel and the
15 procedure that the panel follows that
16 these persons, each of them is essentially
17 acting as independent decision-maker,
18 independent judge, and, you know, since
19 that's the procedure, you know, and it
20 sounds like there's no enforcement of
21 whether they follow one set of guidelines
22 or another, I think it's very important to
23 know, you know, what these persons had
24 been trained to do, because clearly, you
25 know, I think the whole purpose for

1 E. EICHENHOLTZ

2 bringing them on to the panel was to have
3 them use their training. We don't know
4 what the training is. And we know very
5 little about what each of these panel
6 members is bringing to the process of
7 making these votes, these sovereign votes.

8 MR. HAIDER: So we have allowed
9 questions and answers about what was
10 discussed during the Citywide Panel
11 meeting as to the standards being used,
12 how that message was conveyed. You are
13 now asking, the previous question was
14 about prior training as to the subject
15 matter here. Again, that's outside the
16 scope. So we've already allowed the
17 questions as to what information they
18 received from the Citywide Panel or, you
19 know, Mr. Eichenholtz or other members of
20 the panel discussed as relates to the
21 standards.

22 BY MR. NELSON:

23 Q. Mr. Eichenholtz, do you at least
24 know what training they received?

25 DI MR. HAIDER: Objection. Again, I'm

1 E. EICHENHOLTZ

2 instructing the witness not to answer
3 based on the previous stated grounds.

4 MR. NELSON: Well, this goes to the
5 basis of his knowledge.

6 DI MR. HAIDER: Okay. Again, this is
7 knowledge to questions that are not
8 relevant. We can flag this, we can call
9 the Court now, we can flag it to call the
10 Court.

11 But I am going to instruct the
12 witness to not answer any questions about
13 training that panel members may have
14 received prior to the formation of the
15 panel. It's not relevant to this
16 testimony at this stage of the litigation.

17 BY MR. NELSON:

18 Q. Mr. Eichenholtz, did you or anyone
19 else involved in the panel have any direct
20 communications with Bill DeBlasio about the
21 panel?

22 A. No.

23 Q. And did you have any such
24 conversations with him about the nature of
25 religious accommodations or the process for

1 E. EICHENHOLTZ

2 religious accommodations or the standards?

3 A. I've never spoken with Bill DeBlasio
4 in my life about any topic.

5 Q. All right. And what about Mayor
6 Adams?

7 A. I have had discussions with the
8 mayor about the vaccine mandate generally, not
9 about the citywide appeal process or how cases
10 are adjudicated.

11 Q. And please tell us the sum and
12 substance of those conversations.

13 A. I --

14 MR. HAIDER: Objection.

15 THE WITNESS: Yeah.

16 MR. HAIDER: You can answer.

17 A. I cannot do so due to
18 attorney/client privilege. I was in the
19 function of conveying legal advice to the
20 mayor.

21 Q. Do you know whether or not any of
22 the panelists were aware of former Mayor de
23 Blasio's statements that he made, while he was
24 mayor, regarding what criteria would be
25 acceptable for religious exemptions?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

MR. HAIDER: Objection.

A. I would have no independent way of knowing that other than our discussions, and it never came up in those discussions when we talked about standards and how they were to be applied.

Q. Did you ever discuss with anyone on the panel about, you know, Pope Francis having a view that there's nothing in the scripture that suggests people shouldn't get the vaccine?

A. We had discussions in discussing various cases and how to handle them, that Pope Francis, in his capacity as the institutional leader of the Catholic Church, had made such pronouncements and that the fact that he did so was not dispositive in any given case.

Q. And did you ever discuss in conversations with members of the Citywide Appeals Panel the assertion that two well-established religions, Christian Science and Jehovah's Witnesses, have a history of religious opposition to vaccination?

1 E. EICHENHOLTZ

2 A. I don't remember specifically having
3 those discussions. With respect to all
4 religions, we discussed we were going to
5 review the facts and the documentation before
6 us to understand the source of the employees'
7 belief and whether or not there's a conflict
8 between that belief and the vaccine
9 requirement.

10 Q. Did you have any discussion with
11 anyone on the Citywide Appeals Panel as to
12 whether or not Pope Francis' views were
13 relevant to the determination of anyone's
14 religious accommodation, even if they were not
15 dispositive?

16 A. Certainly the fact that
17 institutionally, the church was permitting
18 vaccination could potentially be relevant in
19 particular fact patterns. Beyond that, no, we
20 were -- we review these requests based on the
21 information the employee provides us about the
22 nature of their religious belief, their record
23 as a whole, and all of the facts underpinning
24 that belief.

25 Q. And in any of these discussions, you

1 E. EICHENHOLTZ

2 know, what fact patterns did you discuss, if
3 any, were ones in which Pope Francis' views
4 might be relevant?

5 A. No particular fact patterns;
6 however, it isn't to say it isn't this fact
7 pattern or that fact pattern. There are cases
8 in which the employee would say sort of as a
9 blanket statement, as a Catholic, I should be
10 exempt from this vaccine, without more detail
11 or explanation even after interaction, for
12 example, you know, that that might not be
13 enough because there is no -- we're not
14 stereotyping Catholicism one way or the other,
15 right? We're not stereotyping Catholicism
16 based on the Pope's pronouncement, we're not
17 stereotyping Catholicism based on the fact
18 that some Catholics would have a contrary view
19 to the Pope. We were looking at -- with
20 Catholics, we would have to look at the nature
21 of the employee's belief, the source, and
22 whether the beliefs the employee was
23 articulating were conflicting with the vaccine
24 requirement.

25 Q. And what if one of the voters failed

1 E. EICHENHOLTZ

2 to do that? Was there any control that you or
3 anyone else would have that, you know, would
4 empower you to bring that voter back to look
5 again at the facts if the voter had failed
6 to -- apparently failed to see or to reflect
7 upon the existence of facts that would support
8 having such an objection to vaccines, despite
9 the contrary opinion of someone in authority
10 in the faith?

11 MR. HAIDER: Objection.

12 You can answer.

13 A. I'm not aware of any such
14 circumstance. So I do know that when there's
15 a potential issue that's flagged either
16 because we've had a change of information or a
17 whole host of reasons, and we may need a panel
18 to review what they did, we will do that. I'm
19 not aware of any circumstance where a panel
20 member did not properly apply the standard in
21 reviewing the reasonable accommodation
22 request.

23 Q. But would it be fair to say that
24 that wasn't one of the objects of your quality
25 control review, that you take two minutes on

1 E. EICHENHOLTZ

2 the average to perform for each case?

3 MR. HAIDER: Objection.

4 A. So it wouldn't be a primary focus,
5 but, you know, a lot of the -- yeah, I mean,
6 no. Like I said, we would flag substantive
7 issues if they were raised when we were doing
8 quality control. But in doing that work, I
9 have never seen a substantive issue raised
10 with respect to the application of the
11 standard.

12 Q. On how many occasions did you raise
13 a substantive issue with a voter, aside from
14 just a conflict between a vote and the
15 comment, in your experience?

16 A. It's rare. Like I said, maybe a
17 dozen times. It's usually some sort of
18 irregularity, and it may often not be the
19 voter's fault. For example, a medical appeal
20 routed to the religious, you know, CCHR. You
21 know, things like that. So generally, it is
22 rare.

23 Q. But that wasn't something you were
24 specifically looking for in the course of your
25 quality control; is that correct? Because as

1 E. EICHENHOLTZ

2 I recall your testimony about quality control,
3 it had more to do with procedural things than
4 substantive questions.

5 A. Yeah. Again, but if there's a
6 substantive issue that stood out to me, you
7 know, let's say it's, you know, it's a
8 Catholic requesting a reasonable accommodation
9 and there's some comment about the Muslim
10 religion, obviously, I would flag that.
11 That's never happened.

12 But I'm not -- I guess the best way
13 I can put it for you is, I'm not there to
14 second guess the judgment, the factual -- the
15 balancing of the various facts and the
16 credibility assessments of each individual
17 panelist. That's why we have three panelists
18 from three different agencies.

19 Q. You indicated that the cooperative
20 dialogue process was something that ought to
21 occur or was -- if it were to occur, it should
22 have occurred at the agency level. If that
23 was a process that -- well, I'll withdraw the
24 second sentence there.

25 Did you observe that there were some

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

agencies that engaged in the cooperative dialogue process more than other agencies?

DI MR. HAIDER: Objection. I'm going to instruct the witness to not answer that question as it's outside the scope as to, you know, comparing the agencies.

Again, the scope here is the Citywide Panel's process in reviewing and the standards used by the Citywide Panel.

Q. Mr. Eichenholtz, in review of an agency's decision, did the Citywide Appeal Panel members have a practice of giving the same standards and process of review for decisions that were made by agencies which engaged frequently in the cooperative dialogue process as opposed to those that did not do so?

MR. HAIDER: Objection.
You can answer.

A. So agencies generally went about going through the cooperative dialogue process in different ways. Agencies went about gathering the information and engaging the employees in different ways. I would not say

1 E. EICHENHOLTZ

2 it was a competition where one did a better
3 job than the other.

4 There were times where we would
5 have, you know, them be very brief cooperative
6 dialogue, but it would be very relevant and
7 salient, and there would be times where there
8 may be a longer one where there wasn't. So
9 what we would do is, we would look at the
10 materials that the agency had done, the
11 cooperative dialogue they had engaged in, and
12 we'd review it. And if we felt that
13 additional questions, cooperative dialogue
14 usually was very targeted when we do so, if it
15 was necessary, we would make that inquiry of
16 the agency.

17 Q. Do all the members of the Citywide
18 Panel work full time and exclusively on
19 matters related to the Citywide Panel?

20 A. No.

21 Q. Then what percentage of the work
22 time of panel members is devoted to Citywide
23 Panel matters?

24 A. That is heavily dependent on the
25 panel members, you know, and what percentage

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

of the agency's cases they're reviewing,
things like that.

Q. And is there is a range of the
amount of time that people spend or the
percentage of time that they spend? Does
every panel member, for example, work at least
50 percent of the time? Does no panel member
work more than 80 percent of the time on, you
know, panel matters?

A. It's --

MR. HAIDER: Objection.

THE WITNESS: Yeah, okay. Sorry.

A. It's tough to quantify in that way
because, to be quite frank, I think everyone
on the panel member are City managers, and the
obligation of City managers is to work the
time needed to get the work done. So, for
example, if I have or any panel member has an
insufficient amount of time in that workweek
to get the work that they wanted to get done
on the panel work done, then they're working
on it maybe over the evening or over the
weekend. So it's not like you're there 9 to 5
and you're spending three hours a day on

1 E. EICHENHOLTZ

2 average on it, so it's tough to quantify in
3 that way.

4 And like I said, given the work
5 obligations and the involvement of various
6 panel members, the amount of cases they need
7 to review are different. Obviously DOHMH, as
8 you can tell from the numbers we discussed
9 earlier, have far less cases to review than
10 DCAS for the Law Department, for example.

11 Q. On average, how many appeals is each
12 panelist expected to decide each week?

13 A. There is no expectation. The
14 agencies divide the work amongst the panel
15 members as they best -- as best fits that
16 agency's needs and to keep the workflow going.

17 Q. Now, do you know whether or not
18 there was ever a meeting in which you did not
19 participate in any of the agencies in which
20 the procedures or standards that the voters
21 from that agency would be expected to follow
22 in performing their work as voters on the
23 Citywide Appeals Panel?

24 MR. HAIDER: Objection.

25 Just seeking clarification. Are you

1 E. EICHENHOLTZ

2 referring to the Citywide Panel meetings?
3 You did reference agency meetings.

4 MR. NELSON: So what I'm referring
5 to is some meeting at which the panel
6 members from a particular department met
7 to discuss how they were going to handle
8 their work on the panel.

9 MR. HAIDER: Objection.

10 You can answer.

11 A. So I obviously can't definitively
12 rule out any discussions, but I can tell you
13 from my work with the individual panel members
14 and my discussions with the different agency
15 panel members, agency-specific discussions
16 were primarily on issues of dividing up cases,
17 case management, etcetera. They were not
18 focused -- because again, we work generally --
19 we were all working off the same standards and
20 we discussed them as a group. You know, I
21 generally, when there were questions about
22 standards, they were brought up in the group,
23 you know, and sometimes even panel members
24 from other agencies would raise the issue to
25 me and I'd say, well, let's discuss it at our

1 E. EICHENHOLTZ

2 next check-in, for example. So based on my
3 understanding, if it was happening, it was
4 exceptional and rare, that generally we were
5 discussing standards together.

6 Q. But you don't know whether there
7 were such meetings or not?

8 A. Right, I can't rule it out
9 definitively because I'm not in the room with
10 every panel member all the time, so no, I
11 can't rule it out definitively.

12 Q. And that sort of raises the question
13 of: What is the basis of your knowledge for
14 how the other departments, not the Law
15 Department, handle the reviews that their
16 panel members conduct of the appeals?

17 A. Because we've had both in check-ins
18 and myself with each agency-specific
19 discussions with those agencies on how they
20 are handling the cases. So I'm aware of how
21 every agency is handling the appeals.

22 Q. Now, previously you've indicated,
23 you know, that so far as you know, there are
24 no notes that had been taken at the various
25 kinds of meetings we've been discussing. The

1 E. EICHENHOLTZ

2 answer is really, though, with respect to
3 that, that if there were some there, you just
4 don't know about them, right?

5 MR. HAIDER: Objection.

6 A. Yes, that's entirely possible.

7 Q. Okay. So in reviewing appeals from
8 the City agency's denial decisions, how much
9 weight were panel members instructed to give
10 to the reasoning or analysis of the agency?

11 A. In terms of weight, you know, no
12 more or less than any other fact that we had.
13 We were looking at why the agency did what it
14 did, right? And so, it was relevant because
15 we needed to understand why it was denied.
16 But if the agency didn't have a basis for
17 denial or the agency had multiple bases for
18 denial and the panel member says it thinks --
19 if you have one really strong basis here and a
20 bunch that are questionable, the panel member
21 doesn't have to say, follow what the agency
22 did. So it's, you know, like I said, it's
23 close in our appellate review spectrum that we
24 discussed before, it was closest to de novo
25 review as it was described to the panel

1 E. EICHENHOLTZ

2 members.

3 Q. Did the City have a policy of asking
4 only vaccinated people to serve as panelists
5 on the Citywide Appeals Panel?

6 A. No.

7 THE WITNESS: Sorry.

8 MR. HAIDER: Objection.

9 A. No.

10 Q. Are there any unvaccinated persons
11 who are serving on the Citywide Appeals Panel?

12 DI MR. HAIDER: Objection. I would
13 instruct the witness not to answer as it's
14 outside the scope of the order.

15 MR. NELSON: It does relate to the
16 ability of the panelists to serve their
17 function objectively, so I think it's
18 pretty important.

19 Q. I would ask you to answer.

20 DI MR. HAIDER: Again, objection. I'd
21 instruct the witness not to answer.

22 It's outside the scope of the
23 Citywide Panel's process or the standards
24 used by the Citywide Panel.

25 Q. Can service on the Citywide Panel be

1 E. EICHENHOLTZ

2 performed remotely?

3 A. Yes.

4 Q. Again, I apologize for being quiet.
5 I've got a number of questions that have been
6 answered already and I'm scrolling through
7 them to get to one that hasn't been answered.

8 To your knowledge, has any panel
9 member ever received an instruction from
10 anyone else as to how to consider any specific
11 appeal?

12 A. A specific appeal? No.

13 Q. Now, in the production of documents
14 in this case, we received an email that you
15 had sent to I think somebody else in the Law
16 Department in connection with procedures for
17 deciding certain kinds of religious
18 accommodation questions. Are you familiar
19 with that email?

20 A. I am.

21 Q. Okay. Now, have you or Mr. Sanford
22 ever sent any other email to any panelist
23 that, you know, discussed how to deal with any
24 specific or hypothetical situation arising in
25 appeals to the Citywide Panel?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

A. No, not that I'm aware of.

Q. So that's the only email you ever sent to any panelist that discussed a hypothetical situation?

A. In email? Yes, in email.

Q. Uh-huh. And when you say -- when you distinguish email from something else, was there any situation -- other than a --

A. Now, a hypothetical -- I apologize for cutting you off.

Q. Sure.

A. Hypotheticals, as I said, sometimes would be part of our broad, big-picture check-in discussions. If there was a pattern we were seeing or an issue, we might want to talk it through as a group. Certainly that was the form where we did it. Communication such as emails were generally case-specific.

Q. And so, with respect to case-specific situations, did you send any emails to any panelists about how to deal with it?

A. Procedurally? Yes. On the substance, no. So we might have an agency

1 E. EICHENHOLTZ

2 uploading more documents, the employee
3 approaches the EEO officer and says, I have
4 more information, the EEO wants to reconsider,
5 so I might say, hold off, or, we have more
6 information for you to consider. Those sorts
7 of procedural matters generally I've been lead
8 point for the panel. So I will email panel
9 members and say, you know, this is going on,
10 so could you, you know, take another look
11 again. But I'm very conscientious that those
12 emails are kept to procedural discussions
13 because, again, I want to have the three
14 separate perspectives on every appeal and
15 everyone exercising their independent judgment
16 on the appeal.

17 MR. NELSON: I've just received some
18 communication from some of the other
19 people in the firm here that we need to
20 take a lunch break. So it's 12:30, or
21 it's 12:29, soon going to be 12:30. Let's
22 take a lunch break now. I'm indifferent
23 as to whether we take a one hour or a
24 45-minute break. I think --

25 THE VIDEOGRAPHER: Let me just go

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

off.

We're now going off record. The
time is 12:29.

(Lunch recess taken at 12:29 p.m.)

1 E. EICHENHOLTZ

2 A F T E R N O O N S E S S I O N

3 (Time noted: 1:18 p.m.)

4 THE VIDEOGRAPHER: We're now back
5 on. The time is 1:18.

6 E R I C E I C H E N H O L T Z,

7 resumed and testified as follows:

8 CONTINUED EXAMINATION

9 BY MR. NELSON:

10 Q. Good afternoon, gentlemen.

11 A. Good afternoon.

12 Q. So, Mr. Eichenholtz, at this point
13 I'd like to introduce an exhibit, and it's the
14 part of defendants' production that was
15 labelled DEF with a number of zeros and then 1
16 and a 2 and a 3. And it appears to be an
17 email from Eric Eichenholtz dated November 30,
18 2021, and it's to someone at the Law
19 Department, and it's regarding new law agency
20 panel users. We're going to get the -- we're
21 going to ask the videographer to -- so Brandon
22 will be pulling that up. Brandon is our
23 paralegal who is part of our team who is
24 admitted to this session. So I guess we'll
25 wait for that to be pulled up by Brandon and

1 E. EICHENHOLTZ

2 then we'll ask for the court reporter to mark
3 it.

4 (Exhibit 1, Email chain of
5 November 2021, marked for identification,
6 as of this date.)

7 Q. Are you able to see that marked
8 exhibit?

9 A. Yes, I am.

10 Q. Okay, very good. Let's proceed with
11 that, then.

12 A. Oh, sure.

13 Q. Okay. So, Mr. Eichenholtz, what is
14 this exhibit, please?

15 A. This is an email exchange between
16 myself and actually two of the law panel
17 members going up from the bottom of the
18 exchange. This is when we were getting them
19 set up with the Salesforce system to be able
20 to vote, and then the chain continued into a
21 discussion about the standards to be applied,
22 and that's what the remainder of the chain is.

23 Q. So the start of this chain predates
24 the use of the Salesforce system for the
25 panel; is that correct?

1 E. EICHENHOLTZ

2 A. It predates these individuals voting
3 on the panel. The sort of the timeline here
4 is we added -- we had added -- we had had
5 these two individuals on the panel, but we had
6 not yet set them up and got them ready to
7 vote, and we were in the process of doing so
8 here.

9 Q. Well, were there some votes that
10 were, then, performed on the Salesforce system
11 that you have prior to November 24, 2021?

12 A. Yes, oh, yes, yes.

13 Q. Okay.

14 A. Just to be clear, not by these two
15 individuals.

16 Q. Sure. Now, the exhibit indicates
17 that you'd had verbal conversations with one
18 or more of the panelists. What was the
19 substance of those conversations?

20 A. So when these individuals were
21 brought on board to help out with the project,
22 I was telling them a little about the panel
23 and its work and the standards and sort of the
24 different sources that I wanted them to review
25 before they began voting, including the EEOC

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

Guidance and the DCAS document, which you see listed in this chain.

Q. Were there any other sources that you were instructing them to view?

A. Not at that time.

Q. And is there anything inconsistent with the testimony you've given so far that you told them with respect to the procedures and standards that they were to follow?

A. No.

Q. Did you give them any other instructions in addition to the ones you've told us about so far?

A. Yes. I explained to them how we were going about dividing up the work, how we would go about dividing up the work, I give them instructions on that.

Q. In the email, one of the panelists asked you for two or three examples of the kind of fact pattern where the panel would grant a religious accommodation, and you wrote back, quote, "Given that all we see on appeal is agency denials, there aren't too many," close quote. What did you mean by this?

1 E. EICHENHOLTZ

2 A. Precisely what I said to you this
3 morning, that we don't -- that the reversal in
4 the agency was not a particularly frequent
5 occurrence, so I had far more examples at that
6 moment of specific denials than I did of
7 grants. But I wanted to make sure if -- you
8 know, you cut that quote off mid sentence, the
9 full quote is, "Given that all we see on
10 appeal is agency's denials, there aren't too
11 many, but there are definitely some." And
12 then, I provided a specific case example. I
13 was concerned because I could not provide a
14 broader array of case examples that also
15 wanted to give, as it says in the next
16 paragraph, the general gist of the fact
17 pattern that thus far I had encountered and
18 the panel had encountered in which we would
19 approve on a religious ground, and you see
20 that described in the next paragraph.

21 Q. And why did you provide the specific
22 example that you gave to the people who had
23 addressed you in their email, and how does
24 that differ from others?

25 A. Again, these were -- these two panel

1 E. EICHENHOLTZ

2 users were coming in after we had sort of had
3 a big-picture orientation discussion and the
4 check-ins, so they were sort of getting caught
5 up, in a sense, and asking some questions that
6 I think we had talked through as a panel, you
7 know, previously. And so, what was happening
8 here was we'd had that sort of discussion and
9 there were these follow ups as these two -- or
10 one of the two panelists was thinking through
11 what we discussed, and in particular, I think
12 this one panelist was not clear on a couple of
13 things and wanted some clarification and
14 clarity.

15 Q. So my reading of the November 30th,
16 4:12 p.m. email from this one identified
17 panelist. It starts off, "I think it would be
18 helpful to have two or three examples of the
19 kind of fact pattern where we would," and
20 "would" is emphasized by being in italics,
21 "grant a religious RA." And I'm curious about
22 that because it sounds to me like he was
23 mostly getting instruction with respect to the
24 kinds of fact patterns where he would not
25 grant a religious, you know, accommodation

1 E. EICHENHOLTZ

2 requests.

3 What -- you know, what examples of
4 fact patterns had this panelist been given
5 before he wrote this email?

6 A. That's -- what you said is not
7 accurate.

8 Q. Well, it's certainly accurate with
9 respect to the text that I read, right?

10 A. No, no.

11 Q. I'm sorry. What was incorrect in
12 the text?

13 A. You specifically gave an explanation
14 that was your explanation as to why the word
15 "would" was italicized. That is not an
16 accurate explanation as to why he was
17 italicizing that word and the context for
18 which the panel member was italicizing that
19 word.

20 Q. So what personal knowledge do you
21 have with respect to the reason for the
22 italicization?

23 A. Having spoken with that panel
24 member, the other panel member who was on the
25 chain, and being involved in their onboarding

1 E. EICHENHOLTZ

2 process.

3 Q. Well, I'm sorry, but that's a --
4 those -- the thing you just described all
5 would have preceded, I think, would it not,
6 the date, Tuesday, November 30th, on which
7 this email was sent?

8 A. Correct, and that's why I'm in a
9 position to say that word "would" was not
10 italicized for the reasons you stated in your
11 earlier question.

12 Q. And did you discuss specifically
13 with the person who sent this email why
14 "would" was italicized?

15 A. Not that specific issue, but again,
16 I was sent this email, I responded to this
17 email, and I understand the context in which
18 this email was sent.

19 Q. And so, you are making assumptions
20 about what the word "would" means in this
21 email?

22 A. No.

23 Q. I don't understand. You said that
24 from the context, you were deriving meaning.
25 But if you do it from context, then it's your

1 E. EICHENHOLTZ

2 judgment, correct?

3 A. It's my judgment. I was the
4 intended recipient. I understand what I was
5 being asked here.

6 Q. But you're not the seller, correct,
7 and you can't testify with respect to the
8 seller's intention from personal knowledge?

9 A. I believe I have the context and the
10 understanding to be able to understand what
11 was being asked here, and it was not what you
12 were saying, that the instructions that were
13 given were about how to deny reasonable
14 accommodations.

15 Q. Well, was this panelist given a list
16 of examples or a set of examples of fact
17 patterns where a religious accommodation
18 appeal would be denied?

19 A. They were given -- we went through
20 as a group, the three of us, one maybe two
21 cases that I pulled up in completely random
22 order, they were the next two cases to come,
23 and we talked them through together, as I did
24 the vote on those cases. Both of those cases
25 turned out to be denials, and that is why this

1 E. EICHENHOLTZ

2 question was asked, because in our discussion,
3 in our onboarding process, we'd not yet gone
4 through a case or he'd not yet seen a case
5 where there would be a grant of a religious
6 reasonable accommodation, and as he was
7 beginning his voting, he was asking for the
8 fact pattern so he could make sure that he was
9 seeing both sides as he went through the
10 process. That was my understanding of what
11 was going on here, and based on the context of
12 when it was sent and what we had done thus
13 far.

14 Q. So generally, in the instructions
15 that you were giving to the panelists and the
16 panelists were supposed to follow, what types
17 of factors would you have needed to see in
18 order to grant an application?

19 A. Generally, what you would need to
20 see is a sincerely-held religious belief that,
21 either through the belief itself or the way
22 the employee practiced the belief, would
23 conflict with the vaccination requirement.
24 That's what we were looking for.

25 Q. Doesn't the EEOC Guidance state that

1 E. EICHENHOLTZ

2 you should start by assuming that the employee
3 has a sincerely-held religious belief rather
4 than assuming that he or she does not?

5 A. Did anyone say that there was an
6 assumption that an employee does not have a
7 religious belief? I certainly did not.

8 Q. Did you -- and were you --

9 A. And I never -- in fact, when I
10 review these, I presume what the employee's
11 saying is accurate and what the employee's
12 saying is sincere, unless I have objective
13 facts in the record that say that that's not
14 the case.

15 Q. What kind of objective facts would
16 accomplish that result?

17 A. Inconsistencies. Sometimes either
18 inconsistencies, explanations of how the
19 employee practiced. There are a whole host of
20 factors, I couldn't possibly list them all,
21 because it really -- you have to review the
22 specifics of every individualized case, and it
23 is, you look at the entire record, you look at
24 all these various things, and you look for
25 that, what I described before --

1 E. EICHENHOLTZ

2 Q. So --

3 A. -- which is a sincerely-held
4 religious belief which conflicts with the
5 vaccination requirement.

6 Q. So what kinds of inconsistencies
7 would you -- would the members of the panel
8 have been instructed to view as being
9 inconsistent with sincerely-held religious
10 belief of that type?

11 A. We did not instruct people in that
12 way. These are -- the panel is composed of
13 knowledgeable individuals who, as I said, you
14 can have experience in reasonable
15 accommodations and EEO and the subject matter
16 experience or exposure to this area,
17 experience or exposure to appellate work, and
18 whose job it is to review records and apply
19 standards, especially when those standards
20 have to be applied in a highly individualized
21 and a highly fact-specific way.

22 It would, in my view, have run
23 contrary to what the law requires us to do to
24 have engaged overly in discussion of, well,
25 this type of person or this type of case is

1 E. EICHENHOLTZ

2 always going to be a yes and this is always
3 going to be a no, because you can't review
4 these appeals and these requests in that
5 manner. So we -- that's not the way we had
6 instructed the panel to go about their work.

7 Q. So in this kind of a situation, you
8 expected each panelist to rely on the
9 panelist's prior experience and instruction
10 with respect to these kinds of issues?

11 A. Right. And as I've said previously,
12 we had discussions on trends and particular
13 issues that people find troubling that we
14 would discuss as a group during our check-ins
15 to balance the need to remain current to make
16 sure that we're all, you know, being able to
17 rely on each other in our thoughts and shared
18 experiences in a general sense, versus
19 maintaining our independent and our
20 appropriately-varied perspectives based on the
21 missions of our agencies when it comes to our
22 individual thoughts.

23 Q. Now, in your November 30, 2021
24 response to the requests made in this email,
25 you give an example of the case the appeals

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

panel approved, a number of zeros and then there's 1452.

RQ MR. NELSON: We would request a redacted copy of this model acceptance so that we have an idea of how it reads. You can redact all the personal, specific information about them.

MR. HAIDER: We ask that you follow up in writing.

Q. Now, how are cases distributed to individual panelists?

A. As I said, each agency handles it differently. I'm aware of how each agency does -- would you like me to go through each one, or how would you like me to do this?

Q. I'll ask you to go through each one.

A. Okay. We'll start with law. The Law Department, as I said, has five reviewers. When a reviewer goes into our Salesforce system, they will, generally speaking, just go to the case with the lowest -- appeal with the lowest case number first and work their way through as many cases as they can get through in the time allocated. And when another panel

1 E. EICHENHOLTZ

2 member comes in, they pick up from there.

3 With some exception, as I mentioned
4 earlier, you know, the New York City Housing
5 Authority people wouldn't vote on their cases.
6 You know, if I encountered a case I'd given
7 legal advice to at one time, I would leave it
8 alone and leave it empty so that it would be
9 ready for another panel member to review. And
10 we'd just go through it in that general way.

11 For the Department of Citywide
12 Administrative Services, they have divided up
13 the work using the last digit of the case
14 number. So someone gets 0, 1, and 2, someone
15 else gets 3, 4, 5, someone else gets 6, 7, 8.
16 I don't know if it's consecutive like that,
17 but they divided it up based on the last digit
18 of the case number.

19 The City Commissioner on Human
20 Rights, there's one individual who has done
21 the primary work there, and so that individual
22 does most of the voting. But when other
23 individuals have voted, they've just done the
24 same thing; they've come in and voted as
25 appropriate. And the --

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

Q. I'm sorry. You're saying they've just come in and voted as appropriate, you mean on the --

A. Picked up the next case, right.

Q. Okay. Thank you. So give me your answer.

A. Right, right, I apologize. They will pick up the next case that needs to be voted on. There is one exception across the board to this process, in that I will on a weekly basis distribute a report to the committee -- to the panel on cases that have two out of three votes registered, by case number and by agency that needs to vote for the third vote. The reason for that is because we're hoping that we can move as many cases to completion as promptly as possible, so they may go out of order to do what they call those two-vote cases so that we can get more decisions out and someone doesn't -- you know, two agencies very quickly vote on something and someone doesn't have to wait an overly extensive period of time for the third agency to vote. So we will provide that

1 E. EICHENHOLTZ

2 information to the panel on a weekly basis.
3 We do not provide in that report how the other
4 panel members voted, obviously. Just, they
5 get a number of a case and that that agency is
6 an agency that needs to vote on the case.

7 Q. Okay. And these reports are
8 written; is that correct?

9 A. Yes.

10 Q. Okay. What other information is in
11 these reports?

12 A. That is literally it. It is a
13 series of numbers segmented by agency, and an
14 additional column for DCAS's use that allows
15 you to sort by the last number so they can
16 figure out whose cases are whose
17 responsibility. That is what the document is.

18 Q. Are there any other reports that are
19 issued, from time to time, within or by the
20 Citywide Appeals Panel?

21 A. Not within. Obviously in
22 requests -- in litigation requests and things
23 like that, like this case, we will -- the
24 attorneys will pass those along and we will
25 get the relevant documents pulled. The panel

1 E. EICHENHOLTZ

2 does not have the ability, including me, to
3 access the data in the database in terms of
4 downloading it. We can hear it when we're
5 reviewing a case, but I can't, for example,
6 download a series of documents or a series of
7 information. Only the Salesforce
8 administrators can do that, and then they will
9 send that to either me or litigation counsel
10 in the litigation request.

11 Q. When a denial is issued on a case to
12 the appellant, does the denial list a reason
13 for the denial?

14 A. Initially, there was no reason
15 listed on the email. Eventually, we did split
16 it up into very broad categories, and those
17 categories were listed on the emails sent to
18 both the employee, as well as the agency.

19 Q. When was that change effective?

20 A. Probably sometime in late November,
21 early December 2021, as we were sort of
22 reviewing sort of the process and how it was
23 working and talking with the Salesforce team,
24 we added that feature.

25 Q. So why did you add that feature?

1

E. EICHENHOLTZ

2

3

4

5

6

A. Just to allow for a bit more clarity in the -- not necessarily in the email, but just in the decision when it was issued, that it would at least be a broad category of the sort of decision that we were issuing.

7

8

9

Q. Is there any written record that reflects the or explains this decision to change the way in which denials were drafted?

10

11

12

13

14

15

16

17

18

19

20

A. It wasn't changing the way in which denials were drafted. It was adding a feature that allowed us to do some broad case categories. It wasn't -- we added it to the denials, but that wasn't, like, you know -- we weren't like, oh, we need to change how our denials were. We just wanted to have a -- for a whole host of reasons, we wanted to add that broad case category. There may have been communications; I don't know in what medium they were.

21

22

23

24

25

Q. So there may have been some communications. We would like to find out, of course, if there were, and if they're in writing and/or if they're oral, whether the writing's an email or a memo or something. Do

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

you have any information about that?

A. Not as I sit here today, no.

Q. And were you the one who made that communication, if one was made?

A. I honestly do not remember whether it was me or whether it was someone else. I remember the discussions, and I remember the admission, but I don't remember who communicated it to who.

Q. And if there was such a communication that was made in writing, where would we look to see a record of it or find a record?

A. If there's something in writing, it would almost certainly be via email, and so, obviously, it could -- you know, if appropriate and directed by my counsel, I would conduct or we would conduct a search of that to be able to figure that out.

Q. So aside from the database, is there a repository of records that relate to the workings of the committee -- of the panel, I mean?

A. Just the database. Yeah, just the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

database.

Q. Does the database also contain the denial and grant letters that are sent by the panel?

A. No, the City -- it's not done in such a way that the City would retain a copy, you know, with respect to -- I mean, agencies would receive a copy of it, but that is -- the database automatically generates that email, so it's not like something, someone does it from Outlook and it's in a sent folder. That email is generated out, and it's sent out to the recipients, so the recipients would have those emails.

Q. And no one in the City would have those emails?

A. Well, the agencies, when they are the recipients, would have those emails.

Q. What are the broad categories that are, you know, among the choices that can be put into those automatically-generated denial letters?

A. So there's does not meet criteria, there is insufficient documentation, which I

1 E. EICHENHOLTZ

2 would mention parenthetically is for medical
3 appeals, other, and reason meets criteria, as
4 well as failure to engage in cooperative
5 dialogue.

6 Q. How are people who received denial
7 letters that contain either the does not meet
8 criteria or the others, you know, broad
9 category listings in the denial letter, how
10 are they supposed to understand what it was in
11 their application that was deficient in the
12 minds of the appeals panel?

13 MR. HAIDER: Objection.

14 A. They would know that from their
15 proceedings before the agency. You know, that
16 is, they have engaged in cooperative dialogue
17 prior to at that point, they generally would
18 receive a denial letter notification, they
19 have interacted with the agency's EEO officer,
20 Disability Rights Coordinator, or whatever
21 agency personnel was handling their request on
22 multiple occasions, and we are providing
23 basically an affirmance or denial after
24 appellate review, and that's really all we are
25 attempting to convey in that email, is whether

1 E. EICHENHOLTZ

2 after appellate review, the RA's been affirmed
3 or denied -- the decision has been affirmed or
4 denied, sorry.

5 Q. So having read the complaint in this
6 matter carefully, you are aware, are you not,
7 that the complaint alleges that the denials
8 below did not contain specific reasons for the
9 rejection of the religious accommodation
10 requests?

11 A. Uh-huh. Yes, I'm aware of the
12 allegation.

13 Q. Okay. So in that circumstance,
14 isn't it the truth that if, in fact, they were
15 not aware of the reason for the rejection of
16 the application by the agency, that receiving
17 either a does not meet criteria or an other
18 designation in the appeals denial letter is
19 not going to give them any further information
20 with respect to why they were denied?

21 A. That's -- I -- there were a bunch of
22 things in there that I cannot factually agree
23 with, so I can't really answer that.

24 Q. So how are they supposed to know
25 under those circumstances why their religious

1 E. EICHENHOLTZ

2 application was denied?

3 A. So you're talking about, you're
4 saying a hypothetical employee who's made it
5 through the interactive -- the cooperative
6 dialogue, the interactive process with their
7 agency EEO, is aware of the agency's decision,
8 has chosen to appeal the agency's decision,
9 and is now receiving a decision on appeal, and
10 that employee has not, at any point in that
11 process, understood the basis for their
12 reasonable accommodation or why it might be
13 wanted, is what you're -- is the hypothetical
14 you're exploring? I'm not aware of a case
15 where that would have happened.

16 Q. No, the hypothetical is they're not
17 aware of why their religious accommodation was
18 denied. Not why it was wanted. Why it was
19 denied at both levels.

20 A. Right. I'm not aware of an occasion
21 where -- at least that I'm aware of, where
22 that's -- and I certainly -- if I -- you know,
23 yeah, I can't -- I just don't understand the
24 hypothetical. I'm sorry. I'm trying to, but
25 I don't.

1 E. EICHENHOLTZ

2 Q. And so, it's your understanding that
3 the appeals panel was not under any legal
4 obligation to provide more reasons than this?

5 A. Yes, that's my understanding, that's
6 correct.

7 Q. Are there any statistics with
8 respect to the amount of -- to the average
9 time that each panelist on the Citywide
10 Appeals Panel spends in adjudicating the cases
11 before the panel?

12 A. No, there are no such statistics.

13 Q. So no one keeps statistics of that
14 kind, so far as you're aware?

15 A. Not unless panel members are timing
16 themselves and writing it down, but I do not
17 understand that to be happening.

18 Q. And do you know whether or not the
19 CCHP or DCAS or the Department of Health and
20 Mental Hygiene, you don't know whether or not
21 they keep statistics of that kind?

22 A. No. I -- no, no. I -- I don't see
23 why they would.

24 Q. But you don't know?

25 A. I don't. I assume not, but yes, I

1 E. EICHENHOLTZ

2 would -- I could not tell you for a hundred
3 percent certain, as we sit here today, that
4 they did.

5 Q. Okay. Thank you.

6 A. No problem.

7 Q. Now, does the Citywide Appeals Panel
8 have a procedure for determining whether or
9 not someone is eligible to file an appeal?

10 A. You mean after we've received it?
11 Sorry, so we have an appeal before us?

12 Q. No. Some people are permitted to
13 file an appeal, as I understand it, other
14 people are not permitted to file an appeal.
15 Do you have some way of determining whether or
16 not an appeal -- whether or not a person who
17 files an appeal is eligible to do so?

18 A. I know of no circum- -- perhaps
19 there other circumstances you're thinking of
20 where someone is not permitted to file an
21 appeal?

22 Q. No --

23 A. I can't --

24 Q. Let me just name a couple of
25 circumstances.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

A. Sure. I just don't know -- I don't know what that describes. I --

Q. Sure. There are two or three -- let me just throw them out one, two, three.

A. Sure.

Q. Situation number 1 might be a person who -- from the Department of Education, for example, who attempted to file an appeal to the arbitration appeal, but they were never given an opportunity actually to speak to an arbitrator or have an arbitral decision of the appeal, and so therefore, you know, they might have been interested in filing with the Citywide Appeals Panel. That's situation 1.

Situation 2 might be those people who in another department opted to file an appeal with the arbitration panel and were denied by the arbitration panel.

Situation 3 might be that there are -- that there was a person who filed an appeal with the arbitration panel in the Department of Education, and I think did so outside the window of a few days in which they were, you know, permitted to make that appeal,

1 E. EICHENHOLTZ

2 and so were not -- and they got a denial based
3 on that, or perhaps they got no decision at
4 all from that arbitral panel.

5 So those are three different
6 options. If each one of these persons wants
7 to file an appeal with your panel, how would
8 you determine whether or not they were
9 eligible to do so?

10 DI MR. HAIDER: Objection. Outside the
11 scope.

12 I've been reading the topics, and
13 there's a subsequent sentence in the order
14 from the judge which states that, "A
15 plaintiff may inquire as to the Citywide
16 Panel's general practices, to the extent
17 they exist, as a foundation for acquiring
18 as to the practices applied to the
19 individual plaintiffs' appeals." The
20 scenarios of the examples that you
21 provided are not applicable here because
22 they don't apply to any of the individuals
23 in this litigation's appeal.

24 So given the order and the
25 explanation by the Court as to what the

1 E. EICHENHOLTZ

2 purpose of this is, these hypotheticals
3 that are posed are outside the scope, and
4 thus I instruct the witness not to answer
5 that question.

6 Q. Has anyone associated with the
7 Citywide Panel expressed a goal for a
8 percentage of the number of appeals that
9 should be granted or a limit on the number of
10 them?

11 A. No.

12 Q. And do you know by personal
13 knowledge that no one has ever done so, or are
14 you assuming so?

15 MR. HAIDER: Objection.

16 A. Based on my personal knowledge, no
17 one has done so, and my understanding, as I've
18 gone through this process, is we could affirm
19 100 percent of the appeals. That's our
20 prerogative as we review them, if the facts
21 and circumstances justified those decisions.
22 No one's ever framed this in a, oh, you have
23 to deny this amount or affirm this amount. If
24 they were all denied, if they were all
25 affirmed, as long as the panel was doing its

1 E. EICHENHOLTZ

2 job, the panel was doing its job.

3 Q. So what was the policy of the
4 Citywide Appeals Panel with respect to
5 applicants for religious accommodation who had
6 received vaccinations at a previous time?

7 A. There is no blanket policy. We
8 would consider that as one of many possible
9 objective facts to evaluate whether or not the
10 individual had a sincerely-held religious
11 belief that conflicted with the vaccination
12 requirement, and those facts, along with the
13 employee's explanation of those facts, could
14 be relevant to a bunch of levels of that
15 analysis.

16 Q. So what was the policy of the
17 Citywide Appeals Panel with respect to
18 employees who had experienced a religious
19 conversion and had been vaccinated prior to
20 the conversion and were no longer vaccinated
21 after the conversion?

22 A. So that is an example of what I said
23 a moment ago, right? That is an example of in
24 employee had been vaccinated, let's say,
25 throughout their life and in 2017, for

1 E. EICHENHOLTZ

2 example, they converted, they became a
3 born-again Christian, they converted to
4 another religion, what have you, as a result
5 of that conversion, they took on a set of
6 religious values presumably they had been
7 developing prior to that, then they have a
8 sincerely-held religious belief, and if some
9 of those values that they've explained
10 conflict with the vaccine requirement, then
11 they would be entitled to a reasonable
12 accommodation. So in that case, that sort of
13 fact would, you know, compel a grant of an
14 accommodation notwithstanding that fact that,
15 like, standing alone the fact they had
16 vaccines in the past might mitigate against
17 that accommodation.

18 Q. Now -- oh, sorry.

19 A. Sorry. One last thing. As you said
20 moments ago, you're going to review what the
21 employee said there, and obviously, you know,
22 absent some reason not to, you're going to
23 accept the employee's explanation.

24 Q. Well, and so, accepting the
25 employee's explanation, if those two facts

1 E. EICHENHOLTZ

2 were expressed in the application, are there
3 other factors that would, you know, reasonably
4 cause a panel member to vote to deny the
5 application, despite the fact that the person
6 had no vaccination after the conversion?

7 A. Yes. And it could be a whole host
8 of factors that either, as I said,
9 demonstrates an inconsistency, that something
10 about the employee's description may also
11 suggest that even though they haven't been
12 vaccinated, their religious beliefs that they
13 have developed after the conversion don't
14 conflict with the vaccine requirement. There
15 are a whole host of reasons that
16 notwithstanding that conversion and
17 notwithstanding the fact the employee's not
18 been vaccinated since the conversion, that a
19 reasonable accommodation might not be
20 appropriate.

21 And again, this is why when you say,
22 do you have a policy, this factual scenario or
23 not, you know, and having seen several
24 thousand now, Mr. Nelson, I can tell you with
25 certainty, there are all different

1 E. EICHENHOLTZ

2 permutations and combinations of these facts,
3 so it is very challenging to generalize in the
4 way you were generalizing a moment ago.

5 Q. So given all of these different
6 permutations, is there anybody who has
7 authority to restrict the ability of the
8 decision-maker of the voter to decide one way
9 or as opposed to another?

10 A. Generally, no. Absent some -- you
11 know, anything that would be a judgment call
12 is left to the judgment of the voter. The
13 check that we have on that, again, is the fact
14 that we have three agencies individually
15 reviewing these cases, right? So that if you
16 have one voter who just really reads it, maybe
17 gets the wrong feel, and the other two voters,
18 you know, seem to have a, you know, different
19 view on it, you know, that employee has a
20 chance, you know, obviously then the employee
21 would get the accommodation.

22 In order to be denied an
23 accommodation, the employee has to go through
24 at least three people who are knowledgeable in
25 the process; the agency EEO officer or EEO

1 E. EICHENHOLTZ

2 personnel or whoever in the agency was
3 designated to review it, the Disability Rights
4 Coordinator, for example, and two of the three
5 panel members at least. And then other
6 occasions I think that are in this case, as
7 well, sometimes it's everyone who's reviewed
8 the request has determined the RA is not
9 appropriate or is appropriate, you know, other
10 circumstances.

11 Q. Just talking about that at the
12 Citywide Appeal Panel level, supposed you have
13 a situation where you have a person who had a
14 vaccination as a child, had a religious
15 conversion, had no vaccinations after
16 religious conversion, you get one vote for a
17 grant, and you get two votes for no grant for
18 reasons that are perhaps not, you know,
19 clearly explained in the comments. You know,
20 is that a situation that is acceptable to the
21 Citywide Appeals Panel, first of all? Is that
22 an acceptable way to decide, with two to one,
23 despite the fact that you've got a religious
24 belief which is presumed or assumed to be
25 valid?

1 E. EICHENHOLTZ

2 A. So I'm not aware of that scenario
3 you've described ever coming up, where there
4 were two voters who had infirm justifications
5 on a record that was very clear purely at a
6 religious conversion. You know, again, it
7 would have to be had a religious conversion,
8 the religious belief conflicts with the
9 vaccine requirement in this way, and, you
10 know, and all the other factors, all the other
11 facts that are in the record point to the
12 grant of the RA, and two voters disregarded
13 that entirely -- you know, that's not
14 really -- that's a very out-there scenario,
15 from my experience working on these cases.

16 Q. Well, is it possible that -- are
17 there situations, for example, in which the
18 panel members disagree with each other,
19 without regard to whether one side wins or the
20 other side loses, whether it's a grant or a
21 denial, where it's possible that both
22 positions can reasonably be taken by the panel
23 members on the basis of the material that is
24 provided to the panel?

25 A. Yes. And, in fact, you know, I've

1 E. EICHENHOLTZ

2 seen every permutation and combination that
3 exists. I've seen unanimous grants, unanimous
4 denials, two to one with the different -- all
5 the various agencies at various times being
6 the two, some of agencies at various times
7 being the one, and those generally do occur,
8 as I think you succinctly stated there, in a
9 case where the factual record might -- where
10 there is support for both conclusions
11 depending on how you balance the various
12 things, if there may be some contradictory or
13 conflicting information that needs to be
14 reconciled, and that two agencies reconciled
15 it in one direction and one agency reconciled
16 it in another.

17 Q. SO it's fair to say, then, that each
18 voter has discretion with respect to the
19 decision that the person makes?

20 A. Between the bounds of the legal
21 framework and the analysis that, you know,
22 they're supposed to be applying, yes, for
23 things like, you know -- for things like, you
24 know, balancing of factors, things like
25 credibility assessments to the extent those

1 E. EICHENHOLTZ

2 come up with respect to objective reasons to
3 be concerned of credibility, things like that,
4 yes. The individual panel members exercise
5 that discretion as the law allows and as
6 individuals considering these requests are
7 permitted to do.

8 Q. What was the policy of the Citywide
9 Appeals Panel with respect to applicants who
10 only objected to the COVID-19 vaccine based
11 upon religious objections, but it didn't
12 object to any other vaccines?

13 A. So this is going to sound familiar.
14 There is no uniform blanket policy because
15 that is a factual determination. There can
16 certainly be a basis for granting of
17 reasonable accommodation. I'm sure if we put
18 a series of facts together, you may have some
19 ready to go, where an RA might be granted, and
20 there are many scenarios where if someone is
21 objecting solely to the COVID-19 vaccine,
22 where the RA would be denied, I think, you
23 know, there -- so there's no rule that, oh, if
24 they just said COVID, you've got to deny, or
25 they just said COVID, you've got to grant.

1 E. EICHENHOLTZ

2 There's no rule or policy like that.

3 Q. So again, each voter is left to his
4 or her own discretion with respect to that
5 analysis?

6 A. Yes and no. I mean, I think it's
7 not fair to say it's some, you know, shoot a
8 dart at the dartboard discretionary call here.
9 What the panel members are doing is looking at
10 the objective facts provided in the request
11 and weighing those and coming to a reasonable
12 conclusion, right? These -- you know, or if
13 they need additional cooperative dialogue,
14 there have been some cases roughly along that
15 line that you just said where you might need
16 some additional cooperative dialogue if it's
17 not in the record already. But they're
18 applying their reasoning and their judgment to
19 facts. They're not just saying, well, this is
20 the factual scenario, so it's totally up to
21 me, yes or no. They are applying the facts in
22 a reasonable manner, and if they are competing
23 facts on the record, some people, you know,
24 might -- the balance might tip one way for one
25 person, it might tip the other way for the

1 E. EICHENHOLTZ

2 other person.

3 Q. So among other things, you're saying
4 that that particular scenario is not
5 necessarily dispositive?

6 A. Yes. There's very -- there is -- I
7 cannot think of something that would
8 dispositive in all cases, and I'm sort of
9 laughing, other than maybe someone coming in
10 and saying, I have no religious belief that is
11 the basis of this request. That might be
12 dispositive. Surely no one has done that,
13 that I'm aware of, short of that. It is,
14 you're really looking at the record and having
15 to look at all the different facts that are
16 presented by it.

17 Q. So if an applicant was silent on
18 whether or not he or she had taken other
19 vaccines, was there a policy of the panel as
20 to how that would affect the analysis of
21 whether the person's religious objection to
22 taking the COVID-19 vaccine was sincerely
23 held?

24 A. So there was no policy of the panel.
25 That factor would be looked at amongst --

1 E. EICHENHOLTZ

2 you'd have to look at the other facts in the
3 record, the information that the employee
4 provided, the circumstances presented in the
5 appeal, and make a determination as to whether
6 you want to grant or deny, or if necessary,
7 seek additional cooperative dialogue, if it
8 was felt it was needed.

9 Q. Did the Citywide Panel have a policy
10 as to how an applicant's children might affect
11 the analysis of an appellate's sincere
12 religious belief? For example, if the
13 children were vaccinated but the appellant was
14 objecting to a COVID-19 vaccine?

15 A. Again, you would consider that --
16 the panel would consider that in the context
17 of all the facts presented in the case. As I
18 sit here today, I can think of factual
19 scenarios where that might be, you know,
20 relevant and compel a grant and there are
21 factual scenarios where it might not be
22 relevant and/or it might be denied, but
23 obviously, if it's something the employee
24 offers or provides, it can be and it will be
25 considered by the panel members when weighing

1 E. EICHENHOLTZ

2 all those different competing facts to
3 determine whether a reasonable accommodation
4 is appropriate.

5 Q. And is the same answer appropriate
6 to the question of whether, you know, the
7 question of a situation in which an applicant
8 fails to mention whether his or her children
9 are vaccinated?

10 A. I mean, not -- no, it's not -- you
11 know, there's no implication by silence,
12 right? You know, there's no -- so yes, the
13 answer is: You look at the facts, and if the
14 fact's not there, it's one of the factors
15 you're weighing. You're not saying, oh, you
16 know, I'm going to imply through this employee
17 silence that their children are vaccinated or
18 they even have children, right? So what would
19 happen in that scenario is that would not be a
20 factor of how this person's family has been
21 vaccinated or not vaccinated when you're
22 weighing the various factors.

23 Q. Now, if a person was not scrupulous
24 in their observance of their professed
25 religious belief with respect to vaccines,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

would that be a basis for, a potential basis for a panel number to decide against granting a religious accommodation against the use of the COVID-19 vaccine?

MR. HAIDER: Objection.

You can answer.

THE WITNESS: Okay.

A. It could potentially be a factor one way or the other the panel would consider, be considered in connection with what the employee is saying and all the other factors. Obviously, I think this is a good example, you used the word unscrupulous. One may feel it was, you know, someone just hasn't been, you know, that there's -- you know, that that may not be a dispositive factor in one case, and depending on that record, it may be a highly-relevant factor decision in another case.

Q. Well, of course I used the words "not scrupulous."

A. Yes.

Q. Rather than "unscrupulous."

A. Sorry. I heard unscrupulous. So I

1 E. EICHENHOLTZ

2 heard that through my computer. So if you
3 used "not scrupulous," I will substitute not
4 scrupulous into my answer.

5 Q. Are all the members of the Citywide
6 Panel familiar with that portion of the EEOC
7 Guidance that says that employees need not be
8 scrupulous in their observance of their
9 religious belief?

10 A. Yes.

11 Q. Okay. And in your observation of
12 the decisions that you've reviewed in your
13 quality control responsibility, have you seen
14 decisions or votes by members of the Citywide
15 Panel that rely upon the unscrupulous, if you
16 will, or not scrupulous observance of vaccine
17 objections by applicants to deny the religious
18 accommodation request?

19 A. In cases where there are a variety
20 of factors that compel denial or cause someone
21 to question the sincerity, it is entirely
22 possible that there may be an inconsistency
23 that is unexplained and does not -- and the
24 other factors that are provided by the
25 employee in the circumstances don't mitigate

1 E. EICHENHOLTZ

2 to a degree where one of two things may become
3 true dependent on the facts and the
4 circumstances. One, the belief may not be
5 seen as sincere, or two, that the employee's
6 practice of that particular belief does not
7 extend to the sort of practice that would
8 conflict with the vaccine requirement, but --

9 Q. And -- go ahead, please finish your
10 answer.

11 A. So I was going to say, so it's not
12 necessarily -- the conclusion there isn't
13 necessarily, oh, it's not scrupulous, right?
14 But there may be related issues where the
15 frequency or the consistency of practice
16 becomes a factor.

17 Q. Could the lack of scrupulous
18 observance of objection to vaccines be the
19 sole basis for denying religious accommodation
20 request?

21 A. There is generally -- that would
22 presume, and this is why I'm pausing here for
23 a moment, that would presume that's the only
24 thing presented either by the employee or the
25 agency on the record, and that is almost

1 E. EICHENHOLTZ

2 never -- you know, I don't see how that
3 would -- like, I haven't encountered that
4 situation where someone just says, I need an
5 RA because I abstained from some vaccines but
6 not others, you know, period, please consider
7 my request. That's another one of those I put
8 in the bucket of, to me, comes off as a highly
9 unusual fact pattern.

10 Q. Have you ever seen such a fact
11 pattern?

12 A. Not that -- certainly not where
13 there weren't other things to examine about
14 the employee's request beyond that statement.

15 Q. Have you seen situations in which an
16 applicant's conduct pursuant to their
17 religious beliefs has changed over time. A
18 degree of appearance, for example, that
19 increases so that one's current observation of
20 a religious belief has become more stringent,
21 even though it might be different earlier on?
22 Have you seen situations like that?

23 A. Yes.

24 Q. And how should -- does the Citywide
25 Panel have a policy with respect to how that

1 E. EICHENHOLTZ

2 pattern should affect the determination of a
3 voter on whether or not to grant a religious
4 accommodation?

5 A. So the employee -- so that would be
6 one of the facts that the panel members
7 consider in connection with all the facts of
8 the entire record to determine whether or not
9 the employee has a sincerely-held religious
10 belief and whether there's a conflict with the
11 vaccine requirement that could play a role in
12 that fact, could play a role in the
13 consideration, yes.

14 Q. And what about, there's a provision,
15 there's a guidance, there's a discussion in
16 the EEOC Guidance that says that, "an
17 employee's newly adopted or inconsistently
18 observed practices may nevertheless be
19 sincerely held." And to what extent have you
20 ever seen that guidance applied by a panel
21 member in supporting the grant of a religious
22 accommodation?

23 A. Well, as I think you -- you know, I
24 will just sort of echo back to you that that
25 would be applied. As the EEOC says, you can't

1 E. EICHENHOLTZ

2 say without looking at the entire record, the
3 new adoption of religious belief automatically
4 makes it insincere. What you would do, what
5 the panel would do in the way the panel
6 animates that, you know, I focus here on the
7 word may, they would review the entire record,
8 all the relevant facts, and make a
9 determination on the overall record, of which
10 that issue may or may not be a contributing
11 factor.

12 Q. And so, does your Citywide Panel
13 have a policy following the EEOC Guidance that
14 no one factor or consideration should be
15 determinative and that the religious objective
16 should be evaluated on an individual basis?

17 A. Finally, yes, we do have a policy.
18 And that is generally how we approach it. You
19 know, we look at all the facts, and we weigh
20 those facts. And like I said, to the extent
21 I've seen disagreements between the panel
22 members, it is usually over how the facts are
23 waived.

24 Q. So I'd like to refer again to our
25 Exhibit 1, which is the email exhibit.

1 E. EICHENHOLTZ

2 A. Uh-huh.

3 Q. So in that exhibit, one of the
4 panelists from the Law Department states, "I'm
5 mostly seeing folks expressing their view that
6 all COVID vaccines contain or were tested
7 using fetal stem cells and some personal
8 statements saying I've never taken vaccines
9 ever, or not since I become an adult
10 (vaccinated as an adult). My understanding
11 from our conversation is that those would not
12 constitute sincerely-held religious beliefs."

13 Do you find that text in the email?
14 Have you seen that?

15 A. Yes, I see that text.

16 Q. And that's what it says, right?

17 A. That is what it says.

18 Q. Okay. Now, it looks like this email
19 is saying that the Citywide Panel had a policy
20 that the objection that all COVID vaccines
21 contain fetal stem cells does not constitute a
22 sincerely-held religious belief. Was that a
23 policy that the panel ever had in place?
24 That's the first question.

25 A. No.

1 E. EICHENHOLTZ

2 Q. Is that a policy?

3 A. Yeah, no, no.

4 Q. Aside from in this email, have you
5 heard that view expressed in the course of
6 your discussions with the other panel members?

7 A. Only in this email, and it was a
8 part of what animated my response to this
9 email and my follow up with that panel member,
10 was seeing that particular comment in the
11 previous email. It showed me there was
12 confusion that needed to be clarified.

13 Q. So why didn't you clarify that in
14 your response in the email?

15 A. That is the line General Gist and
16 the fact pattern is, employee articulates
17 sincerely-held belief, has articulated how
18 they act on that belief outside the COVID
19 context, and has properly applied the belief
20 to the COVID vaccination. That was my first
21 step in doing it. You know, we had follow-up
22 discussions to this email, not via email, but
23 that was my very quick response to let him
24 know that that is -- that yes, there are
25 occasions where that would be the basis of a

1 E. EICHENHOLTZ

2 grant.

3 Q. Well, you didn't specifically
4 mention the objection of using fetal stem
5 cells or any of the other details that the
6 panelists wrote in the email. Why is that?

7 A. Again, because -- and I've expressed
8 this throughout this discussion, my view was I
9 was very hesitant to put any particular
10 religious belief, religion issue in a
11 particular yes or no bucket because I don't
12 think that is the way -- that shortcuts things
13 too much. And so, what I was doing more was I
14 was talking about the various factors that
15 would weigh in one direction or another.

16 Q. Well, you said you were not wanting
17 to put specific religious beliefs into one
18 bucket or other, but it seems to me that
19 this -- well, and I see in the email, it says
20 that this person's understanding was that this
21 didn't even constitute a religious belief, a
22 sincerely-held religious belief. Did you
23 unequivocally tell this person either -- it
24 would have had to have been orally because you
25 said it's not in an email --

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

A. Right, right.

Q. -- that a belief with respect to COVID vaccines could be a religious belief?

A. With respect to COVID -- you mean the fetal stem cell testing?

Q. Yes.

A. Yes, if -- I wouldn't have said it unequivocally because it's not an unequivocal concept. There are people who oppose fetal stem cells in testing and do not do so as a matter of religious belief. There are individuals who possess a religious belief that might cause them opposition to the use of fetal stem cells in testing, but nonetheless their religious beliefs in their personal view would permit them to take the vaccine. So I would not say anyone who says fetal stem cells, that's always religious, that's always a yes. You have to look at the record, understand what the source of the religious belief is. Obviously, if the employee says, I'm a Catholic and through my Catholic upbringing and the teachings of the church, I believe that life begins at conception, or

1 E. EICHENHOLTZ

2 life begins at fertilization, if that's what
3 they believe and the source of that is a
4 religious belief, and I have practiced that
5 religious belief by making sure I was never
6 even remotely connected to abortion, including
7 I will not take any vaccines that were tested
8 on cell lines derived from fetal cell lines,
9 then yes, that would be a scenario. But there
10 are a lot of pieces of that scenario that come
11 together. You can't generalize and say that
12 everyone who is opposed to the use of cells
13 derived from -- and by the way, fetal stem
14 cells, fetus that are a product of abortion I
15 think is really the key there. You cannot
16 generalize or assume, you know, absent more
17 from the employee, what the source of that
18 belief is or how it's practiced.

19 Q. Now, some of the applications may
20 have contained claims of belief that vaccines
21 actually contain aborted fetal cells as
22 opposed to being somehow, you know, derived
23 from them or being somehow perhaps tested
24 using them. And were the panel members given
25 any instructions with respect to whether or

1 E. EICHENHOLTZ

2 not any one of or all of those factual
3 contentions were truthful or accurate?

4 A. So we go off of the CDC Guidelines
5 and have DOHMH available to us for any medical
6 questions. My understanding and the factual
7 understanding that we've been functioning on
8 is, because we're doing this in the context of
9 the City Health Commissioner's order and the
10 City Health Commissioner has the authority to
11 make those sorts of medical determinations, is
12 that there is for, I believe, the Pfizer and
13 the Moderna vaccines, there was fetal -- there
14 were cells that were derived from fetal stem
15 cells that were a product of abortion a
16 lengthy period of time ago used in the
17 testing, and that in Johnson & Johnson it was
18 used in sort of the manufacturing, and that
19 neither actually contained those cells,
20 particularly the Pfizer and the Moderna.

21 And when we're applying facts, we
22 are going off the facts that the health
23 commissioner relied on in issuing his order.
24 One could not change those facts by saying
25 that, I do not believe the factual findings of

1 E. EICHENHOLTZ

2 the health commissioner to be true.

3 Q. So if a person cited something that
4 you found to be factually incorrect, was it
5 the policy of the panel that that should be a
6 count against the application for religious
7 accommodation on behalf of that person?

8 A. No, no. What would happen there is
9 we would look at all the facts and the basis
10 for the belief. What might happen there, for
11 example, if someone says, the way I practice,
12 I have a religious belief that prevents me
13 from being associated with abortion, and that
14 belief compels me to never inject cells
15 derived from an aborted fetus into my body,
16 well, these vaccines do not require that, so
17 when you review that record, absent something
18 more, there may be something more that
19 suggests a broader conflict, there would be no
20 RA there because there would be no conflict
21 because the employee could take that vaccine
22 without offending the employee's religious
23 beliefs.

24 So that's not -- I wouldn't call
25 that counting it against the employee. That's

1 E. EICHENHOLTZ

2 assessing the employee's own religious beliefs
3 on the terms and in the manner the employee is
4 explaining it to the agency and that we're
5 reviewing it on appeal.

6 Q. So essentially, then, under those
7 circumstances, the panelist would be
8 determining that the applicant was not
9 violating his own beliefs if he or she were to
10 be taking the COVID-19 vaccine?

11 A. No, the applicant made that
12 statement in connection with a request. The
13 panel's not making that determination.

14 Q. No --

15 A. The applicant is providing us the
16 circumstances under which there is a conflict.

17 Q. Yes.

18 A. We would be applying the applicant's
19 circumstances. We're not making any
20 determination there about the applicant's
21 religious belief.

22 Q. Well, you are making a -- if a
23 religious belief, you know, if it's expressed
24 as an opposition to taking the COVID-19
25 vaccine and it's expressed as being on the

1 E. EICHENHOLTZ

2 basis of a belief that the COVID-19 vaccine,
3 you know, contained aborted fetal stem cells,
4 then aren't you saying essentially that the
5 religious belief is wrong of the applicant, or
6 are you saying something else?

7 A. No, absolutely not. I'm saying in
8 that circumstance, I'm saying that the
9 employee doesn't have those -- the employee
10 has a belief that's sincerely held, they
11 practice it in a certain way, and taking the
12 vaccine is not inconsistent with how they've
13 articulated they will practice their belief.
14 There is no judgment whatsoever in that
15 scenario about the employee and their belief.

16 Q. Well, are you -- it seems to me that
17 there is, and correct me if I'm wrong, but
18 aren't you essentially the determining in the
19 course of that adjudication that a person's
20 belief that there are fetal stem cells
21 contained in the vaccine is not religious?

22 A. No.

23 MR. HAIDER: Objection.

24 A. Absolutely not. I'm -- in that
25 scenario I described, I made the following

1 E. EICHENHOLTZ

2 conclusions. One, that the person's objection
3 to fetal stem cells is religious in nature,
4 let's say for our hypothetical that person
5 says as a result of their Catholic religion.
6 Second, that they have a sincerely-held belief
7 that is practiced in such a manner that it
8 could potentially apply to vaccinations. And
9 third, that they've provided an explanation of
10 what practices would offend their religious
11 beliefs. And all of those things are accepted
12 is true in that scenario. There is no
13 judgment about the employee's belief there.

14 What is done is factually, it's
15 actually the judgment is on the vaccine
16 mandate. Looking factually at the vaccine
17 mandate, there is nothing that conflicts with
18 that religious belief as the employee has
19 expressed it. So there are no judgments being
20 made in that scenario about the sincerity or
21 the extent of the employee's religious belief.

22 Q. But you are making a judgement with
23 respect to the voracity of the belief --

24 A. No.

25 Q. -- to the extent that the belief

1 E. EICHENHOLTZ

2 includes an assertion that stem cells are
3 contained in the vaccine?

4 MR. HAIDER: Objection.

5 A. That's not a religious belief.

6 Q. I was asking. That's my question.
7 You're saying that's not a religious belief?

8 A. Yes, that's not a religious belief.
9 That's not part of the employee's religious
10 belief. The employee's believing that stem
11 cells are in a vaccine that doesn't contain
12 stem cells. That's a fact, the employee may
13 be mistaken about how -- what's contained in
14 the vaccine, there may be a misunderstanding
15 by the employee about the vaccine's
16 ingredients, but that doesn't constitute a
17 religious practice or belief when an employee
18 makes a -- you know, is applying -- is
19 describing, this is how I apply my beliefs,
20 and the vaccine mandate doesn't require the
21 employee to do something that doesn't -- you
22 know, that doesn't conflict with those
23 beliefs.

24 Q. What if the employee is basing the
25 employee's belief on -- with respect to the

1 E. EICHENHOLTZ

2 presence of fetal stem cells in a vaccine on
3 information or direction that has been
4 provided to the applicant by a spiritual
5 director or a clergy person of their faith?

6 A. It's not a religious belief. They
7 cannot -- an employee cannot claim a vaccine
8 contains something they don't claim. If the
9 clergy says it, if -- regardless. If someone
10 says the sky is green, that is -- you know,
11 and we know the sky is blue, then the sky is
12 blue. You know, that is not -- you can't
13 change the underlying facts of what the
14 mandate requires by having a member of clergy
15 say, well, actually the facts are different
16 than what the mandate requires. You can't --
17 there's no legal or factual basis to do
18 something like that.

19 MR. HAIDER: Mr. Nelson, if we could
20 just take a ten-minute bathroom break.

21 MR. NELSON: Sure. We'll break for
22 ten minutes. I have 2:32, but whatever
23 ten minutes is, let's take it and come
24 back.

25 THE VIDEOGRAPHER: We're now going

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. EICHENHOLTZ

off the record. The time is 2:32.

(Recess was taken.)

THE VIDEOGRAPHER: We're now back on. The time is 2:43.

BY MR. NELSON:

Q. So, Mr. Eichenholtz, who gets to make the decision as to whether or not a belief is religious in nature?

A. "Religious in nature." It would be assessed obviously in the first instance, in the primary instance, at the agency level as a result of the information they have, the cooperative dialogue, upon consideration of what the employee has advised, the information the employee has provided.

Q. Why would it not be a matter for the individual involved and his or her pastor or religious leader to make that determination as to whether or not it was a religious, you know, bit of information or a belief?

A. It would be. I don't think we're -- I'm referring more to the process. We're here talking about the process. You're absolutely right, the agency is obtaining information

1 E. EICHENHOLTZ

2 from the employee and potentially, if they
3 provide some furnished information from the
4 employee's religious leader, and that is what
5 the agencies consider.

6 Q. So if an individual, if an employee
7 is making a religious accommodation request
8 based upon instructions the employee has
9 received from his religious leader that the
10 panel finds to be factually untrue, what turns
11 that into not being a religious belief?

12 A. It's not, not a religious -- it is a
13 religious belief.

14 Q. So, for example, taking the scenario
15 that we were discussing before, if the
16 religious leader has told the congregation to
17 which the employee belongs, the applicant,
18 that there stem cells derived from abortion
19 that are contained in all of the vaccines, and
20 that therefore, in order to be religiously
21 observant, the applicant must not take any of
22 the COVID vaccines, how can the panel be
23 empowered to determine that it's not a
24 religious belief?

25 A. That -- they wouldn't be. In this

1 E. EICHENHOLTZ

2 circumstance, the panel will not be
3 questioning that that is the employee's
4 religious belief.

5 Q. And so, as a consequence, what the
6 panel in that circumstance should do is not to
7 count the inaccuracy of any factual element of
8 that belief as disqualifying the person from
9 having a religious belief with respect to the
10 use of the vaccine, correct?

11 MR. HAIDER: Objection.

12 A. With respect to the determination
13 that the employee has a particular religious
14 belief, yes, that's correct.

15 Q. Okay. And so, if the panel, then,
16 decides to deny that application, the panel
17 would be requiring the appellant to violate a
18 sincerely-held religious belief; isn't that
19 correct?

20 A. No, that's not correct.

21 Q. Well, you've got a denial that
22 sanctions the person for not taking a vaccine,
23 right? The person loses his job.

24 A. A denial that -- well, the person
25 would then be subject to the vaccine mandate,

E. EICHENHOLTZ

1

2 yes.

2

3 Q. Okay. And to be subject to the
4 vaccine mandate, a person has to take the
5 vaccine or --

3

4

5

6 A. Correct.

6

7 Q. -- suffer sanctions, correct?

7

8 A. "Suffer sanctions"? Well, to
9 continue in their employment, yes, they're
10 going to have to take the vaccine.

8

9

10

11 Q. Okay. So how is that -- if granted
12 what you just conceded is a sincerely-held
13 religious belief, how does that -- how does a
14 denial of the exemption application not force
15 this person either to violate their
16 sincerely-held religious belief or to suffer
17 sanctions for refusal to violate the belief?

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

 A. Because, and I think we're really
getting into legal arguments which are not,
quite frankly, for me to make in this context,
what the panel is doing there is not
denying -- or the agency and then the panel is
affirming in this instance is not affirming a
denial on the ground that the employee does
not have a sincerely-held religious belief.

1 E. EICHENHOLTZ

2 Q. What would it be doing in the
3 contrary, if it is not doing that?

4 MR. HAIDER: Objection.

5 A. It's denying the -- it's not -- it's
6 making a determination that a reasonable
7 accommodation is not appropriate under the
8 facts and circumstances presented, and there
9 are a whole panoply of reasons that the panel
10 would do that, one of which is the sincerity
11 of a religious belief.

12 Q. But haven't you just conceded that
13 we're dealing with a scenario in which we have
14 a sincerely-held religious belief? They
15 couldn't under those certain circumstances,
16 given no other facts on the matter, conclude
17 otherwise, correct?

18 A. If the belief was insincere?
19 Correct.

20 Q. That it was insincere.

21 A. The panel under those circumstances
22 could not conclude the belief is insincere,
23 that is correct.

24 Q. Or that --

25 A. I mean, absent some additional

1 E. EICHENHOLTZ

2 circumstances, we're not talking about a
3 hypothetical. But that's not the only reason
4 a reasonable accommodation would be denied.
5 So that's what I'm trying -- you know, I'm
6 trying to answer your question to the best of
7 my ability.

8 Q. Sure. And again, I'm trying to get
9 through an outline that I have, and I'm
10 skipping over all the ones where we've asked
11 the question before, so I'm actually saving
12 you time by doing it like this.

13 So were Citywide Panel members given
14 an instruction as to how to handle
15 applications that contained objections that
16 were based upon factual beliefs about
17 vaccination that were in conflict with the
18 actual findings of the health commissioner?

19 A. They were to consider it, you know,
20 based on the facts and circumstances, applying
21 the various standards of Title VII, and make
22 the determination whether the agency had
23 properly denied the reasonable accommodation.

24 Q. So the decision they were making was
25 whether the agency had properly denied the

1 E. EICHENHOLTZ

2 reasonable accommodation; it was not whether
3 or not the person was entitled to a religious
4 accommodation?

5 A. Well, when we're reviewing it, we're
6 reviewing the denial. So if the person was
7 entitled to a reasonable accommodation, the
8 agency's decision would be reversed.

9 Q. Okay. So what if the facts were
10 imbalanced? What if the evaluator, the panel
11 member, found that the, on the one hand, there
12 were perhaps reasons for the denial, but on
13 the other hand, that they were equally
14 balanced by the reasons for affirmance? Was
15 there a policy of the panel as to whether that
16 should lead to a denial or a grant?

17 A. No specific policy about how one
18 would deal with something where they truly
19 believed the factors were equally balanced.

20 Q. But if the matter deemed decided was
21 whether or not the agency was justified in
22 making its determination, isn't that a
23 different determination than whether or not
24 the applicant was entitled to an
25 accommodation?