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E. EICHENHOLTZ

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A. I'm a little confused. Can you try to rephrase it?

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Q. Sure. There are -- these are two different standards, are they not? One is whether or not the panel, the agency below, was justified, you know, had justification for its decision. The other is, if you're on a de novo standard, whether or not the applicant is entitled to an exemption. They're different standards, they have different weights. It sounds to me like what you're saying is that in making an adjudication of this kind, the Citywide Appeal Panel members were expected to deny if they felt that there was justification for the agency's denial; is that correct? Is that what was being done?

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Q. Where was the expectation?

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A. There was no expectation. The panel was required to review the record, which included the reasons the agency gave for their denial, the information provided by the

1 E. EICHENHOLTZ

2 employee, any information provided by the  
3 agency, balance all of that, review all of  
4 that, and make a determination. If they  
5 determine that the reasonable accommodation  
6 should have been denied, the agency's decision  
7 would be affirmed. If they believed the  
8 record demonstrated an accommodation ought to  
9 have been granted, then they would essentially  
10 reverse the agency and grant a reasonable  
11 accommodation.

12 Q. Did the Citywide Panel have a policy  
13 as to how to treat applications that stated  
14 objections to the vaccine based upon aborted  
15 fetal cells, but where the applications were  
16 silent on the applicant's use of Tylenol or  
17 Pepto Bismol?

18 A. No specific policy on that. An  
19 employee providing us information on use of  
20 medications, because at some point in the  
21 cooperative dialogue either they volunteered  
22 it or the agency solicited that information  
23 obviously would be considered along with any  
24 explanation the agency -- the employee  
25 presented about whether they used or did not

1 E. EICHENHOLTZ

2 use those medications.

3 Q. And what would be the purpose for  
4 eliciting that information about the use of  
5 ibuprofen or Pepto Bismol or any other  
6 medications?

7 A. To understand how the employee  
8 applies his or her sincerely-held religious  
9 belief concerning in that case aborted -- a  
10 religious belief that concerned opposition or  
11 a feeling that there was a prohibition on  
12 abortion, because again, you know, you have to  
13 understand not only the general category of  
14 what the belief is, but how the employee  
15 practices.

16 Q. So what is the relevance of the use  
17 of Pepto Bismol to understanding a person's  
18 religious practices?

19 A. Well, it depends on what they're  
20 claim -- there may be no relevance. It  
21 depends on what their particular claim of  
22 their religious belief is. I think we're --  
23 we've been focused recently on the idea of  
24 religious opposition to fetal cells derived  
25 from abortion, and there are many, many

1 E. EICHENHOLTZ

2 people, probably millions, who have that  
3 religious opposition, would use those sorts of  
4 products and would use many and all products  
5 in which there was scientific testing where  
6 there may or may not have been those sorts of  
7 cells. That their religious practice is  
8 baited upon, for example, not, you know,  
9 carrying a baby to term, not engaging or  
10 encouraging abortions, things like that, but  
11 that is where their personal practice of that  
12 religious belief ends, and that there are  
13 others who will practice it differently and  
14 practice it far more deeply when it comes to  
15 the area relevant to the vaccine mandate. And  
16 not all people -- you know, we don't  
17 stereotype. Not all people who have a  
18 religious belief concerning abortion believe  
19 in the same things and practice their beliefs  
20 in the same way.

21 Q. Why would the Citywide Panel or the  
22 agencies below ask a question about Pepto  
23 Bismol?

24 A. As I said, first thing, I don't know  
25 why they would ask about Pepto Bismol or not.

1 E. EICHENHOLTZ

2 As I said, if they did and if the employee did  
3 it, we would consider it amongst a variety of  
4 other factors in the record to the extent  
5 there's any relevance to determine it. And  
6 that at the end of the day is what we're  
7 doing.

8 Q. I'm sorry, but that doesn't get at  
9 the nature of the question. I was asking  
10 about Pepto Bismol. Why in the world would  
11 anyone involved in the City's, you know,  
12 determination of these questions or the  
13 appeals, believe that use of Pepto Bismol was  
14 somehow relevant to the sincerity of a  
15 religious belief that the aborted fetal cells  
16 should not be, you know, ingested?

17 MR. HAIDER: Objection.

18 A. I don't -- I don't know the answer  
19 to that question. To the extent it's helpful,  
20 I can tell you that I'm not aware, and I don't  
21 believe there's any member of the panel who  
22 has denied an appeal on the ground that an  
23 employee has taken Pepto Bismol.

24 Q. And the same questions with respect  
25 to ibuprofen. Why would anybody -- well, I

1 E. EICHENHOLTZ

2 mean, you can see -- well, first of all, let  
3 me step back. I'll take that pending question  
4 off the record, please.

5 You are aware, were you not, that  
6 questions have been raised repeatedly,  
7 frequently by the agency's below and discussed  
8 in the records that you've reviewed in the  
9 Citywide Appeal Panel process concerning the  
10 applicant's use of Pepto Bismol, correct?  
11 You're aware of that?

12 A. Yes.

13 Q. Okay. Is there some fact that  
14 relates to Pepto Bismol that you think might  
15 make use of Pepto Bismol relevant in any way  
16 to an inquiry into the sincerity of someone's  
17 religious belief?

18 A. I don't know if this is the case or  
19 not, but it could be that if Pepto Bismol was  
20 a product that was derived indirectly or  
21 tested indirectly from abortion, aborted fetal  
22 cells, it might have an analogy. So, you  
23 know, an employee might say, well, I  
24 understand Pepto Bismol to be this case and  
25 that's why I abstain from it. You know,

1 E. EICHENHOLTZ

2 generally it would -- you know, as I sit here,  
3 you know, I don't know. I don't know for  
4 sure. I'm not looking at a specific case, and  
5 I can't tell you, as I sit here now.

6 Q. Are you aware that the City Health  
7 Commissioner, the former commissioner,  
8 Mr. Chokshi issued a statement or a paper  
9 mentioning Pepto Bismol and ibuprofen and  
10 containing certain factual assertions with  
11 respect to the use of fetal stem cells in  
12 connection one way or another with those two  
13 products?

14 MR. HAIDER: Objection.

15 A. I'm not aware of a specific paper  
16 issued by the City Health Commissioner, no.  
17 I -- no.

18 Q. And are you aware that the  
19 commissioner had made some statements with  
20 respect to that topic?

21 A. No.

22 Q. And are you aware that some of the  
23 adjudicators of religious accommodation  
24 requests at both the agency level and at the  
25 City Appeals Panel level relied upon some

1 E. EICHENHOLTZ

2 assertions with respect to the use of fetal  
3 stem cells in connection in one way or another  
4 with Pepto Bismol and ibuprofen in  
5 adjudicating religious accommodation requests?

6 MR. HAIDER: Objection. I'm going  
7 to instruct the witness to limit his  
8 answer to as the process of the Citywide  
9 Panel --

10 THE WITNESS: Right.

11 MR. HAIDER: -- agency.

12 THE WITNESS: Thank you, counsel.

13 A. The records I've seen in the panel  
14 generally -- like, what I'm trying to wrap my  
15 head around is I cannot recall, as I sit here  
16 today, did you use Pepto Bismol, yes or no, or  
17 any discussion where it's like, someone used  
18 Pepto Bismol. I remember there have been  
19 questions that tended to group together  
20 products such as Tylenol, Tums, ibuprofen, and  
21 as I understand it, these are products that at  
22 one point in their, you know, in their  
23 creation, in their development, were tested on  
24 cell lines that may have been derived --  
25 again, I don't know if Pepto Bismol was or was



1 E. EICHENHOLTZ

2 not, and as I sit here today and I keep  
3 thinking about it, I certainly can't think of  
4 Pepto Bismol in isolation. The one that I've  
5 seen most frequently is Tylenol.

6 Q. Okay. What is the relevance of  
7 Tylenol, asking questions about Tylenol use to  
8 the existence of a sincerely-held religious  
9 belief?

10 A. Well, the first thing I want to say,  
11 Mr. Nelson, is I see it in both directions,  
12 correct? I see employees volunteering in  
13 support, when they're -- especially where it's  
14 a religious belief that's connected with  
15 abortion. Seeing them affirmatively say, I  
16 don't use Tylenol, acetaminophen, ibuprofen,  
17 and Tums because those products have been  
18 tested on cell lines that derive from  
19 abortion. I do not just see it in agencies --  
20 some agencies have asked that question. I do  
21 not just see it from the agencies. I also see  
22 it from the employees. So, you know,  
23 certainly -- and I've never seen in the  
24 records that I've reviewed a situation where  
25 the agencies, you know, list a bunch of

1 E. EICHENHOLTZ

2 products and the employee said, well, I've  
3 used these because, for example, I don't  
4 understand these to have any connection to  
5 abortion. So that's -- you know, so it's not  
6 accurate to say that this is just something  
7 agencies have asked and that's how I've  
8 encountered it and that's how the panel's  
9 encountered it in their work.

10 Q. What would the -- withdrawn.

11 Does the City have a policy with  
12 respect to the manner in which a religious  
13 accommodation applicant explains what a use of  
14 ibuprofen despite having an objection to the  
15 use of stem cells in the development of the  
16 vaccines and, you know, are there explanations  
17 for which -- of such behavior which the City  
18 panel finds to be acceptable or not?

19 MR. HAIDER: Objection.

20 A. There's no particular policy with  
21 respect to that. You know, I know employees  
22 provided various explanations, and they're  
23 reviewed in conjunction with the other facts  
24 in the record to make the various  
25 determinations that we need to make. So it

1 E. EICHENHOLTZ

2 would not be -- there's no specific policy as  
3 to do this or do that or consider it in this  
4 way or that way.

5 Q. Are you aware of any decisions of  
6 the Citywide Panel that granted a religious  
7 accommodation to anyone who continues to use  
8 Tylenol?

9 A. Offhand, I mean, I can't recall  
10 whether, you know, whether there was an  
11 application that was granted where someone  
12 said specifically, I use Tylenol. I couldn't  
13 tell you that for certain. But like I said, I  
14 can say, categorically, if someone said they  
15 use Tylenol, that's not going to be a  
16 guaranteed rejection of their reasonable  
17 accommodation by any stretch of the  
18 imagination.

19 Q. What training or information, if  
20 any, did Citywide panelists receive with  
21 respect to any connection between Tylenol and  
22 Pepto Bismol to aborted fetal cells?

23 MR. HAIDER: Objection.

24 A. I -- we did not have any specific  
25 training as to Tylenol or Pepto Bismol with

1 E. EICHENHOLTZ

2 respect to aborted fetal cells.

3 Q. And did the Citywide Panel rely on  
4 any particular authority to support the  
5 relevance of Tylenol or Pepto Bismol use in  
6 determining an objection based upon abortion?

7 A. Not that I'm aware of. No one  
8 particular specific authority, no.

9 Q. And did the Citywide Panel consult  
10 with any expert or any scientific studies  
11 about whether Tylenol or Pepto Bismol was  
12 developed using aborted fetal cell lines?

13 A. My understanding is Tylenol wasn't  
14 developed using aborted fetal cell lines in  
15 the first instance. It was developed many,  
16 many years before, but that over the years,  
17 some testing, manufacturing-type work had been  
18 done. That was always my understanding. No,  
19 I don't think there was any specific, you  
20 know -- I'm trying to think of the way to put  
21 this -- a study or -- you know, obviously some  
22 of the medical questions were resolved through  
23 the health commissioner and the Department of  
24 Health and Mental Hygiene who have expertise  
25 in the public health emergency we're going

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E. EICHENHOLTZ

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through, as well as some of the medical issues that were being encountered.

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Q. So was the Citywide Panel made aware

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that the actual development of Tylenol and

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Pepto Bismol did not involve aborted fetal

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cell lines, but after these products were on

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the markets, tests were performed on them

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using fetal cell lines?

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A. Yes. I mean, I don't think we did

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it in a systemic way, but certainly through

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the records that have been reviewed, I'm aware

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of that because it's been pointed -- you know,

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like I said, there is a lot of assertions in

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the cooperative dialogue both from employees

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and from the agencies on this issue that I've

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encountered and the panel's encountered in

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their work.

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RQ MR. NELSON: So, you know, we think

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that pursuant to the requests we've

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already made in this litigation, that we

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should be entitled to any written

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materials that may have been disseminated

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to Citywide Appeal Panel members who

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relied upon them on these topics prepared

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E. EICHENHOLTZ

by Dr. Chokshi or wherever they came from.

A. Okay. That's --

MR. HAIDER: Objection. You can ask a question, but in terms of following up on documents, we can do it in writing. If you have a more pointed question about the existence of documents, go ahead.

Q. So the information that was provided to Citywide Appeal Panel members with regard to Tylenol and Pepto Bismol, was any of that in writing, or was it orally communicated?

A. It was -- it was presented -- we, and I'll say this again because we seem to lose sight of this. The Citywide Appeal Panel is an appellate body. We are not a body to gather facts. Our function is not to do that. We are reviewing the information that is provided by the agency and by the employee about the employee's -- the basis for the employee's requested reasonable accommodation, about the vaccine mandate, about the agency's position to the extent it's relevant, we're reviewing those documents, and we're determining, because we're only seeing

1 E. EICHENHOLTZ

2 denials, whether the reasonable accommodation  
3 should have been denied or should be granted.  
4 That is what we are doing. It is the -- you  
5 know, so no, we did not have any proceedings  
6 where we were gathering facts about Tylenol or  
7 Pepto Bismol or anything like that. The  
8 writings we were reviewing were the records  
9 that were presented to us by the employee and  
10 by the employer and the assertions that were  
11 presented to us by the employee and by the  
12 employer.

13 Q. Did the Citywide Appeals Panel not  
14 send requests to applicants for information  
15 about their use of certain products, including  
16 Tylenol and others --

17 MR. HAIDER: Objection.

18 Q. -- and for information also about  
19 what foods or medications they abstained from  
20 for religious reasons?

21 MR. HAIDER: Objection.

22 A. That's correct. We did that based  
23 on the Department of Education cases, and we  
24 did that based on the fact that we were trying  
25 to approximate as best we could the process

1 E. EICHENHOLTZ

2 agencies had been using to gather that  
3 information so there were inquiries in the  
4 Department of Education cases that  
5 approximated inquiries that we had seen from  
6 other agencies. And in fact, one of the  
7 reasons we asked that question in a more  
8 open-ended way, the way you just described it,  
9 tell us what you abstain from and why, is  
10 because in our view, it was a better way to  
11 allow the employee to explain their religious  
12 practice or belief, because the primary  
13 source, other than maybe practicing employee's  
14 religious leader, if they wanted to provide  
15 documentation from that, to educate us about  
16 extent of the employee's religious belief and  
17 the associated religious practices would be  
18 the employee. So we asked the sort of more  
19 closed-ended question, but we also made sure  
20 that there was also an open-ended question so  
21 that the employee could educate us.

22 Q. Did the Citywide Appeals Panel or  
23 individual panels not also send out  
24 questionnaires about using or abstaining  
25 products to applicants who were not in the



1 E. EICHENHOLTZ

2 Department of Education, but were employees of  
3 other agencies of the City?

4 MR. HAIDER: Objection.

5 A. It could be in isolated incidents in  
6 other cases. Generally the inquiry we have  
7 sent out is a general question of how one  
8 practices their -- the cited religious belief,  
9 whatever it might be, outside the -- you know,  
10 outside of I don't want the COVID vaccine, so  
11 that we can better understand the connection  
12 between that religious practice and the COVID  
13 vaccine and we can understand how the  
14 employees sincerely-held personal belief does  
15 potentially or does not conflict with the  
16 COVID vaccine when the record isn't clear. So  
17 yes, and many employees, again, you know, this  
18 doesn't just come from the agencies, many  
19 employees affirmatively offer that they  
20 abstain from certain products and give us a  
21 reason why to help, you know, the agency in  
22 the first instance, but if the panel feels  
23 that that was missing from the cooperative  
24 dialogue and relevant, ultimately the panel,  
25 after the case is remanded, to understand the

1 E. EICHENHOLTZ

2 nature of their practice. Because as I said,  
3 you know, you need to understand whether there  
4 is a conflict between the religious belief and  
5 the vaccine requirement.

6 Q. Okay. But are you saying that just  
7 because some of the applicants did not follow  
8 the same religious beliefs of other  
9 applicants, that there was to be an adverse  
10 inference to be drawn from their continued use  
11 of products that other people abstained from?

12 MR. HAIDER: Objection.

13 A. No.

14 Q. Well, then what is the purpose of  
15 obtaining the information?

16 A. I explained that in the answer  
17 previously. I'm not going to re-explain that.

18 Q. Is it not true that the Citywide  
19 Appeals Panel drew adverse inferences from the  
20 answers that they obtained from applicants in  
21 the response to questions there concerning  
22 their use of over-the-counter products, like  
23 Tylenol and Pepto Bismol?

24 MR. HAIDER: Objection.

25 A. No. The panel considered various

1 E. EICHENHOLTZ

2 facts presented in the record, balanced those  
3 facts and determined whether the employee had  
4 a sincerely-held religious belief and whether  
5 that religious belief was of such a nature  
6 that the employee's practice with that  
7 religious belief conflicted with the vaccine  
8 requirement. There might be facts that  
9 weighed in one favor or in the other. There  
10 were no adverse inferences drawn. As I said  
11 previously, the panel does not, you know,  
12 imply if an employee volunteers one thing and  
13 not another, and that the other thing would be  
14 unfavorable. That's not, you know, how we go  
15 about these reviews. And you keep trying to  
16 sort of re-characterize and change the way the  
17 panel reviews, and I can't answer the  
18 questions when it doesn't accurately describe  
19 the work that the panel is doing.

20 Q. Did anyone instruct the Citywide  
21 Appeals Panel that as to whether -- I'm going  
22 to withdraw that question.

23 Did anyone instruct the members of  
24 the Citywide Appeals Panel as to how to  
25 determine when the connection between aborted

1 E. EICHENHOLTZ

2 fetal cell lines in a drug or vaccine become  
3 strong enough to form the basis of a sincerely  
4 held religious objection?

5 A. No, because that's not what -- we're  
6 not looking at the strength of the religious  
7 belief at all.

8 Q. So what definition of "sincerely  
9 held" do you use in reviewing religious  
10 applications for accommodation, and where do  
11 you get that definition?

12 A. Does the employee sincerely believe  
13 what they are describing what they believe.  
14 And the get that definition from the EEOC  
15 Guidance and the law.

16 Q. How do you determine if an  
17 applicant's beliefs are sincere?

18 A. The EEOC Guidance provides  
19 generally, you will start at the place that  
20 what they're saying is accurate and sincere.  
21 If you start seeing facts that suggest  
22 otherwise and you may choose to engage in  
23 limited inquiry to test the sincerity of that  
24 belief if you're starting to see those  
25 objective facts, and you look at those facts.

1 E. EICHENHOLTZ

2 And if there are facts, you know, through  
3 inconsistencies, through other factors, you  
4 know, undermine the sincerity of the belief,  
5 then you would find the belief insincere.  
6 And, you know, you could undergo that inquiry  
7 if necessary. It's certainly not always  
8 necessary.

9 Q. So you used the word "accurate."  
10 What role does the accuracy of a person's  
11 religious belief have with respect to whether  
12 or not it is sincerely held?

13 A. So, you know, I don't think I  
14 described an accuracy of a religious belief.  
15 A religious belief --

16 Q. "Accurate and sincere," I'm quoting  
17 you.

18 A. I don't believe --

19 Q. You said, "accurate and sincere."

20 A. I don't believe I used the word  
21 "accurate." I said --

22 MR. NELSON: Would the court  
23 reporter please read back the --

24 A. I need to hear the context.

25 MR. NELSON: -- the question that is

1 E. EICHENHOLTZ

2 the last substantive question that I asked  
3 and then the first two sentences of the  
4 witness' response.

5 (Record read.)

6 MR. NELSON: Thank you. That's  
7 enough.

8 Q. So what relevance does the accuracy  
9 of a belief have to do with whether or not it  
10 is sincerely held?

11 A. I don't -- I understand the court  
12 reporter read back that word. There is no  
13 accuracy of a religious belief. What you have  
14 to look at -- oh, that's what I said, I said  
15 you start at the place where you assume that  
16 the religious belief is sincere, and then if  
17 you start seeing objective facts that might  
18 cause you to question the sincerity, you then  
19 might consider in the agency, on appeal the  
20 agency may have already taken this step, so  
21 the appeals panel may not take it, but you  
22 start -- you might do some limited factual  
23 inquiry to explore that further, and then you  
24 review those facts. That's how you're  
25 supposed to go about it.

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E. EICHENHOLTZ

Q. But the accuracy of the belief has nothing to do with whether or not this is sincere; is that correct?

A. That is correct. I mean, listen, I don't even know conceptually how a religious belief could be accurate or inaccurate because it is what someone believes.

Q. So -- sorry.

A. No, go ahead.

Q. Is it an objective fact or a subjective standard that is used to determine whether or not an applicant's beliefs are sincere?

A. You're relying on objective facts. So if you don't have objective facts to cause -- you know, if someone denies, you know, essentially subjectively, without being able to point to objective facts, that's not appropriate. You need to point to objective facts. And generally, in our review, I think when the agency EEO officers are making their determination, as well, we're looking for those objective facts. It can't be, like, a gut feeling or something like that.

1 E. EICHENHOLTZ

2 Q. Oh, okay. Who determines that a  
3 religious belief cannot be a gut feeling?

4 A. No, no, no, no, no. I said "it,"  
5 meaning the determination of the person about  
6 sincerity, the determination of the  
7 adjudicator about sincerity cannot be a gut  
8 feeling. I'm not talking about the religious  
9 beliefs. I'm sorry I used a pronoun there  
10 and you assumed it was the other part that I  
11 was referring to. I'm saying as someone -- if  
12 you're analyzing whether or not a belief is --  
13 the person who is analyzing whether or -- let  
14 me do this to be perfectly clear: The person  
15 who is analyzing whether or not a religious  
16 belief is sincere cannot say it's insincere  
17 because I have a gut feeling that person's  
18 belief is insincere. That's what I'm saying.  
19 Does that make -- does that clarify it?

20 Q. Can a religious belief be considered  
21 sincere if it contradicts what other members  
22 of the religion believe?

23 A. Yes.

24 Q. Can a new found religious belief be  
25 considered sincere?



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E. EICHENHOLTZ

A. Yes.

Q. How are panel members trained on these distinctions?

MR. HAIDER: Objection.

A. Sure, okay. They're asked -- they review the EEOC's Guidance which covers these things, and they're asked to apply each case individually based on the facts and circumstances of those cases, and we have, in the course of this deposition, gone through many hypotheticals and scenarios that would approximate some discussions, you know, a check-ins, not those exact scenarios, that the panel members might discuss to refine their understanding, as well, as we went through the process.

Q. So was the panel instructed to characterize a belief as personal if involved abstaining from substances?

MR. HAIDER: Objection.

A. I don't understand that question.

Q. Suppose an employee stated that they ate a plant-based diet because of their religious beliefs. Was it the policy of the

1 E. EICHENHOLTZ

2 Citywide Panel to conclude that the employee  
3 was making secular, fact-based choices about  
4 food as opposed to religious decisions?

5 A. No, the panel was instructed to  
6 consider that fact in the context of what the  
7 employee was describing as their beliefs, the  
8 reasons for their beliefs, and any other  
9 objective facts or circumstances in the  
10 record, weigh those facts, and make a  
11 determination about whether the employee had a  
12 sincerely-held religious belief and whether  
13 that belief conflicts with the vaccine  
14 requirement.

15 Q. So if an employee stated that he or  
16 she avoided painkillers, for example, or  
17 alcohol or synthetic sweeteners or other  
18 substances because of his or her religious  
19 beliefs, was it the policy of the Citywide  
20 Panel to treat such decisions as personal  
21 preferences?

22 MR. HAIDER: Objection.

23 A. The policy of the Citywide Panel was  
24 to consider those facts, to review what the  
25 employee was saying the nature of their

1 E. EICHENHOLTZ

2 religious belief was, and to look at all the  
3 other facts and circumstances in the record to  
4 determine whether the employee had a  
5 sincerely-held religious belief, and to the  
6 extent the employee did so, that that belief  
7 was in conflict with the vaccine requirement.

8 Q. Would it have been improper for a  
9 panel to characterize abstaining from those  
10 substances that I described in my last  
11 question as being personal preferences rather  
12 than elements of a religious belief?

13 A. No.

14 Q. From the standpoint of the Citywide  
15 Panel's determinations, what difference did  
16 they draw between personal preferences and  
17 religious beliefs?

18 A. It depends on the facts and  
19 circumstances presented by the employee, all  
20 the other circumstances presented in the  
21 record, and the assessment of all those facts  
22 and the weighing of them.

23 Q. So, for example, what circumstances,  
24 what additional circumstances would justify  
25 characterizing, you know, abstaining from

1 E. EICHENHOLTZ

2 substance use of various kinds as personal  
3 preferences as opposed to religious beliefs?

4 A. I abstain from those substances  
5 because my health is important to me, without,  
6 you know -- you know, just in isolation, that.  
7 But again, that's why the context, the facts  
8 and the circumstances of what the employee's  
9 saying and why is important.

10 Q. What if the justification is, it is  
11 both for religious reasons and health reasons  
12 that the person's abstaining?

13 A. Then you have to look at the  
14 individual facts and circumstances, see what  
15 the employee's saying, you might look at other  
16 facts that are presented by the employee in  
17 the record and determine whether it's either  
18 or a combination of both, as best you can  
19 determine given the record.

20 Q. How are Citywide Panel members  
21 instructed to consider appeals from employees  
22 whose religious exemption requests contain  
23 both religious and political beliefs?

24 MR. HAIDER: Objection.

25 A. Okay. I'll repeat this. What you

1 E. EICHENHOLTZ

2 do is you look at -- the panel member's  
3 instructed to look at all the various facts,  
4 circumstances, assertions, what the employee's  
5 saying, any cooperative dialogue that was  
6 held, look at all those factors, weigh them,  
7 look at the objective facts, and make a  
8 determination as to whether it was a religious  
9 belief or political belief or a combination of  
10 the two, and proceed accordingly.

11 Q. If an application cited scripture to  
12 support the objection that the applicant had  
13 to the use of the COVID-19 vaccine, was there  
14 an instruction to members of the Citywide  
15 Panel as to how to apply that fact, the  
16 citation of scripture, to their analysis or to  
17 an application's religious basis?

18 MR. HAIDER: Objection.

19 A. I may repeat this. If someone cited  
20 to scripture to help describe their religious  
21 belief, it would be considered, you know, as  
22 any employee description of what their  
23 religious belief or the source of the belief  
24 is, and it would be considered in conjunction  
25 with the other facts and circumstances

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E. EICHENHOLTZ

presented by the employee and the agency in connection with the application.

Q. If an employee's application indicates that their religion prohibits them from being vaccinated, is there any circumstance under which it would be appropriate for Citywide Appeals Panel to conclude that the applicant's beliefs do not prohibit vaccination?

A. Yes, if the facts and circumstances of the application suggest that based on the employee's description, the other facts and circumstances in the application suggest that there is no conflict between the vaccine mandate and the employee's religious beliefs, then the panel could conclude there is no conflict.

Q. But if the person states that their religious beliefs do prohibit them from being vaccinated, what basis, what justification could the panel have for concluding that that is not the truth?

A. Whatever justification --

MR. HAIDER: Objection.

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E. EICHENHOLTZ

THE WITNESS: Oh, sorry.

A. Whatever justification may exist in that particular case and the facts and circumstances presented by the employee and reviewed by the panel. It would be highly fact dependent, highly fact dependent, and there's no universal answer to that.

Q. What possible evidence could provide a sufficient basis for concluding that what the applicant says is his or her religious belief is not his or her religious belief?

MR. HAIDER: Objection.

A. Again, I've discussed this numerous -- the first thing, that's a different question than the one you asked moments ago, but let's focus on that. That applicant may say, this is my religious belief and then describe facts and circumstances that are inconsistent with that religious belief. So the panel might conclude either one of two things; either the employee does not have that religious belief or the employee does have that religious belief and it's not practiced in a way that conflicts with the vaccine

1 E. EICHENHOLTZ

2 requirement. You know, amongst a variety of  
3 other factors and possibilities that can lead  
4 to that conclusion.

5 Q. Were panelists instructed as to what  
6 to do if they disagreed with an applicant's  
7 interpretation of religious scripture?

8 A. I cannot think of a circumstance  
9 where a panel member would be placed in a  
10 position to disagree with the -- you know,  
11 you're talking about saying, well, they're  
12 saying scripture says this, but I believe  
13 scripture says something else? That would  
14 never happen.

15 MR. HAIDER: Mr. Nelson, I would  
16 note that, you know, we've been doing  
17 close to 90 minutes of hypotheticals of  
18 testimony time, and obviously, we can do  
19 endless amount of hypotheticals, given how  
20 fact sensitive these religious combination  
21 appeals -- requests and appeals are. I  
22 will just, you know, pursuant to rule 30,  
23 it is approaching -- if we continue along  
24 the line of hours of hypotheticals, we are  
25 close to being in a manner that's



1 E. EICHENHOLTZ

2 unreasonably annoying. So I just want to  
3 note that for the record, as we continued  
4 here. And if need be, if this continues,  
5 we may have to call the Court, and as you  
6 know, Judge Scanlon said she's leaving  
7 prior to 4:30 -- or she's leaving at 4:30.  
8 So if we feel the need to terminate or  
9 stop the deposition to call the Court, we  
10 may, if it continues in this manner.

11 MR. NELSON: I certainly have not  
12 intended to act in -- I forget exactly  
13 what the word, I think "annoying" was the  
14 word that you used, but that's not been my  
15 intent. Every question I've asked has  
16 been a legitimate question that is  
17 relevant to the case and within the scope  
18 of the order pursuant to which we are  
19 proceeding. However, it happens that my  
20 next set of questions is not hypothetical.

21 BY MR. NELSON:

22 Q. What input, if any, did the Citywide  
23 Panel receive concerning hardship from the  
24 Department of Buildings?

25 A. Did you say "hardship"?

1 E. EICHENHOLTZ

2 Q. Undue hardship.

3 A. "Undue hardship." So generally on  
4 an undue hardship case, we would have some  
5 sort of explanation or declination letter in  
6 the file that set forth the agency's basis for  
7 concluding that the reasonable accommodation  
8 if granted would present an undue hardship.

9 Q. And did the Citywide Appeals Panel  
10 receive any materials regarding undue hardship  
11 from the Department of Buildings that was not  
12 contained within an individual file sent to  
13 them with respect to an individual employee's  
14 application for religious accommodation?

15 A. Not that I'm aware of.

16 Q. And was information about the  
17 question of undue hardship received -- oh, I'm  
18 sorry.

19 Was it considered outside of the  
20 individual case with respect to which it was  
21 submitted to the Citywide Appeals Panel?

22 A. Generally, as an answer to that, no.  
23 Theoretically if someone saw something, you  
24 know, if a panel -- if there was a denial on  
25 undue hardship or a panel member saw something

1 E. EICHENHOLTZ

2 that suggested there might be an undue  
3 hardship and felt that that was a grounds for  
4 affirmance, they might note that. But  
5 generally, undue hardship cases involve the  
6 agency providing us in the record some sort of  
7 write-up.

8 Q. So are you saying that a -- I'm not  
9 sure that I understand your answer. I was  
10 asking about whether there was material that  
11 had been contained within one appeal file with  
12 respect to that subject that might have been  
13 considered by a panel member in another appeal  
14 with respect to which it was not contained.

15 A. Oh, no, that would not happen; that  
16 would not. I mean, there -- there could be  
17 information about agency operations that the  
18 panel generally knows, but it would not be  
19 material from one appeal file considered in  
20 another appeal, no.

21 Q. All right. Then, let's go through  
22 the agencies. From the police department, did  
23 the Citywide Appeals Panel receive any  
24 information about undue hardship, other than  
25 in connection with individual appeals that

1 E. EICHENHOLTZ

2 were submitted?

3 A. So there are more than 5,000 --  
4 individual appeals? No, no.

5 Q. I'm sorry, what is your answer?

6 A. So I apologize, I thought you were  
7 saying did we categorically receive anything  
8 from the NYPD about undue hardship, and I was  
9 starting to explain that 5,000 appeals, then I  
10 heard your qualifier that outside of  
11 individual appeals.

12 No, we did not hear anything about  
13 from NYPD outside of individual appeals about  
14 undue hardship.

15 Q. Okay. Same question about the fire  
16 department.

17 A. The fire department -- to the panel?  
18 No, no. The fire department, again, the fire  
19 department provides a denial letter that sets  
20 forth its basis for undue hardship.

21 Q. What about the Department of  
22 Education?

23 A. The Department of Education, yes, in  
24 many but not all the cases, the Department of  
25 Education puts in essentially an explanation

1 E. EICHENHOLTZ

2 when they were determining that they were  
3 denying on undue hardship grounds.

4 Q. Was anything received by the  
5 Citywide Appeals Panel other than in  
6 connection with the individual cases, whether  
7 it's in general?

8 A. No.

9 Q. Okay.

10 A. No. Outside, of course, the EEOC  
11 Guidance that describes how one would analyze  
12 undue hardship.

13 Q. First of all, did the Citywide  
14 Appeals Panel receive any information about  
15 undue hardship from any of the agencies  
16 that -- you know, from which appeals were  
17 taken, other than in the individual appeal  
18 files?

19 MR. HAIDER: Objection.

20 A. No.

21 Q. All right.

22 A. No.

23 Q. Now --

24 A. Yeah, because -- right, if there was  
25 a follow-up inquiry, it would be in the

1 E. EICHENHOLTZ

2 individual appeal files. So yes, no, only in  
3 the individual appeals files.

4 Q. And did individual panels of the  
5 Citywide Appeals Panel make inquiries with  
6 respect to information about undue hardship in  
7 any of the individual cases that they have  
8 adjudicated?

9 A. Yes.

10 Q. Okay. In which departments did they  
11 ask for this information?

12 A. I couldn't tell you categorically it  
13 was always this department or that department  
14 or these are the exhaustive lists of the  
15 departments.

16 Q. So potentially from all departments?

17 A. Sure. It would appear in the file  
18 of the appeal.

19 Q. And was any of this information  
20 about undue hardship shared with the  
21 individual applicants for their feedback?

22 A. No.

23 Q. And why not?

24 A. I mean, the denial letters certainly  
25 were, and the applicants had the ability to

1 E. EICHENHOLTZ

2 respond. But the undue hardship issue, again,  
3 is for the agency to describe. You know, it  
4 is the agency's description of their needs and  
5 how their requested accommodation would  
6 interfere with potentially their needs under  
7 the standards set forth in the law.

8 Q. And it's your position, it's the  
9 City's position that the applicants had no  
10 right to respond to the position that the City  
11 was taking with respect to undue hardship or  
12 to provide information to rebut what the  
13 departments were saying?

14 MR. HAIDER: Objection.

15 A. No, that's not the City's position.

16 Q. Then how could they rebut or how  
17 could they respond if they were not provided  
18 with the information that the departments were  
19 providing on the issue of undue hardship?

20 A. You're making this binary  
21 distinction. I've reviewed multiple appeals  
22 where the employees in the first instance have  
23 asserted that there's no undue hardship --

24 Q. It is binary. You win or you lose,  
25 the department fires you or you keep your job.

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E. EICHENHOLTZ

It's binary.

A. Sir, we're not here to have a debate.

MR. HAIDER: Objection.

A. If you have a question for me, you can ask it.

Q. Isn't it binary?

A. No.

Q. How many outcomes are there, potentially, then?

A. There are many outcomes on --

Q. So how many different outcomes there could be in one of these decisions?

A. Well, there -- they -- there's -- an accommodation can be granted, it can be granted permanently, it can be granted temporarily, the accommodation could be denied, it can be denied for a whole host of reasons and a whole host of justifications depending on the facts and circumstances of each case. So I mean the point of the cooperative dialogue is for the employer and -- the employer to assess whether or not an accommodation is appropriate by engaging



1 E. EICHENHOLTZ

2 with the employee, by having a dialogue with  
3 the employee. As I said earlier, it's not a  
4 litigation proceeding, it's not, you know,  
5 employee verse employer. It is the employee  
6 engaging in cooperative dialogue, making a  
7 determination. And with respect to the City's  
8 policy, we also build into that process and  
9 appeal, and that appeal is being reviewed and  
10 a determination being made on appeal either  
11 affirming or reversing or sometimes remanding  
12 and then affirming or reversing the agency's  
13 determination.

14 Q. Isn't there a possible alternative  
15 conclusion also, which is that the  
16 accommodation is not granted exactly as  
17 requested, but in some other form?

18 A. In connection with many reasonable  
19 accommodation requests, yes, that is a  
20 possibility, certainly.

21 Q. How often did the Citywide Appeals  
22 Panel decision result in that kind of  
23 accommodation?

24 A. So I'm going to say this again.  
25 What the Citywide Appeals Panel is doing is

1 E. EICHENHOLTZ

2 not gathering facts. They are reviewing a  
3 record on appeal. In virtually all of our  
4 appeals, the employees are requesting a  
5 particular accommodation, they have engaged in  
6 cooperative dialogue with the employer, and a  
7 determination has been rendered, and we are  
8 reviewing the factual record to determine  
9 whether or not the decision of the agency  
10 should be affirmed or reversed.

11 Q. Now, do you have any statistics with  
12 respect to the percentage of times in which  
13 cooperative dialogue actually was engaged in,  
14 in these appeals prior to the filing of the  
15 appeal at the agency level?

16 A. I mean, I can't think of a file --  
17 there may be one or two where we made  
18 follow-up inquiry, but I can't think of a file  
19 where there wasn't cooperative dialogue of  
20 some sort.

21 Q. What to you would indicate that  
22 cooperative dialogue took place?

23 A. Agency solicited information from  
24 employee, the employee provided information,  
25 or vice versa.

1 E. EICHENHOLTZ

2 Q. And is that a kind of a dialogue  
3 that, in your mind, results in potentially an  
4 alternative -- a grant of an alternative  
5 accommodation; not perhaps one that was  
6 specifically requested by the applicant?

7 A. I don't think what's in my mind is  
8 relevant here. You know, the law requires  
9 that back and forth, and there are sometimes  
10 circumstances where an agency is part of that  
11 cooperative dialogue, says we can't give you,  
12 employee, what we want, but we could provide  
13 this alternative.

14 Q. In your observation, in what  
15 percentage, approximate percentage of your  
16 cases have you seen that exhibited in the  
17 file?

18 A. I mean, I can't put a percentage on  
19 it. Most of them, I'd say the vast majority  
20 are the employee saying, I don't want to be  
21 vaccinated, and I want to come to work, and  
22 the employer saying, well, you -- you know,  
23 basically either you're not entitled to a  
24 reasonable accommodation at all, you know, or  
25 this presents an undue hardship or a

1 E. EICHENHOLTZ

2 combination of those.

3 Q. So how many times have you seen --

4 A. In the religion.

5 Q. Now, how many times have you seen an  
6 employer offer some accommodation which is not  
7 exactly what was requested by the employee,  
8 but that offers some less restrictive means of  
9 trying to accommodate the employee's religious  
10 beliefs?

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

13 The agency's determinations on the  
14 reasonable accommodations are not subject  
15 to this 30(b)(6) testimony.

16 Q. Well, so it's your position that the  
17 Citywide Appeals Panel was not in a position  
18 to grant any kind of accommodation short of  
19 the accommodation that was expressly requested  
20 in an accommodation request?

21 A. So, Mr. Nelson, you've been telling  
22 me a lot today what the City's position is or  
23 is not. I think I'm here to explain that.

24 Q. I'm sorry, that was a question.  
25 There was a question mark at the end of that.

1 E. EICHENHOLTZ

2 A. Yes, it was a statement with a  
3 question mark. The answer is no, that is not  
4 the City's position.

5 Q. Okay. So then the Citywide Appeals  
6 Panel was empowered to consider and grant  
7 accommodations that were not exactly what was  
8 requested by the applicant; is that correct?

9 A. What we would do in that sort of  
10 scenario, if the cooperative dialogue and the  
11 review of the record suggested that that might  
12 be appropriate is we would remand to the  
13 agency for that sort of additional cooperative  
14 dialogue. But, you know, that would require  
15 to be a relevant consideration that would turn  
16 on, you know -- that would be determinative on  
17 whether or not a reasonable accommodation is  
18 requested or denied, and I cannot think of a  
19 circumstance where either the requests or the  
20 cooperative dialogue were turning on that  
21 issue. But, you know, again, there were some  
22 certainly in the medical context that were  
23 considered. But in the religious context, I  
24 can't think of an example.

25 Q. Right. So you can't think of an

1 E. EICHENHOLTZ

2 example in which a case was sent back to --  
3 remanded to the agency in a religious  
4 accommodation context for consideration of  
5 some alternative accommodation?

6 A. I mean, I can't think of an example  
7 where it was appropriate to do so.

8 Q. What would have determined whether  
9 it was appropriate or not?

10 A. If there was something -- again, if  
11 the reasonable accommodation issue was turning  
12 on the nature of the accommodation, there was  
13 suggestion in the record that a lesser  
14 accommodation would both be permissible under  
15 the City's public health order and possibly --  
16 you know, because we wouldn't know, possibly  
17 acceptable to the employee, I'm certain there  
18 could be, you know, if there was something in  
19 the record that suggested that, we might  
20 remand to the agency. But that's generally  
21 not what these requests were about.

22 Q. Well, I'm trying to think of less  
23 restrictive results that might have, you know,  
24 come from application of a mandate. Did the  
25 Citywide Appeals Panel ever give

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E. EICHENHOLTZ

consideration, for example, to suggesting or finding or somehow ruling that being on leave without pay might permit as a condition that a person could be employed outside the agency?

A. So that --

MR. HAIDER: Objection.

A. Yeah, I mean, employees -- many employees had the ability to do so, at least in the short term. And again, I'm not thinking of requests where that's what the employee was seeking or interested in. These requests were generally for an exception to a vaccine requirement that requires the employee -- where the employee's stating they would like to continue coming to work and testing, and the employee's purpose in requesting the accommodation is they want to come to work in their existing job, so, you know --

Q. But were you aware that there was more at stake for employees, and at least in most of these agencies, than simply whether they were going to be coming to the office every day and working?

1 E. EICHENHOLTZ

2 A. Obviously from the employee's  
3 perspective, if they were unwilling to get  
4 vaccinated and were seeking an accommodation,  
5 a great deal would be at stake from the  
6 employee's perspective.

7 Q. Are you aware that the terms of  
8 being on the leave without pay status also  
9 included a rule for bidding them, the employee  
10 who was on leave without pay, from working  
11 outside the agency for gain, for income?

12 MR. HAIDER: Objection.

13 A. I mean, that -- not -- I don't -- I  
14 have no -- no such prohibition, and there were  
15 many different leave statuses at issue here  
16 and I'm, quite frankly, not here to discuss  
17 leave status.

18 Q. Well, you're not aware that being on  
19 leave without pay, which many of these people  
20 were pursuant to your, you know -- the program  
21 that you designed and that other people  
22 designed for the City, that they were not  
23 permitted to earn outside income while they  
24 were on leave without pay?

25 MR. HAIDER: Objection.



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E. EICHENHOLTZ

A. So -- I mean, we're -- we are sort of in this hypothetical world where, you know --

Q. It's not hypothetical. It's a fact. That's what these people are subject to. They can't -- they have no income while they're on leave without pay, and that's why things are so desperate for them. If they were given an option to work at McDonald's even, they might be able to pay their rent.

MR. HAIDER: Objection.

Is that a question or --

A. Yeah, that's a --

Q. So why did the Citywide Appeals Panel not consider other alternative means of providing some accommodation to the applicants, for example, to alter the conditions of their leave without pay status so that they could earn outside income while the pandemic continued?

MR. HAIDER: Objection.

A. I understand. I will say that, as I said, those considerations, at least in the cases that I've reviewed, never presented

1 E. EICHENHOLTZ

2 themselves as, given the nature of the  
3 cooperative dialogue, the nature of the  
4 request, the facts underlying the request, and  
5 the nature of the vaccine mandate, as the sort  
6 of accommodation requests that were either  
7 being sought or that were appropriate in the  
8 circumstances.

9 Q. If you were giving a de novo review  
10 of the cases, why did you not consider such  
11 alternative grants of accommodations? Since  
12 it was de novo, you should have been -- should  
13 you not have been considering all the  
14 different aspects of the case?

15 MR. HAIDER: Objection.

16 A. Not if there is a dispositive issue.  
17 And again, this is an appellate review. So  
18 this is the appeal stage. The employee has  
19 had their cooperative dialogue with the  
20 agency, and there is a record, and we're  
21 reviewing the record for sufficiency. That is  
22 our function. And in that record an  
23 accommodation is sought as cooperative  
24 dialogue, and we're reviewing that process and  
25 the outcome.

1 E. EICHENHOLTZ

2 Q. So how many cases were denied on the  
3 basis of undue hardship?

4 A. I couldn't give you a number.

5 Q. A percentage?

6 A. I would -- the vast majority of  
7 denials are not undue hardship.

8 Q. Were there any --

9 A. That I've seen, that I've seen.  
10 What?

11 Q. Were there any appeals that were  
12 denied on the basis of undue hardship?

13 A. Of course.

14 Q. Okay. And the hardship generally  
15 consisted of what?

16 A. It's -- that's very fact specific.  
17 There's no general.

18 Q. So what hardship would it have  
19 caused the agencies that were employers of  
20 these applicants to permit them to earn income  
21 outside the agency while they were on leave  
22 without pay?

23 A. In- --

24 MR. HAIDER: Objection.

25 A. Indefinitely?

1 E. EICHENHOLTZ

2 Q. What harm would they have suffered?

3 A. I'm trying to understand the purpose  
4 of that accommodation. If someone is not and  
5 never willing to comply and unable to comply  
6 with a mandate that's going to prevent them  
7 from ever returning to the job, what would the  
8 purpose of an accommodation that allows them  
9 essentially to be on leave without pay from  
10 the City and continue their career elsewhere  
11 give them? I'm really -- this is sort of  
12 getting into -- this is becoming -- you know,  
13 it almost sounds like it's a  
14 reverse-engineered hypothetical. Like, I'm  
15 not seeing the purpose in that. You know, I  
16 know that's -- I'm trying to do my best,  
17 Mr. Nelson, to kind of engage with you to help  
18 understand the various processes and things,  
19 but I -- you -- I'm lost.

20 Q. So forgive me, but I thought that  
21 the mandates were emergency orders. Is that  
22 not the case?

23 A. That is the case. Well, the order  
24 is borne out of a public health emergency,  
25 yes.

1 E. EICHENHOLTZ

2 Q. And isn't every emergency order  
3 limited in time?

4 A. This isn't an emergency executive  
5 order.

6 Q. I'm sorry, what isn't?

7 A. This is not an emergency executive  
8 order. This is a public health order of the  
9 City's Health Commissioner.

10 Q. Well, aren't there both emergency  
11 orders and public health orders?

12 A. Yes, there are.

13 Q. And doesn't each public health order  
14 refer to, you know, a currently-existing  
15 emergency?

16 A. Yes.

17 Q. And isn't every emergency, by its  
18 definition, temporary in character?

19 A. Not -- I mean, certainly the  
20 steps -- there is no -- yeah, I mean, yes.  
21 You know, we're talking theoretically here,  
22 there is obviously, and hopefully there will  
23 be a point where, you know, this order doesn't  
24 need to be necessary.

25 RL Q. Well, and isn't it a fact that if

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E. EICHENHOLTZ

and when the pandemic ends, that the public health order will also end?

DI MR. HAIDER: Objection. This is way beyond the scope of this witness' purview at this point.

We're now getting into what neither the mayor or the Department of Health orders when he's here to simply testify about the Citywide Panel's process and the standards used by the Citywide Panel.

So with that, I'm going to instruct him not to answer that question.

Q. Was the Citywide Panel instructed to assume that the City's public health emergency would never end?

A. No.

Q. I'm sorry, did you miss the question?

A. I said no.

Q. All right.

MR. NELSON: Okay. We're going to preserve the question that I asked to which you made the objection for raising with the magistrate judge. We're not

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E. EICHENHOLTZ

going to do that right now.

I'll just note I understand the magistrate judge is leaving at 4 p.m. It's 4 p.m. now. We can't raise it now with her.

MR. HAIDER: She said she's leaving at 4:30 p.m., so we can raise it, if you --

MR. NELSON: Thank you.

MR. HAIDER: Oh, just to be clear, do you intend on raising it? If so, we ask that you raise it now before 4:30. We have no plans to pause this deposition.

MR. NELSON: Yes, I understand. I'm not going to ask it right now.

BY MR. NELSON:

Q. Did any agency provide information to the Citywide Panel as to the number of employees it could afford to employ without causing undue hardship?

A. No, that's not the context of which generally the agencies were borne --

Q. And --

A. -- [inaudible].

1 E. EICHENHOLTZ

2 (Discussion held off the written  
3 record.)

4 A. I was saying the agencies, that's  
5 not really the basis under which some of the  
6 agencies were making their argument. They  
7 were making -- you know, they were explaining  
8 the necessity to have personnel present and at  
9 work and the importance of the agency's  
10 mission and things of that nature.

11 Q. You know, I am certain -- are you  
12 certain that the agencies never mentioned an  
13 inability to afford to pay employees who were  
14 not working in the course of their  
15 explanations of undue hardship at the agency  
16 level?

17 MR. HAIDER: Objection.

18 A. It could be that they did. That  
19 certainly would not be in -- a dispositive  
20 inability to pay employees? That certainly  
21 has never been a dispositive factor in any  
22 appellate determination I've made while on the  
23 panel.

24 Q. How do you know -- I'm sorry.  
25 You're not referring to the votes of



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E. EICHENHOLTZ

other panel members, however?

A. Right. I'm referring to -- I mean, I could also include, based on our, as I said, we've had discussions about undue hardship, defenses and various agencies that have made the assertion and denials on those grounds, and certainly the ability to pay employees has not come up.

Q. So as far as you know, that wasn't an element of undue hardship for any of the agencies with respect to which religious accommodation or medical accommodation appeals were made?

A. I can't --

MR. HAIDER: Objection.

THE WITNESS: Sorry.

A. I can't rule out that that was some assertion, you know, fits that characterization was made by an agency.

Q. And was any information about their ability or inability to make payroll with unvaccinated persons ever submitted in any of these cases, so far as you know?

MR. HAIDER: Objection.

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E. EICHENHOLTZ

A. Not that -- I've never seen any document like that, no.

Q. Did any agency provide any information as to the additional costs it could afford to spend without causing undue hardship?

A. Additional costs -- I don't -- what does that mean, additional costs they can afford to spend without causing undue hardship?

Q. Yeah.

A. I'm sorry, I'm just -- I don't understand that.

Q. I can --

A. Try to re- -- yeah, if you can rephrase.

Q. I'm not asking a question if I respond to you.

In context of the question, the last question that I'm still asking you to answer, costs are money that an agency might need to spend in the context of making an accommodation to a request for religious accommodation.

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E. EICHENHOLTZ

A. Right.

Q. So did any agency provide you with any information as to those kinds of additional costs that it could afford without causing undue hardship?

A. Not that I recall.

Q. Okay. Did any agency provide any information to the panel as to the number or nature of unfilled positions it was seeking to fill at any time?

A. Unfilled positions? It could have been; I don't know. I know -- I think there was some discussion of staffing of certain requests. Whether those were vacancies that needed to be filled or the importance of maintaining proper staffing I can't characterize accurately, as I sit here today.

Q. Was any of that information considered to be relevant as to whether or not the agencies would suffer undue hardship by granting a religious accommodation?

A. I can't specifically recall whether the information meeting that description was made, so I certainly can't tell you whether it

1 E. EICHENHOLTZ

2 was relevant or not. As I said, we assess the  
3 agency's explanation and generally with the  
4 needs of the agency, the importance of  
5 staffing, things like that.

6 Q. Did any agency provide information  
7 about its capacity to work with remote  
8 workers?

9 A. Generally speaking, and again, there  
10 may be specific exceptions to this, but I will  
11 state this as the rule, agencies that have  
12 positions for which remote work is permissible  
13 were not claiming undue hardship. There may  
14 have been agencies that asserted undue  
15 hardship in those sorts of positions, and the  
16 panel would take into consideration whether  
17 the described nature of the work was such that  
18 maybe an alternative accommodation like remote  
19 work was permissible when determining whether  
20 or not, you know, it would be appropriate to  
21 deny a reasonable accommodation on the ground  
22 of undue hardship.

23 Q. You used the word "may" in your last  
24 answer. Did the Citywide Appeals Panel ever,  
25 you know, consider that, the question of the

1 E. EICHENHOLTZ

2 capacity of agencies to work with remote  
3 workers in deciding a religious accommodation  
4 appeal?

5 A. So again, now we're sort of talking  
6 about two slightly different things. You're  
7 talking about agency capacity, budgets, things  
8 like that. I'm focused more on the nature of  
9 the position the employee has, right? So an  
10 agency may have a capacity for remote work,  
11 but if the employee is engaged in a job for  
12 which the presence at work is needed, even if  
13 the agency has other positions that other  
14 people believe they may be able -- they can do  
15 potentially remote, it might not be a factor.  
16 And that's why I say "might," because it's  
17 highly dependent on the specific facts.  
18 Again, as I've said so many times today, this  
19 is an individualized fact-based interview --  
20 process, and so it really depends on the  
21 particular facts; what the employee's title  
22 is, what the agency's claiming is undue  
23 hardship. And we would review all those  
24 things in connection with an undue hardship  
25 application.

1 E. EICHENHOLTZ

2 Q. Did agencies provide information --  
3 and this is not just to the panel directly,  
4 but in any of the -- this applies also to the  
5 files that they have for the individual cases.  
6 Did they provide any information to the panel  
7 about arrangements they have already made to  
8 accommodate unvaccinated workers whose  
9 accommodation requests were granted?

10 A. There may have been. I can't recall  
11 any, offhand.

12 Q. Did any agencies fail to provide  
13 information about their ability to accommodate  
14 unvaccinated workers with remote work or with  
15 work in an isolated site for unvaccinated  
16 employees?

17 A. No.

18 Q. So they all provided you with that  
19 information?

20 A. No, we were aware -- I can think of  
21 one example in particular of an agency that  
22 had provided accommodations for remote work  
23 sites.

24 Q. And what agency was that?

25 A. That was the Department of

1 E. EICHENHOLTZ

2 Education.

3 Q. And did their provision of remote  
4 work sites have any effect upon the -- did it  
5 result in the grant of any accommodations for  
6 a religious accommodation by the Citywide  
7 Appeals Panel?

8 A. It was a factor considered in  
9 whether or not to grant -- you know, to affirm  
10 the denial or grant the reasonable  
11 accommodation.

12 Q. What was the information that the  
13 Department of Education provided to you  
14 concerning remote sites for unvaccinated  
15 employees?

16 A. I believe that they had given  
17 teachers sort of temporary accommodations  
18 working in remote work sites, you know, in  
19 connection with some of their reasonable  
20 accommodation cases, and the panel inquired  
21 and wanted an explanation as to why the  
22 employees that we were reviewing would present  
23 an undue hardship on the agency. And they  
24 provided the explanation, and the panel  
25 members reviewed it and voted accordingly.

1 E. EICHENHOLTZ

2 Q. So was that information provided  
3 only in connection with individual cases, or  
4 was it provided to the appeals panel as  
5 general information available to all the  
6 members of the panel?

7 A. I don't -- we certainly made the  
8 inquiry of DOE I think because whether the  
9 entire panel was aware, whether it was just  
10 some of us were aware that that had happened  
11 and we wanted to understand the basis for an  
12 undue hardship assertion and to evaluate that.

13 Q. So it may very well have been  
14 provided to the panel as a whole and not  
15 something to individual panelists?

16 A. I know that in our check-ins, we  
17 discussed DOE and undue hardship and even the  
18 fact the DOE had some people working sort of  
19 temporarily offline was discussed in those  
20 discussions. So we were generally aware, and  
21 I know that we made inquiry of the Department  
22 of Education in regards to cases that we were  
23 reviewing to understand their position on the  
24 undue hardship issue.

25 Q. And some of the information was



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E. EICHENHOLTZ

provided to you in writing from the Department of Education?

A. Yes. The writings were submitted in -- the inquiry and the writings were made in individual cases, and I think eventually, you know, the inquiry almost became, like, a standard inquiry, and they would give us the writing in appropriate cases. You know, there were cases the DOE did not assert an undue hardship position, and they didn't give us a writing in those cases.

RQ MR. NELSON: Well, so we are going to be requesting copies of any writings that reflected or constituted any of that information from the DOE regarding the remote sites.

Q. Did the DOE ever tell you whether their remote sites were filled to capacity?

A. I don't think we asked about that, whether they were filled to capacity or not.

Q. And you didn't --

A. We didn't ask.

Q. -- information about it?

A. Not that I am aware of.

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E. EICHENHOLTZ

Q. And why didn't you ask about the extent of their capacity remaining?

A. Because it was for DOE to explain to the panel why DOE was asserting an undue hardship in these individual circumstances.

Q. At what time did the Department of Education first provide you with this information about its remote site capacity?

A. Again, I don't think DOE provided us the information. I think we were aware that there had been people, you know, who were assigned to remote sites through the reasonable accommodation process, and we wanted to understand what their position was with respect to the appeals that we were reviewing, and they provided us in each individual case that they were asserting undue hardship, the DOE that is, the DOE provided us with an explanation for that assertion.

Q. When did you first obtain that information?

A. Again, the DOE filed that information into Salesforce, either contemporaneously with other documentation or

1 E. EICHENHOLTZ

2 separately, when the panel was considering  
3 various DOE appeals.

4 Q. So did you -- did the panel consider  
5 that in connection with all DOE appeals?

6 A. No. As I said moments ago, there  
7 were cases where DOE did not make any  
8 assertion that they were denying on undue  
9 burden grounds, and in those cases or those  
10 appeals, there was nothing in the record to  
11 support -- undue hardship, sorry, undue  
12 hardship grounds, and in those cases there was  
13 nothing -- you know, if there was a case where  
14 there was nothing in the record to support  
15 undue hardship, then there was nothing in the  
16 record to support undue hardship and you  
17 focused on other inquiries.

18 Q. Did any agencies in the -- either in  
19 the individual files or outside of those  
20 files, the appeal files, state that individual  
21 plaintiffs or employees -- I'm sorry, not the  
22 individual plaintiffs, I can't inquire about  
23 that.

24 Did any employees state that their  
25 employees posed a direct threat to others if

1 E. EICHENHOLTZ

2 they remained employed?

3 A. Yes, there were employees who  
4 asserted specifically a direct threat, and  
5 then there was, you know, the health  
6 commissioner's order that said that given the  
7 nature of the public health emergency, that  
8 only vaccinated individuals, with the  
9 exception of those who demonstrated that they  
10 were entitled to a reasonable accommodation to  
11 be without vaccination, should be present at  
12 City work sites.

13 MR. HAIDER: Mr. Nelson, I'd just  
14 ask to take another ten-minute break.

15 MR. NELSON: Okay. We'll come back  
16 in ten minutes.

17 THE VIDEOGRAPHER: Going off record.  
18 The time is 4:17.

19 (Recess was taken.)

20 THE VIDEOGRAPHER: We're now back  
21 on. The time is 4:30.

22 MR. NELSON: Thank you. Gentlemen  
23 and ladies, toward the end of the  
24 deposition I'm going to be surrendering  
25 the mic to my co-counsel, Sujata Gibson,

1 E. EICHENHOLTZ

2 who has some very specific kinds of  
3 questions, lines of questions, not very  
4 long that she's going to be asking. And I  
5 just wanted to let you know in advance so  
6 it's not some sort of a surprise. But,  
7 you know, we're definitely going to get  
8 this done within the seven hours that  
9 we're allowed for the deposition, so no  
10 need to worry about that.

11 BY MR. NELSON:

12 Q. So my first question, I want to just  
13 follow up on, and who knows, maybe -- well, I  
14 want to follow up on a line of questioning I  
15 was asking before.

16 Are the panelists, like, provided  
17 with one or more objective criteria which  
18 would determine whether an exemption request  
19 ought to be granted or denied by itself?

20 A. No.

21 Q. There's none, okay.

22 Now, how many agencies made a claim  
23 that granting a religious accommodation would  
24 cause a direct threat to anyone?

25 A. Correction is the only one that

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E. EICHENHOLTZ

stands out as we sit here today.

Q. Did they make that in 100 percent of their cases or something less?

A. I'm not sure.

Q. I'm sorry?

A. I'm not sure.

Q. Oh, you're not sure. Thanks.

A. Yeah.

Q. All right. I didn't hear the --

A. Sorry, yeah I'll get a little closer, yeah.

Q. And was it in most of the files that they sent you or less than half?

A. I can't remember. It was in many of the ones that I reviewed.

Q. And what about the other agencies? Did any of the others raise the claim of a direct threat?

A. Not -- again, I can't recall an example with another agency.

Q. Did the Citywide Appeals Panel deny any appeals on the basis that the appellant would have caused a direct threat?

A. Can the caveat that I, you know,

1 E. EICHENHOLTZ

2 that maybe that I'm either not aware of or  
3 haven't seen, I cannot think of a single  
4 example that was denied on -- of a reasonable  
5 accommodation request that was denied on  
6 direct threat and affirmed solely on the issue  
7 of direct threat.

8 Q. So there may have been some that  
9 would have been affirmed partially on the  
10 basis of direct threat?

11 A. Again, at least that I've seen, I  
12 haven't seen where someone's focused -- a  
13 panel member has focused on the direct threat  
14 issue in their notes about their affirmance.

15 Q. So insofar as you know, the direct  
16 threat issue was not a basis for any  
17 affirmances from any department?

18 A. As far as I'm aware, yes. But there  
19 may be, and they would be, you know, indicated  
20 in the particular case.

21 Q. And what, if you recall, was the  
22 basis for the Department of Corrections claim  
23 that direct threats existed from the granting  
24 of religious accommodation to employees?

25 A. I don't recall offhand, I don't

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E. EICHENHOLTZ

recall offhand.

Q. Okay. Do you recall whether there was any objective or scientific, you know, analysis that was provided in support of the Corrections Department's assertion that a direct threat existed?

A. As I said, I don't remember precisely what the explanation was.

Q. Okay. Thank you.  
So one presumes -- and again, this is not a question, but a preface to a question. One presumes that the City is concerned that unvaccinated people may get COVID-19 and spread it. So that's the predicate, that's the assumption that I'm stating, and I have a question: Can vaccinated people get COVID-19?

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

He's here to be -- you know, questions that should be directed at a medical professional or someone similar. Again, subject to Citywide Panel's process



1 E. EICHENHOLTZ

2 in reviewing beyond the standards of the  
3 Citywide Panel. So I'm going instruct the  
4 witness to not answer that question.

5 Q. So in considering undue hardship  
6 requests, has the Citywide Appeals Panel or  
7 any of its individual panels considered  
8 whether it makes any difference to the  
9 spreading of COVID-19 whether an employee is  
10 vaccinated or unvaccinated?

11 MR. HAIDER: Objection.

12 You can answer.

13 A. Yeah, as I said, I don't remember  
14 the particular rationale. You know, obviously  
15 I'm aware of the various rationales of the  
16 vaccine and their effectiveness and it might  
17 play a role in depending on the agency's  
18 explanation. But to say here it played a role  
19 in this way or this way, I can't say.

20 Q. So is there a finding on the part of  
21 the panel or any individual panels that it  
22 makes a difference whether unvaccinated people  
23 spread COVID-19 in any greater extent than  
24 vaccinated people do?

25 A. The purpose of --

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E. EICHENHOLTZ

MR. HAIDER: Objection.

THE WITNESS: Sorry.

A. The purpose of the panel is not to gather facts and make a determination in the first instance. It's to review the record presented to it on appeal that has follow-up inquiry in any particular case, to engage in follow-up inquiry to make sure that it has all the facts it needs to decide an appeal.

Q. But isn't it true that on occasion, in cases where applicants present discussions of their own religious beliefs and other bases for their religious accommodation, that the Citywide Appeals Panel considers whether the basis is valid or true or accurate?

A. Yes, and also whether -- I mean, I wouldn't say that -- you see, that's -- you're -- sort of there are two things that are getting mixed up, and we kind of got mixed up on this before. There's a difference between validity of a religious belief, whether a religious belief has a conflict with the COVID-19 vaccine mandate, the factual issue as to whether, we talked about this

1 E. EICHENHOLTZ

2 before, whether the refusal to vaccinate or  
3 the desire not to vaccinate comes from a  
4 religious source or a secular source or a  
5 political source. Those are all three  
6 separate issues that may come into play in any  
7 given case.

8 Q. Okay. Well, when considering those  
9 issues, those questions of, for example,  
10 accuracy and that sort of thing, why do you  
11 not also consider the question of the accuracy  
12 of whether there is a difference -- whether it  
13 makes a difference to exclude unvaccinated  
14 people from employment?

15 MR. HAIDER: Objection.

16 You can answer.

17 A. So there are factual findings  
18 that -- you know, there's a factual basis for  
19 the mandate that is basically that there is a  
20 necessary public health benefit to employees  
21 engaging in the actions contained in the  
22 health commissioner's order that has been  
23 challenged and upheld, and so we are reviewing  
24 these requests in that context. Reasonable  
25 accommodations are not a vehicle to challenge

1 E. EICHENHOLTZ

2 the underlying health order. It is a vehicle  
3 to -- for legal -- on specific legal bases to  
4 request expectations in that order. One of  
5 those bases is not personal, factual  
6 disagreement with the findings of the health  
7 commissioner.

8 Q. So do any Citywide Panel conduct an  
9 independent undue hardship analysis in  
10 considering whether or not a sincere religious  
11 accommodation might be accommodated offsite or  
12 remotely?

13 MR. HAIDER: Objection.

14 A. The Citywide Appeal Panel is doing  
15 appellate-type work. They do not in the first  
16 instance gather fact. We may have factual  
17 inquiries that we direct off into the agency  
18 or the employee, as appropriate, and ask them  
19 to provide the facts to us that we need to  
20 make our determination. We are making our  
21 determination based on the record developed on  
22 appeal.

23 Q. Isn't there a contradiction between  
24 saying you are making your determination on  
25 the -- based on the record that was developed

1 E. EICHENHOLTZ

2 on appeal, that is to say, the record that  
3 comes to you from the agency on the one hand,  
4 and then to say that, you know, if there are  
5 questions that you think require additional  
6 information, you go out and ask the agency for  
7 them, or you ask the applicant for it? Aren't  
8 those two statements in contradiction?

9 A. No.

10 Q. How can that be?

11 A. Because they're not.

12 Q. Well, all right. Either you're  
13 deciding it on the basis of -- well,  
14 withdrawn.

15 So the materials that you solicit  
16 from the agencies, those are not materials  
17 that are contained in the record on appeal; is  
18 that correct? The record that --

19 A. They are -- they are part of the  
20 record when we make our determination on the  
21 appeal, yes.

22 Q. But they are not part of the record  
23 that was sent to you by the agency at the  
24 start of the appeal?

25 A. Right, because we've made a

1 E. EICHENHOLTZ

2 determination that we want to remand for  
3 further development of the record and we have  
4 done so.

5 Q. Okay. So the additional information  
6 is always done on remand?

7 A. Well, again, functionally, yes,  
8 that's how this works. We make an inquiry of  
9 the agency, either on rare occasion directly  
10 to the employee, but generally, the agency to  
11 either provide us an explanation or get  
12 information from the employee, to review it,  
13 and to submit it to augment the record.

14 Q. You just used the word "remand."  
15 Are you saying that you are giving the case  
16 back for a fresh consideration for its own  
17 decision to the City agency, or are you saying  
18 something else?

19 A. We are sending it back, and when  
20 information is provided, there are occasions  
21 where the agency will advise the panel that  
22 when it obtained the information, it  
23 determined that the reasonable accommodation,  
24 in fact, should be granted, and at that point,  
25 we close our appeal administratively because

1 E. EICHENHOLTZ

2 we do not review appeals of grants of  
3 reasonable accommodations.

4 Q. How often has that been done, how  
5 many times?

6 A. I couldn't give you a number. I  
7 would certainly -- yeah, I couldn't give you a  
8 number.

9 Q. And do -- withdrawn.

10 Is there any written communication  
11 or document that sets forth, like, the terms  
12 of the remand, including that the agency may  
13 reconsider its decision before sending it back  
14 to you?

15 A. No, no. Usually what happens is  
16 there is a communication agency, the panel is  
17 interested in this information in any  
18 particular case, and the agency will provide  
19 our response -- its response to the panel, and  
20 we'll proceed from there.

21 RQ MR. NELSON: So we're going to want  
22 to see procedure, in connection with our  
23 procedural request for information on  
24 copies of such communications made to each  
25 agency that received at least one of those

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E. EICHENHOLTZ

things that you call a "remand."

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

MR. NELSON: Okay.

Q. Now, when you informed the agency that you are doing this thing that you call a "remand," do you provide any similar notice to the applicant?

A. So again, we are an appeals panel.

Q. Yes.

A. The entity that is doing the interaction with the applicant is the agency; not the appeals panel. There have been circumstances, they're rare, that we will directly communicate with the applicant for a variety of reasons, you know, exceptional reasons is what I'll call it. But generally, the interaction is because that is their function, through the agency and its EEO office. Our function is to review these matters on appeal.

Q. So does the applicant even have any knowledge, typically, that the matter has been remanded to the agency for further development



1 E. EICHENHOLTZ

2 of the record?

3 A. It would have to because the agency  
4 EEO officer or someone in the agency is  
5 reaching out to the employees and requesting  
6 information, and sometimes they may say, the  
7 City Appeal Panel wanted us to ask or wants to  
8 know, sometimes they say, we need to know  
9 this. But the employee is notified that the  
10 information is needed in considering with  
11 their RA request.

12 Q. So you never remand a case unless  
13 the information you want is coming from the  
14 applicant?

15 A. No. As I said, we've had ones where  
16 we've made inquiries to both the applicant and  
17 the agency, but it is very -- you know, it's  
18 rare that we would have specific follow up for  
19 the agency because it's generally outside of  
20 the context of something like undue hardship,  
21 you know. We really need to understand the  
22 nature of the request from the applicant; not  
23 the agency.

24 Q. Are there times when you are  
25 requesting information from the agency; not

1 E. EICHENHOLTZ

2 from the applicant? Have there been such  
3 instances?

4 A. Exclusively the agency? I can't  
5 recall any, offhand.

6 Q. Were individual panels that were  
7 confronted with undue hardship claims from the  
8 agency involved in an appeal, were those  
9 panels expected to attempt to verify that the  
10 hardship claimed by the agency existed?

11 A. No, they were expected to review the  
12 explanation of the agency and look at the  
13 facts in the record and assess whether the  
14 agency had established an undue hardship.

15 Q. So what level of evidence was the  
16 agency required to provide to the appeals  
17 panel to meet that standard?

18 A. The agency was required to  
19 articulate what about its needs and operations  
20 was causing an undue hardship.

21 Q. Were they able to provide any  
22 evidence that that was true?

23 A. I don't -- certainly if there was  
24 inconsistencies in the agency's statement that  
25 required further inquiry or suggested that it

1 E. EICHENHOLTZ

2 was untrue, we would have followed up. You  
3 know, and certainly in circumstances where the  
4 description doesn't seem to match the nature  
5 of the job the employee's doing, there may  
6 have been some follow up in those cases, as  
7 well. But no, they're not required -- no one  
8 in this process is required to -- you know,  
9 it's put to a burden of evidentiary proof.  
10 You know, it's all about assertions and, you  
11 know, information that is generated as part of  
12 the cooperative dialogue.

13 Q. But it seems to me it isn't true  
14 that no one is required to provide evidentiary  
15 proof because there very clearly is a burden  
16 on the applicant to provide evidence to  
17 support their claim that they have a religious  
18 objection. Why is -- I mean, you would agree  
19 with that statement, wouldn't you?

20 A. No, I would not agree with that  
21 statement.

22 Q. Okay. The religious applicant is  
23 not required to provide any evidence?

24 A. That's -- I mean, not in a -- in  
25 a -- you know, in an evidentiary backup,

1 E. EICHENHOLTZ

2 burden of proof way. The requirement is that  
3 the employee articulate their religious belief  
4 and explain what the belief is, the source of  
5 the belief, and the conflict between the  
6 belief and the vaccine requirement. It could  
7 simply be the employee saying so.

8 Q. But isn't it a fact that normally,  
9 in such a case, the employee is also required  
10 to respond to specific questions that are  
11 addressed to the employee, and if the response  
12 is not sufficient, then there's a denial of  
13 the application?

14 DI MR. HAIDER: Objection. Again, this  
15 is outside the scope.

16 We're now talking about what an  
17 agency is supposed to do rather than what  
18 the Citywide Panel does in reviewing the  
19 appeal through the agency and where the  
20 standards apply.

21 So I would instruct the witness not  
22 to answer.

23 MR. NELSON: That's actually not  
24 true though because what I'm dealing with  
25 here is the inconsistent standards that

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E. EICHENHOLTZ

the appeals panel has with respect to evidentiary requirements. They require evidence of the applicant for an exemption, but they require no evidence of undue burden, if it's asserted by the agency.

MR. HAIDER: Well, I think it was phrased in a different way. You can go ahead and ask it, if it's phrased with respect to the Citywide --

THE WITNESS: Well, I -- yeah, sorry. Okay.

MR. HAIDER: Can you phrase the question?

BY MR. NELSON:

Q. Isn't it a fact that you do not require evidence from the agencies with respect to any claims that they make of undue hardship?

A. No. Like I said, there's no evidentiary requirement of any participants in cooperative dialogue here. There are many cases where it will simply be the employee explaining their needs and the basis for their

1 E. EICHENHOLTZ

2 accomodation and the agency explaining their  
3 needs.

4 Q. Again, I'm trying to eliminate  
5 questions that we've written, so I'm saving us  
6 time by being quiet for a moment.

7 A. I understand. Thank you.

8 Q. Were panelists instructed to assume  
9 that any or all of the agencies that had  
10 denied religious accommodation requests had a  
11 compelling interest of any kind?

12 A. I don't understand -- I'm not  
13 familiar with the term "compelling interest"  
14 in this context.

15 Q. Are you aware that the term  
16 "compelling interest" is used in the context  
17 of the application of the United States  
18 Constitution's First Amendment to situations  
19 of religious discrimination?

20 MR. HAIDER: Objection.

21 THE WITNESS: Yeah.

22 DI MR. HAIDER: I'm going to -- you're  
23 calling for a legal response to a question  
24 about, you know, First Amendment, which  
25 has not been testified as a standard

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E. EICHENHOLTZ

that's applicable here.

So I'm going instruct the witness not to answer.

Q. So did the individual panelists have any instructions with respect to whether or not to consider alternative accommodation possibilities?

A. If the record -- well, I can't recall if there are -- other than the guidance that they were provided, that they reviewed, I can't recall any specific discussions on alternative accommodation possibilities at the panel level.

Again, you know, I want to be extra clear as often as I can that we are really talking about half, and I don't even want to say "half," but the final phase of the reasonable accommodation process, the post-determination phase of the reasonable accommodation process. So what may have been appropriate at other phases, you know, we're not really, you know, here to discuss. But, you know, in terms of the panel, we did not get records where the cooperative dialogue

1 E. EICHENHOLTZ

2 really went too deeply into that issue.

3 Q. So the, as you stated, the Citywide  
4 Panel was governed not only by Title VII, but  
5 also by the New York State and New York City  
6 Human Rights Laws. To what extent did the  
7 panel actually implement the requirements of  
8 the New York State and New York City Human  
9 Rights Laws?

10 A. It wasn't charged with implementing  
11 those laws, it was charged with applying the  
12 standards necessary to review an appeal of the  
13 denial of a reasonable accommodation under the  
14 framework of federal, state, and city law.

15 Q. And that would have included the New  
16 York State and City Human Rights Laws,  
17 correct?

18 A. As I just said, federal, state, and  
19 city law.

20 Q. Right, okay. So what is the  
21 standard for -- what do you understand the --  
22 sorry, I'm sorry.

23 You stated previously that in  
24 consideration whether or not an undue hardship  
25 existed for the agency to grant a religious



1 E. EICHENHOLTZ

2 accommodation, that the City or the agency was  
3 required to show more than a de minimus cost  
4 or burden on their operations from the  
5 granting of such an accomodation. Do you  
6 recall that testimony?

7 A. That's correct.

8 Q. How much more?

9 MR. HAIDER: Objection.

10 A. Again, this is actual inquiry that  
11 we review in every case. We have to see  
12 sufficient level of disruption to agency  
13 operations and justification for why the  
14 reasonable accommodation would present an  
15 undue burden to the particular agency, when  
16 we're considering undue burden.

17 Q. So the standards that the -- I'm  
18 sorry.

19 Were express instructions ever given  
20 to the members of the individual panels with  
21 respect to the exact standards that they were  
22 to apply with respect to determining if  
23 there's an undue burden?

24 MR. HAIDER: Objection.

25 A. With respect to the COVID-19 vaccine

1 E. EICHENHOLTZ

2 requirement and health emergency, the panel  
3 was directed to the EEOC Guidance, and as I  
4 said earlier, my understanding was, given the  
5 nature, the emergent nature of the pandemic,  
6 the City Commission of Human Rights, which is  
7 the agency charged with enforcing the human  
8 rights law, adopted that guidance, so we felt  
9 that that was the guidance that those agencies  
10 that are, unlike the Citywide Panel, charged  
11 with implementing those laws were directing us  
12 to.

13 Q. Did the Citywide Panel routinely  
14 request from agencies that were having an  
15 undue hardship from granting an accommodation,  
16 did they routinely request from those agencies  
17 information about the identifiable cost of the  
18 accommodation request, and including the costs  
19 of loss of productivity and of retaining or  
20 hiring employees or transferring employees  
21 from one facility to another in relation to  
22 the size and operating cost of the employer?

23 MR. HAIDER: Objection.

24 A. So again, as I've said, the agencies  
25 provided the justification for asserting undue

1 E. EICHENHOLTZ

2 hardship, which was factually reviewed in  
3 every case in which it was asserted by the  
4 panel members, and a determination rendered as  
5 to whether or not they had established an  
6 undue hardship under the standards set forth  
7 in the guidance.

8 Q. Did the Citywide Appeal Panel  
9 specifically examine whether or not the  
10 information that I identified in my last  
11 question had been provided by the agency  
12 employers?

13 MR. HAIDER: Objection.

14 A. So again, you know, I'll try and  
15 explain this as best I can, that that is the  
16 agency's, you know -- the agency is doing that  
17 when they are assessing the employee's request  
18 for reasonable accommodation. On appeal, we  
19 review the material that was provided to us by  
20 the employee and the agency and make a  
21 determination on appeal whether the  
22 accommodation was denied, properly denied, or  
23 should have been granted based on the facts  
24 and circumstances presented to us by the  
25 agency and by the employee.

1 E. EICHENHOLTZ

2 Q. Does the civil -- oh, I'm sorry.

3 Does the Citywide Appeals Panel  
4 routinely examine whether or not the materials  
5 provided by the agency employer in connection  
6 with the file from their denial of the  
7 religious accommodation includes information  
8 concerning the identifiable cost of the  
9 accommodation, including the costs of loss of  
10 productivity and of retaining and hiring  
11 employees or transferring employees from one  
12 facility to another in relation to the size  
13 and operating cost of the employer?

14 MR. HAIDER: Objection.

15 A. Again, the various factors, costs,  
16 etcetera, pertinent to a reasonable  
17 accommodation is made during the cooperative  
18 dialogue and the review of the employee's  
19 request by the agency, the Citywide Panel  
20 receives the information provided by the  
21 employee and by the agency, reviews that  
22 information and makes a determination as to  
23 whether the reasonable accommodation was  
24 properly denied, or if it was not, whether the  
25 reasonable accommodation should be granted.

1 E. EICHENHOLTZ

2 Q. And so, in effect, your answer to my  
3 last question is no?

4 A. No, that is not accurate.

5 Q. So, again, I will ask a question  
6 that is designed to produce the same  
7 information that I did not receive in response  
8 to the last several questions.

9 Does the Citywide Appeals Panel  
10 routinely examine whether or not the record on  
11 appeal provided by the agency that claims  
12 undue hardship has included information about  
13 "the identifiable cost of the accommodation,"  
14 and this is statutory language I'm reading,  
15 "including the costs of loss of productivity  
16 and of retaining or hiring employees or  
17 transferring employees from one facility to  
18 another, in relation to the size and operating  
19 costs of the employer"?

20 A. So again, the way the reasonable  
21 accommodation process works is those facts are  
22 reviewed by the agency, they engage in a  
23 cooperative dialogue with the employee, and  
24 they make a determination. The information  
25 the employee provided and the explanation of

1 E. EICHENHOLTZ

2 the agency is submitted to the Citywide Appeal  
3 Panel, and the Citywide Appeal Panel will  
4 decide on appeal whether the agency's  
5 determination to deny the reasonable  
6 accommodation was appropriate, and if it  
7 wasn't appropriate, whether it's appropriate  
8 to grant the reasonable accommodation.

9 Q. So in reviewing a decision to deny a  
10 reasonable accommodation on the basis of undue  
11 hardship, is it the case that the Citywide  
12 Appeals Panel does not consider it  
13 dispositive, whether or not the record on  
14 appeal contains information provided by the  
15 agency employer about "the identifiable cost  
16 of the accomodation, including the costs of  
17 loss of productivity, and retaining or hiring  
18 employees or transferring employees from one  
19 facility to another, in relation to the size  
20 and operating cost of the employer"?

21 A. There does not need to be -- the  
22 employer is providing us the explanation for  
23 why they believe they have an undue hardship.  
24 In making those determinations, they consider  
25 the factors they necessarily need to consider

1 E. EICHENHOLTZ

2 for their operations, and that either is or is  
3 not reflected factually in their summary and  
4 their explanation that they provide us, and we  
5 can take that into consideration as needed  
6 when making our determination on appeal.

7 Q. So are you aware that the language  
8 that I've repeatedly cited here is contained  
9 in the New York State and New York City Human  
10 Rights Laws in context of whether or not an  
11 undue burden has been sufficiently  
12 demonstrated?

13 A. I'm well aware of that, yes.

14 Q. Okay. Then why does the Citywide  
15 Appeals Panel not bother to consider whether  
16 or not that criteria has been met in a claim  
17 of undue burden by the agencies?

18 A. Your --

19 MR. HAIDER: Objection.

20 THE WITNESS: Sorry.

21 A. Your characterization is incorrect,  
22 and I'm not going to engage in argument. This  
23 is legal argument, and I'm not going to  
24 entertain it. If you have a factual question,  
25 I'd be happy to answer a factual question.

1 E. EICHENHOLTZ

2 Q. Does the Citywide Appeals Panel  
3 consider to be dispositive in adjudicating  
4 appeals from agency employers based on undue  
5 hardship, whether that file contains  
6 information about the number of individuals  
7 who will need the particular accommodation to  
8 a sincerely-held religious observance or  
9 practice that is involved in that appeal?

10 A. Do we consider that dispositive? We  
11 consider the explanation the agency provides  
12 as to why there's an undue burden. That is  
13 what we consider, and we look at the facts  
14 that are generated by that and our  
15 understanding of those facts in connection  
16 with what the employee is claiming the facts  
17 provided by the employee, and the panel will  
18 make an appellate determination from that  
19 point forward.

20 Q. So same question about whether or  
21 not the appeal file contains information from  
22 the agency employer for an employer with  
23 multiple facilities about the degree to which  
24 the geographic separateness or administrative  
25 or fiscal relationship of the facilities will



1 E. EICHENHOLTZ

2 make the accommodation more difficult or  
3 expensive.

4 A. I know of no legal requirement that  
5 requires at the appellate phase of a review  
6 that that sort of assessment be provided at  
7 that level of detail. What we are getting on  
8 appellate review from both the employee and  
9 the employer is an explanation as to why an RA  
10 is appropriate, an explanation as to why the  
11 RA may have been denied on reasons, including,  
12 but not limited to, undue hardship, and we  
13 assess that. There is no requirement,  
14 statutory or otherwise, that the employer,  
15 that the agency, that the City -- the City's  
16 internal appeal process specifically provide  
17 that sort of data. What they need to do is  
18 explain their justification for undue burden.

19 Q. So I'm going to ask about some  
20 factors that are listed in the New York City  
21 Human Rights Law concerning how an undue  
22 hardship is to be explained by an employer,  
23 and ask you whether or not this list of  
24 factors is expressly considered by the  
25 Citywide Appeals Panel in making its

## E. EICHENHOLTZ

1  
2 determinations on undue hardship cases where  
3 the accommodation has been denied on the basis  
4 of undue hardship.

5           So that list is as follows: Nature  
6 and cost of the accomodation; the overall  
7 financial resources of the facility or the  
8 facilities involved in the provision of the  
9 reasonable accommodation; the number of  
10 persons employed in such facility; the effect  
11 on expenses and resources, or the impact  
12 otherwise of such accommodation upon the  
13 operation of a facility; the overall financial  
14 resources of the covered entity; the overall  
15 size of the business of a covered entity with  
16 respect to the number of its employees; the  
17 number type and location of its facilities;  
18 and the type of operation or operations of the  
19 covered entity, including the composition,  
20 structure, and functions of the workforce of  
21 such entity; the geographic separateness;  
22 administrative or fiscal relationship of the  
23 facility or facilities in connection to the  
24 covered entity.

25           A.       So we would of course review any

1 E. EICHENHOLTZ

2 requests for an undue hardship asserted by the  
3 agency with an understanding that those are  
4 some of the factors that the agency is --  
5 should be looking at when making its  
6 determination that a particular accomodation  
7 requires an undue hardship.

8 Q. Does the Citywide Panel require  
9 evidence that the agency employer has, in  
10 fact, provided information or obtained  
11 information or relied upon information of this  
12 kind?

13 A. Again, we are -- the panel does  
14 not -- the panel reviews the assertions of the  
15 parties from the cooperative -- not "parties."  
16 The employer and the employee in a cooperative  
17 dialogue determine whether the reasonable  
18 accommodation is granted or should be denied,  
19 outside of -- there's some requirement  
20 obviously for documentation in the medical  
21 context. There was no specific evidentiary  
22 rule or showing that is required on an appeal  
23 of the employer or of the employee. That is  
24 not how the appeal process works. The appeal  
25 process is reviewing the record and the

1 E. EICHENHOLTZ

2 assertions of the employer and the employee of  
3 why the accomodation is necessary and why it  
4 was denied in determining whether or not the  
5 accomodation was properly denied and whether  
6 the accomodation should be granted based on  
7 the facts presented to the panel in that  
8 record. And if we need more information, if  
9 there is a particular aspect of the  
10 explanation that we might need information  
11 about one of those particular elements that  
12 one might need to consider, we can certainly  
13 make inquiry of the agency and have done so.

14 Q. But the Citywide Appeals Panel is  
15 basically not required to determine whether or  
16 not the agency employer has complied with the  
17 New York State Human Rights Law or the New  
18 York City Human Rights Law. Is that a fair --

19 A. Yeah, and to do this, to engage in  
20 this kind of back and forth, you know, I think  
21 we need -- you know, and it's not my role here  
22 to have a legal discussion with you about what  
23 the law requires, what the law requires  
24 someone to show at certain stages of the  
25 process, and so I'm not going to dig into

1 E. EICHENHOLTZ

2 that. I've explained what the panel looks  
3 for, I've explained how we go about looking  
4 for it. I don't think there's more factual  
5 information I can provide, other than what  
6 I've already provided.

7 Q. So when assessing whether or not it  
8 would be an undue hardship to accommodate the  
9 Department of Education employees, does the  
10 Citywide Panel consider the fact that there  
11 are only 30 accommodated Department of  
12 Education employees working remotely at the  
13 department's workspace in Brooklyn at 1087  
14 Ocean Avenue and that it can accommodate 312  
15 employees?

16 MR. HAIDER: Objection.

17 A. To the extent that that fact would  
18 be relevant to a determination in any  
19 individual case, we would consider that.

20 Q. Has the panel ever considered that  
21 evidence?

22 MR. HAIDER: Objection.

23 A. Again, I think right -- you know, I  
24 can't answer that without really discussing  
25 the facts and circumstances of an individual

1 E. EICHENHOLTZ

2 case. I certainly would not say that it is a  
3 dispositive factor on the issue of undue  
4 hardship, that there may be seats available in  
5 any given facility or desks available or what  
6 have you. It would not necessarily be a  
7 dispositive factor.

8 Q. When assessing whether or not it  
9 would be an undue hardship to accommodate City  
10 employees, did the Citywide Panel ever  
11 consider whether it would constitute an undue  
12 hardship on the employing agencies to modify  
13 their termination descriptions so that they  
14 might be eligible to collect unemployment  
15 insurance?

16 MR. HAIDER: Objection.

17 A. I don't know if that came up in any  
18 cooperative dialogue. I can't say here for  
19 certain.

20 MR. NELSON: All right. We have  
21 some other questions that are going to be  
22 posed by Sujata Gibson, but we need to  
23 take a short break before that begins.  
24 This is -- you know, we have -- I guess we  
25 have -- I'm not sure exactly how much more