

CITY AND COUNTY OF SAN FRANCISCO OFFICE OF THE CITY CONTROLLER

Before Hearing Officer Janice L. Sperow

HEARING OFFICER'S FINDINGS AND DETERMINATIONS

In The Matter of the Appeal of Sky Chefs, Inc. (Sky Chefs), from the San Francisco Office of Labor Standards Enforcement (OLSE) Determinations of Violation of the San Francisco Administrative Code, Chapter 12Q Health Care Accountability Ordinance (HCAO) dated June 25, 2021, Case No. MH – 434 [Administrative Code Chapter 12Q]

Hearing Date: October 5, 2021

INTRODUCTION

Sky Chefs appeals the OLSE's determination that it violated the HCAO when it failed to either provide the required health care coverage or contribute the required amount for all Quality Standards Program (QSP) covered employees.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

The Parties

The City and County of San Francisco (City) owns, operates, and manages the San Francisco International Airport (SFO or Airport), physically located in San Mateo County, through the Airport Commission (Commission) under the leadership of the Airport Director (Director). See San Francisco City Charter § 4.115; Aspilla Testimony (T). The OLSE enforces the HCAO pursuant to San Francisco Administrative Code Section 12Q.5 and the SFO's QSP pursuant to a memorandum of understanding with SFO. See Exh. 35; Popek T. Sky Chefs, a subsidiary of LSG Sky Chefs USA Inc., a Delaware corporation, prepares, assembles, and delivers food, beverages, and dry goods to SFO aircrafts pursuant to Permit No. 4105 with SFO effective April 2010. See Parties' Joint Stmt. of Facts; Exh. A.

The Governing Contracts

Permit No. 4105 (Permit) requires Sky Chefs to comply strictly with the QSP as modified from time to time. See Exhs. 2 & A at § 2.1(a), § 3.1. It also requires Sky Chefs to maintain records of its QSP compliance and to supply those records to the Director upon request. See id. at § 3.5. The Permit also empowers the Director to audit Sky Chef's operations, including its implementation and compliance with the QSP. Id. at § 3.10. Upon written request, Sky Chefs must immediately open its books and records to the City and its auditors; compliance failure subjects it to fines, costs, and potential attorneys' fees. Id. at §§ 3.10-11. The Permit also imposes a daily optional fine of \$200 per violation of Sections 3.1 and 3.5's QSP requirements in addition to any other rights and remedies available to the City. Id. at § 9.6. The parties modified the Permit in 2014,

effective February 1, 2015 to specifically incorporate the 2014 changes to the QSP and to increase the daily per violation fine to \$500. See Exh. 3.

Separately from its Permit with SFO, Sky Chefs entered into contracts with the airlines it services, including Aeromexico, Korean Air, Lufthansa, Alaska, American, and Air Canada. See Parties' Joint Stmt. of Facts; Exh. 13. Airlines contracting directly with service providers must incorporate the QSP's and HCAO's standards into their service agreements. See, e.g., Exh. 35 at § 2.3. Hence, under their own contracts with SFO, airlines must also ensure their subcontractors, like Sky Chefs, comply with the QSP and HCAO. See Exhs. 4 & 5 at § 7.8; Parties' Stip. at Hearing on the Record.

The QSP

The Commission first adopted the QSP on December 7, 1999, effective April 1, 2000. See Exh. N. As its creator, the Airport determines who qualifies as a QSP employer and a QSP covered employee under the program. Popek T; Aspilla T. The QSP set minimum hiring, equipment, training, compensation, and benefits requirements for companies whose employees performed services impacting SFO safety and security. Exh. N; Aspilla T. It initially covered only employees directly involved in security and ground handling. Exh. N. The Commission expanded the QSP's coverage on January 18, 2000, effective October 1, 2000, to include airline and service provider employees required to wear a SFO badge who access the Airfield Operations Area (AOA). Id. In 2009, effective April 1, 2010, the Commission again modified the QSP to incorporate the Minimum Compensation Ordinance and the HCAO, both of which the City adopted after the QSP. See id.; see also Exh. 7.

In 2015, the Commission amended the QSP, effective March 1, 2016, to cover airline catering employees, to limit the collective bargaining agreement carve-outs, and to add a severability clause. Exhs. N & 8. In January 2016, the Commission adopted additional safety standards, included custodial workers in the QSP, and increased noncompliance fines. See Exh. 10 at § 2(d)(4). The March 2016 QSP defined the types of employees covered, in part, as follows:

V. Types of Employees Covered by the Program.

The Program is applicable to employees of Covered Employers who: (1) require the issuance of an Airport badge with Airfield Operations Area ("AOA") access and work in and around the AOA in the performance of their duties; or (2) are directly involved in passenger and facility security and/or safety, including but not limited to checkpoint screening, passenger check-in, skycap and baggage check-in and handling services, custodial services, and AOA perimeter control (collectively, "Covered Employees") as further specified below. The Program is applicable to all existing Covered Employers as well as new entrants. ...

B. Those Impacting Safety: Employees in this category include those directly engaged in activities, which may impact safety within the AOA. These employees include but are not limited to the following:

2. Employees located on Airport property and the surrounding areas who are directly involved in the preparation and/or transportation of food and beverage products delivered directly onto aircraft on the AOA. ...

Exh. 4.

More recently, in 2020, the City amended the Administrative Code to enact the Healthy Airport Ordinance (HAO) in which it required employers with SFO QSP covered employees to provide family health insurance to those employees at no cost or to contribute on their behalf to an account established for that purpose. See Exh. 10; Popek T.

The HCAO

The HCAO defines covered employee to include a “San Francisco Airport Service Employee who works any number of hours during any week in such capacity.” Exh. 6 at § 12Q.2.9(a)(4). “San Francisco Airport Service Employees” means QSP covered employees. Id. at § 12.Q.2.16. The HCAO also mandates recordkeeping and City access to those records upon request, as well as site inspections and cooperation. Exhs. 6 at § 12.Q.4, 35 at § 8.2. HCAO violations trigger a host of possible remedies and actions, including liquidated damages. Exhs. 6 at § 12.Q.5, 35 at Reg. 10.

Sky Chefs Closes Burlingame Facility

Prior to April 2021, Sky Chefs operated two facilities in Burlingame under private leases, neither with the City. It used one facility for food production and the other for warehouse space. See Parties’ Joint Stmt. of Facts. In early April 2021, Sky Chefs decided not to renew one of its Burlingame leases, closed its Burlingame food production facility, and consolidated its food preparation in its San Jose facility. See id.; Exh. 42; Exh. 13; Cousineau T. Sky Chefs continued to deliver and provide food and beverages along with other catering services for SFO air carriers from its other Burlingame facility but now prepared that food at its San Jose facility. See Parties’ Joint Stmt. of Facts; Exh. 40; Buehr T. Sky Chefs leases its San Jose facility from the City of San Jose. See Exh. 24.

Initial Audit

In response to the move and employee complaints articulated through union officials, OLSE requested a site visit of the San Jose facility. See Exh. 42; Popek T. After the parties exchanged emails, see, e.g., Exhs. 12, 15-16, OLSE initiated a HCAO compliance audit of Sky Chefs on April 16, 2021. See Exh. 17; Popek T. As part of the audit, OLSE requested Sky Chefs produce documents by April 30, 2021 for the audit period of April 24, 2021 to May 21, 2021, including copies of ledgers and any and all payroll records which show the actual hours worked each day for each employee who performed work covered by the QSP during the audit period and any document showing the HCAO benefits given to employees for both the San Jose and Burlingame facilities.

Exh. 17; Popek T. The audit letter repeated OLSE's site inspection request. Exh. 17; Popek T.

Sky Chefs Objects

Sky Chefs provided most documents for its Burlingame facility, offered guided tours of its Burlingame and San Jose facilities, but objected to the City's jurisdiction over its San Jose facility. See Exhs. C, 18, 24; Popek T. Sky Chefs contended that neither the HCAO nor the QSP applied to its San Jose facility employees, even if they produced food for SFO aircraft. See, e.g., Exh. 21; Popek. Sky Chefs explained that no San Jose employee leaves the San Jose facility to perform work at either the Burlingame facility or at SFO; and that, while they prepare food for SFO aircraft in addition to San Jose City Airport aircraft, all other catering services, such as assembly of dry goods, delivery logistics, and third-party security screening process, occurs in Burlingame. Exh. 24; Buehr T. Sky Chefs' Burlingame employees drive and report to the San Jose facility to pick up food and equipment, which they transport back to the Burlingame facility for processing. Exh. 24; Buehr T. Sky Chefs then dispatches all SFO bound catering trucks from the Burlingame facility. Exh. 24; Buehr T.

Sky Chefs also opined that its permit does not cover catering services and that the QSP does not apply to its San Jose employees because San Jose is not within SFO's "surrounding areas" as required by the QSP. See Exh. 24. For these reasons, Sky Chefs concluded that the QSP requires it to pay the required minimum wage and the HCAO required it to provide the applicable benefits to its Burlingame employees but that neither applied to its San Jose employees. Id. During the audit period, Sky Chefs did not offer employees solely performing work in the San Jose facility the benefits described in S.F. Admin. Code § 12Q.3.(d). See Parties' Joint Stmt. of Facts.

Liquidated Damages Assessment

The City, SFO, Director, and OLSE disagreed with Sky Chefs' view of the QSP's and HCAO's applicability to its San Jose employees preparing food for SFO aircrafts. Popek T; Aspilla T. For example, a day before its formal audit letter, OLSE emailed Sky Chefs and expressly notified it that

Employees at the San Jose location who are directly involved in the preparation of food and beverage products that are delivered directly onto aircraft on the AOA at SFO remain covered QSP employees. As QSP employees, the Healthy Airport Ordinance applies to them.

Exh. 16; see also Exh. 21 (repeating OLSE view 5/21/21). SFO also expected Sky Chefs to comply with OLSE's audit, investigation, and site inspection request. See Exh. 22; Popek T. Accordingly, OLSE assessed appellant \$1,000.00 in liquidated damages for its failure to cooperate, and the Director wrote Sky Chefs urging compliance. See Exhs. 19, 21-22.

Initial Notice of Possible Violation

In compliance with the City's OLSE HCAO Implementing Regulations § 9.4, on June 15, 2021, OLSE notified Sky Chefs that it preliminarily found three possible violations: (1) a wage rate violation; (2) a health coverage violation; and (3) a failure to cooperate violation. See Exhs. D, 25, 35 at § 9.4. Specifically, OLSE noted that Sky Chefs failed to comply with and violated the HCAO and the QSP for employees at its San Jose location for the audit period of April 24, 2021 to May 21, 2021. Exh. 25. The SFO Social Responsibility Director had determined that the QSP covers employees at Sky Chefs' San Jose location who are directly involved in the preparation of food and beverage products that are delivered directly onto aircraft on the AOA at SFO. Id.; Aspilla T; Popek T; see also Exhs. 16 & 21. As QSP covered employees, OSLE determined that the QSP wage rate and HCAO applied to them. Exh. 25. In making these findings, OLSE relied upon Sky Chefs San Jose employee interviews, union provided information, employee survey responses, other information provided by Sky Chefs employees, and the Airport's determination that its QSP applied to Sky Chefs' San Jose based employees preparing food for SFO airlines. Id.; Popek T.

Wage Rate Violation

The SFO QSP requires that QSP employers provide their covered employees with no less than the QSP hourly wage in effect. Exh. 25. The required hourly QSP wage rate during the audit period was \$18.74 per hour. Id. OLSE found that Sky Chefs violated the QSP wage requirement by failing to provide the QSP required wage to twenty (20) covered employees during the audit period April 24, 2021 to May 21, 2021, amounting to a wage shortfall plus interest of \$2,435.00. Id.

Health Coverage Violation

Under the HCAO, QSP employers must offer QSP covered employees a health plan at no employee cost that meets the HAO standards. Id. Alternatively, an employer may comply with the HAO by making contributions to the City's employee option. Id. For the audit period April 24, 2021 to May 21, 2021, the required contribution per employee, per hour was \$9.50. Id. OSLE found that the San Jose workers were covered employees because any employee, including part-time, temporary and seasonal employees, who works for a QSP employer and is a QSP employee, qualifies as a covered employee. Id. In addition, the HCAO requires covered employers to provide an "HCAO Know your Rights Form" to all covered employees for review and signature. OLSE found that Sky Chefs violated the HAO by failing to offer an HAO compliant health plan or make City Option contributions for twenty-five (25) covered employees. Id.

Failure to Cooperate Violation

Pursuant to Section 12Q.4.(a)(4) & (5), OLSE also found that Sky Chefs failed to cooperate with the investigation by not submitting information requested for the San Jose employees. Id. Accordingly, it assessed Sky Chefs liquidated damages of \$1,000. Id.

Determination of Violation

In compliance with the City's OLSE HCAO Implementing Regulations § 9.5, on June 25, 2021, OLSE issued a Determination of Violation against Sky Chefs under the HCAO and the QSP for employees covered by the QSP at its San Jose location for the audit period of April 24, 2021 to May 21, 2021. See Exhs. F, 26, 35 at § 9.5. OLSE determined that Sky Chefs owed \$24,320 in employee contributions and \$6,700 in liquidated damages under the HCAO. Exh. 26. OLSE also assessed \$1,000 liquidated damages for failure to cooperate with its HCAO investigation. Id. OLSE repeated its prior findings, finalized them, and explained the appeals process. Id.

Sky Chefs' Response

On July 1, 2021, Sky Chefs supplied information to OLSE that showed it had not violated the QSP wage rate requirements. Exh. 27. That same day, pursuant to the City's OLSE HCAO Implementing Regulations § 11.1, Sky Chefs also filed an appeal of OLSE's determination with the Controller's Office. Exhs. G, 28, 35 at § 11.1.

Amended Determination of Violation

On July 23, 2021, OLSE issued an amended determination notice changing its findings in the June 15, 2021 Notice of Possible Violation and the June 25, 2021 Determination of Violation. See Exhs. 1, J. OLSE found that Sky Chefs did not violate the QSP wage requirements based upon the newly submitted information. Exhs. 1, J. OLSE still found, however, that Sky Chefs failed to comply with and violated the HCAO. Exhs. 1, J. OLSE mandated Sky Chefs remedy the violation by paying within 30 days \$18,240.00 to the city option for 22 (not the previously numbered 25) covered employees. Exhs. 1, J. It also assessed Sky Chefs \$5,100.00 in liquidated damages for the HCAO violation and \$1,000.00 in liquidated damages for its failure to cooperate. Exhs. 1, J.

The Appeal Process

By letter dated July 26, 2021, the Controller appointed the undersigned as the Hearing Officer in this matter. See Letter 7/26/21. By letter dated August 10, 2021, the Hearing Officer set the hearing for October 5, 2021, commencing at 9:00 a.m. See Letter, dated 8/10/21. The August 10 letter further required each party to submit a detailed pre-hearing statement by September 21, 2021, which included a statement of issues to be decided; a statement of the facts; legal argument with citations; a list describing and a copy of each piece of evidence; and a list of witnesses with a brief summary of their anticipated testimony. Id. The letter further advised that each party will be allotted 90 minutes of total hearing time to present their case, including an opening statement, direct and cross-examination of witnesses, and closing argument. Id. As the letter explained, the Hearing Officer will then issue a written decision based upon her findings within 30 days from the hearing's closure. See S.F. Admin. Code § 12Q.5.2(d)(1).

On September 15, 2021, appellants requested a continuance of the hearing date due to a change in counsel. Appellees objected. The Hearing Officer denied the request given

prior scheduling challenges but granted an extension of the pre-hearing submission deadline to October 1, 2021 to permit some additional time for new counsel. See Email Exchange, dated 9/15/21.

THE HEARING

The Hearing Officer conducted the public hearing on October 5, 2021 via videoconference on the WebEx platform due to the COVID-19 Public Health Orders. Claire Stone, with support from Mark McLean, hosted and recorded the hearing on behalf of the City's Controller's Office. Court reporter John Fahrenwald transcribed the proceedings. Ian Eliasoph, Lisa Powell, and Chris Stewart of the City Attorney's Office represented OLSE, and Ryan Crosner of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. represented Sky Chefs. Beverly Popek served as OLSE's client representative, and Angela May served as Sky Chefs' client representative. Yordanos Dejen of the City Attorney's Office provided technical assistance with exhibits. Official translator Mary So provided Cantonese translation for Cantonese-speaking witnesses, and official translator Quy Dao provided Vietnamese translation for Vietnamese-speaking witnesses.

The Hearing Officer asked the parties if they objected to any of the evidence offered into the record as part of the pre-hearing submissions with their respective pre-hearing statements. OLSE raised no objections. Sky Chefs objected to OLSE's proffered exhibits 14, 36-38, and 40-41 on hearsay and authentication grounds. The Hearing Officer admitted exhibit 14 as a business record, admitted exhibit 38 as a public study subject to impeachment or rebuttal evidence of counter-studies or findings, and admitted exhibit 41 as a business record and party admission. OLSE withdrew exhibits 36 and 37 in light of the parties' stipulation that the airlines require their subcontractors to comply with the QSP and HCAO as applicable. The Hearing Officer initially reserved decision on the admissibility of exhibit 40 pending authentication through a testifying witness and subsequently admitted exhibit 40 after witness Tho Do's authenticating testimony. In sum, the Hearing Officer accepted OLSE's exhibits 1-35 and 38-44 and Sky Chefs' exhibits A-O in evidence into the record. Sky Chefs moved to exclude all witnesses from the hearing pending their own testimony. The Hearing Officer granted the motion and excluded all witnesses until after their testimony except as to client representatives.

OLSE called as witnesses during the hearing: Tho Do, union representative, Siu Ling Sin, a Sky Chefs San Jose-based employee, Gloria Salazar, a Sky Chefs San Jose-based employee, Nga Tran, a Sky Chefs San Jose-based employee, Rosa Huynh, a Sky Chefs San Jose-based employee, Chi Hoang, a Sky Chefs San Jose-based employee, Beverly Popek, OLSE Supervisory Compliance Officer, and Emylene Aspilla, Director of Social Responsibility for SFO. Sky Chefs called as witnesses: Crystal Cousineau, Financial Director, Western Area, and Daniel Buehr, Acting Manager Overseeing Catering Services. All witnesses testified upon oath or affirmation. The Hearing Officer afforded both parties a full opportunity to examine, cross-examine, redirect, and recross each witness as well as to ask additional questions if the Hearing

Officer questioned the witness. The parties waived opening arguments, relying on their extensive pre-hearing statements. At the conclusion of the evidence, each party presented closing argument, and OLSE briefly rebutted. The parties waived the opportunity to file post-hearing briefs and proposed findings and determinations. The Hearing Officer closed the record at end of the business day on October 5, 2021.

STATEMENT OF ISSUES

- ❖ Does the HCAO apply to Sky Chef's employees who prepare food and beverages for delivery onto and consumption on SFO aircraft?
- ❖ If yes, did Sky Chefs comply with HCAO's requirements for covered employees at the San Jose facility during the audit period of April 24, 2021 to May 21, 2021?
- ❖ Did Sky Chefs fail to cooperate with OLSE in violation of S.F. Administrative Code §§ 12Q.4.(a)(4)-(5)?
- ❖ Does S.F. Administrative Code § 12Q.5.1 authorize the OSLE's assessment of liquidated damages against Sky Chefs in its Amended Determination of Violation?

FINDINGS & LEGAL ANALYSIS

Preliminary Findings

Finding: Both parties had a full and fair opportunity to present their respective evidence, positions, and arguments.

Although the regulations contemplate 90 minutes of hearing time all-inclusive per party, the Hearing Officer repeatedly advised the parties that she would afford them both as much time as necessary to prove their respective cases. As a result, the total hearing time lasted over six hours, exclusive of breaks. During that time, each party presented witnesses, exhibits, direct and cross examinations, and rebuttals. The proceedings did not continue until each party exhausted their questioning of each witness and rested their cases. Accordingly, the Hearing Officer finds that the process afforded the parties a full and fair opportunity to present their evidence and argument.

Finding: OLSE has the burden of proof.

By regulation, the OLSE shall have the burden of providing evidence and of proving that the party has violated the HCAO. See Exh. 35 at § 11.2. Accordingly, the Hearing Officer finds that the OLSE bears the burden of proof in this case.

Issue: HCAO's Applicability

- ❖ Does the HCAO apply to Sky Chef's employees who prepare food and beverages for delivery onto and consumption on SFO aircraft?

Finding: Sky Chefs' SFO Permit requires QSP compliance.

Permit No. 4105 requires Sky Chefs to comply strictly with the QSP as modified from time to time. See Exhs. 2 & A at § 2.1(a), § 3.1. The Hearing Officer therefore finds that Sky Chefs must contractually comply with the QSP's terms, and the HCAO incorporated within the QSP, as a condition of providing services to SFO.

Finding: The QSP expressly covers caterers who service SFO aircraft and who are located on SFO's "surrounding areas."

The SFO's QSP specifically defines several categories of employees to whom it applies. Within the category of employees who directly impact airport safety, the QSP lists:

Employees located on Airport property and the surrounding areas who are directly involved in the preparation and/or transportation of food and beverage products delivered directly onto aircraft on the AOA.

Exh. A. Accordingly, the Hearing Officer finds that the QSP covers, *inter alia*, any employee who works directly in the preparation of consumables delivered directly on SFO aircraft if that employee performs his or her work duties either on SFO property or on any of the areas surrounding SFO or Airport property.

Finding: San Jose falls outside the SFO surrounding areas for QSP purposes.

As a geographical matter, San Jose does not "surround" SFO. See Exh. L (map of SFO and surrounding communities). Surrounding typically means encompassing, enclosing, or encircling; it can also mean neighboring or adjacent. While the Hearing Officer acknowledges that SFO borders water on most sides and that hence many of its "surrounding areas" stretch down the peninsula rather than literally around the airport, a commonsense reading of the QSP does not stretch to include San Jose as an SFO surrounding area. See website with map of airport and surrounding area <http://san-francisco-sfo.worldairportguides.com/maps.php>. Many cities have their centers within 12 miles of the airport: Millbrae, San Bruno, South San Francisco, Hillsborough, Burlingame, San Mateo, Pacifica, Daly City, Foster City, Belmont, San Carlos, Half Moon Bay, San Francisco, Redwood City, and Alameda. They constitute part of the Airport's "surrounding communities." Conversely, San Jose lies 35 miles away with its own separate airport. See Exh. L. Recognizing the distances, Sky Chefs' own employees admitted that San Jose is not a surrounding area of SFO. See, e.g., Sin T; Hoang T.

The Airport itself has indirectly acknowledged over the years the differences between San Jose and those communities truly surrounding SFO. For example, in 2009, when the Director explained the need to amend the QSP, he compared SFO to other

California airports including Los Angeles, Oakland, and San Jose. See Exh. 7 at OLSE00178. The Director specifically compared the SFO area to the San Jose area, which constituted the area with the next highest total compensation rate. See id. Thus, at least as of 2009, SFO's Director did not consider the San Jose area to be part of the surrounding area of SFO, but rather a comparable area with its own city-mandated minimum compensation requirements. See id.

Likewise, as recently as 2020, when the City enacted the HAO, it characterized the 2016 QSP modification that added airline caterers as follows:

(3) On October 13, 2015, by Resolution No. 15-0216, the Airport Commission included in the QSP employees located on or *near* Airport property who are directly involved in the preparation and/or transportation of food and beverage products delivered directly onto aircraft in the QSP.

See Exh. 10 at § 2(d)(3). Hence, the HAO legislative history illustrates that the City – SFO's owner – considered the term “surrounding area” the equivalent as nearby airport property. See id.

Even in this case, SFO interpreted the Burlingame, but not San Jose, facility as “near.” After Sky Chefs decided to close one of its Burlingame facilities, the SFO Acting Director, Aviation Management wrote the Sky Chefs' General Manager. See Exh. 14. While he reinforced the Permit's terms and conditions, his letter demonstrates that he considered the Burlingame, not the San Jose, facility near SFO. For example, referring to the remaining Burlingame facility, he wrote that he was glad that Sky Chefs “will continue to maintain a presence in the area *near* SFO.” Id. (emphasis added). He also wrote: “We look forward to a time of recovery from the effects of the pandemic when air traffic rebounds and Sky Chefs will, hopefully, return to having two buildings *near* SFO to provide service to SFO's air carriers.” Id. (emphasis added). The Hearing Officer finds that this letter demonstrates that, as of April 12, 2021, SFO did not consider Sky Chefs' San Jose facility geographically “in the area near SFO.”

Separately, SFO tracks the noise levels in the areas “around SFO.” See Exh. M. In the Director's most recent report on the subject, it mapped 29 locations that keep track of “noise levels in the communities *around* the airport.” Id. (emphasis added). The report relies on the Community Noise Exposure Level metric to assess and regulate aircraft noise exposure “in communities *surrounding* the airport.” Id. (emphasis added). None of the 29 “surrounding” locations include San Jose. Id. The report also listed the communities which reported noise complaints. See id. at 215. None came from San Jose. Id. Accordingly, based upon the record and evidence, the Hearing Officer finds that OLSE did not sufficiently prove that the QSP's application to the Airport property's “surrounding areas” extends to San Jose.

Finding: The QSP's and the HCAO's coverage of catering employees extends beyond SFO's property and immediate vicinity.

Despite the above finding that San Jose does not fall within the geographically surrounding areas of SFO, the evidence also clearly establishes that the City and the Airport intended the QSP and the HCAO to extend beyond SFO's property and beyond its immediate vicinity for catering employees. For example, the minutes of the public comment hearing memorialize that the Director testified, the "amendment to the QSP will include catering employees working both on and off Airport." Exh. 9. Similarly, the QSP specifically identifies other categories of covered employees as working in, within, or around the AOA and its perimeter, whereas it broadened the scope of its coverage of caterers to include those working in surrounding areas without the AOA or perimeter limitation. See Exh. 4. Consequently, the Hearing Officer finds that the QSP and HCAO cover catering employees working off SFO property and beyond SFO's immediate vicinity. See Exh. 4.

Finding: The QSP defines covered employee to include employees directly engaged in work, which may impact SFO safety.

The parties' dispute over San Jose's proximity to SFO ignores the illustrative nature of the QSP's definition of covered employees. The QSP explicitly defines covered employees expansively:

V. Types of Employees Covered by the Program.

The Program is applicable to employees of Covered Employers who: (1) require the issuance of an Airport badge with Airfield Operations Area ("AOA") access and work in and around the AOA in the performance of their duties; or (2) are directly involved in passenger and facility security and/or safety, ***including but not limited to*** checkpoint screening, passenger check-in, skycap and baggage check-in and handling services, custodial services, and AOA perimeter control (collectively, "Covered Employees") ***as further specified below***. The Program is applicable to all existing Covered Employers as well as new entrants. ...

B. ***Those Impacting Safety***: Employees in this category ***include*** those directly engaged in activities, which may impact safety within the AOA. ***These employees include but are not limited to the following***:

2. Employees located on Airport property and the surrounding areas who are directly involved in the preparation and/or transportation of food and beverage products delivered directly onto aircraft on the AOA. ...

Exh. 4 (emphasis added).

In other words, the QSP defines covered employees to include all employees who directly engage in activities which may impact safety within the AOA. Id. Importantly, this definition in the QSP contains no geographical restriction. Id. The QSP does not *define* covered employees as caterers working in the SFO surrounding areas; it defines covered employees as those who may impact Airport safety. Id. It then *illustrates* that definition by highlighting caterers who prepare food offsite in SFO's surrounding areas whose work nevertheless directly impacts SFO safety because the food is delivered,

served, and consumed directly onboard SFO passenger and cargo flights. Id. Accordingly, the Hearing Officer finds that the QSP expansively defines covered employees, *inter alia*, to include employees who directly engage in activities, which may impact SFO safety and that the QSP's inclusion of caterers in SFO's surrounding areas who prepare food for delivery and consumption on SFO aircraft is illustrative, not exhaustive.

Finding: Caterers preparing SFO onboard consumables directly impact Airport safety, regardless of their work location.

The evidentiary record demonstrates the safety impact of the Airport's food preparers. For example, in the Director's written recommendation to the Commission in support of extending the QSP to airline catering services, he wrote:

In its current form, the QSP applies to truck drivers who possess SFO badges with AOA access and deliver food to aircraft on the airfield. The airline catering companies that employ these drivers include Flying Food Group, Gate Gourmet and Sky Chefs. The QSP does not currently cover employees of these airline catering companies that work in kitchens and prepare the food and beverage products that are being delivered to aircraft at SFO. These employees are critical to Airport safety and security because they are preparing food and beverages that are delivered to secure areas of SFO and directly on to aircraft departing from SFO.

Exh. N at #2; Exh. 8 at #2; see also Minutes, October 13, 2015, Page 5 OLSE 00203 (catering employees put food on food carts that go directly to planes, so we think this is important in promoting safety to include these employees); Exh. 38.

In enacting the HAO, the City explicitly noted the COVID-19 concerns facing airline catering service workers, which only exacerbated the safety risks:

(2) Employees of airline catering companies often work in climate-controlled spaces with little ventilation, where they must breathe the same air recirculated throughout their shifts. These employees often work in crowded worksites where distancing is not possible—in industrial kitchens or on assembly lines where employees stand shoulder-to-shoulder as they prepare food, assemble food and beverage carts, and wash dishes.

Exh. 10 at § 2(h)(2).

And, here in this case, the Airport Director of Social Responsibility, who oversees the QSP, concluded that Sky Chefs employees working in the San Jose facility directly preparing food for SFO flights impact SFO safety and that therefore the QSP covers them. Aspilla T; Popek T; see also Exhs. 16, 21. Based upon this ample evidence, the Hearing Officer finds that caterers, who prepare consumables for SFO aircraft, impact SFO safety regardless of their worksite.

Finding: Some Sky Chefs food preparers located in San Jose prepare consumables for SFO flights and hence impact SFO safety.

Several Sky Chefs San Jose-based employees credibly testified that they directly prepare food for SFO flights. For example, Siu Ling Sin, Gloria Salazar, Nga Tran, Rosa Huynh, Chi Hoang, all testified that they work out of Sky Chefs' San Jose facility and prepare food for SFO flights, mostly for Lufthansa and Korean Airlines. Some of the testifying employees referred to boarding bills, and witness Sin showed a boarding bill at the hearing, which lists the food's destination flight, airline, and airport. See, e.g., Sin, Salazar, Huynh, Hoang T. Others mentioned the refrigerator where Sky Chefs stores the food carts pending their transportation to the airports; they reported that Sky Chefs has designated one side for SFO and the other for SJC – San Jose's airport. Salazar T. Witness Tran explained that they receive diagrams showing if the food will go to SFO or SJC and that paper taped to the carts themselves also label the airport designation. Tran T; see also Bruehr T.

Additionally, Tho Do, the local Union Director based in San Jose, credibly testified that she prepared a written survey asking Sky Chefs' San Jose employees to log the hours they spent preparing food and for which airlines and airports. Do T; see also Exh. 40. Director Do handed out the survey as a form which employees completed and returned. Do T. Director Do then spoke personally to each of the 22 employees who returned a completed survey form. Do T. She summarized her findings in a memorandum and submitted her report with the surveys to Union Director Lorraine Powell, who forwarded the information to OLSE Compliance Officer Popek. Do T; Exh. 40. A San Jose employee also sent Do a picture of the Sky Chefs prepared daily schedule showing the airlines and flights for which the employees prepared food on any given day. See Exh. 41.

The survey responses, the Sky Chefs' work schedule, the boarding bills distributed to some food preparers, cart labels, cooler signs, and other indicators all confirm that certain San Jose based Sky Chef employees prepare consumables for SFO flights. Accordingly, the Hearing Officer finds that at least some Sky Chefs food preparers working out of its San Jose facility directly engage in activities impacting SFO safety.

Finding: The QSP covers and the HCAO applies to Sky Chefs' San Jose based employees, who directly prepare consumables for SFO flights.

Given, the above findings, the Hearing Officer further finds that the QSP covers employees based in Sky Chefs' San Jose facility, who directly prepare consumables for SFO flights, because they fall within the QSP's definition of employees directly engaged in activities which may impact Airport security. Accordingly, the Hearing Officer finds that the HCAO and HAO apply to Sky Chefs' San Jose employees who prepare consumables for SFO flights because they constitute "covered employees" within the scope of the QSP.

Issue 2: Compliance

- ❖ If the HCAO applies to Sky Chef's employees who prepare food and beverages for delivery onto and consumption on SFO aircraft, did Sky Chefs comply with HCAO's requirements for covered employees at the San Jose facility during the audit period of April 24, 2021 to May 21, 2021?

Finding: Sky Chefs failed to comply with HCAO's requirements for QSP covered employees at the San Jose facility during the audit period of April 24, 2021 to May 21, 2021.

Sky Chefs acknowledged by stipulation that during the audit period, it did not offer employees solely performing work in its San Jose facility the benefits described in San Francisco Administrative Code § 12Q.3.(d). Parties' Stip. of Facts. In addition, all testifying Sky Chefs employees based in San Jose confirmed that they did not receive health benefits or city option benefits paid by Sky Chefs. Sin, Salazar, Tran, Huynh, Hoang T. Accordingly, the Hearing Officer accepts the parties' stipulation and finds that Sky Chefs failed to comply with HCAO's requirements for QSP covered employees in the San Jose facility during the audit period.

Issue 3: Cooperation

- ❖ Did Sky Chefs fail to cooperate with OLSE in violation of S.F. Administrative Code §§ 12Q.4.(a)(4)-(5)?

Finding: OLSE has jurisdiction to enforce the QSP, HCAO, and HAO.

San Francisco Administrative Code Section 12Q.5 authorizes the OLSE to enforce the HCAO. In addition, the Airport empowered OLSE to enforce SFO's QSP on its behalf pursuant to a memorandum of understanding. See Exh. 35. The Hearing Officer consequently finds that the OLSE has jurisdiction to enforce the requirements of the QSP, HCAO, and HAO and to assess fines and damages, as authorized, for their violation.

Finding: Sky Chefs complied and cooperated with OLSE as to its Burlingame facility.

The HCAO requires, *inter alia*, contracting parties and their subcontractors:

- (4) To provide information and reports to the City in accordance with any reporting standards promulgated by the Agency in consultation with the Director of Health;
- (5) To provide the City with access to pertinent payroll records relating to the number of employees employed and terms of medical coverage after receiving a written request to do so and being provided at least ten (10) business days to respond;

(6) To allow the City to inspect Contracting Parties' job sites and have access to Contracting Parties' employees in order to monitor and determine compliance with this Chapter.

S.F. Admin. Code §§ 12Q.4.(a)(4)-(6); see Exh. 6. In addition, the governing HCAO regulations require Sky Chefs to cooperate with OLSE. Specifically, section 8.4, entitled, "Cooperation with OLSE Investigation and Enforcement," provides:

Contracting Parties shall cooperate with the OLSE when it requests a meeting, site visit, or documentation as part of its audit or investigation. Cooperation includes, but is not limited to: (A) Providing full access to job sites and Employees, so that the OLSE may monitor and determine compliance with the HCAO, (B) Providing copies of pertinent timesheets and payroll records relating to the number of Employees employed and terms of medical coverage provided, after receiving written request from the OLSE and being provided with at least ten (10) business days to respond, and (C) Providing copies of Employee policy manuals, and any other documents that would assist the OLSE in determining compliance with the HCAO.

Exh. 35 at § 8.4. Further, Sky Chefs' Permit with SFO requires it to cooperate with the Director and the Airport's team, maintain records of its QSP compliance and supply them upon request, submit to the Director's audit of Sky Chef's operations, including its implementation and compliance with the QSP, open its books and records to the City and its auditors upon written request. Id. at §§ 3.5, 3.10-11.

The record proves that Sky Chefs complied with OLSE's requests as to its Burlingame facility. Sky Chefs submitted documentation regarding its HCAO compliance for its Burlingame office, contributed to the city option for the Burlingame QSP covered employees, and otherwise met OLSE's demands as to its Burlingame facility. Popek T. In fact, the parties first began discussions when Sky Chefs' counsel contacted Compliance Officer Popek to learn how best to comply with HAO's city option for Sky Chefs' Burlingame office. Popek T. Compliance Officer Popek connected Sky Chefs' counsel with city option personnel to assist. Id. Thereafter, Sky Chefs paid the required amount for its QSP covered Burlingame employees. Popek T. The Hearing Officer hence finds that Sky Chefs both complied and cooperated with OLSE with respect to its Burlingame facility.

Finding: Sky Chefs failed to comply with OLSE's requests as to its San Jose facility but respectfully and cooperatively objected on jurisdictional grounds.

Unlike with its Burlingame facility, Sky Chefs did not comply with OLSE's requests as to its San Jose facility. Sky Chefs objected to OLSE's jurisdiction as to the San Jose facility and therefore did not believe that it had a legal obligation to comply with its requests as to its San Jose operations. See Exhs. C, 18, 21, 24; Popek T. In raising and preserving its objection, however, Sky Chefs cooperated with OLSE: it sought

repeatedly to discuss the legal issues with counsel; it offered a guided tour of the San Jose facility, even though it did not believe that OLSE had jurisdiction to inspect the premises; it explained its position and reasoning in respectful and reconciliatory exchanges; it frequently communicated with OLSE by telephone, email, letter, and videoconference. Indeed, Compliance Officer Popek acknowledged that it seemed like they communicated in some fashion “every other day.” Popek T; see, e.g., Exhs. B, 12, 15-16, 20, 23, 32-33.

Moreover, while not OLSE’s optimal choice, the Hearing Officer finds a guided tour of the San Jose facility where workers prepare food during a pandemic a very reasonable and cooperative offer, an offer OLSE rejected. Popek T. The Hearing Officer finds the offer particularly cooperative when extended by a contracting party that disputes OLSE’s jurisdiction over its San Jose operations in the first instance.

Sky Chefs also behaved cooperatively and reasonably given the novel circumstances of this case. No caterer had previously operated even arguably outside the “surrounding area” of SFO, Aspilla T, and therefore, prior to this appeal, the City and the Airport never had to consider how far the QSP’s application extends. Sky Chefs can and did engage cooperatively with OLSE, the Airport, and the City while still maintaining its right to challenge the QSP’s reach to and the OLSE’s jurisdiction over its San Jose facility. While the Hearing Officer understands OLSE’s frustration at not receiving the San Jose documents despite “at least six written requests,” Popek T, contracting parties must be able to disagree with OLSE’s legal position until its objections are resolved according to the due process appeals procedure without necessarily subjecting themselves to a failure to cooperate finding on top of the underlying substantive violation. In sum, the Hearing Officer finds that, as to its San Jose operations, Sky Chefs did not comply with OLSE’s requests and did not accede to its jurisdiction but did cooperate given its legal objections.

In light of this appellate decision, however, Sky Chefs now has a duty to cooperate more fully with OLSE as to its San Jose facility because this decision overrules its objections to OLSE’s jurisdiction over its San Jose operations to the extent they impact SFO safety. Accordingly, Sky Chefs must comply with OLSE’s document requests, audit, and payroll records demands within the new timeframe to be determined in writing by OLSE. Compliance Officer Popek acknowledged that, through no fault of the OLSE, some of the San Jose workers’ hours, and hence healthcare contributions based upon those hours, may have been erroneous because OLSE had to rely upon worker survey responses rather than official payroll records given Sky Chefs’ refusal to produce the payroll records for its San Jose facility. Popek T. Accordingly, the Hearing Officer leaves the calculation of the appropriate amount of healthcare contribution for Sky Chefs’ San Jose QSP covered employees to OLSE’s discretion to redetermine once it receives the official records from Sky Chefs.

Issue 4: Assessment

- ❖ Does S.F. Administrative Code § 12Q.5.1 authorize the OSLE's assessment of liquidated damages against Sky Chefs in its Amended Determination of Violation?

Finding: OLSE should not have assessed liquidated damages against Sky Chefs for failure to cooperate.

OLSE assessed Sky Chefs two separate liquidated damages amounts for failure to cooperate: \$1,000 for the failure to allow the site visit and \$5,100 for the failure to cooperate as to the HCAO documentation. Popek T. In light of the above finding that OLSE did not sustain its burden of proof on the issue of Sky Chefs' failure to cooperate, the Hearing Officer finds that Section 12Q.5.1 did not authorize the OLSE to assess liquidated damages against Sky Chefs in its Amended Determination of Violation.

DETERMINATION

Wherefore all the evidence having been heard and considered, it is the determination of this Hearing Officer that:

1. OLSE sustained its burden of proof to show by a preponderance of the evidence that the QSP, HCAO, and HAO apply to Sky Chef's employees who directly prepare food and beverages for delivery onto and consumption on SFO aircraft.
2. OLSE sustained its burden of proof to show by a preponderance of the evidence that Sky Chefs did not comply with the QSP's, HCAO's, and HAO's requirements for QSP covered employees at the San Jose facility during the audit period of April 24, 2021 to May 21, 2021.
3. Accordingly, the OLSE's finding that Sky Chefs violated the HAO by failing to offer a HAO compliant health care plan or make city option contributions for 22 employees is **AFFIRMED**.
4. OLSE failed to prove by a preponderance of the evidence that Sky Chefs did not cooperate with OLSE in violation of S.F. Administrative Code §§ 12Q.4.(a)(4)-(5).
5. Accordingly, the OLSE's findings that Sky Chefs failed to cooperate with its investigation and its assessment of liquidated damages against Sky Chefs are hereby **VACATED**.

This decision is final. A party may appeal a final determination only by filing in the San Francisco Superior Court a petition for a writ of mandate under California Code of Civil Procedure, Section 1094.5, et seq. S.F. Admin. Code § 12Q.5.2(d)(2).

Dated: October 8, 2021
BY: /s/Janice L. Sperow
Janice L. Sperow, Esq. Hearing Officer