No. 124831

IN THE
SUPREME COURT OF ILLINOIS

CITY OF CHICAGO,

Petitioner-Appellee,

v.

FRATERNAL ORDER OF POLICE,
CHICAGO LODGE NO. 7,

Respondent-Appellant

Appeal from the Appellate Court of Illinois, First District
No. 1-17-2907
There heard on appeal from the Circuit Court of Cook County,
Illinois, County Department, Chancery Division
No. 2016 CH 9793
The Honorable Sanjay T. Tailor, Judge Presiding

BRIEF OF PETITIONER-APPELLEE CITY OF CHICAGO

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POINTS AND AUTHORITIES

NATURE OF THE CASE 1

ISSUE PRESENTED 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF FACTS 7

ARGUMENT 15

AFSCME v. Department of Central Management Services,
173 Ill. 2d 299 (1996) 15-16

THE ARBITRATOR'S AWARD VIOLATED ILLINOIS PUBLIC POLICY FAVORING THE PROPER RETENTION OF IMPORTANT PUBLIC RECORDS. 16

A. A Well-Defined Public Policy Exists In Illinois Favoring The Proper Retention Of Important Public Records. 16

AFSCME v. Department of Central Management Services,
173 Ill. 2d 299 (1996) 16-17

Chicago Fire Fighters Union Local No. 2 v. City of Chicago,
323 Ill. App. 3d 168 (1st Dist. 2001) 17

Nurses Association v. Board of Trustees of the University of Illinois,
318 Ill. App. 3d 519 (1st Dist. 2001) 17

Illinois State Police v. FOP,
323 Ill. App. 3d 322 (4th Dist. 2001) 17

County of DeWitt v. AFSCME,
298 Ill. App. 3d 634 (4th Dist. 1998) 17-18

Board of Education v. Illinois Educational Labor Relations Board,
216 Ill. App. 3d 990 (4th Dist. 1991) 18

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

City of Chicago v. Fraternal Order of Police, Chicago Lodge No. 7, 2019 IL App (1st) 172907 .... 18, 21, 22

50 ILCS 205/4........ 18, 19

50 ILCS 205/7........ 18

50 ILCS 205/10........ 19

5 ILCS 1601/1, et seq......... 19

5 ILCS 1601/1.5........ 20, 21

5 ILCS 140/1........ 20, 21

B. The Arbitrator's Award Violated Public Policy By Requiring The City To Destroy Decades' Worth Of Records Of Alleged Police Misconduct........ 22

City of Chicago v. Fraternal Order of Police, Chicago Lodge No. 7, 2019 IL App (1st) 172907 .... 23, 26

50 ILCS 205/10........ 23

Monell v. Department of Social Services, 436 U.S. 658 (1978)........ 23-25

C. FOP's Arguments Offer No Reason To Enforce The Award In The Face Of Contrary Public Policy. 26

5 ILCS 315/15........ 26

1. FOP offers no basis to overturn the appellate court's decision. 26

City of Chicago v. Fraternal Order of Police, Chicago Lodge No. 7, 2019 IL App (1st) 172907 27

AFSCME v. Department of Central Management Services, 173 Ill. 2d 299 (1996)........passim

50 ILCS 205/10........ 30

5 ILCS 140/1........ 31

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

Fraternal Order of Police, Lodge No. 7 v. City of Chicago,
2016 IL App (1st) 143884 31

Board of Education v. Illinois Educational Labor Relations Board,
216 Ill. App. 3d 990 (4th Dist. 1991) 32

1010 Lake Shore Association v. Deutsche Bank National Trust Co.,
2015 IL 118372 .... 33, 34

South 51 Development Corp. v. Vega,
335 Ill. App. 3d 542 (1st Dist. 2002) 34-35

Central Bank of Denver v. First Interstate Bank of Denver,
511 U.S. 164 (1994) 35

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,
531 U.S. 159 (2001) 35

Chicago Fire Fighters Union Local No. 2 v. City of Chicago,
323 Ill. App. 3d 168 (1st Dist. 2001) 36

2. FOP misapprehends section 15 of the PLRA and the public policy doctrine. 36

5 ILCS 315/15 36-37

Decatur Police Benevolent & Protective Association Labor Committee v. City of Decatur,
2012 IL App (4th) 110764 37

AFSCME v. Department of Central Management Services,
173 Ill. 2d 299 (1996) 38, 40

1010 Lake Shore Association v. Deutsche Bank National Trust Co.,
2015 IL 118372 38

City of Decatur v. AFSCME, Local 268,
122 Ill. 2d 353 (1988) 39

Forest Preserve District of Cook County v. Illinois Labor Relations Board,
190 Ill. App. 3d 283 (1st Dist. 1989) 39

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

Sroga v. Preckwinkle,
No. 14-C-6594, 2017 WL 345549 (N.D. Ill. Jan. 24, 2017).................... 40

Kalven v. City of Chicago,
2014 IL App (1st) 121846 41

Perry v. Department of Financial & Professional Regulation,
2018 IL 122349 41

CONCLUSION 41

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

NATURE OF THE CASE

An arbitrator ordered petitioner-appellee City of Chicago to destroy records of alleged police misconduct that are more than five years old (or, in some cases, more than seven years old). The City filed a petition to vacate the arbitrator's award on the basis that it violates Illinois public policy favoring the proper maintenance of important public records. Respondent-appellant Fraternal Order of Police, Chicago Lodge No. 7 ("FOP") filed a counter-petition to enforce the award. The circuit court granted the City's petition and denied FOP's counter-petition, holding that the award violated public policy. The appellate court affirmed. This appeal presents questions raised in the parties' pleadings to vacate and enforce the award.

ISSUE PRESENTED

Whether the arbitrator's award requiring the City to destroy records of alleged police misconduct violated Illinois public policy favoring the proper maintenance of important public records.

JURISDICTION

On April 28, 2016, the arbitrator issued his final award. C. 28-52. FOP filed a motion for reconsideration, or, alternatively, clarification, which the arbitrator granted on June 21, 2016, C. 53-64.[1] The City filed a petition

[1] The record on appeal consists of one volume of common-law record, which we cite as "C. __," one volume of report of proceedings, which we cite as

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to vacate the award on July 26, 2016. C. 8-27. FOP filed a counter-petition to enforce the award on August 26, 2016. C. 758-78. The circuit court issued its order granting the City's petition to vacate the award and denying FOP's counter-petition on October 18, 2017. C. 1853-67. FOP filed its notice of appeal from that decision on November 16, 2017. C. 1886-88. The appellate court issued an opinion affirming judgment for the City on March 29, 2019. A. 2-16. FOP filed a petition for leave to appeal to this court on May 14, 2019, and this court granted that petition on September 25, 2019. This court has jurisdiction under Ill. Sup. Ct. R. 315.

STATUTES INVOLVED

Section 4 of the Local Records Act, 50 ILCS 205/4, in relevant part:

> Sec. 4. (a) Except as otherwise provided in subsection (b) of this Section, all public records made or received by, or under the authority of, or coming into the custody, control or possession of any officer or agency shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part, except as provided by law. Any person who knowingly, without lawful authority and with the intent to defraud any party, public officer, or entity, alters, destroys, defaces, removes, or conceals any public record commits a Class 4 felony.

Section 6 of the Local Records Act, 50 ILCS 205/6:

> Sec. 6. For those agencies comprising counties of 3,000,000 or more inhabitants or located in or coterminous with any such county or a majority of whose inhabitants reside in any such

"ROP __," and one volume of supplemental record, which we cite as "Supp. C. __ ." For transcripts from the arbitration hearing, we also include the internal transcript page and line numbers as "___:___." We cite FOP's opening brief as "FOP Br. __" and the appendix to that brief as "A. __."

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

county, this Act shall be administered by a Local Records Commission consisting of the president of the county board of the county wherein the records are kept, the mayor of the most populous city in such county, the State's attorney of such county, the County comptroller, the State archivist, and the State historian. The president of the county board shall be the chairman of the Commission.

Section 7 of the Local Records Act, 50 ILCS 205/7, in relevant part:

> Sec. 7. Disposition rules. Except as otherwise provided by law, no public record shall be disposed of by any officer or agency unless the written approval of the appropriate Local Records Commission is first obtained.
>
> The Commission shall issue regulations which shall be binding on all such officers. Such regulations shall establish procedures for compiling and submitting to the Commission lists and schedules of public records proposed for disposal; procedures for the physical destruction or other disposition of such public records; procedures for the management and preservation of electronically generated and maintained records; and standards for the reproduction of such public records by photography, microphotographic processes, or digitized electronic format.

Section 10 of the Local Records Act, 50 ILCS 205/10:

> Sec. 10. The head of each agency shall submit to the appropriate Commission, in accordance with the regulations of the Commission, lists or schedules of public records in his custody that are not needed in the transaction of current business and that do not have sufficient administrative, legal or fiscal value to warrant their further preservation. The head of each agency shall also submit lists or schedules proposing the length of time each records series warrants retention for administrative, legal or fiscal purposes after it has been received by the agency. The Commission shall determine what public records have no administrative, legal, research or historical value and should be destroyed or otherwise disposed of and shall authorize destruction or other disposal thereof. No public record shall be destroyed or otherwise disposed of by any Local Records Commission on its own initiative, nor contrary to law. This Section shall not apply to court records as governed by Section 4 of this Act.

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

Section 1.5 of the State Records Act, 5 ILCS 160/1.5:

> Sec. 1.5. Purpose. Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois (i) that government records are a form of property whose ownership lies with the citizens and with the State of Illinois; (ii) that those records are to be created, maintained, and administered in support of the rights of those citizens and the operation of the State; (iii) that those records are, with very few exemptions, to be available for the use, benefit, and information of the citizens; and (iv) that those records may not be disposed of without compliance to the regulations in this Act.

Section 3 of the State Records Act, 5 ILCS 160/3:

> Sec. 3. Records as property of State.
> (a) All records created or received by or under the authority of or coming into the custody, control, or possession of public officials of this State in the course of their public duties are the property of the State. These records may not be mutilated, destroyed, transferred, removed, or otherwise damaged or disposed of, in whole or in part, except as provided by law. Any person shall have the right of access to any public records, unless access to the records is otherwise limited or prohibited by law. This subsection (a) does not apply to records that are subject to expungement under subsections (1.5) and (1.6) of Section 5-915 of the Juvenile Court Act of 1987.

Section 11 of the State Records Act, 5 ILCS 160/11:

> Sec. 11. Violation. All records made or received by or under the authority of or coming into the custody, control or possession of public officials of this State in the course of their public duties are the property of the State and shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part except as provided by law. Any person who knowingly and without lawful authority alters, destroys, defaces, removes, or conceals any public record commits a Class 4 felony.

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Section 16 of the State Records Act, 5 ILCS 160/16:

> Sec. 16. There is created the State Records Commission. The Commission shall consist of the following State officials or their authorized representatives: the Secretary of State, who shall act as chairman; the State Historian, who shall serve as secretary; the State Treasurer; the Director of Central Management Services; the Attorney General; and the State Comptroller. The Commission shall meet whenever called by the chairman, who shall have no vote on matters considered by the Commission. It shall be the duty of the Commission to determine what records no longer have any administrative, fiscal, legal, research, or historical value and should be destroyed or disposed of otherwise. The Commission may make recommendations to the Secretary of State concerning policies, guidelines, and best practices for addressing electronic records management issues as authorized under Section 37 of the Government Electronic Records Act.

Section 17 of the State Records Act, 5 ILCS 160/17:

> Sec. 17. (a) Regardless of other authorization to the contrary, except as otherwise provided in subsection (b) of this Section, no record shall be disposed of by any agency of the State, unless approval of the State Records Commission is first obtained. The Commission shall issue regulations, not inconsistent with this Act, which shall be binding on all agencies. Such regulations shall establish procedures for compiling and submitting to the Commission lists and schedules of records proposed for disposal; procedures for the physical destruction or other disposition of records proposed for disposal; and standards for the reproduction of records by digital, photographic, or microphotographic processes with the view to the disposal of the original records. Such standards shall relate to the electronic digital process and format, quality of film used, preparation of the records for reproduction, proper identification matter on the records so that an individual document or series of documents can be located on the film or electronic medium with reasonable facility, and that the copies contain all significant record detail, to the end that the photographic, microphotographic, or digital copies will be adequate.

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Section 1 of the Illinois Freedom of Information Act ("FOIA"), 5 ILCS 140/1, in relevant part:

> Sec. 1. Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.
>
> The General Assembly hereby declares that it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act.
>
> * * *
>
> This Act is not intended to create an obligation on the part of any public body to maintain or prepare any public record which was not maintained or prepared by such public body at the time when this Act becomes effective, except as otherwise required by applicable local, State or federal law.

Section 1.2 of the FOIA, 5 ILCS 140/1.2:

> Sec. 1.2. Presumption. All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt.

Section 15 of the Illinois Public Relations Act, 5 ILCS 315/15, in relevant parts:

> Sec. 15. Act Takes Precedence.
> (a) In case of any conflict between the provisions of this Act and any other law, . . . executive order or administrative

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> regulation relating to wages, hours and conditions of employment and employment relations, the provisions of this Act or any collective bargaining agreement negotiated thereunder shall prevail and control.
>
> * * *
>
> (b) Except as provided in subsection (a) above, any collective bargaining contract between a public employer and a labor organization executed pursuant to this Act shall supersede any contrary statutes, charters, ordinances, rules or regulations relating to wages, hours and conditions of employment and employment relations adopted by the public employer or its agents.

STATEMENT OF FACTS

Background. Complaints of misconduct against Chicago Police Department ("CPD") officers are investigated and evaluated by the Civilian Office of Police Accountability ("COPA") or by CPD's Bureau of Internal Affairs ("BIA"). Chicago Police Board, Allegations of Police Misconduct: A Guide to the Complaint and Disciplinary Process 1 (September 2017), available at https://www.cityofchicago.org/content/dam/city/depts/cpb/PoliceDiscipline/AllegMiscond20170915.pdf.[2] COPA and BIA have the authority to investigate complaints against CPD members and to recommend to the Superintendent of CPD disciplinary action for violations of CPD rules and regulations. Id.; Municipal Code of Chicago, Ill. § 2-78-120. Documents

[2] On October 5, 2016, the Chicago City Council passed an ordinance to establish COPA, which replaced the Independent Police Review Authority ("IPRA") as the civilian oversight agency of the Chicago Police Department. Municipal Code of Chicago, Ill. § 2-78-100, et seq.; https://www.chicagocopa.org/about-copa/our-history/. BIA was formerly called the Internal Affairs Division or "IAD." That division was renamed in 2013.

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generated in the course of these investigations are commonly referred to as complaint register files or CR files. Kalven v. City of Chicago, 2014 IL App (1st) 121846, ¶¶ 2-3.

The City and FOP entered their first Collective Bargaining Agreement ("CBA") effective January 1, 1981. C. 273. Section 8.4 of the first CBA contained a provision governing the retention of disciplinary and investigation records like CR files and required their destruction "five (5) years after the date of the incident or the date upon which the violation is discovered." Id. Future CBAs continued to include some version of section 8.4, including the CBA at issue in this case, the 2007-12 CBA. C. 100. The relevant part of section 8.4 of the 2007-12 CBA states:

> All disciplinary investigation files, disciplinary history card entries, Independent Police Review Authority and Internal Affairs Division disciplinary records, and any other disciplinary record or summary of such record other than records related to Police Board cases, will be destroyed five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, except that not sustained files alleging criminal conduct or excessive force shall be retained for a period of seven (7) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, and thereafter, cannot be used against the officer in any future proceedings in any other forum, except as specified below, unless the investigation relates to a matter which has been subject to either civil or criminal court litigation or arbitration prior to the expiration of the five- (5-) year period. In such instances, the Complaint Register case files normally will be destroyed immediately after the date of the final arbitration award or the final court adjudication, unless a pattern of sustained infractions exists.

Id.

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Until 1991, the City destroyed records subject to section 8.4 in accordance with that provision. Supp. C. 47 at 170:18-21. That changed in 1991 when a federal district judge entered an order in a civil rights case requiring the City to cease destroying CR files. Supp. C. 47 at 169:3-170:15. Thereafter, other federal district judges began entering similar orders as "a matter of routine." Supp. C. 49 at 177:16-22. These civil rights cases often included claims, pursuant to Monell v. Department of Social Services, 436 U.S. 658 (1978), that CPD had a policy, pattern, or practice of deliberate indifference to misconduct by police officers. Supp. C. 50 at 182:8-13. Plaintiffs' lawyers sought discovery of disciplinary records for officers' entire careers on the theory that an analysis of their full disciplinary histories would identify such a pattern and practice. Supp. C. 50 at 183:4-10.

In the late 1990s and early 2000s, the City began seeking to eliminate section 8.4 from the CBA during negotiations with FOP. Supp. C. 51 at 188:15-189:11. The City continued to seek the elimination of that section through the negotiations of 2007-12 CBA at issue. Supp. C. 52 at 190:5-16.

The Arbitration and Related Litigation. On November 30, 2011, FOP submitted a grievance to CPD stating that FOP had recently learned of CPD's retention of disciplinary records in violation of the CBA and demanding that CPD destroy those records as contractually required. C. 264. On April 12, 2012, FOP submitted a second grievance making similar demands. C. 264-65. On June 8, 2012, CPD denied the first grievance,

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

stating that FOP had acquiesced in the retention of disciplinary records because it had known about CPD's retention of those records since courts had begun ordering such retention in the 1990s, that FOP had even intervened in one federal case, and that FOP had discussed the retention of disciplinary records during the past four CBA negotiations. C. 265-67. On June 27, 2012, CPD denied the second grievance for the same reasons. C. 267. FOP then initiated arbitration.

While FOP's grievances and arbitration demand were pending, the appellate court held that CR files are not exempt from FOIA disclosure. Watkins v. McCarthy, 2012 IL App (1st) 100632; Kalven, 2014 IL App (1st) 121846. Subsequently, in October 2014, the City notified FOP that the City had received FOIA requests from the Chicago Tribune and Chicago Sun-Times for information related to CR files dating back to 1967 and that the City intended to comply with those requests. FOP v. City of Chicago, 2016 IL App (1st) 143884, ¶ 4. FOP filed suit in circuit court seeking a preliminary injunction, asserting that disclosure of the CR files during the pendency of the arbitration would interfere with FOP's ability to obtain effective relief in the arbitration. Id. ¶ 5. The circuit court granted the preliminary injunction, id. ¶ 1, but the appellate court reversed, holding that the circuit court had no basis to issue the preliminary injunction because "an arbitration order directing the destruction of the requested records as a result of a breach of

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section 8.4 of the CBA would be unenforceable to the extent it would prevent disclosure under the FOIA," id. ¶ 38.

The arbitrator held a hearing on June 23, 2015. Supp. C. 5-66. On January 12, 2016, the arbitrator issued an opinion and interim award, in which he held that the City was required to destroy records as set forth in section 8.4 and that enforcement of section 8.4 was not against public policy. C. 264-316.

On December 7, 2015, shortly before the arbitrator issued his initial opinion and interim award, the United States Department of Justice ("DOJ") opened an investigation into CPD's use of force policies. C. 1037. The City informed the arbitrator of the pendency of the DOJ investigation and requested guidance on how the City should respond to DOJ's requests for the production of misconduct and disciplinary records. C. 32-33. On February 12 and 19, 2016, an Assistant United States Attorney sent letters to the City specifically stating that, "for the duration of DOJ's pattern and practice investigation," the City and CPD must "preserve all existing documents related to all complaints of misconduct," including those that were subject of the arbitration. C. 33-34. On April 28, 2016, the arbitrator issued a second opinion and award, holding that, because of DOJ's demand that the City preserve all records related to alleged officer misconduct, an order requiring destruction of such records would be against public policy. C. 28-52. On June 21, 2016, the arbitrator issued an order clarifying that public policy

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would no longer prevent enforcement of his original award once DOJ had completed its investigation of CPD. C. 53-64.

On July 26, 2016, the City filed a petition to vacate the arbitration award on the ground that it violated Illinois public policy favoring the proper retention of important public records. C. 9-27. FOP filed a counter-petition to confirm the award on August 26, 2016. C. 758-78.

On January 13, 2017, while the case was pending in the circuit court, DOJ issued its report. C. 1014-1183. Among its conclusions, the DOJ report found that section 8.4's "document destruction provision not only may impair the investigation of older misconduct, but also deprives CPD of important discipline and personnel documentation that will assist in monitoring historical patterns of misconduct." C. 1074.

A local Police Accountability Task Force ("Task Force") was also formed to evaluate CPD's practices separately from DOJ's investigation. The Task Force also concluded that section 8.4 is problematic and likely violates Illinois law. C. 1262-65. The Task Force stated, "Expunging records contradicts best practices, impedes the development of early intervention systems and deprives the public of information that is rightfully theirs." C. 1262-63. "It also deprives police oversight bodies of evidence of potential patterns of bad behavior," and "it may also deprive wrongfully convicted persons of exonerating information." C. 1263. The Task Force recommended: "The provision requiring destruction of records should be eliminated. The

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

rule is in tension if not outright conflict with general principles of public record-keeping, and deprives the public of important information that is rightfully theirs and may include the destruction of information that serves numerous operational and public policy objectives." C. 1265.

On October 18, 2017, the circuit court granted the City's petition to vacate the award and denied FOP's counter-petition to confirm the award. C. 1853-67. The court concluded that "enforcement of the Arbitral Award violated a well-defined and dominant public policy to preserve government records." C. 1866. The court stated that, "[t]o hold otherwise would (i) violate the public policy of maintaining public records for the benefit of the municipality and the general public; (ii) infringe on the municipality and general public's ownership interest in public records; (iii) usurp the municipality's right to determine for itself what records are required for the transaction of business, including legal and administrative matters; and (iv) commandeer the authority of a local records commission as the exclusive arbiter of whether and what public records may be destroyed." Id. The court further explained that "destruction of important public records, such as the police disciplinary files at issue here, undermines principles of government transparency that are so vital to the preservation of the rule of law. If the City is to be responsive to the citizenry, it must have access to historical police disciplinary and investigative records to make better-informed decisions on policing, a point echoed in the DOJ and Task Force reports." Id.

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FOP appealed, C. 1886-88, and the appellate court affirmed, City of Chicago v. Fraternal Order of Police, Chicago Lodge No. 7, 2019 IL App (1st) 172907. The court held that the "statutory framework the General Assembly constructed in the Local [Records] Act, the State [Records] Act, and FOIA establishes a well-defined public policy favoring the proper retention of important public records for access by the public." Id. ¶ 27. The court further explained that the "Local [Records] Act and State [Records] Act mandate that the destruction of public records occur only after consideration by and with the approval of the head of the governmental agency and the Commission and in a well-regulated process established by the Commission." Id. ¶ 32. It also stated that the "conclusions of the investigations by the DOJ and the Task Force further support a finding that public policy favors the maintenance of important public records like those related to allegations of police misconduct." Id. ¶ 33.

The court concluded that the "arbitration award requiring destruction of the records pursuant to section 8.4 of the CBA clearly violated well-defined Illinois public policy requiring the proper retention of important public records." City of Chicago, 2019 IL App (1st) 172907, ¶ 36. This is because the "award required the City to destroy records related to alleged police misconduct without regard to the statute's explicit concerns for those records' 'administrative, legal, research or historical value,'" id. (quoting 50 ILCS 205/10), and because it "ignored the requirements of the Local [Records] Act

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

and obviates the local record commission's authority to determine what records should be destroyed or maintained," id.

This court allowed FOP's petition for leave to appeal.

ARGUMENT

The arbitrator's award required the City to destroy decades' worth of records of alleged police misconduct, regardless of their value to the public or the City. As the courts below properly concluded, that award violated well-defined Illinois public policy favoring the proper maintenance of important public records, and contravened the General Assembly's intent in enacting the Local Records Act, the State Records Act, and FOIA that important public records should be maintained to allow transparency and public scrutiny of official acts. It also stripped the Local Records Commission of the authority vested in it by statute to determine what public records are important enough that they should be retained, and it deprived the City of its ability to defend decades-old civil rights claims and deprived those who claim wrongful conviction of evidence related to their claims.

Ordinarily, judicial review of an arbitral award is "extremely limited." E.g., AFSCME v. Department of Central Management Services, 173 Ill. 2d 299, 304 (1996). A reviewing court will "enforce a labor-arbitration award if the arbitrator acts within the scope of his or her authority and the award draws its essence from the parties' collective-bargaining agreement." E.g., id. at 304-05. But "[c]ourts have crafted a public policy exception to vacate

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

arbitral awards which otherwise derive their essence from a collective-bargaining agreement." E.g., id. at 306. The public policy exception requires a two-step analysis. E.g., id., at 307. The court first considers "whether a well-defined and dominant public policy can be identified." E.g., id. If the court identifies such a public policy, "the court must determine whether the arbitrator's award, as reflected in his interpretation of the agreement, violated the public policy." E.g., id. at 307-08. The courts below properly applied this two-step analysis to conclude that a well-defined Illinois public policy exists favoring the proper retention of important public records and that the arbitrator's award requiring destruction of alleged police misconduct records violates that policy. Accordingly, this court should affirm the judgment vacating the award.

THE ARBITRATOR'S AWARD VIOLATED ILLINOIS PUBLIC POLICY FAVORING THE PROPER RETENTION OF IMPORTANT PUBLIC RECORDS.

Illinois law, as well as the DOJ and Task Force reports, reflects a clear public policy favoring the proper maintenance of important public records like those relating to allegations of police misconduct, and the arbitrator's award requiring the City's destruction of those records violates that policy.

A. A Well-Defined Public Policy Exists In Illinois Favoring The Proper Retention Of Important Public Records.

To determine whether a public policy exists, a court considers Illinois's "constitution and statutes, and when cases arise concerning matters upon

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

which they are silent . . . its judicial decisions and the constant practice of the government officials." AFSCME, 173 Ill. 2d at 307 (internal quotation marks and alteration omitted). In AFSCME, this court vacated as against public policy an arbitral award reinstating an employee of the Department of Children and Family Services ("DCFS"), who had falsely stated that she had seen three children in DCFS custody and that they were "doing fine," when in fact they had perished in a fire. Id. at 301-03. The court looked to state statutes that collectively formed a "comprehensive legislative scheme designed for the welfare and protection of children found to be abused or neglected." Id. at 315. From this legislative scheme, the court determined that "there is a well-defined public policy in favor of truthful and accurate DCFS reporting and that the arbitral award in this case violates that policy." Id. at 308.

The appellate court has followed AFSCME to find public policies in other statutory frameworks that required vacating contrary arbitration awards. E.g., Chicago Fire Fighters Union Local No. 2 v. City of Chicago, 323 Ill. App. 3d 168, 176-77 (1st Dist. 2001) (recognizing policy "favoring safe and effective fire protection services"); Illinois Nurses Association v. Board of Trustees of the University of Illinois, 318 Ill. App. 3d 519, 530 (1st Dist. 2001) (recognizing policy "in favor of safe nursing care"); Illinois State Police v. FOP, 323 Ill. App. 3d 322, 328-29 (4th Dist. 2001) (recognizing policy "promoting effective law enforcement"); County of DeWitt v. AFSCME, 298

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

Ill. App. 3d 634, 637-38 (4th Dist. 1998) (recognizing policy "to protect the elderly from abuse or harm"); Board of Education v. Illinois Educational Labor Relations Board, 216 Ill. App. 3d 990, 1000-01 (4th Dist. 1991) (recognizing policy "favoring the safe transportation of school children").

The appellate court in this case properly applied AFSCME to conclude that the "statutory framework the General Assembly constructed in the Local [Records] Act, the State [Records] Act, and FOIA establishes a well-defined public policy favoring the proper retention of important public records for access by the public." City of Chicago, 2019 IL App (1st) 172907, ¶ 27. The Local Records Act, which applies to the City, directs that local public records "shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part, except as provided by law." 50 ILCS 205/4(a). The Local Records Act then mandates that "no public record shall be disposed of by any officer or agency unless the written approval of the appropriate Local Records Commission is first obtained." Id. 205/7. The law requires the Commission to issue binding regulations and procedures to "establish procedures for compiling and submitting to the Commission lists and schedules of public records proposed for disposal"; to regulate "the physical destruction or other disposition of such public records," and manage the "preservation of electronically generated and maintained records"; and to create "standards for the reproduction of such public records by photography, microphotographic processes, or digitized electronic format." Id.

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

The Local Records Act further requires that the head of each local governmental agency submit to the Commission "lists or schedules of public records in his custody that are not needed in the transaction of current business and that do not have sufficient administrative, legal or fiscal value to warrant their further preservation" and "lists or schedules proposing the length of time each records series warrants retention for administrative, legal or fiscal purposes after it has been received by the agency." 50 ILCS 205/10. The General Assembly vested in the Commission the ultimate authority to determine what records should be maintained or destroyed: "The Commission shall determine what public records have no administrative, legal, research or historical value and should be destroyed or otherwise disposed of and shall authorize destruction or other disposal thereof." Id. The law also dictates that "[n]o public record shall be destroyed or otherwise disposed of by any Local Records Commission on its own initiative, nor contrary to law," id., and even goes so far as to make it a Class 4 felony to "knowingly, without lawful authority and with the intent to defraud any party, public officer, or entity, alter[ ], destroy[ ], deface[ ], remove[ ], or conceal[ ] any public record," id. 205/4.

The State Records Act applies similar requirements to the maintenance and destruction of State records. 5 ILCS 160/1, et seq. In enacting the State Records Act, the General Assembly made its policy purposes explicit, declaring, "[p]ursuant to the fundamental philosophy of the

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

American constitutional form of government," "government records are a form of property whose ownership lies with the citizens and with the State of Illinois"; "those records are to be created, maintained, and administered in support of the rights of those citizens and the operation of the State"; "those records are, with very few exemptions, to be available for the use, benefit, and information of the citizens"; and "those records may not be disposed of without compliance to the regulations in this Act." Id. 160/1.5.

In enacting FOIA, the General Assembly similarly voiced its intent to ensure public access to important government documents: "Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act." 5 ILCS 140/1. "Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest." Id. Moreover, the General Assembly declared "that it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government," and "[i]t is a fundamental obligation of government to operate

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

openly and provide public records as expediently and efficiently as possible in compliance with this Act." Id.

These statutes leave no doubt that Illinois recognizes a public policy favoring the proper retention of important government records for the benefit of the public. As the appellate court explained, "[t]he Local [Records] Act and State [Records] Act mandate that the destruction of public records occur only after consideration by and with the approval of the head of the governmental agency and the Commission and in a well-regulated process established by the Commission." City of Chicago, 2019 IL App (1st) 172907, ¶ 32. Those acts also reflect that public records belong to the public and expressly forbid the destruction of public records outside of those statutorily mandated processes. In addition, FOIA exists to ensure the public's access to records that have not been destroyed through those processes. Indeed, the General Assembly declared the polices underlying these acts part of the "fundamental philosophy of the American constitutional form of government." 5 ILCS 140/1; 5 ILCS 160/1.5.

The appellate court also properly determined that "[t]he conclusions of the investigations by the DOJ and the Task Force further support a finding that public policy favors the maintenance of important public records like those related to allegations of police misconduct." City of Chicago, 2019 IL App (1st) 172907, ¶ 33. DOJ concluded that the "document destruction provision not only may impair the investigation of older misconduct, but also

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

deprives CPD of important discipline and personnel documentation that will assist in monitoring historical patterns of misconduct." C. 1074. The Task Force concluded that the destruction provision "contradicts Illinois law," "contradicts best practices, impedes the development of early intervention systems and deprives the public of information that is rightfully theirs." C. 1262-63. The Task Force also stated that the destruction provision "deprives police oversight bodies of evidence of potential patterns of bad behavior" and "may also deprive wrongfully convicted persons of exonerating information." C. 1263. The Task Force recommended: "The provision requiring destruction of records should be eliminated. The rule is in tension if not outright conflict with general principles of public record-keeping, and deprives the public of important information that is rightfully theirs and may include the destruction of information that serves numerous operational and public policy objectives." C. 1265.

Having considered all of this, the appellate court correctly held that "[t]hese statutes and other materials leave no doubt that Illinois has a well-defined public policy favoring the proper retention of important government records for the benefit of the public, like the CR files at issue here." City of Chicago, 2019 IL App (1st) 172907, ¶ 34.

B. The Arbitrator's Award Violated Public Policy By Requiring The City To Destroy Decades' Worth Of Records Of Alleged Police Misconduct.

The appellate court also properly held that that the "arbitration award

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

requiring destruction of the records pursuant to section 8.4 of the CBA clearly violated well-defined Illinois public policy requiring the proper retention of important public records." City of Chicago, 2019 IL App (1st) 172907, ¶ 36. That is because the award adheres to none of the mandates of the Local Records Act. It eliminates the Local Record Commission's authority to determine what records should be destroyed or maintained, and it requires the City to destroy records related to alleged police misconduct without regard to the statute's explicit concerns for records of "administrative, legal, research or historical value," 50 ILCS 205/10.

Indeed, the award disregards the unrebutted testimony presented by the City at the arbitration hearing regarding the legal and historical value of alleged police misconduct records. Specifically, the then-Deputy Corporation Counsel for the Federal Civil Rights Litigation Division of the City's Law Department testified about the importance of those records in civil rights cases. That Law Department official stated that the division had approximately 480 active cases at the time of the hearing. Supp. C. 58 at 215:20-21. She testified that records related to alleged police misconduct are relevant both to claims against individual officers and to policy and practice claims against the City pursuant to Monell v. Department of Social Services, 436 U.S. 658 (1978). Supp. C. 58-59 at 216:18-217:14. She explained that in litigating claims against individual officers, plaintiffs often seek production of the individual officers' CR files as "[e]vidence of a plan, an absence of

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

mistake, a motive that the individual officer[ ] . . . treated the Plaintiff this way because this officer's treated the following six people in that same manner." Supp. C. 59 at 217:4-8. In Monell claims, plaintiffs attempt to hold the City liable by proving that the City has a pattern or practice that caused the violation of plaintiffs' civil rights. Supp. C. 59 at 218:4-8. The Law Department Official testified that plaintiffs often require a "statistical analysis" of CR files to attempt to prove their Monell claims by looking to "the number of CRs that are sustained. The numbers – what they're sustained for, which ones are not sustained, and look at the patterns in the complaints." Supp. C. 59 at 218:11-17, 219:12-18. She also explained that, although civil rights claims generally have a two-year statute of limitations, the limitations period in cases involving alleged wrongful convictions does not begin to run until "the date the person's charges are dropped." Supp. C. 60 at 224:10-16. For this reason, reversed conviction cases can require production of records for multiple officers dating as far back as the 1980s, Supp. C. 60 at 223:19-224:9, and one case filed in 2013 asserted wrongful conviction claims dating back to an arrest in 1952, Supp. C. 60 at 224:15-18.

The Law Department Official also explained that records related to alleged police misconduct are legally important not only to civil rights plaintiffs but also to the City, which often uses them to defend against plaintiffs' claims. Supp. C. 61 at 226:5-8. She testified that, if those records were destroyed, "we would not be able to defend ourselves against these

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

policy claims because we would lack the information to do so." Id. She gave an example of a case involving claims against a detective who had amassed "an extraordinary number of CRs filed against him," but examination of those CR files revealed that they all contained the same allegations of misconduct asserted by members of the same street gang who were told by fellow gang members to submit reports of the same type of excessive force against the detective. Supp. C. 61 at 226:9-227:6. She explained that, without the CR files, the City would have been unable to defend against Monell claims that it had ignored the detective's history of misconduct. Supp. C. 61 at 227:3-12. She also testified to the immense monetary consequences to Chicago taxpayers that would result from the City's losing its ability to defend such claims: "Our compensatory damages range from . . . a small number of dollars to millions of dollars. Our attorney fee awards always start at $150,000 and head up into the millions. So not being able to defend these lawsuits would be catastrophic." Supp. C. 61 at 227:24-228:5.

The Law Department official also explained that, although no single court order exists requiring retention of all CR files, the City is essentially locked in continual litigation of a variety of Monell claims with no way to anticipate what future claims will entail. Supp. C. 61 at 225:6-13. For this reason, she explained that Monell litigation is never "over" for the City and that it is never "safe" to destroy CR files. Id.

In light of all of this, the appellate court correctly adopted the same

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

reasoning as the circuit court to vacate the arbitrator's award because that award "'(i) violate[d] the public policy of maintaining public records for the benefit of the municipality and the general public; (ii) infringe[d] on the municipality and general public's ownership interest in public records; (iii) usurp[ed] the municipality's right to determine for itself what records are required for the transaction of business, including legal and administrative matters; and (iv) commandeer[ed] the authority of a local records commission as the exclusive arbiter of whether and what public records may be destroyed.'" City of Chicago, 2019 IL App (1st) 172907, ¶ 37 (quoting C. 1866).

C. FOP's Arguments Offer No Basis To Enforce The Award In The Face Of Contrary Public Policy.

None of FOP's arguments supports enforcement of the arbitrator's award despite its violation of public policy. FOP's criticisms of the appellate court's decision are entirely meritless, and its reliance on section 15 of the Illinois Public Labor Relations Act ("PLRA"), 5 ILCS 315/15, completely misapprehends the public policy doctrine.

1. FOP offers no basis to overturn the appellate court's decision.

FOP's arguments fail to comprehend the appellate court's decision from the outset by asserting that the appellate court erred in holding that the State Records Act, the Local Records Act, and FOIA "'show that Illinois recognizes a public policy favoring the proper retention of important

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

government records for the benefit of the public' in perpetuity." FOP Br. 27 (quoting City of Chicago, 2019 IL App (1st) 172907, ¶ 32). The appellate court nowhere held that these statutes establish a public policy requiring the retention of government records "in perpetuity." Rather, the court properly recognized that the State Record Act and Local Record Act reflect a well-established public policy allowing "the destruction of public records . . . only after consideration by and with the approval of the head of the governmental agency and the Commission and in a well-regulated process established by the Commission." City of Chicago, 2019 IL App (1st) 172907, ¶ 32. The court also correctly concluded that the arbitration award's ordering destruction of CR files violates that public policy by "ignor[ing] the requirements of the Local [Records] Act and obviat[ing] the local record commission's authority to determine what records should be destroyed or maintained." Id. ¶ 37.

FOP next asserts that "[n]othing in the [State Records Act] or [Local Records Act] preclude [sic] the City from entering into a document destruction agreement, even if it must also obtain approval to implement it from the Local Records Commission." FOP Br. 28. But this ignores that the document destruction provision of section 8.4 makes no allowance for the Local Records Commission to ultimately decide whether alleged police misconduct records should be destroyed or retained – it simply requires that they be destroyed. FOP did not seek – and the arbitrator did not order – reformation of section 8.4 to require the City to seek and obtain the Local

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

Record Commission's approval before complying with section 8.4. Instead, FOP simply sought and obtained an order requiring enforcement of section 8.4 as written, and that section violates public policy. And FOP cites no case allowing a court to modify a CBA provision that violates public policy or an arbitration award enforcing it; rather, this court has made clear the rule that "a court will not enforce a collective-bargaining agreement that is repugnant to established norms of public policy." AFSCME, 173 Ill. 2d at 307

Moreover, FOP offers no explanation how section 8.4 could be enforced if the Local Records Commission denied a request to destroy CR files as required by the arbitration award. In the appellate court, FOP asserted that the City would be required by section 8.4 to challenge any such denial by the Local Records Commission. FOP Opening App. Ct. Br. 20. Such a challenge to the Local Records Commission's decision would be not only futile but frivolous because the Local Records Commission has statutory authority to determine what records should be maintained or destroyed, and that authority is not subservient to section 8.4. Indeed, FOP's inability to explain how section 8.4 can be enforced in the face of a denial by the Local Records Commission has plagued FOP's position at every level of this litigation. The circuit court asked FOP's counsel for this explanation at a hearing, ROP 34-36, and, as the circuit court noted, "FOP fail[ed] to offer any satisfactory answer to what happens if the Local Records Commission denies the City's request," C. 1861. More than two years after that hearing, FOP still has no

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

answer.

FOP also asserts that "[t]he City voluntarily agreed to some variation of Section 8.4 in each of the collective bargaining agreements between the Lodge and the City since the inception of bargaining in 1981." FOP Br. 28. This is disingenuous at best. The evidence at the hearing established that the City has sought the elimination of section 8.4 during negotiations beginning in the late 1990s and continuing to the present, Supp. C. 51-52 at 188:15-189:11; Supp. C. 52 at 190:5-16, and that the City stopped complying with section 8.4 in 1991 after a federal district judge entered an order in a civil rights case requiring the City to cease destroying CR files, Supp. C. 47 at 169:3-170:15. In any event, it is true of every case involving application of the public policy doctrine that the parties agreed to the CBA provision in question, and this court has made clear that where an agreed-upon CBA provision conflicts with public policy, the public policy "must override" such an agreement. E.g., AFSCME, 173 Ill. 2d at 317.

FOP next states that, "since at least 1975, the City had its own document destruction policies requiring the destruction after five years of those same CR files" and draws the bizarre conclusion that, because of the existence of those internal policies, "there is no record evidence that the City lacked the authority under the [Local Records Act] to comply with either Section 8.4 or its own document destruction policy." FOP Br. 28. Of course, having an internal document retention plan in place does not mean it is

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

proper to destroy alleged police misconduct records pursuant to that plan or that the City has done so. To the contrary, all the witnesses who testified on the subject agreed that the City has not destroyed any alleged police misconduct records – whether pursuant to the City's internal policies or otherwise – since the 1990s. And the Local Records Commission has never considered – let alone approved – the destruction of those records as required by the Local Records Act.

FOP also asserts that "the statutes do not specify that all documents must be retained indefinitely; rather, they leave such decisions to the discretion of the Commissions established under the [State Records Act] and [Local Records Act]." FOP Br. 28. In fact, that is precisely what the State Records Act and Local Records Act do: they establish procedures by which the Commissions have the exclusive authority to determine that records may be destroyed because they "have no administrative, legal, research or historical value." 50 ILCS 205/10. But neither section 8.4 nor the arbitrator's award enforcing it makes any allowance for the Local Records Commission's exercise of that authority because they require destruction of alleged police misconduct records after a fixed date, regardless of their "administrative, legal, research or historical value."[3]

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[3] In a footnote, FOP asserts that the State Records Act "applies only to state agency records and as such, does not seek to regulate in any manner the type of records retained by municipalities." FOP Br. 28 n.6. That misses the point. The courts below properly looked to the State Records Act not as regulation of the City but as an example of the General Assembly's

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

FOP also attempts to downplay the importance of FOIA. FOP ignores entirely the General Assembly's lengthy exposition of the fundamental importance of public access to government records in FOIA's preamble, while focusing exclusively on the provision stating that FOIA "'is not intended to create an obligation on the part of any public body to maintain or prepare any public record.'" FOP Br. 29 (quoting 5 ILCS 140/1). That focus is misplaced. As the appellate court has previously held, FOIA does require maintenance of records of alleged police misconduct when those records are subject to pending FOIA requests. Fraternal Order of Police, Lodge No. 7 v. City of Chicago, 2016 IL App (1st) 143884, ¶ 38. Moreover, FOIA is one of several laws – together with the State Records Act and Local Records Act – that collectively constitute a "comprehensive legislative scheme," AFSCME, 173 Ill. 2d at 315, reflecting the General Assembly's recognition of a public policy favoring the proper maintenance of important public records.

FOP also asserts that this court should ignore the public policy concerns expressed in the DOJ and Task Force reports because those reports "are not constitutional provisions, statutes or judicial decisions." FOP Br. 29. Courts regularly look beyond those sources to determine public policy. As this court has explained, courts "will look to our constitution and statutes,

expression of public policy. Moreover, the Local Records Act, which plainly does apply to the City, includes nearly identical restrictions on the destruction of municipal records.

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

and when cases arise concerning matters upon which they are silent, then in its judicial decisions and the constant practice of the government officials when determining questions regarding public policy." AFSCME, 173 Ill. 2d at 307 (internal quotation marks and alteration omitted); see also Board of Education, 216 Ill. App. 3d at 1001 (considering "rules and regulations in a manual" for bus drivers issued by the Board of Education). As we explain above, Illinois statutes speak generally to the proper maintenance of important public records. In addition, both a federal agency and a public Task Force specifically concluded records of alleged police misconduct should be retained.

FOP also asks this court to discount both reports because they "arose from the action solely taken by the executive branch." FOP Br. 30. FOP states, "In stark contrast, the constitution, statutes and judicial decisions require at least two of the three co-equal branches to weigh in on whether something is a fundamental public policy." Id. This argument is wrong on every level. As we explain above, this court has made clear that courts may consider "the constant practice of the government officials when determining questions regarding public policy." AFSCME, 173 Ill. 2d at 307. Moreover, neither this court nor any other has ever suggested that "at least two of the three co-equal branches" must "weigh in on whether something is a fundamental public policy." And, in any event, FOP's is incorrect that "judicial decisions require at least two of the three co-equal branches"

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

because the judiciary branch alone renders its decisions.

FOP also misleadingly highlights specific issues that the DOJ Report does not address while entirely ignoring the criticism that the report actually does level at section 8.4. Specifically, FOP states, "the DOJ report does not direct the parties to modify Section 8.4; does not direct the City to continue retaining all records; and does not find Section 8.4 to be unlawful or unconstitutional." FOP Br. 30-31. Focusing on what the DOJ Report does not say cannot detract from what it does say, and it clearly criticizes the destruction provision of section 8.4, stating that the provision "not only may impair the investigation of older misconduct, but also deprives CPD of important discipline and personnel documentation that will assist in monitoring historical patterns misconduct." C. 1074.

FOP also asks this court to ignore the DOJ Report on the basis that "the successor United States Attorney Generals have questioned its merits and declined to take any action on the report." FOP Br. 30. FOP forfeited reliance on the issue of successor Attorney Generals by failing to raise it in either the circuit court or the appellate court. "Issues not raised in either the trial court or the appellate court are forfeited." E.g., 1010 Lake Shore Association v. Deutsche Bank National Trust Co., 2015 IL 118372, ¶ 14 Forfeiture aside, FOP does not cite any action or statement by any successor Attorney General calling the DOJ Report's specific criticisms of section 8.4 into question.

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

As to the Task Force Report, FOP states only that the report "was generated by an *ad hoc* committee appointed by the Mayor (not even the Governor or a State agency), and is therefore completely unfit to serve as the basis for a State-wide public policy." FOP Br. 29 n.7. FOP again cites no authority for its peculiar assertion that a committee formed by a Mayor to address, among other issues, the propriety and effect of the very CBA provision before the court should not inform this court's consideration of public policy. More important, FOP has no response at all to the findings and recommendations of that report criticizing section 8.4 and calling for its elimination.

FOP next erroneously asserts that because the General Assembly did not pass proposed bills that would have required retention of records of alleged police misconduct and employee discipline, "the Legislature has signaled that such a public policy mandating indefinite retention of these types of records should not be established." FOP Br. 31-32. At the outset, FOP likewise forfeited the issue of proposed legislation by failing to raise it in either the circuit court or the appellate court. See, e.g., 1010 Lake Shore Association, 2015 IL 118372, ¶ 14. And FOP had good reason not to raise this issue previously because a "legislature can not express its will by a *failure* to legislate. The act of refusing to enact a law has utterly no legal effect, and thus has utterly no place in a serious discussion of the law." South 51 Development Corp. v. Vega, 335 Ill. App. 3d 542, 556 (1st Dist.

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

2002) (internal quotation marks and alterations omitted). The rejection of proposed legislation does not "evince[e] a wholesale legislative disapproval of the substance of failed legislation" "'because several equally tenable inferences may be drawn from such inaction.'" Id. (quoting Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 187 (1994)). "'A bill can be proposed for any number of reasons, and it can be rejected for just as many others.'" Id. (quoting Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 170 (2001)). For all we know, the General Assembly may have rejected the proposed legislation regarding police misconduct records because it believed that the heavily regulated processes for disposal of public records established in the Local Records Act and State Records Act already suffice – processes that, again, section 8.4 and the arbitrator's award disregard entirely.

FOP also asserts that "the Appellate Court was bound by the factual findings of the Arbitrator, including his finding that there was no evidence that the Local Records Commission denied any application by the City to destroy the records at issue." FOP Br. 42 (internal quotation marks omitted). This misses the point. No determination by the Local Records Commission regarding CR files is necessary to recognize that section 8.4 on its face violates the public policy set forth in the Local Records Act, by failing to allow for the Local Records Commission's authority to make that determination in the first place.

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

FOP also incorrectly asserts that because the "[a]rbitrator carefully considered the City's arguments and rejected them," "the courts owe deference to the arbitrator and may not insert their own preferences or opinions." FOP Br. 45. The law is the opposite. "Questions of public policy, of course, are ultimately left for resolution by the courts." E.g., AFSCME, 173 Ill. 2d at 318. "On review, this court is not bound by the arbitrator's consideration of public policy and we may not abdicate to the arbitrator our responsibility to protect the public interest at stake." Chicago Fire Fighters Union, 323 Ill. App. 3d at 175.

2. FOP misapprehends section 15 of the PLRA and the public policy doctrine.

Finally, FOP makes a misguided argument that the "public policy supporting collective bargaining and the enforcement of labor arbitration awards" as embodied by the Illinois Public Labor Relations Act ("PLRA"), 5 ILCS 315/1, et seq., requires a court to enforce a provision of a collective bargaining agreement that violates other public policy. FOP Br. 32-40. Specifically, FOP relies on section 15(a) of the PLRA, which provides that "[i]n case of any conflict between the provisions of this Act and any other law . . . [,] executive order or administrative regulation relating to wages, hours and conditions of employment and employment relations, the provisions of this Act or any collective bargaining agreement negotiated thereunder shall prevail and control," and section 15(b), which provides that "any collective bargaining contract between a public employer and a labor organization

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

executed pursuant to this Act shall supersede any contrary statutes, charters, ordinances, rules or regulations relating to wages, hours and conditions of employment and employment relations adopted by the public employer or its agents." 5 ILCS 315/15(a), (b).

The appellate court has correctly rejected an argument identical to FOP's. Decatur Police Benevolent & Protective Association Labor Committee v. City of Decatur, 2012 IL App (4th) 110764, ¶ 30. And for good reason, because, if section 15 were read as FOP advocates, that section "would swallow the public-policy exception, because, no matter how offensive to public policy an arbitrator's decision is, the arbitrator's decision would stand." Id. Moreover, "[s]ection 15 does not say the Labor Act controls when in conflict with the public policy of the state," and "the public-policy exception has been considered and applied by Illinois courts since the Labor Act's inception." Id. FOP makes only a weak attempt to address Decatur Police Benevolent & Protective Association, asserting that the decision "unnecessarily restricted the scope of Section 15, holding that it 'does not say the Labor Act controls when in conflict with the public policy of the state.'" FOP Br. 38 (quoting Decatur Police Benevolent & Protective Association, 2012 IL App (4th), ¶ 30) According to FOP, "a public policy (which should be based on other statutes or State-wide law) affecting terms and conditions of employment cannot be elevated above the statutes themselves." Id. at 38-39. FOP posits that "a State-wide public policy . . . concerning something other

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

than terms and conditions of employment would not inherently defer to Section 15 of the PLRA." Id. at 39. By this logic, the public policy doctrine would never apply to CBA provisions affecting the terms and conditions of employment. But that flies in the face of this court's decision in AFSCME striking down just such a CBA provision on the ground that, "[a]s with any contract, a court will not enforce a collective-bargaining agreement that is repugnant to established norms of public policy." 173 Ill. 2d at 307.

FOP also devotes four pages of its brief to this court's inapposite decision in City of Decatur v. AFSCME, Local 268, 122 Ill. 2d 353 (1988). FOP Br. 33-36. FOP concedes that City of Decatur does not "addres[s] Section 15 of the PLRA," id. at 36; that decision also nowhere addresses the public policy doctrine. Nonetheless, FOP relies on City of Decatur for the proposition that "the statutes on which the Appellate Court relied do not preclude the City and the Lodge from bargaining over document retention policies relating to disciplinary records." FOP Br. 36. At the outset, FOP forfeited reliance on City of Decatur for this point because it did not cite the decision at any point below nor did it raise any issue regarding the parties' duty or ability to bargain. That forfeits the argument. E.g., 1010 Lake Shore Association, 2015 IL 118372, ¶ 14. Beyond that, FOP's argument regarding City of Decatur has no bearing on this case where the issue is not whether the City and FOP were permitted or required to bargain about the destruction of CR files but, rather, whether enforcement of that bargain

SUBMITTED - 8469604 - Justin Houppert - 2/13/2020 1:29 PM

would violate public policy. In any event, City of Decatur held that a municipal employer was required to bargain over a union's proposal to send certain employee disciplinary matters to arbitration despite the city's adoption of a civil service system to adjudicate disciplinary matters pursuant to the Illinois Municipal Code. 122 Ill. 2d at 367. The court reached that conclusion because "the civil service system provided for in . . . the Municipal Code is an optional scheme" that a municipality is free to "unilaterally alter or amend." Id. at 365. By contrast, there is nothing optional about the Local Records Act, and it is precisely because section 8.4 and the arbitration award disregard its mandates that they violate public policy.

FOP also cites for the first time Forest Preserve District of Cook County v. Illinois Labor Relations Board, 190 Ill. App. 3d 283 (1st Dist. 1989), for its interpretation of City of Decatur "'as recognizing a policy favoring public employee bargaining laws over civil service rules.'" FOP Br. 37 (quoting Forest Preserve District, 190 Ill. App. 3d at 290-91). FOP fails to explain how Forest Preserve District has any bearing on this case, which does not raise the issue whether "a policy favoring public employee bargaining laws" should prevail "over civil service rules."

FOP also includes a string citation to other decisions supporting the proposition that section 15 "'elevat[es] collective bargaining agreements negotiated under the Act over any other laws, executive orders, or administrative regulations relating to wages, hours and employment

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conditions or relations.'" FOP Br. 37-38 (quoting Sroga v. Preckwinkle, No. 14-C-6594, 2017 WL 345549, at *8 (N.D. Ill. Jan. 24, 2017) and citing other decisions). But this proposition adds nothing; it merely mirrors the language of section 15, and none of the decisions, Sroga included, that FOP cites addressed section 15 in the context of the public policy exception to the enforcement of a CBA provision.

FOP also incorrectly asserts that "where the parties not only collectively bargained Section 8.4, but also agreed to the arbitration process for resolving any contractual disputes over the interpretation or application of Section 8.4, the supremacy clause of the PLRA strongly establishes the policy that such collectively bargained resolutions should not be disturbed." FOP Br. 39-40 (internal citation omitted). This argument also directly contradicts AFSCME, which reversed a decision made by an arbitrator pursuant to a CBA's arbitration provision. This court explained that, for the same reasons a contract that violates public policy is unenforceable, "we may not ignore the same public policy concerns when they are undermined through the process of arbitration." AFSCME, 173 Ill. 2d at 307.

FOP also mischaracterizes the nature of the records subject to section 8.4 in an attempt to bring them within the scope of section 15 of the PLRA. FOP Br. 40. FOP asserts that "that matters concerning how employees are disciplined, including the use and retention of disciplinary records, concern terms and conditions of employment." Id. But CR files are far more than

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mere "disciplinary records"; rather, as the appellate court has explained, "CRs are created to investigate reports of police misconduct, and any disciplinary adjudication that may take place as a result of the CRs comes later. While information obtained during the investigation may potentially be introduced during adjudication of a disciplinary case, a CR does not initiate that adjudication, nor can CRs themselves be considered disciplinary." Kalven v. City of Chicago, 2014 IL App (1st) 121846, ¶ 20, overruled on other grounds by Perry v. Department of Financial & Professional Regulation, 2018 IL 122349.

CONCLUSION

For the foregoing reasons, this court should affirm the appellate court's judgment, which in turn affirmed the circuit court's order vacating the arbitrator's award as against public policy.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 41 pages.

s/Justin A. Houppert
JUSTIN A. HOUPPERT, Attorney

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies under penalty of law as provided in 735 ILCS 5/1-109 that the statements set forth in this instrument are true and correct and that the foregoing brief was electronically filed with the Illinois Supreme Court using File & Serve Illinois, and was served on the respondent-appellant and amici by File & Serve Illinois at the email addresses indicated, on February 13, 2020.

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