

No. 132241

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**IN THE SUPREME COURT OF ILLINOIS**


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|---------------------------------------|---|-------------------------------------|
| CHICAGO JOHN DINEEN LODGE # 7,        | ) |                                     |
|                                       | ) | On Appeal from the                  |
| Appellant,                            | ) | Appellate Court of Illinois,        |
|                                       | ) | First Judicial District             |
| v.                                    | ) | No. 1-24-0875                       |
|                                       | ) |                                     |
| CITY OF CHICAGO, DEPARTMENT of        | ) |                                     |
| POLICE, BRANDON JOHNSON, in his       | ) |                                     |
| Official Capacity as MAYOR, LARRY     | ) | On Appeal from the Circuit Court of |
| SNELLING, in his Official Capacity as | ) | Cook County, Chancery Division      |
| Superintendent of the Chicago Police  | ) | Case No. 2024 CH 00093              |
| Department, and THE CHICAGO CITY      | ) | Hon. Michael T. Mullen,             |
| COUNCIL,                              | ) | Judge Presiding                     |
|                                       | ) |                                     |
| Appellees.                            | ) |                                     |

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**APPELLANT’S REPLY BRIEF AND  
RESPONSE TO REQUEST FOR CROSS-RELIEF**

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## ARGUMENT

### **I. Introduction**

At the outset, it bears repeating that there is no public policy in the State of Illinois that requires government employees’ disciplinary hearings – including disciplinary proceedings for any level of discipline being sought against Chicago Police Officers – to be open to public attendance or participation. *Chicago John Dineen Lodge No. 7 v. City of Chicago*, 2025 IL App (1st) 240875, ¶ 82 (referred to herein as “App. Ct. Op.”) (“there is no specific public policy that requires all police misconduct hearings to be open to the public...”); *Id.*, ¶ 106 (Mitchell, J., dissenting) (“there is no expression of well-defined and dominant public policy in Illinois that precludes hearing police disciplinary cases in private arbitration”). This makes sense, considering that “in practice, police disciplinary proceedings have been handled for generations in private arbitration in jurisdictions across Illinois, consistent with state labor law”, and “[i]t is difficult to imagine that the General Assembly would allow such a practice to persist if it actually offended the public policy of the state.” *Id.* ¶¶ 102, 106 (Mitchell, J., dissenting).

Despite this acknowledged lack of any well-defined and dominant public policy speaking to this issue – and despite the explicit policy statements from the General Assembly in statutes like the Illinois Public Labor Relations Act (“IPLRA” or “Labor Act”), the Open Meetings Act (“OMA”), and the Illinois Freedom of Information Act (“FOIA”) that favor private arbitration for government employees’ disciplinary matters and limit public access to those proceedings – the City of Chicago (“the City”) now asks this Court to follow the Appellate Court Majority’s lead and create a brand-new public

policy that would require the City, its employees, and their labor unions to open their grievance arbitration proceedings to public attendance for the first time in history.

Both the City and its supporting *amici* make an impassioned case for why they believe that the creation of a new requirement that certain Chicago Police Officers' disciplinary arbitrations be open to the public would be a positive change that may help to restore the public's faith in law enforcement. As the Dissenting Justice below noted, these are political arguments about what those groups believe that the public policy of the State of Illinois should be, not statements of what the State's well-defined public policy actually is. *See id.*, ¶ 102 (Mitchell, J., dissenting). Those political arguments should be made to legislators, who are responsible for declaring the State's public policy. *City of Chicago v. Fraternal Order of Police*, 2020 IL 124831, ¶ 34. These arguments do not provide a basis for any court to declare a new public policy and then use that policy as the basis to set aside the final and binding award of an interest arbitration panel.

Despite the City and its *amici*'s emotional appeals and attempts to recast this lawsuit as a fight to stamp out police misconduct, at its heart this case is about workers' rights. The Labor Act guarantees all public employees in Illinois the right to final and binding arbitration to resolve their disciplinary grievances. 5 ILCS 315/8. In the interest arbitration proceedings being challenged by the City in this suit (which are also statutorily mandated to resolve disputes over language for these parties' successor collective bargaining agreements ("CBAs"), 5 ILCS 315/14), Chicago John Dineen Lodge #7 ("the Lodge"), on behalf of its members, sought to exercise that right to final and binding grievance arbitration. The Dispute Resolution Board ("DRB"), acting as the interest arbitration panel in this case, adopted the Lodge's proposal and incorporated

language into its Final Award allowing the Lodge's members the option to exercise their right to grievance arbitration for all disciplinary disputes. (C 1546-52; C 1503-06).

There is no record of any arbitration of employee disciplinary disputes, or of any labor arbitration whatsoever, being conducted in an open forum within the State of Illinois. Specific to the Lodge and its members, the DRB expressly found that private arbitrations were the longstanding *status quo* for disciplinary grievance, and it declined to create a brand-new type of arbitration that would be open to the public "when that practice did not previously exist." (C 1554-55). There is no constitutional, statutory, or other policy basis for vacatur of the DRB's Award. Under the Appellate Court Majority's erroneous ruling on this issue, the rights of the Lodge's members would be diminished, and the Labor Act would be severely weakened. The Court should reverse the Appellate Court on this issue and should instead confirm the DRB's Award in its entirety.

In its brief, the City also requests cross-relief with respect to the Appellate Court's ruling on the issue of Officers remaining in pay status pending a final decision from an arbitrator. On that issue, the DRB found that the preexisting *status quo* for all disciplinary arbitration under the parties' CBA required that Officers remain in pay status until a final arbitration decision is issued, and it found no basis to deviate from that agreed-upon practice for arbitration of lengthier suspensions and separations. (C 1554-55). The Appellate Court correctly concluded that this finding was not arbitrary or capricious, even if that court may have ruled differently if it had been acting as the arbitrator. App. Ct. Op., ¶ 91. The City has not shown any basis to conclude that this portion of the Award was arbitrary or capricious, so the Appellate Court's ruling on this matter should be affirmed, and this portion of the Award should similarly be confirmed.

## II. The Court Should Disregard New Facts and Evidence Offered by the City

The Lodge does not include a responsive statement of facts in this combined response/reply brief and instead incorporates the facts stated in its opening brief. (Lodge's Br., pp. 3-9). To the extent facts are misstated or mischaracterized in the City's brief, those issues are addressed *infra* as necessary. However, in its brief the City also improperly seeks to introduce new evidence that does not appear in the record. The Court should reject the City's effort to belatedly supplement the trial court record.

It is axiomatic that a reviewing court must decide the issues raised on appeal based solely on the trial court record, and new evidence or facts not included in that record cannot be considered on review. *See, e.g., People v. Heaton*, 266 Ill. App. 3d 469, 476 (5th Dist. 1994) (citations omitted); *People v. Evans*, 125 Ill. 2d 50, 94 (1988) ("We can discern no basis for permitting defendant leave to supplement a record on appeal with matters which were never made part of the trial court record."); Ill. S. Ct. R. 321.

In its statement of facts, the City quotes repeatedly from a document titled "Allegations of Police Misconduct: A Guide to the Complaint & Disciplinary Process." (City's Br., p. 6). That document, referred to by the City as "Police Board Guide," does not appear in the record on appeal, and instead is followed by a citation to a .pdf internet file. (*Id.*, p. 6 n.2). The City references this document repeatedly throughout its brief, along with Chicago Police Board Annual Reports which similarly do not appear in the record. (*Id.*, pp. 6, 26, 47). The City also later cites to an Inspector General's document that does not appear in the record and is only offered as a .pdf internet file. (*Id.*, p. 51).

Because those materials are not part of the record developed at the Circuit Court, this Court should not consider them on appeal. The prohibition on the introduction of new evidence and outside facts on appeal is especially important in a case such as this,

involving judicial review of a labor arbitration award, which is “extremely limited.” *AFSCME v. Dep’t of Cent. Mgmt. Services*, 173 Ill. 2d 299, 304 (1996) (“*AFSCME II*”) (citations omitted). In considering challenges to labor arbitration awards, courts are limited to reviewing the award on its face and are not to review the arbitral record. *See Chicago Transit Auth. v. Amalgamated Transit Union*, 244 Ill.App.3d 854 (1st Dist. 1993). It would be improper for the Court to dig through the arbitral records, even if they were included in the record on appeal, and it would be even worse for the Court to review evidentiary materials that were never submitted to the arbitrator or to the lower court.

Furthermore, the “Police Board Guide” cited by the City is dated February 6, 2025 (City’s Br., p. 6), long after the DRB’s Final Opinion and Award issued on October 19, 2023. (C 1533-61). It is unclear what relevance the policies followed by the Chicago Police Board as of February 2025 could possibly have on the enforceability of the DRB’s 2023 Award. These new facts should be disregarded by the Court.<sup>1</sup>

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<sup>1</sup> The *amici* briefs filed in support of the City similarly attempt to supplement the trial court record with many new facts. (*See, e.g.*, Community *Amicus* Brief, pp. 38-39, Appendix A-7) (attaching and discussing letter addressed to Illinois Court of Appeals signed by Former President of Chicago Police Board); (*generally id.*, *passim*) (citing various reports, studies, and irrelevant media articles or stories throughout entirety of brief); (Academics *Amicus* Brief, pp. 9-10, 23-27 (citing Cook County State’s Attorney memorandum, COPA Summary Report Log, and irrelevant media articles); (*id.*, Appendix B) (attaching in its entirety the *amicus* brief filed by that group at the Appellate Court level, which is littered with references to facts not included in the record on appeal); (Illinois Attorney General *Amicus* Brief, pp. 6-7, 10, 12) (citing 2017 Department of Justice Report, 2016 Chicago Police Department Accountability Task Force Report, and 2015 Report of President’s Task Force on 21st Century Policing).

Like the parties on appeal, *amicus curiae* are also limited to the factual record as it was developed by the parties, and *amicus* briefs relying on materials not received into evidence and not part of record on appeal are subject to being stricken. *Zurich Ins. Co. v. Raymark Industries, Inc.*, 118 Ill. 2d 23, 60 (1987) (granting motion to strike *amicus* briefs which relied on materials that “were not received into evidence and therefore are not part of the record on appeal before this court.”); *Jenkins v. Wu*, 102 Ill. 2d 468, 485 (1984) (striking appendix to *amicus* brief that included new factual materials). Those new facts and evidence offered by the City’s *amici* should be disregarded by the Court.

### III. Courts Review Whether an Arbitration Award Clearly Violates Public Policy on Appeal *De Novo*, But They Still Must Defer to the Arbitrator's Findings of Fact and Interpretations of Contract Language

The City agrees in its Brief that the appropriate standard of review in this case is *de novo*. However, the City claims that *de novo* review means that no level of deference whatsoever is owed to the findings of the DRB, and suggests that this Court may conduct its own review of the evidence and the arbitral record, make its own findings of fact, and replace the DRB's reasoning with its own. (City's Br., pp. 17-18). This argument is unsupportable and flies in the face of decades of well-established law regarding the limited scope of judicial review of arbitration awards.

As this Court has held, the standard of appellate review for a public policy challenge to an arbitration award is *de novo* because the Court's "inquiry is whether the arbitrator's construction of the CBA, as reflected in his award, is unenforceable due to a predominating public policy, **which is a question of law**". *City of Chicago*, 2020 IL 124831, ¶ 26 (emphasis added). That legal question looks at whether the contract, "as interpreted by the arbitrator," clearly violates some explicit public policy, and "judicial review of an arbitrator's award is extremely limited and the award must be construed, if possible, as valid." *Id.*, ¶ 25. This appellate review does not open up an arbitration award for a judicial reevaluation of the arbitrator's findings of fact or conclusions of law. Instead, the Court accepts the arbitrator's findings and conclusions, and then assesses whether the arbitration award clearly violates public policy – the same limited scope of review that is to be applied by every court in Illinois.

In *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, a public policy case, the U.S. Supreme Court concluded that the appellate court erred by inappropriately drawing factual inferences from evidence which had been rejected by the arbitrator,

explaining: “The parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them who had more opportunity to observe [the grievant] and to be familiar with the plant and its problems. Nor does the fact that it is inquiring into a possible violation of public policy excuse a court for doing the arbitrator’s task. If additional facts were to be found, the arbitrator should find them ...” *Misco*, 484 U.S. 29, 45 (1987); *see also AFSCME II*, 173 Ill. 2d at 308 (citing with approval and following *Misco* as “the seminal case involving the [public policy] exception”).

There is no question that the same level of deference to the arbitrator’s findings and conclusions must be given where the challenge arises under public policy. *See AFSCME v. State of Ill.*, 124 Ill. 2d 246, 262-63 (1988) (“*AFSCME I*”) (although employer identified a public policy in favor of compassionate care of mentally disabled, Court accepted that “the arbitrator expressly finds” that grievants were exemplary employees, some punishment had been imposed, and no nexus existed between infraction and death of a patient, so award ordering reinstatement could not be vacated).

In its opening brief, the Lodge cited two appellate court decisions applying the “public policy exception,” in which the courts expressly ruled that the arbitrator’s findings and interpretations of the facts and the contract language may not be disturbed by courts. (Lodge’s Br., pp. 14-15) (citing *Vill. of Posen v. Illinois Fraternal Order of Police Labor Council*, 2014 IL App (1st) 133329, and *City of Peoria v. Peoria Police Benevolent Ass’n*, 2022 IL App (3d) 210567-U). The City does not attempt to address or even reference either of these decisions in its brief, and it offers no basis to conclude that the scope of judicial review is expanded where a public policy challenge is involved.

The City also asserts unconvincingly that none of the deference owed to a grievance arbitration award applies in the context of an interest arbitration award. (City's Br., at p. 19) (claiming, without any supporting authority, that "review of a dispute resolution board's decision in interest arbitration is less deferential than review of a grievance arbitration award."). The Appellate Court majority in this case correctly noted that its review of the underlying interest arbitration award was required to be "highly deferential." App. Ct. Op., at ¶ 89 (citations omitted). This is consistent with all prior decisions reviewing interest arbitration awards under Section 14(k) of the Labor Act. *See, e.g., Town of Cicero v. IAFF Local 717*, 338 Ill. App. 3d 364, 371 (1st Dist. 2003) ("The standard of review in this case is highly deferential," and "[t]hat this court or the circuit court might have decided the issue differently does not make the Arbitrator's decision arbitrary or capricious"); *Policemen's Benevolent & Protective Ass'n of Illinois v. City of Chicago*, 2023 IL App (1st) 220762-U, ¶ 27; *Int'l Ass'n of Firefighters Local 49 v. City of Bloomington*, 2016 IL App (4th) 150573, ¶ 27. There is no basis to conclude that a different level of deference applies in interest arbitration.<sup>2</sup>

In short, this Court's *de novo* review of the Appellate Court's decision means that the Court need not give any credence to the lower courts' erroneous legal conclusion that the DRB's Award violates public policy. However, like the courts below, this Court is bound by the findings, conclusions, and interpretations of the DRB. As the Dissenting

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<sup>2</sup> The City also criticizes the Lodge's citation to "commercial arbitration" cases. (City's Br., at p. 18 n.4, p. 19 n.5). This criticism is disingenuous, as the City similarly cites to non-labor cases where it believes they support its position. And in any event, this Court has made clear that the extremely limited, deferential scope of judicial review of arbitration awards is "applicable to both labor and nonlabor arbitration," but it "has been even more narrowly circumscribed in reviewing collective bargaining agreements," meaning that the review of labor arbitration awards is even more limited than that of commercial arbitration awards. *Bd. of Trustees of Cmty. Coll. Dist. No. 508, Cook Cnty. v. Cook Cnty. Coll. Teachers Union, Local 1600*, 74 Ill. 2d 412, 418 (1979).

Justice noted, “At its core, the *legal* question presented in this appeal is about deference—deference that judges owe to arbitrators acting within the confines of their authority and the interest arbitration process defined in the parties’ collective bargaining agreement.” App. Ct. Op., ¶ 104 (Mitchell, J., dissenting) (emphasis in original). In answering that legal question, this Court should reaffirm the longstanding principle that judicial review is highly deferential to arbitration awards, especially in the labor context, and that courts will defer to the arbitrator’s findings and conclusions, even if the Court may disagree with some of those findings. *Town of Cicero*, 338 Ill. App. 3d at 371 (“limited judicial review fosters the long accepted and encouraged principle that an arbitration award should be the end, not the beginning, of litigation”).

**IV. The Award’s Provision Allowing for Disciplinary Grievance Arbitration to Continue to be Private Does Not Clearly Violate Any Well-Defined and Dominant Public Policy**

Throughout these proceedings, the City’s primary challenge to the DRB’s Award has been its argument that allowing grievance arbitration for Police Officer discipline to be conducted privately violates public policy. But the basis of this public policy argument advanced by the City, as well as the public policies relied upon by the lower courts, have changed wildly. This constant shifting of the public policy analysis is likely due to the fact that “there is no specific public policy that requires all police misconduct hearings to be open to the public,” as the Appellate Court acknowledged. App. Ct. Op., ¶ 82.

At the trial court, the only public policy argument offered by the City was the general policy of “transparency and accountability,” based solely upon the Consent Decree, a settlement agreement entered into in *State of Illinois v. City of Chicago*, 2019 WL 398703 (N.D. Ill. 2019). (C 903, ¶¶ 26, 55; C 1018-1023). When the Circuit Court ruled that the Award violated public policy, it relied on this public policy of

“accountability and transparency,” but it added a reference to the Illinois FOIA statute in addition to the Consent Decree. (C 1838-1843).

At the Appellate Court, the City’s argument shifted, and it raised several brand-new public policy challenges to the Award that were never raised or considered below, adding a policy of “granting public access to government-sponsored adjudicatory proceedings” based on “constant practice of government officials” (City’s App. Br. at 24), as well as other statutory and constitutional arguments, including First Amendment challenges. (*Id.* at 28-32). The Appellate Court relied on some of these new arguments and added its own additional policies, combining public policies “favoring effective law enforcement,” “favoring the exposure of crime,” “favoring the investigation and prosecution of criminal offenses,” and lastly, favoring “accountability and transparency,” based upon FOIA, the Consent Decree, and the past dealings between the parties. App. Ct. Op., ¶¶ 78-82. That court did not address the First Amendment. (*See id.*).

Now, in its brief to this Court, the City’s public policy argument has once again shifted dramatically. The City devotes all of one page to public policy arguments based on the “constant practice of government officials,” the FOIA statute, and “accountability and transparency,” combined (City’s Br., pp. 23-24), and less than two pages to the Consent Decree (*id.*, pp. 28-30). The remainder of the City’s public policy analysis focuses on the right of public access to court proceedings under the First Amendment to the U.S. Constitution. (*Id.* at pp. 24-28, 30-39, 41-44).

The City’s inability to consistently articulate the public policy that it claims is violated by the DRB’s Award only reinforces the conclusion that there is no “well-defined and dominant public policy” that applies here. Instead, the City and the lower

courts have attempted to cobble together a new policy from an ever-changing collection of irrelevant and inapplicable sources.<sup>3</sup> None of this provides a basis for this Court to vacate the otherwise enforceable and presumptively valid Award of the DRB.

**A. Public Policy in Illinois Favors Private Labor Arbitration, and the City Fails to Meaningfully Respond to the Lodge’s Arguments Against the Public Policies Relied Upon by the Appellate Court**

The Lodge’s opening brief focuses primarily on the public policy arguments raised by the City below and the policies that the Appellate Court relied upon in vacating one provision of the DRB’s Award, namely, “transparency and accountability” based on FOIA, the Consent Decree, and the parties’ past practices, and other tangential policies including “effective law enforcement and the exposure of crime.” (Lodge’s Br., pp. 21-37). The Lodge also explains how Illinois public policy supports the use of arbitration to resolve labor disputes, and how the General Assembly, by carving out public access or attendance to hearings, meetings, and records relating to employee discipline and collective bargaining, has actually declared a public policy in favor of private labor arbitration. (*Id.*, pp. 15-19).

As noted above, the City has very little to say on these issues in its brief to this Court, and the City instead shifts its focus primarily to its First Amendment arguments (which are addressed in Section IV.B, *infra*). Accordingly, the Lodge does not engage in a lengthy restatement of its prior arguments here, but instead replies directly to some of the City’s limited responsive argument.

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<sup>3</sup> The City asserts that a “question of public policy ‘is ultimately one for resolution by the courts.’” (City’s Br., p. 17) (citation omitted). This statement is somewhat misleading. Courts are tasked with looking to the state’s constitution and laws to determine whether a public policy exists, but they are not empowered to declare or announce new public policy – “Declaring public policy is the domain of the legislature.” *City of Chicago*, 2020 IL 124831, ¶ 34.

With respect to the appropriate sources and types of public policies that courts rely upon in applying the public policy exemption, the City asserts that the State of Illinois's well-defined and dominant public policies can be gleaned from the practices of a single government employer – namely, the City and its Police Board. (City's Br., p. 21). The City notes that the Lodge has previously argued that this analysis should be limited to statewide policies, but then states that the Lodge failed to make this argument to this Court and therefore forfeited it. (*Id.*, pp. 21-22 n.6). This claim is demonstrably incorrect. (*See, e.g.*, Lodge's Br., p. 31) ("Actions taken by a single municipality, standing alone, cannot establish policies of the State of Illinois."); (*Id.*, p. 28 n.7) ("Considering that the Consent Decree only applies to the City of Chicago and its Police Department, and does not apply to any other police department in the State, it is unclear how this settlement agreement could possibly be considered a reflection of public policies that are well-defined and dominant in the State of Illinois").

It remains the Lodge's position that the appropriate policies for consideration in this analysis are the policies of the entire State of Illinois, and not the varying preferences of a single local government or agency. This is precisely why courts look to the Illinois Constitution and statutes to identify public policies. *See AFSCME II*, 173 Ill. 2d at 307 (public policy at issue must be "well-defined and dominant" and must be ascertainable "by reference to the laws and legal precedents and not from generalized considerations of supposed public interests."). The City has not identified any such policies that apply here.

Regarding the public policies identified by the Lodge in its opening brief which favor labor arbitration and limit access and attendance to disciplinary proceedings and records – clearly articulated by the General Assembly in laws such as the IPLRA, OMA,

and FOIA – the City responds that these statutes do not “restrict public access” to disciplinary proceedings, so they cannot be interpreted as “tak[ing] a position on whether discipline proceedings must be private or public.” (City’s Br., pp. 40-41). But this does not help the City’s case. If state law is silent on whether disciplinary proceedings must be private or public, then there is no explicit public policy on this issue, meaning there is no public-policy basis to disturb the DRB’s ruling deciding the matter. Additionally, even if those statutes are not read as prohibiting public disciplinary arbitration hearings, they expressly limit the *right* of individuals to attend those proceedings, as well as their right to access records after the fact. 5 ILCS 120/2(c); 5 ILCS 140/7(1)(n). Because members of the public have no right under state law to attend these proceedings, then it cannot plausibly be said that any well-defined public policy in Illinois requires their attendance.

As the Lodge explains in its opening brief, the OMA specifically exempts matters relating to employee discipline and collective bargaining from any obligation of public attendance, and the Labor Act further confirms that the OMA’s public meeting requirements do not apply to collective bargaining and grievance arbitration under that Act. (Lodge’s Br., p. 17) (citing 5 ILCS 120/2(c); 5 ILCS 315/24). This is consistent with the City and the Lodge’s predecessor contract language, which has long provided: “The actual proceedings [for interest arbitration] shall not be open to the public and the parties understand and agree that the provisions of 5 ILCS 120/1 et seq. are not applicable.” (C 1060) (Section 28.3(B)(6) of 2012-2017 CBA).<sup>4</sup>

The City responds, quite bafflingly, that because the OMA does not apply to grievance arbitrations at all, this means that these statutes provide no guidance and take

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<sup>4</sup> The City has never challenged the enforceability of that contract language, and the parties complied with it in the underlying interest arbitration procedures in this case.

no position on whether discipline proceedings must be private or public. (City's Br., p. 41). This argument defies logic. By excluding these labor matters from public attendance in the text of both the OMA and the IPLRA, the General Assembly has clearly taken the position that those matters do not require public attendance or participation – if that were not the case, then lawmakers would have included a public right to attend employee discipline and collective bargaining matters in those statutes. The only reasonable interpretation of Section 24 of the Labor Act is that the OMA's general requirement for publicly open government meetings does not extend to collective bargaining and grievance arbitration conducted pursuant to the IPLRA. 5 ILCS 315/24. This is not the General Assembly taking no position on the issue. To the contrary, it is affirmatively stating that grievance arbitration is **not** required to be open to the public. There is no question that this applies to the disciplinary grievance arbitration that the DRB awarded in this case. And even if the Court were to accept the City's specious argument that the General Assembly has provided no guidance as to whether the public has a right to attend grievance arbitration hearings, that would not help the City's position because, again, if the law is silent on this issue, then there is no well-defined public policy on this issue.

Regarding FOIA, the City argues that this statute does not prohibit the disclosure of employee disciplinary records, it simply does not create a right for the public to request those records. (City's Br., pp. 40-41) (acknowledging Section 7(1)(n) exemption). The Academic *Amici* go a step further and argue that this FOIA exemption is irrelevant to this case because it only relates to records, not proceedings, and that the exemptions to FOIA must be read narrowly. (Academics *Amicus* Br., pp. 17-21).

Section 7(1)(n) of FOIA explicitly carves out from any public policy of transparency in government records all “[r]ecords relating to a public body’s adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the final outcome of cases in which discipline is imposed.” 5 ILCS 140/7. The City’s *amici* would have this Court disregard this statutory language because the ultimate issue in this case is whether the public can attend arbitration hearings, not whether they can access arbitration records. But when read together with the OMA’s exclusion of public attendance at all employee disciplinary proceedings, this FOIA exemption reflects the General Assembly’s determination that labor arbitrations and other employee disciplinary hearings are not the type of proceeding that must be open to the public.

In addition to excluding all matters of employee discipline, Section 2(c) of the OMA exempts the following from all open-meeting requirements: “Evidence or testimony presented in open hearing, or in closed hearing where specifically authorized by law, to a quasi-adjudicative body, as defined in this Act, provided that the body prepares and makes available for public inspection a written decision setting forth its determinative reasoning.” 5 ILCS 120/2(c)(4). This mirrors FOIA’s instruction that records relating to any adjudication of employee discipline shall not be publicly available, except that the final arbitration award shall be made available. 5 ILCS 140/7(1)(n). Those two statutes reflect the balance that the General Assembly has struck in maintaining the privacy of employee disciplinary matters, while satisfying the public’s interest in transparency by providing for public review of final arbitration awards.

The Appellate Court Majority, along with the City and its *amici*, contend that FOIA supports the opposite conclusion: that FOIA’s public policies require that these

disciplinary arbitration hearings be open to the public. App. Ct. Op., ¶ 81; (City’s Br., p. 24; Academics *Amicus* Br., pp. 8-9). In order to accept this argument, the Court would have to read only the first two paragraphs of Section 1 of FOIA, which includes a general policy statement in favor of transparency, but then disregard the rest of that same section, which recognizes that “Restraints on access to information, to the extent permitted by this Act,” – *i.e.*, exemptions under Section 7 – “are limited exceptions to” the public policy identified in that section. 5 ILCS 140/1. The City and its supporters cannot ask this Court to rely on a statute as the source of a public policy to vacate an arbitration award without actually reading the entire statute. *See Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 67 (2000) (courts must “hesitate to infer a public policy ... that goes beyond the careful and detailed scheme” set forth in the statute).

Turning to the Consent Decree, the City argues that this settlement agreement reflects “formal support by the State for transparency in matters of CPD accountability.” (City’s Br., p. 29). Again, the Consent Decree is not a state law or constitutional provision, and it is not even a court adjudication – it is a settlement agreement resolving claims brought by the Illinois Attorney General against the City of Chicago. *See State of Illinois*, 2019 WL 398703. The City may argue that this Consent Decree is consistent with preexisting public policies, but it cannot offer it as the **source** of public policy – that job belongs to the General Assembly, not “the varying opinions of laymen, lawyers or judges as to the demands of the interests of the public.” *AFSCME I*, 124 Ill. 2d at 260.

The City dismisses the importance of the “carve-out” language in Paragraph 711 of the Consent Decree, which provides that nothing in that document shall impair or affect the contractual rights of the Lodge’s members. (City’s Br., pp. 29-30). According

to the City, because that “carve-out” has its own exception for contract language that violates public policy, this means that the text of the Consent Decree can be weaponized against the Lodge and its members to strike out language from their CBA. (*Id.* at 30). Under the City’s circular logic, this settlement agreement (which itself cannot form the basis of state public policy) that expressly limits its own application against collectively-bargained rights, actually establishes new public policies for the State of Illinois, which can then be used to sidestep the agreement’s “carve-out” language because the City claims that the CBA violates the Consent Decree’s own public policies.

Again, no court “has ever found a consent decree to be a source of public policy. More significantly, there is nothing in the consent decree that mandates that police disciplinary proceedings be open to the public, and it expressly provides that nothing in the consent decree alters the City's collective bargaining agreement with the police.” App. Ct. Op., ¶ 107 (Mitchell, J., dissenting). The City acknowledges that nothing in the Consent Decree specifically refers to public attendance at disciplinary hearings, but dismisses this glaring omission on the ground that when the Consent Decree was entered, the Police Board was conducting its hearings in public. (City’s Br., p. 29 n.9). This is unpersuasive. When the Consent Decree was entered, hearings for all Officer discipline up to a full year’s suspension were also being conducted in private arbitration, which the DRB concluded was the parties’ *status quo*. (C 1552-54). The Consent Decree’s silence on this matter only confirms that there is no well-defined and dominant public policy requiring public attendance at any disciplinary proceedings.

In the end, none of the public policies relied upon by the Appellate Court Majority are applicable here because none of them require employee disciplinary

proceedings, including labor arbitrations, to be open to public attendance. The City criticizes the Lodge for “grossly understat[ing] the importance of real-time access to proceedings.” (City’s Br., p. 42). The Lodge does not doubt that the City and its *amici* believe that it could improve public confidence in law enforcement if these labor arbitrations were open to public attendance. However, as well-intentioned as those arguments may be, they ignore the fact that the General Assembly has not seen fit to create any public policy requiring public attendance at arbitration – instead, the relevant statutes expressly limit the public’s right to attend and access those proceedings. The Appellate Court erred in vacating this portion of the DRB’s Award.

**B. The First Amendment Does Not Provide a Basis for the Court to Vacate the DRB’s Award Allowing for Private Arbitration Hearings**

**1. The City Waived Any First Amendment Argument by Failing to Raise It at the Circuit Court**

Although the First Amendment to the U.S. Constitution comprises the vast majority of the City’s current argument on its public policy challenge, that argument was never raised at the trial court level and is therefore not properly before this Court. “It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal.” *City of Chicago v. Int’l Bhd. of Elec. Workers, Local No. 9*, 2022 IL App (1st) 210850, ¶ 21 n.2 (quoting *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996)). Allowing a party to completely change its theory on appeal “would ‘not only weaken the adversarial process and our system of appellate jurisdiction’ ... but would likely prejudice the [opposing party], since he may have been able to present evidence to discredit the theory had it been raised in the evidence presentation stage, that is to say, in the trial court.” *Haudrich*, 169 Ill. 2d at 536 (citations omitted). This “prohibition on raising new arguments applies to vacatur appeals” in which a party seeks

to vacate a labor arbitration award. *City of Chicago*, 2022 IL App (1st) 210850, ¶ 21 n.2 (citing *Forest Pres. Dist. of Cook Cnty. v. Ill. Fraternal Order of Police Labor Council*, 2017 IL App (1st) 161499, ¶ 26).

The City responds that forfeiture rules are largely applied to appellants, not appellees, so the City as appellee should be free to raise whatever new arguments it wishes at this stage. (City’s Br., p. 39). However, the case cited by the City for this point states that “[a]ppellate forfeiture rules are largely (not entirely) directed at appellants,” meaning that arguments of the appellee not raised below can also be barred. *Harrell v. City of Chicago*, 2025 IL App (1st) 240119, ¶ 33. In fact, in *City of Chicago v. Int’l Bhd. of Elec. Workers, Local No. 9*, the City of Chicago was the appellee, defending the trial court’s order vacating an arbitration award, and the appellate court nonetheless concluded that the City “waived” a public policy argument based on a federal statute that was raised for the first time at the appellate court, even though the City had successfully raised a different public policy argument at the trial court. 2022 IL App (1st) 210850, ¶ 21 n.2.

Any courts that have considered legal arguments raised for the first time on appeal have applied the reasoning that on review, a “court may affirm a trial court’s judgment on any grounds which the record supports.” *In re Det. of Stanbridge*, 2012 IL 112337, ¶ 74; *see also In Re Veronica*, 239 Ill. 2d 134, 151 (2000) (arguments raised by appellee must be “supported by the record”). Here, the right of access to court proceedings under the First Amendment was never mentioned during interest arbitration before the DRB, or in the proceedings before the Circuit Court. (See C 1350-58, C 617-24, C 1460-69) (City’s arguments to DRB); (C 903, C 1018-1023, C 992-1034) (City’s arguments to Circuit Court); (C 1838-1843) (Circuit Court’s opinion). As a result, neither

side had the opportunity to present evidence on that issue, so the record cannot support that argument on appeal. The Appellate Court correctly did not consider this argument. The Lodge would be highly prejudiced if this Court were now to consider, for the first time, this First Amendment court-access argument.<sup>5</sup>

It is telling that in its argument on this First Amendment issue, the City found it necessary to cite multiple times to the “Police Board Guide,” a 2025 document that was never introduced at the trial court (and as discussed *supra*, should be disregarded for that reason). (See City’s Br., p. 26). The City relies on that new evidence for its argument that Police Board proceedings resemble trials in court, based on procedural language in that document (*id.*). This confirms that the record below was not developed on this First Amendment issue. Even if this argument were not deemed waived, there is no record from the Circuit Court to support the City’s claims that grievance arbitration cases involve First Amendment rights or that they have been conducted in public proceedings – to the contrary, the only record on this issue is the DRB’s repeated finding that disciplinary arbitration has always been conducted in private, not in public. (See C 1495, 1554-55). Thus, this unsupported new argument must be rejected.

The City’s assertion that its First Amendment argument is not really new because it raises “the same core policy concerns” that have been raised throughout this litigation (City’s Br., p. 38) is unconvincing. Although the City is attempting to use this purported public policy to reach the same end that it tried to reach using its earlier public policy

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<sup>5</sup> In its opening brief, the Lodge also argues that the Appellate Court committed reversible error in considering and relying on other purported public policies that were never raised at the circuit court and therefore were time-barred and should have been deemed waived, including policies “favoring effective law enforcement,” “favoring the exposure of crime,” and “favoring the investigation and prosecution of criminal offenses.” (Lodge’s Br., pp. 38-41). The City does not respond directly to this argument in its brief.

arguments, there are clear and fundamental differences between an individual's constitutional right to attend court proceedings, as compared to FOIA's general policy of government transparency. The fact that the City raised one public policy argument at the trial court does not open the door to arguing an ever-expanding list of public policies as the case progresses on appeal. *Compare City of Chicago*, 2022 IL App (1st) 210850 (at trial court, City successfully raised public policy argument against government regulation based on National Labor Relations Act, but that did not preserve City's ability to raise related public policy against government regulation under Telecommunications Act of 1996 for the first time on appeal, so that new argument was deemed waived).

Lastly, because the City's brand-new and unsupported public policy argument is centered on constitutional questions, there is another compelling reason for this Court not to consider this argument: the doctrine of constitutional avoidance. The Illinois Supreme Court's "long-standing rule is that 'cases should be decided on nonconstitutional grounds whenever possible, reaching constitutional issues only as a last resort.'" *Carle Found. v. Cunningham Twp.*, 2017 IL 120427, ¶ 34 (quoting *In re E.H.*, 224 Ill.2d 172, 178 (2006)). Accordingly, "'courts ... must avoid reaching constitutional issues when a case can be decided on other, nonconstitutional grounds,' and such issues 'should be addressed only if necessary to decide a case.'" *Id.* (quoting *People v. Hampton*, 225 Ill.2d 238, 244 (2007)); *see also Town of Cicero*, 338 Ill. App. 3d at 378 (in Section 14(k) challenge to interest arbitration award, court confirmed that "this court should not unnecessarily address constitutional issues") (citation omitted).

Here, it is not necessary for the Court to consider the City's new constitutional arguments in order to decide this case. As shown in the Lodge's opening brief, the public

policy of the State of Illinois actually supports private arbitration. Furthermore, the City never raised any First Amendment access argument at arbitration or at the trial court, so there is no record relating to that argument. Instead of taking up and ruling on this constitutional issue, which should be a last resort, the Court should instead deem this issue to be waived, and as the Appellate Court did, decline to address this argument.<sup>6</sup>

## **2. The First Amendment Does Not Embody a Well-Defined and Dominant Public Policy in Favor of Public Attendance at Disciplinary Grievance Arbitration Hearings**

Should the Court consider the merits of the City’s new First Amendment argument, the argument should still be rejected because the City fails to prove that the DRB’s Award allowing disciplinary arbitrations to continue to be conducted in private violates any well-defined and dominant public policy under the First Amendment.

The “qualified right of access” to court proceedings was first recognized by the U.S. Supreme Court in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), where a Court plurality held that members of the public had a right to attend criminal trials. That Court later extended that same logic to non-grand-jury preliminary hearings in criminal trials. *See Press-Enter. Co. v. Superior Court of California for Riverside Cnty.*, 478 U.S. 1 (1986). The test articulated by that Court for public access to court proceedings considers: (1) “whether the place and process have historically been open to the press and general public,” and (2) “whether public access plays a significant positive

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<sup>6</sup> The Academics *amicus* brief filed in support of the City also references this First Amendment right to court access argument. (See Academics *Amicus* Br., pp. 21-22). An *amicus curiae* takes the case as he finds it and may not raise issues or arguments not raised by the parties to the case. *Karas v. Strevell*, 227 Ill. 2d 440, 450 (2008). Because the City is barred from raising this argument, the City’s *amici* should similarly be barred from raising it.

role in the functioning of the particular process in question.” *Id.* at 8. Even if those elements are met, the presumption of access may be overcome by overriding interests. *Id.*

Although some lower courts have expanded the application of this doctrine, “[t]he Supreme Court has only ever used it to assess whether the public has a right of access to traditional aspects of criminal proceedings.” *Associated Press v. Neal*, \_\_\_ F.4th \_\_\_, 2026 WL 1616000, at \*2 (7th Cir. June 5, 2026) (collecting cases); *see also Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 611 (1982) (O’Connor, J., concurring) (“neither *Richmond Newspapers* nor the Court’s decision today [] carry any implications outside the context of criminal trials.”). The Seventh Circuit, for its part, has applied the First Amendment right of access to civil trials in addition to criminal trials. *See Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1069 (7th Cir. 2018). However, the Seventh Circuit has “only applied this framework to ‘court proceedings’ and related ‘documents.’” *Associated Press*, \_\_\_ F.4th \_\_\_, 2026 WL 1616000, at \*2 (citations omitted) (finding no right of public access under First Amendment to attend executions).<sup>7</sup>

As this history makes clear, the First Amendment right of access is well-established with respect to attending criminal trials in court, but its application in any other contexts has been limited and inconsistent. *See, e.g., In re NextLevel Health Partners*, 2025 IL App (1st) 230803 (First Amendment right of access does not extend to insurance conservation proceedings in civil courts); *In re A Minor*, 205 Ill. App. 3d 480, 488 (4th Dist. 1990), *aff’d*, 149 Ill. 2d 247 (1992) (declining to extend the right of access to juvenile court adjudicatory hearings regarding abused children taken into shelter care);

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<sup>7</sup> The First Amendment does not create a general, unlimited right to access government information. As the U.S. Supreme Court has stated, “The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.” *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (citation omitted).

*B.H. v. McDonald*, 49 F.3d 294, 299-301 (7th Cir. 1995) (right of access did not extend to in-chambers conferences held in civil proceedings to enforce a consent decree).

The application of this qualified right of access is even more tenuous outside of formal court proceedings. Consistent with the Seventh Circuit, this Court and the Illinois Appellate Court have only ever applied this right of access to court proceedings and related documents. *See, e.g., People v. Zimmerman*, 2018 IL 122261, ¶¶ 25-27 (discussing “public right to attend criminal trials” and “public right of access to court records”); *compare Associated Press*, \_\_\_ F.4th \_\_\_, 2026 WL 1616000, at \*2. Neither the Seventh Circuit nor Illinois courts have ever found a First Amendment right to attend administrative proceedings, employee disciplinary proceedings, or arbitrations.

In fact, the Lodge is unaware of any court in the nation that has ever found a First Amendment right of access to either employee disciplinary proceedings or labor arbitration proceedings. Rather, the few courts that have considered arguments to extend the First Amendment court-access doctrine into this realm have rejected those arguments, and across the board, “courts have found no First Amendment right of access to police disciplinary hearings.” *Oszust v. Town of St. John*, 212 F. Supp. 3d 770, 779 (N.D. Ind. 2016) (collecting cases and finding no public right of access to disciplinary hearing before Town’s Metropolitan Board of Police Commissioners); *see also Smith v. City of Cleveland*, 641 N.E.2d 828, 832-33 (Ohio Ct. App. 1994) (finding no right of access to police discipline hearing and adopting finding that “the reason behind a closed disciplinary hearing is to protect an employee's right of privacy. An employee’s right to

have employment status determined outside of public view outweighs the benefits which might be achieved in opening the disciplinary hearing.”<sup>8</sup>

Relatedly, in *Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd.*, 40 Cal. App. 5th 241 (2019), a California appellate court considered whether the First Amendment creates a public right of access to mandatory mediation and conciliation (“MMC”) proceedings, a quasi-arbitration, quasi-mediation proceeding for collective bargaining mandated by the California Labor Code. Applying the U.S. Supreme Court’s “experience and logic” test, the court found that state law did not require public MMC proceedings, and they had not typically been open in practice. *Id.* at 263-64. The court then compared the history of civil trials, which are normally public, and collective bargaining negotiations, which “historically have been considered private and closed to the public, even in the public sector.” *Id.* at 264. Lastly, the court considered labor arbitration and found: “Arbitrations concerning labor issues generally are private proceedings.” *Id.* at 266 (collecting cases).<sup>9</sup>

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<sup>8</sup> The only case cited by the City in which a First Amendment right to access was found for arbitration proceedings, *Delaware Coal. for Open Gov’t, Inc. v. Strine*, 733 F.3d 510 (3d Cir. 2013), is easily distinguished. That case dealt with Delaware’s government-sponsored arbitration of certain high-stakes commercial disputes, in which the “arbitration” took place before a judge in a Delaware courthouse and resulted in a binding order of the court. *Id.* at 518. As a result, the Third Circuit concluded that those proceedings “differ fundamentally from other arbitrations,” which are typically private. *Id.* The court further explained:

Although proceedings labeled arbitrations have sometimes been accessible to the public, they have often been closed, especially in the twentieth century. This closure, however, can be explained by the private nature of most arbitrations. Confidentiality is a natural outgrowth of the status of arbitrations as private alternatives to government-sponsored proceedings. Indeed, we would be surprised to find that private arbitrations—taking place before private arbitrators in private venues—had historically been accessible to the public. *Id.*

The labor arbitration at issue here is not conducted in court before a judge who issues a binding court order. Instead, the arbitration at issue in this case has always been conducted before private arbitrators in private venues (C 1554-55), so *Delaware Coalition* is inapplicable.

<sup>9</sup> That court also cited the primary treatise on labor arbitration, *How Arbitration Works*, for the principle that “An arbitration hearing usually is not open to the public, even in the public sector,

Ultimately, that court found no right of access to labor arbitrations, concluding:

“According to these histories, while there is a strong tradition of openness for civil trials, the same tradition is lacking as to collective bargaining and labor arbitrations.” *Id.* at 269.

It is clear from these decisions that there is no well-defined and dominant public policy in the State of Illinois – or in any other state in the country – guaranteeing public access to disciplinary arbitration proceedings under the First Amendment. The portion of the DRB’s Award being challenged by the City here is its finding that grievance arbitrations for discipline greater than 365-day suspensions shall be conducted in private. (C 1552-55). In considering whether a First Amendment right to access exists for the proceedings at issue, the questions for the Court to answer are (1) whether the place and process – disciplinary grievance arbitration – have historically been open to the press and general public, and (2) whether public access plays a significant positive role in the functioning of the particular process in question – disciplinary grievance arbitration. *Press-Enter. Co.*, 478 U.S. at 6.

The City makes no attempt to show that any labor arbitration between these parties, or between any parties in Illinois, has historically been open to the press or the public.<sup>10</sup> To the contrary, the record is clear that since the commencement of the collective bargaining relationship between the City and the Lodge in the early 1980s,

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although some public-sector interest arbitration hearings are open by statute.” *Gerawan Farming*, 40 Cal. App. 5th at 266 (quoting Elkouri & Elkouri, *How Arbitration Works* (8th ed. 2016) p. 7-20). In its Interim and Final Awards, the DRB cited this same treatise for its conclusion that labor arbitration is a private proceeding unless agreed otherwise. (C 1493, C 1552).

<sup>10</sup> The only example of public grievance arbitration hearings the City has ever offered is San Antonio, Texas, where the collective bargaining agreement between the employer and the police union allows members of the public to attend disciplinary arbitration hearings. (City’s Br., p. 34). But that public access is by agreement of those parties as a matter of contract. (*Id.*). Furthermore, the labor practices of public employers in a “right-to-work” state have no bearing on the public policies of the State of Illinois and are wholly irrelevant to these proceedings.

there have been no public grievance arbitration case hearings. This finding as to the parties' "past practice" of holding arbitration in private was explicitly made by the DRB, which noted that the City "has not disputed" that finding. (C 1495, C 1554-55). As discussed *supra*, that finding may not be disturbed by the Court. *Vill. of Posen*, 2014 IL App (1st) 133329, ¶ 43. Thus, the City fails to meet the first prong of this analysis.

Next, considering that the public has *never* been granted access to arbitration hearings in the past, it cannot be said that public access plays any significant role in the functioning of labor arbitrations. Instead, public access could only have the effect of making arbitration hearings more formal, more expensive, and slower, as discussed in the Lodge's opening brief. *See Town of Cicero*, 338 Ill. App. 3d at 371 (arbitration is intended to be informal, fast, and inexpensive). Likewise, "[a]n employee's right to have employment status determined outside of public view outweighs the benefits which might be achieved in opening the disciplinary hearing." *Smith*, 641 N.E.2d at 832-33. This is consistent with the General Assembly's decision to exclude the public from all employee disciplinary matters and collective bargaining matters involving government employees. *See OMA*, 5 ILCS 120/1, 2; *IPLRA*, 5 ILCS 315/24; *FOIA*, 5 ILCS 140/7(1)(n).

Through its First Amendment argument, the City asks this Court to disregard entirely the historical and legal background for labor arbitration (both between these parties and across Illinois and the rest of the country), and instead focus solely on the procedures that have been followed in the past by the Chicago Police Board. But this misses the point entirely. First, the DRB expressly found that in establishing procedures for grievance arbitration for severe disciplinary cases, the relevant *status quo* for that analysis was not the Police Board's procedures, but rather the longstanding, preexisting

procedures that had been collectively bargained for grievance arbitration of lesser discipline (C 1554-55), and that finding may not be disturbed.

Second, the City's argument misunderstands what the DRB's Award actually does. The Award does not have any impact on the public's ability to attend Chicago Police Board hearings. Instead, it grants Police Officers and their union their statutory right to submit all disciplinary matters to arbitration, which shall be subject to the same, preexisting procedures as any other disciplinary arbitration; but if an Officer or the Lodge does not select the option of arbitration, then the matter would proceed before the Police Board. (C 1491-93, C 1528-31). Under the previously existing contract language, which is not being challenged here, if an Officer is facing a suspension of 365 days or fewer, he or she has the option of (a) selecting review by the Police Board, (b) filing of a grievance, or (c) accepting the recommended discipline. (C 1528-31). If the Officer does not make an election within 10 working days, or if the Lodge chooses not to advance a grievance to arbitration, then by default that disciplinary matter goes before the Police Board. (*Id.*). The only change that the DRB's Award made is that now, Officers facing discipline greater than 365 days may choose from the same three options. (*Id.*).

Thus, before the DRB's Award was issued, Officers facing a 365-day suspension could have their dispute heard before the Police Board, which opened its proceedings to the public, or before an arbitrator, which was always private. (C 1554-55). After the issuance of that Award, Officers facing a 366-day suspension may also choose to have their dispute heard before the Police Board, which presumably will continue to conduct its hearings in public, or before an arbitrator, which the DRB ruled shall continue to be private. (*Id.*). The Award has no effect whatsoever on the Police Board's procedures.

The City argues that it is inappropriate to focus on the history of arbitration here, because the First Amendment’s court-access analysis requires the Court to focus “not on formalistic descriptions of the government proceeding but on the kind of work the proceeding actually does.” (City’s Br., p. 31) (citation omitted). Solely focusing on the Police Board’s past procedures (which the DRB considered and rejected) does not prove the City’s argument. As noted, both the Police Board and private arbitrators have historically been tasked with hearing and deciding disciplinary disputes for Chicago Police Officers. Therefore, if the Court focuses on “the kind of work” being done, it cannot be said that the work of adjudicating employee disciplinary matters has always been open to public access – it has been heard in both public and private venues in the past (though never in public arbitration). A major difference between the two procedures is that the Police Board’s hearing system was not the result of the collective bargaining that is required by the IPLRA, 5 ILCS 315/7 and 8. Rather, it was unilaterally established by City ordinance and rules adopted by the Police Board. Chicago Ill. Mun. Code Sec. 2-84-030. There is no historical, collectively-bargained procedure for public arbitration for these Officers, for other City employees, or for any other government body in Illinois.

The only case cited by the City for this point, *New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286 (2d Cir. 2012), dealt with quasi-criminal administrative proceedings in which individuals challenged citations issued by police officers for violations of Transit Authority Rules. That court held that the “kind of work” being performed in that “government proceeding” was therefore indistinguishable from trials in criminal court, which are unquestionably covered by the First Amendment’s right to access. *Id.* at 299, 301-03. Neither that case, nor any other reported case, has treated

employee discipline as a “government proceeding” akin to a criminal trial, and this Court should not be the first to make such an unwarranted leap.

Indeed, the very nature of arbitration indicates that the City’s “substance-over-form” argument is inapplicable here. The move from a formalized, court-like hearing to arbitration involves more than simply slapping a different title on the exact same proceeding. In arbitration, as compared to civil litigation, different rules and procedures apply for discovery, motion practice, right to a jury, and appellate rights, in addition to public attendance. *See, e.g., Dick-Ipsen v. Humphrey, Farrington & McClain, P.C.*, 2024 IL App (1st) 241043, ¶ 33 (“arbitration typically results in a client’s waiver of significant rights, including the right to a jury trial, the right to broad discovery, and the right to an appeal on the merits”).

By way of illustration, if an individual files a lawsuit against another individual in Illinois state or federal court, under the Seventh Circuit’s First Amendment case law, the trial in that case would have to be open to the public. But if, after the suit is filed, those parties agree to submit their dispute to the American Arbitration Association (“AAA”) to be resolved through final and binding arbitration, the applicable procedures and rules would change, and most importantly, the arbitration hearing would be private. (C 1493-94). It would be absurd to argue that any and all private arbitrations involving any legal claims must be open to the public under the First Amendment simply because the arbitrator is doing the same “kind of work” that a court would have otherwise done. The City’s argument that labor arbitrations must be open to the public, solely because the Police Board has opened its hearings to the public, is similarly untenable.

In summary, the First Amendment right of public access arises from public attendance at criminal trials. Some courts have extended its application to civil trials and civil court records, but neither the Seventh Circuit nor any Illinois state court has extended that analysis to administrative proceedings or arbitrations. Across the country, courts have rejected attempts to stretch this line of First Amendment cases to matters of employee discipline, collective bargaining, or labor arbitration.

In order to conclude that the DRB's Award violates public policy under the First Amendment's right to court access, this Court would first have to expand that line of cases further than any court has before, to apply it to labor arbitrations involving employee disciplinary grievances. The Court would then have to reject the findings and conclusions of the DRB and focus solely on the past procedures of the Police Board, despite the fact that the DRB's Award has no impact whatsoever on that agency's procedures. The Court would further have to conclude that by allowing these labor arbitrations to *continue* to be private, the DRB's Award clearly violates the public's alleged constitutional right to attend Police Board hearings. It should be apparent that this unprecedented and unwarranted expansion of First Amendment case law goes well beyond the identification of a "well-defined and dominant public policy" in the State of Illinois, and similarly that no clear violation of any such policy has been shown. To the extent the Court even considers this argument, it should be rejected.

**V. The Award's Provision Allowing for Private Arbitration Is Not Arbitrary or Capricious**

The City next argues that the DRB's Award allowing for private arbitration of disciplinary grievances is arbitrary and capricious and subject to vacatur under Section 14(k) of the IPLRA. (City's Br., pp. 44-47). The City raised this argument at the trial

court level, and the Circuit Court rejected it, noting that the DRB's determination "that any arbitration that had been elected by the Lodge should proceed in a private setting" was based on the parties' past practices for other disciplinary grievances; the ethical obligations under the rules of the American Arbitration Association and the National Academy of Arbitrators; and the Worker's Rights Amendment, Illinois Const., Art. I, § 25. (C 1838). That court concluded: "Although the City vigorously disagrees with each of the bases used to support the Neutral Chair's conclusion, his was a considered decision. It certainly was neither arbitrary nor capricious." (C 1838). The City failed to raise and therefore abandoned this argument at the Appellate Court.

In its brief, the City fails to prove that this portion of the Award was arbitrary or capricious. Under Section 14(k) of the Labor Act, an interest arbitration award may only be vacated if it is clearly shown that "the arbitration panel was without or exceeded its statutory authority; the order is arbitrary, or capricious; or the order was procured by fraud, collusion or other similar and unlawful means." 5 ILCS 315/14(k). In considering a challenge raised under Section 14(k), courts will find a decision to be arbitrary and capricious only if the decision maker (1) relies on factors which the legislature did not intend for it to consider; (2) entirely fails to consider an important aspect of the problem; or (3) offers an explanation for its decision which runs counter to the evidence before the decision-maker, or which is so implausible that it could not be ascribed to a difference in view or the product of the decision-maker's expertise. *Town of Cicero*, 338 Ill.App.3d at 372 (citing *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 505-06 (1988)); accord *Bloomington*, 2016 IL App (4th) 150573, at ¶ 27 ("That this court or the circuit court might have decided the issue differently does not make the [Interest]

Arbitrator's decision arbitrary or capricious.”). Under Section 14(k), “[t]he standard is one of rationality.” *Town of Cicero*, 338 Ill.App.3d at 372; (*compare* C 1628) (DRB supplemental award quoting City and Lodge’s own CBA language, which defines “arbitrary or capricious” as “without a rational basis or justification”).

Section 14(h) of the Labor Act identifies eight statutory factors upon which an interest arbitration panel shall base its findings, opinions, and order, “as applicable.” 5 ILCS 315/14(h). The “as applicable” language in that section confirms that not every enumerated factor must be considered for every issue, and certain statutory factors will have no relevance based on the contract language at issue. *See, e.g.*, 5 ILCS 315/14(h)(5) (statutory factor of “average consumer prices for goods and services, commonly referred to as the cost of living,” has no bearing on non-economic issues); *Town of Cicero*, 338 Ill. App. 3d at 377 (rejecting argument that arbitrator gave no weight to factor (h)(3), the “welfare and interest of the public,” and noting that this factor is “more meaningfully considered in arbitration involving purely economic disputes than on an issue such as a residency requirement,” especially considering that this factor also includes “the financial ability of the unit of government to meet those costs.”) (citing 5 ILCS 315/14(h)(3)).

Similarly, courts have acknowledged that Section 14(h)(8) includes a broad and flexible “catchall” that allows interest arbitrators to consider all other relevant, unenumerated factors. *Town of Cicero*, 338 Ill. App. 3d at 374 (it was not arbitrary or capricious to consider employees’ “liberty interests”). Where an arbitrator is aware of the arguments being raised by both sides, but credits one side over the other, “the issue [being raised by the challenging party] is not, stripped of hyperbole, whether the

Arbitrator *ignored* statutory factors, evidence or arguments, but whether he reached the correct conclusion in his consideration of same.” *Id.* at 376 (emphasis in original).

In its brief, the City argues that the DRB’s Award failed entirely to consider the interests and welfare of the public under factor (h)(3), because the City claims that allowing arbitration to be conducted privately will make it harder for CPD to operate effectively and will undermine the public’s perception of the integrity and credibility of the disciplinary process. (City’s Br., p. 45).<sup>11</sup> The City argues that the DRB “considered none of” its arguments that “secrecy” undermines this process. (*Id.* at 46). But this is contrary to the plain text of the DRB’s Award. The Final Opinion and Award devotes an entire section to the City’s argument that private arbitration is inappropriate because it is conducted “behind closed doors,” then explains why this “slogan and catch phrase” is unwarranted, and why private arbitration proceedings do not render this process illegitimate. (C 1542-45, 1552-55). The DRB clearly considered this argument, but it found the Lodge’s position to be more persuasive. And as noted in *Town of Cicero*, 338 Ill. App. 3d at 377, consideration of the public interest under factor (h)(3) is more meaningful in connection with purely economic disputes, which would not include procedures for grievance arbitration. This factor is no basis to vacate the Award.

Next, the City asserts that the DRB ignored the past practice and *status quo* between the parties, arguing that “[t]he status quo of a condition is a typical consideration during interest arbitration proceedings.” (City’s Br., p. 46) (citation omitted). Both the Lodge and the DRB agree as to the relevance of the *status quo* in interest arbitration. The

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<sup>11</sup> There is no record evidence to support the negative impacts that the City claims will result from private arbitration hearings – they are purely speculative, and the DRB was correct in not giving great weight to those arguments.

DRB did not ignore this issue – instead, it relied heavily on the existing *status quo* of private arbitration hearings to conclude that the City’s proposal would be an unwarranted departure from that *status quo*. (C 1495; C 1554-55) (the parties’ past practice is that arbitrations under this CBA are private, and “[t]he City has not disputed that assertion.”). Because private arbitrations were already the *status quo* for suspensions up to 365 days, the DRB found no reason to break from that past practice for suspensions of more than 365 days or separations, as there was no basis to create an entirely new procedure for public arbitration “when that practice did not previously exist.” (C 1554-55).

As discussed throughout this brief and the Lodge’s opening brief, the DRB determined that the relevant *status quo* was derived from existing disciplinary arbitration procedures, not the procedures that were followed (and presumably will continue to be followed) by the Police Board. The DRB is entrusted with interpreting the existing contract language and relevant facts to make findings as to what the relevant *status quo* is, and courts are not empowered to second-guess or replace those findings, even if the Court would have made different findings if it were acting as the arbitrator. *Town of Cicero*, 338 Ill. App. 3d at 376; *City of Calumet City v. Illinois Fraternal Order of Police Labor Council*, 344 Ill. App. 3d 1000, 1007 (1st Dist. 2003) (accepting and deferring to arbitrator’s finding that “there was no long-standing, negotiated status quo on this issue”).

The DRB also reasonably concluded that it would make no sense to allow arbitration hearings for 365-day suspensions to continue to be heard in private, but to require that arbitration hearings for 366-day suspensions be open to the public. (C 1555). The City claims that the DRB’s finding on this issue supports vacatur of the Award, raising wholly irrelevant arguments about rational basis review of government line-

drawing under Equal Protection Clause jurisprudence. (City's Br., pp. 47-48). This argument misunderstands the role of judicial review of the DRB's Award. The Court is not tasked with reevaluating whether the City's arguments presented to the DRB, including the City's proposed line-drawing, were rational. Instead, the Court must only assess whether the DRB's Award itself was rational; and here, it is rational.<sup>12</sup>

The DRB's decision to apply existing grievance arbitration procedures, including private hearings, to arbitrations for lengthier suspensions and separations is a natural extension of the DRB's award of the right to final and binding arbitration of these disputes, and the two issues cannot be separated. In its Final Opinion and Award, the DRB notes that awarding the right to grievance arbitration is required by the Labor Act and by the Workers' Rights Amendment to the Illinois Constitution. (C 1546-48, 1550-51). The DRB cites to 17 earlier interest arbitration cases in which public employees (many of whom were police officers) had historically been subject to disciplinary hearings before Boards of Fire and Police Commissioners or similar agencies (presumably in public), but the interest arbitrator awarded the employees the statutory right to private arbitration. (C 1414-15; C 1549-50) (collecting cases). Pairing this statutory requirement to award the right to disciplinary grievance arbitration with the DRB's finding, based on history and experience, that "Arbitrations are private and not open to the public" (C 1552), it follows that the DRB would award private arbitration, as opposed to creating a new process that does not resemble labor arbitration as it has always functioned. That decision of the DRB was both logical and rational.

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<sup>12</sup> The DRB has already considered this issue and made a finding that it would *not* be rational for the CBA to draw a line between 365-day suspensions and 366-day suspensions to decide whether disciplinary arbitration must be open to the public. (C 1555). This finding may not be disturbed by the Court on review.

Every challenge raised by the City under this Section 14(k) analysis amounts to a mere difference in view with the DRB. The City rehashes the arguments it made to the DRB with the hope that this Court will step in and replace the DRB's reasoning and findings with its own. But the face of the Award shows that the DRB's decision on whether arbitration should continue to be held in private was thoughtful, reasoned, and considered. That decision was neither arbitrary nor capricious, and the Court should not disturb that decision simply because the City disagrees with the DRB's ultimate ruling.

**VI. The DRB's Decision to Apply the Same Remain-In-Pay-Status Procedures to All Disciplinary Grievance Arbitration Proceedings Was Not Arbitrary or Capricious**

As part of its Final Award adopting the Lodge's proposals to allow for grievance arbitration of all disciplinary matters, the DRB ruled that the preexisting procedures for disciplinary arbitration – which in relevant part require Officers to remain in pay status and not serve any suspension or other discipline until an arbitrator has ruled on their grievance – shall apply equally to grievances challenging suspensions in excess of 365 days and separations. (C 46-48). The Appellate Court correctly rejected the City's challenges to that provision and confirmed that portion of the Award. App. Ct. Op., ¶¶ 87-91. The City did not file a petition for leave to appeal that issue to this Court, but now raises it in its request for cross-relief. (City's Br., pp. 48-57). The DRB's decision on this issue was well-reasoned – it had a rational basis and justification – and the Court should affirm the Appellate Court's ruling on this matter.

Under the preexisting language in the parties' CBA, "for grievances challenging suspensions from between 11 and 365 days, '... the Officer will not be required to serve the suspension, nor will the suspension be entered on the Officer's disciplinary record, until the Arbitrator rules on the merits of the grievance.'" (C 1498) (quoting Appendix

Q(C) and Section 9.6(C) of the predecessor contract). This longstanding contractual protection for Police Officers facing potential discipline is not necessarily required as a matter of constitutional due process, but it has nonetheless long been the parties' agreed past practice, and therefore the *status quo*, with respect to disciplinary arbitration under the CBA. (C 1498-99; C 1555-56).

When the DRB awarded the Lodge's proposal to extend the option of final and binding arbitration for *all* disciplinary matters – as it was required to do under the Labor Act, 5 ILCS 315/8 – the DRB concluded that the most rational approach for these hearings would be to simply extend all of the procedural provisions that have historically applied to arbitration for discipline up to a 365-day suspension, including the right to remain in pay status. (*Id.*; C 1528-31) (DRB's awarded language, extending the same rights and procedures that already existed to 366-day-plus suspensions and separations). As discussed above in the context of private hearings, the award of pay-status procedures was also a natural extension of the statutorily-required award of final and binding arbitration, and those two issues cannot be separated.

As with the issue of private versus public arbitration hearings, the DRB concluded that the relevant *status quo* for the issue of pay status was the existing contract language, which provided for private arbitration proceedings and provided that Officers remain on pay status until the arbitrator rules on their grievance. (C 1554-55) (the CBA "explicitly provides that disciplinary actions falling under those provisions do not require the officer be put in non-pay status prior to decision by an arbitrator on the grievance," and because lengthier suspensions and separations are now covered by that language, "there is no reason to deviate from the practice agreed to by the parties for the lesser disciplinary

actions” regarding pay status for those grievances) (C 1637) (prior procedures followed by the Police Board are “not relevant”). As the DRB reasoned: “Why should an officer who is suspended for 365 days remain on the payroll until the arbitration is decided and the officer who is suspended for 366 days be put in non-pay status until that officer’s arbitration is decided? There is no rational basis for such a line drawing.” (C 1556).

In its brief to this Court, the City argues that this portion of the DRB’s Award was arbitrary and capricious because it “ignored evidence of the status quo,” it “created an exception to a citywide practice only for Lodge members,” it failed to consider the financial consequences, and it relied on “the presumption of innocence,” which the City claims does not apply here. (City’s Br., pp. 48-57). As noted above regarding the City’s Section 14(k) challenge to the decision on private arbitration hearings, courts will only find an interest arbitrator’s award to be arbitrary and capricious if it the award (1) relies on factors which the legislature did not intend for it to consider; (2) entirely fails to consider an important aspect of the problem; or (3) offers an explanation for its decision which runs counter to the evidence before the decision-maker, or which is so implausible that it could not be ascribed to a difference in view or the product of the decision-maker’s expertise. *Town of Cicero*, 338 Ill.App.3d at 372; 5 ILCS 315/14(k). And as was the case with the City’s other Section 14(k) challenge, each of the City’s arguments regarding pay status is nothing more than a mere disagreement with the DRB’s ultimate conclusion, which is no basis to vacate the interest arbitration award.

With respect to the *status quo*, the City claims that the DRB erred in disregarding the *status quo* of Police Board hearing procedures, and therefore failed to understand that it was the Lodge, not the City, that was proposing a “breakthrough” change to the *status*

*quo* condition. (City’s Br., pp. 49-50). As discussed in length throughout the Lodge’s briefing, the DRB’s identification of the relevant *status quo* is a finding and conclusion to which the courts must defer – whether the challenge to the award arises under public policy or under Section 14(k) of the Labor Act. *See AFSCME I*, 124 Ill. 2d at 262-63; *Vill. of Posen*, 2014 IL App (1st) 133329; *Town of Cicero*, 338 Ill. App. 3d at 376; *Calumet City*, 344 Ill. App. 3d at 1007 (deferring to arbitrator’s finding with respect to what the “long-standing, negotiated status quo on this issue” was).

Here, the relevant *status quo* stems from the existing, agreed-upon CBA language reflecting the parties’ past practice for disciplinary arbitration. (C 1554-55). That finding may not be disturbed by the Court. Because that was the *status quo*, the DRB correctly found that the Lodge’s proposal was consistent with the *status quo*, whereas the City’s proposal – to create a new procedure, different from either the existing arbitration procedures or the Police Board procedures – was a change to the *status quo*, which was not supported by the record or arguments. (C 1556) (“there is no reason to deviate from the practice agreed to by the parties for the lesser disciplinary actions”). The DRB did not “ignore” the procedures followed by the Police Board; it simply found that they were not relevant to arbitration hearings and gave them little weight. (C 1492-93, 1499) (“the City is clearly attempting to transfer standards used for cases before the Police Board to this class of cases which are now to be heard in arbitration if the option to do so is exercised”). The City’s attempt to flip this analysis on its head, adopt a different *status quo*, and apply a different burden for the Lodge’s proposal, should be rejected.<sup>13</sup>

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<sup>13</sup> The City again points to Equal Protection Clause cases to assert that its own “government line-drawing” is rational. (City’s Br., p. 52). As noted *supra*, that argument and the cases cited are irrelevant to the question of whether the DRB’s decision was arbitrary or capricious, which is the only question presented to this Court. Furthermore, the DRB already considered this issue and

Next, the City claims that this provision of the Award was arbitrary because the DRB fails to acknowledge that no other City of Chicago CBA requires that employees remain in pay status while facing potential termination. (City's Br., pp. 52-53) (stating that City is party to 43 CBAs, and no other CBA allows employees to be paid while discharge proceedings are pending against them). While the comparison of conditions of employment with "other employees performing similar services" and in "comparable communities" is listed as a statutory factor, like all Section 14(h) factors, it is only relied upon by arbitrators "as applicable." 5 ILCS 315/14(h).

Here, that factor is simply not applicable. While it may be true that no other Chicago CBA offers employees the protection of remaining in pay status while they are facing discharge, that is likely because no other Chicago CBA offers this remain-in-pay-status protection for any level of discipline. The predecessor contracts between the City and the Lodge have long protected Officers' pay status while they are facing suspensions up to 365 days in length. (C 1498-99; C 1555-56). The City does not suggest that any other group of City employees has ever had this protection, even for shorter suspensions. Thus, even prior to these interest arbitration proceedings, the Lodge's remain-in-pay-status procedures were unique and not comparable to any other City of Chicago CBA. As a result, this statutory factor was not relevant or applicable in analyzing whether that same procedure should apply to all disciplinary arbitration hearings, and the DRB correctly did not rely on it. The decision to not rely on an irrelevant factor does not indicate that the Award was arbitrary or capricious.

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made the finding that "There is no rational basis for such a line drawing." (C 1556). That finding may not be disturbed by the Court. *Vill. of Posen*, 2014 IL App (1st) 133329, ¶ 43.

The City also claims that the DRB “ignores” and “failed to consider” the financial and operational concerns that it believes will arise from keeping Officers facing serious potential discipline in pay status. (City’s Br., pp. 53-55). Specifically, the City claims that if it is seeking separation, then it has already made the determination that an Officer cannot be trusted to do their job, so they cannot be assigned “law enforcement functions,” and further that any Officer who prevails on a separation grievance will be entitled to back pay, making them whole for any loss. (*Id.*).

The DRB did not “ignore” or “fail to consider” the City’s arguments – the DRB simply disagreed with them. For operational concerns, the DRB pointed out that Officers facing a full years’ suspension are already entitled to remain in pay status pending a final arbitration decision, and it made no sense to apply a different standard to an Officer facing a 366-day suspension. (C 1556). For the City’s arguments about financial strains and the make-whole relief available in arbitration, the DRB explained:

While arbitrators have broad remedial powers including awarding lost backpay and damages and other financial harm that is a direct or foreseeable consequence of a disciplinary action that lacks just cause, an officer being out of work until a case is decided can never be fully rectified – particularly given the stress placed on officers and their families as they suddenly have lost income.

If there is a concern that an officer has committed sufficiently serious misconduct to warrant a suspension greater than 365 days or dismissal and therefore should not be compensated while the officer’s alleged misconduct is investigated, there is an obvious simple answer for that concern. And that is for the City to timely investigate the matter and get the case in front of an arbitrator for decision. (C 1556-57).

As that discussion makes clear, the DRB heard and considered the City’s complaint that it should not be required to keep an Officer in pay status when there is a possibility that the City’s proposed discipline will be upheld and the Officer will be

separated after arbitration is complete. But the DRB balanced that concern against what would happen to Officers who prevailed on their separation grievances but were allowed to be fired by the City in the interim, and the DRB concluded that the losses suffered by those Officers and their families could never be fully rectified, even though a make-whole remedy. (*Id.*). Thus, in balancing those competing interests, the DRB gave greater weight to the injuries that would come from allowing the City to impose separations prior to arbitration. That the City “does not like or agree with the manner in which the balance was struck in this case does not lead to the conclusion that the reasoning employed by [the DRB] was irrational.” *Town of Cicero*, 338 Ill. App. 3d at 374. The DRB also identified a reasonable solution to the City’s complaints about cost: the City should work to expedite the process of receiving a final decision from an arbitrator. (C 1557).

The City’s own argument belies the fact that the DRB did not “ignore” these arguments. The City acknowledges that the DRB considered its arguments, but the City complains that the DRB was “dismissive of these concerns” in the Award. (City’s Br., 55) (citing the text quoted in block format above). Thus, the City is not actually claiming that the DRB failed entirely to consider any aspect of the problem here; the City is simply unhappy with the DRB’s ultimate decision on the issue. Notably, none of the City’s arguments claiming that keeping Officers in pay status will negatively impact the efficient operation or finances of CPD are supported by record evidence – they are entirely speculative, and the DRB was correct in not giving them great weight.

Furthermore, the City acknowledges in its briefing that under CPD guidelines, Officers facing discipline can be placed in “non-street jobs and assigned to the Alternative Response Unit,” where those Officers do not exercise police powers. (City’s

Br., p. 54 n.22). This means that if the City's desire to remove Officers from pay status is based primarily on the Superintendent's conclusion that those Officers cannot be trusted to perform law enforcement duties, there is still meaningful and valuable work that those Officers can perform for the City while awaiting an arbitrator's ruling, and this option to assign Officers to "non-street jobs" has always been available to the City for Officers facing potential separation. This reassignment pending an arbitrator's decision appropriately balances the City's stated concerns with the Officers' contractual right not to serve any discipline until it has been upheld by an arbitrator.<sup>14</sup>

Lastly, the City argues that the DRB ran afoul of the statutory factors delineated in Section 14(h) by relying on the "bedrock 'Rule of Law'" that defendants are innocent until proven guilty, which the City claims does not fall under "such other factors ... which are normally or traditionally taken into consideration" in setting conditions of employment. (City's Br., p. 56). Courts have acknowledged that Section 14(h)(8) includes a broad and flexible "catchall" that allows interest arbitrators to consider all other relevant, unenumerated factors. *Town of Cicero*, 338 Ill. App. 3d at 374. Under that section, the presumption of innocence was a proper consideration by the DRB, and contrary to the City's assertions, this is a key, traditional component of the "just cause" analysis for disciplinary arbitration.

In its Final Opinion and Award, the DRB held that the principle that defendants are innocent until proven guilty is a "Rule of Law" in collective bargaining, and pointed

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<sup>14</sup> There is no record of the City ever placing an Officer on paid administrative leave without any job duties, instead of than assigning them to desk duty, while they await an arbitrator's ruling. However, if the City's true concern here is that the Superintendent believes that an Officer facing potential separation cannot be trusted to perform any work whatsoever for the City while they await the arbitrator's ruling, then the City could likely just place that Officer on paid administrative leave pending the arbitration decision. The City's argument is not compelling.

out that the parties had already adopted a practice of keeping Officers on the payroll pending a final arbitration decision for suspensions up to 365 days in recognition of this principle. (C 1556). As the DRB explained:

Another bedrock “Rule of Law” is “the presumption that a defendant is innocent until proven guilty.” *People of the State of Illinois v. Wheeler*, 871 N.E.2d 728, 748 (2007). As discussed, the parties have adopted a practice for proposed disciplinary actions against an officer less than 365 days of keeping that officer on the payroll until the disciplinary action is adjudicated and there is no rational basis to change that practice because an officer is facing a potential disciplinary action greater than 365 days and dismissal. That practice for officers facing disciplinary actions less [than] 365 days recognizes “the presumption that a defendant is innocent until proven guilty.” To place officers in non-pay status for proposed disciplinary actions greater than 365 days and dismissals throws that presumption of innocence out the window.

(*Id.*). That presumption was clearly relevant to the DRB’s analysis on this issue, and the DRB amply supported the decision to include it in its Award.

The City scoffs at the notion that any “presumption of innocence” could apply in the context of employee discipline. However, as every labor arbitrator (including the DRB’s Neutral Chair) knows, this is a well-established tenet of the “just cause” analysis that arbitrators apply in deciding disciplinary grievances. “Under the just cause or proper cause standard an employee is presumed to be innocent of the charged offense and the employer bears the burden of proving the employee guilty of wrongdoing.” *Ohio Star Forge Co.*, 110 BNA LA 705 (Gibson, 1998).<sup>15</sup> The DRB’s reference to the “presumption of innocence” reflects its conclusion that Lodge members should not have

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<sup>15</sup> See also, e.g., *Sultan General Construction*, 2021 BNA LA 590 (Suardi, 2021) (“as in any disciplinary case, the Employer bears the burden of proof and the Grievant enters arbitration presumed innocent.”); *Colomer USA*, 2002 BNA LA Supp. 109770 (Nicholas, 2002) (“As in most just cause cases, the aggrieved is to be seen with a presumption of innocence”); *Wheatland Farms, Inc.*, 96 BNA LA 596 (Nelson, 1991) (applying “innocent until proven guilty” principle); *Anchorage School District and Alaska Public Employees Association/AFT*, 119 BNA LA 1313 (DiFalco, 2004); *Times Mirror Cable Television of Springfield, Inc.*, 87 BNA 543 (Berns, 1986).

compensation withheld until there is a final decision that the employer can meet its burden of proof to impose the discipline for which the Officer is charged. (C 1556-57).

In its brief, the City focuses primarily on issues related to public employees' due process rights before suspension or termination may legally be imposed. But those issues are irrelevant to the DRB's analysis, as well as this Court's analysis – just because the U.S. Constitution may not require employees to remain in paid status while they await an arbitrator's ruling, that does not mean that a CBA is *prohibited* from providing that protection, or that such a protection would be arbitrary or capricious. In this case, the parties' CBA already acknowledges and incorporates the presumption of innocence by requiring Officers facing 365-day suspensions to remain in pay status pending an arbitration decision. (C 1556). It was appropriate for the DRB to consider this "Rule of Law" in deciding to extend the same protections to Officers facing discipline greater than a 365-day suspension.

The City has not shown, and cannot show, that the DRB's decision on the issue of remaining in pay status was arbitrary or capricious. The DRB considered the applicable, relevant statutory factors under Section 14(h) and the *status quo* practices, considered the parties' arguments and evidence presented, and offered a well-reasoned and considered explanation for why it chose to award the Lodge's proposal instead of the City's proposal. Thus, even if this Court might have given more or less weight to certain factors, or might have made different findings on certain issues presented to the DRB, the Court still "must conclude that the arbitrator's award was not arbitrary or capricious because it did not rely on factors unintended by the legislature; did not entirely fail to consider an important aspect of the problem; nor was it implausible or counter to the evidence..."

(App. Ct. Op., ¶ 91). The Appellate Court's ruling on this issue should therefore be upheld, and this portion of the DRB's Award should be confirmed.

## **VII. The City's Vacatur Challenge Was Untimely**

Finally, the City's attempts to vacate portions of the DRB's Award should be rejected, and the lower courts should not have even considered those challenges, because they were not timely filed within 90 days of the issuance of the DRB's October 19, 2023 Final Opinion and Award, as required by the IPLRA and the Uniform Arbitration Act. (See Lodge's Br., pp. 41-48). The City responds that the DRB stated in its Final Award that if it were rejected by City Council, the parties would meet again to determine whether any modifications could be made to the Award, and that is in fact what the parties did. (City's Br., p. 58). The Lodge does not dispute that this happened, or that this is the procedure contemplated by the parties' CBA. However, the City has still not shown any agreement or authority for the DRB to then issue a Supplemental Final Award after that meeting, and it has identified no basis whatsoever to conclude that the issuance of a Supplemental Award in January 2024 superseded the prior Final Award or reset the strictly-enforced 90-day limitations period for any challenge to the Final Award.

The City again attempts to rely on cases governed by Section 14(n) of the Labor Act, which expressly requires parties to return to interest arbitration for the issuance of "a supplemental decision with respect to the rejected terms" where an arbitration award is rejected by an employer's governing body. (City's Br., pp. 59-60) (quoting 5 ILCS 315/14(n)). The City brushes aside the fact that the parties' CBA in this case does not incorporate Section 14(n), and in its place, the parties adopted language requiring them only to meet and discuss the issues, but neither requiring, nor authorizing, a supplemental award if the parties do not agree to any modification. (C 1061) (CBA Section

28.3(B)(9)). To accept the City’s argument, the Court must disregard the plain text of the CBA, thereby rendering the parties’ agreed-upon contract language a nullity.

In addition to being supported by the plain text of the parties’ contract, the conclusion that the City failed to timely raise any challenge to the DRB’s Award is further supported by the doctrine of constitutional avoidance. As discussed *supra*, at this stage of this litigation, the City has shifted its argument for vacatur to focus almost entirely on the public policies underlying the right to public court access under the First Amendment to the U.S. Constitution. (City’s Br., pp. 24-28, 30-39, 41-44).

It is this Court’s long-standing rule that cases must be decided on non-constitutional grounds whenever possible, and the Court will only reach constitutional issues as a matter of last resort. *In re E.H.*, 224 Ill. 2d at 178. If there is a viable defense that would defeat the constitutional claims, including the timeliness of the claims at issue, then the Court should apply that defense and dismiss the claim rather than wading into the morass of a constitutional issue. For example, in *Noland v. Mendoza*, 2022 IL 127239, the plaintiffs challenged the constitutionality of Salary Reduction Laws, and the defendant raised the affirmative defense of *laches*. The Court noted that the plaintiffs “have slept on their rights, and we will not come to the aid of such complainants.” *Id.* at ¶ 42. The court then reaffirmed the doctrine of constitutional avoidance and concluded: “Consequently, because we find that the affirmative defense of *laches* applies and bars plaintiffs’ claims, we find it unnecessary to address the question regarding the constitutionality of the Salary Reduction Laws.” *Id.* at ¶ 28.

The same reasoning applies here. The City slept on its rights by not raising any challenge to the DRB’s Award until well beyond 90 days after the Final Opinion and

Award issued, even though the Lodge had already filed a suit to confirm that Award within 90 days, and even though there was no reasonable basis for either party to expect any supplemental award to be issued.<sup>16</sup> Because the City has now made its untimely claim for vacatur primarily a constitutional claim, the Court should avoid ruling on the constitutionality of the DRB's Award – including a ruling on whether the Court should, for the first time in history, expand the First Amendment's right to court access and records to apply to private labor arbitrations and employee discipline – and should instead dismiss the City's challenge as untimely under Section 14(k) of the Labor Act.

### **CONCLUSION**

The Lodge respectfully requests that this Court reverse the Appellate Court's partial vacatur of the DRB's Arbitration Award, and instead confirm the Award in its entirety.

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<sup>16</sup> Had the City timely raised a claim to vacate the Final Opinion and Award, that would not have precluded the parties from continuing to meet and attempt to reach an agreement on the disputed issues; it simply would have preserved the City's right to challenge the Award if such agreement was not ultimately reached.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that this Appellant's Brief conforms to the requirements of Rules 315 and 341(a) and (b). The length of this Brief, excluding those items identified as excluded from the length limitation in Rule 341(b)(1), and those matters to be appended to the Brief under Rule 342(a), is 49 pages.

/s/ Matt Pierce

Matt Pierce

**CERTIFICATE OF SERVICE**

The undersigned certifies that on June 24, 2026, a copy of the foregoing Reply Brief and Response to Request for Cross-Relief of Appellant, Chicago John Dineen Lodge #7, was served on the following counsel of record by the Odyssey eFileIL system and via email:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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