No. 124831

IN THE
SUPREME COURT OF ILLINOIS

THE CITY OF CHICAGO,

Petitioner/Appellee,

vs.

FRATERNAL ORDER OF POLICE, CHICAGO LODGE NO. 7,

Respondent/Appellant

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

BRIEF OF RESPONDENT/APPELLANT

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POINTS AND AUTHORITIES

NATURE OF THE CASE

This cause originated as a petition filed by Petitioner/Appellee, City of Chicago ("City")(C 8-342) to vacate the January 12, 2016 Arbitrator's Opinion and Interim Award ("Interim Award")(A 000038-90), the April 28, 2016 Arbitrator's Opinion and Award ("Final Award") (A 000091-116), and the June 21, 2016 Arbitrator's Ruling on Fraternal Order Of Police Lodge No. 7's Motion for Reconsideration or, Alternatively, Clarification ("Clarification")(A 000118-129) (the Interim Award, Final Award and Clarification referred to hereinafter collectively as "Award") issued by Arbitrator George Roumell. Respondent/Appellant, Fraternal Order of Police, Chicago Lodge No. 7 ("Lodge") filed a counter-petition to enforce the Award (C 758-782). The parties filed cross-motions to enforce or vacate the Award based on the arbitral record (C 800-1380, 1508-1525). On October 18, 2017, the Circuit Court granted the City's motion, denied the Lodge's motion, and entered final judgment vacating the Award (A 000018-32). The primary holding was that the Award, by enforcing Section 8.4 of the parties' collective bargaining agreement requiring destruction of Complaint Register ("CR") files more than five years old, in the Circuit Court's opinion, violated State public policy requiring preservation of governmental records, relying primarily upon the Illinois State Records Act and Illinois Local Records Act (A 000034-36). No questions are raised on the pleadings.

The Lodge timely appealed the decision of the Circuit Court to the Illinois Appellate Court, First District (A 000034-36). On March 29, 2019, the Appellate Court issued its Opinion (A 000002-16), in which it affirmed the Judgment and the Memorandum of Opinion and Order entered by the Circuit Court on October 18, 2017 (A 000018-32).

Thereafter, the Lodge petitioned for Leave to Appeal the Appellate Court decision to the Illinois Supreme Court.

STATEMENT OF THE ISSUES

The issues before the Court are:

A. Whether the Appellate Court erred as a matter of law in affirming the decision of the Circuit Court because there is no explicit, well-defined and dominant public policy requiring retention of certain disciplinary records which precludes enforcement of the Award requiring the City to comply with the parties' collective bargaining agreement.

B. Whether the Appellate Court erred as a matter of law by not enforcing the Award in light of the explicit, well-defined and dominant public policy behind the Illinois Public Labor Relations Act, 5 ILCS §315/1, *et seq.* and the Uniform Arbitration Act, 710 ILCS §5/1, *et seq.*, which favor collective bargaining and enforcement of labor arbitration awards.

C. Whether the Appellate Court erred as a matter of law in affirming the decision of the Circuit Court because the Arbitration Award can and should be enforced, consistent with public policy requiring the retention of the records at issue.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal as the Court, on September 25, 2019, granted the Lodge's Petition for Leave to Appeal the Decision of the Appellate Court under Illinois Supreme Court Rule 315.

STATUTES INVOLVED

This case requires the Court to consider the Illinois State Records Act ("SRA"), 5 ILCS §160/1, *et seq.*; the Illinois Local Records Act ("LRA"), 50 ILCS §205/1, *et seq.*; the Illinois Freedom of Information Act ("FOIA"), 5 ILCS §140/1, *et seq.*; the Illinois Public Labor Relations Act ("PLRA"), 5 ILCS §315/1, *et seq.*, and the Illinois Uniform Arbitration Act ("UAA"), 710 ILCS §5/11, *et seq.*, each of which are quoted in relevant part below.

Illinois State Records Act

5 ILCS §160/1.5
Sec. 1.5. Purpose. Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois (i) that government records are a form of property whose ownership lies with the citizens and with the State of Illinois; (ii) that those records are to be created, maintained, and administered in support of the rights of those citizens and the operation of the State; (iii) that those records are, with very few exemptions, to be available for the use, benefit, and information of the citizens; and (iv) that those records may not be disposed of without compliance to the regulations in this Act.

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5 ILCS §160/3
Sec. 3. Records as property of State.
(a) All records created or received by or under the authority of or coming into the custody, control, or possession of public officials of this State in the course of their public duties are the property of the State. These records may not be mutilated, destroyed, transferred, removed, or otherwise damaged or disposed of, in whole or in part, except as provided by law. Any person shall have the right of access to any public records, unless access to the records is otherwise limited or prohibited by law. This subsection (a) does not apply to records that are subject to expungement under subsections (1.5) and (1.6) of Section 5-915 of the Juvenile Court Act of 1987.

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5 ILCS §160/11
Sec. 11. Violation. All records made or received by or under the authority of or coming into the custody, control or possession of public officials of this State in the course of their public duties are the property of the State and shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part except as provided by law. Any person who knowingly and without lawful authority alters, destroys, defaces, removes, or conceals any public record commits a Class 4 felony.

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5 ILCS §160/16
Sec. 16. There is created the State Records Commission. . . .

5 ILCS §160/17
Sec. 17. (a) Regardless of other authorization to the contrary, except as otherwise provided in subsection (b) of this Section, no record shall be disposed of by any agency of the State, unless approval of the State Records Commission is first obtained. The Commission shall issue regulations, not inconsistent with this Act, which shall be binding on all agencies. Such regulations shall establish procedures for compiling and submitting to the Commission lists and schedules of records proposed for disposal; procedures for the physical destruction or other disposition of records proposed for disposal; and standards for the reproduction of records by digital, photographic, or microphotographic processes with the view to the disposal of the original records. . . .

Illinois Local Records Act

50 ILCS §205/2
Sec. 2. This Act declares that a program for the efficient and economical management of local records will promote economy and efficiency in the day-by-day recordkeeping activities of local governments and will facilitate and expedite governmental operations.

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50 ILCS §205/4
Sec. 4. (a) Except as otherwise provided in subsection (b) of this Section, all public records made or received by, or under the authority of, or coming into the custody, control or possession of any officer or agency shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part, except as provided by law. Any person who knowingly, without lawful authority and with the intent to defraud any party,

public officer, or entity, alters, destroys, defaces, removes, or conceals any public record commits a Class 4 felony.

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50 ILCS §205/7
Sec. 7. Disposition rules. Except as otherwise provided by law, no public record shall be disposed of by any officer or agency unless the written approval of the appropriate Local Records Commission is first obtained.

The Commission shall issue regulations which shall be binding on all such officers. Such regulations shall establish procedures for compiling and submitting to the Commission lists and schedules of public records proposed for disposal; procedures for the physical destruction or other disposition of such public records; procedures for the management and preservation of electronically generated and maintained records; and standards for the reproduction of such public records by photography, microphotographic processes, or digitized electronic format. . . .

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50 ILCS §205/10
Sec. 10. The head of each agency shall submit to the appropriate Commission, in accordance with the regulations of the Commission, lists or schedules of public records in his custody that are not needed in the transaction of current business and that do not have sufficient administrative, legal or fiscal value to warrant their further preservation. The head of each agency shall also submit lists or schedules proposing the length of time each records series warrants retention for administrative, legal or fiscal purposes after it has been received by the agency. The Commission shall determine what public records have no administrative, legal, research or historical value and should be destroyed or otherwise disposed of and shall authorize destruction or other disposal thereof.

Illinois Freedom of Information Act

5 ILCS §140/1
Sec. 1. Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed

political judgments and monitoring government to ensure that it is being conducted in the public interest.

The General Assembly hereby declares that it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act.

This Act is not intended to cause an unwarranted invasion of personal privacy, nor to allow the requests of a commercial enterprise to unduly burden public resources, or to disrupt the duly-undertaken work of any public body independent of the fulfillment of any of the fore-mentioned rights of the people to access to information.

This Act is not intended to create an obligation on the part of any public body to maintain or prepare any public record which was not maintained or prepared by such public body at the time when this Act becomes effective, except as otherwise required by applicable local, State or federal law.

Restraints on access to information, to the extent permitted by this Act, are limited exceptions to the principle that the people of this State have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people. The provisions of this Act shall be construed in accordance with this principle. This Act shall be construed to require disclosure of requested information as expediently and efficiently as possible and adherence to the deadlines established in this Act.

The General Assembly recognizes that this Act imposes fiscal obligations on public bodies to provide adequate staff and equipment to comply with its requirements. The General Assembly declares that providing records in compliance with the requirements of this Act is a primary duty of public bodies to the people of this State, and this Act should be construed to this end, fiscal obligations notwithstanding.

The General Assembly further recognizes that technology may advance at a rate that outpaces its ability to address those advances legislatively. To the extent that this Act may not expressly apply to those technological advances, this Act should nonetheless be interpreted to further the declared policy of this Act that public records shall be made available upon request except when denial of access furthers the public policy underlying a specific exemption.

This Act shall be the exclusive State statute on freedom of information, except to the extent that other State statutes might create additional restrictions on disclosure of information or other laws in Illinois might create additional obligations for disclosure of information to the public.

Illinois Public Labor Relations Act

5 ILCS §315/2
§ 2. Policy. It is the public policy of the State of Illinois to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection.

It is the purpose of this Act to regulate labor relations between public employers and employees, including the designation of employee representatives, negotiation of wages, hours and other conditions of employment, and resolution of disputes arising under collective bargaining agreements.

It is the purpose of this Act to prescribe the legitimate rights of both public employees and public employers, to protect the public health and safety of the citizens of Illinois, and to provide peaceful and orderly procedures for protection of the rights of all. To prevent labor strife and to protect the public health and safety of the citizens of Illinois, all collective bargaining disputes involving persons designated by the Board as performing essential services and those persons defined herein as security employees shall be submitted to impartial arbitrators, who shall be authorized to issue awards in order to resolve such disputes. It is the public policy of the State of Illinois that where the right of employees to strike is prohibited by law, it is necessary to afford an alternate, expeditious, equitable and effective procedure for the resolution of labor disputes subject to approval procedures mandated by this Act. To that end, the provisions for such awards shall be liberally construed.

5 ILCS §315/7.5[1]
§ 7.5. Duty to bargain regarding pension amendments.
(a) Notwithstanding any provision of this Act, employers shall not be required to bargain over matters affected by the changes, the impact of changes, and the implementation of changes made to Article 14, 15, or 16 of the Illinois Pension Code, or Article 1 of that Code as it applies to those Articles, made by this amendatory Act of the 98th General Assembly, or over any other provision of Article 14, 15, or 16 of the Illinois Pension Code, or

[1] The quoted text was invalidated after this Court held P.A. 98-599 to be unconstitutional. *Heaton v. Quinn (In re Pension Reform Litig.)*, 2015 IL 118585, 32 N.E. 3d 1, 392 Ill.Dec. 1 (Ill. 2015).

of Article 1 of that Code as it applies to those Articles, which are prohibited subjects of bargaining; nor shall the changes, the impact of changes, or the implementation of changes made to Article 14, 15, or 16 of the Illinois Pension Code, or to Article 1 of that Code as it applies to those Articles, by this amendatory Act of the 98th General Assembly or any other provision of Article 14, 15, or 16 of the Illinois Pension Code, or of Article 1 of that Code as it applies to those Articles, be subject to interest arbitration or any award issued pursuant to interest arbitration. The provisions of this Section shall not apply to an employment contract or collective bargaining agreement that is in effect on the effective date of this amendatory Act of the 98th General Assembly. However, any such contract or agreement that is subsequently modified, amended, or renewed shall be subject to the provisions of this Section. The provisions of this Section shall also not apply to the ability of an employer and employee representative to bargain collectively with regard to the pick up of employee contributions pursuant to Section 14-133.1, 15-157.1, or 16-152.1 of the Illinois Pension Code.

(b) Nothing in this Section, however, shall be construed as otherwise limiting any of the obligations and requirements applicable to each employer under any of the provisions of this Act, including, but not limited to, the requirement to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives, except for the matters deemed prohibited subjects of bargaining under subsection (a) of this Section. Nothing in this Section shall further be construed as otherwise limiting any of the rights of employees or employee representatives under the provisions of this Act, except for matters deemed prohibited subjects of bargaining under subsection (a) of this Section.

(c) In case of any conflict between this Section and any other provisions of this Act or any other law, the provisions of this Section shall control.

5 ILCS §315/8
Sec. 8. Grievance Procedure. The collective bargaining agreement negotiated between the employer and the exclusive representative shall contain a grievance resolution procedure which shall apply to all employees in the bargaining unit and shall provide for final and binding arbitration of disputes concerning the administration or interpretation of the agreement unless mutually agreed otherwise. Any agreement containing a final and binding arbitration provision shall also contain a provision prohibiting strikes for the duration of the agreement. The grievance and arbitration provisions of any collective bargaining agreement shall be subject to the Illinois "Uniform Arbitration Act". The costs of such arbitration shall be borne equally by the employer and the employee organization.

5 ILCS §315/15[2]
Sec. 15. Act Takes Precedence.

(a) In case of any conflict between the provisions of this Act and any other law (other than Section 5 of the State Employees Group Insurance Act of 1971 and other than the changes made to the Illinois Pension Code by this amendatory Act of the 96th General Assembly), executive order or administrative regulation relating to wages, hours and conditions of employment and employment relations, the provisions of this Act or any collective bargaining agreement negotiated thereunder shall prevail and control. . . .

(b) Except as provided in subsection (a) above, any collective bargaining contract between a public employer and a labor organization executed pursuant to this Act shall supersede any contrary statutes, charters, ordinances, rules or regulations relating to wages, hours and conditions of employment and employment relations adopted by the public employer or its agents. Any collective bargaining agreement entered into prior to the effective date of this Act shall remain in full force during its duration.

(c) It is the public policy of this State, pursuant to paragraphs (h) and (i) of Section 6 of Article VII of the Illinois Constitution, that the provisions of this Act are the exclusive exercise by the State of powers and functions which might otherwise be exercised by home rule units. Such powers and functions may not be exercised concurrently, either directly or indirectly, by any unit of local government, including any home rule unit, except as otherwise authorized by this Act.

Illinois Uniform Arbitration Act

710 ILCS §5/11
Sec. 11. Confirmation of an award.
Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 12 and 13.

[2] The quoted text is without the changes made by P.A. 98-599, which was held unconstitutional. *In re Pension Reform Litig.*, 2015 IL 118585.

710 ILCS §5/12
Sec. 12. Vacating an award.

(a) Upon application of a party, the court shall vacate an award where:

(1) the award was procured by corruption, fraud or other undue means;
(2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any one of the arbitrators or misconduct prejudicing the rights of any party;
(3) the arbitrators exceeded their powers;
(4) the arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or
(5) there was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by the circuit court is not ground for vacating or refusing to confirm the award.

(b) An application under this Section shall be made within 90 days after delivery of a copy of the award to the applicant, except that if predicated upon corruption, fraud or other undue means, it shall be made within 90 days after such grounds are known or should have been known.

(c) In vacating the award on grounds other than stated in clause (5) of subsection (a) the court may order a rehearing before new arbitrators chosen as provided in Section 3, or if the award is vacated on grounds set forth in clauses (3) and (4) of subsection (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with Section 3. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

(e) Nothing in this Section or any other Section of this Act shall apply to the vacating, modifying, or correcting of any award entered as a result of an arbitration agreement which is a part of or pursuant to a collective bargaining agreement; and the grounds for vacating,

modifying, or correcting such an award shall be those which existed prior to the enactment of this Act.

STATEMENT OF FACTS

The Lodge is a labor organization representing Police Officers below the rank of Sergeant in the City's Department of Police for collective bargaining (C 11, ¶ 2; C 758, ¶ 2; C 786, ¶ 4).[3] The City is a municipal corporation employing Police Officers represented by the Lodge (C 11 ¶1; C 758 ¶ 1; C 786, ¶ 5).

Since the early 1980's, the Lodge and the City have been parties to collective bargaining agreements ("Agreement"), with the Agreement relevant to this matter effective June 1, 2007 through May 31, 2012 (A 000003-4, ¶7, 000018-19, 000042-43; C 11, ¶ 3; C 84-233; C 758, 759, ¶3; C 786, ¶ 6). The Agreement contains a detailed grievance and arbitration procedure, including a provision in Section 9.7(A) that the decision of an arbitrator "shall be final and binding upon the parties." (C 101-109; C 786-787, ¶ 7-9). Central to this case is Section 8.4 of the Agreement, the relevant terms of which have remained substantially unchanged over decades, which requires the destruction of certain records after a fixed period of time, (A 000004, ¶5, 000018-19, 000042-43; C 15, ¶ 15; C 100; C 762-763, ¶ 15; C 787-788, ¶ 10), and reads in relevant part as follows:

> **Section 8.4 — Use and Destruction of File Material.**
> All disciplinary investigation files, disciplinary history card entries, Independent Police Review Authority and Internal Affairs Division disciplinary records, and any other disciplinary record or summary of such record other than records related to Police Board cases, will be destroyed five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, except that not sustained files alleging criminal conduct or excessive force shall be retained for a period of seven (7)

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[3] Citations to the Appendix will follow the form (A [page no.]). Citations to the Record on Appeal will follow the form (C [page no.]) for citations to the common law record, (R [page no.]) for citations to the transcript, and (Sup C [page no.]) for citations to the supplement to the record.

> years after the date of the incident or the date upon which the violation is discovered, whichever is longer, ...

When the City receives a complaint of misconduct alleged against a Police Officer, a CR file is opened, which contains the information gathered in the course of investigating the alleged misconduct (A 000019, ¶5; C 12, ¶ 4; C 760, ¶ 4). The Lodge filed two grievances over the City's failure to destroy CR files in excess of five years old and otherwise not excepted from destruction pursuant to Section 8.4 of the collective bargaining agreement, which the City denied. (A 000003, ¶ 5, 000020, 000038-42; C 14, ¶ 11; C 256-263; C 762, ¶ 11; C 788, ¶ 11). As the parties could not resolve the grievances, the Lodge advanced them to arbitration (A 000004, ¶9, 000021; C 14, ¶ 11; C 762, ¶ 14; C 788, ¶ 11).

In the interim, in October 2014, the City notified the Lodge that it received Freedom of Information Act requests seeking information from CR files dating back to 1967, and that it intended to comply with those requests (A 00004-5, ¶10, 000021; C 14, ¶ 10; C 761, ¶10; C 1480-1481). *Fraternal Order of Police, Chicago Lodge No. 7 v. City of Chicago*, 2016 IL App (1st) 143884, ¶4 (Ill. App. 1st Dist. 2016). In response, the Lodge filed an action in the Circuit Court of Cook County seeking, *inter alia*, temporary and permanent injunctive relief to prevent the release of the requested information pending the arbitration at issue here (A 00004-5, ¶10, 000021; C 14, ¶ 12; C 762, ¶ 12; C 1481). *Id.* at ¶ 5. The procedural history of that case is set forth in the Appellate Court's Opinion (C1481-1482). *Id.* at ¶ 7, 9, 11, 13. On July 8, 2016, the Appellate Court vacated preliminary injunctions precluding the release of the CR materials (A 000005-6, ¶15, 000020-21; C 19-20, ¶ 23; C 766, ¶ 23; C 1487). *Id.* at ¶ 55. On September 28, 2016, this Court denied the Lodge's petition for

leave to appeal the Appellate Court's decision in that case. *Fraternal Order of Police, Chicago Lodge No. 7 v. City of Chicago*, 60 N.E.3d 872, 406 Ill.Dec. 321 (Ill. 2016).

At the arbitration hearing, which proceeded while the injunction suit was litigated, the parties had an equal opportunity to, and did, in fact, make opening statements and present evidence in the form of documents and testimony, and submitted briefs to the Arbitrator (C 15-16, ¶ 16; C 763, ¶ 16; C 788, ¶ 12-15). Arbitrator Roumell issued his Interim Award on January 12, 2016 (A 000005, ¶12, 0000021, 000038-90), providing a detailed recitation of the evidence considered and conclusions reached, including: the grievances and responses (A 000038-41); the collective bargaining agreement (A 000042-43); the parties' arguments (A 000043-47); the evolution and bargaining of Section 8.4 since the early 1980's (A 000047-50); the City's internal document destruction policies (A 000050-53); prior arbitration decisions addressing Section 8.4 (A 000053-55); the City's testimony regarding its document retention practices (A 000055-58); prior court orders cited by the City (A 000058-64); evidence pertinent to the City's past-practice argument (A 000064-73); the arbitration award of Jules Crystal (A 000073-75); the City's testimony regarding current litigation (A 000075-80); and the City's public policy arguments (A 000080-86). Arbitrator Roumell specifically considered the City's arguments that the LRA precluded the relief sought by the Lodge (A 000085). Ultimately, Arbitrator Roumell found that the City violated Section 8.4 of the Agreement and directed the parties to meet and attempt to establish a procedure for compliance (A 000086-90).

The parties met consistent with the Interim Award, submitted letters and other records, and subsequently met with Arbitrator Roumell on March 22, 2016 (A 000093-94;

C 16, ¶ 18; C 764, ¶ 18; C 789, ¶ 18). Thereafter, Arbitrator Roumell issued his April 28, 2016, Opinion and Award, reviewing developments since the Interim Award (A 000005, ¶14, 000021, 000092-116; C 18-19, ¶ 20; C 765, ¶ 20). He noted that "[t]he request of the Justice Department brings forth a dynamic that was not present when this Arbitrator considered the public policy arguments, and, if not in existence currently, would not change this Arbitrator's view as to the public policy argument." (A 000112). Ultimately, Arbitrator Roumell concluded (A 000115):

> In arriving at the conclusion that he has, this Arbitrator is still of the opinion that 8.4, as he has interpreted 8.4, is there to be read in the context of the bargaining history subject to a final resolution of the effect of the term 'normally' in the last sentence of the first paragraph of 8.4. But this Arbitrator, because of the public policy as now established by the request of the U.S. Department of Justice pursuant to statute, cannot provide any remedy as suggested in the January 12, 2016 Opinion and Interim Award or any other relief or remedy at this point in time.

On May 2, 2016, the Lodge filed a motion to reconsider or clarify the April 28, 2016 Award, and the City responded (C 19, ¶ 22; C 765, ¶ 22; C 790 ¶ 21). The Arbitrator ruled on the motion on June 21, 2016, once again carefully reviewing the parties' arguments (A 000005, ¶14, 000022, 000118-129; C 19, ¶ 22; C 53-64; C 765, ¶ 22; C 790, ¶ 22), and concluded (A 000127-128):

> The Award stands, but with a clarification as to the Award's meaning. The initial finding of January 12, 2016 as to the destruction of records pursuant to the language of Section 8.4 is there to be read and applied once the public policy exception brought on by the Department of Justice investigation and its possible consequences no longer exists. This is the meaning of the Award of April 28, 2016 by the language 'at this point in time', namely, as long as the Department of Justice is involved in any capacity with the City of Chicago Police Department and makes any requirements or requests, as currently is the case and may be in the future, that the records at issue be preserved. The language 'only for this reason' means that if the Department of Justice is no longer involved with the City of Chicago in any capacity

> wherein the retention of the records is not involved, then the public policy exception ceases to exist. The definition of involvement by the Department of Justice as a result of the investigation could mean litigation or an agreement between the City and the Department of Justice in lieu of litigation or a settlement stemming from litigation monitoring or oversight that would involve retention of records pursuant to the Department of Justice's authority as set forth in 42 U.S.C. §14141.

The City timely filed its petition to vacate the Award on July 26, 2016 (C 8-342), and the Lodge filed its answer and counterclaim to enforce the Award on August 26, 2016 (C 758-782). The parties subsequently filed cross-motions to enforce and vacate the Award based on the record before the Arbitrator (C 800-1380, 1508-1525). On October 18, 2017, the Circuit Court granted the City's motion to vacate, denied the Lodge's motion to enforce, and entered final judgment vacating the Award on public policy grounds (A 000018-32).

On November 16, 2017, the Lodge timely filed its appeal from the decision of the Circuit Court (A 000034-36). On March 29, 2019, the Appellate Court issued its decision affirming the Circuit Court, concluding: "we find that the arbitration award violated an explicit, well-defined, and dominant public policy requiring retention of important public records." (A 000016, ¶ 40). The Lodge subsequently sought leave to appeal to the Illinois Supreme Court from the adverse decision of the Appellate Court, which was granted on September 25, 2019.

ARGUMENT

Both this Court and most other State and Federal Courts have recognized that the courts have very limited roles in reviewing arbitration decisions. Statutorily, there are only a handful of reasons for a court to vacate an arbitration award, none of which were relied upon by the City, the Circuit Court or the Appellate Court in this case (A 000008-15, ¶ 21-40, 000023-32; C 806-815). Instead, the City and the lower courts relied upon the judicially crafted "public policy" basis for vacating an arbitration award (A 000008-16, ¶ 21-40, 000023-32). In so doing, the City and the lower Courts stretched the public policy exception beyond its purpose and failed to give due regard to the strong public policy embodied in the Illinois Public Labor Relations Act, 5 ILCS § 5/1, *et seq.* and the Uniform Arbitration Act, 710 ILCS §5/1, *et seq.*, favoring collective bargaining and the enforcement of labor arbitration awards.

The facts in this case are simple and the law is clear. The Lodge filed grievances under its collective bargaining agreement with the City, alleging that the City failed to destroy certain disciplinary records within the contractually mandated time frame under Section 8.4 (A 000003, ¶ 5, 000020, 000038-42). Arbitrator Roumell ultimately agreed with the Lodge that the City violated Section 8.4, issuing three separate Opinions detailing the legal and factual basis for his decision, and ordering the City to comply with its contractual obligations (A 000038-90, 000092-116, 000118-129). The City objected on the basis that "public policy" required it to retain such records indefinitely (an argument the arbitrator considered and rejected) and precluded enforcement of the award (A 000080-86). Both the Circuit Court and Appellate Court agreed with the City (A 000008-16, ¶ 21-40, 000023-32).

As explained more fully below, the public policy favoring collective bargaining and enforcing labor arbitration awards is clearly established, whereas the public policy manufactured by the City and relied upon by the Appellate Court is not. Moreover, the Award can be enforced consistent with any applicable public policies. Accordingly, the decision of the Appellate Court should be reversed and the Arbitration Award enforced.

A. Standard of Review.

There are only five statutory bases upon which a court may vacate an arbitration award under the UAA. 710 ILCS §5/12(a).[4] This Court "has consistently recognized that the judicial review of an arbitral award is extremely limited." *American Federation of State, County & Municipal Employees v. Department of Central Management Services*, 173 Ill. 2d 299, 304, 671 N.E.2d 668, 219 Ill.Dec. 501 (Ill. 1996) (*"AFSCME")*. Courts are "duty bound to enforce a labor-arbitration award if the arbitrator acts within the scope of his or her authority and the award draws its essence from the parties' collective-bargaining agreement." *Id.* Moreover, "arbitration awards should be construed, wherever possible, so as to uphold their validity[, and that] there is a presumption that the arbitrator did not exceed her authority." *Rauh v. Rockford Products Corp.*, 143 Ill. 2d 377, 386, 574 N.E.2d 636, 158 Ill.Dec. 523 (Ill. 1991). Generally, even "[g]ross errors of judgment in law or a gross mistake of fact are not grounds for vacating an award[.]" *Id.* at 392.

This Court also has recognized one non-statutory basis for denying enforcement of an arbitration award, where "the contract, as interpreted by the arbitrator, . . . violate[s] some

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[4] The PLRA provides that "[t]he grievance and arbitration provisions of any collective bargaining agreement shall be subject to the Illinois 'Uniform Arbitration Act.'" 5 ILCS §315/8.

explicit public policy." *AFSCME*, 173 Ill. 2d at 307, (citing, *American Federation of State, County & Municipal Employees v. State of Illinois*, 124 Ill.2d 246, 261, 124 Ill.Dec. 553, 529 N.E.2d 534 (1988), and *W.R. Grace & Co. v. Local Union No. 759*, 461 U.S. 757, 766, 103 S.Ct. 2177, 2183, 76 L.Ed.2d 298, 307 (1983)). "[T]he exception is a narrow one and is invoked only when a contravention of public policy is clearly shown." *Id.* (citing, *American Federation of State, County & Municipal Employees*, 124 Ill.2d at 261 and *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 43, 108 S.Ct. 364, 373–74, 98 L.Ed.2d 286, 302 (1987)). Whether an award violates public policy "is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." *Misco*, 484 U.S. at 42. To vacate an arbitration award on this basis, "the public policy must be 'well-defined and dominant' and ascertainable 'by reference to the laws and legal precedents and not from generalized considerations of supposed public interests.'" *AFSCME*, 173 Ill. 2d at 307, (citing, *W.R. Grace*, 461 U.S. at 766). Specifically, "[t]his court has stated that it will look to our 'constitution and . . . statutes, and when cases arise concerning matters upon which they are silent, then in its judicial decisions and the constant practice of the government officials' when determining questions regarding public policy." *Id.* (citing, *Zeigler v. Illinois Trust & Savings Bank*, 245 Ill. 180, 193, 91 N.E. 1041 (1910)). In applying the public policy exception, *AFSCME*, 173 Ill. 2d at 307-08:

> The threshold question is whether a well-defined and dominant public policy can be identified. If so, the court must determine whether the arbitrator's award, as reflected in his interpretation of the agreement, violated the public policy.

Because neither the statutory nor non-statutory bases for vacating the Award are satisfied, the UAA mandates that the decision of the Appellate Court be reversed and the Award enforced. 710 ILCS §5/11 ("Upon application of a party, the court shall confirm an award[.]"); 710 ILCS §5/12(d) ("If the application to vacate is denied . . ., the court shall confirm the award.").

B. The public policy exception does not provide a basis to vacate the Award because there is no well-defined, dominant public policy requiring the indefinite retention of the disciplinary records at issue.

As Arbitrator Roumell explained: "The initial finding of January 12, 2016 as to the destruction of records pursuant to the language of Section 8.4 is there to be read and applied once the public policy exception brought on by the Department of Justice investigation and its possible consequences no longer exists." (A 000127).[5] Contrary to the holding of the Appellate Court, neither the SRA, LRA or FOIA establish a well-defined, dominant public policy requiring the indefinite retention of the CR files at issue in the Award. (A 000011-14, ¶27-32). The Appellate Court relied on Sections 4(a), 7 and 10 of the LRA, 50 ILCS §205/4(a), 205/7 and 205/10, Sections 1.5 of the SRA, 5 ILCS §160/1.5, and Section 1 of FOIA, 5 ILCS §140/1 (A 000011-14, ¶27-31). Based on the combination of these sections of the SRA, LRA and FOIA, the Appellate Court incorrectly concluded that "[t]hese statutes clearly show that Illinois recognizes a public policy favoring the proper retention of important government records for the benefit of the public" in perpetuity (A 000013, ¶32).

[5] Neither the Lodge nor the City disputed the Arbitrator's finding that the DOJ investigation pursuant to its federal statutory authority created a temporary public policy staying the enforcement of the Award. Indeed, the City is not relying on this finding, but rather asserts that a separate public policy under State law warranted the complete vacation of the Award.

Nothing in the SRA[6] or LRA preclude the City from entering into a document destruction agreement, even if it must also obtain approval to implement it from the Local Records Commission. The City voluntarily agreed to some variation of Section 8.4 in each of the collective bargaining agreements between the Lodge and the City since the inception of bargaining in 1981 (A 000047-50). Indeed, as the record before the Arbitrator established, the City regularly sought changes to Section 8.4 at the bargaining table, achieving some, but not all of its proposals prior to reaching agreement on the 2007-2012 collective bargaining agreement (A 000047-50). Further, as Arbitrator Roumell found, since at least 1975, the City had its own document destruction policies requiring the destruction after five years of those same CR files (A 000050-53). The City failed to present any evidence at the arbitration (or in the Circuit Court) regarding its processes for implementing its own document destruction policy. Thus, there is no record evidence that the City lacked the authority under the LRA to comply with either Section 8.4 or its own document destruction policy (A 000085).

The existence of provisions in the SRA and LRA establishing procedures to schedule documents for destructions means that these statutes cannot form the basis for a well-defined and dominant public policy requiring the indefinite retention of the disciplinary records at issue here. Significantly, the statutes do not specify that all documents must be retained indefinitely; rather, they leave such decisions to the discretion of the Commissions established under the SRA and LRA. Indeed, there would be no need for a Commission if the SRA and the LRA demanded indefinite retention. Thus, the public policy of the LRA

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[6] Moreover, the SRA applies only to state agency records and as such, does not seek to regulate in any manner the type of records retained by municipalities.

and SRA is to provide for the orderly destruction of records that have exceeded their value, as determined by the Commissions, rather than the indefinite retention of everything.

FOIA, likewise, does not provide a statutory basis for a public policy requiring the indefinite retention of the disciplinary records at issue here. Section 1 of FOIA clearly states: "[t]his Act is not intended to create an obligation on the part of any public body to maintain or prepare any public record which was not maintained or prepared by such public body at the time when this Act becomes effective, except as otherwise required by applicable local, State or federal law." 5 ILCS §140/1. The Appellate Court provided no explanation for why it disregarded this clear language to reach the conclusion that FOIA requires the indefinite retention of the disciplinary records at issue (A 000013-14, ¶31-32).

Perhaps most troubling is the Appellate Court's reliance on the DOJ and Mayoral Task Force reports to "further support a finding that public policy favors the maintenance of important public records like those related to allegations of police misconduct." (A 000014, ¶33). The Appellate Court offered no rationale for how such reports fit within the limited scope of what can serve as the basis for public policy (A 000014, ¶33). Clearly, the DOJ report (C 1014-1183) and Mayoral Task Force report[7] (C 1184-1374) are not constitutional provisions, statutes or judicial decisions. *AFSCME*, 173 Ill. 2d at 307. At best, these reports are "general considerations of supposed public interests" that cannot be the basis for the

[7] The Lodge will focus on the DOJ report, as it at least had the imprimatur of the chief law enforcement department of the United States Government. The Mayoral Task Force report was generated by an *ad hoc* committee appointed by the Mayor (not even the Governor or a State agency), and is therefore completely unfit to serve as the basis for a State-wide public policy. For this reason alone, the Appellate Court's reliance on it is perplexing.

public policy exception. *Misco*, 484 U.S. at 43. Indeed, both reports arose from the action solely taken by the executive branch. In stark contrast, the constitution, statutes and judicial decisions require at least two of the three co-equal branches to weigh in on whether something is a fundamental public policy.

Purported declarations of public policy by the executive branch are uniquely susceptible to 180 degree swings in the face of a single election. This volatility is highlighted by the change in viewpoint of the United States Department of Justice from the time the DOJ report was issued on January 13, 2017 to the time after the inauguration of President Trump on January 20, 2017. Since the issuance of the DOJ report, the successor United States Attorney Generals have questioned its merits[8] and declined to take any action on the report, beyond objecting[9] to the Federal Court consent decree[10] sought by the Illinois Attorney General.[11] Significantly, the DOJ report does not direct the parties to modify

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[8] https://thehill.com/homenews/administration/321515-sessions-disputes-doj-findings-on-chicago-police-abuse

[9] https://chicago.suntimes.com/2018/10/10/18390126/trump-s-justice-department-to-oppose-pending-chicago-police-consent-decree

[10] *State of Illinois v. City of Chicago*, Case No. 17 C 6260, (N.D. IL., January 31, 2019). Consent Decree available at: http://chicagopoliceconsentdecree.org/wp-content/uploads/2019/02/FINAL-CONSENT-DECREE-SIGNED-BY-JUDGE-DOW.pdf

[11] Neither the City nor the lower courts relied upon the Illinois Attorney General's litigation as a basis for finding a public policy. Moreover, like the DOJ report, the consent decree entered in the Illinois Attorney General's litigation makes no finding that Section 8.4 is unconstitutional. Rather, the consent decree directs the City to invoke the collective

Section 8.4; does not direct the City to continue retaining all records; and does not find Section 8.4 to be unlawful or unconstitutional (C 1074). The DOJ report provides only "Recommendations," none of which address the Award, Section 8.4 or document destruction policies in general (C 1172-1183). Accordingly, the Appellate Court erred by relying on the DOJ and Task Force reports as a basis for a well-established, dominant public policy.

In considering the public policy of the State of Illinois concerning retention of police disciplinary records, the Court should further consider introduced bills that were not signed into law. In particular, House Bill 6266 was introduced in February of 2016 to make several changes to the PLRA and other statutes. 2015 IL H.B. 6266 (NS). The bill sought to amend Section 4 of the PLRA to state: "Management Rights. Employers shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as . . . deletion or destruction of employee disciplinary reports, letters of reprimand, or other records of disciplinary action." *Id.* Section 15 of the PLRA would have been amended to read in part: "Nothing in this Act shall be construed to take precedence over Section 25 of the Local Records Act or Section 8 of the Personnel Record Review Act with regard to deletion or destruction of disciplinary reports, letters of reprimand, or other records of disciplinary action of peace officers." *Id.* HB6266 would have added a new Section 25 to the LRA, which would have stated: "Police misconduct records. All records, both public records and non-public, related to complaints, investigations, and adjudications of police misconduct shall be permanently retained and may not be destroyed." *Id.* Finally, HB6266 would have amended Section 8 of the Personnel Record Review Act, 820 ILCS

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bargaining process to seek any desired changes to Section 8.4. (See paragraphs 710-711).

§40/8, to provide in part that: "[e]xcept as otherwise provided in this Section . . . . An employer shall not delete or destroy disciplinary reports, letters of reprimand, or other records of disciplinary action of peace officers, as defined in Section 3 of the Illinois Public Labor Relations Act." While such detailed amendments may have provided a public policy basis to vacate the Award at issue here, HB6266 was never passed into law. On January 10, 2017 the House adjourned and the bill died by Session *Sine Die*. Further, in the nearly three years since, no similar legislation has been re-introduced for consideration. Accordingly, by its inaction, the Legislature has signaled that such a public policy mandating indefinite retention of these types of records should not be established.

In light of the above, the Appellate Court erred in relying on its interpretation of a combination of the SRA, LRA, FOIA, the DOJ report and Mayoral Task Force report to find a well-defined, dominant public policy requiring the indefinite retention of the police disciplinary records at issue here. The fact that the State Legislature considered passing a specific bill to amend the PLRA, LRA and Personnel Record Review Act on this issue further highlights how the statutes as they currently exist fail to establish a clear, well-defined public policy basis to vacate the Award. Accordingly, the decision of the Appellate Court should be reversed and the Award enforced.

C. The public policy behind the Public Labor Relations Act, favoring collective bargaining and the enforcement of labor arbitration awards, requires enforcement of the Award.

Not only is there no well-established, dominant public policy requiring the indefinite retention of police disciplinary records, there is a well-established, dominant public policy supporting collective bargaining and the enforcement of labor arbitration awards.

Unfortunately, the Appellate Court failed to address the Lodge's argument regarding the supremacy clause of the PLRA, (A 000015-16, ¶ 38), which provides that it and any agreements made thereunder, "shall control" where there is "any conflict between the provisions of this Act and any other law[,]" and that they "shall supercede any contrary statutes, charters, ordinances, rules or regulations relating to wages, hours and conditions of employment and employment relations adopted by the public employer or its agents". 5 ILCS §315/15(a)&(b).

This Court has not yet had the opportunity to clarify the scope of Section 15 of the PLRA. The closest this Court came to addressing the relationship between the PLRA and other laws addressing terms and conditions of employment was in the *AFSCME* case,124 Ill.2d at 258. This Court cited to Section 15, but did not discuss it in detail, holding that the question of whether there was just cause for a discharge was a question for the arbitrator, not the courts. *Id.* Without relying directly on Section 15, this Court rejected the employer's public policy argument to vacate the award, emphasizing that "[t]his case, however, also involves the public policy of promoting constructive relationships between public employers and public employees, and the public policy which requires finality in arbitration awards." *Id.* at 262. Here, the important public policy concerning collective bargaining and enforcement of labor arbitration awards deserve no less weight.

This Court's decision in *City of Decatur v. AFSCME, Local 268*, 122 Ill.2d 353, 119 Ill.Dec. 360, 522 N.E.2d 1219 (Ill. 1988), is also highly relevant. In the *City of Decatur*, the employer refused to bargain over a contractual grievance and arbitration provision concerning terminations, claiming that optional statutory civil service provisions that it

adopted relieved it of its duty to bargain. *Id.* at 356-57. The *City of Decatur* discussed several sections of the PLRA, finding ample support for a public policy favoring collective bargaining and arbitration, but it did not discuss the supremacy clause in Section 15. Nevertheless, this Court's decision in *City of Decatur* is instructive.

This Court noted that other "courts facing conflicts between public employee bargaining laws and local civil service systems have opted in favor of granting primacy to the bargaining laws." *Id.* at 363-64 (citations omitted). The *City of Decatur* Court then found support in the PLRA to reach a similar conclusion, *Id.* at 364-65 (citations omitted):

> This court has previously noted the broad scope of the Act, with its complex of provisions governing the various aspects of public labor relations. 'The Act provides a comprehensive system of collective bargaining for those public employees and employers who fall within its scope.' We do not believe that the legislature intended to make the broad duties imposed by the Act hostage to the myriad of State statutes and local ordinances pertaining to matters of public employment.

Although disagreeing with the Labor Board's interpretation of Section 7, 5 ILCS § 315/7, this Court clarified, *Id.* at 361-62:

> The interpretation adopted by the State Board in this case suggests that the duty to bargain set out in section 7 invariably overrides any contrary statutory command. That reading of the accommodation provision effectively eliminates any potential conflict between another statute and the bargaining duty prescribed by the Act; under that interpretation, no statute would ever limit the duty to bargain. We do not agree that section 7 may be read so broadly. Section 7 requires the parties to bargain over mandatory subjects that are 'not specifically provided for in any other law or not specifically in violation of the provisions of any law.' This indicates that the bargaining duty may in fact be limited by a law that specifically provides for, or prohibits, a matter that would otherwise be a mandatory subject of bargaining. In addition, section 7 provides that if another statute 'pertains, in part,' to a mandatory subject, the other law does not limit the duty to bargain over clauses that would 'supplement, implement, or relate to the effect of such provisions in other laws.' Under that provision, statutes that pertain in part to a mandatory subject do not have preemptive effect, and the parties remain

> obligated to bargain over supplementary clauses. Contrary to the interpretation adopted by the State Board in this case, the accommodation provision in section 7 allows for laws that will limit the duty to bargain.

This Court then noted the explicit public policy set forth in Section 2 of the PLRA, that "[i]t is the public policy of the State of Illinois to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection." *Id.* at 364 (citing to the predecessor to 5 ILCS § 315/2). Thus, "[t]o construe the accommodation provision of section 7 narrowly would, we believe, frustrate the declared policy of the State." *Id.* This Court further explained, *Id.* at 364-65 (citations omitted):

> As the language of section 7 indicates, the mere existence of a statute on a subject does not, without more, remove that subject from the scope of the bargaining duty. For example, one type of statute that would not relieve an employer of the duty to bargain over an otherwise mandatory subject of bargaining would be a provision establishing a minimum level of benefit, such as a minimum wage law or minimum salary law. In that case, wages would remain a mandatory subject of bargaining, and the employees' bargaining representative would be free to insist on a level higher—but not lower—than that required by law. Thus, . . ., it is appropriate to consider the nature of the other law.

This Court next highlighted the legislative preference for collectively bargained grievance and arbitration provisions, *Id.* at 365 (citations omitted):

> An additional consideration relevant here is the common role that arbitration plays in resolving labor disputes. The importance of arbitration in private-sector labor relations has long been recognized. With respect to public employees, the legislature has expressed a similar preference for arbitration in section 8 of the Act[.][12]

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[12] Section 8 of the PLRA provides in relevant part: "The collective bargaining agreement negotiated between the employer and the exclusive representative shall contain

Despite not addressing Section 15 of the PLRA, the *City of Decatur* makes clear that there is a well-defined, dominant, State-wide public policy favoring collective bargaining agreements and the enforcement of labor arbitration awards. The decision in *City of Decatur* is fully consistent with the clear language in Section 15, that the grievance and arbitration provisions in a collective bargaining agreement "shall control" where there is "any conflict between the provisions of this Act and any other law[,]" and that they "shall supercede any contrary statutes, charters, ordinances, rules or regulations relating to wages, hours and conditions of employment and employment relations adopted by the public employer or its agents". 5 ILCS §315/15(a)&(b).

As with the civil service statute in *City of Decatur*, the statutes on which the Appellate Court relied do not preclude the City and the Lodge from bargaining over document retention policies relating to disciplinary records. At best, they set a floor (like a minimum wage statute referenced in *City of Decatur*), but they do not preclude bargaining over the topic. For instance, although subsequently invalidated by *In re Pension Reform Litigation*, 2015 IL 118585, Section 7.5 of the PLRA, 5 ILCS §315/7.5, expressly precluded bargaining over changes made to the Pension Code. That is the type of explicit statute concerning terms and conditions of employment that this Court recognized as precluding the duty to bargain in Section 7, and similarly should be the only type of statute that could trump the supremacy clause in Section 15. Indeed, Section 15 was amended at the same time as

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a grievance resolution procedure which shall apply to all employees in the bargaining unit and shall provide for final and binding arbitration of disputes concerning the administration or interpretation of the agreement unless mutually agreed otherwise. . . . The grievance and arbitration provisions of any collective bargaining agreement shall be subject to the Illinois 'Uniform Arbitration Act'." 5 ILCS §315/8.

Section 7.5 to exclude pension issues from the broad reach of the supremacy clause. House Bill 6266, discussed *supra*, p. 31-32, would have included such an explicit limitation, but it was not passed into law.

A number of Appellate and Federal courts have also considered Section 15 of the PLRA. For instance, an employer tried to distinguish *City of Decatur* on the basis of the "optional" nature of the civil service rules adopted therein. *Forest Preserve Dist. of Cook County v. Illinois Local Labor Relations Bd.*, 137 Ill.Dec. 730, 190 Ill.App.3d 283, 290-91, 546 N.E.2d 675 (Ill. App. 1st Dist. 1989). However, the Appellate Court did not agree, and cited to Section 15, before concluding that:"[w]e believe the Board correctly interpreted the *Decatur* case as recognizing a policy favoring public employee bargaining laws over civil service rules." *Id.*

Section 15 was succinctly explained in a recent Federal case, as: "elevat[ing] collective bargaining agreements negotiated under the Act over any other laws, executive orders, or administrative regulations relating to wages, hours and employment conditions or relations." *Sroga v. Preckwinkle*, 14-C-6594, 2017 U.S.Dist. LEXIS 9407 (N.D.Ill. Jan. 24, 2017). *See also*, *Drnek v. City of Chicago*, 192 F.Supp. 2d 835, 847-48 (N.D.Ill. 2002) (finding that collectively bargained right to continued employment preempted ordinance establishing mandatory retirement for firefighters, and absence of collectively bargained protection left ordinance in effect for police officers); *Brownlee v. City of Chicago*, 983 F.Supp. 776, 782 (N.D.Ill. 1997) (finding four year probationary period for apprentices in collective bargaining agreement preempts six month probationary period in ordinance); *Tobias v. Villa Park*, 13-C-1475, 2014 U.S.Dist. LEXIS 103540 (N.D.Ill. 2014) (two year

probationary period in collective bargaining agreement preempts any claim to property right in continuing employment for due process claim); *Glinski v. City of Chicago*, 99-C-3063, 2001 U.S.Dist. LEXIS 976 (N.D.Ill. 2001) (finding indemnification provision in collective bargaining agreement must be resolved through contractual grievance procedure rather than as claim under City ordinance requiring indemnification); *City of Rock Island v. Human Rights Commission*, 297 Ill. App. 766 (Ill. App. 3rd Dist. 1998) (finding that terms of collective bargaining agreement did not make grievance process exclusive remedy for violation of Human Rights Act); *Reiff v. Calumet City*, 10-C-126679, 2014 U.S.Dist LEXIS 126679 (N.D.Ill. 2014) (residency requirement in collective bargaining agreement preempts claim challenging residency requirement in ordinance); *Health Employees Labor Program of Metropolitan Chicago v. County of Cook*, 177 Ill.Dec. 521, 523, 236 Ill.App.3d 93, 96-97, 603 N.E.2d 591 (Ill. App. 1st Dist. 1992) (finding collectively bargained grievance and arbitration provisions prevailed over civil service provisions regarding terminations).

While most Appellate Courts have recognized the breadth of Section 15, some have attempted to limit its scope. Of particular concern is the decision in *Decatur Police Benevolent and Protective Association Labor Committee v. City of Decatur*, 2012 IL App (4th) 110764 (Ill. App. 4th Dist. 2012). There, the Appellate Court upheld the lower court's decision vacating an arbitration award that reinstated an officer who admitted to committing acts of domestic violence. *Id.* at ¶30. While the outcome of the case was reasonable, in reaching its conclusion the court unnecessarily restricted the scope of Section 15, holding that it "does not say the Labor Act controls when in conflict with the public policy of the state." *Id.* Quite simply, a public policy (which should be based on other statutes or State-

wide law) affecting terms and conditions of employment cannot be elevated above the statutes themselves. More reasonably, a State-wide public policy (again, undergirded by a statute or other well-defined, State-wide expression of law), concerning something other than terms and conditions of employment would not inherently defer to Section 15 of the PLRA. Other appellate courts have similarly attempted to artificially restrict the scope of Section 15 and public policy favoring collective bargaining. *See*, *Oak Lawn Professional Firefighters Association v. Village of Oak Lawn*, App. 1 Dist. 2018, 427 Ill.Dec. 242, 117 N.E.3d 1179 (Ill. App. 1st Dist. 2018) (finding that residency requirement imposed under home rule authority was not subservient to Section 15); *City of Markham v. State & Municipal Teamsters, Chauffeurs & Helpers, Local 726*, 299 Ill.App.3d 615, 618, 233 Ill.Dec. 510, 701 N.E.2d 153 (Ill. App. 1st Dist., 1998) (though not addressing Section 15, finding that city was not required to bargain over disciplinary procedures imposed by Municipal Code). The reasoning in those decisions cannot stand up to the clear language in Section 15.[13] This Court should hold that the public policy favoring collective bargaining and enforcement of labor arbitration awards, as broadly expressed in Section 15 and throughout the PLRA, may only be subordinated to other public policies in extremely limited circumstances not applicable here. Indeed, particularly in the instant case where the parties not only collectively bargained Section 8.4, but also agreed to the arbitration process for resolving any contractual disputes over the interpretation or application of Section 8.4 (A 000003-4, ¶7,

[13] Another Appellate Court reached more appropriate, contrary conclusions, finding both residency requirements and disciplinary matters to be mandatory subjects of bargaining. *See*, *City of Calumet City v. Illinois Fraternal Order of Police Labor Council*, 344 Ill.App. 3d 1000, 1006, 1009, 801 N.E.2d 147 (Ill. App. 1st Dist. 2003).

000018-19, 000038-43), the supremacy clause of the PLRA strongly establishes the policy that such collectively bargained resolutions should not be disturbed.

The Award does not restrict the City's ability to discipline Officers who are found to have engaged in serious misconduct. The Award only addresses the contractual issue of how long certain disciplinary records are maintained. It is well established that matters concerning how employees are disciplined, including the use and retention of disciplinary records, concern terms and conditions of employment. *See*, *Int'l Bhd. of Teamsters, Local 700 v. Ill. Labor Rels. Bd.*, 2017 IL App (1st) 152993, ¶33 (Ill. App. 1st Dist. Feb. 1, 2017) ("a rule that subjects employees to potential discipline concerns the terms and conditions of employment"); *American Federation of State, County and Mun. Employees, AFL-CIO v. State Labor Relations Bd.*, 190 Ill.App.3d 259, 268, 546 N.E.2d 687 (Ill. App. 1st Dist. 1989) ("If the new policy includes disciplinary sanctions, these sanctions are mandatory subjects of bargaining."); *City of Calumet City*, 344 Ill.App.3d at 1009; *City of Decatur*, 2 PERI 2008 (ILRB 1986) (employee discipline is a mandatory subject of collective bargaining within the meaning of Section 7 of the Act). Simply put, Section 8.4 is intended to limit, within its terms, the amount of time the City can look back on an Officer's record as it imposes discipline. If a disciplinary record is destroyed, the City is unable to evade that limitation by covertly, or even accidentally, giving consideration to past disciplinary investigations. Section 8.4 (if the City had complied with it) and the Award give the Lodge and its members security that discipline will be imposed fairly, without improperly considering past incidents of discipline. Because Section 8.4 is a mandatory subject of bargaining addressing a term and condition of employment, the well-defined, dominant public policy favoring collective

bargaining and enforcement of labor arbitration awards embodied in Section 15 of the PLRA mandates that the decision of the Appellate Court be reversed and the Award enforced.

D. The Award can and should be enforced because it is consistent with any public policies explicit or implicit in the SRA, LRA and FOIA.

Even if the LRA, SRA and/or FOIA establish a well-defined, dominant public policy, the Award can be enforced without violating such a policy. The Appellate Court did not explain how it reached its conclusion that the Award "clearly violated well-defined Illinois public policy requiring the proper retention of important public records[,]" (A 000015, ¶ 36). Instead, the Appellate Court quoted from the Circuit Court's Opinion, holding that the Circuit Court was correct because the Arbitration Award (A 000015, ¶37):

> (i) violate[d] the public policy of maintaining public records for the benefit of the municipality and the general public; (ii) infringe[d] on the municipality and general public's ownership interest in public records; (iii) usurp[ed] the municipalities right to determine for itself what records are required for the transaction of business, including legal and administrative matters; and (iv) commandeer[ed] the authority of a local records commission as the exclusive arbiter of whether and what public records may be destroyed.

However, as the Appellate Court noted, the LRA gives the Local Records Commission the authority to determine what records may be destroyed (A 000011-12, ¶28-29). 50 ILCS §205/7. This fact alone demonstrates that not all records need be retained indefinitely, such that an arbitration award consistent with the LRA would be enforceable.

The Appellate Court did not address key findings by the Arbitrator which establish that the Arbitration Award can be enforced consistent with the LRA, rather, incorrectly stating that "the award ignored the requirements of the Local Record Act and obviates the local record commission's authority to determine what records should be destroyed or

maintained."[14] (A 000015-16, ¶36-38). While the Courts have the authority to determine pubic policy and whether an arbitration award can be enforced consistent therewith, they remain bound by the factual findings and the record before the Arbitrator. *AFSCME*, 173 Ill. 2d at 304-305. Thus, the Appellate Court was bound by the factual findings of the Arbitrator, including his finding that there was no evidence "that the Local Records Commission denied" any application by the City to destroy the records at issue (A 000085). The City did not attempt to present any contrary evidence to the Circuit Court, nor has it supported any claim that the Local Records Commission has denied or would deny it the ability to comply with Section 8.4.

In a further factual finding that is binding on the courts, the Arbitrator found that the City has had, since at least 1975, various internal policies providing for destruction of records consistent with the LRA (A 000050-53, 000085). The Arbitrator explained that "the carefully negotiated retention policy set forth in Section 8.4, . . . was confirmed basically by the recent Special Order. . . ." (A 000085). Based on the existence of the City's document destruction policies, the Arbitrator found that he "has no basis to suggest that the issuance of an award granting relief in these grievances violates public policy based upon the Local Records Act." (A 000085). These are factual findings by the Arbitrator and the Circuit Court and Appellate Court were not free to disregard them. Given the City's policies, with their comparable destruction period to Section 8.4, and the absence of evidence that the City would be precluded from complying with its own document destruction policy (A 000047-

[14] The Lodge is not separately addressing the SRA, as it applies only to the State, whereas the LRA applies to municipalities.

53, 000085), the Award can clearly be enforced consistent with the LRA and any public policy implicit therein regarding record preservation. Accordingly, the decision of the Appellate Court should be reversed and the Award enforced.

The Award similarly can be enforced consistent with FOIA. By requiring a municipal employer to produce all non-exempt records pursuant to a request, FOIA effectively precludes the destruction of records when subject to a request. *See*, 5 ILCS § 140/3; *Fraternal Order of Police*, 2016 IL App (1st) 143884, ¶32, Petition for Leave to Appeal Denied, 60 N.E.3d 872 (Table), 406 Ill.Dec. 321 (Ill. 2016). However, FOIA has no bearing on records that are not subject to a FOIA request. Thus, once the records have been produced and are no longer the subject of a pending FOIA request, FOIA does not require their continued maintenance. *See generally*, *Amuso v. United States DOJ*, 600 F. Supp.2d 78, 89 (D.D.C. 2009) (Whether lost or destroyed, "[n]othing in the law requires the agency to document the fate of documents it cannot find.") (citation omitted). As the Arbitrator found, the City acknowledged at the Arbitration hearing that if documents are destroyed pursuant to a valid destruction policy, there is no conflict with FOIA (A 000081). Indeed, as noted above, *supra*, p. 29, FOIA expressly states that it: "is not intended to create an obligation on the part of any public body to maintain or prepare any public record which was not maintained or prepared by such public body at the time when this Act becomes effective, except as otherwise required by applicable local, State or federal law." 5 ILCS §140/1. The Appellate Court, in a case related to this one vacating a preliminary injunction ordering the

City not to comply with a FOIA request while the instant arbitration proceedings were completed, explained, *Fraternal Order of Police*, 2016 IL App (1st) 143884, ¶32:[15]

> However, this remedy would not be enforceable if it impeded the defendants from complying with the pending FOIA requests. Enforcement of an arbitration award requiring destruction of the requested records on the ground that the City breached section 8.4 of the CBA would violate the FOIA as well as the public policy underlying the General Assembly's adoption of the Act.

The Appellate Court was not then faced with the issue in this case, and therefore did not hold that FOIA precludes enforcement of an arbitration award requiring the destruction of records even if such records are not subject to a FOIA request. Once a record is no longer the subject of a pending FOIA request, there is no public policy embedded in FOIA that would require its continued maintenance. The Appellate Court in this case hinted at this, explaining that "FOIA exists to ensure the public's access to records that have not been destroyed through those processes[,]" provided by the LRA and SRA. (A 000013, ¶ 32). Accordingly, while compliance may be delayed to accommodate any pending FOIA requests, an arbitration award enforcing a requirement that records be destroyed after a fixed period of time cannot be "clearly contrary" to FOIA nor "manifestly injurious to the public welfare." *Fosler v. Midwest Care Center II, Inc.*, 398 Ill.App.3d 563, 571, 928 N.E.2d 1, 340 Ill. Dec. 282 (quoting, *H & M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 209 Ill.2d 52, 57, 282 Ill.Dec. 160, 805 N.E.2d 1177 (Ill. 2004)). The City can fully comply with FOIA, the Award and Section 8.4, albeit after any pending FOIA requests are satisfied.

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[15] The Third District Appellate Court subsequently disagreed with any holding by the First District that "Section 11 of the Review Act negates the applicability of Section 8 of the Review Act to FOIA." *Johnson v. Joliet Police Dept.*, 2018 Ill.App (3d) 170726, ¶18), 107 N.E.3d 964, 424 Ill.Dec. 245 (Ill. App. 3rd Dist. 2018).

It is important to recognize that the City is not a passive victim here, making the Appellate Court's finding that the Award somehow usurps the City's rights unsupportable. The City made promises to the Lodge and the Officers it represents concerning how it would handle certain disciplinary records, and it has completely failed to live up to those promises. Quite simply, the Appellate Court failed to acknowledge that the City was a voluntary party to a series of collective bargaining agreements since 1981 in which it agreed to Section 8.4, as modified throughout the years (A 000047-50). The Arbitrator's findings in this regard are clear and binding (A 000047-50). Thus, the City has already exercised its discretion over what records it wishes to keep and for how long. The City's internal document destruction policies, which are consistent with Section 8.4, further establish that the City has already exercised its discretion "to determine for itself what records are required for the transaction of business[.]" (A 000047-53, 000085). While the City may be able to change its internal policies, it cannot deviate from or change Section 8.4 without bargaining with the Lodge. *See*, *City of Belvidere v. Illinois State Labor Relations Bd.*, 181 Ill.2d 191, 206-7; 692 N.E.2d 295 (Ill. 1998).

The Award enforces the clear contractual provisions to which the City agreed, including both Section 8.4 and the contractual provision for binding arbitration. The Arbitrator carefully considered the City's arguments and rejected them. When a Union and employer agree to binding arbitration, the courts owe deference to the arbitrator and may not insert their own preferences or opinions. *Rauh*, 143 Ill. 2d at 386.[16] That the City may now

[16] That the decisions of the Circuit Court and Appellate Court were based on their own opinions, without deference to the arbitrator, is most clearly seen at the end of the Circuit Court's Opinion, where it states that it is vacating the Award because, "[o]therwise,

regret its agreement to Section 8.4, or that the Appellate Court may disapprove of the bargain the City voluntarily made, is not a basis upon which to vacate the Award. Rather, as the Illinois Public Labor Relations Act requires, any changes to Section 8.4 must occur at the bargaining table. Accordingly, the decision of the Appellate Court should be reversed and the Award enforced.

---

policy makers are condemned to repeat the failings of the past, like the 'Thin Blue Line' or 'Code of Silence' that Mayor Emanuel declared was a problem 'at the heart of the policing profession' in his address to the Chicago City Council on December 9, 2015." (A 000031).

CONCLUSION

For the reasons set forth herein, Respondent/Appellant, Fraternal Order of Police, Chicago Lodge No. 7, respectfully requests that the Court reverse the judgment of the Appellate Court and enforce the Arbitration Award.

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CERTIFICATE OF COMPLIANCE

I certify that this petition conforms to the requirements of Rules 315(d) and 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is under 13,563 words.

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CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that on or before the hour of 5:00 p.m., this 30th day of October 2019, he filed the foregoing document (Brief of Respondent /Appellant) with the Supreme Court of Illinois, via the Court's electronic filing system, pursuant to Illinois Supreme Court Rule 9(a).

VERIFICATION BY CERTIFICATION: 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, except as to matters therein stated to be on information and belief and, as to such matters, the undersigned certifies as aforesaid that he verily believes the same to be true. The undersigned further certifies that he served the above-referenced document by electronic mail to the parties listed below.

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No. 124831

IN THE
SUPREME COURT OF ILLINOIS

THE CITY OF CHICAGO,

Petitioner/Appellee,

vs.

FRATERNAL ORDER OF POLICE, CHICAGO LODGE NO. 7,

Respondent/Appellant.

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

APPENDIX OF RESPONDENT/APPELLANT, FRATERNAL ORDER OF POLICE, CHICAGO LODGE NO. 7

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Exhibit 1

2019 IL App (1st) 172907
No. 1-17-2907
Opinion filed March 29, 2019

Fifth Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE CITY OF CHICAGO, Petitioner-Appellee, v. FRATERNAL ORDER OF POLICE, CHICAGO LODGE NO. 7, Respondent-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 16 CH 9793 Honorable Sanjay T. Tailor, Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court, with opinion.
Justices Hoffman and Hall concurred in the judgment and opinion.

OPINION

¶ 1 The Fraternal Order of Police, Chicago Lodge No. 7 (FOP), appeals the circuit court's decision that granted the petition of the City of Chicago (City) to vacate an arbitration award that ordered the City to destroy records of alleged police misconduct that were more than five years old and denied the FOP's counterpetition to enforce the award.

¶ 2 The FOP argues that the circuit court erred as a matter of law by (1) holding that a well-established Illinois public policy required the preservation of governmental records; (2) holding that the award could not be enforced consistent with the Local Records Act (Local Act) (50 ILCS

205/1 *et seq.* (West 2016)), State Records Act (State Act) (5 ILCS 160/1 *et seq.* (West 2016)), or any public policy embodied therein or based on any other State law or public policy; and (3) not enforcing the award pursuant to the Illinois Public Labor Relations Act (Labor Act) (5 ILCS 315/1 *et seq.* (West 2016)) and the Uniform Arbitration Act (Arbitration Act) (710 ILCS 5/1 *et seq.* (West 2016)).

¶ 3 For the reasons that follow, we affirm the judgment of the circuit court that granted the City's petition to vacate the award and denied the FOP's counterpetition to enforce the same.[1]

¶ 4 I. BACKGROUND

¶ 5 This appeal arises from grievances the FOP submitted in 2011 and 2012 to the Chicago Police Department (CPD) over the retention of disciplinary records older than five years, which retention the FOP claimed was in violation of section 8.4 of the 2007-12 collective bargaining agreement (CBA) between the FOP and the City.

¶ 6 The records at issue are complaint register files (CR files). CR files are produced in the course of investigations by the Civilian Office of Police Accountability (COPA) and the CPD's Bureau of Internal Affairs (Internal Affairs) of alleged misconduct by CPD officers. COPA and Internal Affairs had the authority to recommend to the CPD superintendent disciplinary action for violations of CPD rules and regulations.

¶ 7 The retention of disciplinary and investigation records like CR files was governed in the first CBA between the City and FOP, effective January 1, 1981, by a provision in section 8.4, which required the destruction of such records "five (5) years after the date of the incident or the

[1]In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

date upon which the violation is discovered." Future CBAs continued to include some version of section 8.4, including the 2007-12 CBA at issue in this case, which provided, in relevant part:

> "All disciplinary investigation files, disciplinary history card entries, Independent Police Review Authority and Internal Affairs Division disciplinary records, and any other disciplinary record or summary of such record other than records related to Police Board cases, will be destroyed five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer[.]"

¶ 8 The City's destruction of records pursuant to section 8.4 ceased following a federal court's 1991 order in a civil rights case, which required the City to cease destroying CR files. Thereafter, other federal district court judges began entering similar orders as a matter of routine, and the City sought to eliminate section 8.4 from the CBA during negotiations with the FOP.

¶ 9 In 2012, the CPD denied both of the FOP's 2011 and 2012 grievances, and the FOP initiated arbitration.

¶ 10 Meanwhile, in October 2014, the City notified the FOP that the City intended to comply with requests under the Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2014)), from the Chicago Tribune and Chicago Sun-Times for CR files dating back to 1967. The FOP sought a preliminary injunction in the circuit court on the basis that disclosure of the CR files during arbitration would interfere with the FOP's ability to obtain relief in arbitration. In December 2014, the circuit court granted the FOP's request for a preliminary injunction barring the release of the CR files to maintain the status quo until the FOP's claims under the CBA were adjudicated. The City and Chicago Tribune filed separate interlocutory appeals challenging the

preliminary injunction. In May 2015, the circuit court entered a second preliminary injunction enjoining the City from releasing any CR files more than four years old as of the date of the FOIA request, and the City filed an interlocutory appeal.

¶ 11 In December 2015, the United States Department of Justice (DOJ) opened an investigation into the CPD's use of force policies. The City informed the arbitrator of the pendency of the DOJ investigation and requested guidance on how the City should respond to the DOJ's requests for the production of misconduct and disciplinary records.

¶ 12 In January 2016, the arbitrator issued an opinion and interim award, which found that the City violated section 8.4 of the CBA and directed the parties to meet and attempt to establish a procedure for compliance.

¶ 13 In February 2016, an assistant United States attorney sent letters to the City specifically stating that, "for the duration of DOJ's pattern and practice investigation," the City and CPD must "preserve all existing documents related to all complaints of misconduct," including those that were the subject of the arbitration.

¶ 14 In April 2016, the arbitrator issued a second opinion and award, holding that, because of the DOJ's demand that the City preserve all records related to alleged officer misconduct, an order requiring destruction of such records would be against public policy. In June 2016, the arbitrator issued an order clarifying that public policy would not prevent enforcement of the initial January 2016 award once the DOJ had completed its investigation of the CPD.

¶ 15 On July 8, 2016, this court vacated the circuit court's 2014 and 2015 orders granting the FOP's preliminary injunction requests. This court found that, although the parties' CBA mandated destruction of CR files that were more than four years old, an arbitration award

seeking enforcement of this provision would violate FOIA and the public policy underlying the General Assembly's adoption of the FOIA. Accordingly, this court held that there was no legal basis to enjoin the City and CPD from releasing the requested records in order to allow the FOP to pursue a legally unenforceable remedy at arbitration. *Fraternal Order of Police, Chicago Lodge No. 7 v. City of Chicago*, 2016 IL App (1st) 143884, ¶¶ 32-36.

¶ 16 On July 26, 2016, the City filed a petition in the circuit court to vacate the arbitration award on the grounds that it violated Illinois public policy favoring the proper retention of important public records. In August 2016, the FOP filed a counterpetition to confirm the arbitration award.

¶ 17 In January 2017, the DOJ issued its report. Among its conclusions, the DOJ found that section 8.4's "document destruction provision not only may impair the investigation of older misconduct, but also deprives CPD of important discipline and personnel documentation that will assist in monitoring historical patterns of misconduct." A local police accountability task force (Task Force) was also formed to evaluate the CPD's practices separately from the DOJ's investigation. The Task Force also concluded that section 8.4 was problematic and likely violated Illinois law. The Task Force stated, "Expunging records contradicts best practices, impedes the development of early intervention systems and deprives the public of information that is rightfully theirs." Further, the Task Force stated that "[i]t also deprives police oversight bodies of evidence of potential patterns of bad behavior," and "it may also deprive wrongfully convicted persons of exonerating information." The Task Force recommended that the "provision requiring destruction of records should be eliminated. The rule is in tension if not outright conflict with general principles of public record-keeping, and deprives the public of

important information that is rightfully theirs and may include the destruction of information that serves numerous operational and public policy objectives."

¶ 18 In October 2017, the circuit court granted the City's petition to vacate the arbitration award and denied the FOP's counterpetition to enforce the award. The court concluded that "enforcement of the Arbitral Award violated a well-defined and dominant public policy to preserve government records." The court stated that,

> "[t]o hold otherwise would (i) violate the public policy of maintaining public records for the benefit of the municipality and the general public; (ii) infringe on the municipality and general public's ownership interest in public records; (iii) usurp the municipality's right to determine for itself what records are required for the transaction of business, including legal and administrative matters; and (iv) commandeer the authority of a local records commission as the exclusive arbiter of whether and what public records may be destroyed."

The court further stated that

> "destruction of important public records, such as the police disciplinary files at issue here, undermines principles of government transparency that are so vital to the preservation of the rule of law. If the City is to be responsive to the citizenry, it must have access to historical police disciplinary and investigative records to make better-informed decisions on policing, a point echoed in the DOJ and Task Force reports."

¶ 19 The FOP appealed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, the FOP contends that the circuit court's order vacating the arbitration award and denying the FOP's counterpetition should be reversed because the court erred as a matter of law in holding that there is a well-established Illinois public policy requiring the preservation of governmental records. Alternatively the FOP contends the court erred as a matter of law by holding that the award could not be enforced consistent with the Local Act (50 ILCS 205/1 *et seq.* (West 2016)), the State Act (5 ILCS 160/1 *et seq.* (West 2016)), or any public policy embodied therein, or based on any other State law or public policy. The FOP also contends that the court erred by not enforcing the award pursuant to the Labor Act (5 ILCS 315/1 *et seq.* (West 2016)), and the Arbitration Act (710 ILCS 5/1 *et seq.* (West 2016)).

¶ 22 A. The Public Policy Exception

¶ 23 A court's review of an arbitration award is extremely limited, and courts must construe arbitration awards, if possible, as valid. *American Federation of State, County & Municipal Employees v. State*, 124 Ill. 2d 246, 254 (1988). Where, as here, the arbitration involved a collective bargaining agreement, a court, consistent with section 12(e) of the Arbitration Act (710 ILCS 5/12(e) (West 2016)), will disturb the arbitration award only on the common-law grounds that existed prior to the enactment of the Arbitration Act, *i.e.*, "instances of fraud, corruption, partiality, misconduct, mistake, or failure to submit the question to arbitration." *American Federation of State, County & Municipal Employees v. Department of Central Management Services*, 173 Ill. 2d 299, 304 (1996) (*AFSCME 1996*).

> "The rationale for the limited review of an award interpreting a collective bargaining agreement is that the parties have contracted to have their disputes

settled by an arbitrator, rather than by a judge. [Citation.] A labor arbitration award must be enforced if the arbitrator acts within his scope of authority and the award draws its essence from the parties' collective bargaining agreement. [Citation.]

However, a court will vacate the award if it is repugnant to the established norms of public policy. [Citation.] The public policy exception is narrow and its successful invocation requires a clear showing that the award violates some explicit public policy. [Citation.] The contract as interpreted by the arbitrator must violate some explicit public policy that is well-defined and dominant and ascertainable by reference to the laws and legal precedents and not from generalized considerations of supposed public interest. [Citation.] Accordingly, the public policy of a state must be determined by its constitution, laws, and judicial decisions. [Citation.] ***

To vacate an award under the public policy exception, this court is required to undertake a two-step analysis. The threshold question is whether a well-defined and dominant public policy can be identified. [Citation.] If so, the court must determine whether the arbitrator's award, as reflected in his interpretation of the agreement, violated public policy. [Citation.] As our supreme court has cautioned, although a rote recitation of the exception's two-prong test can be easily made, the exception's ultimate applicability to a case is necessarily fact dependent. [Citation.]" (Internal quotation marks omitted.) *Chicago Transit Authority v. Amalgamated Transit Union, Local 241*, 399 Ill. App. 3d 689, 695-96 (2010).

The question of whether an award violated public policy is one of law, which we review *de novo*. *City of Des Plaines v. Metropolitan Alliance of Police, Chapter No. 240*, 2015 IL App (1st) 140957, ¶ 20.

¶ 24 B. The Existence of a Well-Defined Public Policy

¶ 25 To determine whether a public policy exists, a court considers Illinois's "constitution and *** statutes, and when cases arise concerning matters upon which they are silent, then *** its judicial decisions and the constant practice of the government officials." (Internal quotation marks omitted.) *AFSCME 1996*, 173 Ill. 2d at 307. In *AFSCME 1996*, the supreme court vacated as against public policy an arbitral award reinstating an employee of the Department of Children and Family Services (DCFS), who had falsely stated that she had seen three children in DCFS custody and that they were "doing fine," when in fact they had perished in a fire. *Id.* at 301, 306. The court looked to various state statutes that collectively formed a "comprehensive legislative scheme designed for the welfare and protection of children found to be abused or neglected." *Id.* at 315. From this legislative scheme, the court determined that "there is a well-defined public policy in favor of truthful and accurate DCFS reporting and that the arbitral award in this case violates that policy." *Id.* at 308.

¶ 26 This court has followed *AFSCME 1996* to find public policies in other statutory frameworks that required vacating contrary arbitration awards. *E.g.*, *Chicago Fire Fighters Union Local No. 2 v. City of Chicago*, 323 Ill. App. 3d 168, 176-77 (2001) (recognizing public policy "favoring safe and effective fire protection services"); *Illinois Nurses Ass'n v. Board of Trustees of the University of Illinois*, 318 Ill. App. 3d 519, 530 (2000) (recognizing public policy "in favor of safe nursing care"); *State Police v. Fraternal Order of Police Troopers Lodge No.*

41, 323 Ill. App. 3d 322, 328-29 (2001) (recognizing public policy "promoting effective law enforcement"); *County of De Witt v. American Federation of State, County & Municipal Employees*, 298 Ill. App. 3d 634, 637-38 (1998) (recognizing public policy "to protect the elderly from abuse or harm"); *Board of Education of School District U-46 v. Illinois Educational Labor Relations Board*, 216 Ill. App. 3d 990, 1000-01 (1991) (recognizing public policy "favoring the safe transportation of school children").

¶ 27 The statutory framework the General Assembly constructed in the Local Act, the State Act, and FOIA establishes a well-defined public policy favoring the proper retention of important public records for access by the public. The Local Act, which applies to the City, directs that local public records "shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part, except as provided by law." 50 ILCS 205/4(a) (West 2016). The Local Act then requires that "no public record shall be disposed of by any officer or agency unless the written approval of the appropriate Local Records Commission is first obtained." *Id.* § 7. The law requires the Commission to issue binding regulations and procedures to "establish procedures for compiling and submitting to the Commission lists and schedules of public records proposed for disposal"; to regulate "the physical destruction or other disposition of such public records"; and manage the "preservation of electronically generated and maintained records"; and to create "standards for the reproduction of such public records by photography, microphotographic processes, or digitized electronic format." *Id.*

¶ 28 The Local Act further requires that the head of each local governmental agency submit to the Commission "lists or schedules of public records in his custody that are not needed in the transaction of current business and that do not have sufficient administrative, legal or fiscal value

to warrant their further preservation" and "lists or schedules proposing the length of time each records series warrants retention for administrative, legal or fiscal purposes after it has been received by the agency." *Id.* § 10. The General Assembly vested in the Commission the ultimate authority to determine what records should be maintained or destroyed: "The Commission shall determine what public records have no administrative, legal, research or historical value and should be destroyed or otherwise disposed of and shall authorize destruction or other disposal thereof." *Id.*

¶ 29 The law also dictates that "[n]o public record shall be destroyed or otherwise disposed of by any Local Records Commission on its own initiative, nor contrary to law" (*id.*), and even goes so far as to make it a Class 4 felony to "knowingly, without lawful authority and with the intent to defraud any party, public officer, or entity, alter[ ], destroy[ ], deface[ ], remove[ ], or conceal[ ] any public record." *Id.* § 4.

¶ 30 The State Act applies similar requirements to the maintenance and destruction of State records. 5 ILCS 160/1 *et seq.* (West 2016). In enacting the State Act, the legislature made its policy purposes explicit, stating,

> "[p]ursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois (i) that government records are a form of property whose ownership lies with the citizens and with the State of Illinois; [and] (ii) that "those records are to be created, maintained, and administered in support of the rights of those citizens and the operation of the State." *Id.* § 1.5.

Further, "those records are, with very few exemptions, to be available for the use, benefit, and information of the citizens; and *** may not be disposed of without compliance to the regulations in this Act." *Id.*

¶ 31 In enacting FOIA, a similar explicit intent to ensure public access to important government documents was expressed:

> "Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act." 5 ILCS 140/1 (West 2016).

"Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest." *Id.* Moreover, the General Assembly declared "that it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government," and "[i]t is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act." *Id.*

¶ 32 These statutes clearly show that Illinois recognizes a public policy favoring the proper retention of important government records for the benefit of the public. The Local Act and State Act mandate that the destruction of public records occur only after consideration by and with the approval of the head of the governmental agency and the Commission and in a well-regulated process established by the Commission. Those acts also reflect that public records belong to the

public and expressly forbid the destruction of public records outside of those statutorily mandated processes. In addition, FOIA exists to ensure the public's access to records that have not been destroyed through those processes. The General Assembly declared the policies underlying these acts part of the "fundamental philosophy of the American constitutional form of government." *Id.* § 1; 5 ILCS 160/1.5 (West 2016).

¶ 33 The conclusions of the investigations by the DOJ and the Task Force further support a finding that public policy favors the maintenance of important public records like those related to allegations of police misconduct. The DOJ concluded that the CBA's document destruction provision not only might impair the investigation of older misconduct but also deprive the CPD of important discipline and personnel documentation that would assist in monitoring historical patterns of misconduct. The Task Force concluded that the destruction provision contradicts Illinois law and best practices, impedes the development of early intervention systems, and deprives the public of information that is rightfully theirs. The Task Force also concluded that the destruction provision deprives police oversight bodies of evidence of potential patterns of bad behavior and may also deprive wrongfully convicted persons of exonerating information. The Task Force recommended the elimination of the provision requiring the destruction of records because it was in tension, if not outright conflict, with general principles of public record-keeping and deprives the public of important information that is rightfully theirs and may include the destruction of information that serves numerous operational and public policy objectives.

¶ 34 These statutes and other materials leave no doubt that Illinois has a well-defined public policy favoring the proper retention of important government records for the benefit of the public, like the CR files at issue here.

¶ 35 C. Violation of a Well-Defined Public Policy

¶ 36 The arbitration award requiring destruction of the records pursuant to section 8.4 of the CBA clearly violated well-defined Illinois public policy requiring the proper retention of important public records. The award ignored the requirements of the Local Act and obviates the local record commission's authority to determine what records should be destroyed or maintained. Further, the award required the City to destroy records related to alleged police misconduct without regard to the statute's explicit concerns for those records' "administrative, legal, research or historical value." 50 ILCS 205/10 (West 2016).

¶ 37 The circuit court properly vacated this arbitration award because, as stated in the circuit court's October 2017 order, the arbitration award

> "(i) violate[d] the public policy of maintaining public records for the benefit of the municipality and the general public; (ii) infringe[d] on the municipality and general public's ownership interest in public records; (iii) usurp[ed] the municipality's right to determine for itself what records are required for the transaction of business, including legal and administrative matters; and (iv) commandeer[ed] the authority of a local records commission as the exclusive arbiter of whether and what public records may be destroyed."

¶ 38 Based on our analysis above concerning the statutory framework constructed by the General Assembly's enactment of the Local Act, the State Act, and FOIA, which established a

well-defined public policy favoring the proper retention of important public records for access by the public, we need not address the FOP's remaining assertions that the circuit court should have deemed the arbitration award enforceable as consistent with the Labor Act and Arbitration Act.

¶ 39 III. CONCLUSION

¶ 40 For the foregoing reasons, we find that the arbitration award violated an explicit, well-defined, and dominant public policy requiring retention of important public records. Therefore, we affirm the judgment of the circuit court, which vacated the arbitration award and denied the FOP's counterpetition to enforce the award.

¶ 41 Affirmed.

Exhibit 2

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

4246-P
5046-D
8001

CITY OF CHICAGO,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 16 CH 9793
	)	
FRATERNAL ORDER OF POLICE, CHICAGO LODGE NO. 7,	)	
	)	
Respondent.	)	

ENTERED
JUDGE SANJAY TAILOR-1870
OCT 18 2017
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

MEMORANDUM OPINION AND ORDER

The petitioner, the City of Chicago ("City"), brings this action under the Illinois Uniform Arbitration Act, 710 ILCS 5/1 *et seq.*, against the defendant, the Fraternal Order of Police, Chicago Lodge No. 7 ("FOP"), to vacate an arbitration award entered on April 28, 2016, as modified on June 21, 2016 ("Arbitral Award"). The Arbitral Award enforces a provision in a collective bargaining agreement between the City and the FOP that requires, with few exceptions, the destruction after five years of police officer disciplinary records, including records in connection with the investigation of complaints for excessive and deadly force against residents of Chicago. The City moves to vacate the Arbitral Award on the basis that the document destruction provision is unenforceable because it violates public policy. The FOP cross-moves to enforce the Arbitral Award.

I. BACKGROUND

When the Chicago Police Department ("CPD") receives a complaint of police officer misconduct, it opens an investigatory file. These files are stored and maintained in the CPD's Records Division. Since the early 1980s, the City and the FOP, the union that represents Chicago's approximately 11,000 police officers below the rank of sergeant, have been parties to

numerous collective bargaining agreements, with the agreement relevant to this case effective June 1, 2007 through May 31, 2012 (the "CBA"). Section 8.4 of the CBA, the provision at issue in this action, states in relevant part:

> All disciplinary investigation files, disciplinary history card entries, IPRA [Independent Police Review Authority] and IAD [Internal Affairs Division] disciplinary records, and any other disciplinary record or summary of such record other than records related to Police Board cases, will be destroyed five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, except that no sustained files alleging criminal conduct or excessive force shall be retained for a period of seven (7) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, and thereafter, cannot be used against the Officer in any future proceedings in any other forum, except as specified below, unless the investigation relates to a matter which has been subject to either civil or criminal court litigation or arbitration prior to the expiration of the five- (5-) year period. In such instances, the Complaint Register case files normally will be destroyed immediately after the date of the final arbitration award or the final court adjudication, unless a pattern of sustained infractions exists.

CBA §8.4.[1]

The City alleges in its petition that beginning in the 1990s, federal courts presiding over civil lawsuits against the City and its police officers began to order that all records relevant to the cases be retained, including disciplinary histories and investigative files, regardless of their age. The City complied with those court orders. The City has been party to thousands of civil lawsuits since that time, and as of the time of the filing of the petition had approximately 480 civil lawsuits pending alleging police misconduct, with 90% in federal court and 10% in state court. The City contends that these lawsuits include wrongful conviction claims that date back to the 1980s, and could include cases that go back even further. Finally, the City alleges that many of these court actions involved claims of civil rights violations under 42 U.S.C. §1983 and

[1] This provision has remained substantially unchanged over the decades that collective bargaining agreements have been in place between the City and the FOP.

Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978),[2] alleging individual and department-wide police misconduct. In these cases, courts have required the City to preserve and produce investigatory files and other disciplinary documents as evidence of whether officers have shown a pattern of misconduct and whether the City has taken appropriate steps to ensure proper training and discipline of officers whose conduct has such a significant impact on all residents of Chicago.

On November 30, 2011 and April 12, 2012, the FOP filed separate grievances related to the City's retention of police disciplinary records, claiming that the City violated section 8.4 of the CBA by releasing records that should have been destroyed after five years.[3] While those grievances were pending, in October 2014, the City notified the FOP that it received Freedom of Information Act ("FOIA") requests from the Chicago Sun-Times and Chicago Tribune seeking information from complaint register ("CR") files, which are records generated by police oversight agencies' investigation into citizen complaints of police misconduct, dating back to 1967. The City further advised the FOP that it intended to comply with the FOIA requests. The FOP then filed a complaint in the Circuit Court of Cook County seeking to enjoin the disclosure of any disciplinary records or lists more than five years old, on the basis that such records should have been destroyed pursuant to section 8.4 of the CBA. On December 19, 2014, the Circuit Court granted the injunction requested by the FOP pending the arbitration of the FOP's grievances, but on July 8, 2016, the Appellate Court vacated the injunction, holding that any arbitration award directing the destruction of the files at issue "would violate the FOIA as well as

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[2] In *Monell*, the United States Supreme Court held that a governmental entity can be liable under Section 1983 of the Civil Rights Acts if the plaintiff's injury was inflicted as a result of a governmental policy.

[3] The CBA contains a grievance and arbitration procedure, including a provision in section 9.7(A) that the decision of an arbitrator "shall be final and binding upon the parties." CBA §9.7(A).

the public policy under the General Assembly's adoption of the Act." *Fraternal Order of Police v. City of Chicago*, 2016 IL App (1st) 143884, ¶32, 35 ("In light of these public policy considerations and the purposes of the FOIA to open governmental records to the light of public scrutiny, an award in the pending arbitration proceedings would be unenforceable if it circumvented the City's required compliance with FOIA . . .").

The FOP's grievances were submitted to arbitration on June 23, 2015. On January 12, 2016, before the Appellate Court vacated the Circuit Court's injunction, the Arbitrator issued an interim award sustaining the FOP's grievances that the City violated section 8.4 of the CBA and directing the parties to negotiate a timeline for destruction of documents that were more than five years old. The parties met but failed to come to agreement on which records were to be destroyed and when.

In the meantime, the City informed the Arbitrator that on December 7, 2015, the United States Department of Justice ("DOJ") had, pursuant to a number of federal statutes, opened an investigation into the CPD and Independent Police Review Authority ("IPRA"). The purpose of the investigation was to determine whether the CPD was engaging in a pattern or practice of unlawful conduct and, if so, what systemic deficiencies or practices within CPD, IPRA, and the City might be facilitating or causing this pattern or practice.[4] The City also informed the Arbitrator that the DOJ had requested that all relevant documents, including disciplinary and investigative records, be preserved. On April 28, 2016, the Arbitrator issued his final award on the FOP's grievances, determining that state law did not make section 8.4 of the CBA unenforceable, but that the DOJ document preservation request constituted a sufficient public policy exception to preserve the subject records until the investigation and all resulting

[4] Days earlier, City of Chicago Mayor Rahm Emanuel appointed a task force of experienced professionals to evaluate the CPD.

intervention and litigation was concluded. On June 21, 2016, the Arbitrator clarified the award by stating that " . . . destruction of records pursuant to the language of Section 8.4 is there to be read and applied once the public policy exception brought by the Department of Justice investigation and its possible consequences no longer exists."

On January 13, 2017, after the City filed the present petition to vacate the Arbitral Award and the FOP filed its answer and counterclaim to enforce the Arbitral Award, the DOJ, through its Civil Rights Division and the United States Attorney's Office for the Northern District of Illinois, issued a report on its investigation of the CPD. In the section addressing policies and practices that impede the investigation of officer misconduct, the report states that the CBA:

> requires destruction of most disciplinary records older than five years. Yet, CPD's culture and 'code of silence' as described elsewhere in these findings may prevent disclosure of serious misconduct in a timely fashion. Moreover, the document destruction provision not only may impair the investigation of older misconduct, but also deprives CPD of important discipline and personnel documentation that will assist in monitoring historical patterns of misconduct.

DOJ Report, p. 52. The City of Chicago Police Accountability Task Force ("Task Force") went even further, recommending that the document destruction provision of the CBA be eliminated because it impedes the development of early intervention systems and deprives the public of information that is rightfully theirs. Task Force Recommendations for Reform Report, p. 72. Further, the document destruction provision deprives "police oversight bodies of evidence of potential patterns of bad behavior," and "wrongfully convicted persons of exonerating information." *Id.* at 72-73. The Task Force concluded that the document destruction provision of the CBA "is in tension if not outright conflict with general principles of public record-keeping . . ." *Id.* at 75.

II. DISCUSSION

Judicial review of arbitral awards is "extremely limited." *American Fed. of State, County & Mun. Emples. v. Department of Cen. Mgmt. Servs.*, 173 Ill. 2d 299, 304 (1996). Courts are "duty bound to enforce a labor-arbitration award if the arbitrator acts within the scope of his or her authority and the award draws its essence from the parties' collective bargaining agreement." *Id.* However, there is a "public policy exception to vacate arbitral awards which otherwise derive their essence from a collective bargaining agreement." *Id.* at 307 ("As with any contract, a court will not enforce a collective-bargaining agreement that is repugnant to established norms of public policy. Likewise, we may not ignore the same public policy concerns when they are undermined through the process of arbitration."). The exception is a narrow one and is invoked only when a contravention of public policy is clearly shown. *Id.* The public policy must be "well-defined and dominant" and ascertainable "by reference to the laws and legal precedents and not from generalized considerations of supposed public interests." *Id.* To determine whether there is a well-defined and dominant public policy, a court must look to the "constitution and . . . statutes, and when cases arise concerning matters upon which they are silent, then in its judicial decisions and the constant practice of the government officials." *Id.*

Thus, application of the public policy exception requires a two-step analysis. *Id.* The threshold question is whether a well-defined and dominant public policy can be identified. If so, the court must determine whether the arbitrator's award, as reflected in his interpretation of the agreement, violated the public policy. *Id.* at 307-8. Applying these two steps, the Court finds a well-defined and dominant public policy of preserving government records, and that the Arbitral Award in this case violates that policy.

The State Records Act, 5 ILCS 160/1 *et seq.* ("SRA"), and the Local Records Act, 50

ILCS 205/1 *et seq.* ("LRA"), establish that preservation of government records is a well-defined and dominant public policy.[5] In enacting the SRA, the General Assembly declared a public policy to maintain public records for the benefit of not only the State government apparatus but also the general public, going so far as to grant the citizenry an ownership interest in such records:

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

5 ILCS 160/1.5 (emphasis added). *See also Family Life League v. Department of Pub. Aid*, 112 Ill. 2d 449, 458 (1986) ("The purpose of the [SRA] is to open the State's books to the light of public scrutiny."); *cf. See also Weinstein v. Rosenbloom*, 59 Ill. 2d 475, 482 (1974) ("Good policy requires liberality in the right to examine public records.").

Section 3(a) of the SRA prohibits destruction of public records except as provided by law:

> All records created or received by or under the authority of or coming into the custody, control, or possession of public officials of this State in the course of their public duties are the property of the State. These records may not be mutilated, destroyed, transferred, removed, or otherwise damaged or disposed of, in whole or in part, except as provided by law. Any person shall have the right of access to any public records, unless access to the records is otherwise limited or prohibited by law.

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[5] Because the SRA and LRA are dispositive, the Court need not consider whether the DOJ and Task Force reports may also serve as the basis of a public policy to preserve disciplinary records. Nevertheless, the principles of government transparency and an informed citizenry that permeate the DOJ and Task Force reports likewise form the basis of the public policy reflected in the SRA and LRA to preserve government records. To be clear, however, the Court does not base its decision on the DOJ and Task Force Reports.

Id. at §3. The SRA further creates the State Records Commission, whose duty it is "to determine what records no longer have any administrative, fiscal, legal, research, or historical value and should be destroyed or disposed of otherwise." 5 ILCS 160/16; *see also* 5 ILCS 160/17 ("Regardless of other authorization to the contrary, . . . no record shall be disposed of by any agency of the State, unless approval of the State Records Commission is first obtained."). Finally, knowing destruction of public records without legal authority constitutes a felony: "Any person who knowingly and without lawful authority alters, destroys, defaces, removes, or conceals any public record commits a Class 4 felony." *Id.* at §11. In short, the provisions of the SRA reflect a well-defined and dominant public policy to maintain public records. Indeed, the rule of default under the SRA is to preserve public records.

Like the SRA, the LRA provides that "all public records made or received by, or under the authority of, or coming into the custody, control or possession of any officer or agency shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part, except as provided by law." 50 ILCS 205/4(a). Further, the LRA provides that "any person who knowingly, without lawful authority and with the intent to defraud any party, public officer, or entity, alters, destroys, defaces, removes, or conceals any public record commits a Class 4 felony." *Id.* Public records may only be destroyed with the written approval of the appropriate Local Record Commission, *id.* at §7, the members of which are designated by statute. *Id.* at §6. In addition, section 10 of the LRA provides that the head of each agency shall submit a schedule of "public records in his custody that are not needed in the transaction of current business and that do not have sufficient administrative, legal or fiscal value to warrant their further preservation." *Id.* at §10. Finally, section 10 states that "[t]he Commission shall determine what public records have no administrative, legal, research or historical value and

should be destroyed or otherwise disposed of and shall authorize destruction or other disposal thereof. No public record shall be destroyed or otherwise disposed of by any Local Records Commission on its own initiative, nor contrary to law." *Id.* Thus, like the SRA, the rule of default under the LRA is to preserve public records. *See also Lopez v. Fitzgerald*, 76 Ill. 2d 107, 116 (observing that "Local Records Act is concerned with the preservation of records," and that "the definition of public records is broad and serves to ensure that no important records will be destroyed.").

Several aspects of the SRA and LRA establish the legislature's clear and unequivocal policy favoring the preservation and public availability of government records. First, public records are to be maintained not only for the government's benefit, but the general public's as well. Second, the rule of default for public records is that they are to be preserved. Public records may not be destroyed except as provided by law. Third, knowing and willful destruction of public records constitutes a felony. Finally, only the state and local records commissions may authorize the destruction of public records.

The FOP, however, argues that neither the SRA nor the LRA affirmatively declare a public policy to preserve records; rather, each statute permits destruction of public records so long as the statutory requirements are met. Thus, according to the FOP, there is nothing in the SRA or LRA to preclude the City from entering into a disciplinary file destruction contract, even if the City must first obtain approval to implement it from the Local Records Commission. However, the FOP fails to offer any satisfactory answer to what happens if the Local Records Commission denies the City's request to destroy police disciplinary records. Tr. of Aug. 28, 2017 Hrg., pp. 34-35 (indicating that FOP would have to examine the decision of the local records Commission).

In any case, a public policy may be found even in the absence of the legislature's express declaration. For instance, in *Board of Education v. Illinois Education Labor Relations Board*, 216 Ill. App. 3d 990 (4th Dist. 1991), no statute stated that it was the public policy of the state to safely transport school children. Rather, the court analyzed the constitution, statutes, judicial decisions, and rules and regulations of the school district to determine whether such a public policy exists. The court held that the legislative determination that a school board may provide transportation to school and school-related activities supported a public policy to safely transport school children because it "suggests . . . a corollary desire to ensure the students reach their destination," and "[a]t the very least, these statutes indicate a public policy favoring the transportation of school children and undoubtedly this would include the safe transportation of those students." *Id.* at 1000. So even if the SRA and LRA do not explicitly establish that preservation of government records is a well-defined and dominant public policy, preservation of such records is a necessary corollary to the policies underlying these statutes.

The City also looks to the FOIA as proof of a public policy to preserve government records, arguing that "it would eviscerate the policy behind FOIA favoring disclosure and public use if the City destroyed documents of great public interest, such as the disciplinary files at issue here." City's Mot. at 10. The FOP responds that FOIA disclaims any obligation to preserve records, pointing to Section 1 of the FOIA, which provides that the FOIA "is not intended to create an obligation on the part of any public body to maintain or prepare any public record which was not prepared or maintained by such public body at the time when this Act becomes effective except as otherwise required by local, State or federal law." 5 ILCS 140/1. The FOP likely reads too much into Section 1 of the FOIA, but the Court need not decide this question because the policy to preserve government records is strongly embraced by the SRA and LRA.

Nevertheless, the public policy behind the FOIA informs the Court's decision here for a different reason. As discussed above, in *Fraternal Order of Police v. City of Chicago*, 2016 IL App (1st) 143884, the court held that any arbitration award directing the destruction of the files that were subject to the FOIA request in that case "would violate the FOIA as well as the public policy under the General Assembly's adoption of the Act." *Id.* at ¶32. The FOP argues the appellate court did not prohibit the destruction of disciplinary records that are not subject to a FOIA request or once disciplinary records have been produced pursuant to a FOIA request. But even if the FOP is correct, the City is currently responding to a FOIA request for *all* CR files from 1967 through 2014 in *Green v. CPD*, 15 CH 17646 (Cir. Ct. of Cook County, Illinois). Thus, pursuant to the appellate court's holding in *Fraternal Order of Police v. City of Chicago*, as a matter of the public policy reflected in the FOIA, the City is prohibited from destroying responsive records until that FOIA request, and any others that the City may receive in the interim, is responded to.

Beyond the requirement that disciplinary files be preserved due to pending FOIA requests, the City also has litigation hold obligations in pending lawsuits in federal and state courts alleging misconduct against itself and its police officers. As discussed above, the LRA empowers a municipality to determine, in the first instance, whether records are "needed in the transaction of current business and that do not have sufficient administrative, legal or fiscal value to warrant their further preservation." 50 ILCS 205/10. Thus, the LRA permits the City to retain indefinitely records that in its judgment are needed in the transaction of current business or have significant legal, administrative, or fiscal value to the public. The disciplinary records at issue here must be preserved because of liability exposure that the City and its police officers have in current and future civil litigation. Federal courts have ordered the City to preserve records that could be relevant to police-involved litigation. Destruction of these files would cause the City to

be in violation of these obligations and put the City at risk of being sanctioned. Moreover, in civil lawsuits involving police officers, the City is regularly required to produce the disciplinary files at issue here, sometimes records that are more than five years old. When these lawsuits involve *Monell* policy and practice claims, these requests include department-wide information spanning several years, and not just information related to the underlying incident or the individuals named in the lawsuit. At any given time, there are 40 *Monell* claims pending against the City. Enforcement of Section 8.4 of the CBA would cause the City to be in violation of federal and state court orders, and put it at risk of being sanctioned.

Further, enforcement of the Arbitrator's award also prejudices the City in defending itself against pending lawsuits. Disciplinary files may contain information that the City can use in defending itself and its officers, including in *Monell* policy and practice claims. The destruction of these records would disable the City's defense of these lawsuits. Although section 8.4 of the CBA allows for disciplinary records to be retained during the pendency of civil litigation, this provision is insufficient as it does not account for anticipated future litigation involving unknown officers. The City cannot predict what claims will be filed against it and what disciplinary files will be relevant. If these documents are destroyed, then they cannot be recreated should a lawsuit be filed thereafter. In addition, the destruction of disciplinary files could prejudice plaintiffs asserting civil rights claims against the City, the very class that the City's litigation hold obligation is intended to benefit. The FOP fails to offer any satisfactory approach to reconcile the destruction of police disciplinary records and the protection of the City and its police officers from the exposure that might ensue therefrom in future civil lawsuits.

Finally, the City suggests that preservation of disciplinary records is necessary as it formulates and implements reform policies for its police department and the independent police

review body. Again, the LRA grants the City the prerogative to decide which records are necessary to preserve for the transaction of current business, which would include the City's stated decision to implement reforms in its police department. The FOP negotiated its contract with the City fully aware of the City's prerogative and obligation relating to the retention of public records under the LRA. While the FOP argues that the City agreed to destroy police disciplinary records in contracts over several decades and that the Court should not protect the City from itself, the public policy exception is a judicially created doctrine to protect the public from the parties' offensive agreement, and it matters not that the City benefits from the exception here.

In its final bid to defend the Arbitral Award, the FOP argues that under the Illinois Public Labor Relations Act, 5 ILCS 315/1 *et seq.* ("Labor Act"), the SRA and LRA must yield to the provisions of the CBA. Section 15(a) of the Labor Act states: "in case of any conflict between the provisions of this Act and any other law . . .the provisions of this Act or any collective bargaining agreement negotiated thereunder shall prevail and control." Section 15(b) of the Labor Act states that "any collective bargaining contract between a public employer and a labor organization executed pursuant to this Act shall supersede any contrary statutes, charters, ordinances, rules or regulations relating to wages, hours and conditions of employment and employment relations adopted by the public employer or its agents." Assuming, without deciding, that section 8.4 of the CBA represents a condition of employment, the FOP's argument is unpersuasive because the Labor Act does not control when in conflict with the public policy of Illinois. *See Decatur Police Benevolent and Protective Assn. Labor Comm. v. City of Decatur*, 2012 IL App (4th) 110764, ¶30 ("The wording of section 15 is that when the Labor Act is in conflict with a specific statute or rule regarding of conditions of employment, the Labor Act's

provisions control. Section 15 does not say the Labor Act controls when in conflict with the public policy of the state. If applied as the Union argues, section 15 would swallow the public-policy exception, because, no matter how offensive to public policy an arbitrator's decision is, the arbitrator's decision would stand. We will not read it so broadly, particularly when the public-policy exception has been considered and applied by Illinois courts since the Labor Act's inception." (citations omitted)). Thus, the Labor Act provides no refuge to the FOP.

In conclusion, enforcement of the Arbitral Award violates a well-defined and dominant public policy to preserve government records. To hold otherwise would (i) violate the public policy of maintaining public records for the benefit of the municipality and the general public; (ii) infringe on the municipality and general public's ownership interest in public records; (iii) usurp the municipality's right to determine for itself what records are required for the transaction of business, including legal and administrative matters; and (iv) commandeer the authority of a local records commission as the exclusive arbiter of whether and what public records may be destroyed. Moreover, destruction of important public records, such as the police disciplinary files at issue here, undermines principles of government transparency that are so vital to the preservation of the rule of law. If the City is to be responsive to the citizenry, it must have access to historical police disciplinary and investigative records to make better-informed decisions on policing, a point echoed in the DOJ and Task Force reports. Otherwise, policy makers are condemned to repeat the failings of the past, like the "Thin Blue Line" or "Code of Silence" that Mayor Emanuel declared was a problem "at the heart of the policing profession" in his address to the Chicago City Council on December 9, 2015.

III. CONCLUSION

The City's motion to vacate the Arbitral Award is granted and the FOP's motion to affirm the Arbitral Award is denied.

The Clerk shall notify all counsel of record of the entry of this order.

Entered:

Sanjay T. Tailor

Sanjay T. Tailor

ENTERED
JUDGE SANJAY TAILOR-1870
OCT 18 2017
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Exhibit 3

No. _____

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT/CHANCERY DIVISION

CITY OF CHICAGO, Petitioner/Appellee, v. FRATERNAL ORDER OF POLICE, CHICAGO LODGE NO. 7, Respondent/Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois County Department/Chancery Division No. 2016 CH 9793 The Honorable Sanjay T. Tailor Judge Presiding

NOTICE OF APPEAL

TO: See Certificate of Service

YOU ARE HEREBY NOTIFIED that Respondent/Appellant, Fraternal Order of Police, Chicago Lodge No. 7, hereby appeals to the Appellate Court of Illinois, First Judicial District, Chicago, Illinois, pursuant to Illinois Supreme Court Rule 303(a) from the final Judgment Order entered by the Honorable Sanjay T. Tailor on October 18, 2017 (copy attached), wherein the Court granted the Petitioner/Appellee's Motion to Vacate the Arbitration Award.

By this Appeal, Respondent/Appellant will ask the Appellate Court to reverse the Order of the Circuit Court and grant such other relief as it may be entitled to on this Appeal.

Dated this 16th day of November 2017.

Respectfully submitted,

/s/ Brian C. Hlavin
Brian C. Hlavin

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Brian C. Hlavin
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CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that on or before the hour of 5:00 p.m., this 16th day of November 2017, he filed the foregoing document (Notice of Appeal) with the Clerk of Circuit Court of Cook County, Illinois.

The undersigned further certifies that he served the above-referenced document by United States Mail and by electronic mail to the parties listed below.

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Exhibit 4

VOLUNTARY LABOR ARBITRATION TRIBUNAL
Before George T. Roumell, Jr., Arbitrator

In the Matter of:

CITY OF CHICAGO

-and-

FRATERNAL ORDER OF POLICE
CHICAGO LODGE NO. 7

Gr. Nos. 129-11-035 and 129-12-004
(Policy Grievances)

ARBITRATOR'S OPINION AND INTERIM AWARD

APPEARANCES:

FOR CITY OF CHICAGO

Richard Schnadig, Special Assistant
Corporation Counsel
Tamara B. Starks, Asst. Corporation Counsel
Joseph Martinico, Chief Labor Negotiator
Judy Dever
Donald J. O'Neill, Director, Human Resources

FOR FRATERNAL ORDER OF POLICE
CHICAGO LODGE No. 7:

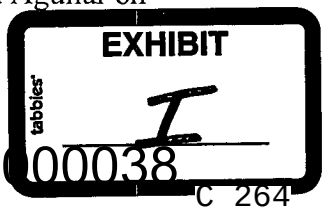
Brian C. Hlavin, Attorney
Patrick N. Ryan, Attorney
Dean C. Angelo, Sr., FOP President

The Grievances and Answers

Grievance No. 129-11-035, initiated at Step 1 on 30 November 2011 by Richard Aguilar, then Grievance Chair of the FOP Chicago Lodge No. 7, on behalf of all affected members reads:

> On 30 November 2011, the Lodge learned that the City of Chicago was retaining files and documents in violation of Section 8.4 of the contract. The Lodge demands that all investigative files, disciplinary history entries, OPS, IPRA & IAD disciplinary records along with any other records or summaries thereof, be destroyed in accordance with the contract. The Lodge further requests that the City be ordered to certify its compliance with Section 8.4 and cease and desist its practice of wrongly retaining records in violation of the collective bargaining agreement, and the contract made whole.

Grievance No. 129-12-004, initiated on April 12, 2012 at Step 1 by Richard Aguilar on



behalf of all affected members reads:

> Today, the Lodge became aware that the Department has not destroyed any disciplinary files since, at least 1998. This revelation occurred during an arbitration hearing of Grievance 015-09-006 when Sgt. Muzupappa, the CO of Records Management for the Bureau of Internal Affairs, stated, under oath, that in 1998 she was told by ADS Kirby that she was to discontinue the practice of destroying any disciplinary files. She went on to state that this included sustained disciplinary files. The Lodge demands that this practice cease immediately and demands that all disciplinary files five years old or older be destroyed immediately as required by the CBA.

On June 8, 2012, then Commander Donald J. O'Neill, Management and Labor Affairs Section of the Chicago Police Department, in a letter to Richard Aguilar denied Gr. No. 129-12-004, writing:

> Grievances: 129-12-004 DESTRUCTION OF DISCIPLINARY FILES
> Grievant: Richard Aguilar on behalf of all FOP members
>
> Dear Mr. Aguilar:
>
> This letter is in response to the above-identified grievance filed by the Fraternal Order of Police, Chicago Lodge 7 ("the Union"). The Chicago Police Department ("the Department") has reviewed the information and circumstances that gave rise to the grievance and, for the reasons stated below, the grievance is denied in its entirety.
>
> The Union alleges that, on April 12, 2012, it first learned that the Department has, notwithstanding Section 8.4 of the collective bargaining agreement, been preserving officer investigative files and disciplinary records and/or histories. This statement, and the grievance itself alleging the Department's wrongful retention of such records, are most surprising given the Union's longstanding knowledge of the Department's open practice of retaining disciplinary records. As the Union well knows, this practice is the result of several Federal Court orders issued in litigation dating back to the early 1990's involving matters of alleged police misconduct. It is even more surprising given the fact that nearly twenty years ago the Union affirmatively attempted to intervene in one of these cases over the issue of record preservation. The Union's knowledge and longstanding acceptance of the Department's practice, demonstrate that the Union has waived its right to grieve this issue given its failure to timely grieve any violation of the pertinent provisions of the collective bargaining agreement during the intervening 20 years.

By way of background, the Union became aware of the retention of disciplinary records more than 20 years ago. In 1990, the City's Corporation Counsel defended Departmental officers in *Fallon v. Dillon*, 90 C 6722, a case filed in the Northern District of Illinois purporting "policy" claims pursuant to 42 U.S.C. § 1983 and *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). During the litigation, plaintiff's counsel made several broad discovery requests in response to which Judge Milton Shadur ordered the City to cease destruction of certain documents, including disciplinary records. Judge Shadur did so despite City objections that the order would result in a violation of relevant provisions of its collective bargaining agreement with the Union. Although the Union did not seek to intervene in this matter to raise its own objections about potential violations of the retention provisions of the collective bargaining agreement, Judge Shadur's order constitutes the first instance of notification to the Union of the Department's duty to preserve disciplinary records.

In 1994, the Union was once again provided notice of the Department's obligation to preserve disciplinary records when it filed a motion for leave to intervene in *Wiggins v. Burge et. al.*, 93 CV 0019, another case alleging police misconduct for violations of 42 U.S.C. § 1983 and 28 U.S.C. § 1367(a). On June 16, 1994, Judge Rueben Castillo granted plaintiff's oral motion seeking preservation of Departmental disciplinary records. Shortly following Judge Castillo's order, the Union in fact published an article in its August 1994 internal newsletter advising its members of the obligation imposed upon the City to preserve disciplinary and investigative records and files, notwithstanding Section 8.4 of the collective bargaining agreement. Thereafter on August 16, 1994, and in an effort to prevent the Chicago Reader and other third parties from obtaining access to the disciplinary records, the Union sought to intervene. This motion was denied. Undeterred, on November 20, 1996, the Union filed a subsequent motion to intervene and that motion was granted by the district court.

Following Judge Castillo's May 9, 2007 order granting the Chicago Reader's request for access and motion to strike the confidential designation attached to the disciplinary records, the Union filed an appeal to the United States Court of Appeals for the Seventh Circuit. Although the appeal was denied due to lack of standing, the Seventh Circuit rejected the Union's attempt to require the destruction of disciplinary records. In fact, the Seventh Circuit did explain that the preservation orders prohibit the FOP [the Union] from enforcing any right to the destruction of documents. *Wiggins v. Martin*, 150 F. 3d 671 (7th Cir. 1998). The Seventh Circuit's decision constitutes explicit notice to the Union of the Department's obligation to preserve such records. What is more, the Union's tacit acceptance of the Department's obligation to preserve disciplinary records is evidenced by its decision to forgo further appeals by way of a motion requesting an *en banc*

> hearing before the Seventh Circuit or a petition for certiorari to the United States Supreme Court.
>
> Further litigation involving the Department by the People's Law Office and others followed and included similar broad discovery requests seeking the preservation of Department disciplinary records. In response to the litigation, the Department, in consultation with the Corporation Counsel, continued to preserve disciplinary records. Similar litigation has been ongoing up until the present time. Neither the Department nor the Corporation Counsel has departed from the practice of preserving disciplinary records. And, the Union has had knowledge of and accepted this practice.
>
> In addition to the federal litigation, the Department and the Union have frequently discussed the retention of disciplinary records at discipline sub-committee meetings and during the past four collective bargaining negotiations. It is also important to emphasize that the Department strictly adheres to Department Directive G.0.08-01 (formerly G.O. 93-03) when making determinations on the appropriate use of certain disciplinary records when recommending discipline in sustained complaint register investigations. To this end, Department retained disciplinary records are not used for such employment decisions.
>
> In view of the Union's twenty year knowledge of and acquiescence to the Department's practice, as well as the Department's continuing legal obligation with respect to the preservation of these records, the grievance is denied in the entirety. Should you have any questions or require further information please contact me at 312-745-5807.

By letter dated June 27, 2012, Commander O'Neill wrote Richard Aguilar as Grievance Chair, Fraternal Order of Police Chicago Lodge No. 7, denying Gr. No. 129-11-035 which began:

> On today's date, the Management and Labor Affairs Section received grievance no. 129-11-035, via e-mail, from Richard Aguilar of the Fraternal Order of Police, Chicago Lodge 7 ("the Union"). The below response to grievance no. 129-11-035 was also sent to the Union in response to a similar grievance, no. 129-12-004, filed by the Union in April 2012. The Chicago Police Department ("the Department") reviewed the information and circumstances that gave rise to grievance no. 129-12-004 and, for the reasons stated below, denied the grievance in its entirety. The Department now denies this grievance, no. 129-11-035, for the same reasons.

The letter then continued essentially reiterating the Department's rationale as set forth in Commander O'Neill's June 8, 2012 answer to Gr. No. 129-12-004.

Section 8.4

Grievance Nos. 129-11-035 and 129-12-004 were filed when the parties' 2007-2012 contract was in effect as the July 1, 2012 to June 30, 2017 contract between the parties did not become effective until November 18, 2014. The focus of the grievances are on Section 8.4 which in the 2007-2012 contract reads:

> **Section 8.4 - Use and Destruction of File Material.**
>
> All disciplinary investigation files, disciplinary history card entries, **Independent Police Review Authority and Internal Affairs Division** disciplinary records, and any other disciplinary record or summary of such record other than records related to Police Board cases, will be destroyed five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, except that not sustained files alleging criminal conduct or excessive force shall be retained for a period of seven (7) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, and thereafter, cannot be used against the officer in any future proceedings in any other forum, except as specified below, unless the investigation relates to a matter which has been subject to either civil or criminal court litigation or arbitration prior to the expiration of the five-(5-) year period. In such instances, the Complaint Register case files normally will be destroyed immediately after the date of the final arbitration award or the final court adjudication, unless a pattern of sustained infractions exists.
>
> Any information of an adverse employment nature which may be contained in any unfounded, exonerated, or otherwise not sustained file, shall not be used against the officer in any future proceedings. Information contained in files alleging excessive force or criminal conduct which are not sustained may be used in future disciplinary proceedings to determine credibility and notice.
>
> A finding of "Sustained - Violation Noted, No Disciplinary Action" entered upon a member's disciplinary record or any record of Summary Punishment may be used for a period of time not to exceed one (1) year and shall thereafter be removed from the officer's disciplinary record and not used to support or as evidence of adverse employment action. The Department's finding of "Sustained - Violation Noted, No Disciplinary Action" is not subject to the grievance procedure.
>
> Information relating to a preventable traffic accident involving a Department Vehicle may be used and/or considered in determining future discipline for a period of time not to exceed two (2) years from

> the date of such preventable traffic accident and shall thereafter not be used and/or considered in any employment action provided there is no intervening preventable traffic accident involving a Department Vehicle and if there is, the two-year period shall continue to run from the date of the most recent preventable traffic accident and any prior incidents may be used and/or considered in employment actions. In no event shall any prior incident five (5) or more years old be used and/or considered.

Issues Presented

The Lodge presents the issue as follows:

> Whether the City violated Section 8.4 of the parties' Collective Bargaining Agreement by its admitted failure to destroy disciplinary records, CR Files and/or other records identified within Section 8.4 of the parties' Collective Bargaining Agreement. If so, what should the remedy be?

The City presents the issue as:

> Whether the city is violating Section 8.4 of the parties' Agreement by retaining Complaint Register and related disciplinary and/or investigatory files pursuant to Court order or otherwise? If so, what is the remedy?

The Parties' Positions

In order to fully appreciate the parties' respective positions when reviewing the history, the circumstances and the current state of affairs surrounding the issue of the destruction of disciplinary files, this Arbitrator deemed it appropriate to set forth the introductory comments of the parties' Counsel prior to addressing the facts.

The Lodge's Position:

In his opening statement, the Lodge's Counsel noted:

> Mr. Arbitrator, this case involves the City's failure to destroy records that are listed within Section 8.4 of the parties' Collective Bargaining Agreement.
>
> While the language has evolved over the years, Section 8.4, entitled Use of Destruction of File Materials, requires the City to destroy disciplinary records, CR files, and/or other records or summaries thereof, which are identified within Section 8.4, once the period of time

for their retention, typically it's a five-year period, has expired.

The provision does allow the retention time period to be tolled if the records relate to a matter that is subject to a civil or criminal procedure.

However, Section 8.4 is clear and specifically states, "In such circumstances the records shall be destroyed upon the conclusion of the proceeding."

Now, while these grievances were filed in 2011 and 2012 respectively, these grievances took on a higher significance once the City notified the Lodge that it had received Freedom of Information Act requests, or FOIA requests, from the Chicago Tribune and Chicago Sun-Times seeking the disclosure of lists of CR investigations and the accompanying disciplinary findings, if any, for all officers dating all the way back to 1969. Thereafter, the City received FOIA requests seeking the underlying CR files related to certain of these cases.

The Lodge filed suit in the Circuit Court of Cook County, and relying on Section 8.4 successfully obtained an injunction prohibiting the release of records related to the first FOIA request and then a second injunction prohibiting the release of the CR files requested by the later FOIA request.

Judge Flynn, in granting both injunctions, relied upon the pending grievances and the importance of maintaining the status quo until this Arbitrator had an opportunity to render a decision and a remedy.

Judge Flynn specifically left to the Arbitrator the role of determining whether the contract has been violated and what remedy, including an order of immediate destruction of records, would be appropriate.

And the evidence will show in this case that the City and the Lodge, since the initial contract was entered into back in 1981, have always had a provision under Section 8.4 requiring the destruction of records.

The evidence will also establish that the City initially complied with the destruction requirement. However, at a date which is unknown, but is believed to be sometime in 1998, the City unilaterally ceased destroying any records identified for destruction within Section B.4 and have since retained such records.

This action by the City was done in secret and not communicated to the Lodge. In fact, the City's official policies continue

to publicize that the City destroyed such records once the retention period has expired.

What the Arbitrator will hear is that beginning in the early 1990s the City was sued repeatedly in federal court, more often than not, by a specific law firm who requested Court orders requiring the City to preserve and turn over records related to the misconduct that was alleged in the particular case.

The first such order was entered by Judge Shadur. However, contrary to the representations I expect to be made by the City here today, none of those orders require the permanent retention of any record. Rather, the order applies only while the litigation remained ongoing.

* * *

The Lodge's Counsel supplemented his opening statement with the following introduction to his post-hearing brief:

In its opening statement at the Arbitration, the City claimed that it "has adhered to the spirit years old." (Tr, p. 28). Assuming (for now) the truth of the City's claim that it never uses stale records, it provides no defense to the City's admitted violation of the destruction requirement in Section 8.4 (Tr. pp. 129-132, 137, 144, 157, 164-165). The City does its best to acknowledge and minimize the difficulties in its position, first noting that "there is language in the contract that says that we should destroy, and there's bargaining history trying to change or modify some of that language for a long, long period of time," (Tr. p. 26). It then suggests that these facts should not "disturb" the Arbitrator, because "where both parties know that the contract is not being followed, then the obligation is on both parties to try and conform the contract to the reality." (Tr. p. 26). Thus, according to the City, it's failure "in obtaining the modification that should have been made to make the contract an honest contract instead of a deceptive contract" should be overlooked (Tr. p. 28).

As the testimony at the hearing makes clear, the existence or non-existence of particular CR files and other disciplinary records can either help or hinder the relative positions of individual Officers, the City, and third-parties. There are reasonable arguments both for and against retaining records indefinitely. Notwithstanding arguments for retention, the City cannot escape the clear language of Section 8.4 which unambiguously requires the destruction of CR files after a set period of time. Any changes to that language must be made in bargaining. It is not enough for the City to say that it tried and failed to eliminate the destruction requirement within Section 8.4, particularly when it had the option to pursue its desired changes through interest

arbitration and chose not to.

> The City has not and cannot establish that its non-compliance is warranted by either contractual exceptions or public policy arguments. Because the destruction requirement in Section 8.4 and the City's breach thereof are clear, the grievances should be sustained and the City ordered to comply with the destruction requirement forthwith. (See pages 1-2, Lodge's brief; footnote omitted).[1]

The City's position was succinctly set forth in then Commander O'Neill's answers to the grievances and in the introduction of its Counsel's post-hearing brief, which reads:

> Section 8.4 of the collective bargaining agreement ("CBA") negotiated between the City and the Fraternal Order of Police, Lodge No.7, ("FOP" or "Union") is undisputedly intended to govern how the City uses Complaint Register files ("CR files") and related records in subsequent disciplinary proceedings. The section's first paragraph requires that disciplinary records be "destroyed" after five years so that the City will not use them against the officer "in any future proceedings in any other forum .. , unless the investigation relates to a matter which has been subject to either civil or criminal court litigation or arbitration prior to the expiration of the five- (5-) year period." The subsequent paragraphs in Section 8.4 set out additional limits on how disciplinary files are to be used in future discipline, including a bar on the City using "not sustained" findings, a one-year limit on the use of findings deemed "Sustained- Violation Noted, No Disciplinary Action," and a two-year limit on the City's use of information related to "preventable" traffic accidents. Taken as a whole, every paragraph of Section 8,4 is focused on the City's use of prior disciplinary records in subsequent disciplinary proceedings. These grievances, however, do not allege any such misuse by the Department of any officers' disciplinary records. Indeed, at the hearing, the Union failed to produce any evidence that the City has used disciplinary records older than five years in any proceeding against any officer, even though they are admittedly retained by the Department. None of the Unions' witnesses presented any evidence that the City has ever used or considered records older than five years against any officer in disciplinary proceedings or otherwise.
>
> Despite the clear purpose of this provision, the Union instead asserts that the Department's well-known and long-standing practice, extending over several decades, of retaining disciplinary files not for use by the City in any future proceedings but rather due to court-sanctioned discovery requests in literally hundreds of civil lawsuits filed by

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[1] References in the quotation as well as in this Opinion to "Tr." is to the transcript of the arbitration hearing.

> Chicago citizens alleging police misconduct, violates Section 8,4' s direction that police officer disciplinary records be "destroyed."
>
> As explained in greater detail below, the instant grievances are entirely without merit and should be denied for the following reasons: First, the Union has unquestioningly known of the Department's practice of retaining disciplinary documents for decades and has acquiesced in it; Second, the City has complied with the negotiated meaning and purpose of Section 8,4; Third, requiring destruction of all disciplinary documents would cause irreparable harm to the City's ability to defend itself and its police officers; Fourth, the City has a legal duty as a matter of public policy to preserve police disciplinary files; Fifth, the recent award in the grievances filed by the supervisory unions is wrong and without precedential value; Lastly, the remedy sought by the FOP is overly broad and unreasonable, and no remedy comports with the law. (Quoting pages 1-3 of City's brief.)

The Evolution of Section 8.4

Section 8.4 appeared in the parties' first Collective Bargaining Agreement covering the period January 1, 1981 through July 1, 1983, and in its entirety read:

> **Section 8.4 Use And Destruction Of File Material.**
>
> Disciplinary Investigation Files, other than police Board cases, will be destroyed by the Internal Affairs Division five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, unless the investigation relates to a matter which has been subject to either civil or criminal court litigation prior to the expiration of the five year period. In such instances, the Complaint Register case files normally will be destroyed five years after the date of the final court adjudication, unless a pattern of sustained infractions exists.
>
> Any information of an adverse employment nature which may be contained in any unfounded, exonerated or otherwise not sustained file, shall not be used against the officer in any future proceedings.
>
> Any record of summary punishment may be used for a period of time not to exceed one (1) year and shall thereafter not be used to support or as evidence of adverse employment action.

In the successor 1983 through December 31, 1985 contract, the first paragraph of Section 8.4 was amended as set forth in the following italics language to expand the definition of the disciplinary records covered by the Section that continues in the 2007-2012 contract and even in

the successor 2012-2017 contract.

> Section 8.4 Use and Destruction of File Material.
>
> Disciplinary Investigation Files, *Disciplinary History Card Entries, OPS disciplinary records, and any other disciplinary record or summary of such record* other than Police Board cases, will be destroyed five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, unless the investigation relates to a matter which has been subject to either civil or criminal court litigation prior to the expiration of the five year period. In such instances, the Complaint Register case files normally will be destroyed five years after the date of the final court adjudication, unless a pattern of sustained infractions exists.
>
> Any information of an adverse employment nature which may be contained in any unfounded, exonerated or otherwise not sustained file, shall not be used against the officer in any future proceedings.
>
> Any record of summary punishment may be used for a period of time not to exceed one (1) year *(three (3) years in the case of vehicle license violations)* and shall thereafter not be used to support or as evidence of adverse employment action.

In addition, as italicized, the third paragraph added the "(three (3) years in the case of vehicle license violations)" as to summary punishment records.

The 1985-1988 contract made the following change to Paragraph 1 of Section 8.4 as italicized, providing:

> Section 8.4 Use and Destruction of File Material.
>
> Disciplinary Investigation Files, Disciplinary History Card Entries, OPS disciplinary records, and any other disciplinary record or summary of such record other than Police Board cases, will be destroyed five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, *and therefore cannot be used against the officer in any future proceedings in any other forum,* unless the investigation relates to a matter which has been subject to either civil or criminal court litigation prior to the expiration of the five year period. In such instances, the Complaint Register case files normally will be destroyed five years after the date of the final court adjudication, unless a pattern of sustained infractions exists.

In the 1989-1991 contract in Section 8.4 the following change as italicized in the last

sentence of the first paragraph: "In such instances, the complaint register case file normally will be destroyed five years after the date of the final arbitration award or the final court adjudication unless a pattern of sustained infraction exists".

There were no changes in the successor 1992-1995 contract in the Section 8.4 language. In the 1995-1999 Collective Bargaining Agreement, the first two paragraphs of Section 8.4 were inadvertently omitted when the contract was printed. But, there were no changes negotiated as to the first two paragraphs. (Jt. Ex. 1; Tr. 47-48). However, in the 1995-1999 Agreement the following paragraphs were introduced:

> Section 8.4 – Use and Destruction of File Material.
>
> A finding of "Sustained - Violation Noted, No Disciplinary Action" entered upon a member's disciplinary record or any record of Summary Punishment may be used for a period of time not to exceed one (1) year and shall thereafter be removed from the officer's disciplinary record and not used to support or as evidence of adverse employment action. The Department's finding of "Sustained - Violation Noted, No Disciplinary Action" is not subject to the grievance procedure.
>
> Information relating to a traffic accident involving a Department Vehicle may be used and/or considered in determining future discipline for a period of time not to exceed two (2) years from the date of such traffic accident and shall thereafter not be used and/or considered in any employment action provided there is no intervening traffic accident involving a Department Vehicle and if there is, the two-year period shall continue to run from the date of the most recent accident and any prior incidents may be used and/or considered in employment actions. In no event shall any prior incident five (5) or more years old be used and/or considered.

The language in Section 8.4 that appears in the 2007-2012 contract first appeared as amendments to the July 1, 1999-June 30, 2003 contract, namely, "except that non-sustained files alleging criminal conduct or excessive force shall be retained for a period of seven (7) years after the date of the incident or the date which the violation is discovered whichever is longer and the term "immediately" was added to the language "will be destroyed immediately after the date of

the final arbitration or final court adjudication unless a pattern of sustained infraction exists". The second paragraph language "information contained in files alleging excessive force or criminal conduct which are not sustained may be used in future disciplinary proceedings to determine credibility". The term "preventable traffic accident" was also introduced in the 1999-2003 contract and continued in the 2003-2007 contract and, as noted, in the 2007-2012 contract.[2]

With this history of the language that was adopted by the parties in negotiations or in what turned out to be three interest arbitrations reveals that since the initial adoption of Section 8.4 there is the use of the word "destroyed" consistently in Section 8.4; that the definition of discipline records has been expanded; that the retention in certain cases has been expanded to seven years; and that arbitration is included, along with civil or criminal court litigation. In addition, there were certain exceptions adopted as to the general use of records in future disciplinary proceedings.

The Applicable General and Special Orders

On 14 December 1975, effective 15 December 1975, then Superintendent of Police James M. Rockford issued General Order 75-22 "Complaint and Disciplinary Procedures", wherein the Order provided in part:

> XVI. EXPUNGEMENT OF RECORDS OF COMPLAINTS
>
> All Complaint Register case files involving the investigation of complaints against Department members shall be destroyed five years from the date of the conclusion of an investigation unless the investigation relates to a matter which has been subject to either civil or criminal court litigation prior to the expiration of the five year period. The Complaint Register case files, in such instances, will be destroyed

[2] As a matter of fact, the 2012-2017 contract in Section 8.4 is identical to the 2007-2012 contract except there is an added statement after the third paragraph providing "reprimands and suspensions of one (1) to five (5) days will stay on the officer's disciplinary history for a period of three (3) years from the last date of suspension or date of reprimand, or five (5) years from the date of the incident, whichever is earlier."

five years after the ate of the final court adjudication.

The significance of this Order is, though it was entitled "Expungement of Records of Complaints", the language in Paragraph XVI used the term "shall be destroyed" and set forth a "five year" time period. General Order 75-22 was issued prior to any collective bargaining agreements between the City and the Lodge but, as just noted, contained the concept of "destroy".

General Order 75-22 was rescinded by General Order 82-14 which was not introduced into this record. However, Addendum 6A issued on 16 May 1986, effective 17 May 1986, classified as an addendum to General Order 82-14, provided in part:

> Q. Expungement of Records of Complaints
>
> 1. Disciplinary investigation files, other than Police Board cases, will be destroyed by the Internal Affairs Division five years after the date of the incident or the date upon which the violation is discovered, whichever is longer, unless the investigation relates to a matter which has been subject to either civil or criminal court litigation prior to the expiration fo the five year period. In such instances, the Complaint Register case files normally will be destroyed five years after the date of the final court adjudication, unless a pattern of sustained infractions exists.
>
> 2. Any information of an adverse employment nature which may be contained in any exonerated file, shall not be used against the member in any future proceedings.

General Order 93-3-6, effective 13 January 1993, as did the 1986 addendum, contained the same language as to expunging of records of complaints, namely:

> R. Expungement of Records of Complaints
>
> 1. Disciplinary investigation files, other than Police Board cases, will be destroyed by the Internal Affairs Division five years after the date of the incident or the date upon which the violation is discovered, whichever is longer, unless the investigation relates to a matter which has

> been subject to either civil or criminal court litigation or arbitration prior to the expiration of the five year period. In such instances, the Complaint Register case files normally will be destroyed five years after the date of the final arbitration award or the final court adjudication, unless a pattern of sustained infractions exists.
>
> * * *

The addendum to General Order 82-14 as well as General Order 93-3-6 tracked the then effective Section 8.4 language in terms of the five year time line and the "normally will be destroyed five years after the date of the final court adjudication, unless a pattern of sustained infractions exists". This particular language was not in General Order 75-22.

Special Order S08-01-04 entitled "Sustained Complaint Options", issued on 11 March 2013, effective 17 March 2013, though issued after the date of the grievances, announced that it rescinds the 13 January 1993 version and does continue the same language that this Arbitrator has noted appearing in previous Orders over the duration of time, namely, in Paragraph II and II.N.2.a:

> N. Expungement of Records of Complaints
>
> * * *
>
> 2. Members represented by the Fraternal Order of Police, Chicago Lodge 7 bargaining unit.
>
> a. Disciplinary investigation files, other than Police Board cases, will be destroyed/purged by the BIA five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, except that not sustained files alleging criminal conduct or excessive force shall be retained for a period of seven (7) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, and thereafter, cannot be used against the member in any future proceedings in any other forum, unless the investigation relates to a matter which has been subject to either civil or criminal court litigation or arbitration prior to the expiration of the five

> (5) year period. In such instances, the case files normally will be destroyed/purged from the five (5) years after the date of the final arbitration award or the final court adjudication unless a pattern of sustained infractions exists.

Special Order S08-01-04 does add the five year time line and does introduce the term "be destroyed/purged". It is interesting to note that Paragraph N.3 from the same Order addresses "members represented by the Policemen's Benevolent and Protective Association of Illinois (PBPA) Unit 156 Sergeants, Lieutenants and Captains, and American Federation of State, County Employees (AFSCME) in 3.A adopts the same language as N.2.a as regards to the Lodge. It is further noted that the Unit 156 contracts refer to "purged" rather than "destroyed". The importance of the history of the General Orders in regard to the Lodge contract as noted is that the concept of destroy came from the Department's Orders and has continued even to the current Special Order S08-01-04 which though adding the term "purge" seemed by doing so to recognize the language of other contracts. In other words, the term "destroyed" is not a new concept and initially came from the Department.

Prior Arbitration Decisions Regarding Section 8.4

Within two years of the expiration of the first contract between the parties – January 1, 1981 through July 1, 1983 – where Section 8.4 first appeared, arbitrators in disputes between the parties, namely, the City of Chicago Department of Police and the Fraternal Order of Police Chicago Lodge No. 7, were called upon to interpret Section 8.4 as might be applicable to the matter before the arbitrator. Arbitrator Kelleher issued an award finding that the City violated Section 8.4 and ordered "all references to instances occurring more than five years previously be destroyed" and ordered that "Officer X's records wherever maintained be appropriately expunged and all references to instances occurring more than five years previously be destroyed". In the

same year (1985), in Gr. No. 710-83-04, Arbitrator Gabriel N. Alexander, considering a just cause issue in a behavior alert, noted at page 9:

> Insofar as Officer Bauer is concerned, I perceive no pending issue of consequence. The evidence is uncontradicted to the effect that all files and documents pertaining to the Behavioral Alert counselling session to which he was subjected have been destroyed. That portion of the Union's request for relief has already been effectuated. ...

Though not referring to 8.4, earlier in the opinion Arbitrator Alexander had made reference to Section 8.4 and this quoted comment seemed to be a recognition of the applicable Section 8.4 provisions as to destroying records.

In 1985, Arbitrator Goldberg in *Hayes Gr. No. 11-84-4* sustained a grievance in part challenging an Officer's removal from active duty after a fitness for duty examination on the basis that the doctor's reliance on C.R.s.

In 1988, Arbitrator Kossoff in *Gr. Nos. 03-85-09, 003-85-10* concluded that the transfers that were challenged had been based upon the use of information in C.R.s in violation of Section 8.4 required that the transfers be rescinded.

In 1997, Arbitrator James R. Cox, in *Gr. No. 284-95-004*, where a transfer involving an Officer with 27 years of service was challenged, was being based on the use of discipline records older than five years in violation of Section 8.4, Arbitrator Cox granted that portion of the grievance challenging the use of the older discipline records and in doing so wrote at pages 9-10:

> The portion of the Grievance relating to a violation of 8.4 is granted. While the Commander did not rely on the stale discipline information or upon unfounded or not sustained files and that evidence was not used "against" Officer Anderson, that information, as she conceded, should not have been made available to her. Furthermore, Section 8.4 states that such stale disciplinary records "will be destroyed five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer". The Department violated 8.4 in failing to destroy the stale documentation. The part of the Grievance relating to stale violations is granted.

All state CR violations are to be removed from Grievant's file and destroyed except as otherwise provided by Section 8.4.

* * *

(Emphasis in original.)

The Cox opinion in the opinion of this Arbitrator is even more precise as to the destroy language of 8.4 than the previous decisions cited in which the same conclusion as to the meaning of "destroy" was reached in a variety of circumstances.

In 2012 Arbitrator Meyers, in *Gr. No. 123-10-054/179*, in a decision rendered during the life of the 2007-2012 contract, denied the grievance based on the proposition that the Lodge failed to prove there was an existing C.R. file or that any C.R. file was consulted in regard to the request for a fitness for duty examination. However, in doing so, Arbitrator Meyers recognized the prohibition and requirements of Section 8.4 when he wrote at page 17: "Under the clear and unambiguous language of Section 8.4, there is no doubt that the City is not authorized to retain unsustained C.R. files for as long as nine years".

The conclusion that can be drawn from an examination of the above cases is that arbitrators consistently have recognized that the "destroyed" language of Section 8.4 is unambiguous.

The Testimony of Sergeant Muzupappa

Sergeant Phyllis Muzupappa is the Commanding Officer of the Records Section, having assumed her Command in 1998. (Tr. 108-109; 132). A short time after she arrived as Commanding Officer of Records in 1998, she was told by the Office of Legal Affairs that she could not destroy any disciplinary files. (Tr. 132).

Referring to Section 8.4, Sergeant Muzupappa testified that the Records Section she commands keeps the records described in Section 8.4. (Tr. 111-113). Sergeant Muzupappa

testified that the records are both kept as physical documents and on computers. She described the CLEAR system involving investigations conducted by the Internal Affairs Division and the Independent Police Review Authority. (Tr. 113-114).

Sergeant Muzupappa described the "CRMS" system known as the Complaint Register Management System, which is a computer data base housing "the members' complaint and disciplinary history"; that the complaint and disciplinary history are two separate histories and can be pulled up currently on CRMS. (Tr. 115-116).

Sergeant Muzupappa described the CLEAR system as coming into existence in 2007 and CRMS in 2000. (Tr. 118-119). Before 2000, Sergeant Muzupappa stated there was a main frame which initially she testified that she could not answer whether it was still in existence and where it was. She also stated that the main frame began in 1967 and apparently was used until the CLEAR system was developed in 2000. (Tr. 119-120).

Sergeant Muzupappa also described keeping paper files in boxes in various locations, including "the warehouse". (Tr. 120-122). In terms of paper documents, Sergeant Muzupappa testified that the volume, apparently referring to the number of boxes, was up to something "like 3,600 plus". (Tr. 122).

Sergeant Muzupappa testified that there was limited access to the files, including through the CLEAR system and from the CRMS, normally for Command Channel Review and members within the Internal Affairs Division and persons in Records as well as individuals in the Advocate Section. (Tr. 124-125). Sergeant Muzupappa testified that the main frame goes back to 1967; that she did not recall if any actual paper files existed from 1967; that she was aware that either on the CLEAR system, the CRMS, the main frame or hard copy that there were records more than five years old from the date of the incident. (Tr. 129).

Sergeant Muzupappa acknowledged that she did not have any first-hand knowledge as to whether records were destroyed after five years before she came to Records. She also stated that she does view the main frame and does not use it to enter data; that the material on the main frame has never been destroyed. (Tr.135-137).

This Arbitrator notes that in Special Order S-08-01-04 issued 11 March 2013 there is a reference to the "electronically attached to the automatic complaint system (ACS). In the provision of Special Order S-08-01-04 quoted by this Arbitrator in N.2.a there is a reference to the "case files normally will be destroyed/purged from the ACS five years ...". Yet, Sergeant Muzupappa made no reference to the ACS in her testimony nor was she asked about the ACS. Instead, the computer system she referred to was the CLEAR system and the CRMS. Interesting, though asked numerous questions about the main frame, she at one point suggested that she did not know what information was on the main frame and then suggested that since 2000 she has used the main frame to review, but not to enter data. (Tr. 136-137).

Sergeant Muzupappa also stated that the CRMS system is programmed to go back five years. (Tr. 138-139). She was aware that "I know electronically [referring to files prior to 1998], there was files that were expunged that information electronically. As far as the physical files, sometimes we do searches and we can't find that file so we're going to just assume that was destroyed. But I can't, you know, I don't know what happened prior to my ...". (Tr. 146-147). She also at the same time testified that there were some paper files beyond five years that have still been kept. (Tr. 147).

Though there were times that Sergeant Muzupappa's testimony may have been equivocal, she was firm in stating that since 1998 no records have been destroyed; that she acknowledged that there were some files prior to 1998 that were electronically "expunged" and that some paper

files were missing. She also acknowledged that there were files older than 1998 that are still kept by Records.

The Court Orders

Based upon the record evidence, beginning around 1991 there were a series of Court Orders emanating from the United States District Court, Northern District of Illinois Division, in lawsuits brought against the City or Officers or both where plaintiffs were requesting discovery or preservation of Police disciplinary records. In *Fallon v Dillon*, Docket No. 90-C-6722, before the Honorable Milton I. Shadur, U.S. District Judge, in a hearing held on March 13, 1991, the following colloquy occurred between Judge Shadur and Patrick Rocks representing the defendant:

> THE COURT: Right. Because there is no need for you to do that. So we are going to replace that, as I say, with April 4th at 9:00 o'clock. In the meantime, though, I do think that it's appropriate to order preservation of records. I gather that there is a regular procedure under which things get disposed of as they reach a certain age.
>
> MR. ROCKS: Yes.
>
> THE COURT: And in the interim that should not be done.
>
> MR. ROCKS: If may comment just for the record?
>
> THE COURT: Yes.
>
> MR. ROCKS: The City does have a procedure by which Complaint Registers that are not sustained are destroyed after a five-year period.
>
> THE COURT: Yes.
>
> MR. ROCKS: It's a procedure devised by a contract between the Police Union and the City. And Mr. Taylor – I advised Mr. Taylor that the City could not voluntarily –
>
> THE COURT: I flow that.
>
> MR. ROCKS: – breach the terms of that contract.

> THE COURT: I know that. I recognize that. And basically remember it's not – these are not being produced currently, so it's not as though you are undercutting the force of the existing agreement with – I don't know whether it's a federation or whatever.
>
> MR. ROCKS: It's the Fraternal Attorney Order of Police.
>
> THE COURT: Fraternal Order of Police. But in any event, preservation it seems to me is important given the nature of the claim. And that can be further – you know, resolution of that in substantive terms can be for the future. Before anything would be done along those lines it would seem to me that it might be well for you to notify counsel for the Fraternal Order of Police. They may have some legal position that they want to advance –

Though Mr. Rocks was stating in 1991 that the City did destroy records after five years and the Court recognized that there could be a regular procedure for disposal "as they reached a certain age" issued a preservation order which was also discussed with the Court on March 21, 1991. The upshot of this was that on March 22, 1991 Patrick Rocks, Assistant Corporation Counsel, wrote to Marvin Gittler, then General Counsel of the Lodge, referring to a number of cases brought by the same law firm at the time seeking the discovery of "disciplinary histories of police officers who had no contact with plaintiffs in each case" and, noting Judge Shadur's preservation Order, "for that reason the City cannot continue the destruction of records pursuant to Section 8.4 of the agreement between the City and the Lodge ...".

On March 29, 1991, Mr. Gittler wrote Mr. Rocks acknowledging the letter of March 22, 1991, pointing out that Section 8.4 was the bargain struck which was "an effective balance between the right to privacy interest of officers covered by our agreement and the City's claimed right to consider work history in making current disciplinary judgments". Mr. Gittler went on to state "Lodge 7 will hold the City of Chicago to the terms of its bargain and contract; and will hold the City accountable for any breach".

In *Wiggins v. Burgee*, Case No. 93-C-199 before the Honorable Ruben Castillo, on June

6, 1994 there was a hearing over the preservation of files. In that hearing, Assistant Corporation Counsel Donald Zoufal represented to the Court that "there has been an order that was entered by Judge Shadur in a case that is now no longer before the Court and again by Judge Moran in a case that no longer is before him with regard to preservation of complaint registers". (P6, C. Ex. 4). Mr. Zoufal then stated, "There are contract issues that the City has with regard to the bargaining unit that causes some concern over that and the "policy is pursuant to the bargaining agreement to eliminate that documentation". (P6, C. Ex. 4). Mr. Zoufal again advised Judge Castillo "It's important to understand, though, those orders are gone because the cases are gone". (P8, C. Ex. 4). Nevertheless, Judge Castillo issued an order preserving the records involved, noting "all we want to is stay at the status quo". (P9, C. Ex. 4).

The Lodge through its Counsel on August 16, 1994 sought to intervene, seeking in effect to have the Court recognize the provisions of Section 8.4. The motion to intervene by the Fraternal Order of Police on August 16, 1994 was denied. (P5, C. Ex. 4). On August 29, 1996, prior to the scheduled trial date, the case was settled. However, the Lodge's motion to again intervene filed on November 20, 1996 was granted by the District Court on November 26, 1996.

The matter was appealed to the Seventh Circuit in the Seventh Circuit in an opinion reported in *Wiggins and Chicago Reader et al v. Leroy Martin et al,* 150 F3d 671 (1998). The Seventh Circuit held that the Lodge had no standing to intervene. Thomas Pleines, who became General Counsel, had signed the initial motion to intervene plus the accompanying affidavit. *See, City Ex. 5.* In the initial motion, Lodge Counsel specifically in paragraph 3 set forth the Section 8.4 language existing at the time.

Counsel Pleines had advised the membership of the Lodge of the *Wiggins* case and the efforts to intervene before Judge Castillo in both the August and September 1994 issue of the

Lodge's newsletter. (L. Ex. 38). *See, City Ex. 8.*

After the Lodge filed its notice of appeal in *Wiggins*, which according to the Seventh Circuit was around June 9, 1997, on November 13, 1997, Donald R. Zoufal, General Counsel to the Superintendent, had written FOP Lodge No. 7 Counsel Thomas J. Pleines as follows:

> This is in response to your letter of October 23, 1997, concerning the destruction of complaint register files. Please be advised that it is the position of the Department that it is now and always has been in compliance with the provisions of section 8.4 of the collective bargaining agreement with the FOP. As you know, an exception for destruction is provided under section 8.4 for materials relating to civil and criminal court litigation. I advised you back in August that the Corporation Counsel has indicated that destruction of C.R. file material is precluded by several on going civil proceedings. I suggest that you set up a meeting with the Corporation Counsel's office so that they can answer any specific questions you have with regard to this issue.

Introduced as City Exhibit 7 was an Order signed by United States District Judge James B. Moran, United States District Court for the Northern District of Illinois, Eastern District, in *Fuentes and Young v. City of Chicago et al* in Case No. 92-C-1871. The Order directs the City's Department of Police to preserve a wide range of Police records involving Police Officers, though the Order is undated by the case number that appears that the Order was in the same time period as the *Fuentes* and *Wiggins* period.

The above history of Federal Court Orders directed to the Department to preserve records involving Police Officers prompted Jeffrey Given, then Chief Assistant Corporation Counsel, at the request of George Rosenbrock, then Commander of the Management and Labor Affairs Section of the Chicago Police Department, to write the following letter dated January 29, 2002 concerning "preserving C.R.s beyond contract retention period":

> As Chief Assistant Corporation Counsel responsible for defending the City in police misconduct cases, I am responding to your request for a short historical summary of litigation involving the retention of CR files. My understanding is that this summary is to be forwarded to the

Captain's Union in connection with a grievance alleging that the City has violated the captains' bargaining agreement "by retaining and/or maintaining disciplinary files and records past the agreed upon retention period." This summary explains why that assertion is not correct.

As you are aware, since the early 1990's the City has been subjected to an unbroken chain of lawsuits brought by the People's Law Office ("PLO") and other civil rights plaintiffs' lawyers alleging various "policy" claims pursuant to 42 U.S.C. § 1983 and Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978). One of the central allegations in these cases is that the City fails to properly investigate and discipline police officers accused of misconduct. Typically, plaintiffs' attorneys take an expansive view of this claim and essentially contend that all disciplinary files of all police officers for all time are potentially relevant; thus, plaintiffs serve extremely broad discovery requests seeking such records, and the City then fights over the scope of the request and the subsequent production.

One such case was Fallon v. Dillon, 90 C 6722 (N.D. Ill.). In Fallon, the PLO made extremely broad discovery requests for disciplinary records, to which the City objected. In 1991, the City was ordered by Judge Shadur to cease destruction of all documents that were potentially responsive to the PLO' s discovery requests, despite the fact that the City objected because following his order would cause the City to violate the retention provisions of the F.O.P. contract. The F.O.P. chose not to seek intervention in order to raise their own objections. (Attachment A)

After Fallon, the PLO made a concerted and successful effort to ensure that they always had a lawsuit pending against the City alleging a "policy" claim and making the same (or even broader) discovery requests for disciplinary records as were made in Fallon. In the early and mid-1990s, the PLO sought and received written judicial orders that, as in Fallon, expressly required the City to preserve and maintain all relevant disciplinary records regardless of age or bargaining agreement. Over time, the PLO ceased to seek such written orders; instead, they merely filed their "policy" case and served their related discovery requests, and the City was obligated by the force of previous court orders and by federal law to preserve any document that potentially was responsive to those discovery requests.

As the 1990's wore on, more plaintiffs' attorneys began bringing more of the same "policy" cases and making more of the same (or even broader) discovery requests as did the PLO. I have enclosed various samples of some typical discovery requests served by the PLO and other plaintiffs' attorneys in lawsuits dating from Fallon through cases filed only a few months ago. (Attachment B) As you will see, the scope of the requests makes it virtually impossible not to retain every CR that has existed since the time of Fallon.

> The net effect of this history is that, since 1991 and continuing to the present (and into the foreseeable future), the City has been required to retain disciplinary files and records that would otherwise not have been retained under the various bargaining agreements. If the City unilaterally decided to destroy such documents without the approval of each federal judge before whom was pending a "policy" claim and its attendant discovery requests, the City would be subject to petitions for rules to show cause why it should not be held in contempt of court and would face other judicial sanctions that would adversely and severely impact the defense of the City and every defendant police officer. And given the broad scope of the discovery requests and their broad interpretation by courts, there is no reasonable way to try weeding out C.R.s that might fit some relatively small "loophole."
>
> Consequently, the City no longer fights the "retention" battle, but rather fights the "production" battle on a case-by-case and request-by-request basis. However, as in 1991, the unions are free to file a motion to intervene in any "policy" case they may desire if they wish to litigate the issue of document retention. Based on the F.O.P.'s failed efforts to intervene in Wiggins v. Martin, 150 F.3d 671 (7th Cir. 1998), it would seem unlikely that such a strategy would succeed.
>
> In the meantime, the City will continue to abide by the contract provisions while at the same time following the rules and laws of the federal courts. To the extent documents are kept past their usual retention period, that is done solely for purposes relating to matters that are subject to civil court litigation, a circumstance that is permitted by the contract.
>
> I hope this answers your questions. Please call me if you need more information.

Donald J. O'Neill, the Department's current Director of Human Resources, and previously Commander of the Management and Labor Affairs Section, at one time was President of both the Lieutenants Association and General Counsel and President of the Captains Association. As such, he was involved in negotiations for those two Associations in 2002, resulting in their respective collective bargaining agreements. (Tr. 150-152). Director O'Neill has been admitted to the Bar of Illinois since 1984. In connection with his negotiations on behalf of the Sergeants, Lieutenants and Captains who were negotiating as one group in 2003, he researched in the Federal Court records for any Orders concerning destroying Officers' discipline

records, including the Castillo and Shadur Orders. Director O'Neill stated he found the Shadur and Castillo Orders "but those cases had been resolved". Director O'Neill further stated that as a result of his research, referring to 2003, "that there were no current judicial Court Orders, Federal Court Orders that said that you cannot destroy any files". (Tr. 155-156).

However, in his January 29, 2002 letter to Commander Rosenbrock, Jeffrey Givens was discussing court activity and noted that "only a few months ago there were lawsuits filed seeking discovery of disciplinary records."

Up to this point in this Opinion, this Arbitrator had discussed the historical antecedent leading to the adoption of Section 8.4, the bargaining history involving the evolution of 8.4 and successive contracts resulting in the language set forth in the 2007-2012 contract, the contract before this Arbitrator, and for that matter the 2012-2017 contract. Similarly, this Arbitrator has also referenced that the General and Special Orders of the Department over the years have tracked in the broadest respects the language of Section 8.4.

The reference to the history of the preservation orders in the various Federal Court cases along with the efforts in the *Wiggins* case of the Lodge to intervene, along with the internal analysis of the effect of those Court Orders on the application of 8.4 as represented by the Givens and Zoufal letters seem to confirm that until about 1991 the Department was complying with Section 8.4; that since about 1991, the advent of the Court Orders, the Department is maintaining that if there is compliance with 8.4 it is limited.

Past Practice Or Acquiescence

The City is maintaining that the Lodge by past practice or, in other words, acquiescence, has in effect agreed that since 1991 the Department, in applying Section 8.4, was not destroying disciplinary records.

As pointed out in the still relevant seminal article by Arbitrator Richard Mittenthal, Past Practice in the Administration of Collective Bargaining Agreements, 59 Mich L Rev 1017 (1961), past practices, namely, the practices that have either been recognized by the parties or have been mutually permitted to be established, may serve to interpret, amend, implement the agreement or establish enforceable conditions of employment. Thus, past practice can be used as a tool of interpretation when the contract language is ambiguous, when the contract language is general, and when there is no contract language and the practice fills a missing gap. There is a fourth category where some arbitrators have used past practice to arrive at a decision, namely, utilizing past practice to modify unambiguous language. It is the latter category that the City is urging this Arbitrator to apply the principle of past practice or, in other words, has acquiescence to the City's not destroying disciplinary records.

As pointed out, the "destroyed" language and the "cannot be used against the officer in any further proceedings" language along with the reference to five years, seven years and, later on, as to certain actions one year and two years, are clear and unambiguous. The line of authority suggesting that where the contract language is clear and unambiguous despite a past practice, the Arbitrator is required to follow the language of the contract. *See, e.g., Lackawanna Leather*, 113 LA 603, 608 (Pelofsky, 1990); *BASF Wyandotte Corp.*, 84 LA 1055, 1057-58 (Caraway, 1985). In *Anheuser-Busch Inc. v Teamsters Local 744*, 280 F3d 1133 (2013), the Court held in effect that clear contract terms cannot be modified by past practice. Nevertheless, there are some situation where arbitrators have recognized where there is clear contract language the "existence of a binding past practice may be established where it is shown to be the understood and accepted way of doing things over an extended period of time. Mutuality of the parties must be shown". *Reed Tool Co.*, 115 LA 1057, 1061 (Bankston, 2001).

However, long ago, in terms of modifying clear language, Arbitrator Killingsworth in *Bethlehem Steel*, 13 LA 556, 560 (1949), noted that a positive acceptance or endorsement of the practice by the parties must be shown to support a modification by a binding past practice.

There was a dispute on this record as to the extent that the Lodge through its representatives knew since 1991 that the Department was not destroying records as set forth in Section 8.4. By March 22, 1991, Assistant Corporation Counsel Rocks had advised the Lodge's then Attorney Marvin Gittler by letter of the protective orders being issued in *Fallon v Dillon* and other cases. But the March 29, 1991 letter from Mr. Gittler in response, to repeat, contained the statement, "Lodge 7 will hold the City of Chicago to the terms of its bargain and contract; and will hold the City accountable for any breach".

Thomas Pleines was General Counsel to the Lodge from 1993 until 2002, preceding Marvin Gittler. (Tr. 36-37). By August 1994, Thomas Pleines was aware in the *Wiggins* case of the existence of a broad protective order. Mr. Pleines discussed the *Wiggins* case and the issue of the disciplinary files in the Lodge's newsletters in July and August 1994.

David Johnson, who was the City's chief labor negotiator of 2004 to 2010, the Chief Assistant Corporation Counsel from 1989 to 2004, and previously a Senior Supervisory Assistant Corporation Counsel, positions in which he was either familiar with the Collective Bargaining Agreement with the Lodge or as early as 1992 was involved in negotiations with the Lodge. (Tr. 167-168; 197-199). In his capacity, Mr. Johnson became familiar with litigation in the Federal Courts where Orders were sought and obtained concerning preservation of Officer discipline files. Mr. Johnson testified there was a change in policy in the Department as to the destruction of C.R. files, namely, that prior to 1991 he understood "that C.R. files unless they qualify for one of the exceptions set forth in 8.4 were destroyed pending the five year mark" but the change

according to Mr. Johnson came about because of the Federal Court litigation. (Tr. 170-171).

Throughout Mr. Johnson's testimony, he suggested that the representatives of the Lodge knew of the change going back as far as the decisions of Judges Shadur and Castillo. (Tr. 71-74). In particular, Mr. Johnson referenced the interest arbitration before a panel consisting of Arbitrator Steven Briggs and the Lodge's appointed Thomas Pleines and City appointed Darka Papushkewych, members, in connection with the 2000 contract.

On September 27, 2001, the interest arbitration panel in a hearing heard testimony from a City representative discussing the fact that the City had been sued in Federal Court and that from time to time there have been Federal Court injunctions relevant to maintaining of discipline files and in particular the representative stated, "At any given time they have a number of cases pending, they always have some cases pending, and this group of lawyers have been successful for over a decade to my understanding of obtaining upon the filing of one of their lawsuits an order from a judge, a federal judge or a number of judges, basically barring the City from physically destroying any of its – any of its old investigative files or CR files. And as I said, this has been going on for a period of time." The representative then stated to a question:

> Q So pursuant to these orders, how far back does the City have to maintain files for?
>
> A To my understanding, it's at least a decade, at least ten years.
> (City Ex. 12, p. 306-308).

This testimony was heard by the Lodge's representative on the panel.

Mr. Johnson testified in regard to the negotiations leading to the 2012-2017 contract that a member of the discipline sub-committee representing the Lodge, Rich Aguilar, stated that "we knew you weren't destroying the files". (Tr. 193). However, it is noted that this testimony was over objection and the fact is, by the time of Mr. Aguilar's comment, he had filed at least the first

grievance if not the second grievance now before this Arbitrator and by those times clearly had knowledge of the City's retention of the files.

Mr. Johnson, as did Director O'Neill, who was testifying in regard to his experience as Commanding Officer of the Department's Management and Labor Affairs Section, testified that until the two grievances involved in this matter, the City had not received any grievances from the FOP Chicago Lodge No. 7 protesting the failure to destroy C.R. files as set forth in Section 8.4. (Tr. 183-184; 160).

Director O'Neill testified that, as a member of the Lodge when he was a Police Officer, he was aware, as were other Officers, that the City was retaining records. He also testified that he learned from letters that the City was not destroying records and that officers who were involved in depositions complained that they were confronted with "C.R. files that were more than five years old, ten years old, and I don't know how they got these. And this whole Shadur thing was in the FOP newsletter. It was discussed." (Tr. 158-160).

Sergeant Muzupappa testified that in her capacity as Commanding Officer of the Records Section she had conversations with Harold Kunz who was involved on the FOP's negotiating team for the 1995 negotiations and in the 1994 newsletters was listed as a member of the Lodge's Board of Trustees. According to Sergeant Muzupappa, she complained to Harold Kunz "about the fact that I had to keep these files." (Tr. 142-143; 45).

This Arbitrator has set forth a litany of evidence on the record that arguably established knowledge on the part of the representatives of the FOP that the City was not complying with the provisions as to destruction of C.R. files as set forth in Section 8.4 for a considerable period of time in an effort to determine whether there was the requirement of mutuality supporting a past practice to modify unambiguous contract language. The problem for the City is, noting the

discussion by such arbitrators as Bankston in *Reed Tool Co.*, 115 LA 1057,1061 (2001), or Arbitrator Killingsworth in *Bethlehem Steel*, 13 LA 556, 560 (1949), there was not the unequivocal acceptance of the alleged past practice to override unambiguous contract language because of one glaring reason.

The problem for the City as to being able to reach the unequivocal acceptance of the alleged past practice necessary to override unambiguous contract language first begins with the Gittler letter of March 29, 1991 insisting that Section 8.4 be followed. General Counsel Pleines participated in the negotiations for the contracts covering the periods from 1995 through 2003. (Tr. 43-51). During his testimony, he essentially denied that during this period the Lodge was never told during negotiations that the City had ceased destroying complaint register and similar files. The following stipulation was entered on the record:

> MR. SCHNADIG: So if questioned about -- in any of your capacities with FOP, or for that matter representing any other union, the City has never explicitly told you that they had ceased destroying complaint register and similar files; is that true?
>
> BY THE WITNESS:
> A. That is true and accurate.
>
> * * *
>
> ARBITRATOR ROUMELL: Is the stipulation accepted?
>
> MR. HLAVIN: Yes, I'm sorry. I accept the stipulation.
>
> ARBITRATOR ROUMELL: It's received.
> (Tr. 50-51).

In regard to Mr. Zoufal's letter of November 13, 1997, Mr. Pleines testified:

> A. Yes. This is a letter sent to me by Don Zoufal, and that's Z-o-u-f-a-l, on November 13th, 1997.
>
> Q. And can you tell us what were the circumstances or events as you recall that gave rise to this letter?

A. Well, going from what the letter says, Mr. Zoufal is responding to a letter of mine dated October 23rd, 1997, which concerned the destruction of complaint register files, and Mr. Zoufal is assuring me and assuring the Lodge that the City has always been in compliance with 8.4.

Q At any point related to the events concerning this letter, did anyone from the City advise Lodge 7 that the City was not complying with Section 8.4 and had ceased destroying all records referenced within 8.4?

A. No.
(Tr. 49).

Again, if all there was on this record is the evidence as to the knowledge by Lodge representatives that the Courts were issuing injunctions and discovery that prevented the destruction of certain records, along with such testimony quoted above before Arbitrator Briggs leading to the 1999-2003 contract, the City could perhaps argue that there was acquiescence by virtue of a mutual adopted past practice because there was some knowledge. However, the bargaining history undermines such an argument.

The parties seem to suggest that prior to Judge Shadur's Order in *Fallon v Dillon* in 1991 the Department was destroying records. The *Fallon* litigation as well as other litigation as expressed in Mr. Rocks' letter of March 22, 1991 was known when the parties were engaged in formulating their 1992-1995 agreement which resulted in an interest arbitration before this Arbitrator. Except for the adding of "final arbitration award", there was no change to the Section 8.4 language in the 1992-1995 contract in that the "destroyed" language was continued. In the 1995-1998 contract, the printer inadvertently left out the first two paragraphs of Section 8.4 but the record evidence is that the parties recognized that there were no changes in the first two paragraphs from the 1992-1995 contract and that the "destroyed" language continued.

In bargaining the 1999-2003 agreement, the City on September 13, 1999 had a proposal to delete the word "destroyed" from the first paragraph of Section 8.4 and substitute "purge from the online file system". (L. Ex. 16; Tr. 52). Later, on April 11, 2002, the City had an amended proposal providing for "will be destroyed ten (10) years after the investigation is completed ...". (L. Ex. 18). The reason for doing so as this Arbitrator has already quoted was discussed before the interest arbitration panel chaired by Arbitrator Briggs.

The July 1, 1999-June 30, 2003 contract was the result of negotiations and the interest arbitration award. As already noted, there were changes in the first two paragraphs of Section 8.4. But none of the changes eliminated the "destroy" language. There were changes in the time limits by providing a five year and seven year limit for retaining. And there was the provision, as noted, that "information contained in the files alleging excessive force or criminal conduct which are not sustained may be used in further disciplinary proceedings to determine credibility and notice". But, to repeat, though there was an opportunity in the interest arbitration to change the term "destroyed", and the City attempted to do so, the City was not successful in doing so during the period where apparently there were Court injunctions and discovery proceedings.

The negotiations for the July 1, 2003-June 30, 2007 contract highlight the proposition that the parties were continuing to consider the language of the first two paragraphs of Section 8.4 and yet the "destroyed" language continued in the 2003-2007 agreement.

On September 13, 2003, Lidia Taylor, Executive Director, Justice Coalition, Greater Chicago, and allegedly a liaison for 70 religious legal education and community organizations, wrote Darka Papushkewych, Chief Labor Negotiator, City of Chicago Law Department, urging certain amendments or changes to Section 8.4 be changed by the City, including a proposal that

"disciplinary records regarding a particular officer should be retained for as long as an officer works for the CPD, and at least three years thereafter. Accordingly, the JCGC recommends a removal of this language". (U. Ex. 25). Ms. Taylor's letter was shared with the Lodge's bargaining team. Yet, on January 23, 2004, the City proposed to continue the "destroyed" language with the five year and seven year provisions.

During these same negotiations, the Lodge had proposed a four year period. Nevertheless, the 2003 contract ended up with the "destroyed" language and the five and seven year time lines. This bargaining history for the 2003-2007 contract and the resulting continuing of the "destroyed" language against a background where the City was aware of the Court Orders and arguably so were Lodge representatives, the parties specifically in a give and take continued the "destroyed" language. This action does not sound like acquiescence to retaining files other than as set forth in the Section 8.4 exceptions.

In the negotiations for the 2007 contract, the contract as issued here, the City had proposed as to Section 8.4 on November 19, 2007, that "all disciplinary records related to sustained complaint register case files will be retained for the duration of the member's employment with the Department". This language was rejected. The parties continued the five year, seven year time lines and the destruction language. (U. Ex. 28). The only change in the 2007-2012 Section 8.4 language is that the parties substituted "Independent Police Review Authority and Internal Affairs Division" for the previous Office of Professional Standards and Bureau of Internal Affairs.

It is also noted that the 2007-2012 contract came about pursuant to an interest arbitration chaired by Arbitrator Edwin Benn. The arbitration panel made no changes as proposed by the

City and continued the "destroyed" language.

In the negotiations for the 2012-2017 contract, there was again an attempt to obtain retention language for the duration of the member's employment with the Department, which was rejected and the language of the 2007-2012 language was continued. Though David Johnson maintains that the purpose of making the proposals was to conform to the practice or acquiescence, the fact is this bargaining history even up to current times belies the fact that there was an unequivocal mutually accepted past practice or that the Lodge was acquiescent in the retention of all disciplinary files.

"Destroyed"

Viewed from the various prospectives that this Arbitrator has thus far employed, the Section 8.4 "destroyed" language in regard to discipline records that qualify under the five or seven year benchmark in 8.4 has been and has become a feature of the recordkeeping of the Chicago Police Department. The term "destroyed" existed prior to the parties' first Collective Bargaining Agreement as evidenced by the 1975 General Order 75-22 and continues as part of the recently issued Special Order S08-01-04. The "destroyed" language has continued in the successor contracts since 1981 to the present, despite attempts to modify the language and despite the fact that three of the contracts, including the 2007-2012 contract, were the result of interest arbitration where the "destroyed" language was not changed. Though there was an attempt to suggest that the Lodge and its representatives knew that as early as 1991 the Department was not destroying records because of Court litigation, the fact is the continued utilizing of the term "destroyed" in successor contracts belied any acquiescence or viable, enforceable past practice to override the clear and unambiguous term "destroyed". And then

there were the arbitrators who, on occasion considered the term "destroyed", had applied its obvious meaning to eliminate. There is no other way that this Arbitrator can interpret the contract language.

In reviewing the language in the dispute between these parties, this Arbitrator's attention was called to the November 4, 2015 decision of Arbitrator Jules I. Crystal in the arbitration between the *Chicago Police Benevolent and Protective Association and City of Chicago Department of Police*, Case Nos. SGTS-14-013, SGTS-14-013 (amended), CPTS 14-001, LTS 14-003. To begin, Arbitrator Crystal was not faced with the daunting faced by this Arbitrator because he was dealing with different contracts that did not include the "destroyed" language, but rather "purged" language. Thus, Arbitrator Crystal, at page 33 of his opinion, recognized that though he was agreeing that the online information should be purged, noted: "The City has organized and stored this data in file boxes which have been kept in a number of locations including a warehouse facility. Since this information is not on the 'online file system', the requirements of Section 8.4 are not applicable". Earlier, as page 33, Arbitrator Crystal wrote, "The record confirms the existence of source investigated files".

At page 34, Arbitrator Crystal wrote, "Thus, the City's obligation to remove – without having to destroy – the records from the online file system already existed in clear words prior to this obligation. The investigation files that are in storage, discussed *infra*, are not addressed by Section 8.4."

At page 41, Arbitrator Crystal writes, "As noted earlier, the record herein reveals that original source investigation files of all complaints are retained and stored by the City. Therefore, the City has the capability to comply with the language for which it and the

Association bargained, and yet still provide historical information required for litigation purposes".

In other words, Arbitrator Crystal did not have before him the task of determining the meaning of the term "destroyed" as used by the parties. In this regard, at page 31 of his opinion, Arbitrator Crystal noted in regard to the 1998 negotiations with the Sergeants, Lieutenants and Captains, the City's attorneys, James Franczek and David Johnson, who negotiated that contract on behalf of the City, specifically testified that they advised the joint Sergeants/Lieutenants/ Captains bargaining team that the City would not destroy the disciplinary records. There was no such testimony before this Arbitrator except that David Johnson, while acknowledging that the City had attempted in several negotiations to change or modify the "destroyed" language, only stated specifically at negotiations for the 2012-2017 contract that the City was not destroying records. This was after the grievances were filed.

Finally, Arbitrator Crystal, as is obvious, was not faced with the "destroyed" language.

Section 8.4 Revisited

Paragraph 1 of Section 8.4, which is central to the dispute here, bears repeating:

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

> arbitration award or the final court adjudication, unless a pattern of sustained infractions exists.
> (Emphasis supplied by Arbitrator.)

The five year and seven year benchmarks are there to be read as are the exceptions. The "destroyed" language is there to be read as is the "civil or criminal court litigation or arbitration" provision if such litigation or arbitration commenced prior to the five year period. But then there is the language which this Arbitrator has emphasized, "... the Complaint Register case files normally will be destroyed immediately after the date of ... unless a pattern of sustained infractions exists".

This analysis brings this Arbitrator to certain statements of acknowledgment in the Lodge's post-hearing brief. At page 47-48 of the Lodge's brief, the following is stated, "The Lodge is not suggesting that CR files can only be retained pursuant to the litigation exception where there is a Court order precluding their destruction. The Lodge fully understands that while litigation is pending (or reasonably anticipated) the parties are required to retain records which may be relevant to litigation not withstanding any document destruction/retention policy". This Arbitrator also notes that after making this statement the Lodge's Counsel writes, "The problem for the City is that it stretches this general rule beyond the breaking point effectively assuming that it cannot destroy any records if there is any litigation pending then or potentially arising regardless of how related the records actually are to the litigation".

At page 49, Lodge Counsel writes, "Of course, Section 8.4 itself allows the City to retain documents subject to litigation until such time as litigation is concluded. The Lodge simply is not seeking to have the City destroy records which it must retain due to pending litigation. However, if the City is notified of litigation concerning a dozen officers, then it needs to

implement a litigation hold as to that relevant universe, not to "every shred of paper or electronic document forever".

At page 50, Lodge Counsel writes, "While the City provided testimony regarding an officer involved in a shooting case requiring analysis of CR Files on shooting cases covering a ten year period (Tr. pp. 235-236) even that universe of files is still finite in identifiable. There is no dispute that this finite universe of records may be retained during the pendency of litigation without violating Section 8.4. While the City is subject to a dozen, if not hundreds, of separate civil rights suits at any given time (Tr. pp. 215-216), there was no evidence provided by the City that 100% of CR files are relevant to pending or reasonably anticipated litigation now at the time of the grievances or at any time since the Sadur, Moran and Castillo orders in the 1990's."

At page 51, Lodge Counsel writes, "If somebody is convicted of a crime they could not credibly argue that subsequent reverse conviction claim is 'reasonably anticipated, to the point where the City is required to maintain records until long after the person is out of prison. However, the mere potentiality of litigation is not sufficient to trigger a litigation hold or for the City to invoke the litigation exception to Section 8.4. Only if litigation is pending or reasonably anticipated at the five (or seven) year earmark may the record be preserved".

At page 77 of their brief, Lodge Counsel writes:

> As Judge Flynn noted, the *Wiggins v. Martin* case (Lodge Ex. 39) supports the view that Section 8.4 is a valid, enforceable contract provision and that the Lodge acted properly by invoking it before the documents at issue find their way to third-parties. (Lodge Ex. 40, p. 56). Judge Flynn correctly explained that "*Wiggins* held that the Lodge lacked standing in that case because it had suffered no injury because of the Litigation exception and because, in any event, the documents at issue were already in the hands of third parties not in privity with the contractual requirements imposed on the City." (Lodge Ex. 40, p. 56). The Lodge is not asking for the City to somehow be responsible for destroying records in the hands of third-parties. It is seeking the

> destruction of records before they can make it into the hands of third-parties under circumstances in which destruction places the parties in the position they would have been in but for the City's breach.

The reason this Arbitrator has quoted extensively from sentences and paragraphs from the Lodge's post-hearing brief is to test the Lodge's understanding of the last sentence of paragraph 1 of Section 8.4 and particularly the term "normally will be destroyed". It is clear what the ending phrase "unless a pattern of sustained infractions exists" means. But is the Lodge recognizing that once a file has been released through discovery or preservation order to parties engaged in litigation with the City or involving Police Officers, that those files need not be destroyed because of reasonably anticipated future litigation by counsel who have obtained those files?

This inquiry dovetails the testimony of Liza Franklin who has been with the City of Chicago Department of Law since February 1997 and is currently Deputy of the Federal Civil Rights Litigation in the Corporation Counsel's Office whose responsibility is defending the City and Police Officers in civil suits. (Tr. 213-214). After describing in detail the need to preserve C.R. files, Ms. Franklin testified as follows:

> Q. When you were discussing earlier the potential for having a Court enter an adverse inference if we were unable to produce a document, in your experience, do you believe it would be sufficient at this point to say, "We destroyed those because of this Collective Bargaining Agreement or under -- or pursuant to a schedule"?
>
> A. It would not.
>
> Q. And why not?
>
> A. Well, first of all, other people have a lot of these CRs.
>
> If, for example, we destroyed the City's copy of Jon Burge CRs, that just means we have to get them from the People's Law Office. So the only party that is hampered in the defense is the City of Chicago.

> Second of all, litigation is pending. There's always litigation pending. And so if we destroyed CRs today, we are in violation of at least one of those policy claims.

(Tr. 236-237).

It was brought to the Arbitrator's attention that the People's Law Office is a frequent counsel for plaintiffs in cases involving the Chicago Police Department and its Police Officers and has attained over the years a number of discipline files pursuant to discovery orders and preservation orders. This has been true of other lawyers involving lawsuits against the City and its Police Officers.

There are two points to be made from this discussion. First, as should now be obvious by this Opinion, this Arbitrator will find that there is an obligation on the part of the City to destroy the files described in Section 8.4 that are beyond the enumerated benchmarks set forth therein and are not within the exceptions noted in Section 8.4. The second point, however, is that there is a litigation exception which in noting the comments in the Lodge's brief the Lodge seems to recognize, particularly when third parties have the information. The question is whether the proclivity of some law firms or any lawyer in Cook County to bring lawsuits against the City and Police Officers if those firms or lawyers have the files or the information contained therein, does this mean that those files are not to be destroyed as coming within the flexibility of the term "normally" as used in the last sentence of the third paragraph of Section 8.4 or the concept of anticipated litigation in regard to the use of those files already in the hands of law firms or lawyers that were acquired through preservation and discovery orders? It is for this reason that in fashioning an award will give the Lodge and the City an opportunity for a short period of time to address the litigation exception set forth in Section 8.4 within the parameters as just raised by this Arbitrator after considering the comments in Counsel's brief.

Although the City may have understandable reasons not to destroy any disciplinary files due to litigation concerns, the City has over the years engaged in numerous collective bargaining sessions resulting in numerous agreements with a number of changes increasing the limitations in Section 8.4, the City has not been able in contract negotiations with the Lodge, although attempting to do so, to obtain what the City is seeking in defending against these grievances. Any way that this Arbitrator has viewed the history and circumstances, the contractual path leads to one conclusion that the discipline records are to be destroyed if the records are within the definition and outside the benchmarks or exceptions set forth in Section 8.4. The only caveat to this conclusion is to give the parties an opportunity to explore the meaning of the last sentence as involving files already released to third parties through court litigation involving lawyers who may have the propensity to continue to sue the City of Chicago on behalf of various clients and have information in the files that have been released for this, as noted, this Arbitrator will address in the Award.

Public Policy

Both the United States Supreme Court and the Illinois Supreme Court have recognized that an arbitration award that violates law or public policy is subject to being vacated by the Courts. *United Paperworkers International Union v. Misco Inc.*, 484 U.S. 29, 42 (1987); *American Federation of State, County and Municipal Employees AFL-CIO v. State of Illinois Dept. Of Mental Health, et al*, 124 Ill.2d 426, 460 (1988). However, as the Supreme Court noted in *Misco*, 484 U.S. at 43, in order to apply the public policy exception, "some explicit public policy as is well defined and dominate as ascertained by reference to laws and legal precedent and not from general considerations of supposed public interest".

This caution set forth in *Misco* is not new to these parties. Arbitrator Sinicropi noted in *Detective Promotion Grievance*, # 129-90-049 & 129-90-063, p. 15-16 (1991):

> An arbitrator must be aware of the legal concerns and public policies surrounding the resolution of the dispute. Clearly, an arbitrator would be loathe to mandate a resolution which would render either party to be in violation of the law as such award would surely be subject to challenge.
>
> * * *
>
> This Arbitrator is of the opinion that he clearly has a duty to construe Collective Bargaining Agreements in light of statutes and case law. And he may also take into account well-settled public policy, if it does not conflict with the labor agreement and is either explicitly argued by the parties or implied in their presented evidence and/or argument. Moreover that public policy must be clearly articulated by statutory law or specific judicial decision and not merely be a general notion of what the state of affairs is.

In his opening statement, Counsel for the City made the observation that the retention comports with "policy reflected in the Freedom of Information Act statute here in Illinois and the local Record Act". (Tr. 28). In testimony, Liza Franklin was asked the following questions and answered:

> Q. With respect to -- you mentioned Kalven, and you mentioned FOIA.
>
> It's correct that nothing under the Freedom of Information Act, FOIA, requires the police department to maintain records, right?
>
> A. True.
>
> Q. FOIA only requires the police department to turn over records that are in its possession, correct?
>
> A. Correct.
>
> Q. If the documents do not exist, there's no obligation to turn them over, correct?
>
> A. Correct.
>
> (Tr. 242-243).

There is the interesting analysis which is indeed persuasive on this Arbitrator of the Honorable Peter Flint, Judge of the Circuit Court of Cook County, IL, Chancery Division, who in *FOP Order of Police and Chicago Lodge No. 7 v. City of Chicago et al,* in Case No. 14-CH-17454, in a proceeding held on that matter on December 15, 2015, reported at pages 52-56:

> The language of Section 8 just about directly contradicts the City's position that a record which should have been deleted has to be produced because the language of Section 8 calls for a two-step process by an employer.
>
> The first step is to review a personnel record and the second step is to delete information which is more than four years old. If the information is there when the record is reviewed, IPRRA says it should be deleted before the information is disclosed.
>
> So the notion that information that shouldn't be in a file is nevertheless fair game under FOIA is certainly not supported by Section 8 of IPRRA.
>
> The City argues, however, that Watkins versus McCarthy, 2012 IL App (1st) 100632 held that IPRRA is not a state law which would prohibit the disclosure of information contained in CR files to the extent such information may fall within the scope of IPRRA but was required to be disclosed under FOIA. The City's invocation of Watkins without qualification comes in my view close to inexcusable. The Watkins' decision, when you read it, turns out to be based on the 2009 version of the legislation. But effective January 1, 2010 Section 7.5(q) of FOIA, 5 ILCS 14017.5(q) took effect. Watkins did not consider 7.6(q) and could not have considered 7.5(q) because Watkins carefully pointed out that it was dealing with a version of the legislation which predates 7.5(q).
>
> 7.5(q) creates an exception -- an explicit exception to FOIA for, quote, information prohibited from being disclosed by the Personnel Record Review Act, end of quote.
>
> In light of Section 7.5(q), it would be impossible to apply the language of the Watkins' court that I just quoted to this situation. At a minimum it would require a whole lot of explaining. The City not only didn't explain it. The City ignored it. The City also cited Kalven, K A L V E N versus the City of Chicago, 2014 IL App (1st) 121846 for the proposition that CPD complete registered histories generally are not exempt from disclosure under FOIA Section 7. But Kalven also does not address Section 7.5(q). It considered only whether CRs were exempt from discussion under 7.1 -- Sorry -- 7(1)(n) or 7(1)(f) holding

that they were not.

The Kalven court's opinion makes clear that its opinion concerns those exceptions and no others. In fact, the Kalven court explicitly declined to rely on cases considering other FOIA exemptions, Gekas, G E K A S, being one of them.

Neither Watkins nor Kalven, therefore, is instructive on the issue of the impact of Section 7.5(q) on this case. Furthermore, Watkins and Kalven are also factually distinct from this case because in those cases the parties objected to disclosure of all of the requested documents. There was no nuance about it.

In this case, on the other hand, the Lodge only objects to disclosure of documents that are over four years old and that, therefore, fall within FOIA's 7.5(q) exemption.

In short, Count 1 of this case is mostly about a FOIA provision which was not considered in either Kalven or Watkins. In reply, the plaintiffs having pointed this out, the defendants offer an argument that 7.5(q) really doesn't mean anything. I decline to hold that 7.5(q) doesn't mean anything.

7.5(q) on its face says that FOIA does not require disclosure of that which IPRRA -- of that -- let me get the grammar correct. That FOIA does not require disclosure of information as to which IPRRA prevents disclosure and where we began was with IPRRA Section 8 which says and delete disciplinary reports, letters of reprimand, or other records of disciplinary action which are more than four years old.

The argument that this is all meaningless which is essentially the City's position taken in the City's reply doesn't do much for me. And the argument that the information in question doesn't fall within IPRRA Section 8 because isn't not a personnel record comes close to challenging my common sense, but at any event, is not exactly a self evident conclusion which I am prepared to pitch my tent on as a matter of law so as to prevent the plaintiffs from even being heard on their arguments in this matter.

The City also cites Wiggins versus Martin, 150 F3d 671. That's another miscitation. The City asserts that in Wiggins versus Martin, the Seventh Circuit recognized that the police department's policy of retaining CRs beyond a five-year period is not a breach of the CBA, I don't think Wiggins held that at all. Wiggins held that the Lodge lacked standing in that case because it had suffered no injury because of the litigation exception and because, in any event, the documents at issue were already in the hands of third parties not in privity with the contractual requirements imposed on the City. The horse was out of the

> barn. Let's stop talking about the barn door.
>
> To that extent, if Wiggins is relevant at all in this discussion, it supports the plaintiffs position because Wiggins says if the information once gets out of the bag, there is no remedy, and that is exactly what the plaintiffs have argued.

This analysis certainly answers any questions about the Freedom of Information Act as applied to Section 8.4. In fact, Section 8.4 does retain most files for at least five years and some files for at least seven years as a result of careful negotiated contracts between the parties. Addressing a public policy argument based on the Freedom of Information Act on its face fails. Furthermore, as this Arbitrator views the matter, the grievances here were filed two years before the suit before Judge Flint which would suggest that any claims for files beyond the benchmarks, unless within the contractual exceptions, would be invalid because the files should have been destroyed by virtue of the contract.

In *Police Benevolent and Protective Association Unit No. 5 et al v. City of Springfield*, 7th Judicial Circuit Sangamon Cty, 13-CH-504 (2013), the trial court did grant summary judgment in favor of releasing certain discipline files of the Springfield Police Department pursuant to a Freedom of Information request even though the collective bargaining agreement required destruction of all Internal Affairs files over five years old. Besides the fact an unpublished order of a trial court in Illinois is not considered precedential value, *Norton v. City of Chicago*, 293 Ill. App.3d 620, 625 (Ill. App. 1st Dist. 1997), this Arbitrator believes that Judge Flint's analysis of the Freedom of Information Act as applied to the situation involving Section 8.4 is more persuasive than *Springfield* and emphasizes that the specific public policy claim by the City, based upon the Freedom of Information Act, is not well taken, recognizing that certain files as set forth in Section 8.4 are kept for various amounts of time with five years being a minimum.

The City's Counsel has correctly noted that pursuant to the Illinois Local Records Act, 50 ILCS 205/7, City files cannot be destroyed without the approval of the Local Records Commission. The Department has in place since 7 April 2004 Special Order S09-03-01, "Records Management", that provides for the destruction of certain records providing there is approval by the Local Records Commission which recognizes the impact of the Local Records Act. Presumably, as to other records not at issue in this case, the Department, following Special Order S09-03-01, has been disposing of records from time to time pursuant to the procedure noted in the Special Order, including obtaining permission from the Local Records Commission.

This Arbitrator recognizes this point but notes that in the context of this dispute there is no showing that the City has applied to the Local Records Commission to destroy the discipline files that were subject to the mandate of Section 8.4. Nor is there any showing that the Local Records Commission denied such application or permission.

Given the existence of a procedure of Special Order S09-03-01, this Arbitrator has no basis to suggest that the issuance of an award granting relief in these grievances violates public policy based upon the Local Records Act. Whether this becomes an issue at a later date in another forum is not before this Arbitrator.

The bottom line is that this Arbitrator, aware of *Misco* and aware of the Illinois Supreme Court's concerns as to arbitrators issuing awards contrary to specifically definable public policy as noted in *AFSCME v. Dept. of Mental Health*, has not been shown that the enforcement of the carefully negotiated retention policy set forth in Section 8.4, which was confirmed basically by the recent Special Order S08-01-04 is contrary to law or public policy. For this reason, this Arbitrator concludes that in issuing an Award that enforces Section 8.4 he is doing so consistent

with State law and not contrary to State public policy for the reasons enumerated above.

The Remedy

Although the Lodge has proposed an extensive remedy, this Arbitrator believes that because of the nature of the grievances and the underlying concerns plus the language of Section 8.4 that has benchmarks with provisos, the approach to a remedy should be tempered so as to reflect the integrity of the Agreement and the practicalities involved from the viewpoints of both parties.

Having made the above statement, this Arbitrator, based upon the analysis in the Opinion, makes a finding that once the method in doing so and the records to be destroyed have been determined, the final Award shall be entered directing the City to destroy all discipline records covered by Section 8.4 now in existence, regardless of the format in which they exist, namely, physical files or electronic records, for which the benchmark for destruction or the provisions related to litigation or arbitration are applicable, unless there is a Section 8.4 exemption. But, before a final Award can be entered an Interim Award will be entered to answer the question raised by this Arbitrator concerning the litigation exception and to give the opportunity to the City in negotiations with the Lodge to have input as to the method and procedure to be followed in destroying eligible disciplinary records as well as to give the City the opportunity to list records that are exempt from destruction and the Lodge to respond to such list and for the parties to attempt to agree on a method of resolving disputes. Thus, the Interim Award will provide as follows:

(1) The matter shall be remanded back to the parties until March 15, 2016 during which time the parties are directed to attempt to negotiate between themselves a time line and

method to implement the findings set forth above that the City should be directed to destroy all records covered by Section 8.4 not in existence, regardless of the format in which they exist, namely, physical files or electronic files, for which the benchmark for destruction or the provisions related to litigation or arbitration are applicable or there are exceptions provided therein.

(2) By February 15, 2016, the City shall provide a list to the Lodge of all records which the City believes should not be destroyed, specifying the reasons why the records should be retained.

(3) By February 15, 2016, the City shall provide a list of records other than those discussed in Paragraph (2) above that it wishes to remain in anticipation due to pending or actual threatened litigation.

(4) As part of the remand as discussed in the Opinion, for records that have already been released in litigation involving law firms or lawyers that have a proclivity to sue the City of Chicago and its Officers, whether the term "normally" would suggest that such records because of anticipated litigation should remain, both the Lodge and the City shall have until February 9, 2016 to submit statements to this Arbitrator as to whether "normally" would encompass the anticipation of litigation as to the possible use of records already released in anticipation of subsequent litigation. It is anticipated that the statements should not be longer than three to four typed pages, if that, and not a regurgitation of the arguments in their briefs. After receipt of these statements, unless there is agreement between the parties on the point, this Arbitrator will make a ruling on the issue by February 20, 2016.

(5) If there are disputes between the parties as to the records not to be destroyed, the

parties are to submit to this Arbitrator by March 15, 2016 their agreed upon method of resolving said disputes as to the current list and recommendations as to resolving disputes as to records to be destroyed in the future.

(6) The parties, either jointly or individually, are to report in writing to this Arbitrator by March 15, 2016 as to whether they have reached any agreements as to the method of implementing a final Award based upon this Arbitrator's finding or any agreement as to resolving any disputes concerning records to be or not to be destroyed. The Arbitrator intends to issue after receiving the report from the parties, but no later than April 15, 2016, his final Award.

(7) The time lines set in this Interim Award are specific. However, on request by either party, the Arbitrator will consider extending the time lines.

It should also be noted that in setting forth the areas to be covered in the remand, the parties should understand that this Arbitrator made a basic finding upon which he intends to issue a final Award upon, but is giving the parties an opportunity to resolve the procedural matters and come to some understandings as to what records are affected. It should also be clear that any claim by the City that all records are in anticipation of litigation would not be in keeping with the spirit of the Interim Award as that matter has been addressed in the Opinion.

Pursuant to the provisions of Article 9.8, the Interim Award will provide that the Arbitrator's fees and expenses shall be borne by the City of Chicago as the City's position was not sustained.

INTERIM AWARD

1. The matter is remanded back to the parties until March 15, 2016 during which

time the parties are directed to attempt to negotiate between themselves a time line and method to implement the findings set forth above that the City should be directed to destroy all records covered by Section 8.4 not in existence, regardless of the format in which they exist, namely, physical files or electronic files, for which the benchmark for destruction or the provisions related to litigation or arbitration are applicable or there are exceptions provided therein.

2. By February 15, 2016, the City shall provide a list to the Lodge of all records which the City believes should not be destroyed, specifying the reasons why the records should be retained.

3. By February 15, 2016, the City shall provide a list of records other than those discussed in Paragraph (2) above that it wishes to remain in anticipation due to pending or actual threatened litigation.

4. As part of the remand as discussed in the Opinion, for records that have already been released in litigation involving law firms or lawyers that have a proclivity to sue the City of Chicago and its Officers, whether the term "normally" would suggest that such records because of anticipated litigation should remain, both the Lodge and the City shall have until February 9, 2016 to submit statements to this Arbitrator as to whether "normally" would encompass the anticipation of litigation as to the possible use of records already released in anticipation of subsequent litigation. It is anticipated that the statements should not be longer than three to four typed pages, if that, and not a regurgitation of the arguments in their briefs. After receipt of these statements, unless there is agreement between the parties on the point, this Arbitrator will make a ruling on the issue by February 20, 2016.

5. If there are disputes between the parties as to the records not to be destroyed, the

parties are to submit to this Arbitrator by March 15, 2016 their agreed upon method of resolving said disputes as to the current list and recommendations as to resolving disputes as to records to be destroyed in the future.

6. The parties, either jointly or individually, are to report in writing to this Arbitrator by March 15, 2016 as to whether they have reached any agreements as to the method of implementing a final Award based upon this Arbitrator's finding or any agreement as to resolving any disputes concerning records to be or not to be destroyed. The Arbitrator intends to issue after receiving the report from the parties, but in any event no later than April 15, 2016, his final Award.

7. The time lines set in this Interim Award are specific. However, on request by either party, the Arbitrator will consider extending the time lines.

8. The Arbitrator's fees and expenses shall be borne by the City of Chicago.

GEORGE T. ROUMELL, JR.
Arbitrator

January 12, 2016

Exhibit 5

VOLUNTARY LABOR ARBITRATION TRIBUNAL
Before George T. Roumell, Jr., Arbitrator

In the Matter of:

CITY OF CHICAGO

-and-

FRATERNAL ORDER OF POLICE
CHICAGO LODGE NO. 7

Gr. Nos. 129-11-035 and 129-12-004
(Policy Grievances)

ARBITRATOR'S OPINION AND AWARD

APPEARANCES:

FOR CITY OF CHICAGO

Richard Schnadig, Special Assistant
Corporation Counsel
Joseph Martinico, Chief Labor Negotiator
Donald J. O'Neill, Director, Human Resources

FOR FRATERNAL ORDER OF POLICE
CHICAGO LODGE No. 7:

Brian C. Hlavin, Attorney
Patrick N. Ryan, Attorney
Dean C. Angelo, Sr., FOP President

Background

On January 12, 2016, following a hearing in the above matter and briefing by the parties, this Arbitrator issued the following Interim Award:

INTERIM AWARD

1. The matter is remanded back to the parties until March 15, 2016 during which time the parties are directed to attempt to negotiate between themselves a time line and method to implement the findings set forth above that the City should be directed to destroy all records covered by Section 8.4 now in existence, regardless of the format in which they exist, namely, physical files or electronic files, for which the benchmark for destruction or the provisions related to litigation or arbitration are applicable or there are exceptions provided therein.

2. By February 15, 2016, the City shall provide a list to the Lodge of all records which the City believes should not be destroyed,

specifying the reasons why the records should be retained.

3. By February 15, 2016, the City shall provide a list of records other than those discussed in Paragraph (2) above that it wishes to remain in anticipation due to pending or actual threatened litigation.

4. As part of the remand as discussed in the Opinion, for records that have already been released in litigation involving law firms or lawyers that have a proclivity to sue the City of Chicago and its Officers, whether the term "normally" would suggest that such records because of anticipated litigation should remain, both the Lodge and the City shall have until February 9, 2016 to submit statements to this Arbitrator as to whether "normally" would encompass the anticipation of litigation as to the possible use of records already released in anticipation of subsequent litigation. It is anticipated that the statements should not be longer than three to four typed pages, if that, and not a regurgitation of the arguments in their briefs. After receipt of these statements, unless there is agreement between the parties on the point, this Arbitrator will make a ruling on the issue by February 20, 2016.

5. If there are disputes between the parties as to the records not to be destroyed, the parties are to submit to this Arbitrator by March 15, 2016 their agreed upon method of resolving said disputes as to the current list and recommendations as to resolving disputes as to records to be destroyed in the future.

6. The parties, either jointly or individually, are to report in writing to this Arbitrator by March 15, 2016 as to whether they have reached any agreements as to the method of implementing a final Award based upon this Arbitrator's finding or any agreement as to resolving any disputes concerning records to be or not to be destroyed. The Arbitrator intends to issue after receiving the report from the parties, but in any event no later than April 15, 2016, his final Award.

7. The time lines set in this Interim Award are specific. However, on request by either party, the Arbitrator will consider extending the time lines.

8. The Arbitrator's fees and expenses shall be borne by the City of Chicago.

Following the issuance of the Interim Award, the parties did meet. As noted in footnote 1 of the Supplemental Statement of the Fraternal Order of Police Chicago Lodge No. 7, submitted on February 9, 2016:

The parties met on February 4, 2015, to discuss this issue, at

> which time the City made clear its position that it intends to retain all records under the justification of "in anticipation of litigation," notwithstanding the Arbitrator's admonishment, and notwithstanding the finite number of cases currently pending (approximately 480 at this time).

This position was confirmed by the City in the City's February 9, 2016 letter to this Arbitrator pursuant to the Interim Award wherein the following statement was made:

> 1. The parties were unable to find any areas of agreement with respect to what disciplinary and/or investigatory records of any age or subject matter must be retained or conversely destroyed. The only exception, if it can be treated as such, was on the subject of current and ongoing litigation where the Lodge reiterated its recognition, reflected in your Opinion, that these records must be kept.

Pursuant to Paragraph 4 of the Interim Award, the Fraternal Order in its Supplemental Statement stated as follows:

> In the Arbitrator's Opinion and Interim Award, the parties were given until February 9, 2016, to "submit statements to this Arbitrator as to whether 'normally' would encompass the anticipation of litigation as to the possible use of records already released in anticipation of subsequent litigation." (p. 50). In remanding this discrete issue to the parties, the Arbitrator stated that "[i]t should also be clear that any claim by the City that all records are in anticipation of litigation would not be in keeping with the spirit of the Interim Award as that matter has been addressed in the Opinion." (p. 51).

The City's position responding to the Lodge's position as expressed in the City's February 9, 2016 letter was:

> 2. The City's position, simply put, is the same as articulated at the hearing in the above case. It cannot, without fatally undermining its ability to defend itself, agree to the destruction of any disciplinary or investigative records. The vagaries of litigation make it nearly impossible to predict or anticipate what records must be maintained in order to satisfy future court discovery requirements and other legal proceedings. However, the probability of having to defend unknown numbers of police officers (whose identities cannot be predicted in advance) and the Department in future litigation can certainly be reasonably anticipated. ...

On February 29, 2016 the City's Chief Labor Relations Negotiator, Joseph P. Martinico, emailed this Arbitrator with copies to the FOP Counsel:

> Attached please find the following documents, submitted in connection with your Interim Award issued on January 12, 2016 in the above referenced matter:
>
> > Arbitrator Crystal's February 29, 2016 Decision In Response to the City's Request For Clarification of his Award in PBPA Case Nos. Sgts. 14-013, Us. 14-003 and Capts. 14-001; Failure to Purge Complaint and Disciplinary Records From Online File System. Arbitrator Crystal's initial award was provided to you by FOP and referenced in your Interim Award. The attached Decision finds Article 34, Savings Clause, to be applicable in the case and "*directs the parties to comply with the directives of Article 34 and negotiate a substitute provision for Section 8.4 -- a provision that addresses the pertinent issues and concerns raised by both parties and that is not inconsistent with court rulings, judicial pronouncements and/or legislative enactments*".
> >
> > Copies of correspondence recently received from the US Department of Justice, issued in connection with DOJ's investigation of the Chicago Police Department to determine whether the Department has engaged in patterns and practices of conduct which violate the US Constitution and/or federal statutory law, which correspondence specifically requests the preservation of all disciplinary/investigative records which are the subject matter of the FOP arbitration currently before you for final award.
>
> The City believes these documents bear directly upon the matter before you and requests that you consider them in rendering your final award. Thank you.

The attachments included Arbitrator Crystal's February 29, 2016 Decision in Response to the City's Request For Clarification of his Award in PBPA Case Nos. SGTS 14-013, Lts 14-003 and Capts. 14-001 plus two letters dated February 12 and February 19, 2016, respectively, from Assistant U.S. Attorney Patrick W. Johnson to outside counsel for the City of Chicago.

The next day by email and regular mail, Counsel for the Fraternal Order of Police wrote this Arbitrator:

> The Fraternal Order of Police, Chicago Lodge No.7, hereby objects to the City's February 29, 2016, supplemental submission. The Opinion and Interim Award set February 9, 2016, as the date by which supplemental submissions were due from the parties. As nearly three weeks have passed, the City's submission is untimely. The Lodge further objects to the extent the City is attempting to insert new issues into this proceeding or to reargue issues already decided. Accordingly, the Lodge respectfully requests that the City's submissions be stricken and that the final Award be issued based on the record before the Arbitrator as of the February 9, 2016 submission due date.
>
> Thank you for your consideration. Please let us know if you have any questions.

This Arbitrator responded to the parties by the following letter dated March 4, 2016 setting forth some of the background enumerated above and explaining that there are facts that have evolved since the rendering of the Interim Award raising issues that this Arbitrator believed should be considered:

> As you know, on January 12, 2016 I issued an Opinion and Interim Award in the above matter wherein I discussed the issues raised by the grievance and set forth an Interim Award as contrasted to a final Award. In the Interim Award, I did raise questions referring to the Opinion as to the meaning of "normally" as set forth in Article 8, Section 8.4, "Use and Destruction of File Material" appearing in the parties' contract. I invited the parties to present additional statements to me concerning the issue I raised.
>
> By February 9, 2016, each of you did so either by fax or email.
>
> I have reviewed carefully each of your respective statements, including Mr. Hlavin's extensive discussion concerning the word "normally". I likewise note that Counsel for the FOP reminded this Arbitrator that at page 51 of his Opinion this Arbitrator did write, "It should also be clear that any claim by the City that all records are in anticipation of litigation would not be keeping with the spirit of the Interim Award as that matter has been addressed in the Opinion".
>
> The parties advised this Arbitrator that as of February 9, 2016 they had reached no agreements. In the City's position statement, the City's Advocates did write:
>
> > ... the Department of Justice has recently commenced an investigation, pursuant to the Violent Crime Control and Law Enforcement Act, 42 U.S.C. § 14141, to determine

> whether CPD officers may be engaging in patterns and practices of conduct that violate the U.S. Constitution and federal statutory law, including Title VI of the Civil Rights Act of 1964 ("Title VI"). The DOJ has informed CPD of its obligation to ensure that all potentially relevant documents, *on a department-wide basis*, are preserved for purposes of its investigation, and to provide DOJ with access to such documents in connection with the investigation. The DOJ investigation and the related requirements for document preservation, includes police investigative and disciplinary records. This DOJ investigation in some sense parallels *Monell* litigation, evidence concerning which was presented in the hearing. If this position seems unduly rigid given the flexibility sought by the remedial portion of your Award, we ask you to consider how the City is to respond to court ordered discovery or DOJ inquires that may require production of department-wide records many years old on a wide variety of subject matters.

Appreciating the arguments proffered by FOP Counsel as to the word "normally", notice which was disseminated publicly in the press that the Justice Department is conducting an investigation of the Chicago Police Department cannot be ignored, including the potential litigation by the DOJ that could be forthcoming.

Then what did occur is that on February 29, 2016 Mr. Martinico emailed to this Arbitrator three documents. One was Arbitrator Crystal's "Arbitrator's Decision In Response to City's Request for Clarification Of Remedy" in Case Nos. SGTS 14-013, 14-013 (Amended), CPTS 14-001 and LTS 14-003 issued on February 29, 2016. In addition, two letters were enclosed. The letter dated February 12, 2016, signed by Assistant United States Attorney Patrick W. Johnson, read:

> Re: Chicago Police Department Investigation pursuant to 42 U.S. C.§ 14141
>
> Dear Mr. Slagel and Mr. Gurney:
>
> Pursuant to our December 30, 2015 document preservation request and document preservation notice, please confirm that for the duration of DOJ's pattern and practice investigation under 42 U.S.C. § 14141, the City of Chicago and the Chicago Police Department will preserve all existing documents related to all complaints of misconduct against officers of the Chicago Police Department, including documents related to the

investigations into and discipline imposed because of such alleged misconduct.

If you have any questions, you may contact me at 312-353-5327.

The second letter, dated February 19, 2016, was signed by Assistant United States Attorney Patrick W. Johnson which as with the first letter was written to outside counsel for the City and read:

Re: Chicago Police Department Investigation pursuant to 42 U.S. C.§ 14141

Dear Mr. Slagel and Mr. Gurney:

Per our recent conversation, I am writing to clarify our document preservation request contained in my February 12, 2016 letter. That request is intended to cover all officer misconduct complaint and disciplinary files maintained by the Chicago Police Department, including those that are the subject of the two pending arbitration cases: (1) Chicago and FOP No. 7, Nos. 129-11-035, 129-12-004; and (2) Chicago and PBPA, Nos. SGTS 14-013, CPTSI4-001, L TS 14-003.

In a very quick response by email on March 1, 2016, Attorney Brian C. Hlavin on behalf of the Lodge as well as by regular mail sent the following letter to this Arbitrator:

Re: City of Chicago and Fraternal Order of Police, Lodge No.7
Grievance Numbers: 129-11-035 and 129-12-004 (File Destruction)
Our File Number: 25697

Dear Arbitrator Roumell:

The Fraternal Order of Police, Chicago Lodge No.7, hereby objects to the City's February 29, 2016, supplemental submission. The Opinion and Interim Award set February 9, 2016, as the date by which supplemental submissions were due from the parties. As nearly three weeks have passed, the City's submission is untimely. The Lodge further objects to the extent the City is attempting to insert new issues into this proceeding or to reargue issues already decided. Accordingly, the Lodge respectfully requests that the City's submissions be stricken and that the final Award be issued based on the record before the Arbitrator as of

the February 9, 2016 submission due date.

Thank you for your consideration. Please let us know if you have any questions.

This Arbitrator recognizes the vigor and sincerity of the above response of Mr. Hlavin. And, indeed, there were certain guideline dates set forth in the Interim Award although in Paragraph 7, though there were no such requests, this Arbitrator did indicate that he would consider "extending the time lines".

The problem presented is that there have been developing factors since the issuance of the January 12, 2016 Interim Award, which the parties are reminded is not a final Award, which impact on the situation and perhaps the approach that the Arbitrator took.

Though there were objections to considering the materials submitted to this Arbitrator on February 29, 2016, which copies were sent to Mr. Hlavin, this Arbitrator cannot ignore what was presented in the scheme of the circumstances. To begin, as noted in particular at pages 35-37 of the Lodge's post-hearing brief in this matter, there was reliance on Arbitrator Crystal's opinion and award in *City of Chicago (Chicago Police Benevolent and Protective Association No. 14-013, 14-001 and 14-003* (November 4, 2015), which this Arbitrator quoted in his Opinion favorably as one of the foundations for this Arbitrator's analysis of the issues before him. Now the City has presented a clarification by Arbitrator Crystal where he announced that he had met with the parties and concluded that he had authority notwithstanding the doctrine of *functus officio* to reconsider his proposed remedy. In doing so, Arbitrator Crystal noted that "the undersigned cannot ignore the fact that the posture of this case is different from what it was when the matter was arbitrated in 2015". (Pg. 15). Arbitrator Crystal also stated, "In light of recent developments that have transpired and become more consequential issues since the issuance of the award, I must agree with the City that contract provisions at issue is a direct contravention of what has become a clear and predominant public policy ...". (Pg. 16).

This Arbitrator recognizes that he took a different tact in his analysis of public policy beginning at page 47 of the January 12, 2016 Opinion than Arbitrator Crystal's analysis of public policy at pages 16-17 of his clarification.

Then what Arbitrator Crystal did is make reference to negotiations between the parties pursuant to Article 34 in the contracts involved, which is Article 33 of the FOP contract which reads:

ARTICLE 33 - SAVINGS CLAUSE

If any provisions of this Agreement or any application

> thereof should be rendered or declared unlawful, invalid or unenforceable by virtue of any judicial action, or by any existing or subsequently enacted Federal or State legislation, or by Executive Order or other competent authority, the remaining provisions of this Agreement shall remain in full force and effect. In such event, upon the request of either party, the parties shall meet promptly and negotiate with respect to substitute provisions for those provisions rendered or declared unlawful, invalid, or unenforceable.

The fact is there is the existence of the February 29, 2016 Crystal clarification of an opinion that this Arbitrator in part relied on.

Directly on point is what was referenced in the February 9, 2016 submission, namely, that the Justice Department has commenced an investigation of the Chicago Police Department pursuant to Violence, Crime Control and Law Enforcement Act, 42 U.S.C. §14141. In this connection, there are the two letters from Assistant United States Attorney Patrick Johnson. The February 12, 2016 letter asks for the preservation of all files. The February 19, 2016 letter confirms a conversation that the files that are asked to be retained as part of the investigation includes the files under consideration in the arbitration involving this Arbitrator, Chicago and FOP No. 7, Nos. 129-11-035, 129-12-004, as well as the files involved in the arbitration under consideration by Arbitrator Crystal.

At this point, under such circumstances, the public policy issue surfaces with new emphasis because the Department of Justice investigation could well result in litigation as has happened in other communities.

When faced with such facts, the question then becomes whether the public policy argument takes on new meaning with the advent of the Justice Department investigation and requests. There is a fundamental principle in contract negotiations that the contract must be read as a whole, which could mean that perhaps Article 33 is in play in this situation.

This Arbitrator has chosen to address the issues raised even though the Lodge maintains these are new issues because there are continuing issues based on newly developing evidence. This Arbitrator has chosen to address the matters raised so that he can give the opportunity to both parties to discuss the issues with this Arbitrator. The Arbitrator's preference is to have an in-person discussion with Counsel of the issues raised in this letter and by the submissions of February 9, 2016, February 29, 2016 and March 1, 2016.

In this regard, I note that I am now scheduled to be in Chicago

> for a hearing between the City and the Lodge both on March 11 and March 25, 2016. It could be that I could meet with the parties at 9:00 a.m. on March 11, 2016 before the scheduled hearing on March 11th to have a discussion on the issues raised. I also would be available after 4:30 p.m. in Chicago on March 10, 2016.
>
> It may be another time might be more convenient for the parties. It may be that it can be done on the phone. There is also the possibility that I could meet late on March 15 and March 22, 2016. Please let me know your pleasure. I am sending this letter by email. I have chosen to make these comments via letter simply because I think this is appropriate before issuing any further Interim Awards or final Awards. I have put this matter on high priority as I want to bring the assignment to completion.
>
> Please let me hear from you as soon as convenient so that we can have a possible meeting consistent with your respective schedules.
>
> As always, I appreciate your professionalism and the opportunity of working with you.

The parties did meet with this Arbitrator on March 22, 2016 where the issues were discussed with the Lodge maintaining that its position concerning the application of Section 8.4 should be enforced and the City maintaining that it not be ordered to destroy the records at issue.

Discussion

The discussion of the issues in this case that have now surfaced begins with reference to the Opinion and Award of Arbitrator Jules I. Crystal issued November 4, 2015 between the City and the Chicago Police Benevolent and Protective Association in Case Nos. SGTS14-013, SGTS14-013 (Amended), CPTS14-001 and LTS14-003. Arbitrator Crystal was interpreting Section 8.4 of the Sergeants, Captains and Lieutenants contracts which contain the language: "In such instances the complaint register case file will be purged from the online file system five (5) years after the date of the final arbitration award or the final court adjudication, unless a pattern of sustained infractions exists".

This language is to be contrasted with the 8.4 language of the FOP contract which

provides: "In such instance the complaint register case file normally will be destroyed immediately after the date of the final arbitration award or the final court adjudication, unless a pattern of sustained infractions exists". At page 34 of his Opinion, Arbitrator Crystal noted that he was dealing with the "obligation to purge the discipline records 'from the online file system'" and noted that "the investigation files that are in storage, discussed *infra*, are not addressed by Section 8.4".

In other words, Arbitrator Crystal was addressing an obligation that was different as between the Captains, Sergeants and Lieutenants contracts on the one hand and the FOP contract on the other hand. This Arbitrator recognized this difference in his January 12, 2016 Opinion when noting at page 38 that Arbitrator Crystal "did not have before him the task of determining the meaning of the term 'destroyed' as used by the parties". Thus, the Crystal Opinion and this Arbitrator's Opinion were dealing with two different approaches as to records represented by different contract language.

Nevertheless, Arbitrator Crystal's November 4, 2015 Opinion and Award was offered by the FOP in support of its position before this Arbitrator at pages 35-37, 45, 50, 54-62, 66, 70 and 75 of the Lodge's post-hearing brief dated November 20, 2015. Having been made aware of the Crystal Opinion and Award of November 4, 2015, this Arbitrator analyzed the grievance before him in part by considering the Crystal analysis.

There is no question in addressing the City's arguments opposing the FOP grievance this Arbitrator followed the same analysis as did Arbitrator Crystal, including Arbitrator Crystal's analysis of the public policy argument.

Beginning at page 39 of his Opinion, Arbitrator Crystal discussed "public policies/ compliance with judicial rulings" wherein he concluded that it was not against public policy or

judicial rulings to decide "that the City violated the agreements before him when it failed to purge C.R. and disciplinary records from the online file system as set forth in Section 8.4 of the agreement". (Pg. 46). As was argued by the City before Arbitrator Crystal, the City before this Arbitrator also argued that the granting of the grievance enforcing Section 8.4 of the FOP's contract would be against public policy. In addressing the public policy arguments of the City, this Arbitrator at pages 48-49, essentially reaching the same conclusions as Arbitrator Crystal as to the public policy argument, wrote:

> The bottom line is that this Arbitrator, aware of *Misco* and aware of the Illinois Supreme Court's concerns as to arbitrators issuing awards contrary to specifically definable public policy as noted in *AFSCME v. Dept. of Mental Health*, has not been shown that the enforcement of the carefully negotiated retention policy set forth in Section 8.4, which was confirmed basically by the recent Special Order S08-01-04 is contrary to law or public policy. For this reason, this Arbitrator concludes that in issuing an Award that enforces Section 8.4 he is doing so consistent with State law and not contrary to State public policy for the reasons enumerated above.

As did Arbitrator Crystal, this Arbitrator buttressed his analysis of the public policy argument by referring to Special Order SO9-03-01.

There have been certain events that have taken place since the issuance of the January 12, 2016 Opinion and Interim Award. In particular, there is the investigation of the Justice Department of the Chicago Police Department and, in connection with that investigation, Counsel for the City, as previously noted, on February 12 and February 19, 2016, respectively, received written confirmation of a request from an Assistant United States Attorney on behalf of the Department of Justice "that for the duration of DOJ's pattern and practice investigation under 42 U.S.C. ¶14141, the City of Chicago and the Chicago Police Department will preserve all existing documents related to all complaints of misconduct against officers of the Chicago Police Department ...". The letter of February 19, 2016 refers "to clarify our document preservation

requests contained in my February 12, 2016 letter ... including those that are the subject of two pending arbitration cases (1) Chicago and FOP No. 7 Nos. 129-11-035, 129-12-004 ...".

In addition, Arbitrator Crystal on February 29, 2016 issued "Arbitrator's Decision In Response To City's Request For Clarification Of Remedy" in Case Nos. SGTS-14-013, SGTS-14-013 (Amended), CPTS-14-001 and LTS-14-003. A foundation of Arbitrator Crystal's November 4, 2015 Opinion and Award and a foundation of this Arbitrator's Opinion and Interim Award, namely, that enforcement of Section 8.4 in the FOP contract and in the Sergeants, Lieutenants and Captains contracts did not contravene public policy.

Arbitrator Crystal on February 29, 2016 reconsidered the public policy argument and in doing so at pages 15-17 wrote:

> Fourth, with respect to the City's specific request, the undersigned cannot ignore that fact that the posture of this case is different from what it was when the matter was arbitrated in 2015. While I agree with the Union that there has been no court pronouncement that has directly ordered the City to retain the disciplinary files of all police officers, I cannot agree with the Union that the litigation and civic developments since issuance of my Award should be summarily discounted. Without parsing the language of any court ruling or order -- in particular, that of Judge Flynn, which was referenced during the parties' conference and in their correspondence -- there is little doubt that the wholesale purging of files as requested by the Union such that they would be inaccessible if their production were legally required, would be contrary to the objective of prior court rulings and recent judicial pronouncements. At the same time, the inability to find and produce such data when legally required could have a devastating impact on the City's ability to defend itself in matters where the past disciplinary record of officers is germane to potential court action either by a citizen, or by the state or federal government. Clearly the import of Judge Flynn's remarks -- as well as the remarks of Judge Shadur in the earlier Kalven decision noted in my Award -- point to a judiciary that is in tune with the climate of the times and the public's demand that, assuming the proper legal protocols are followed and the privacy rights of officers are not compromised, records be both locatable and retrievable.
>
> The undersigned cannot simply shut his eyes to the events that have taken place since the issuance of his Award. He is compelled by

> the circumstances of this case and his responsibilities as Arbitrator to consider the broader context. In light of recent developments that have transpired and become more consequential since the issuance of the Award, I must agree with the City that the contract provision at issue is a direct contravention of what has become a clear and predominant public policy -- a public policy that has been embraced by recent judicial pronouncements and mirrored in the language of existing legislation. With respect to the latter, the language of FOIA, the Public Records Act and the Local Records Act supports the trend toward disclosure. This legislation makes clear that public records must be maintained rather than destroyed, and that subject to judicial approval, be made accessible to plaintiffs in the event of court actions initiated by citizens alleging City and/or police misconduct.

Viewed from any perspective, the fact is the elements that were present at the time Arbitrator Crystal issued his Opinion and Award on November 4, 2015 were the same elements that he relied on on February 29, 2016 in concluding that the Award that he had issued on November 4, 2015 was against public policy. This observation is highlighted by reference to pages 41-42 of Arbitrator Crystal's Opinion where he wrote:

> The above analysis is not meant to minimize the extraordinary monetary liability potentially confronting the City where the disciplinary records of officers may be critical to the City's defense in a cause of action. In this respect, deputy Liza Franklin described with clarity the taxpayer dollars that potentially are at stake if disciplinary records are unavailable to the City. As Ms. Franklin noted, the City's failure to produce the requested tiles pursuant to a court order in any pending litigation as a result of their destruction could result in sanctions by the court and adverse jury instruction against the City. The rapid recent increase in *Monell* claims in particular was noted by Ms. Franklin. Callous as this may sound, however, the potential liability as a result of *Monell* and a host of other claims are not recent phenomena. The information disclosure requirements of state and federal statutes pertaining to information requests similarly are not new. There is no evidence that the City was forced to agree first to the word destroy, and then more recently to the word *purge*, or that either party was unaware of the import of having the two words "will be" immediately precede these affirmative, active verbs.
>
> Reaching the conclusion of negotiations for a collective bargaining agreement takes many turns, and often involves comprises large and small, some obvious, some less-so. While the purge language in Section 8.4 may have been the result of hard fought negotiations and/or a simply compromise, the end result is language that is clear and

> unambiguous. In the absence of any evidence supporting a finding that the words don't mean what they clearly say – and the parties never intended the words to mean what they appear to clearly say – the undersigned has no basis to support the City's decision to ignore the negotiated terms of Section 8.4. Public policy considerations cannot in this instance step into the negotiations and nullify the language.

By any definition, Arbitrator Crystal reconsidered his Opinion because, as he suggested, "the posture of this case is different from what is, was, when the matter was arbitrated in 2015".

Where does this leave this Arbitrator in his analysis in dealing with discipline files in the same Police Department as Arbitrator Crystal who now concludes that the enforcement of 8.4 in the Sergeants, Lieutenants and Captains contracts is against public policy when previously Arbitrator Crystal held that such enforcement was not against public policy – a holding which this Arbitrator adopted in holding that the enforcement of the FOP 8.4 language did not violate public policy while raising a question as to the extent of enforcement, thereby issuing an Interim Award?

There are two differences in the context of the issues now involved as between the Crystal Opinions and Awards and this Arbitrator's Opinion and Interim Award. As noted, the Crystal Award of November 4, 2015 never directed that discipline files be destroyed because of the language in the contracts before him referred to online purging. Thus, Arbitrator Crystal, in addressing the clarification, was inviting the parties to apply Article 34 of the contract before him which is identical to Article 33 of the FOP contract which reads:

> **ARTICLE 33 – SAVINGS CLAUSE**
>
> If any provisions of this Agreement or any application thereof should be rendered or declared unlawful, invalid or unenforceable by virtue of any judicial action, or by an existing or subsequently enacted Federal or State legislation, or by Executive Order or other competent authority, the remaining provisions of this Agreement shall remain in full force and effect. In such event, upon the request of either party, the parties shall meet promptly and negotiate with respect to substitute provisions

> for those provisions rendered or declared unlawful, invalid, or unenforceable.

In other words, his February 29, 2016 decision addresses the question of the online index wherein Arbitrator Crystal notes at page 17, "Inasmuch as the Union has rejected the City's proposed establishment of a searchable electronic database or index of all disciplinary files and/or records which would permit the City, when legally required, to locate specific police officer disciplinary data, the undersigned is of the opinion that the city's proposal to negotiate a new provision pursuant to Article 34 is the appropriate course of action." Here, what is involved is implementing the "destroy" language which was not involved before Arbitrator Crystal.

The second difference is that this Arbitrator did not issue a final award. His Award was an Interim Award whereby this Arbitrator kept jurisdiction pending issuing a Final Award. It is true that in discussing the remedy at page 49 this Arbitrator in his January 12, 2016 Opinion wrote: "Having made the above statement, this Arbitrator, based upon the analysis in the Opinion, makes a finding that once the method in doing so and the records to be destroyed have been determined, the final Award shall be entered directing the City to destroy all discipline records covered by Section 8.4 now in existence, regardless of the format in which they exist, namely, physical files or electronic records, for which the benchmark for destruction or the provisions related to litigation or arbitration are applicable, unless there is a Section 8.4 exemption." Nevertheless, this Arbitrator only issued an Interim Award wherein there were certain instructions directed to the parties, including discussing the meaning of the term "normally" that was the prerequisite to the entering of a final award.

As this Arbitrator views the matter, he has continuing jurisdiction and it was not necessary to discuss the concept of *functus officio* discussed at length at pages 10-15 of

Arbitrator Crystal's Opinion of February 29, 2016. Even so, the analysis of the *functus officio* doctrine set forth by Arbitrator Crystal is well taken and researched and does not require repeating here except to note the discussion of one published arbitration case at pages 13-14 of Arbitrator Crystal's Opinion wherein he wrote:

> Although not involving potential legal or civic repercussions, one published case that did address post-award issues involved an employer who, having been found to have violated its collective bargaining agreement when it transferred out certain bargaining unit work, was directed to restore this work to the bargaining unit.[22] Shortly after the award issued, the employer sought to have the arbitrator reconsider his remedy, arguing that it was not capable of implementing the award "due to impossibility because the position was no longer being funded, as the grant to fund the program had not been renewed.[23] What is significant about this case is not the arbitrator's ultimate determination that the employer's witnesses -- who had provided evidence of the purported impossibility of compliance with the initial remedy -- were not credible, but the willingness on the part of the arbitrator to hear this evidence in the first place. One must assume that if the evidence presented by the employer had in fact been deemed creditworthy, the arbitrator would have had no problem modifying his remedy accordingly.
>
> The following explanation was provided by the arbitrator regarding his willingness to consider a modification to his initial remedy:
>
> > Addressing the substance of the Employer's Functus Officio argument, this Arbitrator retained jurisdiction for a very obvious reason. This Employer had flagrantly, for a period of seven (7) years, assigned bargaining unit work ... to exempt employees in violation of the [parties' collective bargaining agreement]. This Arbitrator wanted to insure, to the extent that an Arbitrator is in a position to insure anything, that the remedy was implemented. Surely, an Arbitrator has such authority and Elkouri and Elkouri in How Arbitration Works 6th Edition Chapter 7E recognize the right and authority of Arbitrators to retain jurisdiction to address remedial issues. This is exactly what this Arbitrator did in retaining jurisdiction in this case and this is exactly why arbitrators generally retain jurisdiction in contexts such as the present, when a party claims that a remedy cannot be effectuated *for one reason or another*, not addressed in the hearing in chief. For all these reasons, the

> Employer's objection to the retention of jurisdiction is found to be meritless. (Italics added.)[24]

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22 *Labor Arbitration Decision*, 162372-AAA, 2010 BNA LA Supp. 162372 (Obee, 2010).

23 *Id.* slip. op., p. 2.

24 *Id.*, slip. op. p. 5.

Having concluded that this Arbitrator continues to have jurisdiction, the question remains as to whether because of recent events public policy prevents the issuance of an award at this time in any respect as sought by the Lodge. As noted, in regard to the Sergeants, Lieutenants and Captains, Arbitrator Crystal came to the conclusion that public policy did prevent the issuance of the type of award he issued on November 4, 2015.

The United States Supreme Court in *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983), noted that in order to vacate an arbitrator's award the contract as interpreted by the arbitrator must violate "some explicit public policy, that is 'well defined and dominant, and is to be ascertained' by reference to the laws of legal precedence and not of general considerations of supposed public interest'". 461 U.S. at 766. In *United Paperworkers International Union v. Misco*, 494 U.S. 29, 108 S. Ct. 364, 98 L.Ed.2d 286 (1987), the Supreme Court stated that in order to set aside an arbitrator's award for violating public policy the award must create an "explicit conflict with 'laws and legal precedent rather than general considerations of supposed public interest' 484 U.S. 29 at 43.

The United States Supreme Court again reaffirmed the principle in *Misco* in determining whether an arbitrator's award violates public policy in *Eastern Associated Coal Corp. v. Mine Workers District 17*, 531 U.S. 57 (2000).

The Supreme Court of Illinois in *American Federation of State, County and Municipal Employees v. State of Illinois, Department of Mental Health, et al*, 124 Ill.2d 246, 529 N.E.2d

534 (1988), though recognizing that the Court was "not bound to follow federal decisions because Illinois has a different arbitration act, we can look to them for guidance". 124 Ill.2d at 261. The Court then went on to cite *W.R. Grace* and *Misco*. In holding that the reinstatement of the employee involved did not violate public policy, the Illinois Supreme Court noted, "While there is no precise definition of public policy, it is to be found in the constitution and statutes and when these are silent in judicial decisions ... The public policy of a state or nation must be determined by its constitution laws and judicial decisions, not by the varying opinions of laymen, lawyers or judges as to the demands of the interest of the public." (Citations omitted). 124 Ill.2d 246 at 260. The Court proceeded to distinguish the case before it in *AFSCME* from cases where arbitrator awards have been set aside as contrary to public policy when at 263 the Court noted in part:

> While courts refuse to enforce an arbitration award that requires violation of law (*American Postal Workers Union v. United States Postal Service* (9th Cir.1982), 682 F.2d 1280), we need not measure the arbitrator's award in this case by that standard. The Department's reliance on *Board of Trustees of Community College District No. 508 v. Cook County College Teachers Union* (1979), 74 Ill.2d 412,24 Ill. Dec. 843, 386 N.E.2d 47, as grounds for mandating that this arbitration award be vacated as against public policy, is misplaced. In Board of Trustees of Community College District No. 508, this court refused to enforce an arbitration award because the award sanctioned violations of the law. (74 Ill.2d at 425-26, 24 Ill.Dec. 843, 386 N.E.2d 47.) The award was repugnant to public policy because enforcement of the award would have benefitted those teachers engaged in it. The arbitration award, in the case at bar, does not even remotely sanction violations of the law. ...

If all that was before this Arbitrator at this point in time were the observations made by Arbitrator Crystal at pages 16-17 of his February 29, 2016 Opinion as to the reasons he concluded that public policy prevented him from enforcing the provisions of Section 8.4 of the Sergeants, Lieutenants and Captains contracts, this Arbitrator would not be persuaded. The

reason is that at pages 43-49 of this Arbitrator's January 12, 2016 Opinion this Arbitrator considered the very arguments as to public policy that were discussed by Arbitrator Crystal in his February 29, 2016 Opinion at pages 16-17 and concluded that there was no violation of public policy.

In particular, this Arbitrator noted Judge Flynn's erudite discussion of the application and limits of the Illinois Freedom of Information Act. At page 48 this Arbitrator discussed the Local Records Act, specifically noting "there is no showing that the City has applied to the Local Records Commission to destroy the discipline files that were subject to the mandate of Section 8.4. Nor is there any showing that the Local Records Commission denied such application or permission ... Whether this becomes an issue at a later date in another forum is not before this Arbitrator."

Nevertheless, Arbitrator Crystal did make reference to "in light of reasons developed that have transpired ...". (Pg. 16). Arbitrator Crystal referenced at page 4 a meeting with the parties on December 14, 2015. As of that date, this Arbitrator had not issued his January 16, 2016 Opinion. It is not clear whether between December 14, 2015 and the time that he issued his Award on February 29, 2016 Arbitrator Crystal became aware of the February 12 and February 19, 2016 letters from Assistant U.S. Attorney Patrick W. Johnson to Counsel for the City.

It is noted that in the February 12, 2016 letter Mr. Johnson referenced "our December 30, 2015 document preservation request and document". What is clear is that, despite the comment this Arbitrator has just made concerning the February 29, 2016 public policy analysis of Arbitrator Crystal and the suggestion that this Arbitrator would not follow this analysis, the letters or the December 30, 2015 request were not mentioned by Arbitrator Crystal but they have been brought to this Arbitrator's attention. The two letters from Assistant U.S. Attorney Johnson

were non-existent at the time that this Arbitrator issued his January 12, 2016 Opinion. Nor was this Arbitrator aware of the December 30, 2015 request.

The request of the Justice Department brings forth a dynamic that was not present when this Arbitrator considered the public policy arguments and, if not in existence currently, would not change this Arbitrator's view as to the public policy argument. But the request has been made by the Justice Department and confirmed in writing. Consistent with *Grace, Misco* and *AFSCME*, the request has been made pursuant to a specific statute, 42 U.S.C. §14141, which reads:

> (a) UNLAWFUL CONDUCT
>
> It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.
>
> (b) CIVIL ACTION BY ATTORNEY GENERAL
>
> Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

It is not lost on this Arbitrator that there have been instances such as in Detroit, Ferguson, Missouri and New Orleans, to name a few, where the Justice Department has conducted an investigation involving a police department resulting in legal action which in some cases involved court supervision for a period of time. This may not come about in Chicago. But the fact the United States Department of Justice is requesting that the records be preserved pending investigation to determine if there is any basis for the Attorney General to institute civil action

pursuant to 42 U.S.C. §14141 as contrasted to generalizations that were made by the City in terms of unforeseen possible individual lawsuits in the future. This Arbitrator emphasizes that there have been investigations by the Justice Department that have not resulted in any litigation or Court supervision. And this may be the ultimate result in Chicago. But, the potential for litigation is there and, pursuant to a specific statute, the Department has made a preservation request and document preservation notice pursuant to 42 U.S.C. §14141.

With such a request, the public policy argument involves a dimension which this Arbitrator has not previously addressed, though this Arbitrator addressed the public policy arguments considered by Arbitrator Crystal in his February 29, 2016 Opinion.

It has been suggested that it is for the Courts to consider public policy arguments and not arbitrators. In this regard, this Arbitrator's attention was called to Arbitrator Sinicropi's opinion and award between these parties in *Gr. No. 129-90-049-468, 129-90-063-432* (1991) where at pages 15-16 Arbitrator Sinicropi wrote:

> ... Moreover in the area of affirmative action programs, which mandate minority hiring goals and/or quotas, the law is far from settled. This Arbitrator is of the opinion that he clearly has a duty to construe Collective Bargaining Agreements in light of statutes and caselaw. And he may also take into account well-settled public policy, if it does not conflict with the labor agreement and is either explicitly argued by the parties or implied in their presented evidence and/or argument. Moreover that public policy must be clearly articulated by statutory law or specific judicial decision and not merely be a general notion of what the state of affairs is. Unfortunately, in this Arbitrator's view this area is in flux, and there is no clear or focused public policy at this time. ...

In other words, Arbitrator Sinicropi interpreted the contract noting that there was no basis to consider public policy because the external law was in a state of flux. This approach was even more pronounced in *San Francisco Opera Association*, 129 LA 42 (2011), wherein Arbitrator Bogue chose to interpret the parties' collective bargaining agreement and not to consider public

policy arguments for she found "the Opera provided no evidence that any arbitrator or court had found these clauses to be unenforceable as unlawful or contrary to public policy". 129 LA 49.

Here, this Arbitrator is faced with a specific federal statute permitting action by the Attorney General. The Attorney General through the Assistant U.S. District Attorney has given document preservation notice pursuant to procedures followed by the Attorney General in administering 42 U.S.C. §14141. There is nothing about the statute being in flux, particularly when it is known that in other communities based upon the statute the Attorney General has commenced litigation.

Arbitrators Sinicropi and Bogue were not dealing with such a situation.

This analysis brings back a reference that this Arbitrator made at page 39 of is January 12, 2016 Opinion when in quoting from pages 47-48 of the Lodge's brief he noted, "The Lodge is not suggesting that CR Files can only be retained pursuant to the litigation exception where there is a court order precluding their destruction. The Lodge fully understands that while litigation is pending (or reasonably anticipated), the parties are required to retain records which may be relevant to litigating notwithstanding any document destruction/retention policy".

During the March 22, 2016 meeting with this Arbitrator, the Lodge reiterated this point which this Arbitrator acknowledges. This Arbitrator recognizes that this position by the Lodge was made in good faith and with the best of intentions. Likewise, the Lodge emphasized to this Arbitrator that files have been kept for many years contrary to 8.4 involving Officers in some cases who were retired. An example was given of a past President of the Lodge who served four presidents ago, persuasively implying that such files may indeed have no value.

Nevertheless, the point is that as contrasted to a general speculation about private litigation in the future, the investigation of the Attorney General is ongoing. Litigation may not

be initiated by the Attorney General following this investigation. Nevertheless, the investigation is ongoing and the Justice Department's notice and request is action pursuant to specific federal statute.

This Arbitrator could ignore the actions of the Justice Department and grant the grievance outright knowing that to do so would now be against public policy and leave it to the City to move to set aside this Arbitrator's Opinion. However, it is not in the interest of the parties to engage in unnecessary litigation or precipitate litigation by the Justice Department when litigation by the Justice Department may ultimately never be forthcoming as a result of the investigation.

In arriving at the conclusions that he has, this Arbitrator is still of the opinion that 8.4, as he has interpreted 8.4, is there to be read in the context of the bargaining history subject to a final resolution of the effect of the term "normally" in the last sentence of the first paragraph of 8.4. But this Arbitrator, because of the public policy as now established by the request of the U.S. Department of Justice pursuant to statute, cannot provide any remedy as suggested in the January 12, 2016 Opinion and Interim Award or any other relief or remedy at this point in time. Likewise, for the same reason, not being able to give any relief, it is unnecessary at this point in time to resolve the question that this Arbitrator raised as to the effect of the term "normally".

Since at this point in time the Lodge has not continued to prevail, the Arbitrator's fees and expenses shall be borne by the Lodge.

AWARD

The grievance is denied at this point in time for the reasons of the public policy involved in the request of the U.S. Department of Justice, and only for this reason, as set forth in the

Opinion. The Arbitrator's fees and expenses shall be borne by the Lodge.

GEORGE T. ROUMELL, JR.
Arbitrator

April 28, 2016

Exhibit 6

VOLUNTARY LABOR ARBITRATION TRIBUNAL
Before George T. Roumell, Jr., Arbitrator

In the Matter of:

CITY OF CHICAGO

-and-

FRATERNAL ORDER OF POLICE
CHICAGO LODGE NO. 7

Gr. Nos. 129-11-035 and 129-12-004
(Policy Grievances)

ARBITRATOR'S RULING ON FRATERNAL ORDER OF POLICE LODGE NO. 7'S MOTION FOR RECONSIDERATION OR, ALTERNATIVELY, CLARIFICATION

APPEARANCES:

FOR CITY OF CHICAGO

Joseph Martinico, Attorney and Chief Labor Negotiator

FOR FRATERNAL ORDER OF POLICE CHICAGO LODGE No. 7:

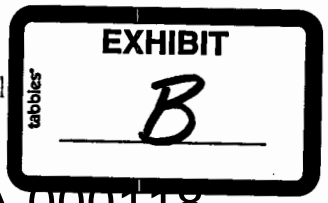
Brian C. Hlavin, Attorney

Background

Policy Gr. Nos. 129-11-035 and 129-12-004, filed by the Fraternal Order of Police Chicago Lodge No. 7, sought to have disciplinary investigative files, disciplinary histories, current entries, Independent Police Review Authority and Internal Affairs Division disciplinary records and any other discipline records or summaries of such records other than records related to Police Board cases be destroyed if not within the exceptions set forth in Section 8.4 of the parties' 2012-2017 Collective Bargaining Agreement.

In the discussion immediately preceding setting forth the Interim Award, this Arbitrator at pages 49-50 wrote:

(1) The matter shall be remanded back to the parties until



> March 15, 2016 during which time the parties are directed to attempt to negotiate between themselves a time line and method to implement the findings set forth above that the City should be directed to destroy all records covered by Section 8.4 not in existence, regardless of the format in which they exist, namely, physical files or electronic files, for which the benchmark for destruction or the provisions related to litigation or arbitration are applicable or there are exceptions provided therein.
> (Emphasis supplied here by Arbitrator.)

This was the finding.

In reaching this finding, this Arbitrator at pages 39-40 made reference to comments in the Lodge's post-hearing brief setting forth the Lodge's acknowledgment concerning the application of Section 8.4:

> This analysis brings this Arbitrator to certain statements of acknowledgment in the Lodge's post-hearing brief. At page 47-48 of the Lodge's brief, the following is stated, "The Lodge is not suggesting that CR files can only be retained pursuant to the litigation exception where there is a Court order precluding their destruction. The Lodge fully understands that while litigation is pending (or reasonably anticipated) the parties are required to retain records which may be relevant to litigation not withstanding any document destruction/ retention policy". This Arbitrator also notes that after making this statement the Lodge's Counsel writes, "The problem for the City is that it stretches this general rule beyond the breaking point effectively assuming that it cannot destroy any records if there is any litigation pending then or potentially arising regardless of how related the records actually are to the litigation".
>
> At page 49, Lodge Counsel writes, "Of course, Section 8.4 itself allows the City to retain documents subject to litigation until such time as litigation is concluded. The Lodge simply is not seeking to have the City destroy records which it must retain due to pending litigation. However, if the City is notified of litigation concerning a dozen officers, then it needs to implement a litigation hold as to that relevant universe, not to "every shred of paper or electronic document forever".

Beginning at page 43 through page 49 of the January 12, 2016 Opinion, this Arbitrator concluded that the public policy at issue before this Arbitrator at the time would not prevent enforcement of Section 8.4, namely, the Freedom of Information Act, and noting that there was

no evidence that the Illinois Local Records Act had been violated. In doing so, this Arbitrator quoted extensively from the Ruling of Judge Peter Flynn of the Circuit Court of Cook County, Illinois, Chancery Division in *FOP Order of Police Chicago Lodge No. 7 v. City of Chicago, et al*, in Case No. 14-CH-17454 (2015).

These observations as to what this Arbitrator considered in the January 12, 2016 Opinion are relevant in considering the current Motion for Reconsideration or Clarification, namely, that the Lodge recognized in its post-hearing brief some litigation limitations and this Arbitrator concluded that on January 12, 2016, based upon the information before him when hearing the case, there was no basis to claim that a decision finding a requirement to destroy certain records not exempt did not violate public policy.

In reaching the January 12, 2016 Opinion, this Arbitrator was furnished the November 4, 2015 Opinion of Arbitrator Jules I. Crystal who decided a similar issue favorable to the Unions involved in interpreting Section 8.4 in the Sergeants, Captains and Lieutenants contracts concerning purging on-line records. *See, SGTS 14-013, SGTS 14-013 (Amended), CPTS 14-001, LTS 14-003*. At the time, Arbitrator Crystal had reached the conclusion that there should be a purging based upon the language of Section 8.4 in the contracts he was reviewing. The rationale proffered by Arbitrator Crystal was favorably considered by this Arbitrator in arriving at the January 12, 2016 Opinion and Interim Award.

Subsequent to the issuance of the Interim Award, the City, over the objections of the Lodge, submitted Arbitrator Crystal's "Decision in Response to City's Request for Clarification of Remedy" in Case Nos. SGTS 14-013, SGTS 14-013 (Amended), CPTS 14-001, LTS 14-003 dated February 29, 2016 as well as two letters dated February 12 and 19, 2016, respectively, from Assistant U.S. Attorney Patrick Johnson whereby, as part of an investigation that had been

commenced by the United States Department of Justice investigating the Chicago Police Department pursuant to Violence, Crime Control and Law Enforcement Act 42 U.S.C. §14141, a request was made in the February 12, 2016 letter "that for the duration of DOJ's pattern and practice investigation under 42 U.S.C. §14141, the City of Chicago and the Chicago Police Department will preserve all existing documents relating to all complaints of misconduct against officers of the Chicago Police Department ...". The February 19, 2016 letter refers "to clarify our document preservation request contained in my February 12, 2016 letter ... including those that are the subject of two pending arbitration cases (1) Chicago and FOP No. 7 Nos. 129-11-035, 129-12-004; and (2) Chicago and PBPA Nos. SGTS 14-013, CPTS 14-001, LTS 14-003".

What occurred after the submission to this Arbitrator of Arbitrator Crystal's February 29, 2016 opinion and the two letters from Assistant U.S. Attorney Patrick Johnson is that this Arbitrator on March 4, 2016 wrote the parties' Counsel discussing the submission and noting that Arbitrator Crystal made reference to the parties negotiating pursuant to the savings clause in Article 34 of the contracts before him, which is the same as the savings clause in Article 33 of the FOP contract. This Arbitrator then noted at page 5 of his letter:

> Directly on point is what was referenced in the February 9, 2016 submission, namely, that the Justice Department has commenced an investigation of the Chicago Police Department pursuant to Violence, Crime Control and Law Enforcement Act, 42 U.S.C. §14141. In this connection, there are the two letters from Assistant United States Attorney Patrick Johnson. The February 12, 2016 letter asks for the preservation of all files. The February 19, 2016 letter confirms a conversation that the files that are asked to be retained as part of the investigation includes the files under consideration in the arbitration involving this Arbitrator, Chicago and FOP No. 7, Nos. 129-11-035, 129-12-004, as well as the files involved in the arbitration under consideration by Arbitrator Crystal.
>
> At this point, under such circumstances, the public policy issue surfaces with new emphasis because the Department of Justice investigation could well result in litigation as has happened in other

communities.

> When faced with such facts, the question then becomes whether the public policy argument takes on new meaning with the advent of the Justice Department investigation and requests. There is a fundamental principle in contract negotiations that the contract must be read as a whole, which could mean that perhaps Article 33 is in play in this situation.
>
> This Arbitrator has chosen to address the issues raised even though the Lodge maintains these are new issues because there are continuing issues based on newly developing evidence. This Arbitrator has chosen to address the matters raised so that he can give the opportunity to both parties to discuss the issues with this Arbitrator. The Arbitrator's preference is to have an in-person discussion with Counsel of the issues raised in this letter and by the submissions of February 9, 2016, February 29, 2016 and March 1, 2016.
> (Emphasis supplied here by this Arbitrator.)

Whereas Arbitrator Crystal in his November 4, 2015 opinion and award seemed poised to grant the grievances purging the on-line records, as a result of his February 29, 2016 opinion and award Arbitrator Crystal, depending on how one interprets the award, either clarified, modified or reversed his position by referring the parties back to negotiation pursuant to the Article 34 savings clause.

In doing so, Arbitrator Crystal at page 15 of his February 29, 2016 wrote:

> Fourth, with respect to the City's specific request, the undersigned cannot ignore that fact that the posture of this case is different from what it was when the matter was arbitrated in 2015. ...

Earlier at pages 7-8, Arbitrator Crystal wrote:

> ... Additionally, argues the City, an investigation by the US Department of Justice has been initiated regarding an alleged pattern or practice of excessive force by CPD officers, which will likely include an investigation of the Department's investigative files and practices, and that, as a result of this investigation, there will continue to be a "heightened focus upon the Department's internal investigation process and its record keeping practices." Thus, argues the City, the Department's retention and possession of all past police disciplinary records and files is critically essential, particularly at this time.

Thus, Arbitrator Crystal was obviously motivated by the Department of Justice investigation in reaching his conclusions in his February 29, 2016 opinion.

This Arbitrator did meet with the parties and, after doing so, issued this Arbitrator's Opinion and Award dated April 28, 2016. This Arbitrator, beginning at page 19 of the April 28, 2016 Opinion, expressed uncertainty as to whether Arbitrator Crystal was aware at the time he issued his February 29, 2016 opinion of the Justice Department investigation and more specifically as to the preservation request of U.S. Assistant District Attorney Patrick Johnson. As this Arbitrator has now pointed out, Arbitrator Crystal was apparently aware of the Justice Department investigation. Arbitrator Crystal did not mention Patrick Johnson's request. Yet, Arbitrator Crystal seemed to conclude that his motivation for his Clarification, Modification or Reversal was at least in part due to the Justice Department investigation.

This Arbitrator in his April 28, 2016 Opinion, beginning at page 19 went into detail concerning the request of the Justice Department, quoting in particular the relevant language of 42 U.S.C. §14141. Though this Arbitrator rejected previous public policy arguments by the City in his January 12, 2016 Opinion, as was the case with Arbitrator Crystal, this Arbitrator could not ignore subsequent developments, namely, an investigation of the Chicago Police Department pursuant to a Federal statute wherein a request was made to preserve files.

As a result, though this Arbitrator had found that pursuant to Article 8.4 that certain records not exempt were to be destroyed, because of the public policy that surfaced due to the actions of the Justice Department, issued the following Award:

> The grievance is denied at this point in time for the reasons of the public policy involved in the request of the U.S. Department of Justice, and only for this reason, as set forth in the Opinion. The Arbitrator's fees and expenses shall be borne by the Lodge. (Emphasis supplied here by Arbitrator.)

Discussion

This Arbitrator has set forth in detail the background leading to the April 28, 2016 Arbitrator's Opinion and Award so as to hone in on the issues raised by the Fraternal Order's Motion for Reconsideration or, Alternatively, Clarification and the City's response.

Insofar as the City challenges the Motion on the grounds that this Arbitrator has issued an Award and therefore the doctrine of *ex functus officio* applies, this argument fails. To begin, contrary to the City's current position, the approach that the Order is now taking was the same approach taken by the City in convincing both this Arbitrator and Arbitrator Crystal to issue their respective April 28 and February 29, 2016 opinions and awards after previously issuing their respective January 16, 2016 and November 4, 2015 opinions and interim award or award. Furthermore, in his February 29, 2016 opinion, Arbitrator Crystal presented a scholarly analysis of the limits of the *ex functus officio* doctrine which this Arbitrator incorporated by reference, including a quotation in his April 28, 2016 Opinion. Then, too, there is precedent and comment that when there is an ambiguity or even an apparent mistake in the award or the award is incomplete, the arbitrator has jurisdiction to address the claims as an exception to the basic *ex functus officio* document. *See, e.g., GTE North Inc.*, 98 LA 894, 895-896; *also see,* Dunsford, Should Arbitrators Retain Jurisdiction Over Awards, Proceedings of the 51st (1998) annual Meeting of the National Academy of Arbitrators (pp. 102-111) (BNA).

Before addressing what this Arbitrator perceives is the focus of the dispute in its present form between the parties, the parties' attention is called to the comments that this Arbitrator made at pages 21-22 of his April 28, 2016 Opinion:

> It is not lost on this Arbitrator that there have been instances such as in Detroit, Ferguson, Missouri and New Orleans, to name a few, where the Justice Department has conducted an investigation involving a

> police department resulting in legal action which in some cases involved court supervision for a period of time. This may not come about in Chicago. But the fact the United States Department of Justice is requesting that the records be preserved pending investigation to determine if there is any basis for the Attorney General to institute civil action pursuant to 42 U.S.C. §14141 as contrasted to generalizations that were made by the City in terms of unforeseen possible individual lawsuits in the future. This Arbitrator emphasizes that there have been investigations by the Justice Department that have not resulted in any litigation or Court supervision. And this may be the ultimate result in Chicago. But, the potential for litigation is there and, pursuant to a specific statute, the Department has made a preservation request and document preservation notice pursuant to 42 U.S.C. §14141.

And herein is the nub of the concern raised by both parties from their respective points of view.

At page 4 of his written response, the City's Attorney writes:

> Perhaps the FOPs claim that the Final Award fails to provide "finality" to the parties' dispute and instead "assures future litigation" constitutes, in the union's eyes, an "imperfection" as to form. This claim must be rejected for several reasons. First, FOP's concern about the award's "finality" is articulated by its question, "what happens when the DOJ investigation is concluded?" The question fails to take into account numerous intervening and virtually certain events which may soon address, in whole or in part, the underlying dispute. Within a year or so, the parties will be at the bargaining table where it is very likely that some form of resolution of this issue will be the subject of negotiations between the parties. Additionally, the subject matter of the dispute will undoubtedly be included within the DOJ's investigation of the Department's practices and it may ultimately be resolved within that process. Secondly, this claim itself does not constitute an "imperfection" as to form, not affecting the merits of the Final Award. In his Final Award, the Arbitrator found that the DOJ's investigation and the potential outcomes thereof, including protracted litigation and/or extended periods of supervision/monitoring, constituted a sufficient public policy basis upon which to deny the FOP's grievances. The FOP's request for reconsideration is based not upon some "imperfection as to form", but rather its plain disagreement with the merits of this conclusion and finding.
> (Emphasis by this Arbitrator.)

Now read the closing paragraph and conclusion of the Lodge's Counsel in his Motion wherein at pages 7-8 he writes:

The Lodge has consistently recognized, and the Arbitrator so noted, that a litigation exception exists to Section 8.4 which permits the City to retain documents otherwise subject to destruction. Indeed, the Arbitrator in his January 12, 2016 Interim Award quoted extensively from the Lodge's Post-Hearing Brief wherein the Lodge fully acknowledged the litigation exception (Interim Award, p. 39):

> ... "The Lodge is not suggesting that CR Files can only be retained pursuant to the litigation exception where there is a court order precluding their destruction. The Lodge fully understands that while litigation is pending (or reasonably anticipated) the parties are required to retain records which may be relevant to litigation not withstanding any document destruction/retention policy." This Arbitrator also notes that have making the statement the Lodge's Counsel writes, "The problem for the City is that it stretches this general rule beyond the breaking point effectively assuming that it cannot destroy any records if there is any litigation pending then or potentially arising regardless of how related the records are to the litigation."

At the meeting between the parties and the Arbitrator on March 22, 2016, the Lodge unequivocally stated that the Department of Justice's preservation request would trigger the litigation exception under Section 8.4 as understood by the Lodge. Indeed, the Arbitrator confirms such fact in his final Opinion and Award, stating "during the March 22, 2016 meeting with the Arbitrator, the Lodge reiterated this point which this Arbitrator acknowledges. This Arbitrator recognizes that the position by the Lodge was made in good faith and with the best of intentions." Accordingly, the Lodge submits that the impact of the Department of Justice retention request does not create a public policy making the document destruction clause unenforceable nor does it absolve the City of its admitted breach of Section 8.4 for the past twenty years. However, the request may act to stay the parties from complying with Section 8.4's clear and unequivocal obligation to destroy records until such time as the U.S. Department of Justice's preservation order is lifted.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Fraternal Order of Police, Lodge No. 7 respectfully requests this Arbitrator to reconsider his Opinion and Award entered April 28, 2016 and/or clarify same to reaffirm this Arbitrator's prior findings as to the meanings and intent of Section 8.4 as clearly set forth in his January 12,2016 Interim Award; direct the City to comply with said Award consistent with the order set forth in the January 12, 2016 Interim Award; and that said compliance

> shall not commence until after the preservation notice issued by the U.S. Department of Justice has expired.
> (Emphasis supplied by Arbitrator.)

When the respective statements as just quoted by this Arbitrator are reviewed, a reasonable argument can be made that under the circumstances, with the intervention of the Department of Justice, the parties are closer in their analysis of the situation than they might acknowledge. As this Arbitrator noted and as the Lodge repeats at page 7 of its Motion, the Lodge recognizes that under Article 8.4 the litigation exception could preclude destruction "while litigation is pending (or reasonably anticipated)". This Arbitrator in his quote from page 21-22 of his April 28, 2016 Opinion, made reference as to potential outcomes based on the experience in other cities of a Department of Justice investigation of a police department.

The comments quoted by this Arbitrator of the City's response make reference to the potential that the Justice Department's current preservation request may go beyond the status of the situation as now existing. Neither party, nor can this Arbitrator, anticipate the course of the DOJ investigation which could lead to potential litigation which may be based on public policy as set forth in 42 U.S.C. §14141, thereby invoking the Article 8.4 litigation exception.

The bottom line is straightforward. The Award stands, but with a clarification as to the Award's meaning. The initial finding of January 12, 2016 as to the destruction of records pursuant to the language of Section 8.4 is there to be read and applied once the public policy exception brought on by the Department of Justice investigation and its possible consequences no longer exists. This is the meaning of the Award of April 28, 2016 by the language "at this point in time", namely, as long as the Department of Justice is involved in any capacity with the City of Chicago Police Department and makes any requirements or requests, as currently is the case and may be in the future, that the records at issue be preserved. The language "only for this

reason" means that if the Department of Justice is no longer involved with the City of Chicago in any capacity wherein the retention of the records is not involved, then the public policy exception ceases to exist. The definition of involvement by the Department of Justice as a result of the investigation could mean litigation or an agreement between the City and the Department of Justice in lieu of litigation or a settlement stemming from litigation monitoring or oversight that would involve retention of records pursuant to the Department of Justice's authority as set forth in 42 U.S.C. §14141.

The Department of Justice may conclude its investigation without any further action or any action that affects the records involved. But until the Department of Justice is no longer involved in any capacity, as just defined by this Arbitrator, the Award as issued stands as clarified, noting that this Arbitrator did make a finding as to the meaning of Section 8.4 without the intervention of and record preservation request by the Department of Justice. This is the clarification.

This clarification somewhat bridges the respective positions of the parties as this Arbitrator has analyzed their positions with the quotes he has made from their respective submissions. The public policy exception which this Arbitrator relied on, to repeat, only applies as long as the Department of Justice is involved with the City of Chicago Police Department in any capacity, as "any capacity" has been defined herein by this Arbitrator.

Because this Arbitrator, though repeating his Award as set forth on April 28, 2016, believes that the clarification as to the meaning of the Award in the context of this dispute has aspects that are consistent with each parties respective positions, the Arbitrator's fees for issuing what has amounted to a clarification in the body of this response shall be equally split between the parties.

Based upon the clarification as set forth in the above discussion, the Arbitrator issues the following Award which will be subject to the above-described clarifications.

AWARD

Subject to the clarification as explained in this Ruling, particularly as set forth at pages 10-11, the grievances are denied at this point in time for the reasons of public policy involved in the request of the United States Department of Justice, and only for this reason, as set forth in the Opinion of April 28, 2016.

GEORGE T. ROUMELL, JR.
Arbitrator

June 21, 2016

Exhibit 7

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FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

CITY OF CHICAGO
Plaintiff/Petitioner

Appellate Court No: 1-17-2907
Circuit Court No: 2016CH009793
Trial Judge: SANJAY T. TAILOR

v.

FRATERNAL ORDER OF POLICE, ET AL.
Defendant/Respondent

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FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

CITY OF CHICAGO
Plaintiff/Petitioner

Reviewing Court No: 1-17-2907
Circuit Court No: 2016CH009793
Trial Judge: SANJAY T. TAILOR

v.

FRATERNAL ORDER OF POLICE, ET AL.
Defendant/Respondent

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