

**BEFORE
DISPUTE RESOLUTION BOARD**

**EDWIN H. BENN (Neutral Chair)
CICELY PORTER ADAMS (City Appointee)
JOHN CATANZARA, JR. (Lodge Appointee)**

In the Matter of the Arbitration

between

CITY OF CHICAGO

(“CITY”)

and

**FRATERNAL ORDER OF
POLICE, CHICAGO LODGE NO. 7**

(“LODGE”)

CASE NOS.: L-MA-18-016
AAA 01-22-0003-6534
Arb. Ref. 22.372
(Interest Arbitration)

SUPPLEMENTAL FINAL OPINION AND AWARD

APPEARANCES:

For the City: James C. Franczek, Jr. Esq.
David A. Johnson, Esq.
Jennifer A. Dunn, Esq.

For the Lodge: Joel A. D’Alba, Esq.
Margaret A. Angelucci, Esq.

Dated: January 4, 2024

CONTENTS

SUMMARY 3

FULL DISCUSSION 11

I. BACKGROUND 11

II. A PROCEDURAL ISSUE RAISED BY THE CITY CONCERNING
PROCEEDINGS AFTER THE CITY COUNCIL’S REJECTION..... 13

III. THE CITY COUNCIL MEMBERS VOTING TO REJECT THE ARBITRATION
PROVISIONS OF THE FINAL AWARD AND MAYOR JOHNSON VIOLATED
THEIR OATH OF OFFICE 18

IV. THE COMING COURT CHALLENGE 29

 A. The Likelihood Of The City’s Prevailing In A Court Challenge To Overturn The
 Final Award’s Requirement For Arbitration 29

 1. Deference Of The Courts To Interpretations Made By Arbitrators 30

 2. The Consent Decree Argument..... 33

 3. The City’s Public Policy Argument..... 36

 4. The City’s Long History Of Having The Police Board Decide These
 Disciplinary Actions Argument 39

 5. The City’s Transparency Argument 41

 6. Conclusion On The City’s Court Challenge Arguments 42

 B. How Did This Happen? 42

V. WHAT HAPPENS NEXT?..... 53

VI. CONCLUSION 59

Following the Chicago City Council's rejection of the arbitration provisions of this Dispute Resolution Board's October 19, 2023 Final Award (City's Board Member dissenting) and after return of the matter to this Board, a majority of this Board re-affirms the mandate for arbitration found in the Final Award.

Because of the length of this Supplemental Final Award, I have provided a summary (pages 3-10) and a more complete full discussion (pages 11-end).

SUMMARY

1. Background

By vote of 33 to 17 on December 13, 2023, the Chicago City Council rejected the arbitration provisions of this Dispute Resolution Board's October 19, 2023 Final Award (City Member dissenting in the Final Award). The remaining terms for changes to the parties' successor collective bargaining agreement to the contract that expired June 30, 2017 adopted by the Final Award through this interest arbitration proceeding were ratified in a separate vote by the City Council.

The Final Award provided for an option for the Lodge to protest disciplinary actions in excess of 365 days and separations (dismissals) issued to police officers to arbitration rather than having those disputes exclusively decided by the Chicago Police Board. That option currently exists for officers who receive suspensions ranging from 11 to 365 days. The Final Award extended that option to those officers who are charged to receive disciplinary suspensions in excess of 365 days and dismissals.

The rejected arbitration provisions of the Final Award have been returned to this Board for consideration.

2. Violation Of The Oath Of Office

The Workers' Rights Amendment of the Illinois Constitution provides that "[n]o law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively over their wages, hours, and other terms and conditions of employment" The Workers' Rights Amendment is a constitutional protection of the statutory right for final and binding arbitration explicitly provided in Sections 8, 2 and 15 of the Illinois Public Labor Relations Act ("IPLRA"). Those sections of the IPLRA specifically *guarantee* police officers the right to have final and binding arbitration in their collective bargaining agreements. That is the "Rule of Law". That firmly established rule has been followed in 17 published interest arbitration awards dating back to 1988 (prior to this case, six of those awards issued by this Neutral Chair going back to 1990).

The alderpersons of the City Council (as did Mayor Johnson) took an oath that “I _____ do solemnly swear that I will support ... the Constitution of the State of Illinois”

Those alderpersons who voted to reject the arbitration requirements of the Final Award which placed the statutory and constitutional right of arbitration for protests of disciplinary matters in excess of 365 days into the parties’ collective bargaining agreement therefore violated their oath of office to “... support ... the Constitution of the State of Illinois.” Mayor Johnson’s statements advocating for rejection by the City Council and then supporting that rejection after it occurred (“*So if you’re asking this body to just simply accept something because it’s law*, that would be the antithesis to how this stage even exists”) similarly constituted a violation of his oath of office. The laws of Illinois are not merely “*asking* this body to just simply accept something because it’s law” – the laws of Illinois are *telling* the City that it *must* accept “something because it’s law”. Rejecting a constitutionally protected right of arbitration and therefore denying that right to police officers is not an action consistent with an oath “... that I will support ... the Constitution of the State of Illinois”

3. Reasons Offered By Those Alderpersons Voting For Rejection Of The Arbitration Provisions Of The Final Award Do Not Permit Them To Ignore The Rule of Law

The right for police officers to have arbitration is a statutory and constitutional mandate that if the Lodge requests to have arbitration over these disciplinary actions in its collective bargaining agreement with the City as it has done in this case, such a provision *must* be placed into the parties’ collective bargaining agreement providing for that right.

The reasons offered for rejection of the arbitration provisions of the Final Award as stated by alderpersons speaking at the December 13, 2023 City Council meeting show strongly held beliefs that arbitration is a corrupt form of dispute resolution because the requirement for arbitration “just is not right”; the process occurs “behind closed doors”; and for some, there is a distrust – indeed, a disdain – of the police.

However, adherence to the Rule of Law is not a cafeteria selection process for the City to choose which State of Illinois laws should apply and which should not. Compliance with the Rule of Law is an obligation. And that obligation applies equally to everyone – individuals and governing bodies, be they large or small in stature or size, powerful or not.

Taking the City Council’s reasons for rejection to its logical extent, if laws such as the IPLRA could be ignored because it is felt by the City Council that those laws are not “just” or “right”, then the City could ignore all State if Illinois or federal laws applicable to the City and, going further, individuals could opt to not pay taxes, fees,

finer, comply with City ordinances, state and federal laws, etc. which they similarly believe are not “just” or “right”.

In a democracy, that is not how it works.

4. The Coming Litigation And The City’s Chances Of Prevailing

Should the City Council’s rejection of the arbitration provisions of the Final Award remain unchanged, there will be court action instituted by the Lodge to enforce the arbitration provisions of the Final Award.

At the December 7, 2023 Committee on Workforce Development, labor counsel for the City Jim Franczek was asked about the chances of the City prevailing in that sure-to-come court challenge. Jim Franczek is one of the most highly regarded, respected and experienced management-side attorneys in the country. Mr. Franczek candidly responded with the assessment that although the City has what he characterized as “pretty strong” arguments to present to a court, “... a challenge in the Circuit Court of Cook County to an interest arbitrator decision is a steep hill to climb and that would be a challenging legal proceeding for the City of Chicago ... the challenge in circuit court, yes, is going to be significant”

From my view of this matter, the City’s chances of prevailing in that litigation will be a *very* steep hill to climb that will be a *very* challenging legal proceeding for the City (indeed, a course of action with no possibility of prevailing).

The City’s overwhelming hurdle in court will be because:

1. The courts give great deference to interpretations made by arbitrators.
2. The Federal Court Consent Decree in paragraph 711 specifically carves out collective bargaining and interest arbitrations such as this proceeding from coverage by that decree. Moreover, aside from the carve out for these proceedings in paragraph 711 of the Consent Decree, the Federal Court would be hard pressed to deny the statutory and constitutionally protected right for arbitration due to a consent decree to which the Lodge was not a party and was even denied the ability to become a party when the Lodge was denied intervention by the Federal Court. In short, the Consent Decree does not apply to this case.
3. The City does not have a winnable public policy argument because the Illinois Supreme Court has stated “... Illinois public policy is shaped by our statutes, through which the General Assembly speaks.” Because of the IPLRA’s mandate for final and binding arbitration for police officers found in Section 8; the specific public policy declaration for arbitration for police officers’

collective bargaining disputes found in Section 2; and the supremacy clause found in Section 15, the public policy in Illinois is to require final and binding arbitration for protests of the kinds of discipline cases at issue in this matter.

4. Because the Lodge no longer “mutually agree[s] otherwise” to have the Police Board decide these cases rather than to have arbitration, under Section 8’s mandate for arbitration in collective bargaining agreements, the fact that there has been a long history of having the Police Board resolve the type of disciplinary actions involved in this case is not relevant.
5. The City’s argument that arbitration is not “transparent” because the proceedings are not open to the public cannot prevail over the right for arbitration found in the IPLRA which is a right supported by the Workers’ Rights provisions of the Illinois Constitution. The legal precedent is that “[a]rbitration is, however, a private proceeding which is generally closed to the public.” Further, the ethics rules of the American Arbitration Association and National Academy of Arbitrators which provide for the privacy of arbitration support the privacy of arbitration in this case. However, the parties are free to request an arbitrator in an individual case to open the proceedings to the public. In any event, whether the proceedings are open to the public is a procedural question and the U. S. Supreme Court has found that “[o]nce it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, ‘procedural’ questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.”
6. Any argument that adoption of arbitration and doing so as a private proceeding is inconsistent with “the interests and welfare of the public” under the IPLRA cannot prevail because the interests and welfare of the public are that the Rule of Law from Sections 8, 2 and 15 of the IPLRA and the Illinois Constitution must be followed. The “interests and welfare of the public” are not to have the City Council pick and choose which laws of the State of Illinois are to apply to the City on the basis of what the City Council believes are laws that are not “just” or “right”. Moreover, the IPLRA provides that “[t]he lawful authority of the employer” can be considered by interest arbitrators. The City has no “lawful authority” to act in direct contradiction of the Rule of Law from Sections 8, 2 and 15 the IPLRA and the Illinois Constitution requiring final and binding arbitration in police collective bargaining disputes.

7. Since 1988 there have been 17 published interest arbitration awards (prior to this dispute, six by this Neutral Chair going back to 1990) that have held consistent with Sections 8, 2 and 15 of the IPLRA that if a party requests to have arbitration of disputes, including discipline, that party is entitled to that right to be placed in the collective bargaining agreement.
8. An interest arbitration such as this requiring the mandate for arbitration as provided in Sections 8, 2 and 15 of the IPLRA is a proceeding to *apply* the law as set forth in those sections – it is not a proceeding to *make* the law. Those who oppose arbitration of police discipline because they believe it “just is not right” or because they distrust (or disdain) the police, can only get the requirement for arbitration changed through changing the law. That result cannot be obtained in an interest arbitration proceeding before this Dispute Resolution Board.

Therefore, in reality, the likelihood of the City prevailing in the coming court challenge to the Final Award is none. The result of a court challenge will be costly to the City – monetarily and to the morale of the police officers as they see the City thumbing its nose at such a clear statutorily and constitutionally mandated right that the Lodge seeks in this case.

5. The City’s Potential Liability

The coming court battle may well go on for years. In the end, the officers who were adversely affected because they were not afforded the right to arbitration will be entitled to be made whole for losses they suffered as a result of being deprived of the statutory and constitutional right of arbitration and they will be entitled to make-whole relief for the delay caused by the City in refusing to follow the Final Award.

Make-whole relief is not just backpay for lost wages. Not only are lost wages part of make-whole relief, but so are costs that are a direct or indirect but foreseeable consequence of the deprivation of a right. Here, for the adversely affected officers, that would include, out-of-pocket medical expenses; credit card debt incurred due to lost wages; and other costs simply to make ends meet. Further, make-whole relief could also include those costs resulting from loss of a car or a home. Those elements of make-whole relief are consistent with the broad authority to formulate remedies possessed by arbitrators as remedies are designed to restore the *status quo ante* – *i.e.*, to put the parties back to where they would have been before a contract violation occurred and to make whole those who have been harmed by a breach of the contract.

The remedy for the City Council’s refusal to ratify the arbitration provisions of the Final Award will apply to *all* officers who were suspended for periods greater than 365 days or dismissed who were or become deprived of the right of arbitration going back to the retroactive date of September 14, 2022 – whether those officers’ discipline

is ultimately upheld or denied in arbitration. That is because, like disciplinary actions for officers between 11 and 365 days, under the Final Award those officers who are being forced to have their disciplinary actions adjudicated by the Police Board now have the same right that exists under the prior contract for officers whose discipline was between 11 and 365 days to remain on the payroll until their cases are decided in arbitration.

In her presentation to the City Council opposing rejection, Alderwoman Silvana Tabares recognized that prospect of wasted taxpayers' money on police officers whose discipline would have been upheld in arbitration, but who will be entitled to a remedy because of the City's delay caused by its challenging the arbitration provisions of the Final Award. Alderwoman Tabares pointed out to the City Council:

These cases will last years and could cost the City hundreds of millions of dollars. Those are dollars that will go into the pockets of police officers who were rightfully suspended or terminated. None of us – I'm sure none of us want public dollars to be awarded in court to bad cops as opposed to being used to fund mental health clinics or homeless services.

Alderwoman Tabares is correct.

6. The Detractors Of Arbitration And Chicago's Version Of "The Big Lie"

The detractors of arbitration have successfully persuaded some members of the public and those alderpersons who voted to reject with assertions that the privacy of arbitration which occurs "behind closed doors" is somehow a corrupt process for dispute resolution – even though arbitration is required by the Rule of Law and is the long-held policy of this state (as well as at the federal level). Misinformation, untruths and half-truths about the arbitration process have been fed to the public and have been repeated over and over to the point that the misinformation, untruths and half-truths have now become fact. That misinformation, untruths and half-truths are that the Lodge selects the arbitrators and the arbitrators therefore have a financial incentive to please the Lodge and the arbitrators therefore compromise their decisions and rule in the Lodge's favor in order to get future work. The fact and truth are that arbitrators are *mutually* selected *by the parties* (and *not* solely by the Lodge as has been misrepresented) and that the arbitrators cannot compromise their decisions to curry favor with the Lodge because doing so will (and should) get those arbitrators removed from hearing future cases. The rule for the arbitrators is "Good cases win. Bad cases lose. Split no babies. Throw no bones." If arbitrators do not follow that rule, they should not be used.

The strategy that has been used to disparage arbitration through repeated misinformation, untruths and half-truths is the same type of strategy used by those

now seeking to divide the country through repetition of “The Big Lie” that former President Trump actually won the 2020 election and that election was “rigged.” As former President Trump told his White House press secretary Stephanie Grisham, to make a falsity into truth “[a]s long as you keep repeating something, it doesn’t matter what you say.” That is what happened here when the phrase “behind closed doors” and untrue inherent biases of arbitrators whose goal has been made out to be that arbitrators decide and compromise cases based upon their desire to be selected for future work were repeatedly used in a negative fashion to describe the decades-old statutory right to arbitration. Disputes decided in arbitration by arbitrators are decided on the basis of the circumstances and facts presented in each case – arbitrators call balls and strikes – period.

It should be lost on no one that this interest arbitration proceeding resolved many unresolved issues between the parties that festered for now over six and one-half years and arbitration of discipline was only one of those issues. The end product of this interest arbitration proceeding was captured by the City Member’s dissenting opinion in the Final Award:

The Neutral Chair has labored valiantly, and successfully, to assist the parties in reaching agreement on a broad range of issues, as set forth in the Appendix attached to the Neutral Chair’s “Final Opinion and Award” (“Award”). It is the City’s belief that these agreements are in the best interest of all parties, especially including the residents of Chicago, and will prove instrumental in advancing the City’s continuing commitment to embedding principles of constitutional policing. We are grateful to the Neutral Chair for his efforts in helping the parties get to this outcome.

This interest arbitration that resulted in resolution of the many remaining long-running disputes between the parties was an arbitration proceeding that was conducted “*behind closed doors.*”

7. The Simple And Required Result

All of this really returns to one simple notion. With the statutory mandate for arbitration found in the IPLRA as protected by the Workers’ Rights Amendment to the Illinois Constitution which constitute the Rule of Law, those alderpersons who voted to reject the arbitration provisions of the Final Award violated their oath of office that “I _____ do solemnly swear that I will support ... the Constitution of the State of Illinois” And while slogans, catch phrases, public relations efforts and talking points like “behind closed doors” have been successfully utilized to disparage and demean arbitration to achieve the result from the City Council (but at the same time has allowed those voting to reject to make their no doubt heart-felt positions publicly known), the real phrase for those alderpersons who voted to reject is this:

“You took an oath.”

Therefore, the City Council must not reject the arbitration provisions of the Final Award.

8. A Plea

Therefore, I make a last-ditch plea to the City Council. Please, don't do this and continue with the rejection and go down a path of years of fruitless, expensive and wasteful litigation and resulting discord – only to lose that litigation and then to have to pay make-whole relief for those officers who were affected by the delay – whether those officers ultimately prevail in arbitration or not. Please, consider the absolutely correct legal assessment given to you by the City's attorney that although there are arguments that can be presented, “... a challenge in the Circuit Court of Cook County to an interest arbitrator decision is a steep hill to climb and that would be a challenging legal proceeding for the City of Chicago ... the challenge in circuit court, yes, is going to be significant”

To those alderpersons who voted to reject and to Mayor Johnson, your disagreement and dislike of the result of the arbitration requirements of the Final Award which you made on behalf of some of your constituents have been heard and preserved by this Supplemental Final Award and video of the City Council proceedings. If you voted to reject to make a protest, your point has been made. Now please don't throw away potentially large sums of taxpayers' money that could be used better elsewhere than on a legal fight you cannot win which you are undertaking to make a point you have already resoundingly made. The law is clear – and you took an oath to support that law. If you don't like the results coming from the Rule of Law, then seek to change the law. However, you cannot ignore or defy the results of the Rule of Law merely because you do not like those results.

Again, “You took an oath.”

9. Conclusion

The arbitration provisions of the Final Award therefore remain.

FULL DISCUSSION

I. BACKGROUND

To reject the terms of an interest arbitration award, the Chicago City Council must do so by a three-fifths vote (30 votes needed to reject). If not rejected by the required number of votes, the terms of an interest arbitration award become the parties' collective bargaining agreement.

By a vote of 33 to 17 on December 13, 2023, the Chicago City Council rejected a portion of an interest arbitration award ("Final Award") issued by this Dispute Resolution Board on October 19, 2023 (City's Member dissenting) adopting a proposal made by the Lodge to be part of the parties' new Agreement. That proposal was to provide to the Lodge the option to protest disciplinary actions of greater than 365 days and separations (dismissals) issued to police officers to final and binding arbitration rather than having the Chicago Police Board decide all of those disputes. The remainder of the new Agreement which was resolved through the interest arbitration process was ratified by the City Council.

This Supplemental Final Award issues as a result of that partial rejection vote by the City Council to place the arbitration provisions into the new Agreement between the parties and the returning of this matter to this Board.

As the Neutral Chair of the Dispute Resolution Board, I have issued three prior decisions in this dispute – an Interim Award dated June 26, 2023; a Supplemental Interim Award dated August 2, 2023; and the Final Award dated October 19, 2023.¹

¹ The Interim Award is posted at:
https://ilrb.illinois.gov/content/dam/soi/en/web/ilrb/arbitration/documents/L-MA-18-016_Interim_Award.pdf

The Supplemental Interim Award is posted at:
https://ilrb.illinois.gov/content/dam/soi/en/web/ilrb/arbitration/documents/L-MA-18-016_Supp_award.pdf

The Final Award is posted at (copy and paste the URL into a browser if the link doesn't open to the award):
[https://ilrb.illinois.gov/content/dam/soi/en/web/ilrb/arbitration/documents/City_of_Chicago_-_FOP_Lodge_7_Interest_Arbitration_Award_\(L-MA-18-016\).pdf](https://ilrb.illinois.gov/content/dam/soi/en/web/ilrb/arbitration/documents/City_of_Chicago_-_FOP_Lodge_7_Interest_Arbitration_Award_(L-MA-18-016).pdf)

The Final Award contained numerous changes to the parties' prior Agreement which expired June 30, 2017.

The rationale in the Final Award adopting the arbitration requirement was as follows [emphasis added]:²

1. Section 8 of the Illinois Public Labor Relations Act ("IPLRA") provides that collective bargaining agreements for police officers "... *shall provide* for final and binding arbitration of disputes concerning the administration or interpretation of the agreement unless mutually agreed otherwise."
2. The Lodge no longer "agree[s] otherwise", therefore, in accord with Section 8, the Agreement "*shall provide* for final and binding arbitration of disputes"
3. The parties' Agreement requires that the City have "just cause" to discipline police officers. If there are "disputes" over whether "just cause" exists for discipline of police officers, those are "disputes concerning the administration or interpretation of the agreement" under Section 8 of the IPLRA which, if contested, "shall" be submitted "for final and binding arbitration of disputes."
4. Section 15 of the IPLRA (Act Takes Precedence) is a supremacy clause which provides 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."
5. Section 2 of the IPLRA provides that for employees such as police officers, it is the "policy" of the State of Illinois that "*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."

² Final Award at 10-26.

6. Since 1988 there have been 17 published interest arbitration awards (six by this Neutral Chair going back to 1990) that have held that if a party requests to have arbitration of disputes, including discipline, the quoted sections of the IPLRA require that the interest arbitrator rule that final and binding arbitration must be part of the parties' collective bargaining agreement.
7. The Illinois Constitution now provides the "Workers' Rights" Amendment that for "employees" – which include police officers – "[n]o law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively over their wages, hours, and other terms and conditions of employment"

In accord with the provisions of Section 28.3(B)(9) of the existing Agreement, the parties met after the City Council's rejection vote, but were unable to agree upon modifications to the resolve the arbitration of discipline dispute.

On December 21, 2023, the parties met with the undersigned Neutral Chair and the other Board members. Discussion was had on the unresolved arbitration dispute, but again, resolution of the unresolved arbitration dispute did not occur.³

II. A PROCEDURAL ISSUE RAISED BY THE CITY CONCERNING PROCEEDINGS AFTER THE CITY COUNCIL'S REJECTION

At the December 21, 2023 meeting of the parties with this Board, the City requested the ability to present further argument and perhaps testimony and wanted to further delay this matter to February 1, 2024. I denied that request.

At the December 21, 2023 meeting where discussion showed there would be no resolution of the disputed arbitration of discipline issue, I advised the parties that I

³ At the December 21, 2023 meeting of the Board and the parties, the Lodge raised a dispute concerning an increase to health care costs as provided in the City ordinance adopting the portion of the Final Award ratified by the City Council. I advised the parties that I saw that dispute as a matter to be resolved through further discussion between the parties or through arbitration or unfair labor practice proceedings. Litigation on the insurance issue has apparently begun. In this Supplemental Final Award, I express no opinion on the insurance dispute.

viewed the videos of the December 7, 2023 Committee on Workforce Development (which included a detailed presentation by the City’s negotiating team and opinion of legal counsel); and the December 13, 2023 full City Council meeting where, at both meetings, objections and supporting positions for the arbitration provisions of the Final Award were presented in great detail. Further considering that I had previously issued three awards in this case resulting from a very voluminous record addressing the right to arbitration and after considering the parties positions on how to proceed, I advised the parties that I had enough information to issue another decision – this time on the objections to the arbitration requirements of the Final Award raised during the City Council proceedings. I further advised the parties that they were free to submit anything further concerning the reasons for the City Council’s rejection and that I would issue a Supplemental Final Award after the holidays towards the end of the week of January 2, 2024.

Section 14(p) of the IPLRA allows parties to “... agree to submit unresolved disputes concerning wages, hours, terms and conditions of employment to an alternative form of impasse resolution.” In Section 28.3(11) of the parties’ collective bargaining agreement, the parties took advantage of Section 14(p) of the IPLRA and agreed to adopt Sections 14(h), (i), (k) and (m) of the IPLRA. Those sections were also specifically listed in the agreed-upon October 31, 2022 Scheduling Order at IX(3) as governing these proceedings (“[t]hese proceedings shall be governed by the following ... Sections 14(h), (i), (k) and (m) of the Illinois Public Labor Relations Act”).

Section 14(n) of the IPLRA specifically provides that after there is a rejection of an interest arbitration award by a governing body, “... the parties shall return to the arbitration panel for further proceedings and issuance of a supplemental decision with respect to the rejected terms.” However, the parties did *not* adopt Section 14(n)

as part of their “alternative form of impasse resolution” as allowed by Section 14(p) of the IPLRA.

The governing language for what happens after a City Council rejection is found in Section 28.3(B)(9) of the parties’ Agreement:

9. If the City Council should reject the arbitrated agreement, the parties shall meet again within ten (10) days of the Council’s vote to discuss the reasons for the Council’s rejection and to determine whether any modifications can be made to deal with the problems; but either party may thereafter terminate this Agreement upon ten (10) days’ written notice to the other.

The parties met this obligation under Section 28.3(B)(9) – they met, but without success.

Thus, there is no requirement for the parties to return to this Board after the City Council rejected the Final Award. Nevertheless, from the outset, the parties agreed that if there was a City Council rejection, they would return to this Board. Following that informal agreement, I stated in the Final Award at 26-27:

... Should the City Council reject the terms of this Award establishing the parties’ successor Agreement to the 2012-2017 Agreement and the matter is returned to this Board based on objections to the arbitration requirement, given that the arbitration provisions have now been determined and discussed on three occasions, the parties can rationally assess the outcome of this Board having to reconsider its prior rulings – but we will listen to and consider those objections (and any other objections the City Council may have).

For purposes of the City’s objection and its desire to present further evidence, this is my fourth decision in this case on the arbitration issue. Actually, this is my sixth ruling in this case on the arbitration issue. Aside from the Interim Award,

City of Chicago and FOP Lodge 7
Supplemental Final Opinion and Award
Page 16

Supplemental Interim Award, Final Award and now this Supplemental Final Award, there were two previous orders in this case addressing the substance of the arbitration issue (orders dated May 5 and May 12, 2023) making six rulings by me on the arbitration dispute.⁴

There have been (to say the least) extensive arguments, briefs and negotiations on this issue. And because the parties agreed to exclude Section 14(n)'s procedures for post-rejection proceedings, there is no statutory or contractual process agreed to by the parties to govern their voluntary returning to this Board after the City Council rejected the Final Award.

⁴ The October 31, 2022 agreed-upon Scheduling Order provided for a procedure for the parties to file final offers, evidence and arguments; file briefs and reply briefs; engage in mediation; and present evidence and arguments at hearings. As of October 31, 2022 when the Scheduling Order issued, former Mayor Lori Lightfoot was in office. As provided in the Scheduling Order, the hearings were to commence March 27, 2023 and end April 10, 2023.

As reflected in a March 1, 2023 Order Pausing Proceedings, the proceedings in this matter were paused with a May 5, 2023 status date due to former Mayor Lightfoot's elimination from the mayoral election as a result of her losing the February 28, 2023 election and exclusion from a runoff election to be held April 4, 2023 – a runoff election that Mayor Johnson won.

On May 5, 2023, the City requested a further stay of the proceedings, to which the Lodge objected. Because then Mayor-Elect Johnson had not yet been installed; there was going to be a transition of power; and further because before she left office, former Mayor Lightfoot dismissed the City's Lead Counsel Jim Franczek and his firm essentially leaving a rudderless ship in the middle of a very complex proceeding, on May 5, 2023, I issued an Order Partially Granting Stay And Scheduling Show Cause Hearing. In relevant part, that May 5, 2023 Order specifically referenced the arbitration issue and cited the most recent case I decided granting a similar arbitration request and noted that there was underlying arbitration authority cited in that case. May 5, 2023 Order at 5, par. 10 (vii).

On May 12, 2023, I supplemented the May 5, 2023 Order and gave a detailed explanation of the arbitration issues with case and statutory citations. Supplemental Order To May 5, 2023 Order at 14-18. That was done because of the need to get two of the many issues decided (the other being retention bonuses); the fact that Mayor Johnson had not yet been installed and needed time to put his administration together; and further because Jim Franczek was, at the time, no longer heading the City's team in these proceedings. I wanted the attorneys taking over the case for the City to be brought up to speed on the issues involved, with the hope that Mr. Franczek would return as he and his firm had been so deeply involved in the complex proceedings that had occurred before he was relieved of his responsibilities by former Mayor Lightfoot as she was walking out the door thus leaving Mayor Johnson with a rudderless ship in these proceedings. That return to reason occurred after Mayor Johnson was installed as Mayor Johnson brought back the Jim Franczek and his firm to again represent the City in this matter.

Given the voluminous record in this case; the number of prior decisions on the arbitration dispute that I have issued in this case; the discussions of the parties at the December 21, 2023 meeting which did not yield a negotiated resolution; and my viewing of the lengthy arguments made at the Committee on Workforce Development and the full City Council meetings, I really have enough information to issue this Supplemental Final Award (which I am not even required to issue). Moreover, at the December 21, 2023 meeting, I gave the City the opportunity to file anything further they desired to be considered before the pre-determined time frame for issuance date of this Supplemental Final Award. The City did not do so.

How to proceed procedurally in a process that is not provided for in the contract (here, Section 28.3) is governed by the rule that "... 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *John Wiley & Sons, Inc., v. Livingston*, 376 U.S. 543, 557 (1964). Aside from having the general authority to rule on how procedural questions such as this are to be handled, in the October 31, 2022 agreed-upon Scheduling Order at II(12), it was agreed that "... the Neutral Chair reserves the right to modify this procedure at his discretion." I have exercised that authority through how the post-rejection process is to be handled.

In short, with respect to further proceedings after the City Council's rejection and the City's desire to have more proceedings including possibly testimony from witnesses, I have discretion to say "enough is enough." Given the previous rulings (again, there have now been five before this one, making this one the sixth ruling); the voluminous record with evidence, briefs and arguments developed in the interest arbitration proceedings before the City Council rejected the Final Award; my viewing of the proceedings before the December 7, 2023 Committee on Workforce Development (which included a detailed presentation by the City's negotiating team and

opinion of legal counsel); my viewing of the December 13, 2023 full City Council meeting; and finally the discussions from the December 21, 2023 meeting, I have enough to make another ruling in this matter.

III. THE CITY COUNCIL MEMBERS VOTING TO REJECT THE ARBITRATION PROVISIONS OF THE FINAL AWARD AND MAYOR JOHNSON VIOLATED THEIR OATH OF OFFICE

On May 15, 2023, 13 new members of the City Council took their oath of office.⁵ The oath taken that day (as did the incumbent members of the City Council when they were sworn in) was [emphasis added]:⁶

I _____ do solemnly swear that I will support the Constitution of the United States and the *Constitution of the State of Illinois* and that I will faithfully discharge the duties of the Office of Alderperson of the City of Chicago according to the best of my ability.

On that same day, Mayor Johnson took that oath as it applied to his office as mayor – again with the promise to “... support ... the *Constitution of the State of Illinois*”⁷

The Final Award adopted the Lodge’s proposal for arbitration based upon the mandate for final and binding arbitration found in Sections 8, 2 and 15 of the IPLRA. The Workers’ Rights Amendment found in the Illinois Constitution solidifies and

⁵ The May 15, 2023 proceedings are posted at:
<https://vimeo.com/showcase/6277394/video/826670252>
See also, Chicago Tribune (May 15, 2023):
<https://www.chicagotribune.com/politics/elections/ct-chicago-mayor-brandon-johnson-sworn-in-20230515-h4h3flacmigytnwf6xgbp6dtry-story.html>
Chicago Sun-Times (May 15, 2023):
<https://chicago.suntimes.com/city-hall/2023/5/15/23724686/chicago-city-council-inauguration-alderpersons>
WGN News:
<https://wgntv.com/news/13-new-chicago-city-council-members-sworn-into-office/>

⁶ The newly elected alderpersons taking of that oath of office is captured in the video of the May 15, 2023 proceedings at 1:52:45-1:54:20):
<https://vimeo.com/showcase/6277394/video/826670252>

⁷ *Id.* at 2:15:25-2:16:55.

protects that right to arbitration found in those sections of the IPLRA. By rejecting the right to arbitration found in the IPLRA and the Workers' Rights Amendment to the Illinois Constitution, the City Council and Mayor Johnson violated their oath to "... support ... the Constitution of the State of Illinois"

On October 23, 2023 Mayor Johnson opposed the arbitration provision of the Final Award and requested that the City Council reject it ("We are disappointed in today's arbitrator ruling that would allow police disciplinary cases that resulted in a year or longer suspension or termination to forego the Chicago Police Board. ... I am asking the body to reject this measure when it comes up in the coming weeks."⁸)

On December 7, 2023, the City Council's Committee on Workforce Development voted 10 to 5 to recommend that the City Council reject the arbitration provisions adopted in the Final Award.⁹ At that meeting, the City's legal counsel was asked by an alderman about the likelihood of the City succeeding in court litigation should the full City Council reject the arbitration provisions. The City's Labor Counsel, Jim Franczek, candidly responded that while the City had arguments to make (which he characterized as "pretty strong" by referencing the Federal Court Consent Decree, public policy, the long history of having the Police Board decide these cases and transparency), Mr. Franczek also stated that with respect to the Final Award, "... a challenge in the Circuit Court of Cook County to an interest arbitrator decision is a steep hill to climb and that would be a challenging legal proceeding for the City of Chicago ... the challenge in circuit court, yes, is going to be significant"¹⁰

⁸ <https://twitter.com/ChicagosMayor/status/1716652507575796092/photo/1>

⁹ The minutes of the December 7, 2023 meeting of the Committee are posted at: <https://occpodstoragev1.blob.core.usgovcloudapi.net/meetingattachmentspublic/1ade1db0-39ab-4fa7-9e3a-fa7d98b70956.pdf>

The video proceeding of the Committee is posted at: <https://vimeo.com/showcase/8928568/video/892317880>

¹⁰ *Id.* Video at 2:14:55-2:16:30.

On December 13, 2023 and following Mayor Johnson's request to reject and the Committee on Workforce Development's similar recommendation, the full City Council voted 33-17 to reject the arbitration provisions of the Final Award and adopted the remainder of the terms for the new collective bargaining agreement.¹¹

The statements made at the City Council debate on December 13, 2023 show positions ranging from heart-felt opinions of distrust (indeed, disdain) of the police to strong opinions in support of the police. Several alderpersons spoke. I will highlight a few showing the thoughtful and powerfully-held sentiments for their respective positions.

Alderman Jason Ervin supported rejection of the Final Award's arbitration provisions:¹²

* * *

Let's keep in mind. Sometimes the law doesn't quite get it right. Slavery was the law of this land. It wasn't right. Separate but equal was the law of the land. Again, it wasn't right. Women didn't have a right to vote – hell, I didn't have a right to vote. Again, it wasn't right. While we are in this moment to deal with this matter, I think we have to in some respects recognize when this is not in the public interest.

Again, as Alderman Tabares has told us and laid out for us from what the State Act says, there is precedent – I think the Corporation Counsel has given us some same ideals and etiology – but in this moment, this just is not right. And I think that we as a body have to make a decision on what we believe on behalf of our residents and our constituents to be what is right. If we believe that what is being put before us is not right or just – and again, if our rejection leads to additional back and forth, then so be it. It's not the first fight – won't be the last fight. But again, I think that in this case – and I'm not against the FOP; I'm not against their

¹¹ The video proceeding of the December 13, 2023 meeting of the City Council is posted at: <https://vimeo.com/893801913>

¹² <https://vimeo.com/893801913>

Video at 2:06:02- 2:09:06.

leadership; not against the police officers – however, we have to be for what the public is calling for and it's right for us to do or not to do. So, while we may get mired in the back and forth of the conversation, I think that we have to land in a sense of what is right and what is just. And what is being put before us today is not right, it is not just for the constituents that we serve.

And so, it's in accordance with the Chairman, I would ask that we reject this and hopefully come back and get something better out of this conversation.

Alderwoman Jeanette Taylor also supported rejection:¹³

There's a saying that says "Forward ever, backwards never!" And we love throwing around the word "trust". Trust is a two-way street. Anjanette Young trusted you all. Rekia Boyd trusted you all. Miracle Boyd trusted you all. And their trust was betrayed. Our co-workers are quick to say there are nine bodies of accountability, but we're about to pay eleven million dollars in lawsuits for bad behavior. Where is the trust and the protection for us? Now I named these Black women intentionally because I'm a Black woman and I want to be able to pick up a call and 911 and not be worried if you're gonna shoot me because I'm Black. ... Patrick Jenkins whose family we're about to pay eight million dollars to – that won't bring him back. We have all these levels of accountability, but every month you ask us to pay families money because of mistakes. And sometimes I don't think they're mistakes. I think they're intentional. Why I agree that the police don't get their just due and should be at the table when decisions about their job should be made, we're not going behind closed doors. We're still paying lawsuits for John Burge victims. Why? Why? When you look at what the police looks like now, they're not a lot of Black police. Nobody wants to be the police. They don't. We are at a time where we gotta hold each other accountable. And going behind closed doors to decide fate ain't holding the people accountable. The gentleman who hit Miracle Boy to her mouth, guess what? He retired. But he's going to get his pension. I asked this body a long time ago, should they have their own insurance? I was laughed at. I was ridiculed for asking the question because we continue to pay for bad behavior. Because

¹³ <https://vimeo.com/893801913>

Video at 2:20:00-2:24:17.

that's what this is. And trust? I want to trust. If I call 911, you're gonna come and do what I need to do and not shoot and kill me. We were just in Finance and I was more confused than anybody sitting in here on why Mr. Jenkins called the police to say he was being stabbed and within two minutes he was killed. Where's accountability for his kids? And we can throw around money all day long. You all love talkin' about we're gonna spend more money on arbitration. We spend \$167,000 a month on rent on certain spaces. Come on. Stop it. I am tired of you all acting like the sky is fallin' when it ain't. It's when it's convenient for you all. At the end of the day it is our responsibility to build trust amongst everybody. And don't get me wrong. I don't know who I'll call in when something happens. Am I callin' the boys on the block or the police? I don't know who I got a better chance with. And that's on you all. That's how we've been treated. We love, love, love talkin' about money. We've thrown away more money than any city council I've ever seen in the country. On BS. So stop it. I am not voting to have nothing behind no closed doors. This is not what the community asks us to do. And this wasn't just about Black and Brown people. You had White people are talkin' about police brutality. So let's make it real around here if we're goin' to talk about it. You're all irritating. You really are. Because at the end of the day, now you want to talk about workers' rights? We just passed Fight for 15. Stop it. We just made sure the temp workers got their fair share. Stop it. Just stop it. Enough is enough. You all wonder why the people come here on the City Council and act a fool? Cause we actin' a fool. I tell people every time when I come here, I'm going to the universal soul soakin'. This is clowning.

While recognizing that there should be collaboration with the Lodge on some transparency of arbitration proceedings, which the Lodge was open to, Alderwoman Silvana Tabares stated the opposition to rejection of the arbitration provisions of the Final Award:¹⁴

I'd like to lay out three important facts that we learned in Workforce ... Development Committee last week – three important

¹⁴ <https://vimeo.com/893801913>
Video at 1:20:00-1:26:56.

facts. Number one: the Illinois Public Relations Act of 1984 guarantees, guarantees Chicago Police the right to arbitration in exchange for the right to strike. Number 2: that same state law states any local ordinance that attempts to infringe on that right shall be considered illegal. And number 3: the City's attorney admitted – they admitted that they are likely to be unsuccessful in court defending the blatant disregard the City has shown to the State law when it comes to how it treats Chicago police officers. Let me repeat, the State law already gives Chicago police officers the right to arbitration. ...

The arbitration award makes it clear as day and even our City attorneys know it's an open and shut case if this goes to court. My fellow colleagues, we therefore have two options. Option 1: we as a counsel could vote to reject the ruling and defy the Illinois Public Labor Relations Act and be just like the right-wing activists that push right to work laws to infringe on the rights of public sector employees. We thereby kick off a chain of events which will lead to a court ruling in favor of arbitration anyway and open the floodgates to further litigation. These cases will last years and could cost the City hundreds of millions of dollars. Those are dollars that will go into the pockets of police officers who were rightfully suspended or terminated. None of us – I'm sure none of us want public dollars to be awarded in court to bad cops as opposed to being used to fund mental health clinics or homeless services. Further, this option will also send a strong message to all other labor unions that we do not respect their legal rights. We do not respect their due process and we are willing to break the law when it comes to infringing on the rights of members when it is politically expedient. All the unions are watching today because they know it starts with one and will lead to more. ...

We must acknowledge what the law says about police arbitration rights and pass this contract and continue to use the momentum to forge a path forward of collaboration between officers and the City, worker and employer. ...

If those who make the law decide to break the law to punish those who enforce the law, we do not deserve the right to make decisions running a government. Transparency and accountability will only be achieved through collaboration. We can achieve great things when everybody is at the table. That is the central belief. That is the foundation of collective bargaining. Let's pass this contract and show that we still believe that in Chicago.

Alderwoman Nicole Lee illustrated the difficulty in making her decision, but also gave the side of the argument against rejection and ultimately took the position not to reject and gave guidance for the correct course to be followed:¹⁵

You know, I've gotten up here a lot of times to talk about my own personal struggles with what weighs on each of us as alderpeople. This by far has been the hardest. I thought long and hard – I'm still thinking as I stand here about what's been put before us.

And I've got concerns. I had concerns about what we just said yes to and the fact that we didn't get that contract to review until the day of the Committee hearing. I think we need to be able as a body to have as much information as possible to consider when we're looking at something as significant as a police contract.

I've had conversations with constituents as well as members on both sides of the bargaining table. And I still have questions, right? Look, let me be clear. I do not want there to be a lack of transparency, because I agree we need that for trust. And the transition from a public process from the Police Board to arbitration does threaten to erode that trust between the community and the police.

But trust is built one-on-one too. It's built by the officers that are in our community patrolling our streets, attending CAPS events, talking to our seniors, responding where they are at night. Look, I've heard lots of things in this room today about them not showing up or there's not trust there. The fact is I live in a community where we feel like we need police, very desperately. In the year 2022, Beat 914 in the City of Chicago in Chinatown – we had the highest level of robberies in the entire City of Chicago. And when people call the police, they want them to be there to respond. And we need to support them on that, which is why I was happy to vote yes on the contract – on the other piece of the contract. And we know how big an issue public safety is in this City and that there's a lot more that we need to do.

And when I look at misconduct by some police officers and not having that be as representative of everybody, I know that we have a lot of work to do all around. This is not something that's

¹⁵ <https://vimeo.com/893801913>
Video at 2:09:10-2:13:34.

going to be solved by this contract alone, either. That we even had to resort to arbitration in the first place for the very first time to settle our contract is pretty symbolic. And I think that everything we've done today around this contract has been precedent setting. And that's not lost on me and the weight of it, absolutely, kind of makes me want to throw up right now. Because this is the decision that we have to make here.

What I've gotten from all of the work I've done in this process to make the determination on where I stand on the arbitration piece is that we are a labor city. The State statute is clear that there is the right to arbitration. That is not in question. And it also is true that I don't believe that arbitration as it exists today leads to any real public trust in the police officers, with the police, excuse me, and with this process. And I think the place that we should be focusing on changing the State statute, changing the State laws that govern this. Laws are meant to be amended, folks. We can't look at everything that we're doing, set a law – it's not a set it and forget it. This is not like a [Ron Popeil] grill. We have to keep going back and looking at where we need to make changes and tweaks. And for that reason, I'm going to be in support of the contract as it is today with the arbitration. And I will work ferreently with my colleagues to make the changes that are necessary at the State level and throughout and continue to build trust. But we need to get this done.

Following the rejection vote by the City Council, Mayor Johnson held a press conference. When asked about legal advice given by Mr. Franczek that a court action would be a steep hill to climb to get a judge to rule in the City's favor, Mayor Johnson responded:¹⁶

There are a lot of policies over the course of time that have been in place. It doesn't make them right. So if you're asking this body to just simply accept something because it's law, that would be the antithesis to how this stage even exists. Could you imagine if

¹⁶ Video at 21:53-22:55.

<https://www.facebook.com/ChicagoMayorsOffice/videos/update-from-city-hall/325578323583296>

WBEZ covered the news conference reporting the same with the reporting that "The 33-to-17 vote extends a stalemate with the union for most Chicago cops and could lead to a Cook County Circuit Court battle that city attorneys acknowledge would be an uphill climb":

<https://www.wbez.org/stories/chicago-city-council-rejects-arbitration-for-police-firings/c26a50be-70b5-48db-836f-1060f4ea8005>

women just accepted the law and did not continue to pursue justice or Black folks or brown folks or Asian folks or poor people, working people?

The reasons for rejection were based upon the belief that the mandate for arbitration in Sections 8, 2 and 15 of the IPLRA and the Workers' Rights Amendment of the Illinois Constitution "... doesn't quite get it right ... what is being put before us today is not right" (Alderman Ervin); "I am not voting to have nothing behind no closed doors ... [t]his is not what the community asks us to do" (Alderman Taylor) and "... a lot of policies over the course of time that have been in place ... doesn't make them right ... if you're asking this body to just simply accept something because it's law, that would be the antithesis to how this stage even exists" (Mayor Johnson).

The legal requirements to provide for arbitration of disputes as specified in the IPLRA and protected by the Workers' Rights Amendment to the Illinois Constitution is "the Rule of Law."

Adherence to the Rule of Law is not a request or a cafeteria selection process for the City to choose which State of Illinois laws should apply and which should not. Adherence to the Rule of Law is an obligation and that obligation applies equally to everyone – individuals and governing bodies, be they large or small in stature or size, powerful or not.

The reasons offered for rejection of the arbitration provisions of the Final Award are a belief by the City that the Rule of Law mandating arbitration as found in the IPLRA is not "just" or "right" and the most troubling statement that came from Mayor Johnson that with respect to the Rule of Law, "if you're asking this body to just simply accept something because it's law, that would be the antithesis to how this stage even exists." The laws of Illinois are not merely "*asking* this body to just simply accept something because it's law" – the laws of Illinois are *telling* the City

that it *must* accept “something because it’s law”. The City does not get to choose which laws apply to it. The City is not above the law – here, the requirement for arbitration as imposed by the Final Award which is based on the IPLRA and the Workers’ Rights Amendment in the Illinois Constitution.

For those alderpersons who voted to reject (as well as Mayor Johnson for supporting that rejection), you took an oath to support the Illinois Constitution – no matter how you personally feel. You violated that oath.

The obvious and strikingly sad parallel to the City Council’s action is former President Trump’s belief that he is above the law and not bound by the Rule of Law. That belief has been slapped down by the courts. *See e.g., Donald J. Trump v. United States of America*, 54 F.4th 689, 701 (11th Cir. 2022) (“To create a special exception here would defy our Nation’s fundamental principle that our law applies ‘to all, without regard to numbers, wealth, or rank’” [citation omitted]);¹⁷ *United States of America v. Donald J. Trump*, No. 23-3190 (D.C. Cir. December 8, 2023), slip op. at 68 (“... Mr. Trump is also an indicted criminal defendant, and he must stand trial in a courtroom under the same procedures that govern all other criminal defendants ... [t]hat is what the rule of law means”).¹⁸ *See also, United States of America v. Donald J. Trump*, No. 23-257 (D.D.C. December 1, 2023) where, in response to the former President’s assertion that because he is a former president he is immune from the criminal charges brought against him, the court observed in rejecting that contention, upholding such a theory (slip op. at 25-26):¹⁹

... would undermine the foundation of the rule of law that our first former President described: “Respect for its authority, compliance

¹⁷ https://scholar.google.com/scholar_case?case=10915598169263830153&q=donald+i.+trump+v.+United+states+of+America&hl=en&as_sdt=4.121

¹⁸ [https://www.cadc.uscourts.gov/internet/opinions.nsf/062EE6E27AEF48AC85258A7F0069B15F/\\$file/23-3190-2030689.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/062EE6E27AEF48AC85258A7F0069B15F/$file/23-3190-2030689.pdf)

¹⁹ <https://storage.courtlistener.com/recap/gov.uscourts.dcd.258149/gov.uscourts.dcd.258149.171.0.pdf>

with its laws, [and] acquiescence in its measures” – “duties enjoined by the fundamental maxim of true liberty.” [George] Washington’s Farewell Address at 13.

The City Council’s reasons for rejection of the arbitration requirement in the Final Award that the City is not bound by the IPLRA and the Illinois Constitution are really no different from Trump’s belief that the Rule of Law does not apply to him.

Taking the City’s reasons for rejection to their logical extent, if laws such as the IPLRA could be ignored or defied because it is felt by the City Council that those laws are not “just” or “right”, then the City could ignore all State of Illinois or federal laws applicable to the City and, going further, individuals could opt to not pay taxes, fees, fines, comply with City ordinances, state and federal laws, etc. which they similarly believe are not “just” or “right”.

In a democracy, that is not how it works.

Alderwomen Taberas and Lee are correct. The Rule of Law mandates arbitration as required by the Final Award; the parties should work in collaboration to overcome the remaining differences and in the end, because the law requires arbitration, if issues remain that can’t be resolved, then the proper avenue for attempting to correct differences is to make efforts to change the law.

The Final Award is the culmination of what is now an over six and one-half year labor dispute between the City and the Lodge to establish the terms of the successor collective bargaining agreement to the parties’ prior contract which expired June 30, 2017. Through the mediation-arbitration process (“med-arb”), with my serving as the mediator and arbitrator, the parties came to agreement on terms of their new contract – with the exception of the option for arbitration of grievances for disciplinary actions in excess of 365 days and dismissals.

For the above reasons, the arbitration requirement in the Final Award therefore stands unchanged and should be finalized.

IV. THE COMING COURT CHALLENGE

The City Council now has a choice. It can reconsider its rejection (take another vote) and not reject or, if rejection remains, face the coming court challenge by the Lodge to enforce the Final Award.

A. The Likelihood Of The City's Prevailing In A Court Challenge To Overturn The Final Award's Requirement For Arbitration

Unless modified by agreement of the parties (which has not happened), if the City Council does not adopt the provisions of the Final Award, there will no doubt be a court challenge instituted by the Lodge.

I closely watched the video of the December 7, 2023 meeting of City Council's Committee on Workforce Development proceedings²⁰ as well as the December 13, 2023 meeting of the full City Council.²¹ An objective conclusion that can be reached (which is consistent with counsel for the City's assessment that although the City may make what it can refer to as "pretty strong" arguments as stated by counsel for the City at the Committee on Workforce Development), a court challenge to the Final Award as an interest arbitrator's decision will be a *very* "steep hill to climb" that will be a *very* "challenging legal proceeding for the City."

As I view the arguments referenced by the City (and taking the arguments raised by the City Member's Dissent to the Final Award discussed below), such a challenge will be an impossible task for the City to successfully achieve and the City's

²⁰ <https://vimeo.com/showcase/8928568/video/892317880>

²¹ <https://vimeo.com/893801913>

arguments to overturn the arbitration requirement of the Final Award will not prevail.

This is why:

1. Deference Of The Courts To Interpretations Made By Arbitrators

Section 14(k) of the IPLRA substantially limits the review of any challenge to an interest arbitration award as follows:

(k) Orders of the arbitration panel shall be reviewable, upon appropriate petition by either the public employer or the exclusive bargaining representative, by the circuit court for the county in which the dispute arose or in which a majority of the affected employees reside, but only for reasons that the arbitration panel was without or exceeded its statutory authority; the order is arbitrary, or capricious; or the order was procured by fraud, collusion or other similar and unlawful means.

In Section 28.3(B)(11) of the parties' Agreement, the parties specifically adopted the provisions of Section 14(k) of the IPLRA as the standard of court review of interest arbitration awards such as the Final Award.

In a court challenge brought by the Lodge to the City Council's rejection of the arbitration provisions in the Final Award, the City will not be able to successfully argue that the majority of this Board in the Final Award "was without or exceeded its statutory authority". The mandate and policy to provide for final and binding arbitration found in Sections 8 and 2 of the IPLRA; the supremacy of that mandate found in Section 15 of the IPLRA; the 17 published decisions going back to 1988 following the mandate for final and binding arbitration; and the guaranteed protection of that right to have final and binding arbitration as protected by the Workers' Rights provisions of the Illinois Constitution will prevent any assertion that in issuing the

Final Award a majority of this Board “was without or exceeded its statutory authority”.

Thus, as a matter of statute in Section 14(k) of the IPLRA governing challenges to the Final Award, the only basis for the City to argue will be that the Final Award “is arbitrary, or capricious.”²²

What does “arbitrary, or capricious” mean? The parties’ have answered that question by following the traditional definition of those terms.

In the new Agreement, the parties addressed how disputes over the ability of resigning or retiring police officers to receive retirement credentials should be decided by arbitrators [emphasis added]:²³

In the event that the Lodge disagrees with the Superintendent’s decision, the Lodge may submit the grievance to arbitration. The Arbitrator may set aside the Superintendent’s decision only if the Arbitrator determines that the Superintendent’s decision *was arbitrary - or capricious i.e., without a rational basis or justification - at the time of retirement.*

The parties’ definition of “arbitrary” or “capricious” is the long-accepted standard limiting how arbitrators review challenges to managerial decisions. To succeed on a challenge under an “arbitrary or capricious” standard of review requires a showing that the decision was made “without a rational basis or justification.”²⁴ Therefore, the City’s successful challenging of the Final Award’s arbitration requirement as being “arbitrary” or “capricious” requires the City to hurdle a very high bar. Whether

²² No one can assert that the Final Award “was procured by fraud, collusion or other similar and unlawful means”.

²³ Final Award Appendix at page 20, paragraph 19.

²⁴ *South Central Bell Telephone Co.*, 52 LA 1104, 1109 (Platt, 1969):

In general, ... action is arbitrary when it is without consideration and in disregard of facts and circumstances of a case, without rational basis, justification or excuse.

the Final Award was “correct” is not the standard for court review. As required by Section 14(k) of the IPLRA adopted into the parties’ contract at Section 28.3(B)(11), there must be a showing by the City that the decision of this Board adopting the IPLRA’s statutory mandate for arbitration was without a rational basis or justification.²⁵

The City’s high hurdle is clearly established by the courts because the courts give great deference to interpretations made by arbitrators. *See American Federation of State County and Municipal Employees v. Department of Central Management Services, et al.*, 671 N.E.2d 668, 672 (1996) [citation omitted]:

... [A]ny question regarding the interpretation of a collective-bargaining agreement is to be answered by the arbitrator. Because the parties have contracted to have their disputes settled by an arbitrator, rather than by a judge, it is the arbitrator’s view of the meaning of the contract that the parties have agreed to accept. We will not overrule that construction merely because our own interpretation differs from that of the arbitrator. ...

See also, Brotherhood of Locomotive Engineers and Trainmen v. Union Pacific Railroad Co., 707 F.3d 791, 796 (7th, Cir. 2013) [quoting *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1194-95 (7th Cir. 1987)]:

²⁵ *See e.g.*, my award in *City of Chicago and FOP Lodge 7, (Security Specialists)*, Grv. Nos. 045-11-001, etc. (2014) at 20 where the Lodge unsuccessfully challenged former Mayor Rahm Emanuel’s managerial decision to change personnel on his security detail and where I discussed the burden in making a demonstration of arbitrary decision making [footnotes omitted]:

... [D]ecision making “... is arbitrary when it is without consideration and in disregard of facts and circumstances of a case, without rational basis, justification or excuse.”

Stated differently, because this is a management rights case, the City has the “right” to be “wrong” – it just cannot be arbitrary in its decision making. As long as the City can show a “rational basis, justification or excuse” for its managerial decisions, arbitrators have no authority to second-guess those decisions.

In the *Security Specialists* case, because the Lodge challenged the City’s decision concerning the assignments to former Mayor Emanuel’s security detail, the burden was on the Lodge to show that the City’s decision was arbitrary because the decision was without rational basis or justification. In this case, the burden to set aside the Final Award will be on the City to make that showing because the City will be challenging the Final Award as arbitrary as lacking a rational basis or justification.

As we have said too many times to want to repeat again, the question for decision by a federal court asked to set aside an arbitration award — whether the award is made under the Railway Labor Act, the Taft-Hartley Act, or the United States Arbitration Act — is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract.

Given the great deference courts give to arbitrators' interpretations, the discussion in this Supplemental Final Award and the Final Award (as well as the Interim and Supplemental Interim Awards) and the above-quoted authority, validates the assessment of the City's counsel that "... a challenge in the Circuit Court of Cook County to an interest arbitrator decision is a steep hill to climb and that would be a challenging legal proceeding for the City of Chicago ... the challenge in circuit court, yes, is going to be significant"

As I see it, that will be a *very* steep hill and a *very* significant challenge – indeed, given the circumstances of this case, it will be an impossible task.

2. The Consent Decree Argument

The City's reliance upon the Federal Court Consent Decree (*State of Illinois v. City of Chicago* (17-cv-6260 (N.D. Ill.))²⁶ will also not be a basis for overturning the arbitration requirement in the Final Award.

The Consent Decree carves out collective bargaining agreements and interest arbitrations such as this proceeding from coverage by the Consent Decree as follows [emphasis added]:

711. Nothing in this Consent Decree is intended to (a) alter any of the CBAs [collective bargaining agreements] between the City and the Unions; or (b) impair or conflict with the

²⁶ City Exhibit 5, posted at:
https://www.chicago.gov/content/dam/city/depts/cpb/supp_info/ConsentDecreeComplete.pdf

collective bargaining rights of employees in those units under the IPLRA. Nothing in this Consent Decree shall be interpreted as obligating the City or the Unions to violate (i) the terms of the CBAs, including any Successor CBAs resulting from the negotiation process (including Statutory Impasse Resolution Procedures) mandated by the IPLRA with respect to the subject of wages, hours and terms and conditions of employment unless such terms violate the U.S. Constitution, Illinois law or public policy, or (ii) any bargaining obligations under the IPLRA, and/or waive any rights or obligations thereunder. In negotiating Successor CBAs and during any Statutory Resolution Impasse Procedures, the City shall use its best efforts to secure modifications to the CBAs consistent with the terms of this Consent Decree, or to the extent necessary to provide for the effective implementation of the provisions of this Consent Decree.

In this proceeding, the City used its “best efforts to secure modifications to the CBA ...” as required by the Consent Decree. However, paragraph 711 of the Consent Decree provides that “[n]othing in this Consent Decree shall be interpreted as obligating the City or the Unions to violate (i) the terms of the CBAs, including any Successor CBAs resulting from the negotiation process (*including Statutory Impasse Resolution Procedures*) mandated by the IPLRA with respect to the subject of wages, hours and terms and conditions of employment *unless such terms violate the U.S. Constitution, Illinois law or public policy*, or (ii) any bargaining obligations under the IPLRA ...” [emphasis added].

The requirement of arbitration as adopted by the Final Award is “*mandated by the IPLRA*” and because that requirement results from a literal reading of Sections 8, 2 and 15 of the IPLRA and the Workers’ Rights provisions of the Illinois Constitution, such terms cannot “... violate ... Illinois law or public policy ...” as stated in paragraph 711 of the Consent Decree. Indeed, under Section 2 of the IPLRA, the mandate for arbitration is stated as the public policy in Illinois. And this proceeding, as

contemplated by paragraph 711 of the Consent Decree, is a “Statutory Resolution Impasse Procedure” removed from coverage by the Consent Decree.

Moreover, aside from the carve out for these proceedings in paragraph 711 of the Consent Decree, the Federal Court would be hard pressed to deny the statutory and constitutionally protected right for arbitration due to a consent decree to which the Lodge was not a party and was even denied the ability to become a party when the Lodge was denied intervention by the Federal Court. *See State of Illinois v. City of Chicago*, 912 F.3d 979, 987-988 (7th Cir. 2019):

But, as the district court recognized, existing law already provides protections for the Lodge. “Before entering a consent decree the judge must satisfy himself that the decree is consistent with the Constitution and laws, does not undermine the rightful interests of third parties, and is an appropriate commitment of the court’s limited resources.” *Kasper v. Bd. of Election Comm’rs of the City of Chicago*, 814 F.2d 332, 338 (7th Cir. 1987). Similarly, consent decrees “may not alter collective bargaining agreements without the union’s assent.” *People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205*, 961 F.2d 1335, 1337 (7th Cir. 1992). “Neither may litigants agree to disregard valid state laws.” *Id.* In other words, because “[c]onsent decrees are fundamentally contracts,” the parties to those decrees “may not impose duties or obligations on a third party, without that party’s agreement.” *Id.* (quoting *Firefighters Local 93 v. Cleveland*, 478 U.S. 501, 529, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986)).

The parties negotiate and the district court considers the consent decree against this background law, which protects the Lodge even if ¶ 687 contains ambiguities. Simply put, a consent decree cannot accidentally eliminate the rights of third parties. And if the parties interpret the consent decree in a way which violates CBA rights, the Lodge can avail itself of normal remedies for CBA violations. *See W.R. Grace & Co. v. Local Union 759, Int’l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 770, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983) (affirming the enforcement of an arbitration award for violating the CBA, even though a settlement agreement required the company’s violation).

The State of Illinois and the City of Chicago therefore cannot agree through the Consent Decree to negate the Lodge's statutory and constitutional right to have in their collective bargaining agreement final and binding arbitration for disputes over the class of cases involved in this matter.

Thus, to me, there is no basis for an argument that the Federal Court's Consent Decree will provide a different result than the one adopted in this case.²⁷

3. The City's Public Policy Argument

Any reliance upon "public policy" by the City will not be a basis for overturning the arbitration requirement in the Final Award.

²⁷ In the Interim Award at 49-50, I discussed the role of arbitrators interpreting external law as it applied to the paragraph 711 of the Consent Decree [emphasis added]:

While Sections 8 and 2 of the IPLRA are clear, whether the terms set by this Interim Award relying upon the statutory mandate in the IPLRA actually "violate the U.S. Constitution, Illinois law or public policy" *under Paragraph 711 of the Consent Decree* is a question that is really not for this Board to decide. That question *under the Consent Decree* is ultimately for the courts [citing *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987); *W.R. Grace & Co v. Rubber Workers*, 461 U.S. 757, 766 (1983)]; *Alexander v. Gardner-Denver, Co.*, 415 U.S. 36, 57 (1974); *AFSCME v. Department of Central Management Services, supra*, 671 N.E.2d at 678].

Throughout the Final Award and here, I have referenced Sections 8, 2 and 15 of the IPLRA as well as the Workers' Rights Amendment of the Illinois Constitution. My use of those statutory and constitutional provisions is required because those are the sections governing this dispute and the mandate for arbitration under the IPLRA. And because Section 14(h) of the IPLRA (which the parties have adopted in Section 28.3(B)(11) of their Agreement for resolving new contract terms as permitted by Section 14(p) of the IPLRA) allows interest arbitrators to look to factors listed in Section 14(h) "as applicable", Section 14(h)(1) of the IPLRA permits consideration of "[t]he lawful authority of the employer". Therefore, consideration of Sections 8, 2 and 15 of the IPLRA and the Workers' Rights Amendment can be considered *in this proceeding*. Stated differently, this Board considered whether the City has the lawful authority to ignore the cited sections of the IPLRA – and a majority of this Board concluded that the City did not have the authority to defy Illinois law and 17 published arbitration awards mandating arbitration of protests over the class of disciplinary actions involved in this dispute as a term to be placed in the parties' collective bargaining agreement.

In an effort to stop what truly looks like a legal train wreck should the City continue with its rejection of the arbitration provisions of the Final Award, I have expressed my opinion on how a challenge using the Consent Decree will result. In the end, how the Federal Court views matters under paragraph 711 of the Consent Decree is for the Federal Court to decide should it be called upon to do so. However, for purposes of discussion, the conclusion appears inevitable that the Consent Decree cannot block the Lodge's statutory and constitutional right under Illinois law to have arbitration of these disputes in their collective bargaining agreement.

The Illinois Supreme Court states that “... Illinois public policy is shaped by our statutes, through which the General Assembly speaks.” *State of Illinois v. AF-SCME*, 51 N.E.3d 738, 747 (2016). Through Sections 8, 2 and 15 of the IPLRA requiring arbitration of disputes for the police officers in this case, the General Assembly has clearly spoken.

The requirement for arbitration of disputes (which includes review of discipline) for employees involved in this dispute as found in Section 8 of the IPLRA is clear. And Section 2 of the IPLRA is similarly clear that “... 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.” Under Section 2 of the IPLRA, that requirement “... *is the public policy of the State of Illinois ... necessary to afford an alternate, expeditious, equitable and effective procedure for the resolution of labor disputes subject to approval procedures mandated by this Act*” [emphasis added]. If there is any doubt about the Lodge’s ability to have in the Agreement the ability to have arbitrators issue awards in disputes concerning discipline of the type at issue, Section 2’s requirement “... for such awards shall be liberally construed” removes that doubt. Section 15 of the IPLRA makes the mandates of Sections 8 and 2 supreme to all other legislative actions in all levels of government in Illinois.

Arbitration of disputes as public policy in Illinois as stated in Section 2 of the IPLRA follows the long-held similar federal policy. *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) [footnotes and citation omitted]:

... The present federal policy is to promote industrial stabilization through the collective bargaining agreement. ... A major factor in

achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.

Consistent with its Dissent to the Final Award at 2, the City's assertion to a court that the imposition of arbitration of protests over these types of disciplinary actions is "inconsistent with the 'interests and welfare of the public' as required by Section 14(h)(3) of the [IPLRA]" also cannot prevail.

Section 14(h)(3)'s provision for consideration of the "interests and welfare of the public" is one of the factors that interest arbitrators can weigh "as applicable" for deciding whether a provision should be placed into a collective bargaining agreement. Section 8's statutory *mandate* for arbitration overrides any argument that the factors for weighing in Section 14(h) govern. *See Village of Lansing and Illinois FOP Labor Council*, S-MA-04-240 (2007) at 17 where, like here, under authority of Section 8, an option for appealing discipline to arbitration or to the employer's board of fire and commissioners was imposed by reason of Section 8 and not the balancing of applicable factors allowed by Section 14(h) of the IPLRA [footnote omitted]:²⁸

The Village argues that the *status quo* must be maintained because the Union has not shown that the current system is broken and comparability considerations [Section 14(h)(4)(A) of the IPLRA] require that no change be imposed. However, this issue is not an issue ... which is subject to the traditional examination of burdens requiring the party seeking the change to demonstrate that the existing condition is broken and in need of repair. Nor is this issue subject to comparability considerations. The resolution of this issue is required by the Act [Section 8 of the IPLRA].

However, if the "interests and welfare of the public" could be considered, the "interests and welfare of the public" that the Rule of Law be followed must prevail – *i.e.*, those provisions requiring arbitration (Sections 8, 2 and 15 of the IPLRA and the

²⁸ <https://ilrb.illinois.gov/content/dam/soi/en/web/ilrb/arbitration/documents/s-ma-04-240.pdf>

Workers' Rights provisions of the Illinois Constitution) and not to have the City Council pick and choose which laws of the State of Illinois are to apply to the City on the basis of what the City Council believes are not "just" or "right".

Moreover, if examined under Section 14(h) of the IPLRA, the first factor in Section 14(h)(1) certainly ends the discussion. Section 14(h)(1) provides that this Board can consider "[t]he lawful authority of the employer." The City has no "lawful authority" to act in direct contradiction of the Rule of Law from Sections 8, 2 and 15 the IPLRA and the Illinois Constitution requiring final and binding arbitration.

With respect to whether arbitrations should be open to the public, that is a procedural question concerning the procedures for holding of an arbitration hearing. The U. S. Supreme Court has made it clear that "[o]nce it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *John Wiley & Sons, Inc., v. Livingston, supra*, 376 U.S. at 557. A majority of this Board has decided that procedural question and determined that consistent with the holding of arbitration hearings for grievances protesting disciplinary actions ranging from 11 to 365 days where the parties have agreed to hold those hearings in private, the hearings for discipline in excess of 365 days to dismissals shall also be private.

4. The City's Long History Of Having The Police Board Decide These Disciplinary Actions Argument

As the City argues, there is a long history of the Police Board deciding appeals of disciplinary actions in excess of 365 days and dismissals of police officers. However, that history developed because in the prior contracts between the parties the Lodge agreed that the Police Board could do so. Section 8 of the IPLRA is clear that collective bargaining agreements for police officers "... shall provide for final and binding

arbitration of disputes concerning the administration or interpretation of the agreement *unless mutually agreed otherwise*” [emphasis added]. Because the Lodge now seeks an option for arbitration for protests of disciplinary actions in excess of 365 days and dismissals, the Lodge no longer “mutually agree[s] otherwise.” The long history of the Police Board having exclusive authority to decide protests of disciplinary actions in excess of 365 days and dismissals is therefore not relevant. As a matter of statute, arbitration of protests over these disciplinary actions is now required. *See Village of River Forest and Illinois Fraternal Order of Police Labor Council*, S-MA-19-132 (2021) at 11-12 [footnote references to the record in that case omitted]:²⁹

... [T]herefore, because of the mandate in Section 8 to include arbitration if requested, the Village’s argument that there is no evidence that the BFPC [Board of Fire and Police Commissioners] has been biased against the Union and that there has been no showing by the Union that the BFPC has acted with cronyism, patronage, favoritism, corruption or not being trustworthy cannot change the result. *See City of Springfield* [S-MA-89-74], *supra* at 4 (in light of the statutory mandate “... the fact that the Union could point to no specific problems with the present system is immaterial.”).^[30] *See also, the 2014 Lansing Award* [S-MA-12-214], *supra* at 40 (“Even if a fire and police commission has been functioning well for years with no problems for anyone involved, a party’s request to have arbitration of grievances – made for whatever reason – must, as a matter of statute, be granted and placed into a contract through interest arbitration.”).^[31] The Village represents that “... in the last 10 years not a single discipline case has come in front of the commission.” Even so, the mandate in Section 8 requires adopting the Union’s position.

²⁹ <https://ilrb.illinois.gov/content/dam/soi/en/web/ilrb/arbitration/documents/s-ma-19-132-arb-award.pdf>

³⁰ <https://ilrb.illinois.gov/content/dam/soi/en/web/ilrb/arbitration/documents/s-ma-89-074.pdf>

³¹ <https://ilrb.illinois.gov/content/dam/soi/en/web/ilrb/arbitration/documents/s-ma-12-214.pdf>

The Lodge no longer “mutually agree[s] otherwise” to have the Police Board decide these cases. The statutory requirement for arbitration now applies.

5. The City’s Transparency Argument

The City’s position that arbitration proceedings are not open to the public to the extent that Police Board hearings are open and that difference requires defeat of the imposition of arbitration of these discipline cases, even though as has been discussed, arbitration of these disciplinary appeals is a mandated right found in the IPLRA and protected by the Illinois Constitution’s Workers’ Rights provisions cannot prevail.

The Lodge is correct that arbitration is a private proceeding. As discussed in the Supplemental Interim Award at 14-16, the courts have held that “[a]rbitration is, however, a private proceeding which is generally closed to the public.” *Hoteles Conrado Beach etc. v. Union De Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir. 1985); the main treatise on arbitration discusses the privacy of arbitration (“[a]rbitration is a private proceeding and the hearing is not, as a rule, open to the public” (*How Arbitration Works*, (BNA, 5th ed.) at 338-339); the American Arbitration Association Rules at Rule 21 provides that “[t]he arbitrator and the AAA shall maintain the privacy of the hearing unless the law provides to the contrary”;³² and Section 2(C) of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the National Academy of Arbitrators similarly provides that “[a]ll significant aspects of an arbitration proceeding must be treated by the arbitrator as confidential unless this requirement is waived by both parties or disclosure is required or permitted by law ... [a]ttendance at hearings by persons not representing the parties or invited by

³² https://www.adr.org/sites/default/files/Labor_Arbitration_Rules_3.pdf

either or both of them should be permitted only when the parties agree or when an applicable law requires or permits.”³³ Aside from the Police Board’s rules (which are superseded by the provisions of Section 8, 2, and 15 of the IPLRA and the Workers’ Rights provisions of the Illinois Constitution), there is no relevant “law” requiring that arbitration proceedings be open to the public.

This is the “Rule of Law” governing arbitration – arbitration is a private proceeding. A party is always free to request from the arbitrator hearing a specific case that the proceedings be open to the public. But there is nothing that requires that the proceedings be open. Indeed, the parties have adhered to that privacy of arbitration for grievances protesting disciplinary actions between 11 and 365 days (which also encompass allegations of very serious misconduct in that any suspension that falls within the higher range of those actions must be for allegations of very serious misconduct).

6. Conclusion On The City’s Court Challenge Arguments

Thus, in sum, a court challenge to the Final Award because it provides for the option of the Lodge to pursue protests of disciplinary actions greater than 365 days and dismissals to arbitration which are held in private will not overturn the Final Award which is premised on the guaranteed right to arbitration found in the IPLRA and the Workers’ Rights provisions of the Illinois Constitution.

B. How Did This Happen?

I am still puzzled (but, given the publicity and volatility of this dispute, not really surprised) how the dispute resolution process of final and binding arbitration – which is embedded in the IPLRA as a mandate and a public policy and made supreme to all other statutes and ordinances and protected by the Workers’ Rights

³³ <https://naarb.org/code-of-professional-responsibility/>

provision of the Illinois Constitution and follows the similar federal policy – became so demeaned and disparaged as it has become since the Lodge sought to implement what the IPLRA and the Illinois Constitution gives police officers the right to have.

As discussed in the Final Award at 10-14, the view that arbitration as a dispute resolution process is somehow corrupt tracks to the use of the phrase “behind closed doors” and that phrase’s “added meaning to those of us who have grown up, lived or worked in Chicago as that expression gives the image of smoke-filled closed rooms of the past with politicians, criminals and the powerful cutting deals to line their own pockets without regard to rights of ordinary citizens.” *Id.* at 13.

The repeated and extensive use of the phrase “behind closed doors” in the media and during the City Council proceedings to portray final and binding arbitration in a negative light is now a destructive genie that cannot be put back in the bottle. The phrase “behind closed doors” is not only “a slogan – a catch phrase (perhaps, even the creation of a public relations effort) designed to defeat arbitration as a dispute resolution process” (Final Award at 12), “behind closed doors” is now a talking point in the campaign to defeat the arbitration process. When final and binding arbitration is discussed by those opposing the process, it is now clear that the phrase “behind closed doors” with attached negative connotations seems always to be present.

History shows us that through repetition, myths, half-truths, and false, fictitious and misleading information can be transformed into accurate and truthful facts in the eyes of significant portions of the public. This is known as “the illusory truth effect”. *See* Hassan and Barber, “The effects of repetition frequency on the illusory truth effect” (2021):³⁴

³⁴ Published by the National Library of Medicine, National Center for Biotechnology Information, National Institute of Health (NIH):
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8116821/>

... [R]esearch has shown that repeated information is perceived as more truthful than new information. This finding is known as the illusory truth effect

... the illusory truth effect even occurs when the repeated statements are highly implausible ... or when the repeated statements directly contradict participants' prior knowledge.

See also, Vellaini, et al., “The illusory truth effect leads to the spread of misinformation” (“... repetition of misinformation biased people’s judgement of accuracy and as a result fueled the spread of misinformation”).³⁵

But slogans and catch phrases such as “behind closed doors” “... are undoubtedly foes of sober reasoning; they implant the comfortable but illusory feeling that the user is thinking when only mouthing ... [they] are almost invariably one-sided, with little or no room for qualifiers or argument ... [t]hey often contain untruths or half truths” Final Award at 12-13 [quoting Bailey “Voices of America The Nation’s Story In Slogans, Sayings, and Songs” (Macmillan Publishing Co., The Free Press, 1976) at 501-502].

To see the illusory truth effect at work in high gear, just look at the news. A good example is how in his effort to convince the public that he won the 2020 election, former President Trump told his White House press secretary Stephanie Grisham that to make lies into truth, “[a]s long as you keep repeating something, it doesn’t matter what you say.”³⁶

That is what happened here. The constant repeating of the phrase “behind closed doors” in a negative description of arbitration just turned misinformation, untruths and half-truths into fact and reality. The disheartening aspect of this is that many on the City Council fell for it – as did many members of the public.

³⁵ Elsevier, Cognition Volume 236 (July 2023) 105421
https://www.sciencedirect.com/science/article/pii/S0010027723000550?ref=pdf_download&fr=RR-2&rr=83c9dce26d21e1d3

³⁶ <https://www.youtube.com/watch?v=glzZ1j2uUFM>

For police officers to have – as the law requires – final and binding arbitration for protests of discipline in excess of 365 days and dismissals, misinformation, untruths and half-truths about the arbitration process abound and have been so often repeated that they have become fact in the eyes of the public.

The best example of this occurred at the December 7, 2023 City Council’s Committee on Workforce Development when the Committee was addressed by Clinical Law Professor Craig Futterman who stated the following to the Committee [emphasis added]³⁷

This is a defining moment for City Council. City Council’s ratification of the arbitrator’s award to the FOP would all but guarantee another decade of impunity – of police impunity in Chicago. *The few arbitrators who would decide police discipline would do so behind closed doors, handpicked by the FOP. They have a powerful financial incentive to keep the FOP happy and they have a long history of exercising those powers to protect police from accountability. ...*

In an interview with the Chicago Sun-Times (December 6, 2023), the following quote is attributed to the same individual about the arbitrators deciding police discipline cases and the arbitrator selection process.³⁸

University of Chicago law professor Craig Futterman argues that the arbitrator selection process sets up financial incentives for arbitrators to issue split decisions on charges and soften the punishment.

“It’s a cash cow for them,” said Futterman, who heads a civil rights and police accountability project for the school. “They’re not going to get business unless they keep the unions happy.”

³⁷ <https://vimeo.com/showcase/8928568/video/892317880>
Video at 50:35-51:24.

³⁸ <https://chicago.suntimes.com/2023/12/6/23990544/who-should-decide-the-fate-of-chicagos-most-serious-police-misconduct-cases>

In a commentary written by the same individual as a co-author appearing in the Chicago Tribune (October 27, 2023), Futterman also referred to “FOP-friendly arbitrators”.³⁹

Statements about arbitrators being “handpicked by the FOP” and therefore making decisions favoring the Lodge to “keep the FOP happy” in order to create a “cash cow” to “get business ... [and] keep the unions happy” who are “FOP-friendly” are precisely the “untruths or half truths” Bailey writes of in “Voices of America”, *supra*, that make the slogan and catch phrase “behind closed doors” mantra so dangerously untrue and destructive. As was done here, these kinds of statements get reported to the media; from the media the statements are dispersed to the public; and “the illusory truth effect” is then cranking in high gear with the clear message that arbitration is corrupt.

Contrary to Professor Futterman’s statements to the Committee on Workforce Development, arbitrators are *not* “handpicked by the FOP.” Arbitrators are *mutually* selected by the Lodge *and the City* and can be removed from the arbitration panel – even at times without agreement and for any reason.

The process for selecting and removing arbitrators from panels is found in Appendix Q of the parties’ current Agreement [emphasis added]:

A. The Lodge and the Employer have agreed to a panel of five (5) Arbitrators ... After 2023, *the parties agree to consult with their counsel responsible for scheduling to obtain any updated list of five (5) arbitrators. Each December the Lodge and the City shall each be permitted to strike one (1) Arbitrator from the panel for any reason.* In the event an Arbitrator is removed from the panel, the parties shall attempt to agree upon a replacement Arbitrator. If the parties are unable to agree upon a replacement, they shall request a list of seven (7) Arbitrators from the Federal Mediation and Conciliation Service (“FMCS”), each of whom must be a

39

<https://www.chicagotribune.com/opinion/commentary/ct-opinion-chicago-reject-police-contract-accountability-20231027-bzy2a4voi5cp5aza6ftzmv27lu-story.html>

member of the National Academy of Arbitrators. Within ten (10) days after receipt of the list, *the parties shall select an Arbitrator*. Both the Employer and the Lodge shall alternately strike names from the list. The remaining person shall be added to the panel. In the event the Lodge and the City each strike an Arbitrator from the panel as part of the December process, and if the parties are unable to agree upon replacement Arbitrators, the parties shall request two lists from the FMCS to be used to select the two replacement Arbitrators.

Arbitrators issuing compromised decisions in the Lodge's favor because "[i]t's a cash cow for them ...[t]hey're not going to get business unless they keep the unions happy", as asserted by Futterman will merely get themselves stricken by the City from the panel of arbitrators.

This misinformation, untruths and half-truths is spread by Professor Futterman and others who proclaim themselves to be experts on arbitration (even though it is not clear what extent of actual experience of being involved in arbitrations, if any, is possessed). These "experts" make their claims although they have examined a limited number of arbitration decisions and performed a "won-lost" statistical analysis to publish papers on those results.

There are so many disciplinary actions and arbitrations occurring in quasi-military police settings that go unreported that it is virtually impossible to get a statistically relevant number of arbitration decisions – so many of the decisions are unpublished or just unobtainable. As the results of articles and published papers making their way into the media, the public's perception of the arbitration process is therefore molded to believe that the privacy of arbitration proceedings conducted "behind closed doors" is somehow corrupt and a potential hinderance to a desire for intentions for police reform.

The "split the baby" or in order to create a "cash cow" criticism is not new. *See* Rushin, "Police Disciplinary Appeals", 167 University of Pennsylvania Law Review,

No. 3 (2019) 545, 576 where the author compared selection procedures for arbitrators to that of selecting jurors [footnotes omitted, emphasis added]:⁴⁰

The potential problem with using such a procedure in internal disciplinary appeals is that *it may incentivize arbitrators to consistently compromise on punishment to increase their probability of being selected in future cases*. Unlike a juror in the American justice system, arbitrators are often repeat players. Arbitrators must frequently survive these selection procedures *in order to obtain work in the future*. An arbitrator that frequently sides with either police management or officers during appellate procedures may be unlikely to survive future selection proceedings. *From an accountability perspective, this mindset can be highly problematic if it results in arbitrators feeling compelled to frequently reduce the termination of unfit officers to mere suspensions*.

See also, Iris, “Police Discipline in Chicago: Arbitration or Arbitrary”, 89 J. Cim. L. & Criminology (1998) 215, 235 (“In the aggregate, the arbitrators ‘split the baby’...”);⁴¹ Rushin, “Police Arbitration”, 74 Vanderbilt Law Review 1023, 1029 (2021) at footnote 38, (citing Iris, “explaining that the ‘selection of who will serve as an arbitrator depends upon the willingness of both parties to a dispute . . . to accept that individual as an arbitrator’ and how the selection method may result in arbitrators frequently choosing to ‘split the baby’”).⁴²

To be kind, that is just pure nonsense. However, repeating that nonsense as was done in the campaign to defeat the arbitration provisions of the Final Award made that nonsense into fact.

From the experience of a 50-year labor lawyer and now going on 38-year arbitrator who is a member of the National Academy of Arbitrators and a member the

⁴⁰ <https://lawcommons.luc.edu/cgi/viewcontent.cgi?article=1651&context=facpubs>

⁴¹ <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6990&context=jclc>

⁴² <https://cdn.vanderbilt.edu/vu-wordpress-0/wp-content/uploads/sites/278/2021/05/19115804/Police-Arbitration.pdf>

College of Labor and Employment Lawyers; who litigated arbitrations as an attorney before becoming an arbitrator; and as an arbitrator has issued over 6,500 decisions and well over 100 interest arbitration awards (far more than any other interest arbitrator in this state), the arbitration process is quite the opposite than what is being portrayed to the public – especially in this dispute.

Compromising a decision for a party for the sake of appeasement in order to be selected for future work makes an arbitrator untrustworthy and unacceptable for future cases because “if the arbitrator will do it *for* me today when I didn’t deserve to win, the arbitrator will do it *to* me tomorrow when I did deserve to win.” And don’t forget, *the parties* select the arbitrators – unions do not unilaterally make the selections. A timid arbitrator who doesn’t want to offend and therefore compromises decisions in order to get future work should not be selected to hear future cases and should be removed from arbitration panels by the parties. The rule that arbitrators must follow is:

Good cases win. Bad cases lose. Split no babies. Throw no bones.

A well-functioning arbitration panel is one comprised of arbitrators who follow that rule without exception. The strength of the arbitration process is to have arbitrators on the parties’ panels who adhere to that rule. Arbitrators who do not follow that rule should be fired by the parties as untrustworthy. The decisions the arbitrators make must be based on the facts of the individual cases.

Aside from the fact that it is impossible to get a sufficient number of arbitration awards to make relevant statistically reliable conclusions, the real weak point of all of these “won-lost” statistically based studies is the underlying premise of those studies – and that is that in *every* case where discipline is issued, an employer’s assessment of discipline is always “right.” That is not a universal truth.

And for the portrayal of arbitrators as making decisions based upon the “split the baby” in order to create a “cash cow” and ...[t]hey’re not going to get business unless they keep the unions happy” misrepresentation, for this arbitrator and irrespective of whether the parties desire that I function as an arbitrator for the cases that are being sent to arbitration as a result of the Final Award, that was addressed by me in the Interim Award at 70 – I will not accept those cases:

I imagine that there will be some out there who will look at all of this and say that by my requiring the option of arbitration of discipline as ordered in this matter and my efforts to dispel misplaced perceptions of the arbitration process, “Well, that’s all just a lot of legal mumbo-jumbo just so he can get more work.” So let me put that perception to rest. I don’t want the work that will be coming from the added arbitration requirement adopted in this case. I am a very busy arbitrator and I have more than enough to do.

Does that sound like a timid arbitrator who makes decisions based upon the “split the baby” in order to create a “cash cow” and ...[t]hey’re not going to get business unless they keep the unions happy” approach to deciding cases? My arbitrator colleagues function in the same way knowing that their job is limited to “calling balls and strikes” and if they purposely widen or narrow the strike zone to curry favor in order to get future work, they should not (and will not) be used in the future.

As discussed, for all purposes with those alderpersons supporting rejection of the Final Award’s requirement for arbitration by repeating the “behind closed doors” mantra, the City Council’s rejection of the arbitration provisions in the Final Award is really a statement that “the Rule of Law must be followed – unless you don’t like the result.” Therefore, the City Council sees itself as “above the law”. However, following the Rule of Law is not an option – it is a requirement.

The Rule of Law *requires* that the arbitration provisions of the Final Award not be rejected. Understandably, given the reasons explained by those speaking against arbitration at the City Council Workforce Committee and full City Council meeting, voting not to reject may necessitate the effective holding of one's nose as votes on rejection are cast. Nevertheless, if it comes to that, holding one's nose is required because adoption of arbitration for the class of cases in this matter to be part of the Agreement is required by law and the oath the alderpersons took to "support ... the Constitution of the State of Illinois"

While disagreeing with the arbitration portion of the Final Award in her Dissent, the City's Board Member nevertheless captured the final product and the efforts that went into resolution of the entire dispute with its many issues that kept the parties apart for over six and one-half years:

The Neutral Chair has labored valiantly, and successfully, to assist the parties in reaching agreement on a broad range of issues, as set forth in the Appendix attached to the Neutral Chair's "Final Opinion and Award" ("Award"). It is the City's belief that these agreements are in the best interest of all parties, especially including the residents of Chicago, and will prove instrumental in advancing the City's continuing commitment to embedding principles of constitutional policing. We are grateful to the Neutral Chair for his efforts in helping the parties get to this outcome.

I truly appreciate the comments made by the City's Board Member. However, although the City dissented to the arbitration provisions of the Final Award, it should not escape anyone that what the City has viewed in its Dissent from the remainder of the Final Award exclusive of the arbitration dispute as producing "agreements [that] are in the best interest of all parties, especially including the residents of Chicago, and will prove instrumental in advancing the City's continuing commitment to

embedding principles of constitutional policing”, that result *came from this interest arbitration proceeding that was conducted “behind closed doors.”*

I don’t know how to get that through to the public now that “behind closed doors” illusion cast upon arbitration makes arbitration a corrupt process – nor should I be required to do so. Actually, congratulations should go to those who pulled off that misconception of arbitration and successfully fed it to the public and the City Council – so far, they have accomplished their goal.

Arbitrators work alone. We don’t have public relations machines (at least effective ones) to hold press conferences, to generate slogans, catch phrases and talking points. We just decide cases (and mediate them when we can). Arbitrators just call balls and strikes. And if a party doesn’t like the result, that party can go elsewhere for the next case. A letter to the editor can be written after a misleading article or editorial is published about an arbitration decision – but by then, the public doesn’t care (even assuming the correcting letter is read). The damage has been done.

I have no choice in this case. My function as the Neutral Chair of this Board is to follow the Rule of Law. My personal opinions are irrelevant. Chicago is no different from any other public employer covered by the IPLRA’s mandate for final and binding arbitration for police officers. Therefore, the requirement in the Final Award (which incorporates the Interim Award and the Supplemental Interim Award) providing for an option for the Lodge and the police officers to have final and binding arbitration for protests over disciplinary actions in excess of 365 days including dismissals against police officers must remain. That is the Rule of Law. Sections 8, 2 and 15 of the IPLRA mandating arbitration as they are protected by the Workers’ Rights provisions of the Illinois Constitution make no distinctions excusing the City from application of that rule.

Where the IPLRA seeks to distinguish rights and obligations appropriate for different communities, it specifically does so. *See e.g.*, IPLRA Sections 5(a-5), 5(b), 14(i) where population sizes are determinative of applicability of those sections of the Act. Sections 8, 2 and 15 of the IPLRA and the Workers' Rights Amendment in the Illinois Constitution make no distinctions which are urged by the City to avoid applications of those provisions of the Rule of Law. Therefore, even though the statute is clear in the Lodge's favor, but giving the City the benefit of the doubt that there is some ambiguity to allow it to claim the exemptions it seeks (which there are not), it follows that no exceptions that could exempt the City from the statutory and constitutional mandate for arbitration are intended by the IPLRA.⁴³

V. WHAT HAPPENS NEXT?

This matter can now go back to the City Council for further consideration and perhaps a second vote. If the City Council does not correct its rejection of the Final

⁴³ For purposes of statutory construction, clear language governs in this case. As stated by the Illinois Supreme Court in *Lee v. John Deere Insurance Company*, 802 N.E.2d 774, 777 (2003) ("When the statute's language is clear it will be given effect without resort to other aids of statutory construction.") However, where statutory language is ambiguous, the Illinois Supreme Court states when a statute provides exceptions, no other exceptions apply. *Metzger v. DaRosa*, 805 N.E.2d 1165, 1172 (2004) [citations omitted]:

The familiar maxim *expressio unius est exclusio alterius* is an aid of statutory interpretation meaning "the expression of one thing is the exclusion of another." ... "Where a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions * * *." ... This rule of statutory construction is based on logic and common sense. It expresses the learning of common experience that when people say one thing they do not mean something else. The maxim is closely related to the plain language rule in that it emphasizes the statutory language as it is written.

The language in these laws giving police officers the right to final and binding arbitration is stunningly clear. But even if it could be argued that there is some ambiguity (there is not), the fact that the IPLRA provides for exceptions for some provisions, but does not relevantly do so in Sections 8, 2 and 15, requires a finding that the construction must be that there are no exceptions for Chicago from the mandate that police officers are entitled to final and binding arbitration of grievances protesting these disciplinary actions. For purposes of the right to arbitration, Sections 8, 2 and 15 of the IPLRA and the Workers' Rights provisions of the Illinois Constitution mean that the City stands in the same shoes as all other public employers governed by the IPLRA – and the requirement for final and binding arbitration.

Award’s provisions for arbitration of discipline, a court fight will no doubt follow with the Lodge seeking to enforce this Board’s awarding of arbitration in the Final Award as it incorporates the previous Awards. Hopefully, after a second vote is held and the arbitration provisions of the Final Award are not rejected, that court fight will be avoided and the arbitration provisions from the Final Award will be included in the parties’ collective bargaining agreement, which means a final end to a labor dispute that is now over six and one-half years old.

Potentially, the City has much to lose in a protracted court fight in which it cannot prevail.

The arbitration provisions were made retroactive to September 14, 2022 – which is the date I was notified by the American Arbitration Association that I was selected as the Neutral Chair of this Dispute Resolution Board. It was at that time that the Board was composed and had authority to act. Supplemental Interim Award at 23.⁴⁴

The June 26, 2023 Interim Award adopted the arbitration of discipline option and remanded the issue to the parties to draft language consistent with that Award which included a direction to the parties to propose a retroactive date. Interim Award at 72-74.⁴⁵ The remand to the parties from the Interim Award for the parties to draft language was clear – “[i]f the parties are unable to agree upon the language needed to implement the adopted proposals ... this Board shall formulate that language based upon the *final positions* submitted by the parties” [emphasis added]. *Id.* at 74. In interest arbitration, requiring the parties to submit final offers of issues in dispute forces the parties to be reasonable in their proposals, because an unreasonable offer will not be selected.

⁴⁴ https://ilrb.illinois.gov/content/dam/soi/en/web/ilrb/arbitration/documents/L-MA-18-016_Supp_award.pdf

⁴⁵ https://ilrb.illinois.gov/content/dam/soi/en/web/ilrb/arbitration/documents/L-MA-18-016_Interim_Award.pdf

The parties could not agree upon language for the arbitration provisions and their final offers on language were so far apart and *unreasonable* that I was forced to formulate the provisions. The parties' unreasonable final offers on remand "... puts this Board in the position of having to choose a lesser unreasonable offer as opposed to a more reasonable offer." Supplemental Interim Award at 5. As was found, the unreasonable final offers on the retroactive date "are so unreasonable that the selection of the more reasonable offer is not possible thus ... forcing a formulation of the language by this Board." *Id.* at 12.

When the parties filed their positions on language, the City proposed an effective date of "on or after the date of ratification". Supplemental Interim Award at 13. The City's proposed effective date was rejected by me, in relevant part, because potential delays in the ratification process amounted to a delay of implementation of a statutory and constitutional right for arbitration (*id.*) – a delayed scenario that is playing out here. Under the City's proposed effective date for the arbitration process to begin after the City Council rejected the provisions requiring the Lodge to institute litigation to force the City to ratify the Final Award, the "on or after the date of ratification" is being dragged out and will not begin until after the years of litigation are over.

The Lodge's proposed retroactive date was August 1, 2021. *Id.* at 20. That date was also rejected by me because the Lodge contributed to delay in the proceedings by holding the interest arbitration process in abeyance as the parties continued to negotiate. *Id.* at 22.

The parties' unreasonable final offers on the retroactivity date forced me as the Neutral Chair to reject both language proposals ("As the Neutral Chair ... I cannot go that route and this Board is therefore forced to formulate the language."). *Id.* The reasonable date chosen for retroactivity therefore was September 14, 2022 when the

interest arbitration process began moving forward in earnest after I was appointed as the Neutral Chair thereby giving this Board the power to act. *Id.* at 22-23.

A substantial number of disciplinary actions are now pending before the Police Board and are affected by that September 14, 2022 retroactive date for arbitration. After the arbitration option was imposed by the June 26, 2023 Interim Award and by Order dated September 26, 2023, the Police Board denied the Lodge's motion to transfer 22 cases from the Police Board to the arbitration process or stay proceedings before the Police Board.⁴⁶ If a court challenge fails to reverse the Final Award and enforces its requirements, the retroactivity date of September 14, 2022 may well require that the proceedings for cases which should have been transferred from the Police Board to arbitration begin anew before arbitrators. The Lodge will no doubt seek make-whole relief for the affected officers back to the September 14, 2022 retroactive date. And the longer the court challenge drags on and should the City not prevail, the larger the potential make-whole relief will be – even for those officers who ultimately do not prevail and are disciplined or dismissed through the arbitration process. That is because those officers who are ultimately given discipline in excess of 365 days or dismissed through the arbitration process were deprived from remaining on the payroll until their cases were decided as required by the Final Award at 23-25. The requirement in the Final Award that officers who are disciplined in excess of 365 days or dismissed remain on the payroll merely extended that same requirement existing in the parties' Agreement for officers who are disciplined between 11 and 365 days. Final Award at 23-24:

Under the parties' Agreement, Appendix Q(C) provides (with exceptions not relevant here) that for grievances challenging suspensions from between 11 and 365 days, "... the Officer will not be

⁴⁶ https://www.chicago.gov/content/dam/city/depts/cpb/PoliceDiscipline/PB_Order_FOP_Motion20230926.pdf

required to serve the suspension, nor will the suspension be entered on the Officer's disciplinary record, until the Arbitrator rules on the merits of the grievance." That same provision is found in Sections 9.6((B) and (C) of the Agreement as those sections refer to the procedure in Appendix Q(C) which does not require the officer to go into a non-pay status.

As discussed, the extension of the statutory right of arbitration for grievances protesting discipline for suspensions in excess of 365 days and separations is merely an extension of the right to arbitrate the class of cases involving discipline between 11 and 365 days as provided in the Agreement. Focusing particularly on Appendix Q as currently written which explicitly provides that disciplinary actions falling under those provisions do not require the officer be put in non-pay status prior to decision by an arbitrator on the grievance, there is no reason to deviate from the practice agreed to by the parties for the lesser disciplinary actions. The line drawn by the City at 365 days as to whether an officer is suspended without pay and kept on the payroll is not reasonable. Why should an officer who is suspended for 365 days remain on the payroll until the arbitration is decided and the officer who is suspended for 366 days be put in non-pay status until that officer's arbitration is decided? There is no rational basis for such a line drawing.

Another bedrock "Rule of Law" is "the presumption that a defendant is innocent until proven guilty." *People of the State of Illinois v. Wheeler*, 871 N.E.2d 728, 748 (2007). As discussed, the parties have adopted a practice for proposed disciplinary actions against an officer less than 365 days of keeping that officer on the payroll until the disciplinary action is adjudicated and there is no rational basis to change that practice because an officer is facing a potential disciplinary action greater than 365 days and dismissal. That practice for officers facing disciplinary actions less than 365 days recognizes "the presumption that a defendant is innocent until proven guilty." To place officers in non-pay status for proposed disciplinary actions greater than 365 days and dismissals throws that presumption of innocence out the window. While arbitrators have broad remedial powers including awarding lost backpay and damages and other financial harm that is a direct or foreseeable consequence of a disciplinary action that lacks just cause, an officer being out of work until a case is decided can never be fully rectified – particularly given the stress placed on officers and their families as they suddenly have lost income.

Further, as future disciplinary actions in excess of 365 days and dismissals are imposed and the City does not agree to proceed to arbitration as required by the Final Award while the court proceedings continue, potential relief will exist for those officers charged with misconduct whether or not they ultimately prevail in an arbitration after the court proceedings are over.

Make-whole relief is not just backpay for lost wages. Not only are lost earnings part of make-whole relief, but so are costs that are a direct or indirect but foreseeable consequence of a deprivation of a right including out-of-pocket medical expenses; credit card debt incurred due to lost wages; and other costs simply to make ends meet. Make-whole relief can also include those costs resulting from loss of a car or a home. Those elements of make-whole relief are consistent with the broad authority to formulate remedies possessed by arbitrators as remedies are designed to restore the *status quo ante* – *i.e.*, to put the parties back to where they were before a contract violation occurred and to make whole those who have been harmed by a breach of the contract.⁴⁷

⁴⁷ *Wicker v. Hoppock*, 73 U.S. (6 Wall.) 94, 99 (1867) (“The general rule is, that when a wrong has been done and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed”); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (“When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations.”). *Local 369 Bakery and Confectionery Workers International Union of America v. Cotton Baking Company, Inc.*, 514 F.2d 1235, 1237, *reh. denied*, 520 F.2d 943 (5th Cir. 1975), *cert. denied*, 423 U.S. 1055 and cases cited therein (“In view of the variety and novelty of many labor-management disputes, reviewing courts must not unduly restrain an arbitrator’s flexibility”); *Eastern Associated Coal Corp. v. United Mine Workers of America*, 531 U.S. 57, 62, 67 (2000) (“... courts will set aside the arbitrator’s interpretation of what their agreement means only in rare instances. ... [w]e recognize that reasonable people can differ as to whether reinstatement or discharge is the more appropriate remedy here ... [b]ut both employer and union have agreed to entrust this remedial decision to an arbitrator.”).

[footnote continued on next page]

The City therefore has much to lose by pursuing a case it cannot win.

VI. CONCLUSION

Much has been said. However, all of this really comes down to a few simple propositions:

1. The Lodge's ability to have an option for final and binding arbitration of protests for discipline in excess of 365 days and separations (dismissals) issued to police officers is the Rule of Law as codified in Sections 8, 2 and 15 of the Illinois Public Labor Relations Act and that right is protected by the Workers' Rights provisions of the Illinois Constitution.
2. By extending the right to arbitration to disciplinary actions in excess of 365 days and dismissals issued to police officers, these officers will be treated the same as officers who have disciplinary actions pending against them for periods of 11 through 365 days.
3. The Rule of Law applies equally to everyone, including individuals and governing bodies such as the City of Chicago – without regard to their size or stature.
4. We live in a democracy that does not follow a principle that the Rule of Law applies to everyone, unless that person or entity doesn't agree with the result.

[continuation of footnote]

With respect to relief beyond just lost wages extending to costs that are a direct or indirect but foreseeable consequence of a deprivation of a right, *see* the National Labor Relations Board's decision in *Thryv, Inc.*, 372 NLRB No. 22 (December 16, 2022) (decision found in pdf reference "decision issued today" downloadable in pdf format):

<https://www.nlr.gov/news-outreach/news-story/board-rules-remedies-must-compensate-employees-for-all-direct-or>

See also, this Neutral Chair's award in *State of Illinois and AFSCME Council 31*, Arb. Ref. 10.251 (2011), where an agreement between the State and AFSCME required that in light of concessions given by AFSCME to the State due to the 2008 Great Recession, there would be no closures of facilities or layoffs prior to June 30, 2012. When former Governor Pat Quinn sought to close seven mental health and correctional facilities prior to the agreed-upon June 30, 2012 date in violation of that agreement, the remedy included reinstatement of all employees and make-whole relief in all respects, which included lost wages and benefits; payment of medical expenses which would otherwise have been paid for or covered by insurance (for the employees and others covered by the employees' insurance); and payments to employees who lost their homes or cars or were forced to move from their residences. *Id.* at 15-26. That award is posted at:

<https://www.civicfed.org/sites/default/files/State-AFSCME-2011-12-Layoffs-and-Closures.pdf>

5. By rejecting the portion of the Final Award adopting the Lodge's right to have an option for final and binding arbitration of the class of discipline involved in this matter, the City Council violated the Rule of Law.
6. Those alderpersons of the City Council who voted to reject the Final Award's adopting final and binding arbitration guaranteed to police officers by the IPLRA and the Workers' Rights provisions of the Illinois Constitution (as well as Mayor Johnson) violated their oath of office that "I _____ do solemnly swear that I will support ... the Constitution of the State of Illinois"
7. An interest arbitration proceeding conducted under the Illinois Public Labor Relations Act is not the forum to change the Rule of Law – that is for the State Legislature. The function of interest arbitrators under the IPLRA is to apply the Rule of Law – which the Final Award did.

The City Council now has the opportunity to rectify a wrong and avoid a court fight in which it has no chance of prevailing. For those alderpersons who voted to reject, your voices of displeasure over the existing Rule of Law and with the police have been heard – loud and *very* clear – and your voiced displeasure with the existing laws are available for your constituents and the rest of the world to see and hear from the video of the City Council proceedings.⁴⁸ If you voted to reject to make a protest, your point has been made. Now please don't throw away potentially large sums of taxpayer money that could be used better elsewhere than on a legal fight you cannot win which you are undertaking to make a point that you have already made. The law is clear – and you took an oath to support that law. If you don't like the results coming from the Rule of Law, then seek to change the law.

However, for this proceeding – an interest arbitration – the “rule” is that the Rule of Law is to be followed and the “rule” is *not* that the Rule of Law is to be followed

⁴⁸ <https://vimeo.com/893801913>

only if you agree with the result. This Board's function is to apply the law – not make the law. If there are changes to be made, those changes to the law must be sought from the elected officials of Illinois who have authority to make those changes.

Writing for a majority of this Board, I cannot undo the damage that has been done to the arbitration process by those who seek its destruction – a process that is the law and policy of this state guaranteed by the IPLRA and protected by the Workers' Rights provisions of the Illinois Constitution. That damage has been done by repeatedly linking the phrase “behind closed doors” to the word “arbitration” and doing so in a demeaning and destructive manner. Given how often “behind closed doors” is linked to “arbitration” to cast arbitration in a negative light in order to make the arbitration process look corrupt and given how that phrase so influenced the City Council to reject the Final Award's adoption of arbitration, the detractors of the arbitration process have succeeded in spreading that misconception and misrepresentation. To me, the ability of those opposing arbitration as a dispute resolution process with the repeated use of the “behind closed doors” mantra is really Chicago's equivalent of “the Big Lie” (*i.e.*, that Donald Trump actually won the 2020 election and that election was “rigged” and so many continue to believe that because of the publicity generating machine which spread that repeated lie). If you keep repeating it, myths, fictions, half-truths and misrepresentations become fact and reality. That is what happened here with the repeated negative connotations linked to the phrase “behind closed doors.”

However, I can state a fact – a truth. The arbitration process is the “Rule of Law” by virtue of the IPLRA and the Illinois Constitution. To those alderpersons of the City Council who voted to reject the Rule of Law requiring arbitration of discipline in collective bargaining agreements (and to Mayor Johnson who supported that position), you did so even though you took an oath – “I _____ do solemnly swear that I will

support ... the Constitution of the State of Illinois” You therefore violated that oath.

So, if there is a phrase that should influence the public’s perception of this dispute, it is not “behind closed doors.” The phrase that governs is a simple one directed to those alderpersons on the City Council who voted to reject the arbitration provisions of the Final Award. And that phrase states a real fact and a simple truth directed to the City Council – “You took an oath.”

Now the City Council has an opportunity to do the right thing and vote not to reject the Final Award.

I end this with a personal plea – an unusual action, no doubt, but an action I believe is required in this most unusual and highly-charged case.

The City Council now places the City at a precipice. Do you adhere to the Rule of Law or defy it? And if you choose to ignore the Rule of Law, you do so after being told by one of the most highly regarded, respected and experienced management-side attorneys in the country – Jim Franczek – that although arguments can be made, by failing to follow the laws of this state mandating arbitration as decided by an interest arbitrator in the Final Award that your chances of prevailing in court are, in the words of counsel, “... a challenge in the Circuit Court of Cook County to an interest arbitrator decision is a steep hill to climb and that would be a challenging legal proceeding for the City of Chicago ... the challenge in circuit court, yes, is going to be significant”⁴⁹

Years of litigation over a case that has no chance of prevailing brings the discussion back to a point made by Alderwoman Tabares at the December 13, 2023 City Council meeting where she spoke that, if litigated, “[t]hese cases will last years” and

⁴⁹ <https://vimeo.com/showcase/8928568/video/892317880>
Video at 2:14:55-2:16:30.

will result in damage awards to police officers who should have been maintained on the payroll until their cases were decided by an arbitrator (as is the parties' treatment of all officers who are disciplined for suspensions between 11 and 365 days), but whose cases were delayed being heard by an arbitrator because of fruitless years of litigation only to have the final result of the case being heard by an arbitrator after the litigation is over with the arbitrator agreeing that the discipline was proper:⁵⁰

These cases will last years and could cost the City hundreds of millions of dollars. Those are dollars that will go into the pockets of police officers who were rightfully suspended or terminated. None of us – I'm sure none of us want public dollars to be awarded in court to bad cops as opposed to being used to fund mental health clinics or homeless services.

With years of litigation coming, in terms of receiving damages awards from the City, it really will not matter whether the officers prevail in arbitration. The delay caused by the City's refusal to implement the arbitration requirements of the Final Award retroactive to September 14, 2022 will result in damage awards for those officers who do not prevail as a result of being kept off the payroll until the arbitration is decided (up to the point where the discipline is found appropriate) and further, for those officers who do prevail (until they receive a full remedy from reduced or rescinded discipline). And those damages will be significant because make-whole relief includes not only lost earnings, but also includes costs that are a direct or indirect but foreseeable consequence of a contract violation which include out-of-pocket medical expenses; credit card debt; other costs simply to make ends meet; and damages which could include those costs resulting from loss of a car or a home. That liability will be on the City to pay – and it will be large and potentially staggering. Although

⁵⁰ <https://vimeo.com/893801913>
Video at 1:22:47-1:23:36.

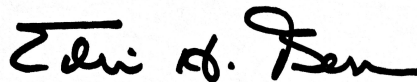
City of Chicago and FOP Lodge 7
Supplemental Final Opinion and Award
Page 64

Aldерwoman Taylor supported rejection of the Final Award, to fight this dispute further in court may well prove her complaint about needless spending to be correct – “We’ve thrown away more money than any city council I’ve ever seen in the country.”

To fight this case to lose solely to make a point of disagreement (which has already been resoundingly made through votes and positions stated before the City Council) just makes no sense. If you do not like the Rule of Law, then seek to change it. But the City Council does not have the right to simply ignore the requirements of the IPLRA and the constitutional protection in the Workers’ Rights Amendment mandating police officers’ right to arbitration of discipline.

Therefore, to the alderpersons who voted to reject the arbitration provisions of the Final Award, please, don’t do this and go down a path of years of fruitless, expensive litigation and resulting discord. Your protests and dislike of the result of the Final Award have been heard and preserved by this Supplemental Final Award. However, the law is clear – and you took an oath to support that law.

In final conclusion, the arbitration provisions of the Final Award stand unchanged.



Edwin H. Benn
Neutral Chair

The Lodge’s Board Member concurs.

The City’s Board Member dissents (reserving the right to file a written dissent).

Dated: January 4, 2024