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

In the Matter of:

CITY OF CHICAGO

-and-

FRATERNAL ORDER OF POLICE
CHICAGO LODGE NO. 7

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

ARBITRATOR'S OPINION AND INTERIM AWARD

APPEARANCES:

FOR CITY OF CHICAGO

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

FOR FRATERNAL ORDER OF POLICE
CHICAGO LODGE No. 7:

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

The Grievances and Answers

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

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

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

behalf of all affected members reads:

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

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

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

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

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

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

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

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

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

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

Section 8.4

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

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

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

Issues Presented

The Lodge presents the issue as follows:

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

The City presents the issue as:

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

The Parties' Positions

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

The Lodge's Position:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

arbitration and chose not to.

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

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

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

---

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

Chicago citizens alleging police misconduct, violates Section 8,4' s direction that police officer disciplinary records be "destroyed."

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

The Evolution of Section 8.4

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

Section 8.4 Use And Destruction Of File Material.

Disciplinary Investigation Files, other than police Board cases, will be destroyed by the Internal Affairs Division five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, unless the investigation relates to a matter which has been subject to either civil or criminal court litigation prior to the expiration of the five year period. In such instances, the Complaint Register case files normally will be destroyed five years after the date of the final court adjudication, unless a pattern of sustained infractions exists.

Any information of an adverse employment nature which may be contained in any unfounded, exonerated or otherwise not sustained file, shall not be used against the officer in any future proceedings.

Any record of summary punishment may be used for a period of time not to exceed one (1) year and shall thereafter not be used to support or as evidence of adverse employment action.

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

the successor 2012-2017 contract.

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

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

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

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

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

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

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

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

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

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

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

The Applicable General and Special Orders

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

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

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

five years after the ate of the final court adjudication.

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

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

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

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

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

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

* * *

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

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

N. Expungement of Records of Complaints

* * *

2. Members represented by the Fraternal Order of Police, Chicago Lodge 7 bargaining unit.

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

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

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

Prior Arbitration Decisions Regarding Section 8.4

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

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

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

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

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

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

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

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

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

* * *

(Emphasis in original.)

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

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

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

The Testimony of Sergeant Muzupappa

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

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

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

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

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

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

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

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

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

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

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

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

The Court Orders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Past Practice Or Acquiescence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. No.
(Tr. 49).

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

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

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

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

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

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

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

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

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

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

City and continued the "destroyed" language.

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

"Destroyed"

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

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

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

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

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

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

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

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

Section 8.4 Revisited

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

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

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

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

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

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

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

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

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

At page 77 of their brief, Lodge Counsel writes:

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

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

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

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

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

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

(Tr. 236-237).

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

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

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

Public Policy

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

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

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

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

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

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

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

that they were not.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Remedy

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

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

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

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

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

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

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

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

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

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

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

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

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

INTERIM AWARD

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

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

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

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

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

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

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

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

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

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

GEORGE T. ROUMELL, JR.
Arbitrator

January 12, 2016