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

In the Matter of:

CITY OF CHICAGO

-and-

FRATERNAL ORDER OF POLICE
CHICAGO LODGE NO. 7

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

ARBITRATOR'S OPINION AND AWARD

APPEARANCES:

FOR CITY OF CHICAGO

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

FOR FRATERNAL ORDER OF POLICE
CHICAGO LODGE No. 7:

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

Background

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

INTERIM AWARD

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

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

specifying the reasons why the records should be retained.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dear Mr. Slagel and Mr. Gurney:

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

investigations into and discipline imposed because of such alleged misconduct.

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

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

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

Dear Mr. Slagel and Mr. Gurney:

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

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

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

Dear Arbitrator Roumell:

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

the February 9, 2016 submission due date.

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

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

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

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

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

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

ARTICLE 33 - SAVINGS CLAUSE

If any provisions of this Agreement or any application

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

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

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

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

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

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

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

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[22] *Labor Arbitration Decision*, 162372-AAA, 2010 BNA LA Supp. 162372 (Obee, 2010).
[23] *Id.* slip. op., p. 2.
[24] *Id.*, slip. op. p. 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AWARD

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

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

GEORGE T. ROUMELL, JR.
Arbitrator

April 28, 2016