March 7, 2024

Honorable Mayor Brandon Johnson
Office of the Mayor
121 North LaSalle Street, 4th Floor
Chicago, IL 60602

Corporation Counsel Mary B. Richardson-Lowry
City of Chicago Law Department
121 North LaSalle Street, Suite 600
Chicago, IL 60602

Re: Litigation Over Private Arbitration in Serious Police Misconduct Cases in the City of Chicago

Dear Mayor Johnson and Corporation Counsel Richardson-Lowry:

On behalf of the undersigned civil rights, justice reform, racial justice and community-based organizations in the city of Chicago, we write to support the City of Chicago in pursuing litigation between the Chicago Fraternal Order of Police ("FOP") and the City over the option of private arbitration in serious police misconduct cases. Many of us are part of the newly formed Coalition for Police Accountability and Transparency, which is a cohort of more than a dozen community-based organizations focused on protecting and expanding mechanisms for police accountability and transparency in the city of Chicago. We applaud the City Council of Chicago for its rejection of Arbitrator Edwin Benn's ruling, which would have allowed Chicago Police Department ("CPD") officers accused of serious misconduct to bypass the Police Board and, instead, have their cases reviewed in closed-door, private arbitration. Mr. Benn's ruling fundamentally ignored the profound public interest in police accountability and transparency regarding how the most serious police misconduct cases are reviewed and decided. The City of Chicago and its residents have the right to insist upon a process for deciding CPD discipline that accounts for the paramount interests and welfare of the public at stake here. We believe the City has a meritorious position, which we outline below; we humbly suggest that you consider raising these points to the court.

<u>Background</u>
More than 60 years ago, the City of Chicago recognized that it faced unique challenges in its police oversight system, and it established the Chicago Police Board as part of the apparatus to handle those unique public safety challenges. For the past 60 years, the Police Board has been charged with the exclusive authority for adjudicating disciplinary charges when the City seeks to fire or suspend a police officer for a year or more. These proceedings are limited to instances in which the City has found that an officer has committed the most severe forms of police misconduct such as an unjustified killing, excessive force, sexual misconduct, false arrest and more.

In the 60 years since that exclusive jurisdiction was granted to the Chicago Police Board, the board's processes have been improved and refined. The Police Board's processes reflect a careful balancing of the City's and the public's interest in public safety; the City's financial challenges posed by a history of

police misconduct (especially abuse committed by repeat offenders); effectiveness and transparency in resolving disputes; and the accused officers' rights to due process in a fair and impartial hearing.

The Illinois General Assembly also has recognized that Chicago's unique circumstances justify the creation of a special body dedicated to effectiveness, transparency and fairness in resolving disciplinary disputes. The General Assembly did so by adopting a special provision in the Municipal Code for the City of Chicago authorizing the creation of a Police Board in the city that would have exclusive jurisdiction over serious cases of police misconduct, would assure public transparency and would ensure a process that was fair to accused officers. In advancing those interests, the Police Board would employ a process that far more carefully balanced those competing rights in a more finely tuned manner than in ordinary arbitrations, including ensuring the transparency and the competency of the decision-makers (65 ILCS 5/10-1-18.1). Moreover, the General Assembly did so not just once in 1987, but again in 1991, when it amended that provision in the code to include a five-year statute of limitations. Both of those pieces of legislation were passed *after* the adoption of the Illinois Public Labor Relations Act ("PLRA") in 1984. That distinguishes this case from prior decisions by the Illinois Supreme Court where it held that the Legislature's later adoption of Municipal Code provisions that permitted smaller municipalities to consider alternatives to private arbitration did not override the *presumed* legislative intent in favor of arbitration expressed in the PLRA.

Consent Decree Implications

In 2017, the U.S. Department of Justice issued a report that documented the CPD's pattern and practice of discrimination and excessive force and the shortcomings in Chicago's police oversight apparatus that long allowed those practices to continue unchecked.[1] The Illinois Attorney General subsequently filed an action in federal court seeking to improve those processes, and the federal court entered a consent decree in 2019 requiring an overhaul of police accountability and transparency mechanisms.[2] The consent decree mandates specific improvements be undertaken in the Police Board's selection of members and evaluation of cases alleging serious police misconduct.[3] Removing consideration of serious police disciplinary matters from the authority of the Police Board and consigning them to closed-door arbitrations before arbitrators, which have a long history of protecting Chicago police officers from discipline and lack the qualifications and training required for Police Board members, contradicts the spirit and intent of the consent decree. Arbitrator Benn's award undermines the public interest in the hard-fought progress won by the State of Illinois and community members toward ending CPD's pattern of civil rights violations under the decree. It also runs counter to the consent decree's goals of ensuring transparency and community engagement in disciplinary processes and accountability for officers who violate the law and CPD policy.

National Efforts to Rollback Transparency and Issues with Arbitrator Benn's Ruling

[1] "Investigation of the Chicago Department", available at https://www.justice.gov/d9/chicago_police_department_findings.pdf

[2].https://www.chicago.gov/content/dam/city/sites/police-reform/docs/Consent%20Decree.pdf

[3] See Consent Decree at paragraphs 531 and following.

In Chicago, the FOP agreed for more than 40 years that the Police Board's exclusive jurisdiction over serious disciplinary disputes was appropriate. Now, however, there is a nationwide effort by police unions to move serious disciplinary proceedings behind closed doors and out of public view, with the Chicago FOP leading the effort to obstruct transparency in this city. Such efforts to move these proceedings out of the public's view have been rejected in at least two other jurisdictions in analogous situations.[4] These efforts should be similarly rejected here.

Mr. Benn acted arbitrarily and capriciously in rejecting and ignoring the public interests that weigh in favor of public hearings in serious misconduct cases, as required by Section 14 of the PLRA. He ignored the City's proposals to require that arbitrations be conducted in public to ensure a level of transparency necessary to assure public faith in the oversight process. He disregarded the unique considerations that a large city like Chicago — with a documented history of repeated constitutional rights violations at the hands of CPD officers — would have. He ignored the considerable body of scholarly research demonstrating that private arbitration is a less effective means of resolving such cases, at least in large cities, by trying to dismiss that research as somehow incomplete. He ignored the City's transparency and financial incentives in ensuring that such proceedings were handled in a thorough enough manner to prevent erroneous decisions that keep problematic officers on the force and then end up costing the City hundreds of millions of dollars because of later improper conduct.[5] He totally ignored and did not address the City's request that any individuals handling such proceedings have special training to enhance the likelihood of appropriate and fair decisions. He ignored the fact that the Illinois General Assembly repeatedly has indicated — since the passage of the more general PLRA — that Chicago's situation is unique and is entitled to a unique solution. The solution must properly balance public safety interests, transparency and effectiveness against the general right of public employees to utilize private arbitration to resolve employment disputes.

The fundamental legal errors in Mr. Benn's ruling did not stop there. He decided that denying a right to private arbitration in these cases would violate the 2022 Workers' Rights Amendment to the Illinois Constitution, totally ignoring the fact that maintaining the process that has governed the resolution of serious police misconduct disciplinary cases in Chicago for the past 60 years in no way "diminishes" any rights that police officers in Chicago have ever had.[6] The entire question of the scope of the Workers'

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[4] See, Connecticut State Police v. Rovella, 36 F. 4th 54 (2d Cir. 2022) that rejects the argument that the state statute requiring public availability of information concerning police misconduct disciplinary cases was invalid as contrary to prior collective bargaining contract provision. Also Fraternal Order of Police, et al. v. District of Columbia, 45 Fed Rptr 4th 954 (DC Cir. 2022) upholding the DC City Council decision to remove police disciplinary matters from the City's collective bargaining process.

[5] See, "Repeated Police Misconduct by 116 Officers Cost Chicago Taxpayers $91.3M Over 3 Years: Analysis," report by WTTW, available at https://news.wttw.com/2023/08/22/repeated-police-misconduct-116-officers-cost-chicago-taxpayers-913m-over-3-years-analysis

[6] Compare, Arlington Heights Police Pension Fund v. Pritzker, 2024 IL 129471, ¶ 32 holding that the statute consolidating numerous pension funds did not "diminish" pension fund rights under the Illinois Constitution's Pension Guarantee Clause.

Rights Amendment to the Illinois Constitution is a matter of first impression on which no Illinois Court has yet had an opportunity to rule. The Illinois courts may well conclude that the amendment does not prohibit the Illinois General Assembly from adopting "enhanced arbitration" procedures in cases of serious misconduct by police officers, including having such cases decided by public officials (such as the Police Board members) rather than private arbitrators, allowing individuals harmed by such misconduct the right to participate in such proceedings and opening such proceedings to greater public scrutiny. None of these measures necessarily "diminishes" any right that police officers might have to arbitration in any meaningful way. Mr. Benn failed to seriously consider whether a right to arbitration as enshrined in the PLRA necessarily includes a right to secret or private arbitration.

Furthermore, there is substantial evidence of partiality in Mr. Benn's award. When his decision was questioned and ultimately rejected by a three-fifths majority of the Chicago City Council — something the City Council had an absolute right to do under the parties' collective bargaining agreement — he accused Alderpersons of acting illegally and in violation of their oaths of office. He even threatened the City with the imposition of large damage awards if it had the temerity to continue to question the legal correctness of his decision.[7] He accused those who argued that his decision was arbitrary, capricious and erroneous of seeking to perpetuate the "big lie" that private arbitration proceedings are conducted "behind closed doors"— at the same time that he defended such proceedings as being decided behind closed doors.[8] Additionally, in his award, Mr. Benn singled out a member of the public for his criticisms of Mr. Benn's decision, which was entirely unnecessary to support the basis of his decision. He also refers to published academic research by highly respected subject matter experts as "pure nonsense."

Conclusion

It is well-documented that Black, Latine, low-income and disabled Chicagoans face increased risk and rates of police violence and misconduct. It is unconscionable to consider taking backward steps on transparency and police accountability, especially given the systematic and ongoing nature of police misconduct in the city of Chicago.

The City Council of Chicago was entirely within its rights to reject Mr. Benn's flawed conclusions. The City Council properly recognized that the public deserves transparency in the handling of serious police misconduct cases; that it deserves effectiveness in handling such cases from both a public safety and financial standpoint; and that it deserves diverse decision-makers with proper training involved in such processes. Mr. Benn's decisions on this issue were arbitrary and capricious in failing to recognize those facts and should be vacated by the court in the litigation now proceeding.

Thank you for your leadership and commitment to the people of the City of Chicago on this issue. If you have any questions about this letter, please feel free to reach out to David Melton, co-chair of the

[7] See Arbitrator Benn's Jan. 4, 2024, opinion at pages 4 and 7-9, available at https://www.chicago.gov/content/dam/city/depts/cpb/PoliceDiscipline/L-MA-18-016_Supp_Final_Opinion_Award.pdf

[8] Ibid, at page 9

Civil Liberties & Police Accountability Committee for the Chicago Council of Lawyers at david.melton.law@gmail.com, or Queen Adesuyi, policy strategist for Color Of Change, at queen.adesuyi@colorofchange.org.

Sincerely,

ACLU of Illinois
Chicago Alliance Against Racist and Political Repression
Chicago Appleseed Center for Fair Courts
Chicago Council of Lawyers
Chicago Torture Justice Center
Color Of Change
Common Cause Illinois
Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School
The Exoneration Project
Impact for Equity
Julia Kline, Police District Councilor, 2nd District
League of Women Voters of Chicago
Loevy + Loevy
NAACP Chicago Westside Branch
Network 49
ONE Northside
The People's Lobby
Rainbow PUSH Coalition
Southsiders Organized for Unity and Liberation (SOUL)