BEFORE THE POLICE BOARD OF THE CITY OF CHICAGO

IN THE MATTER OF CHARGES FILED AGAINST SERGEANT TIMOTHY CONLAN, STAR No. 890, DEPARTMENT OF POLICE, CITY OF CHICAGO,	)	**No. 23 PB 3035**
RESPONDENT.	)	

MEMORANDUM AND ORDER

On September 22, 2023, the Superintendent of Police filed with the Police Board of the City of Chicago charges against Sergeant Timothy Conlan, Star No. 890 ("Respondent"), recommending that Respondent be discharged from the Chicago Police Department ("Department" or "CPD") for violating CPD's Rules of Conduct.

On June 3, 2024, Respondent filed a Motion to Stay the Chicago Police Board Proceedings and/or Transfer This Matter to the Arbitration Call Pursuant to the Circuit Court's March 21, 2024 Order and Illinois Labor Law ("Motion"). The Superintendent filed a response in opposition to the Motion. Respondent did not file a reply. For the reasons set forth below, Respondent's Motion shall be denied.

BACKGROUND

On June 26, 2023, Neutral Chair Edwin H. Benn (the "Neutral Chair") issued an Interim Award and Opinion (the "Interim Award") in an interest arbitration proceeding between the City of Chicago and the Fraternal Order of Police Lodge 7 (the "FOP" or "Lodge") concerning the parties' successor collective bargaining agreement ("CBA") to their prior 2012-2017 CBA, which expired June 30, 2017 (the "2012-2017 FOP CBA"). The Interim Award adopted the FOP's proposal for the successor CBA to provide for "[t]he ability of the Lodge to have the

option to have certain grievances protesting discipline given to officers in excess of 365-day suspensions and separations (dismissals) decided by an arbitrator in final and binding arbitration or by the Police Board as opposed to the current procedure of having all such disciplinary actions decided by the Police Board." Interim Award at 72.

On October 19, 2023, the Neutral Chair issued a Final Opinion and Award (the "Final Award"), which confirmed the adoption of the Lodge's proposal for the parties' successor CBA to include an option to arbitrate grievances protesting officer discipline in excess of 365-day suspensions and separations. Pursuant to the terms of the 2012-2017 FOP CBA, the Final Award was sent to City Council for ratification. On December 13, 2023, the Chicago City Council rejected the arbitration provisions of the Final Award, which returned the matter to the Dispute Resolution Board for consideration. On January 4, 2024, the Neutral Chair issued a Supplemental Final Opinion and Award (the "Supplemental Final Award") which concluded that the "arbitration provisions of the Final Award stand unchanged." Supplemental Final Award at 64.

Following the issuance of the Supplemental Final Award, the parties engaged in litigation before the Circuit Court of Cook County (Case No. 2024 CH 00093) in which the Lodge sought to confirm and the City sought to challenge the arbitration provisions of the Supplemental Final Award. On March 21, 2024, the Court issued a Memorandum Opinion and Order (the "Order"), which provided final resolution of the disputed issues in the case. Among other items, the Order (i) confirmed, in part, the "portions of the 'Final Opinion and Award' and the 'Supplemental Final Opinion and Award'" providing for a right to arbitration, (ii) observed that "[t]he City of Chicago is required by the terms of the Supplemental Final Opinion and Award to offer any police officer, who is protesting a suspension in excess of 365 days or separation (dismissal),

with the option to present any grievances to final and binding arbitration instead of having the Chicago Police Board decide the disciplinary action," (iii) enjoined and prohibited the City of Chicago "from conducting any such disciplinary hearings before the Chicago Police Board unless any officer so charged on or after September 14, 20[2]2, has consented to such a procedure," and (iv) clarified that "[t]his Order applies to all pending disciplinary hearings that have not proceeded to an evidentiary hearing." Order at 25-26.

While the Lodge has filed an appeal challenging certain aspects of the Order, neither the City nor the Lodge has appealed from the portions of the Order requiring the City to offer an arbitration option to any officer protesting a suspension in excess of 365 days or separation (dismissal). Accordingly, any "Officer" (defined in the 2012-2017 FOP CBA as any "sworn Police Officer[] below the rank of sergeant") charged with a suspension in excess of 365 days or separation on or after September 14, 2022 (whose case had not yet proceeded to an evidentiary hearing as of March 21, 2024) is entitled to elect to have their grievance decided in arbitration, instead of before the Board.

RESPONDENT'S MOTION

The Motion argues that because the charges against Sergeant Conlan stem from an incident that occurred on November 28, 2017 (before Sergeant Conlan was promoted to sergeant and at a time when he was still a police officer and member of the FOP), Sergeant Conlan is entitled to the protections of the City and FOP's successor CBA, including the right to elect to have his case heard in arbitration. Motion at 1-2.

The Motion further observes that "the collective bargaining agreement between the City of Chicago and sergeants also has benefits that are conveyed automatically to Chicago Sergeants

once conveyed to other City of Chicago Unions," and that such benefits include "wage increases received by the FOP" and "Health Insurance contributions and salary cap calculations negotiated by the FOP." Id. at 4-5. The Motion argues that "a similar concept . . . can be found in the traditional ex post facto laws in criminal court" which "prohibit the retroactive application of laws that inflict greater punishment than the law in effect at the time the crime was committed." Id. at 5. The Motion concludes that "[t]his analogous concept should also be applied in Sergeant Conlan's case" and that he "should be allowed to make the election, like all other public employees, between a board or arbitration." Id.

DISCUSSION

As explained more fully below, Sergeant Conlan is not entitled to elect to have his case decided in arbitration. Notably, and contrary to the Motion's suggestion, the Illinois Public Labor Relations Act ("IPLRA") does not provide all public employees with the right to arbitration. Instead, Section 8 of the IPLRA provides that the "collective bargaining agreement negotiated between the employer and the exclusive representative shall contain a grievance resolution procedure which shall apply to all *employees in the bargaining unit* and shall provide for final and binding arbitration of disputes concerning the administration or interpretation of the agreement *unless mutually agreed otherwise*." 5 ILCS 315/8 (emphasis added).

Here, because the City and FOP no longer "mutually agreed otherwise," the successor CBA between the City and FOP was required by the Neutral Chair to include a grievance resolution procedure providing for final and binding arbitration of disputes. Accordingly, had Sergeant Conlan been, at the time of the charges brought against him, an employee in the bargaining unit represented by the FOP (*i.e.*, an officer below the rank of sergeant), there would

be no question that he would be entitled to elect to have his grievance decided in arbitration. However, at the time of the charges, Sergeant Conlan was no longer an employee in a bargaining unit represented by the FOP, as he had been promoted to sergeant. As a result, the procedures for Sergeant Conlan's separation are governed not by the successor CBA between the City and the FOP, but by the 2016-2022 CBA (the "2016-2022 Sergeants' CBA") between the City and the Policemen's Benevolent & Protective Association of Illinois, Unit 156-Sergeants ("PBPA 156"), the sole and exclusive collective bargaining representative for all sworn police officers in the rank of sergeant. As that CBA makes clear, the City and PBPA 156 continue to mutually agree that "[t]he separation of a Sergeant from service is cognizable *only* before the Police Board." 2016-2022 Sergeants' CBA at 12 (emphasis added).

For these reasons, and as explained more fully below, the Board determines that Sergeant Conlan's Motion shall be denied in its entirety.

Sergeant Conlan Is Not Entitled to Arbitration of His Grievance Because He Is Not an "Officer" Covered by the FOP's CBA

As an initial matter, the plain language of the CBA between the City and FOP makes clear that Sergeant Conlan is not entitled to arbitration of his grievance. As reflected therein, the right to elect to have grievances protesting separation decided in arbitration instead of Police Board proceedings applies only to "Officers" who receive a recommendation for separation (and who file a grievance concerning the same), not sergeants. *See* 2012-2017 FOP CBA at 2 (defining "Officer" as any "sworn Police Officer[] below the rank of sergeant"); Supplemental Interim Award at 24-25 ("*Officers* who receive a recommendation for discipline greater than thirty days or separations as a result of a sustained CR# . . . shall have one of three options . . .

[including t]he filing of a grievance challenging the recommendation for discipline. . . . When an *Officer* files a grievance, the Lodge will have sixty (60) days from the receipt of the investigative file to inform the Department whether the Lodge will advance the grievance to arbitration.") (emphasis added).

Here, Sergeant Conlan had already been promoted to sergeant by the time the Superintendent filed charges with the Board seeking his termination from CPD. Accordingly, this matter does not involve an "Officer[] who receive[d] a recommendation for . . . separation." Nor does it involve an "Officer [who] file[d] a grievance." The matter of Sergeant Conlan's separation is therefore outside the scope of arbitration awarded in the successor CBA between the City and FOP, and the FOP has no authority to advance such matter to arbitration. By contrast, Sergeant Conlan's case, involving the "separation of a Sergeant from service," falls squarely within the scope of the 2016-2022 Sergeants' CBA, which unambiguously provides that such cases are within the exclusive purview of the Police Board. *See* 2016-2022 Sergeants' CBA at 12 ("In cases where the Superintendent seeks a Sergeant's separation from the Department, the Superintendent's current and past practice of suspending a Sergeant for thirty (30) days and filing charges with the Police Board seeking a Sergeant's separation will not change . . . The separation of a Sergeant from service is cognizable *only* before the Police Board and *shall not be cognizable under this grievance procedure*.") (emphasis added).

Notably, neither the 2012-2017 FOP CBA nor the 2016-2022 Sergeants' CBA include any carveout for cases in which the Superintendent seeks the separation of individuals who are now sergeants, but were police officers at the time of the alleged conduct giving rise to the disciplinary recommendation. Thus, by the plain language of those CBAs, such cases involve the "separation of a Sergeant from service" (not "Officers who receive a recommendation for . . .

separation"), and can only be resolved by the Board, not in arbitration.

In addition to the language of the relevant CBAs, Illinois case law likewise indicates that Sergeant Conlan—as a former, not current police officer—cannot avail himself of a right to arbitration provided in the City and FOP's successor CBA. Indeed, Illinois courts have repeatedly held that the provisions of a CBA do not apply to former members of the bargaining unit. *See Int'l Bhd. of Elec. Workers, Loc. 193 v. City of Springfield*, 2011 IL App (4th) 100905, ¶¶ 17-18, 23, 959 N.E.2d 687, 690, 92 ("[T]he arbitrability of the controversy at issue in this case is not unclear. The collective-bargaining agreement entered into by the parties applies only to employees who are members of the bargaining unit covered by the agreement. Malcom does not qualify as a member of the bargaining unit covered by the collective-bargaining agreement at issue because . . . the office-coordinator position she holds is not covered by the collective-bargaining agreement. . . . Section 8 of the [IPLRA] only applies to 'employees in the bargaining unit.' At the time the grievance was submitted, Malcom was not an employee . . . in the bargaining unit. Because Malcom is not a part of a bargaining unit, the grievance and arbitration procedures required under section 8 do not apply to Malcom."); *Carnock v. City of Decatur*, 253 Ill. App. 3d 892, 898–99, 625 N.E.2d 1165, 1169 (1993) ("The language of the collective-bargaining agreement only requires disputes between the City and the Union or an employee covered by the agreement to be subject to the grievance procedure. Although the contract does not define 'employee,' we construe that term as applying only to 'active' employees, not retirees. Because he was not covered by the agreement, [plaintiff] should not have to exhaust the grievance procedures."); *Maas v. Bd. of Educ. of Peoria Pub. Sch. Dist. 150*, 2023 IL App (4th) 220773-U, ¶ 22 ("Because plaintiff is retired . . . she is no longer a member of the Union . . . . As a grievance may only arise between defendant 'and the Union or any member of the bargaining

unit,' plaintiff's situation does not fall within the CBA's definition of a grievance.").

Illinois cases have likewise confirmed that an individual's promotion to a new role can remove that individual from the bargaining unit covered by a CBA. *See City of E. St. Louis v. Illinois State Lab. Rels. Bd.*, 213 Ill. App. 3d 1031, 1035, 573 N.E.2d 302, 305 (1991) ("In the matter before us the record clearly established that when the City eliminated the positions of six sergeants and one patrol officer and appointed the individuals who had held those positions to the new positions of inspector, those individuals continued to perform all of the basic tasks for which they were previously responsible. The difference now was that they were no longer members of the bargaining unit."); *Hazel Crest Fed'n of Tchrs., Loc. 2077, IFT, AFT, AFL-CIO ("Union") v. Bd. of Educ. of Sch. Dist. 152 1/2, Cook Cnty.*, 206 Ill. App. 3d 69, 74, 563 N.E.2d 1088, 1091 (1990) ("Davis was subsequently promoted to principal of another school. As such she was no longer a member of the bargaining unit . . . ."); *Stacy v. Bd. of Governors of State Colleges & Universities*, 48 Ill. Ct. Cl. 269, 272–73 (1995) ("Because the directorship was an administrative position, the person who filled the job would no longer be a union unit member. . . . On October 31, 1985, GSU's president . . . appointed Stacy Director of Career Planning and Placement at GSU beginning January 1, 1986. Stacy continued as a union unit member until January 1, 1986, but, thereafter, she was no longer subject to the collective bargaining agreement.").

Sergeant Conlan Does Not Have a Right to Arbitration

At various points throughout the Motion, Sergeant Conlan suggests that he should be entitled to make the election between the Board and arbitration because such a right is afforded to all public employees by Illinois law. *See* Motion at 3 ("The law [providing for a right to

arbitration] clearly applies to all public employees in the State of Illinois."); 5 ("[Sergeant Conlan] should be allowed to make the election, like all other public employees, between a board or arbitration."); 6 ("Sergeant Conlan is simply requesting to be allowed to make the election of arbitration as guaranteed by Illinois law."). Such arguments fundamentally misunderstand the nature of the "right to arbitration" afforded to public employees under the Illinois Public Labor Relations Act ("IPLRA").

Notably, the IPLRA does not provide any individual officer or category of public employees with an independent right to have their disciplinary grievances heard in arbitration. It only requires an option for final and binding arbitration to be included in the "collective bargaining agreement negotiated between the employer and the exclusive representative . . . unless mutually agreed otherwise." 5 ILCS 315/8. Here, the Neutral Chair found (and the Circuit Court later confirmed) that, as between the City and the FOP, the parties no longer "mutually agreed otherwise." Accordingly, the Neutral Chair and Circuit Court found that the City and the FOP's successor CBA must include a term providing Officers protesting suspensions in excess of 365 days and separations with the option to have those grievances heard in arbitration instead of before the Board. Critically, however, neither the Neutral Chair's Awards nor the Circuit Court's Order have any bearing on the CBA between the City and PBPA 156—the sole and exclusive collective bargaining representative for all sworn police officers in the rank of sergeant—and whether CPD sergeants also have the option to have their grievances heard in arbitration instead of by the Board. As that CBA makes clear, the City and PBPA 156 continue to "mutually agree otherwise" that "[t]he separation of a Sergeant from service is cognizable *only* before the Police Board." 2016-2022 Sergeants' CBA at 12 (emphasis added).

As discussed above, Sergeant Conlan is not a member of the bargaining unit (CPD

Officers) represented by the FOP, and is instead a member of the bargaining unit (CPD Sergeants) represented by PBPA 156. Thus, the procedures governing his separation from CPD are those provided in the CBA negotiated between the City and PBPA 156, which mandates that Sergeant's Conlan's separation be decided by the Board, not in arbitration. In other words, while the IPLRA may allow for a bargaining unit's exclusive representative to insist on an arbitration option for members of the unit, the exclusive representative of Sergeant Conlan's bargaining unit did not negotiate such an option for separations of sergeants from CPD, and, consequently, no such option is available to Sergeant Conlan here.

In his Motion, Sergeant Conlan observes that "the collective bargaining agreement between the City of Chicago and sergeants also has benefits that are conveyed automatically to Chicago Sergeants once conveyed to other City of Chicago Unions." Motion at 4. Specifically, the Motion notes that "there are two instances where rights conveyed to the FOP are automatically conveyed to Chicago Police Sergeants. Article 26.1(B) states that wage increases received by the FOP will automatically be given to sergeants. In Article 12, section 12.1, Health Insurance contributions and salary cap calculations negotiated by the FOP are also automatically given to the sergeants." *Id.* at 4-5. Though not expressly stated, the implication Sergeant Conlan appears to draw from such observations is that a right to arbitration conveyed to CPD police officers of the FOP should likewise be automatically given to CPD sergeants of PBPA 156.

The fact that the City and PBPA 156 specifically negotiated for two types of benefits to be automatically conveyed to CPD sergeants if conveyed to CPD police officers, and did not negotiate for automatic conveyance of other types of benefits such as the right to arbitration, weighs against, not in favor, of finding automatic conveyance of a right to arbitration. Notably, the inclusion of such automatic conveyance procedures elsewhere in the 2016-2022 Sergeants'

CBA demonstrates that the parties knew how to draft language to effectuate such automatic conveyance for benefits intended to be automatically conferred. That no such language appears in the grievance or arbitration procedures of the 2016-2022 Sergeants' CBA suggests that the parties to that CBA did not intend for any right to arbitration negotiated by (or awarded to) CPD police officers to be automatically applied to CPD sergeants. *See Old Republic Ins. Co. v. Gilbane Bldg. Co*., 2014 IL App (1st) 123430-U, ¶ 25 ("[W]e agree with the trial court in that the language of the subcontract between Air Comfort and Gilbane is clear and unambiguous. The subcontract only requires that Air Comfort list Gilbane as an additional insured on its certificate of insurance, which Air Comfort did, and does not require Gilbane be added as an additional insured on the CGL policy. The subcontract does, however, require that the employees of Air Comfort be named as additional insureds on the CGL policy, implying that the parties knew how to ensure that certain parties were included as additional insureds on the CGL policy. . . . As such, despite Gilbane's argument that the trial court's literal interpretation of the contract terms results in an absurd outcome, we cannot change or modify the clearly expressed language in the contract, which only requires Gilbane be placed as an additional insured on the certificate of insurance."); *see also Roselle Police Pension Bd. v. Vill. of Roselle*, 232 Ill. 2d 546, 556–57, 905 N.E.2d 831, 836–37 (2009) ("[Various p]rovisions of the Pension Code . . . include express and specific language authorizing annual increases in retirement benefits paid to spouses or other survivors. These provisions clearly demonstrate that the legislature knew exactly how to authorize such annual increases when it intended to do so. Because the legislature failed to provide for annual increases with equal clarity with respect to pension benefits awarded to survivors of police officers who had been granted 'line of duty' disability pensions, we must conclude that no such annual increases were authorized.").

The Constitutional Prohibition Against Ex Post Facto Laws Does Not Apply Here

In his Motion, Sergeant Conlan argues that the Board should apply the constitutional prohibition against *ex post facto* laws to Sergeant Conlan's case. *See* Motion at 5 ("The *ex post facto* laws under the United States and Illinois Constitutions prohibit the retroactive application of laws that inflict greater punishment than the law in effect at the time of the crime was committed. . . . This analogous concept should also be applied to Sergeant Conlan's case."). Though not fully articulated in the Motion, Sergeant Conlan's rationale appears to be that because such *ex post facto* laws prohibit the retroactive application of laws that are more disadvantageous to the defendant than the law in effect at the time the crime was committed, and because Sergeant Conlan would have been entitled to elect between arbitration and Police Board review at the time of his conduct giving rise to the charges against him, he cannot now be subject to a more disadvantageous process in which he has no option but Police Board review. This rationale is flawed for several reasons.

First, Illinois courts have repeatedly held that the constitutional prohibition against *ex post facto* laws has no application to civil matters, such as the termination of Sergeant Conlan here. *See, e.g.*, *Steinmetz v. Bd. of Trustees of Cmty. Coll. Dist*. No. 529, 68 Ill. App. 3d 83, 86, 385 N.E.2d 745, 747 (1978) ("Plaintiff is apparently contending that since the Board policy in effect at the time he entered continual contractual service did not specifically provide for dismissal of teachers for reasons of retrenchment the Board is therefore prohibited from dismissing him for that reason. . . . He alleges that a change in tenure policy which the Board adopted after he entered upon continual contractual service is . . . prohibited as an Ex post facto law. Plaintiff cites this court to no case law in support of his contention and presents no argument beyond this bare assertion. However, we note that the constitutional prohibition against Ex post

facto laws concerns criminal matters solely and has no application to civil law."); *In re Samuels*, 126 Ill. 2d 509, 523–24, 535 N.E.2d 808, 813 (1989) ("The Federal and Illinois *ex post facto* clauses, however, apply only to retroactive measures which are either criminal or penal in nature."); *Toia v. People*, 333 Ill. App. 3d 523, 528, 776 N.E.2d 599, 604 (2002) ("[T]he constitutional prohibition against *ex post facto laws* concerns criminal matters solely and has no application to civil law.").

Second, this is not a case involving the retroactive application of a new, more disadvantageous law or policy. To the extent Sergeant Conlan is subject to less favorable policies than those that would have applied at the time of his conduct giving rise to the charges against him, it is because his status has changed (from a police officer to a sergeant), not because any law or policy has changed. The exclusive jurisdiction of the Board over charges seeking the separation of a sergeant from CPD was in place at the time of Sergeant Conlan's alleged conduct giving rise to the charges against him, at the time Sergeant Conlan accepted his promotion to sergeant, and remains in place today. The circumstances here are therefore not analogous to those of a prohibited *ex post facto* law.

Third, even at the time of the alleged conduct giving rise to the charges against Sergeant Conlan, then-Officer Conlan would not have had the right to arbitration of his separation from CPD. Notably, the underlying conduct is alleged to have occurred in 2017 and 2018, well before the issue of arbitration of Officer separations was submitted to the Dispute Resolution Board (which was only convened on September 14, 2022). Thus, at the time of the alleged conduct, the operative CBA for CPD police officers remained the 2012-2017 FOP CBA, which provided for all grievances by officers protesting their recommended separation from CPD to be heard by the Board. There is accordingly no basis to apply the constitutional prohibition against *ex post facto*

laws (or any analogous principle) to the circumstances here, as then-Officer Conlan would have been aware that any recommended termination stemming from his conduct would be resolved before the Board.

POLICE BOARD ORDER

IT IS HEREBY ORDERED that, for the reasons set forth above, Respondent's Motion to Stay the Chicago Police Board Proceedings and/or Transfer This Matter to the Arbitration Call Pursuant to the Circuit Court's March 21, 2024 Order and Illinois Labor Law is **denied**.

This Memorandum and Order is adopted and entered by a majority of the members of the Police Board: Kyle Cooper, Paula Wolff, Steven Block, Mareilé Cusack, Nanette Doorley, Kathryn Liss, Andreas Safakas, and Justin Terry.

DATED AT CHICAGO, COUNTY OF COOK, STATE OF ILLINOIS, THIS 18th DAY OF JULY 2024.

Attested by:

/s/ KYLE COOPER
President

/s/ MAX A. CAPRONI
Executive Director