

**IN THE MATTER OF THE
GRIEVANCE ARBITRATION**

Austin Police Association
Grievant,

v.

The City of Austin
Employer.

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AAA Case No. 01-21-0002-2944

Before Arbitrator

Lynne Gomez

Grievant's Post-Hearing Brief

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POST-HEARING BRIEF OF THE AUSTIN POLICE ASSOCIATION

TO THE HONORABLE HEARING EXAMINER:

On July 28-30, 2021, a hearing was conducted by the Honorable Hearing Examiner regarding two outstanding grievances between the Austin Police Association (“Grievant”, “Association” or “APA”) and the City of Austin (“City”). The Grievant respectfully submits this post-hearing brief for your consideration:

I. INTRODUCTION

On November 15, 2018, the City of Austin and the Austin Police Association entered into a Meet and Confer Agreement which governs the terms and conditions of Austin police officers’ employment and provides for an orderly way for the City to conduct relations with these police officers.¹ Article 16 of the Meet and Confer addresses civilian oversight of the Austin Police Department. Article 16 clearly lays out the purview of the authority granted to the Office of Police Oversight (“OPO”) and expressly identifies very specific prohibitions on conduct by the OPO.

Unfortunately, the City of Austin has failed to abide by the terms of Article 16, and in some instances, blatantly refused to abide by the binding terms of Article 16. Specifically, but not exclusively, the City of Austin has allowed the OPO to investigate complaints, collect evidence and interview witnesses in direct violation of the express language of the contract. These violations have been brought to the attention of the Chief of Police and his executive staff, the City Manager’s Office, City Legal and Labor Relations on numerous occasions but the City, in all capacities, has refused to enforce the unambiguous provisions of the contract.

II. APPLICABLE CONTRACT PROVISIONS

The relevant provisions, clauses and language of the Meet and Confer Agreement are as follows:

1. Article 16, Section 1(b)(1-4)

The purpose of Civilian Oversight is:

¹ Union Ex. 1 at 3.

- (1) To assure timely, fair, impartial, and objective administrative review of complaints against police officers, while protecting the individual rights of officers and civilians;
- (2) To provide an independent and objective review of the policies and procedures of the Austin Police Department; and
- (3) To provide a non-exclusive location for accepting administrative complaints of officer misconduct.
- (4) To provide transparency in policing and thereby fostering trust between the community and the Police Department.

2. Article 16, Section 1(d)

Except as specifically permitted in this Article, the Civilian Oversight process, regardless of its name or structure, shall not be used or permitted to gather evidence, contact or interview witnesses, or otherwise independently investigate a complaint of misconduct by an Officer. There shall be no legal or administrative requirement, including but not limited to subpoena power or an order from the City Manager or the Department, that an Officer appear before or present evidence to any individual, panel, committee, group, or forum of any type involved in Civilian Oversight. . . .

3. Article 16, Section 3(a)

The Director of the OPO will have unfettered access to the Internal Affairs investigation process, except as provided herein. The Director of the OPO may inquire of the Commander of the Internal Affairs Division or the Chief of Police, or the Chief's designee, as to the status of any pending IAD investigation.

4. Article 16, Section 3(b)(1-4)

Complaint Intake

- (1) The OPO shall not gather evidence, or interview witnesses (except the complainant as provided herein), or otherwise independently investigate a complaint or other information of police misconduct. The OPO shall not have the authority to subpoena witnesses. There shall be no administrative requirement, including but not limited to an order from the City Manager or the Department, that an Officer appear or present evidence to the Director of the OPO. The OPO is authorized to accept complaints of Officer misconduct as provided in this Section.
- (2) The OPO may obtain the following information in connection with the filing of a complaint of officer misconduct:
 - (a) The complainant's personal information;
 - (b) The nature of the complaint;
 - (c) Witness information;
 - (d) The incident location, date, and time; and
 - (e) The APD Officer(s) involved.

(3) Of the intake is in person, the OPO shall digitally audio record the taking of the information provided in Section 3(b)(2). The OPO will promptly forward the completed complaint and audio recording to IAD when requested by IAD. A complainant may be subsequently interview by the IAD investigator for purposes of clarification or to obtain additional information relevant to the investigation. The OPO may attend any such subsequent interviews.

For external complaints, the OPO may make a recommendation for classification of the complaint to IA. The nature of the complaint and OPO's recommended classification may be made public, but shall not include the name of the complainant or officer, witness information, or the incident location, date and time.

(4) Personnel form the OPO shall assist an individual in understanding the complaint process and the requirements for filing a complaint but shall not solicit or insist upon the filing of a complaint by any individual.

5. Article 16, Section 3(c)

Access to Investigation Interviews

A representative from the OPO may attend an interview of the Officer who is the subject of the investigation or administrative inquiry, as well as all witness interviews. The OPO representative may directly question the Officer who is the subject of the investigation and any witness Officer only if agreed to by the subject Officer or witness Officer or his/her representative and the IAD investigator. At the conclusion of or during a break in any interview, the OPO representative may take the IAD investigator aside and request that the investigator ask additional questions. Whether such information is sought in any witness interview is within the discretion of the IAD investigator.

6. Article 16, Section 3(d)

Access to Dismissal Review Hearings

The Director of the OPO and/or one other member of the OPO may attend any Dismissal Review Hearing (or other administrative hearing or meeting conducted for the purpose of determining whether the Department shall take disciplinary action against an Officer for alleged misconduct). Neither the Director of the OPO, and/or other member of the OPO nor the Internal Affairs Representative(s) may remain in the Hearing while the chain of command and the Chief of Police or his/her designee discusses the final classification and/or appropriate discipline, if any, to be imposed. The final classification of an allegation of misconduct is within the sole discretion of the Chief of Police, subject to the Officer's right of appeal of any discipline imposed as provided by Chapter 143 of the Texas Local Government Code and this AGREEMENT.

III. BURDEN OF PROOF

The burden of proof in this matter is a preponderance of the evidence standard and is to be borne by the Grievant as to the validity of the contents of the grievances.

IV. ISSUES TO BE DETERMINED

1. Did the City violate the Meet and Confer Agreement by allowing the Office of Police Oversight to investigate complaints?
2. Did the City violate the Meet and Confer Agreement by allowing the Office of Police Oversight to collect evidence?
3. Did the City violate the Meet and Confer Agreement by allowing the Office of Police Oversight to interview witnesses?
4. If the City committed all, or any, of the alleged Meet and Confer violations, what is the appropriate remedy?

V. GRIEVANCE SUMMARIES

1. On November 15, 2018, the City of Austin and the Austin Police Association entered into a binding Meet and Confer Agreement.²
2. Article 16 of the Agreement expressly addresses the role of the Office of Police Oversight, the power and authority bestowed upon the OPO, and delineates clear prohibitions on certain conduct and/or actions by the OPO.³

July 10, 2020 Grievance

3. On July 10, 2020, the APA filed a grievance with former Chief of Police, Brian Manley.⁴
4. This grievance stemmed from an IA investigation that was initiated based on an external complaint received by the OPO into the conduct of Officer Michael Hewitt.⁵

² Union Ex. 1.

³ Union Ex. 1 at 46.

⁴ Union Ex. 6.

⁵ Union Ex. 7.

5. On October 9, 2019, Officer Hewitt encountered a subject who was loitering for an extended period of time at a gas pump. Officer Hewitt notated that the subject was not patronizing the store and was otherwise blocking other individuals from using the gas pump that he was parked at. (Arb. Tr. 240:22-241:19).
6. The specific gas station that the subject was loitering at was in a high crime location, known for drug transactions and violent crime. (Arb. Tr. 240:2-6). The gas station previously approved the Austin Police Department to issue blanket Criminal Trespass Notices⁶ (“CTN”) to anyone that was loitering on the property. (Arb. Tr. 240:5-10).
7. Officer Hewitt approached the loitering subject and had a discussion with him about his actions at the gas pump. After speaking with the subject, it became clear to Officer Hewitt that the subject was not patronizing the store and had been loitering for an extended period of time at that specific gas pump. (Arb. Tr. 241:18-242:4).
8. Officer Hewitt issued the loitering subject a CTN and advised him not to loiter at the gas station anymore. (Arb. Tr. 242:242:3-4).
9. Some time before January 13, 2020⁷, the OPO was contacted by a complainant who alleged that “an Austin police officer harassed him.”⁸
10. Claire Vaho, the OPO representative assigned to the complaint, contacted IA and requested all information related to this complaint.⁹
11. IA provided Ms. Vaho with all of Officer Hewitt’s body-worn camera footage around the timeframe of the complainant’s incident.¹⁰

⁶ A blanket Criminal Trespass Notice authorizes the Austin Police Department to issue CTN’s without the express approval of the owners of the property each individual time a CTN needs to be issued. (Arb. Tr. 240:13-20).

⁷ Due to the fact that the City declined to participate in voluntary discovery and refused to comply with the subpoena duces tecum signed by the Arbitrator for information surrounding this complaint, it is unknown exactly when the complainant called into the OPO. However, it is presumed it was before January 13, 2020, as that is the date that the OPO issued the NFC regarding this incident.

⁸ Union Ex. 7.

⁹ It is unclear based on the complaint itself and the testimony provided at the hearing by Ms. Vaho how exactly Ms. Vaho was able to identify this specific incident or Officer Hewitt in order to request the proper information.

¹⁰ It is not known why IA provided Ms. Vaho with body worn camera footage that was not associated directly with the complainant or the complaint because the City refused to produce the email request from Ms. Vaho to IA and the testimony at the hearing was unclear.

12. Ms. Vaho compared footage of the complainant's interaction, who happens to be black, with another interaction Officer Hewitt had that day with a white individual.
13. The footage from the white individual's interaction with Officer Hewitt showed that he was parked at the same gas station, but along the side of the parking lot near the air pumps, not at a gas pump. (Arb. Tr. 247:21-23). When Officer Hewitt approached the white individual and inquired as to his actions, the white individual explained that he was an uber driver and that he was waiting for his next fare. (Arb. Tr. 248:8-15). Officer Hewitt did not issue the white individual a CTN. (Arb. Tr. 248:15-17).
14. Based on the comparison of these two body-worn camera videos, the OPO issued a Notice of Formal Complaint ("NFC") on January 13, 2020, alleging that Officer Hewitt may have violated policies related to being courteous and treating all individuals fairly and equally without regard to race.¹¹
15. On May 19, 2020, Internal Affairs issued Officer Hewitt a Notice of Allegations ("NOA") based on the January 13, 2020 NFC it received from the OPO.¹² The NOA stated the following:

"On October 19, 2019, you contacted two subjects at the 7-11, at 7114 N IH 35 SVRD SB. Your actions during these contacts do not appear consistent with treating all persons fairly and equally, and performing your duties impartially without respect to racial or bias-based profiling."¹³

The NOA identified two specific potential policy violations: (1) Policy 301.2 *Impartial Attitude and Courtesy* and; (2) Policy 328.2 *Racial or Bias-Based Profiling*.¹⁴

16. Officer Hewitt later participated in an IA interview regarding these allegations and explained the reasons why the black subject received a CTN and the white subject did not receive a CTN. (Arb. Tr. 263:8-15). Officer Hewitt reiterated that the issuance or non-issuance of a CTN had absolutely nothing to do with the race of

¹¹ Union Ex. 7.

¹² Union Ex. 8.

¹³ Union Ex. 8, Page 2.

¹⁴ Union Ex. 8, Page 2.

the subject and was predicated solely on the individual and wholly different actions of the subjects.

17. Officer Hewitt's chain of command reviewed the complaint and the IA investigation and did not find that Officer Hewitt's actions substantiated the allegations against him. (Arb. Tr. 265:5-9). Officer Hewitt was not sustained on any policy violations regarding this complaint and accordingly, received no formal discipline. (Arb. Tr. 264:21-23).
18. Upset by the chain of command's decision to not sustain Officer Hewitt on the OPO's suggested policy violations, Director Muscadin emailed Commander Jason Staniszewski and copied Assistant Chief Robin Henderson.¹⁵ In this email, Director Muscadin alleged that Officer Hewitt should have at least been sustained on some kind of violation, even suggesting another violation that had absolutely nothing to do with the initial complaint. Director Muscadin then threatened Commander Staniszewski, specifically stating:

“As a result, Stan, you are now on notice that the OPO will be closely monitoring Ofc. Hewitt's behavior.”

Director Muscadin further went on to advise the Assistant Chief of her responsibilities, stating:

“AC Henderson, I also ask that you intervene, if necessary, in how Stan addresses these concerning and ongoing issues with Ofc. Hewitt.”

19. The Association later became aware of the circumstances surrounding this complaint filed with the OPO and how the OPO conducted an investigation, which ultimately manipulated and fabricated these allegations against Officer Hewitt.

November 3, 2020 Grievance

20. On November 3, 2020, the APA filed a grievance with former Police Chief Brian Manley.¹⁶

¹⁵ Union Ex. 9.

¹⁶ Union Ex. 4.

21. This grievance stemmed from audio recordings of the OPO representatives intaking complaints. As a sampling, the grievance identifies three separate cases in which the OPO representative informed a complainant during the initial intake of their complaint that (1) the OPO will request all evidence and information related to the complainant's incident and review it and (2) after review someone from the OPO will call the complainant back for more information or update the complainant on where the OPO is in the process.¹⁷
22. The audio of these complaint intakes were not uncovered until the subject officer of the complaint was brought into IA for his/her interview.

VI. TESTIMONY SUMMARIES

Farah Muscadin

1. Farah Muscadin is the Director of the Office of Police Oversight and also a co-chair for Reimagined Public Safety. (Arb. Tr. 50:21-51:2).
2. She has served in the role as the Police Monitor and/or Director of Oversight since January 2018¹⁸. (Arb. Tr. 51:4-14).
3. She has never been a police officer before or worked in law enforcement. (Arb. Tr. 53:23-54:11)
4. She is an attorney, who is licensed in Illinois and is not practicing law in Texas. (Arb. Tr. 54:12-24).
5. Director Muscadin testified that her office takes in complaints and looks at them with a broad lens to ascertain whether or not there are potential policy violations and then they make recommendations to the Department. (Arb. Tr. 55:13-17).
6. Director Muscadin testified that her office's role throughout the process is to ensure that the investigations that are conducted by the Department are fair and thorough. (Arb. Tr. 55:23-25).

¹⁷ Union Ex. 4.

¹⁸ Prior to November 2018, the Office of Police Oversight was called the Office of Police Monitor. Specifically, Director Muscadin testified that she was brought on as the Interim Police Monitor in January 2018, became the permanent Police Monitor in June 2018 and then became the Director of the Office of Police Oversight in November 2018 when the name and title of the office changed. (Arb. Tr. 51:6-14).

7. Approximately 10-12 people work under Director Muscadin in the Office of Police Oversight. (Arb. Tr. 61:22-24).
8. Director Muscadin testified that not a single individual that currently works in her office has any law enforcement experience. (Arb. Tr. 63:13-17).
9. When asked if her office does investigations, Director Muscadin testified “No. We do not.” (Arb. Tr. 63:19-21).
10. When asked if her office interviews witnesses, Director Muscadin testified “No. We do not.” (Arb. Tr. 63:22-23).
11. When asked if her office collects evidence, Director Muscadin testified “No. We do not.” (Arb. Tr. 63:24-25).
12. Director Muscadin testified that “the Officer of Police Oversight’s purview is not limited to the contract” because she reports to the City Manager, and the City Manager’s authority over her office comes from charter. Specifically, Director Muscadin stated that her ability to conduct preliminary reviews comes from the authority of the City Manager, which is not something that would be contained within the Meet and Confer Agreement. (Arb. Tr. 67:16-24).
13. Director Muscadin testified that her office makes a request for all information available regarding a complaint from IA “upon receipt of a contact from a complainant about a potential complaint.” (Arb. Tr. 72:5-20).
14. When asked about the Notice of Formal Complaint, Director Muscadin testified that her office drafts the NFC and that the NFC is the complaint the IA uses to initiate their investigation. (Arb. Tr. 75:1-12).
15. Director Muscadin testified that collecting body-worn camera footage, dash camera footage and reports is not collecting evidence “because it is part of information that the department already has, that is a part of the City of Austin, and essentially [the OPO] is entitled to that information and can obtain that information as a City of Austin department.” (Arb. Tr. 82:22-83:5).
16. Director Muscadin testified that ICMS is a database that contains (g)file material and is maintained by the Austin Police Department. (Arb. Tr. 112:13-113:4).
17. Director Muscadin also testified that ICMS was a database that the two departments (IA and OPO) worked with “collaboratively” but that her and/or her

staff makes notes and comments within ICMS regarding investigations. (Arb. Tr. 113:8-115:8).

18. Director Muscadin confirmed that the Austin Police Department and the Office of Police Oversight are currently in the process of drafting Standard Operating Procedures (SOP) for how the two departments will collaborate in the future. Director Muscadin testified that as a part of these SOP's she wants her office to have the ability to write addendums to IA summaries to include "issues with the investigatory summary, salient facts that have been omitted or to point out if the summary has been written in a biased fashion." (Arb. Tr. 115:9-116:15).
19. Director Muscadin testified that it is the OPO's "responsibility to ensure that the department is following its own policies and procedures." (Arb. Tr. 124:5-7).
20. Director Muscadin testified that the Meet and Confer Agreement provides that her purview is Commander and below and any complaints received about, regarding, or involving the Executive Staff (Assistant Chiefs and above) are to be provided to the City Manager and her office does not monitor or oversee that investigation. (Arb. Tr. 130:7-131:21).
21. Director Muscadin testified that sometimes her office has to call back complainants to get follow up information. (Arb. Tr. 162:3-10).

Mai Wines

1. Mai Wines is a former Sergeant with the Austin Police Department. (Arb. Tr. 169:7-9).
2. Sergeant Wines retired after 26 years with the Department, 18 of which she was a commissioned peace officer for. (Arb. Tr. 169:14-25).
3. When Sergeant Wines retired, she was a Sergeant in Internal Affairs and was in that position for approximately 4 years at the time of her retirement. (Arb. Tr. 170:2-13).
4. Sergeant Wines testified that she was tasked with providing information to the OPO. Specifically, Sergeant Wines testified that after the OPO received a complaint, they would ask her or Detective Normand to provide any evidence, any body-worn camera, any digital mobile audio video, any report, anything related to the incident of their complaint. Sergeant Wines or Detective Normand would then

research that incident and if they located the items, they would provide them to the OPO. (Arb. Tr. 171:8-19).

5. Sergeant Wines testified that this request for information from the OPO came prior to the NFC being submitted to IA and prior to an IA Sergeant being assigned the case. (Arb. Tr. 172:4-9).
6. Sergeant Wines testified that in her opinion, the OPO was investigating complaints. (Arb. Tr. 172:10-15).
7. When asked why Sergeant Wines was of the opinion that the OPO was investigating complaints she testified that “[t]he reason why I believe that, in my opinion again, when you investigate something you review all the facts, review all the evidence, and you interview people, you gather all the facts, and you have a case summary. So if, if I were to investigate that, that’s what I would do. And because they were provided with the same means and the same resources that I was that would involve my investigation, that’s the reason why I feel like they were investigating it too as well.” (Arb. Tr. 172:16-173:2).
8. Sergeant Wines testified that collection of the body-worn camera and DMAV is collecting evidence because that is what records the incident and whatever records the incident, in her opinion, is the definition of evidence. (Arb. Tr. 173:13-18).
9. Sergeant Wines testified that when she was the main investigator on an IA case, the OPO was involved in the investigation by attending interviews, reviewing questions and in her opinion, they even had a say-so in the investigation. (Arb. Tr. 175:16-23).
10. Sergeant Wines testified that she had far less discretion during her IA interviews in what questions should or should not be asked towards the end of her tenure in IA. (Arb. Tr. 177:6-178:3).
11. Sergeant Wines testified that the IA interview questions are uploaded to the case folder in Citrix but that they do notify the OPO when they upload them. (Arb. Tr. 181:15-19).
12. Sergeant Wines testified that although she does not know the details or exact process of the OPO’s “preliminary review”, she is aware they are investigating because she has received phone calls from the OPO representative after they reviewed the initial video stating that they wanted other information related to the

video or other officer's body camera footage that the saw was in the initial footage. (Arb. Tr. 174:2-9).

Michael Hewitt

1. Officer Michael Hewitt is a police officer with the Austin Police Department. (Arb. Tr. 232:4-10).
2. Officer Hewitt has been with APD for approximately 5 years. (Arb. Tr. 232:13-20).
3. Prior to coming to APD, Officer Hewitt was a law enforcement officer in Mobile, Alabama. (Arb. Tr. 232:21-23).
4. Officer Hewitt retired from the Mobile Police Department as a Lieutenant after 20 years. (Arb. Tr. 232:24-233:4).
5. Officer Hewitt did not receive any discipline over the 20 years he was employed with the Mobile Police Department, besides minor discipline for damage to vehicles. (Arb. Tr. 234:3-11).
6. Officer Hewitt testified that the area of town he currently works in has a lot of issues with homelessness, crime in general, violence and has two of the biggest open-air drug markets in the city. (Arb. Tr. 235:11-19).
7. Officer Hewitt testified that prior to receiving the NOA in this case, he was pulled into the office by his chain of command and informed that IA was going to compare a video of a white subject with a video of a black subject. (Arb. Tr. 239:5-22).
8. Officer Hewitt testified that there is a 7-Eleven in his sector that is an open-air drug market and there is a lot of violence so the owner of the 7-Eleven signed a blanket criminal trespass authorization, allowing Austin Police officer to issue CTN's on behalf of him and his employees. (Arb. Tr. 240:2-10).
9. Officer Hewitt testified that a week prior to the incident giving rise to the complaint filed against him, he observed the same individual identified in the complaint at a gas pump for several hours. (Arb. Tr. 240:22-25).
10. Officer Hewitt testified that he was informed by another officer that works the night-shift and enforces the blanket CTNs, that individuals were trying to get around the CTN requirements by parking at gas pumps to make it look as if they were patronizing the store. (Arb. Tr. 241:1-5).

11. Officer Hewitt testified that when he saw the same vehicle parked at the gas pump a week later, he made contact with the individual because he recognized him from the week prior but also because the individual had been again sitting at the gas pump for an extended period of time that day. (Arb. Tr. 241:18-24).
12. Officer Hewitt testified that when he asked the subject if he was patronizing the store, the subject informed him that he was “just hanging out in the neighborhood.” (Arb. Tr. 241:18-242:4).
13. Officer Hewitt testified that he gave this individual, who happened to be black, a CTN. (Arb. Tr. 252:2-6).
14. Officer Hewitt testified that at some other point during that shift, he observed another individual at the same gas station, loitering in his vehicle at the air pump. (Arb. Tr. 247:21-23).
15. Officer Hewitt testified that he approached this individual, who happened to be white, and made contact. He asked this individual why he was loitering and the individual explained that he was an uber driver and he was waiting for his next fare. (Arb. Tr. 248:8-13).
16. Officer Hewitt testified that he believed that to be a reasonable excuse, and that he had never seen the driver before, so he explained the high-crime area and that the owner does not like people hanging out on the property. (Arb. Tr. 248:11-19).
17. Officer Hewitt testified that he did not issue this individual a CTN.
18. Officer Hewitt testified that although he could not remember exactly when each interaction took place, the interaction between the black individual and the white individual did not occur at the same time and neither individual were present when he interacted with the other. (Arb. Tr. 246:4-25).
19. Officer Hewitt testified that after his chain of command informed him that the investigation was going to compare his interactions with white and black individuals he felt blind sighted and broke down and his chain of command had to send him home because he was so upset. (Arb. Tr. 256:15-257:7).
20. When asked about the details of the complaint, Officer Hewitt testified that he was not provided any additional information about the complaint besides that he allegedly harassed the complainant. (Arb. Tr. 260:8-11).

21. Officer Hewitt testified that he was not provided any audio recording of complainant's call, any written documentation further explaining the complainant's complaint and he was not provided any information from the OPO or IA regarding how the comparison of his interactions with white and black individuals actually came about. (Arb. Tr. 260:12-22).
22. Officer Hewitt testified that he later went to IA and was asked to explain the difference in the two videos and why he issued a CTN to the black individual but not the white individual. (Arb. Tr. 263:6-15).
23. Officer Hewitt testified that he did not harass the individual that made the complaint against him, he did not treat the individual any different than he would anyone else, that he was respectful to the individual, that he was not rude to the individual, that he did not call the individual any mean names, that he did not yell at the individual and that he did not treat the individual any different because he was black. (Arb. Tr. 2643:19-264:13).
24. When asked if Officer Hewitt generally, throughout his work, treats anyone differently based on their race, Officer Hewitt stated: "I do not. I make it - - I try to treat everybody the same. I mean, it's - - and because I don't - - I just try to treat everyone as how I would want to be treated." (Arb. Tr. 264:14-20).
25. Officer Hewitt testified that after he was cleared of all allegations of misconduct, his Commander pulled him aside to reassure him that he was doing a good job and provided him with an email exchange that was from Director Muscadin. (Arb. Tr. 265:16-19).
26. Officer Hewitt testified that he feels targeted by Director Muscadin and the OPO and that he is afraid to do proactive police work because he is worried it will be improperly scrutinized by the OPO. (Arb. Tr. 276:5-14).
27. Officer Hewitt testified that he is worried that he is going to be accused of being racist or discriminating against individuals again by the OPO for simply doing his job. (Arb. Tr. 277:8-11).
28. Officer Hewitt testified that although the allegations against him were not sustained, they still follow him around and he feels like the allegations have tarnished his reputation (Arb. Tr. 291:11-17).

29. Officer Hewitt testified that what upsets him the most about this process is “that a complaint could be made out of taking one video and comparing it to another video without any other, looking at any other part of [his] job. [It can be seen] that [he] talks to people of all sorts of races, gender . . . and [he tries] to treat everybody the same. But in this case, [they] took one video and [they] took another video and [they] said one video plus one equals racial bias.” (Arb. Tr. 292:22-293:5).

Thomas Villarreal

1. Thomas Villarreal is a Detective with the Austin Police Department. (Arb. Tr. 300:2-5).
2. Detective Villarreal has been with APD for approximately 16 years. (Arb. Tr. 300:5).
3. He is currently assigned to the Austin Police Association full-time and serves as the Association Vice President. (Arb. Tr. 300:6-8).
4. He has been working with the APA for over 10 years but has been full-time with the APA for the last 5 years. (Arb. Tr. 302:4-6).
5. Detective Villarreal testified that as a representative of the APA, he has a lot of communications and interactions with the City Manager’s office, the OPO, the APD executive staff and City labor relations. (Arb. Tr. 303:2-22).
6. Detective Villarreal testified that he was on the 2013 contract negotiations team, the 2017 contract negotiations team that ultimately failed, and he was the co-chair of the 2018 contract negotiations team. (Arb. Tr. 304:21-305:2).
7. Detective Villarreal testified that the APA does not oppose oversight, they believe oversight is necessary and they encourage fair and impartial oversight. (Arb. Tr. 308:17-309:3).
8. Detective Villarreal testified that expansion of the OPO’s authority has been accomplished through contract and it was not until very recently that the City has started claiming that the OPO has authority outside of the contract. (Arb. Tr. 309:11-310:6).
9. Detective Villarreal testified that the APA was never informed that the November 2, 2018 memo was meant to grant additional authority to the OPO outside of the Meet and Confer and prior to the issuance of this memorandum, the OPO’s sole

power and authority has come from agreements negotiated in good faith between the City of Austin and the APA. (Arb. Tr. 311:2-10).

10. Detective Villarreal testified that he does not agree that the City Ordinance provides the OPO and Director Muscadin additional authority outside of the contract, (Arb. Tr. 311:15-21), and that the APA was never informed by anyone in city council or management that the ordinance was intended to provide additional authority to the OPO. (Arb. Tr. 313:4-8).
11. Detective Villarreal testified that if the Meet and Confer did not exist, the OPO would not have the authority to monitor or be present during IA investigations at all because that information is (g)file protected. (Arb. Tr. 314:7-14).
12. Detective Villarreal testified that in 2018 the APA filed a lawsuit against the City regarding the OPO attending and participating in IA interviews and investigations during a period of time that the Meet and Confer had lapsed. (Arb. Tr. 315:16-316:11).
13. Detective Villarreal testified that the APA's position has always been that the OPO derives its authority from the Meet and Confer and thus, if there is no Meet and Confer in place, Section 143.089(g) strictly prohibits the OPO from having access to IA information. (Arb. Tr. 315:19-316:11).
14. Detective Villarreal testified that the Association agreed to drop the lawsuit once the new Meet and Confer was ratified because now the OPO's authority was back delineated within the contract and they had agreed to the powers that their members were comfortable with for that office. (Arb. Tr. 319:6-11).
15. Detective Villarreal testified that the OPO was never intended to be an office capable of doing any investigations or preliminary reviews. (Arb. Tr. 319:12-16).
16. Detective Villarreal testified that a preliminary review is the same thing as an investigation. (Arb. Tr. 320:9-11).
17. Detective Villarreal testified that the OPO is still collecting evidence, even if the information that they are collecting is already within the possession or control of the Austin Police Department. (Arb. Tr. 320:12-15).
18. Detective Villarreal testified that the OPO having authority regarding what questions are asked during an IA interview constitutes them having the ability to interview witnesses. (Arb. Tr. 320:20-23).

19. Detective Villarreal testified that the OPO does not have the authority to call complainants back and clarify information or update them on the process of their “preliminary review.” (Arb. Tr. 321:4-15).
20. Detective Villarreal testified that in the last 12 years, the APA and the City has not had any issues settling grievances or issues outside of arbitration and to his knowledge, not a single grievance has had to go to arbitration prior to this one. (Arb. Tr. 326:10-17).
21. Detective Villarreal testified that now, when it come to the OPO and Article 16 of this contract, the City has not been willing to negotiate, discuss, sit down, or even attempt to resolve any issues or grievances. (Arb. Tr. 326:18-22).
22. Detective Villarreal testified that it’s a general thought in the Department that the City is not willing to come to the table regarding any of the grievances involving Article 16 because nobody wants to push back on the OPO’s office. (Arb. Tr. 331:16-20).
23. Detective Villarreal testified that requiring the IA Sergeants to forward their interview questions to the OPO 72 hours in advance was not contemplated or intended when negotiating the contract and that is a newer change that the City has unilaterally made to the process. (Arb. Tr. 341:16-23).
24. Detective Villarreal testified that it is his understanding that the IA Sergeants are now required to send their interview questions to the OPO prior to an interview and that the OPO representative is allowed to make any changes they want to the questions or add questions to ask. (Arb. Tr. 342:25-343:5).
25. Detective Villarreal testified that he has personally experienced an interview where they took a break, there was conversation between the OPO representative and the IA Sergeant, then they went back into the interview, IA asked a question, then they took another break to see if the question was sufficient for the OPO’s liking, went back into the interview and IA asked the same question again but just phrased it differently and then they had to take another break.” (Arb. Tr. 343:8-15).
26. Detective Villarreal testified that the OPO essentially does what they want, they completely ignore the contract and the Department is aware that the OPO completely ignores the contract. (Arb. Tr. 352:1-12).

27. Detective Villarreal testified that when Director Muscadin first came to the City of Austin she was far more open to collaboration and discussion between the departments. (Arb. Tr. 356:14:357:3).
28. When asked to put a percentage on the level of collaboration that Director Muscadin and the OPO is willing to do with the APA, Detective Villarreal stated “zero.” (Arb. Tr. 357:4-9).
29. When asked to put a percentage on the level of collaboration that Director Muscadin and the OPO is willing to do with APD, Detective Villarreal stated “less than 5 percent.” (Arb. Tr. 357:10-13).
30. Detective Villarreal testified that Director Muscadin chairs an anti-police committee that puts out public reports that suggest abolishing the police, civilianizing the police, eliminating traffic enforcement, eliminating K9 units, eliminating mounted units, eliminating park patrol and eliminating the use of deadly force entirely. (Arb. Tr. 359:4-360:10).
31. Detective Villarreal testified that Director Muscadin posted on her personal facebook an article whose main premise was that black people needed a space away from white people in the workplace. (Arb. Tr. 363:4-11).

Sheldon “Scott” Askew

1. Sheldon Scott Askew is a Lieutenant at the Austin Police Department. (Arb. Tr. 395:23-25).
2. Lieutenant Askew has been with APD for 21 years and is currently assigned to the Police Technologies Unit. (Arb. Tr. 396:2-6).
3. He worked in the Internal Affairs Department as both a Sergeant and then later on as a Lieutenant. (Arb. Tr. 396:21-397:20).
4. Lieutenant Askew testified that he participated in the 2018 contract negotiations and specifically that he was the designated chairperson for Article 16, the oversight portion. (Arb. Tr. 398:11-20).
5. Lieutenant Askew testified that as a Lieutenant in IA, it was his responsibility to oversee the investigations of the internal complaints that the actual sergeants in the unit conduct. (Arb. Tr. 401:1-5).

6. Lieutenant Askew testified that as a Lieutenant he was allowed to directly communicate with Director Muscadin and her staff but the IA Sergeants were required to utilize a common email inbox for most of their communications with the OPO. (Arb. Tr. 401:6-20).
7. Lieutenant Askew testified that to his knowledge, after the OPO's office receives a complaint, they make a request for all of the information related to the incident through a universal email inbox or directly to Detective Tanya Normand. (Arb. Tr. 402:24-404:4).
8. Lieutenant Askew testified that IA sends that information that the OPO requests, such as body-worn camera, dash camera and reports over to the OPO prior to the OPO sending over the actual complaint (NFC) to IA. (Arb. Tr. 405:1-11).
9. Lieutenant Askew testified that once IA receives the NFC from the OPO, it is staffed with an IA Sergeant on a rotational basis and that the IA Sergeants are not assigned to cases until the actual NFC is received. (Arb. Tr. 405:15-406:7).
10. Lieutenant Askew testified that the contract requires that if additional clarification or follow up is needed from a complainant, that IA will reach out to the complainant directly with the OPO's participation. (Arb. Tr. 407:2-13).
11. Lieutenant Askew testified that the NFC's that the OPO sent over to IA were always a point of frustration because the policy violations they suggested would not match the actual complaint in the NFC. Without more information about their investigation or preliminary review, such as their notes, it was daunting and sometimes impossible for IA to ascertain where the OPO believed they found a suggested policy violation that did not match the complaint. (Arb. Tr. 409:10-412:13).
12. Lieutenant Askew testified that it usually takes the OPO months to get the NFC over from the time they take the complaint, although that time period has recently improved greatly. (Arb. Tr. 413:10-22).
13. Lieutenant Askew testified that the extended length of time the OPO spends with the complaint before sending it over to IA eats into the contractual 180-day timeline and can cause great problems for the actual IA investigation. (Arb. Tr. 413:23-414:11).

14. Lieutenant Askew testified that it is imperative that IA receives the complaint as soon as possible to begin their investigation because they aim to complete the investigations within 150 days, rather than 180, and thus, even less time is allotted when the OPO holds on to a complaint for an extended period of time. (Arb. Tr. 414:20-415:19).
15. When asked if there was a requirement that the IA Sergeants forward their interview questions to the OPO at least 72 hours in advance, Lieutenant Askew stated that, yes, this was a requirement. (Arb. Tr. 418:3-6). Lieutenant Askew further testified that the IA Sergeants draft a series of questions prior to an interview to keep them on track and then they are required to provide those to the OPO by uploading them to the casefile 72 hours in advance and then sending an email to the generic OPO inbox informing them that the questions have been uploaded. (Arb. Tr. 416:23-418:2).
16. Lieutenant Askew testified that if the IA Sergeant does not meet the 72-hour question upload deadline, that the OPO will decline the interview. (Arb. Tr. 418:7-11). When further asked if the OPO can decline the interview, and thus, essentially control when is interview is conducted, Lieutenant Askew stated: "I think that's a fair statement. Yes." (Arb. Tr. 418:12-15).
17. Lieutenant Askew testified that the IA Department tries to work around the OPO's schedule for interviews, however, there has been times that he has instructed his staff to move forward with the interviews regardless of the OPO's participation. (Arb. Tr. 419:2-420:14). When further asked how often does IA have interviews without the OPO present against the OPO's opposition, Lieutenant Askew stated: "Very rarely." (Arb. Tr. 420:15-18).
18. Lieutenant Askew testified that if the IA Sergeant fails to send the questions over to the OPO within 72 hours, the likelihood that the interview is just going to be cancelled and rescheduled is very high, "probably north of 95 percent." (Arb. Tr. 420:19-25).
19. Lieutenant Askew testified that if IA deviates from the practices that the OPO wants, they "hear about it." (Arb. Tr. 422:6-8).
20. Lieutenant Askew testified that the OPO has the ability to review the interview questions, add suggestions and make modifications to them. (Arb. Tr. 426:7-24).

21. Lieutenant Askew testified that the contract requires that the IA Sergeants have discretion on how to conduct the interview and what questions are asked but in practice, they do not really have that discretion. (Arb. Tr. 427:12-22).
22. Lieutenant Askew testified that the Sergeants in IA have gotten away from denying questions and instead go to their Lieutenants to address the denial of questions directly with the OPO representative. (Arb. Tr. 428:3-18).
23. Lieutenant Askew testified that IA is also now required to explain to the OPO why they aren't adopting or asking suggested questions if they chose not to do so. (Arb. Tr. 428:19-25).
24. Lieutenant Askew testified about a particular example of when he declined to ask an OPO suggested question, he stated that: "in one particular event or setting case I was - - we were asked to ask a question of an officer. This is in an interview, not written questions. I declined the question based on the fact that I did not feel that the NFC adequately identified that particular policy. So therefore, as a result, I felt like it, it bordered on a violation of 143, the officer's rights in and of itself, so as a result I declined the question. I tried after that - - as a matter of fact, I initiated contact with the complaint specialist and, and wrote a lengthy email discussing my reasons why, encouraged her to reach out to me to further that conversation, and I got an email saying she'd received it, thanks. Fast-forward, I don't know, maybe a month, and once that case was finished it of course ra through the chain of command up the executive branch of the police department, and I know that the police monitor was involved in that discussion, because there was essentially a rebuttal sent back explaining that I essentially stood in the way of this particular question being asked." (Arb. Tr. 430:18-431:15).
25. Lieutenant Askew testified that the OPO demanding or requiring a question to be asked is considered interviewing a witness. (Arb. Tr. 431:19-22).
26. Lieutenant Askew testified that there is no difference between a preliminary review and an investigation. (Arb. Tr. 431:23-25).
27. Lieutenant Askew testified that he brought all of his concerns up regarding potential contract violations to his Commander and the Director of the OPO numerous times and nothing was addressed or changed to address these concerns and/or contract violations. (Arb. Tr. 434:1-435:18).

28. Lieutenant Askew testified that Director Muscadin has referred to him and other individuals as an “obstructionist” and “displaying obstructionist behavior.” (Arb. Tr. 435:19-436:1).
29. Lieutenant Askew testified that the general morale of the subject officers that are being paraded through IA is at a very low point and a contributing factor to this low morale is related to the fishing expeditions the OPO has been conducting. (Arb. Tr. 436:14-25).
30. When asked about the Police Oversight Advisory Working Group Recommendations document¹⁹, Lieutenant Askew testified that the document was not a collective work of agreement. Lieutenant Askew testified that the document identified all ideas that were brought up during the sessions but not necessarily that all of the parties involved agreed with the ideas. He further testified that the formal document was created by the OPO, he was never asked to review the document for approval prior to publication and that he did not then, nor now, agree with all of the ideas identified in the document. (Arb. Tr. 441:15-446:3).
31. Lieutenant Askew testified that the individuals that participated in the Police Oversight Advisory Working Group were social justice advocates that have very strong opinions regarding policing. (Arb. Tr. 446:4-13).
32. Lieutenant Askew testified that when he was negotiating Article 16, there was never a thought in his mind that additional authority would be granted to the OPO through an ordinance or city memorandum. (Arb. Tr. 447:1-5).
33. Lieutenant Askew testified that when he negotiated Article 16, he believed that would be the OPO’s sole authority and there would not be authority granted to the office outside of that authority. (Arb. Tr. 447:6-13).
34. When asked to define evidence, Lieutenant Askew stated: “any item that might lend itself to the proof or, or - - proof of fact with respect to guilt and/or innocence with respect to an allegation.” (Arb. Tr. 451:12-20).
35. Lieutenant Askew testified that there has been a least one time where the OPO contacted a complainant for follow up or clarification and then subsequently added

¹⁹ City Ex. 3.

additional information about the complaint after the NFC had been filed. (Arb. Tr. 453:13-454:9).

Tonya Normand

1. Tanya Normand is a Detective with the Austin Police Department. (Arb. Tr. 476:17-20).
2. Detective Normand has worked for APD for 20 years and currently works in the Internal Affairs Department. (Arb. Tr. 476:21-477:4).
3. Detective Normand testified that her responsibilities within the IA Department are to provide evidence to the OPO when they ask, among other unrelated things. (Arb. Tr. 477:11-18).
4. Detective Normand testified that the OPO sends her a list of case numbers that the OPO has entered into the complaint management system and they will ask for the body-worn camera, DMAV, CAD, anything that is related to the complaint and she will provide it to them. (Arb. Tr. 477:19-478:7).
5. Detective Normand testified that all of the requests used to go directly to her email inbox but recently they have set up a universal email inbox that all of the OPO's requests go to. The only reason they contact her directly now is if they have already reviewed the material and they are looking for something specific or in particular. (Arb. Tr. 478:17-23).
6. When asked what information Detective Normand was required to send over upon request by the OPO, Detective Normand stated: "It would include the body-worn camera; the DMAV; the Visinet, or CAD report that says what officers were at that call and the times and so forth; the traffic ticket; and the 911 audio recording sometimes, very rare, but they will ask for that sometimes, or - - that's about it. Collision report, ticket." (Arb. Tr. 479:21-480:2).
7. Detective Normand testified that to her knowledge the Notice of Formal Complaint is not in existence until after the OPO has reviewed all of the material that she has sent them. (Arb. Tr. 480:10-21).

Shauna Griffin

1. Shauna Griffin is a Lieutenant with the Austin Police Department. (Arb. Tr. 48:17-22).
2. Lieutenant Griffin has been with the Austin Police Department for 19 years. (Arb. Tr. 482:23-25).
3. Lieutenant Griffin is currently assigned to IA and has been there for the past 15 months as a Lieutenant. (Arb. Tr. 483:1-8). She also previously worked in IA as a Sergeant for approximately a year and half about four or five years ago. (Arb. Tr. 83:9-15).
4. Lieutenant Griffin testified that she is allowed to communicate directly with the OPO through email but the Sergeants have to communicate with the OPO through the centralized email inbox they set up. (Arb. Tr. 485:18-486:3).
5. Lieutenant Griffin testified that the IA Sergeants are required to send their interview questions over to the OPO 72 hours prior to an interview and she has personally experienced a case where the interview was cancelled by the OPO because the questions were not sent over 72 hours prior. (Arb. Tr. 486:18-487:1).
6. Lieutenant Griffin testified that the hardest part about scheduling the IA interviews is working with the OPO's office because they are the least flexible and there are so many rules in place about their schedule. (Arb. Tr. 487:2-11).
7. When asked if she believes she is allowed to move forward with an interview without the OPO, Lieutenant Griffin stated: "No, ma'am. Now, there could be specific situations where there's a 180 right around the corner and we have no choice, but for the most part we do not go forward with interviews if the OPO is not available." (Arb. Tr. 487:12-17). She further testified this was a directive given from the executive staff that IA needs to coordinate the interview schedule with the OPO, even though the contract does not require them to be in the interview but allows them to be in the interview. (Arb. Tr. 487:18-7).
8. Lieutenant Griffin testified that at times, it has taken the OPO months to get the complaint over to IA. (Arb. Tr. 489:2-7).
9. When asked if the OPO's delay in sending the complaints over in a timely manner effects the IA Sergeants morale, Lieutenant Griffin stated: "It can at times, because

when a situation like that happens and several months of the 180 have already been eaten up before the complaint even comes over, those sergeants are going to have to work hard and fast to get the investigation completed before the 180. And it's really not 180, because the sergeants are trying to get something out really at the 150 mark so that the chain of command has enough time to review it before they have to make any decisions about discipline. So really, they don't have 180 days." (Arb. Tr. 489:11-23).

10. Lieutenant Griffin testified that on any given day, each IA Sergeant has approximately 10 to 12 cases, she supervises 5 IA Sergeants, and there are three other Lieutenants who have approximately the same amount of IA Sergeants they supervise. (Arb. Tr. 492:3-18). She further testified that the majority of these cases are from OPO generated complaints. (Arb. Tr. 492:19-22).
11. Lieutenant Griffin testified that a small percentage of the cases that the OPO sends over for investigation are for serious misconduct and that the majority of the complaints are shift-level type issues that should be handled at the supervisor level. (Arb. Tr. 492:23-493:18).
12. Lieutenant Griffin testified that if the Sergeants don't want to ask a question suggested by the OPO, the Sergeants will escalate it to the Lieutenant and if the Lieutenant agrees with the Sergeant then they better have a good reason for denying to ask the question because they will have to answer for it later on. (Arb. Tr. 494:19-1).
13. Lieutenant Griffin testified that she has been called an obstructionist by Director Muscadin. (Arb. Tr. 496:19-21). When asked to explain why, she stated: "Because when I was reviewing an NFC that was sent over by the OPO the complaint was not adequate. It does not comply with Chapter 143, so I requested an additional complaint or an amended complaint. And at that point I was accused of being an obstructionist in protecting the officer's rights, and I had to again offer an explanation as to why I was doing what I was doing. I was actually requesting a new complaint so that it could be investigated." (Arb. Tr. 496:24-497-7).
14. Lieutenant Griffin testified that there is no difference between an investigation and preliminary review and that is all "semantics." (Arb. Tr. 497:21-23).

15. Lieutenant Griffin testified that there is no one in her office that she is aware of that doesn't have a stressed or contentious relationship with Director Muscadin and the OPO. (Arb. Tr. 499:20-24).
16. Lieutenant Griffin testified that the 72-hour requirement to forward the interview questions to OPO started approximately a year ago and that requirement was not in place when she first came to IA as a Lieutenant. (Arb. Tr. 500:1-14).
17. Lieutenant Griffin testified that if IA does not want to investigate one of the suggested policy violations on the NFC, IA has to inform the OPO and if they do not concur, it then gets escalated to the Commander and then all the way to the Assistant Chief to be decided if they will investigate a specific suggested policy violation. (Arb. Tr. 511:1-17).
18. Lieutenant Griffin testified that IA and the OPO disagree on the majority of the suggested policy violations, thus, almost all cases get escalated all the way to the Assistant Chief for decision. (Arb. Tr. 511:18-512:7).

Deven Desai

1. Deven Desai is the Labor Relations Officer for the City of Austin. (Arb. Tr. 523:2-4).
2. The Labor Relations Officer is in charge of the City's side of the negotiations with police, fire and EMS. (Arb. Tr. 523:5-8).
3. Mr. Desai has served as many roles with the City of Austin to include working in the law department, as the acting Human Resources Director, as the acting Police Monitor and now, labor relations. (Arb. Tr. 523:9-25).
4. Mr. Desai testified that he was acting Police Monitor in 2017. (Arb. Tr. 524:2-3).
5. Mr. Desai testified that during the 2018 contract negotiations his role was negotiating the entire agreement on behalf of the City. (Arb. Tr. 530:16-22).
6. Mr. Desai testified that he did not attend any of the negotiation meetings and discussions regarding the group that was put together to discuss Article 16. (Arb. Tr. 531:14-21).
7. Mr. Desai testified that "generally speaking, . . . the city's position on oversight is, is that, you know, [they] try to take each contract and get more things to be public in subsequent agreements." (Arb. Tr. 536:12-15).

8. Mr. Desai testified that the role of the OPO is to be that entity that is not in APD that is checking in and to be the eye and ensure internal affairs is doing an adequate job. (Arb. Tr. 544:2-18).
9. When asked if the City Manager's memo or city ordinance increased the scope of the OPO's authority, Mr. Desai stated: "I mean, I think that, you know - - I guess let me give you, you know, the lawyerly answer here. I'm not sure that it increases the role, because that authority was already existing. You know, that's been the city's position, you know, that the authority is there. What the memo does is kind of define out, from the manager's perspective, this is how I was it presented. This is how I want the office to be run. It's not so much creation of new rights. It's, okay, we already have authority. I have the authority as the city manager to direct Farah to do X, Y, and Z. This is the manner in which I was X, Y, and Z done. You know, I think that's, that's the way we would put it. And I know - - I've had many discussions with the association. I know they fundamentally different about what existing authority there already is, and that's just an area we'll just agree to disagree on. But that's the way I would phrase what the memo and what the ordinance does. So the ordinance kind of does, in addition to a name change, the ordinance does the same thing from the council's perspective: Okay. We as the elected officials want to see X, Y, and Z, you know. There's nothing - - you know, as I told the association at the time, you know, the manager nor, the manager nor the council can somehow override 143, you know, but there is, you know - - so there's nothing they can do to say, Hey, you know what, you didn't - - we weren't successful in getting these types of investigations to be public, you know, through the negotiations, so we'll just do it through this memo. Like, you can't do that, you know. There's no legal authority to do that. What this does is talks about kind of the other authority that the - - is inherent within the city manager's realm, so . . ." (Arb. Tr. 553:2-554:14).
10. Mr. Desai testified that when he was in the role as Police Monitor he does not recall doing preliminary reviews and/or requesting and reviewing all footage and information regarding a complaint prior to sending it over to IA. (Arb. Tr. 587:11-24).

11. Mr. Desai testified that body-worn camera footage and DMAV footage is evidence. (Arb. Tr. 620:17-20).
12. Mr. Desai testified that to the extent anything in the ordinance or city manager memorandum contradicted Article 16, it would be superseded by the contract. (Arb. Tr. 645:24-6466:1).

Claire Vaho

1. Claire Vaho is the Program Compliance Coordinator for the Office of Police Oversight. (Arb. Tr. 650:11-15).
2. Ms. Vaho has been in the role as the Program Compliance Coordinator for a little over two years. (Arb. Tr. 650:16-17).
3. Ms. Vaho testified that her role as a complaint specialist consists of having a caseload assigned to her of complaints where she attends interviews, does preliminary reviews, she is also frequently in contact with IA and supports the complaint specialists and staff in whatever projects they are working on. (Arb. Tr. 651:2-13).
4. Ms. Vaho testified that she was the one that was assigned to the complaint regarding Officer Hewitt and that she probably drafted the NFC. (Arb. Tr. 653:15-21).
5. Ms. Vaho testified that she did the preliminary review for the complaint regarding Officer Hewitt. (Arb. Tr. 654:10-11).
6. Ms. Vaho testified that in order for the OPO to get access to body-worn camera and other evidence, it has to be provided to them and that the OPO does not have independent access to any of this evidence or the databases. (Arb. Tr. 655:22-656:8).
7. Ms. Vaho testified that the reason there were two clips in Officer Hewitt's case was because they were two completely separate instances, so there was one video for the complainant's interaction and another video for the other individual's interaction. (Arb. Tr. 671:18-24).

8. Ms. Vaho testified that in regards to the Hewitt complaint she reviewed the two body worn camera clips, the Versadex report and the actual CTN. (Arb. Tr. 674:2-6).
9. Ms. Vaho testified that she is not sure if she was aware, at the time she drafted the NFC and made the policy recommendations, that the gas station had authorized a blanket criminal trespass notice. (Arb. Tr. 674:18-675:4).
10. When asked if the complainant expressly stated to her that Officer Hewitt harassed him because he black, Ms. Vaho stated: “So I don’t - - since it’s been awhile since I’ve listened to the audio recording, I can’t testify to what he said in that audio recording simply because I don’t remember. In terms of did we receive a complaint where he said, He gave this guy a - - me a CTN and not this guy, like, I don’t remember any of that being in there, but that’s what was in the body-worn camera, so...” (Arb. Tr. 687:8-18).
11. Ms. Vaho testified that when the complainant called and made his complaint, he did not state that Officer Hewitt treated him differently than the white individual. (Arb. Tr. 688:8-12).

VII. ARGUMENTS AND AUTHORITIES

The OPO’s Authority is Limited to Article 16

The City alleges that the Office of Police Oversight derives its authority from multiple sources, and thus, is allowed to conduct “preliminary reviews”, obtain evidence from the Department, and otherwise engage in behavior prohibited by and/or not authorized by the Meet and Confer Agreement. More specifically, in addition to Article 16 of the Meet and Confer, the City alleges that the OPO derives authority from a memorandum issued by the City Manager²⁰ and from a City Ordinance²¹. (Arb. Tr. 47:9-18). However, the City’s arguments do not resonate with current Texas law, valid legal precedent, or the accepted legal cannons of contract construction.

²⁰ City Ex. 1.

²¹ City Ex. 2.

First, and most importantly, under provisions of the Texas Local Government Code, a valid Meet and Confer Agreement preempts all contrary local ordinances, executive orders, legislation, or rules adopted by the state or a political subdivision or agent of the state.²² In the instant case, there is no question, and there have been no arguments made, that the Meet and Confer Agreement is not valid. Thus, the black letter of the law unambiguously and expressly supports that Ordinance 20181115-016 and the City Manager’s November 2, 2018 Memorandum, which the City purports to bestow powers upon the OPO that conflict with the powers and limitations set forth in Article 16, are preempted by the Meet and Confer Agreement.

Furthermore, enactment and/or enforcement of local ordinances are subject to the traditional rules and principles of contract law. As such, “restrictive covenants are subject to the general rules of contract construction.”²³ “In construing restrictive covenants, [the courts] primary goal is to ascertain the parties’ true intentions as expressed within the ‘four corners’ of the instrument.”²⁴ Construction should not be used to enlarge, extend, stretch, or change words used in a restrictive covenant.²⁵ Rather, we give words and phrases used in the covenant their commonly accepted meaning.²⁶

For example, Texas courts have found that a zoning ordinance cannot override or impair a restrictive covenant that limits a property’s use or relieves the land from such restrictive covenant, but the zoning ordinance that is more restrictive than the restrictive covenant is valid and enforceable.²⁷ Although a zoning ordinance may be more restrictive, it cannot enlarge a contractual restrictive covenant.²⁸ The ordinance prevails if the restrictive covenant is less restrictive than the ordinance, the restrictive covenant prevails if it is more restrictive than the ordinance.²⁹

In this case, Ordinance 20181115-016 attempts to expand the authority of the OPO outside of the limitations of Article 16 but it also grants the OPO the authority to take

²² See TEX. LOC GOVT CODE 143.361; *Wheeler v. White*, 314 S.W.3d 225, 228 (Tex. App. 2010).

²³ *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998).

²⁴ *Ostrowski v. Ivanoe Prop. Owners Improvement Ass’n, Inc.*, 38 S.W.3d 248, 253 (Tex. App. – Texarkana 2001, pet. denied).

²⁵ *Davis v. Huey*, 620 S.W.2d 561, 565 (Tex. 1981); *Dyegard Land P’ship v. Hoover*, 39 S.W.3d 300, 308 (Tex. App. – Fort Worth 2001, no pet.).

²⁶ *Id.*

²⁷ See *Powell*, 500 S.W.2d at 583.

²⁸ *Id.*

²⁹ *Id.*

actions that are expressly prohibited, such as conducting “preliminary reviews” which inherently requires the OPO to collect evidence and investigate complaints. As such, the provisions of Article 16 governing the OPO’s authority are more restrictive than the ordinance. Thus, even if Section 143.361 of the Texas Government Code did not apply here, Article 16 would still prevail over the ordinance.

In addition to legal precedent being very clear that the terms of a Meet and Confer Agreement preempt any local ordinances or rules, common sense and logic also supports the Association’s argument that the OPO’s authority derives from and is limited to Article 16. For example, the City Manager’s Memorandum that the City alleges is a source of the OPO’s authority was issued on November 2, 2018.³⁰ This is 13 days before the Meet and Confer Agreement was signed and ratified.³¹ The City Manager is a direct party to the Meet and Confer Agreement and thus, would know that he cannot agree to legally binding terms and conditions of a contract, but then later claim that the contrary terms he discussed in a non-binding document prior to the contract ratification were the actual intention and/or interpretation.

Even more so, the City’s own arguments are contradicted by the plain language of Article 16. First, oversight, by its very nature and plain definition, is just that – oversight. Oversight consists of observation, not participation. Second, Section 1 of Article 16 defines civilian oversight and sets forth the purpose of civilian oversight. It expressly identifies the purpose of the OPO to provide impartial civilian oversight into the administrative review of the conduct of Austin police officers and to serve as a non-exclusive location for accepting administrative complaints.³² Nowhere within Section 1 (or anywhere within Article 16) is there language that expressly states or even implies the OPO is allowed to participate in investigations or do their own independent investigation/review.

³⁰ City Ex. 1.

³¹ Union Ex. 1.

³² There are also other purposes identified that are not relevant to the grievances subject to this proceeding.

The OPO Has Been Investigating Complaints

Article 16 of the Meet and Confer Agreement is unambiguous in that it contains an express prohibition on the OPO investigating complaints. Specifically, Section 1(d) of Article 16 states:

Except as specifically permitted in this Article, the Civilian Oversight process, regardless of its name or structure, shall not be used or permitted to gather evidence, contact or interview witnesses, or ***otherwise independently investigate a complaint of misconduct by an Officer***. There shall be no legal or administrative requirement, including but not limited to subpoena power or an order from the City Manager or the Department, that an Officer appear before or present evidence to any individual, panel, committee, group, or forum of any type involved in Civilian Oversight. . . .³³

Further, Section 3(b)(1) of Article 16 states:

The OPO shall not gather evidence, or interview witnesses (except the complainant as provided herein), or ***otherwise independently investigate a complaint or other information of police misconduct***. The OPO shall not have the authority to subpoena witnesses. There shall be no administrative requirement, including but not limited to an order from the City Manager or the Department, that an Officer appear or present evidence to the Director of the OPO. The OPO is authorized to accept complaints of Officer misconduct as provided in this Section.³⁴

Despite this express contractual prohibition, the City has allowed the OPO to investigate complaints of officer misconduct. At the hearing, the City's sole argument that it did not violate the Agreement was that the OPO does not conduct investigations, but rather "preliminary reviews." This is a distinction without a difference and is merely the City splitting hairs in an attempt to justify its egregious and blatant disregard of the requirements of the contract.

First, the plain and ordinary definition of investigation would encompass a preliminary review, particularly the kind of preliminary review in which the OPO undertakes. The testimony and evidence presented at the hearing proved the following process occurs: (1) the OPO receives a complaint; (2) the OPO then collects and obtains information and evidence regarding the alleged complaint prior to forwarding that

³³ Union Ex. 1 at 46.

³⁴ Union Ex. 1 at 47.

complaint to IA and; (3) the OPO identifies additional violations of alleged misconduct that was not contained in the original complaint or asserted by the complainant. Regardless of how you define investigation, there is no question that these actions constitute one.

The City's assertion that the OPO's actions are a preliminary review is intentionally misleading, particularly because the OPO is recommending policy violations upon completion of its preliminary review.³⁵ The term "preliminary review" implies that the OPO is solely reviewing the information and evidence to verify the validity of the complaint prior to submitting it to IA. In theory, this would render the preliminary review a procedural process used to weed out the invalid complaints.

However, that is not the case here, because the OPO uses the preliminary review to identify a myriad of baseless policy violations that are completely unrelated to the original complaint. Thus, the OPO is using the information and evidence that it gathered – also a violation of the contract – to come to a conclusion. The OPO may not make the ultimate findings in the investigation or issue discipline, but that does not negate the fact that the findings from the OPO's preliminary review trigger the next step in the process and have a lasting impact on the remainder of the investigation.

Second, the OPO refers to the process as an investigation on their own website! Specifically, the OPO's website states: "Learn about the Office of Police Oversight's complaint investigation process."³⁶ It does not say: "Learn about the Office of Police Oversight's preliminary review process." In fact, no where on the OPO's website does it reference or use the phrase preliminary review. Additionally, further on the same page, the website states that "Internal Affairs begins an investigation with the Office of Police Oversight."³⁷ This statement implies that the investigation process is a collaborative one, and thus, that the OPO conducts investigations with IA.

Third, the fact that the OPO recommends policy violations that do not match the actual complaint is apparent and compelling evidence that the OPO is conducting an

³⁵ Of note, nothing in the Meet and Confer Agreement grants the OPO the authority to recommend policy violations with the submission of the NFC. (Arb. Tr. 76: 1-4). Section 3(b)(3) of Article 16 expressly allows the OPO to make a recommendation regarding the classification (seriousness) of external complaints but no policy recommendations are authorized.

³⁶ Union Ex. 12 at 1.

³⁷ Union Ex. 12 at 2.

investigation. For example, the first NFC in Union Exhibit 2 is a complaint generated on April 30, 2021 which states:

“My 15-year-old daughter’s shoulder was dislocated while being taken into custody. She was taken to the hospital prior to her being taken to [redacted]. My daughter was charged with resisting arrest. Charges have been dropped.”³⁸

The OPO’s recommended policy violations for this complaint include 301.2 *Impartial Attitude and Courtesy* and 301.3.1 *Search Protocol*. How could an individual find those unrelated potential policy violations within the plain language of the above stated complaint without doing some form of an investigation? Had the OPO not conducted an improper investigation, it is likely that the only potential policy violations that would have been investigated regarding this complaint would have related to whether his/her force was reasonable, which is the crux of the actual complaint in the first place.³⁹

Even more egregious is the second NFC in Union Exhibit 2. This is a complaint that was generated on April 20, 2021 and states the following:

“Ms. [redacted], complainant, alleges that her son, [redacted], was treated disrespectfully while being arrested. Complainant alleges an officer laughed in her son’s face and told him he was being arrested for one thing, then booked him for something else. Complainant further alleges officers slammed his face into the wall during booking and broke his tooth.”⁴⁰

The OPO recommended the following policy violations to be investigated related to this complaint: (1) 303.3.1 *When Department Issued BWC System Use Is Required*; (2) 900.4.3 *Neglect of Duty*; (3) 402.2 *Incident Reporting*; and (4) 402.2.4 *Report Writing*. Again, based solely on the language of the complaint, how could an individual find any of these unrelated potential policy violations without doing an investigation? What is most concerning about this specific complaint is that not a single recommended policy violation matches the actual complaint. Thus, had the OPO not conducted an investigation in violation of the contract, this complaint likely would have never even been investigated at all.⁴¹

³⁸ Union Ex. 2 at 1.

³⁹ It is unknown if this complaint was formally investigated by IA.

⁴⁰ Union Ex. 2 at 2.

⁴¹ It is unknown if this complaint was formally investigated by IA.

Other evidence that provides support that the OPO is conducting investigations, not preliminary reviews, is the length of time it takes the OPO to forward the complaint to IA. Testimony at the hearing established that it often takes the OPO a month or two (sometimes longer) to send the NFC to IA after the initial contact from the complainant. (Arb. Tr. 413:10-25). It is unclear why it takes the OPO such an extended time to forward the complaint to IA if they are not conducting their own investigation. At the hearing we heard testimony ad nauseum regarding the mission of the OPO's office, with the primary tenant being to ensure that a fair, impartial, and thorough investigation was conducted into the alleged misconduct or complaint. (Arb. Tr. 55:23-25; Arb. Tr. 116:6-7; Arb. Tr. 117:1-3; 118:1-7; 130:3-6). If that were truly the focus of that office, the OPO would ensure that the actual investigative body – IA – received the complaint as soon as possible to begin working on the investigation.

The Byron Chambers complaint is a particularly egregious example of this. In that instance, the OPO received the complaint from Mr. Chambers on May 8, 2020.⁴² When he submitted his complaint, he informed the OPO that the incident occurred on April 22, 2020.⁴³ This is the date that would trigger the 180-day timeline for completing the IA investigation, as required by Chapter 143 of the Texas Government Code. The OPO did not generate the NFC until July 29, 2020.⁴⁴ The OPO spent at least 82 days with the complaint before forwarding it to IA.

Therefore, under the 180-day timeline, assuming the OPO forwarded the NFC to IA on the day they generated the complaint, IA only had 82 days to complete their investigation. However, APD requires the IA Sergeants to complete their investigations at the 150-day mark so that the chain of command has at least 30 days to review the case and issue discipline if needed. (Arb. Tr. 489:18-23). Thus, based on the 150-day timeline, IA only had 52 days to investigate this complaint. Whether we use the 180-day deadline or the 150-day deadline, the bottom line is, the OPO spent more time with the complaint doing a “preliminary review” than IA spent with the complaint doing the actual investigation.

⁴² Union Ex. 3.

⁴³ Union Ex. 3.

⁴⁴ Union Ex. 5.

Most importantly, there is absolutely no need for the OPO to do a preliminary review because IA is exceptionally capable of recognizing and identifying potential policy violations when they review the complaint and evidence through the course of the actual investigation. At the hearing, when asked why a preliminary review is the exact same thing as an investigation, Detective Villarreal said it best:

“It’s, it’s the same action just with, with a different name. You’re, you’re taking in - - you’re accessing, it sounds like, not taking in physically, but you’re accessing evidence that’s been put somewhere for you to look and see what’s going on. Like, whether you call it a review, you call it an investigation, the action is the same. And beyond, beyond the City trying to play semantics, it’s 100 percent not in the spirit of what was negotiated in the contract.”

(Arb. Tr. 336:17-25).

The evidence presented has proven that the OPO has been investigating complaints in violation of Article 16. The evidence has also proven that the City of Austin is aware that the OPO has been investigating complaints and has condoned and/or approved these actions, resulting in a clear violation of the Meet and Confer Agreement.

The OPO Has Been Collecting Evidence

Not only is the Meet and Confer Agreement very clear that the OPO is not allowed to conduct investigations, it is also very clear that the OPO is not allowed to collect evidence. Specifically, Section 1(d) of Article 16 states:

Except as specifically permitted in this Article, the Civilian Oversight process, regardless of its name or structure, **shall not be used or permitted to gather evidence**, contact or interview witnesses, or otherwise independently investigate a complaint of misconduct by an Officer. There shall be no legal or administrative requirement, including but not limited to subpoena power or an order from the City Manager or the Department, that an Officer appear before or present evidence to any individual, panel, committee, group, or forum of any type involved in Civilian Oversight. . . .⁴⁵

Despite the unambiguous language of this provision, the City has allowed the OPO to gather evidence in violation of Article 16.

⁴⁵ Union Ex. 1 at 46.

Based on the testimony provided at the hearing, the City claims that the OPO is not gathering evidence in violation of the contract because the body-worn camera footage, dash camera footage, reports and all other information associated with an incident that is requested by the OPO for their preliminary review is already within the possession of APD. (Arb. Tr. 84:8-21). Not only is the City once again playing semantics, but there is nothing within the contract or the plain language interpretation of the phrase “collecting evidence” that would support this argument.

First, there can be no dispute that the information and material the OPO obtains for their preliminary review is evidence. The footage and material is information used to prove the truth or validity of an allegation of misconduct, and thus, cannot be categorized as anything other than evidence. Second, the OPO is **requesting** the information and evidence. The mere nature of making a request, requires that you would be collecting something. If something was already within your possession, you would not have to make a request to gain access to it. Third, there is absolutely no language or implication in the contract that would infer that APD’s possession of evidence somehow transfers into the OPO equally having possession or access to that evidence simply because they are both departments within the same City. Fourth, there is also no distinction in the contract between internal and external evidence. Evidence is evidence, regardless of how it is collected or where it is collected from.

However, regardless of how the City chooses to self-servingly interpret the phrase “collecting evidence”, the City has still violated the contract because it has given the OPO access to information and material in violation of the contract. Specifically, Article 16, Section 3(a) states the following:

The Director of the OPO will have unfettered access **to the Internal Affairs investigation process**, except as provided herein. The Director of the OPO may inquire of the Commander of the Internal Affairs Division or the Chief of Police, or the Chief’s designee, as to the status of any pending IAD investigation.⁴⁶

⁴⁶ Union Ex. 1 at 48.

Based on this provision, it is a violation of the contract to provide the OPO with information and evidence that is not directly correlated with the IA process and/or within the IA file. Nonetheless, the City allows this violation to occur every single day.

The evidence and testimony provided at the hearing unequivocally established that the OPO requests information and evidence from IA regarding a complaint of alleged officer misconduct prior to forwarding the NFC to IA. (Arb. Tr. 75:13-17). Further, the testimony at the hearing established that an IA investigation is not initiated until the OPO submits the NFC to IA. (Arb. Tr. 75:1-12). Thus, when IA provides the OPO with the materials for the preliminary review, an IA investigation is not yet initiated. If an IA investigation is not yet initiated, it is impossible for the OPO to be accessing information related to the internal affairs investigation process.

The evidence and testimony proves that the OPO has been collecting evidence despite the prohibition in Article 16. The evidence has also shown that the City of Austin has been aware that this was occurring and is complicit in these actions, resulting in the City violating the Meet and Confer Agreement.

The OPO Has Been Contacting and Interviewing Witnesses

The Meet and Confer also expressly prohibits the OPO from contacting or interviewing witnesses. Specifically, Article 16, Section 1(d) states:

Except as specifically permitted in this Article, the Civilian Oversight process, regardless of its name or structure, shall not be used or permitted to gather evidence, **contact or interview witnesses**, or otherwise independently investigate a complaint of misconduct by an Officer. There shall be no legal or administrative requirement, including but not limited to subpoena power or an order from the City Manager or the Department, that an Officer appear before or present evidence to any individual, panel, committee, group, or forum of any type involved in Civilian Oversight. . . .⁴⁷

Despite the unambiguous prohibition on contacting and interviewing witnesses within this provision, the City allows the OPO to contact and interview witnesses and in turn, has violated the Meet and Confer for doing so.

⁴⁷ Union Ex. 1 at 46.

The contract expressly lays out the conditions under which the OPO may contact a witness and what information the OPO may obtain from the complainant. Specifically, Article 16, Section 3(b) states the following:

Complaint Intake

(1) The OPO shall not gather evidence, **or interview witnesses (except the complainant as provided herein)**, or otherwise independently investigate a complaint or other information of police misconduct. The OPO shall not have the authority to subpoena witnesses. There shall be no administrative requirement, including but not limited to an order from the City Manager or the Department, that an Officer appear or present evidence to the Director of the OPO. The OPO is authorized to accept complaints of Officer misconduct as provided in this Section.

(2) The OPO may obtain the following information in connection with the filing of a complaint of officer misconduct:

- (f) The complainant's personal information;
- (g) The nature of the complaint;
- (h) Witness information;
- (i) The incident location, date, and time; and
- (j) The APD Officer(s) involved.

(3) Of the intake is in person, the OPO shall digitally audio record the taking of the information provided in Section 3(b)(2). The OPO will promptly forward the completed complaint and audio recording to IAD when requested by IAD. **A complainant may be subsequently interview by the IAD investigator for purposes of clarification or to obtain additional information relevant to the investigation. The OPO may attend any such subsequent interviews.**

For external complaints, the OPO may make a recommendation for classification of the complaint to IA. The nature of the complaint and OPO's recommended classification may be made public, but shall not include the name of the complainant or officer, witness information, or the incident location, date and time.

(4) Personnel from the OPO shall assist an individual in understanding the complaint process and the requirements for filing a complaint but shall not solicit or insist upon the filing of a complaint by any individual.

A plethora of evidence was presented at the hearing establishing that representatives of the OPO are improperly contacting witnesses in violation of the

contract. Specifically, audio recordings were presented that showed that after taking an individual's complaint, the OPO representative informed the complainant that a complaint specialist will review their complaint and the associated evidence and will either call the complainant back to get more information or update that complainant on where they are in the process.⁴⁸ Also, Director Muscadin admitted that her office sometimes need to call complainants back to get clarification or more context regarding a complaint. (Arb. Tr. 162:16-21). However, the contract is clear, and the OPO does not have the authority to call complainants back and get clarifying or additional information, nor does the OPO have the authority to call them back to update them on the progress. (Arb. Tr. 321:4-15; 453:5-12).

First, the contract expressly lays out a specific list of information that the OPO is allowed to obtain from the complainant when they file their complaint. The contract is exceptionally clear that if additional context or information is needed from a complainant regarding a complaint, IAD will conduct a subsequent interview and OPO has the ability to attend that interview. Further, the contract does not permit the OPO to follow up with complainants to provide an update at any point in time while the investigation is pending. The update the OPO is permitted to provide a complainant is during the closeout meeting, whose parameters are expressly laid out within Article 16.⁴⁹ Any direct witness contact by the OPO, outside of taking the initial complaint and the closeout meeting, is a violation of the Meet and Confer Agreement.

The contract also provides for special provisions related to the subject officer's IA interview. Specifically, Article 16, Section 3(c) states:

A representative from the OPO may attend an interview of the Officer who is the subject of the investigation or administrative inquiry, as well as all witness interviews. The OPO representative may directly question the Officer who is the subject of the investigation and any witness Officer only if agreed to by the subject Officer or witness Officer or his/her representative and the IAD investigator. At the conclusion of or during a break in any interview, the OPO representative may take the IAD investigator aside and request that the investigator ask additional questions. Whether such information is sought in any witness interview is within the discretion of the IAD investigator.⁵⁰

⁴⁸ Union Ex. 3.

⁴⁹ Union Ex. 1 at 58.

⁵⁰ Union Ex. 1 at 49.

Despite another clearly unambiguous provision, the City continues to violate the Meet and Confer by permitting the OPO to skirt the requirements of this Section, resulting in the IA Sergeants being stripped of the sole discretion bestowed on them by this provision and, in turn, allowing the OPO to interview witnesses by proxy.

The first manner in which the OPO is permitted to interview witnesses by proxy is the 72-hour questions requirement. This requirement, which was implemented approximately a year ago by executive staff, means the IA Sergeants have to send their interview questions over to the OPO at least 72-hours before the interview. The OPO not only reviews all of the interview questions beforehand, but makes edits to questions and suggests additions. (Arb. Tr. 426:7-15). There is nothing in the contract that requires IA to forward the interview questions to OPO prior to the interview, in fact, there is nothing that requires IA to inform OPO of any information related to the interview questions beforehand. However, what is most concerning is that the OPO is permitted to make changes to the questions and additions. Providing the OPO a say in what questions are asked and how they are asked is a roundabout way in which the OPO is permitted to interview witnesses.

However, the most concerning manner in which the OPO is permitted to interview witnesses by proxy is during the actual interview itself. Testimony and evidence was presented at the hearing that established that the express discretion to decline to ask a question posed by the OPO has been virtually stripped from the IA Sergeants. (Arb. Tr. 427:12-22). The Sergeants are so uncomfortable with utilizing their contractual discretion that they have gotten away from denying questions and just go directly to their Lieutenant to escalate the matter. (Arb. Tr. 428:3-18). Even the ones that do occasionally use their discretion directly are required to provide a reason to the OPO for why they are not asking certain questions. (Arb. Tr. 428:19-428). Specifically, when asked why the IA Sergeants don't push back against the OPO regarding suggested questions, Lieutenant Griffin stated:

“If they're not going to ask a question, it's usually going to be elevated to the lieutenant level, and after we review it if we are going to concur with their assessment that the question shouldn't be asked, we're going to have to have a really good reason, because we're going to have to explain it later on.”

(Arb. Tr. 494:21-495:1).

In addition to essentially being forced to ask the OPO's questions, in some cases, the IA Sergeants have even been required to take multiple breaks after asking the OPO's questions to ensure that the manner in which the question was asked or that the answer provided was sufficient for the OPO. (Arb. Tr. 343:8-15). There is not a more clear example of an interview by proxy than requiring the IA Sergeants to continue to take breaks until the OPO is satisfied with the questions and answers. Detective Villarreal testified regarding this topic on behalf of the APA and stated:

“If we wanted to allow the OPO to ask our officers questions, we would have negotiated over it. And again, I go back to, like, you, you can, you can change the name, you can try to skirt the formula, but you're doing the same thing, Like, you are trying to get around the language in the contract that was negotiated in good faith.”

(Arb. Tr. 343:16-23).

As such, the evidence has shown that the OPO has been interviewing and contacting witnesses in violation of Article 16. The evidence has also shown that the City has been aware of the OPO's actions and by failing to stop them, the City has violated the Meet and Confer Agreement.

Bargaining History and Intent of Provisions Do Not Support City's Position

In addition to the language of the Meet and Confer being unambiguous as it relates to the City's violations, the bargaining history and intent of the provisions do not support the City's claims and interpretations of Article 16.

First, the OPO's authority has always derived from the contract and thus, the OPO's role has expanded solely through the contract. (Arb. Tr. 309:11-18). The OPO having additional authority outside of the contract has never been granted before or purported to come from other sources until recently. (Arb. Tr. 310:2-6). The co-chair of the 2018 negotiations team for Article 16, Lieutenant Askew, testified that Article 16 has always been the extent of the OPO's authority. Specifically, he stated:

“It was my understanding that if it didn't live in this contract, it didn't, it didn't matter. If - - the only other superseding, if you will document that might have existed was state law, and that was it.

(Arb. Tr. 447:16-19).

Additionally, Lieutenant Askew testified that throughout the course of the 2018 contract negotiations, the City did not mention the ordinance or memorandum, or that the City believes those documents give the OPO additional authority outside of Article 16. (Arb. Tr. 447:1-13). When asked specifically about this, Detective Villarreal testified:

URBAN: Okay. Prior to Director Muscadin did any memos grant the OPO additional authorities outside of the contract?

VILLARREAL: No. I mean, until this memo was issued on November 2nd of 2018, all of the OPO/OPM's power, authority, rules of the road, if you will, have come from agreements negotiated in good faith between the City of Austin and the APA.

URBAN: Was the APA informed by anyone that this, when this memo came out, that this was additional authority granted to the OPO?

VILLARREAL: No, ma'am.

(Arb. Tr. 310:24-311:10).

Additionally, both Detective Villarreal and Lieutenant Askew, who both participated in the 2018 contract negotiations, testified that the intent of the provisions of Article 16 were never to include the ability for the OPO to conduct investigations or preliminary reviews. (Arb. Tr. 319:12-16; (Arb. Tr. 447:20-448:3). Furthermore, Article 16 was not negotiated with the intent of allowing the OPO to follow up with complainants outside of the closeout meeting. (Arb. Tr. 448:4-15). Article 16 was not negotiated with the intent of allowing the OPO to have access to any material or evidence they wanted at any time. (Arb. Tr. 448:16-449:23). The manner in which the City has misconstrued Article 16 is deeply concerning and this is not the kind of oversight that the APA believed was going to occur when they entered into the Meet and Confer. (Arb. Tr. 309:4-10).

VIII. REMEDY

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully requests that this Honorable Hearing Examiner GRANT the Appellant's appeal/grievance and require the City of Austin to do the following:

1. Cease allowing the OPO to investigate complaints or do a "preliminary review."

2. Cease providing the OPO any information, material or evidence prior to the initiation of an IA investigation.
3. Cease providing the OPO any information, material or evidence that is not contained within the IA file.
4. Cease allowing the OPO to interview or contact witnesses.
5. Cease allowing the OPO to follow up with a complainant for clarification purposes.
6. Cease allowing the OPO to follow up with a complainant to provide an update, unless it is the closeout meeting.
7. Cease requiring the IA Sergeants to provide the interview questions to the OPO in advance.
8. Cease allowing the OPO to change, modify, edit or add suggestions to interview questions.
9. Cease allowing the OPO to demand a question be asked during an interview and allow the Sergeant to use his/her sole discretion on whether the question will be asked.
10. Cease requiring the IA personnel to provide a reason for every single time they decline to ask a question or investigate a recommended policy violation.
11. Cease requiring the IA Sergeants to take multiple breaks to ensure the OPO's questions have been adequately answered.
12. Cease allowing the OPO to control whether a complaint will be investigated and allow the IA supervisors to determine if an informal process should be utilized based on the severity of the alleged misconduct.
13. Cease allowing the OPO to threaten individual members of the Austin Police Department.
14. Cease allowing the OPO to monitor individual officer's conduct.

And grant any and all other remedies that the Honorable Hearing Examiner believes appropriate or necessary.

IX. CONCLUSION

In conclusion, the provisions of Article 16 are clear and the City has violated the Meet and Confer Agreement by allowing the Office of Police Oversight to conduct investigations, interview and contact witnesses, and collect evidence. The ramifications of the City’s violations of the Agreement are profound but most importantly they have had a severe impact on officer morale. The Association respectfully requests that the Arbitrator rule in its favor and help restore some of that morale to the hard working men and women of the Austin Police Department.

Respectfully submitted,

Alyssa Urban

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Bar No. 24080295

**ATTORNEY FOR THE AUSTIN
POLICE ASSOCIATION**

CERTIFICATE OF SERVICE

On October 28, 2021, the foregoing *Grievant’s Post Hearing Brief* has been provided to Ben Phillips, Attorney of Record for the City of Austin, via email at Ben.Phillips@austintexas.gov.

Alyssa Urban

Alyssa Urban