

<p style="text-align: center;">IN THE MATTER OF ARBITRATION</p> <p style="text-align: center;">BETWEEN</p> <p style="text-align: center;">AUSTIN POLICE ASSOCIATION (Union)</p> <p style="text-align: center;">and</p> <p style="text-align: center;">CITY OF AUSTIN POLICE DEPARTMENT (Employer)</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Contract Dispute (Article 16)</p>
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Hearing Examiner: Lynne M. Gomez, selected by the Parties.

HEARING

A Hearing was held in the above matter on July 28, 29 and 30, 2021 at the City of Austin’s Learning and Research Center in Austin, Texas. The witnesses were sworn and excluded. The Hearing was transcribed and a copy of the transcript was provided to the Hearing Examiner. The Parties submitted post-Hearing briefs, all of which were received by October 28, 2021. The undersigned requested, and the Parties agreed, to an extension of time in which to render the written decision. The Parties were given full opportunity to present testimony and evidence at the Hearing.

APPEARANCES

For the Association

Alyssa Urban	Counsel for the Association
Mai Wines	Former APD Sergeant, witness (by Zoom)
Michael Hewitt	APD Patrol Officer, Grievant, witness
Thomas Villareal	APD Detective, witness
Sheldon Scott Askew	APD Lieutenant, witness
Tanya Normand	APD Detective, witness
Shawna Griffin	APD Lieutenant, witness

For the City

Ben Phillips	Assistant Attorney for the City of Austin
Neal Falgout	Assistant Attorney for the City of Austin
Cristina Pezulich	Paralegal
Farah Muscadin	OPO Director, witness
Deven Desai	Labor Relations Officer, witness
Claire Vajo	OPO Complaint Coordinator, witness

ISSUES

The Parties did not stipulate to a statement of the issue(s). The Union proposed the following:

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

The City proposes the following issues:

1. Are the grievances arbitrable? If so:
2. Do the changes to contractual language in the 2018 Agreement Between the Austin Police Association ("APA") and the City (hereinafter "Agreement" or "contract") evidence the Parties' intent to expand the Office of the Police Oversight's ("OPO") purpose and attendant authority?
3. Does OPO have contractual authority to conduct preliminary reviews of complaints alleging potential officer misconduct, and to recommend complaints to the Austin Police Department-Internal Affairs Division ("IAD") for investigation?
4. Does the Parties' bargaining history in negotiating their current Agreement evidence their intent to allow OPO to conduct preliminary reviews of complaints and issue recommendations to APD-IAD?
5. Does the Arbitrator have the authority to grant the relief requested in the grievances?

Having considered these proposals and the evidence presented, the Hearing Examiner frames the issue as:

Are the grievances arbitrable? If so, did the City violate the Parties' 2018 Agreement and, if so, what is the appropriate remedy?

BACKGROUND

On November 15, 2018, the City of Austin and the Austin Police Association entered into their current Meet and Confer Agreement ("Agreement"). This grievance concerns only Article 16 of the Agreement, which addresses civilian oversight of the Austin Police Department by the Office of Police Oversight ("OPO"). The Association alleges that the City of Austin has failed to abide by the terms of Article 16 by allowing OPO to investigate complaints, collect evidence and interview witnesses in direct violation of the express language of the contract. The City denies these allegations. The appeal/grievance was appropriately processed and remains unresolved. The Parties stipulate that this matter is properly before this Hearing Examiner for Opinion and Award.

APPLICABLE CONTRACT PROVISIONS

**Agreement Between
the Austin Police Association (“APA”) and the City of Austin
November 15, 2018**

Article 16, Section 1(b)

The purpose of Civilian Oversight is:

- (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.

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. . . .

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.

Article 16, Section 3(b)

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) If 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 interviewed 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.

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.

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.

POSITION OF THE ASSOCIATION

The Association makes the following arguments and contentions in support of its position:

Article 16 expressly addresses the role, power and authority of the Office of Police Oversight (OPO), and clearly prohibits certain conduct and/or actions. This matter arises from a July 10, 2020, grievance stemming from an IA investigation that was initiated based on an external complaint OPO received about Officer Michael Hewitt. As Officer Hewitt testified, on October 9, 2019, he encountered a subject who was loitering at a gas station located in a high crime area known for drug transactions and violent crime where the owner previously had approved issuance of blanket Criminal Trespass Notices ("CTN") to anyone found loitering on the property. The subject Officer Hewitt observed had been at a gas pump for an extended period of time, blocking others from using it and without otherwise patronizing the store and he recognized the subject, having seen him before at the same location. After confirming that the subject had been loitering at the gas pump for quite some time without buying anything, Officer Hewitt issued him a CTN and advised him not to loiter at the gas station anymore. Sometime later, an individual contacted OPO and alleged that "an Austin police officer harassed him." OPO contacted IA requesting all related information and was provided all of Officer Hewitt's body-worn camera footage around the timeframe of the alleged incident. The evidence did not show exactly how OPO was able to identify Officer Hewitt or this specific incident because the City refused to produce the email request from OPO to IA, and the testimony at the hearing was unclear. OPO compared footage of Officer Hewitt's interaction with the complainant, who is Black, with another interaction he had with a White individual who was parked along the side of the same gas station, near the air pumps. As he had done with the Black individual, Officer Hewitt approached the White individual to make inquiries and learned he was an Uber driver waiting for his next fare. Officer Hewitt did not issue the White individual a CTN because he had not seen him on the property before and considered his explanation reasonable. Based solely on this comparison, 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. On May 19, 2020, IA issued Officer Hewitt a Notice of Allegations ("NOA") stating, "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." 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. During a later IA interview Officer Hewitt explained why only

the Black subject received a CTN and that it had nothing to do with race. Officer Hewitt's chain of command rightfully did not sustain any policy violations regarding this complaint or issue any formal discipline. However, OPO Director Muscadin emailed Commander Jason Staniszewski and copied Assistant Chief ("AC") Robin Henderson asserting 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. She then threatened Commander Staniszewski, specifically stating: "As a result, Stan, you are now on notice that OPO will be closely monitoring Ofc. Hewitt's behavior" and purported to advise AC Henderson 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." When the Association became aware of the circumstances surrounding this complaint it became apparent that OPO had fabricated allegations against Officer Hewitt.

The Association filed a grievance with former Chief Manley on November 3, 2020, stemming from audio recordings of OPO representatives taking in complaints. As a sampling, the grievance identifies three separate cases in which OPO representatives informed a complainant during the initial intake of their complaint that (1) OPO will request all evidence and information related to the complainant's incident and review it and (2) after review someone from OPO will call the complainant back for more information or update the complainant on where OPO is in the process. These recordings were discovered when the subject officer of the complaint was brought into IA for his/her interview, and the representations made reflect that Article 16 is being violated.

Article 16 clearly limits OPO's authority. The City erroneously argues that OPO derives its authority from multiple sources including City Ordinance 20181115-016 (the "City Ordinance") and the City Manager's November 2, 2018 Memorandum (the "Memorandum") and, therefore, is allowed to conduct "preliminary reviews", obtain evidence from the Department, and otherwise engage in behaviors that are prohibited by and/or not authorized by Article 16. These arguments conflict with current Texas law, valid legal precedent, and the accepted legal cannons of contract construction. The Texas Local Government Code ("TLGC") recognizes that 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. Additionally, local ordinances are subject to the traditional rules and principles of contract law. Restrictive covenants are subject to the general rules of contract construction. The primary goal in construing a contract is to ascertain the parties' true intentions as expressed within the 'four corners' of the instrument' and not to enlarge, extend, stretch, or change words used, but to give words and phrases their commonly accepted meaning. The City Ordinance tries to expand OPO's authority beyond the

limitations of the Article 16 and also purports to authorize OPO to take actions not expressly prohibited by Article 16, such as conducting “preliminary reviews” which inherently require OPO to collect evidence and investigate complaints. Since Article 16’s provisions governing OPO’s authority are more restrictive than the Ordinance, Article 16 would still prevail even in the absence of TLGC Chapter 143. Moreover, the Memorandum was issued on November 2, 2018 – thirteen (13) days before the Agreement was signed and ratified. The City Manager is a direct party to the Agreement. The City knows or should know that it cannot agree to legally binding terms and conditions of a contract and then claim that contrary terms contained in an earlier, non-binding document reflects the Parties’ actual intention and/or interpretation.

The City’s arguments are contradicted by the Article 16’s plain language. Oversight, by its very nature and plain definition, consists of observation rather than participation. Article 16 does not expressly state or even imply OPO is allowed to participate in investigations or perform its own independent investigation/review. Article 16, Section 1(d) states in part that, except as specifically permitted in the Article, OPO “shall not be used or permitted to gather evidence, contact or interview witnesses, or otherwise independently investigate a complaint of misconduct by an Officer.” Section 3(b)(1) contains a similar prohibition. Yet the City has allowed OPO to investigate complaints of officer misconduct. At the hearing, the City’s sole response to this violation was that OPO does not conduct “investigations” but merely “preliminary reviews.” This is a distinction without a difference, as a plain and ordinary definition of investigation encompasses OPO’s “preliminary review.” OPO receives a complaint, then collects and obtains information and evidence before sending the complaint to IA, and proposes additional violations and alleged misconduct not contained in the original complaint or asserted by the complainant. Such activities clearly constitute an “investigation” because OPO recommends other policy violations rather than solely reviewing the information and evidence to verify the validity of the complaint prior to submitting it to IA. In theory, the preliminary review should be a procedural process used to weed out invalid complaints but, instead, OPO uses it to identify a myriad of baseless policy violations that are completely unrelated to the original complaint. Even if OPO does not make the ultimate findings in the investigation or issue discipline, its preliminary review triggers the next step in the process and has a lasting impact on the remainder of the investigation. Significantly, OPO’s own website refers to its “complaint *investigation* process” (emphasis added) and not a “preliminary review.” The website also states that “Internal Affairs begins *an investigation with* the Office of Police Oversight” (emphasis added), implying that OPO conducts investigations. The fact that OPO recommends policy violations that do not match the actual complaint also is compelling

evidence that in fact it investigates in violation of Article 16. For example, an NFC generated on April 30, 2021 alleged that a 15-year-old's shoulder was dislocated while being taken into custody; OPO's cited policy violations for this complaint include 301.2, Impartial Attitude and Courtesy and 301.3.1, Search Protocol. Neither were gleaned from the complaint's plain language; OPO had to have performed an investigation to come up with these policy cites. Otherwise, the only potential policy violations would have related to whether force was reasonable, which is the crux of the actual complaint. Other examples showed OPO recommended policy violations that were not based on or even related to the language of the complaint and could not have been identified without investigation. Indeed, at times none of the recommended policy violations matches the actual complaints. Had OPO not conducted investigations in violation of Article 16, such complaints likely would have never even been investigated at all.

Other evidence supporting the fact that OPO is conducting investigations, and not preliminary reviews, is the length of time it takes for it to forward complaints to IA. OPO often delays a month or two (2), or even longer, to send the NFC to IA after its initial contact with a complainant. Such an extended time results from OPO conducting its own investigation. The City's witnesses described OPO's primary mission as ensuring that a fair, impartial, and thorough investigation is conducted into the alleged misconduct or complaint. However, OPO's failure to submit the complaint to IA as soon as possible prejudices IA's ability to perform a thorough investigation. A particularly egregious example of OPO's delay occurred with the Byron Chambers complaint, which OPO received on May 8, 2020 and claimed an incident on April 22, 2020. That date triggered the 180-day timeline for completing the IA investigation, as required by Chapter 143. Yet OPO waited more than eighty (80) days to generate the NFC, leaving IA only 82 days to complete its investigation. IA Sergeants are required to complete their investigations at the 150-day mark to give the chain of command at least 30 days to review the case and issue discipline if needed. But OPO's delay left IA with only 52 days to investigate. Using either deadline, it is apparent that OPO spent more time doing a "preliminary review" of the complaint than IA had to perform its actual investigation. IA is exceptionally capable of recognizing and identifying potential policy violations and there is no need for OPO's "preliminary review." Detective Villarreal explained that a preliminary review and an investigation are the same action, and noted that the City is trying to play semantics because its position is "100 percent not in the spirit of what was negotiated in the contract." The evidence proved that the City knows and has condoned or approved OPO investigating complaints in violation of Article 16 and that clearly violates the Agreement.

Section 1(d) of Article 16 states OPO “shall not be used or permitted to gather evidence, contact or interview witnesses, or otherwise independently investigate a complaint of misconduct by an Officer.” Despite such unambiguous language, the City has allowed OPO to gather evidence by obtaining the body-worn camera (BWC) footage, dash camera footage, reports and all other information associated with an incident. The City claims that OPO is not gathering evidence by requesting these items because they are already within APD’s possession. However, nothing in the contract or the plain language interpretation of the phrase “collecting evidence” supports this argument. Rather, the information and other material OPO obtains for its preliminary review obviously is evidence. And since OPO requests it, obviously it is seeking to gain access to it. There is nothing allowing OPO possession or access to evidence in APD’s possession simply because both are departments within the same City. Moreover, the Agreement does not distinguish between internal and external evidence: Evidence is evidence. The City has given OPO access to information and material that is not directly correlated with the IA process and/or within the IA file, and allows this violation to occur every single day. And OPO requests information and evidence from IA prior to forwarding the NFC to IA, which is what triggers IA’s investigation. Hence, OPO cannot be accessing information “related to” the IA investigation process because it has not commenced. All of this demonstrates that OPO collects evidence contrary to Article 16’s prohibition and the City of Austin knows and is complicit.

The evidence also demonstrated OPO has been contacting and interviewing witnesses despite Article 16, Section 1(d) express prohibition. Specifically, audio recordings were presented showing 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. Director Muscadin admitted that her office sometimes needs to call complainants back to get clarification or more context regarding a complaint, but the contract is clear: OPO does not have the authority to do this, or to update complainants while the investigation is pending. Article 16 expressly identifies what information OPO is allowed to obtain from a complainant filing a complaint and, if additional context or information is needed, IAD will conduct a subsequent interview, which OPO has the ability to attend. The only update OPO is contractually permitted to provide a complainant is during the closeout meeting, as expressly stated within Article 16. Any other direct witness contact by OPO violates the Agreement.

The Agreement also has special provisions related to the subject officer’s IA interview. Article 16, Section 3(c) provides that a representative from OPO may attend an interview or

administrative inquiry of the subject Officer as well as all witness interviews, and may directly question the Officer and any witness Officer only if agreed to by the subject Officer or witness Officer or his/her representative and the IAD investigator. It also allows the OPO representative to take the IAD investigator aside during a break or at the conclusion of the interview and request that (s)he ask additional questions, but seeking that information is within the IAD investigator's discretion. Despite this clear, unambiguous provision, the City permits OPO to skirt the requirements of this Section by stripping the IA Sergeants of the sole discretion bestowed on them by contract and, in turn, allowing OPO to interview witnesses by proxy. The first manner in which OPO is permitted to do this is the 72-hour questions requirement, which was implemented approximately a year ago by executive staff and which requires IA Sergeants to send OPO their interview questions at least 72-hours before the interview, to permit OPO to reviews all of the interview questions beforehand, edit them and propose more questions. This essentially allows OPO to influence IA interviews contrary to the IA Sergeants' contractual sole discretion. Even more concerning is how OPO is permitted to interview witnesses by proxy during the actual interview itself. The IA Sergeants' express discretion to decline to ask a question posed by OPO has been virtually stripped from them and the evidence showed they are so uncomfortable with utilizing their contractual discretion to deny questions demanded by OPO that they now just go directly to their Lieutenant to escalate the matter. Even those who occasionally use their discretion directly are required to provide "a really good" reason to OPO for why they are not asking certain questions. When asked why the IA Sergeants do not push back against OPO regarding its 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." Besides essentially being forced to ask OPO's questions, the IA Sergeants sometimes have even been required to take multiple breaks after asking OPO's questions to ensure that OPO is satisfied with the questions and answers. Detective Villarreal noted that if the Association had wanted to allow OPO to question Officers, it would have negotiated over it. The City is aware of OPO's actions and has failed to stop them.

The Parties' bargaining history and intent also fail to support the City's claims and interpretations of Article 16. First, OPO's authority has always derived from the contract and any expansion of OPO's role should occur solely through the contract. Only recently has OPO purportedly been given "additional authority" outside of Article 16. Lt. Askew, the co-chair of the Association's 2018 negotiations team, testified that Article 16 has always been the extent of OPO's

authority and that he understood that “if it didn’t live in this contract, it didn’t, it didn’t matter.” Both Detective Villarreal and Lt. Askew participated in the 2018 contract negotiations and testified that the provisions of Article 16 were never intended to permit OPO to conduct investigations or preliminary reviews, or to allow follow up with complainants outside of the closeout meeting, or to provide access to any material or evidence OPO wanted at any time. Lt. Askew also testified that the City did not mention the ordinance or memorandum, or any belief those documents give OPO additional authority outside of Article 16, throughout the course of the 2018 contract negotiations. Detective Villarreal testified that prior to the November 2, 2018 Memorandum “all of 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 APA” and that when the Memorandum issued, no one informed APA that it was intended to grant OPO additional authority. The manner in which the City purports to construe Article 16 is deeply concerning. This is not the kind of oversight that APA agreed to, or had reason to believe would occur when it entered into the Meet and Confer.

APA respectfully requests that the Appellant’s appeal/grievance be granted and that the City of Austin be required to do the following:

1. Cease allowing OPO to investigate complaints or do a “preliminary review.”
2. Cease providing OPO any information, material or evidence prior to the initiation of an IA investigation.
3. Cease providing OPO any information, material or evidence that is not contained within the IA file.
4. Cease allowing OPO to interview or contact witnesses.
5. Cease allowing OPO to follow up with a complainant for clarification purposes.
6. Cease allowing 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 OPO in advance.
8. Cease allowing OPO to change, modify, edit or add suggestions to interview questions.
9. Cease allowing 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 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 OPO’s questions have been adequately answered.
12. Cease allowing 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 OPO to threaten individual members of the Austin Police Department.
14. Cease allowing OPO to monitor individual officer’s conduct.
15. Grant any and all other remedies that the Honorable Hearing Examiner believes appropriate or necessary

POSITION OF THE CITY

The City makes the following arguments and contentions in support of its position:

Subject to and without waiving its timeliness and arbitrability challenges, the City asserts that the language of the relevant provisions of the Agreement and the Parties' bargaining reflect their shared intent to expand OPO's role and authority. The Parties added Article 16, Section 1(b)(4) so OPO can provide transparency in policing and thereby foster trust between the community and the Police Department. This necessarily required OPO to enhance its level of engagement with APD and to increase its practical input into administrative reviews of police officer conduct such as reviewing APD-gathered and controlled evidence, conducting preliminary complaint reviews, and issuing complaint recommendations to APD. APA's two grievances at issue are based on this enhanced engagement — and, specifically, OPO's input into APD-IAD administrative reviews of officer conduct. APA argues that OPO is performing independent "investigations" when it reviews APD-gathered materials, but the materials have been placed into the ICMS system for OPO to access. APA argues that OPO is gathering evidence, but OPO relies entirely on the Department's IAD for investigation. The evidence also demonstrated that APD ultimately determines not only the classification of individual complaints but also the merits: APD alone decides whether IAD needs to investigate a complaint against an officer, just as APD alone decides whether discipline should be imposed upon an officer. Despite its prior agreement, APA has become disenchanted with OPO's increased involvement and promotes its own interpretation of the provisions pertaining to OPO. However, APA misinterprets the meaning of the Agreement terms and alleges Article 16 violations based solely on unfounded conclusions. For example, APA alleges that an OPO staff member reviewing the body worn camera (BWC) footage of an officer named in a complaint constitutes an "investigation" and "gathering evidence." However, the evidence demonstrated that OPO is required to conduct a preliminary review of complaints received, particularly for external complaints received from community members, which are frequently submitted anonymously. APA similarly argues that OPO violates the Agreement because an OPO representative questions complainants about the interaction that triggered the complaints and informs them that OPO will review available materials. Yet APA's allegation disregards Section 3(b)(2) of the Agreement which allows conversing with and questioning a complainant. Thus, it is permissible and reasonable for OPO staff to review BWC footage and to question the complainant to obtain basic pertinent information.

APA's Grievances are further undermined by Article 16, Section 2(c), a new addition to the Agreement, which explicitly authorizes OPO to "act as complainant in any allegation on its own

initiative” and delineates that if “OPO acts as the complainant, the Director of OPO shall document the source of the complaint.” Through its grievances, APA asks the arbitrator to interpret Article 16 in a manner that it is both inconsistent with its text and that is internally inconsistent. When the Parties drafted Article 16 to give OPO specific duties and functions, they intended to give OPO the authority to do the basic work to carry out those functions. The Parties’ 2018 contract negotiations resulted in the current Agreement, which expanded OPO’s purpose and attendant authority. Moreover, APA dropped its lawsuit against the City, which involved the same complaints as it makes in these grievances, upon reaching the November 15, 2018 Agreement. The arbitrator lacks authority to modify or create additional provisions to the Agreement, but is “strictly limited to interpreting and applying the explicit provisions” of the Agreement. APA failed to sustain its burden of proving that the City is in “direct” and “clear” violation of the Agreement or TLGC Section 143.312. OPO has effectively grown into its contractually expanded purpose, and is providing the transparency in policing and building the trust between the community and APD that the Parties intended and memorialized in the Agreement. Thus, the grievances must be denied.

APA’s grievances are untimely and inarbitrable under Article 20, Section 3, which provides that “[i]f any timeline or deadline for a decision is missed by the City, the grievance automatically proceeds to the next step in the process. If any timeline or deadline for a decision is missed by the Association, the grievance is considered to be resolved and dismissed.” The City does not dispute that the Chief of Police failed to issue Step 2 grievance responses in either of the grievances at issue within the 15-day period delineated by Article 20. This, however, automatically advanced both grievances to Step 3 and APA failed to adhere to Step 3’s mandated deadlines. As a result, both grievances are “dismissed.” Moreover, APA been aware that OPO reviews APD materials related to complaints of officer conduct — which it characterizes as “conducting independent investigations”— since at least May 9, 2018, when it filed a lawsuit in state district court alleging statutory violations based on the same activities. APA argues that OPO’s acts constitute “continuing violations” but fails to explain why it waited until July of 2020 to first grieve the alleged violations on behalf of one individual officer (Hewitt). Nor does it offer evidence that it attempted to use Section 7(a)’s “Dispute Resolution” but suggested that submitting its complaints directly to OPO “would probably be very frowned upon.” This is not a legitimate basis for declining to use the process. APA is forum shopping and has not exhausted available remedies.

New provisions to Article 16 evidence the Parties’ intent to expand OPO’s role, including Sections 2 (“Definitions”), 3(b)(3), 6(a)(8) and 8(d)(4)(d). These new provisions pertain to OPO’s purpose, role, responsibilities, and authority and differ substantively from the prior Agreement. The

Agreement must be construed as a whole and in accord with the plain meaning of its terms to ascertain the Parties' true intent. If the language lends itself to a clear and definite legal meaning, the contract is not ambiguous and will be construed as a matter of law. A contract is ambiguous only when it is susceptible to more than one reasonable interpretation. The prior Agreement did not include any of the above-listed language, all of which expands OPO's role, authority, and level of involvement with APD as OPO Director Muscadin testified at length. APA Vice President Villarreal testified that he understood and agreed that "OPO has expanded."

To satisfy the Parties' intent that OPO provide transparency in policing, OPO must be allowed to review confidential materials and conduct preliminary reviews. OPO's accessing confidential materials is not a "release" under the relevant statute. OPO's Director is an appointee of the City Manager, in his chain of command and acts as his designee in matters within his authority under the City Charter, and performs her duties within all relevant confidentiality provisions, laws and City personnel policies. There are no PIA records requests or subpoenas in the Grievances at issue; if a request or subpoena for protected records was made by a member of the general public or a person outside of the City it would be denied and the information withheld. APA's request under the PIA related to the hearing in this matter was not such a request, as APA and its counsel are not members of the general public. Ultimately, APA's claim based on OPO's potential release of confidential information to the general public – which has never occurred – is wholly speculative, particularly when employees are subject to penalties and discipline.

OPO's preliminary review of APD materials related to complaints received is not an "investigation." APA alleges that APD allowing OPO "unfettered access to Departmental material prior to an official internal affairs investigation" violates the Agreement because the Agreement does not "specifically authorize a pre-review of Departmental material prior to the case being sent to IAD for assignment for investigation." That interpretation is fatally flawed. OPO acts on behalf of the City Manager in monitoring IAD proceedings. The Civil Service Act expressly allows a city employee to "conduct" an investigation without running afoul of §143.089(g) or §552.102. Thus, it follows that a city employee may provide oversight and input in an investigation including but not limited to reviewing confidential APD gathered materials and issuing recommendations to IAD for complaint classifications. APA asserts that OPO is independently investigating APD officers, and points to an email OPO Director Muscadin sent to APD Commander Staniszewski regarding Officer Hewitt's conduct. But Section 3(a) explicitly authorizes such inquiries as to the status of any pending IAD investigation. Moreover, Section 12(a) states that APA recognizes that the City expressly retains its right and ability to determine whether or not police misconduct occurred and

the Chief's authority to impose disciplinary action. The Agreement explicitly authorizes OPO to "make a recommendation" to APD regarding classification of external complaints alleging officer misconduct, such as that received against Officer Hewitt. OPO Director Muscadin's recommendation that Officer Hewitt receive counseling or additional training was appropriate pursuant to APD policy. She acted within the scope of her authority and prescribed duties.

Austin is a home-rule municipality with broad authority to exercise all powers not prohibited by statute. The City Manager's grant of authority is derived from the Charter adopted by the City Council. City Manager Cronk was hired in December of 2017 and has responsibility for directing the operations of all City departments, including APD. There is no City Council delegation issue here because the Charter gives that authority directly to the City Manager without need for formal Council action each time he acts within his express authority. OPO acts as the City Manager's eyes and ears in the oversight process and the City Manager is well within his authority under both the Agreement and state law to designate duties to other individuals in the chain of command, including review of confidential materials. The AG has opined that information made confidential by TLGC 143.089(g) may be released to the city manager and the city attorney. The chief executive and the members of the governing body, and any other individual in the chain of command between the fire and police chief and the chief executive, are not persons 'outside the department' but supervisors. The Texas Supreme Court has held that subsection (g) should not be read to include the municipality's chief executive and members of its governing body within the ambit of those 'persons or agencies' from whom the subsection (g) file must be withheld, and it is undisputed that the City Manager has ultimate authority over APD and its employees, including police officers, pursuant to the Austin City Charter. The City Manager's authority over APD is also established in the Civil Service Act, which authorizes appointment of the Chief of Police by the City Manager and "Investigation" by a non-sworn employee. There is no limitation on the City Manager's authority to delegate a city employee to oversee investigations into police officer misconduct, civilian or otherwise. Despite contractual and statutory deadlines for imposing discipline, APA seeks to effectively extinguish the City Manager's ability to control and oversee APD's complaint and disciplinary process.

TLGC §143.312 expressly authorizes a city employee to conduct "investigations." APA incorrectly contends that allowing civilian employees of OPO to participate in APD departmental disciplinary investigation processes violates §143.089. However, subsections (a)-(f) mandate personnel files to be maintained by the Civil Service Commission that for the most part are subject to public disclosure. Subsection (g) allows personnel files to be maintained by the Department that

are discretionary, solely for the Department's own use and not subject to disclosure to any third party, including prosecutors. Officers are not allowed access to Departmental personnel files. There has been no request from a requestor for (g) file records. Regardless, IAD and not OPO maintains all files and §143.089(g) prohibits it from releasing "any information contained in the department file to any agency or person requesting information." The City is preserving the legislature's intent of "ensuring that innocent officers would not have their reputation smeared." See Abbott v. City of Corpus Christi, 109 S.W.3d 113, 120 (Tex.App.—Austin 2003). The Agreement explicitly allows the release of confidential information pertaining to APD officers in certain situations. Specifically, Section 6(a)(9) acknowledges that "any recommendation and/or report released pursuant to this Section may contain information which would otherwise be made confidential by Section 143.089(g)."

The City has established that it has not violated the terms of the Agreement, and the grievances lack merit. Even if APA had proven violation of the Agreement, its requested relief exceeds the authority granted to the hearing examiner under Article 20 of the Agreement, besides being unnecessary and contrary to the terms of the Agreement and applicable law. No APA member has suffered injury from the invasion of a legally protected interest and there has been no release of any confidential personnel files to the general public. APA offers no legitimate basis for its ostensible concern that OPO will violate laws and policies by releasing confidential information to the public in the future. APA has not satisfied its burden of proof. The evidence demonstrated that changes to pertinent terms of the Agreement as well as the Parties' bargaining history reflect their shared intent to expand OPO's purpose to provide for transparency in policing and to build trust between the community and APD. The relevant Agreement terms do not prohibit OPO from conducting preliminary reviews of complaints, obtaining information from complainants, or reviewing materials it receives from APD. Applicable statutes and germane case law provide that municipal police oversight entities such as OPO are authorized to perform duties required to serve their purpose. The City requests that the grievances be dismissed and that APA, as the losing party, be ordered to pay the Hearing Examiner's fees and expenses as provided for in Article 20.

OPINION

FACTS

The evidence presented was straightforward and, for the most part, is not contested. The City does not deny that OPO engaged in the actions APA described, but it does deny that those actions constitute Article 16 violations. The evidence demonstrated the following:

The previous Agreement between the City of Austin Police Department and the Austin Police Association, which had gone into effect in 2013, expired on or about September 30, 2017. The Parties continued to honor that Agreement while negotiating the current Agreement, and entered into the current Meet and Confer Agreement November 15, 2018. The grievances at issue herein concern only Article 16, which addresses civilian oversight of the Austin Police Department by the Office of Police Oversight (“OPO”). Until November 2018, Austin had an Office of Police Monitor. Farah Muscadin was hired as the Interim Police Monitor in January 2018 and became the permanent Police Monitor about five (5) months later. In November 2018 the title of the office changed and she became OPO’s Director. Director Muscadin is an attorney and has not previously worked in law enforcement. She testified OPO’s responsibility is to ensure that APD is following its own policies and procedures. OPO’s staff consists of approximately 10-12 people besides Director Muscadin. OPO takes in complaints, considers whether potential policy violations exist and makes recommendations to the Department. Director Muscadin testified OPO’s purview is not limited by the Agreement because she reports to the City Manager, and the City Manager’s authority over her office comes from charter. She denied that OPO investigates complaints, but stated that OPO’s 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. According to Director Muscadin, OPO requests IA to provide it with all information available regarding a complaint when contacted by a complainant. OPO also drafts a Notice of Formal Complaint (“NFC”) which IA uses to initiate its investigation. Director Muscadin testified that collecting body-worn camera (“BWC”) footage, dash camera footage and reports does not constitute collecting evidence “because it is part of information that the department already has, that is a part of the City of Austin” and that OPO, as a City of Austin department, is entitled to obtain that information.” Her testimony reflected that OPO also has access to the ICMS database, including (g) file materials maintained by the Department, because OPO and IAD work “collaboratively.” OPO currently makes notes and comments within ICMS regarding investigations and, with the Department, is currently in the process of drafting Standard Operating Procedures (SOP) for future collaboration. Director Muscadin testified that she wants the SOPs to give OPO 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.”

Former IA Sgt. Mai Wines testified that one of her duties was to provide information requested by OPO such as any BWC, digital mobile audio video, reports or anything else related to

the incident about which there had been a complaint. OPO requested these items before the NFC was submitted to IA or an IA Sergeant had been assigned the case. Sgt. Wines is of the opinion that OPO investigates complaints because it is provided with the same means and the same resources IA uses to investigate and also attends interviews and reviews questions. Sgt. Wines stated she does not know the details or exact process of OPO's "preliminary review" but knows it is performing investigations because she has received phone calls from OPO representatives seeking additional information related to an initial video or BWC footage. In her opinion, OPO has significantly reduced IA investigators' discretion.

Officer Hewitt has been with APD for approximately 5 years. He retired from the Mobile Police Department as a Lieutenant after 20 years during which he received no discipline other than minor discipline for damage to vehicles. He testified that the area of town he currently works has a lot of issues with homelessness, crime in general and violence, and that it has two (2) of the biggest open-air drug markets in Austin. 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. Officer Hewitt testified that a 7-Eleven in his sector is an open-air drug market with significant violence whose owner signed a blanket criminal trespass authorization, allowing APD Officers to issue CTNs on his and his employees' behalf. A week prior to the incident giving rise to the complaint filed against him, Officer Hewitt observed the same individual identified in the complaint at a gas pump for several hours. Another officer who works the night-shift and enforces the blanket CTNs told him individuals were trying to avoid CTNs by parking at gas pumps so it would appear they were patronizing the store. When he saw the same vehicle parked at a gas pump for an extended period of time a week later, he recognized the same individual and made contact with him. When asked if he was patronizing the store, the subject said he was "just hanging out in the neighborhood." Officer Hewitt gave this individual, who is Black, a CTN. At some other point during that shift, he observed another individual at the same gas station, loitering in his vehicle at the air pump. Officer Hewitt had never seen this individual before. He made contact and asked this individual why he was loitering and the individual responded that he was an Uber driver waiting for his next fare. Officer Hewitt believed that to be a reasonable excuse, but he informed the individual that this was a high-crime area and that the 7-11's owner did not want people hanging out on the property. Officer Hewitt testified that he did not issue a CTN to this individual, who was White. These two (2) interactions did not occur at the same time and neither individual was present when he interacted with the other. Officer Hewitt testified that he was blindsided by his chain of command informing him that the investigation would compare his

interactions with White and Black individuals; he broke down and was sent home because he was so upset. Officer Hewitt testified that the only information provided to him was that he allegedly “harassed” the Black complainant. 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, but not the White, individual. Officer Hewitt testified that he did not harass the Black individual or treat him any different than he would anyone else and that he was respectful the same as he would want to be treated. Officer Hewitt was cleared of all allegations of misconduct. His Commander later pulled him aside to reassure him that he was doing a good job and showed him an email written by Director Muscadin which he believes is a threat and demonstrates she is targeting him. As a result, he stated he now is afraid to do proactive police work because OPO will inappropriately scrutinize it and again falsely accuse him of discrimination simply for doing his job. Officer Hewitt stated the accusations follow him around and he feels like they have tarnished his reputation and that this process is so upsetting because “ [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.”

Claire Vaho was OPO’s Program Compliance Coordinator about two (2) years. The complaint regarding Officer Hewitt was assigned to her and she believes she drafted the NFC and also performed the preliminary review. Ms. Vaho testified that OPO does not have independent access to BWC or APD databases but this has to be provided to OPO when requested. In regards to the Officer Hewitt complaint, she reviewed the two (2) BWC clips, the Versadex report and the actual CTN but was not sure if she knew, at the time she drafted the NFC and made policy recommendations, that the gas station had authorized a blanket CTN. When asked if the complainant expressly stated to her that Officer Hewitt harassed him because he is Black, she did not remember. She also stated she did not recall if the complainant informed OPO that he was issued a CTN but another person was not; that is what the body-worn camera showed. She also testified the complainant did not state that Officer Hewitt treated him differently than the White individual and she did not know the other man was an Uber driver waiting for his next fare.

Detective Thomas Villarreal has been with APD for approximately 16 years and currently is assigned full-time to APA. As the Association’s Vice President, he frequently communicates and interacts with the City Manager’s office, OPO, the APD executive staff and City Labor Relations. He was a member of the 2013 contract negotiations team, the 2017 contract negotiations team that ultimately failed, and co-chaired the 2018 contract negotiations team. Detective Villarreal testified that APA does not oppose oversight, and that it believes oversight is necessary and encourages

fair and impartial oversight. He noted that expansion of OPO's authority was accomplished through contract negotiations and is described in Article 16, but recently the City has begun to claim that OPO has authority outside of the Contract. According to Detective Villarreal, OPO's sole power and authority has come from Meet and Confer agreements that were negotiated in good faith with the City, and APA was never informed that the November 2, 2018 Memorandum was meant to grant OPO additional authority outside of Article 16. Detective Villarreal pointed out that if the Agreement did not exist, OPO would not have the authority to monitor or be present during IA investigations at all because that information is (g) file protected. He also described the 2018 lawsuit APA filed against the City regarding OPO attending and participating in IA interviews and investigations during a period of time that the Meet and Confer had lapsed. APA's position has always been that OPO derives its authority from the Meet and Confer and if there is none in place, Section 143.089(g) strictly prohibits OPO from having access to IA information. APA agreed to drop its lawsuit when the current Meet and Confer was ratified, as it understood that OPO's authority was delineated solely within the contract and APA had agreed to terms its members were comfortable with. He testified that OPO was never intended to be an office capable of doing any investigations yet it is collecting evidence, even if the information is already within the possession or control of the APD. Moreover, the Agreement does not give OPO the authority to call complainants back and clarify information or update them on the process of their "preliminary review." Detective Villarreal testified that in the last 12 years, APA and the City have 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. However, the City has not been willing to negotiate, discuss, sit down, or even attempt to resolve any issues or grievances concerning OPO and Article 16 of this Contract, leading APA to conclude that nobody wants to push back on OPO's office. Detective Villarreal testified that requiring the IA Sergeants to forward their interview questions to OPO 72 hours in advance was not contemplated or intended when negotiating the contract and is a change unilaterally made to the process by the City. He has learned that the IA Sergeants now are required to send their interview questions to OPO prior to an interview and that OPO representatives are allowed to change or add questions, and he has experienced this during an interview when numerous breaks were taken so the IA Sergeant could determine if OPO liked the question asked. He has concluded that OPO completely ignores the contract, and that the Department knows this is occurring. According to Detective Villarreal, Director Muscadin was far more open to collaboration and discussion between the departments when she first came to Austin but now her/OPO's willingness to collaborate with APA is "less than 5 percent." 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 K-9 and mounted units, eliminating park patrol and eliminating the use of deadly force entirely and has posted on her personal Facebook an article whose main premise was that Black people needed a space away from White people in the workplace.

Sheldon "Scott" Askew is a Lieutenant and has worked for APD for 21 years. He currently is assigned to the Police Technologies Unit but has worked in IAD both as Sergeant and a Lieutenant. He also participated in the 2018 contract negotiations, specifically as the designated chairperson for Article 16. He testified that his responsibly, as a Lieutenant in IA, was to oversee the investigations of the internal complaints that the actual Sergeants in the unit conduct. He also was allowed to directly communicate with Director Muscadin and her staff, but IA Sergeants must utilize a common email inbox for most of their communications with OPO. To his knowledge, after OPO's office receives a complaint, it requests all of the information related to the incident through a universal email inbox or directly to Detective Tanya Normand. IA sends OPO the information it requests, such as BWC, dash camera and reports and OPO later sends the actual complaint (NFC) to IA. When IA receives the NFC, it is assigned to an IA Sergeant on a rotational basis. If clarification or follow up is needed from a complainant, IA will reach out to the complainant directly with OPO's participation. According to Lt. Askew, OPO's NFCs caused frustration because the policy violations OPO suggested would not match the actual complaint in the NFC. Without more information about OPO's investigation or preliminary review, such as its notes, it was daunting and sometimes impossible for IA to ascertain where OPO thought it found a suggested policy violation that did not match the complaint. Also, it usually takes OPO months from the time it takes the complaint to get the NFC to IA. Although that time period recently has improved, Lt. Askew testified that the extended length of time OPO spends with the complaint before sending it over to IA eats into the contractual 180-day timeline and can cause significant problems for the actual IA investigation. It is imperative that IA receive the complaint as soon as possible to begin its investigation, which they try to complete within 150 days, rather than 180. Lt. Askew acknowledged the requirement that the IA Sergeants forward their interview questions to OPO at least 72 hours in advance, by uploading them to the casefile and then sending an email to the generic OPO inbox advising that the questions have been uploaded. If the IA Sergeant does not meet the 72-hour question upload deadline OPO will decline the interview which, in Lt. Askew's opinion, essentially controls when an interview is conducted. While the IA Department tries to work around OPO's schedule for interviews, there have been times that Lt. Askew has instructed his

staff to move forward with the interviews regardless of OPO's participation but this occurs "very rarely" and if IA Sergeants fail to send the questions to 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." If IA deviates from the practices that OPO wants, they "hear about it." Lt. Askew testified that OPO's ability to review the interview questions, add suggestions and make modifications essentially strips IA Sergeants of discretion on how to conduct the interview and what questions are asked, as the contract requires. Rather than denying OPO questions, IA Sergeants instead go directly to their Lieutenants to address the denial of questions directly with OPO representative, and IA also is now required to explain to OPO why it is not asking OPO's suggested questions. Lt. Askew gave an example of when he declined to ask an OPO suggested question – which, he felt, was not justified based on the NFC and which bordered on a violation of the Officer's rights – and which resulted in OPO accusing him of standing in the way of the question being asked. Lt. Askew is of the opinion that OPO is interviewing witnesses because it can demand and require that its questions be asked. He brought all of his concerns regarding potential contract violations to his Commander and the Director of OPO numerous times and nothing was addressed or changed to address these concerns and/or contract violations. According to Lt. Askew, Director Muscadin has referred to him and others as "obstructionist" and "displaying obstructionist behavior." He also 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 is the fishing expeditions OPO has been conducting. When asked about the Police Oversight Advisory Working Group Recommendations document, Lt. Askew testified that the document was not a collective work of agreement and that, while the document identified all ideas that were brought up during the sessions, all parties did not necessarily agree with the ideas. OPO created it and APA was never asked to review or comment on it prior to publication. Lt. Askew testified that when he was negotiating Article 16, there was never a thought in his mind that additional authority would be granted to OPO through an ordinance or memorandum, and he negotiated believing Article 16 would be OPO's sole authority.

Detective Tonya Normand, a 20 year employee who currently works in IAD, testified that her responsibilities include providing evidence to OPO. It sends her a list of case numbers and asks for BWC, DMAV, CAD, and anything that is related to the complaint and she provides it to OPO. IAD Lieutenant Shauna Griffin previously worked in IA as a Sergeant for approximately a year and half. She is allowed to communicate directly with OPO through email but IA Sergeants have to communicate with OPO through the centralized email. Lt. Griffin testified that OPO cancels interviews when questions are not sent over 72 hours prior and the hardest part about

scheduling the IA interviews is working with OPO's office because of its inflexibility and so many rules in place about OPO's schedule. She testified she is not allowed to move forward with an interview without OPO, even in situations "where there's a 180 (deadline) right around the corner and we have no choice, but for the most part we do not go forward with interviews if OPO is not available." She also stated the executive staff directed that IA needs to coordinate the interview schedule with OPO, even though the Agreement does not require that OPO be in the interview. At times it has taken OPO months to get the complaint over to IA and this negatively affects the IA Sergeants' morale, because "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." Lt. Griffin testified that each IA Sergeant has approximately 10 to 12 cases on any given day. She supervises five (5) IA Sergeants, and there are three (3) other Lieutenants who supervise about the same number of IA Sergeants. The majority of these cases are from OPO generated complaints. A small percentage of the cases that OPO sends to IA concerns serious misconduct but most are shift-level type issues that can and should be handled at the supervisor level. She testified that even if the Lieutenant agrees with the IA Sergeant about whether to ask OPO questions, they better have a good reason for denying them because they will have to answer for it later on. Director Muscadin has called Lt. Griffin an "obstructionist" after she requested OPO submit an additional complaint or an amended complaint because the NFC OPO had sent to IA did not comply with Chapter 143. According to Lt. Griffin, she is not aware of anyone in her office that does not have a stressed or contentious relationship with Director Muscadin and OPO. The 72-hour requirement to forward the interview questions to OPO began about a year ago and was not in place when she first came to IA as a Lieutenant. If IA does not want to investigate one of the suggested policy violations on the NFC, IA has to inform OPO and if it does not concur, it then gets escalated to the Commander and then all the way to the Assistant Chief to be decided. IA and OPO disagree on the majority of the suggested policy violations so almost all cases are escalated to the Assistant Chief for decision.

Deven Desai is the Labor Relations Officer ("LRO") for the City of Austin and previously worked as the acting Police Monitor in 2017, prior to the creation of OPO. He negotiated the 2018 Agreement on behalf of the City but did not attend any of the negotiation meetings and discussions regarding the group that was put together to discuss Article 16. He described the City's position on

police oversight as seeking to make “more things ... public” in subsequent Agreements. When asked if the City Manager’s memo or City ordinance increased OPO’s scope of authority, LRO Desai responded:

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 want 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 feel 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 . . .” (See Transcript, pages 553-554).

He also testified that, to the extent anything in the Ordinance or Memorandum contradicted Article 16, it would be superseded by the Agreement. LRO Desai also testified that he did not recall performing preliminary reviews and/or requesting and reviewing all footage and information regarding a complaint prior to sending it over to IA when he was the Police Monitor.

ARGUMENTS

Timeliness and Arbitrability Challenges

The City argues that APA’s grievances are untimely and should be dismissed. The City admits that the Chief of Police to submit a written response to the grievances within fifteen (15) days of receipt. As a result, the grievances automatically advanced to Step 3 of the Parties’ grievance procedure. The City argues that APA then missed “a timeline or deadline for a decision” that resulted in the grievances being “considered to be resolved and dismissed” pursuant to Article 20, Section 3. These arguments were rejected prior to the Hearing and are again rejected. The only “deadline” applicable to APA in Step 3 states that if a grievance is not resolved at Step 2, APA “**may within fifteen (15) business days after receipt of the Chief’s Step 2 response** submit the

grievance to arbitration in accordance with the provisions of this AGREEMENT” (emphasis added). However, APA did not receive a Step 2 response from the Chief, which would have started the fifteen (15) day deadline. Moreover, there was no evidence that the Parties’ practice had been to treat the Chief’s failure to submit a Step 2 response as a triggering event, or that the time limit was to be calculated from the last date the Chief should have provided a Step 2 response or any other date. As a result, the undersigned is unable to conclude that the grievances are untimely or that they should be considered to be resolved and dismissed.

The City also contends that APA has waived or is estopped from litigating the matters presented in the grievances because it has been aware of OPO’s actions since at least May 9, 2018, when it filed a lawsuit in state district court complaining of statutory violations based on the same or similar activities at issue herein. The evidence showed that APA dismissed that lawsuit because the Parties enter into the current Agreement and Article 16’s negotiated provisions addressed the issues APA had alleged in the lawsuit. Thus, APA dismissed the lawsuit in reliance on the City’s representations through its agreement to Article 16. As the evidence herein demonstrated, however, the City is not complying with all of Article 16’s provisions and seems to claim, in part, that OPO acts on the authority of the City Manager and is not required to comply with the Parties’ Agreement. The violations alleged by APA are “continuing” and not time-barred, as the City Argues. Under the circumstances the undersigned cannot conclude that APA has waived or is estopped from making the claims raised herein. Moreover, these grievances allege contractual violations rather than individual employee misconduct and there has been no showing that APA is obligated to utilize the Dispute Resolution program addressed in Article 16, Sec. 7(a). Based on the City’s arguments and Director Muscadin’s testimony, APA attempting to resolve these grievances through Article 16 Dispute Resolution program indeed would have been futile. Hence, the City’s improper forum and delay arguments are rejected.

The City is Bound by Article 16

There is no question that APA supports “timely, fair, impartial, and objective administrative review of complaints against police officers, while protecting the individual rights of officers and civilians.” Otherwise, it would not have signed the current Agreement which, in Section 1(b), defines a purpose of Civilian Oversight as “providing transparency in policing and thereby fostering trust between the community and the Police Department.” Contrary to the City’s argument, however, this “shared intent” does not mean that APA agreed to “expand” OPO’s role beyond what

is set forth in Article 16 and APA relied¹ on the City's agreement to those terms. Nevertheless, the evidence and arguments raise by the City indicate that the City does not consider itself or OPO bound by Article 16's provisions. LRO Desai testified that the City is taking the position that Director Muscadin has whatever authority the City Manager assigns to her, and that such authority is "unfettered" if not specifically prohibited by Article 16. See Tr., page 591. However, that position is contradicted in Section 1(d) which clearly states that OPO shall not be used or permitted to gather evidence, contact or interview witnesses, or otherwise independently investigate a complaint of misconduct by an Officer **"(e)xcept as specifically permitted in this Article²."** LRO Desai further explained the City's position as follows:

There was an Article 16 in the previous contracts as well (as) before I arrived at the City of Austin. The City wanted to start an oversight process. They felt they had the authority to do an oversight process. Okay? However, it's good to get buy-in from the Association, like we talked about before. If you get buy-in, it's going to be a lot easier. So unfortunately, or fortunately, we got the buy-in and we started the process of oversight at the same time that we did the contract negotiations. So I think that has led to kind of this belief from the Association's side that this office didn't exist before, before a contract, so therefore, you can't have an office if it's not in the contract. And the City feels like, you know, we're doing this to get some buy-in, but we're trying to expand the authority. There are certain things that we 100 percent have to get the Association to sign off on. For example, confidential information becoming public has to be negotiated. Otherwise, you can't -- it doesn't matter what the City wants to do, you can't make it public. So that's -- I think that would be the best way for me to put it. . . . There's also kind of a general change in the, in the level of interest of citizens all around the country on oversight now. So there's also more things, regardless of whether or not the contract has it. You know, there's a sentiment, at least in Austin, to do more with the authority that you have if it's not prohibited by the contract, and the office should do more even if we had that authority before but we just weren't exercising it because, frankly, there wasn't the same level of interest that there is today, so...

Tr., page 502, line 10- page 504, line 11.

These statements seem to suggest that the City agreed to Article 16's provisions simply to persuade APA to approve the current Agreement, yet believing that the City Manager retains the authority to direct Director Muscadin to act contrary to Article 16's provisions. But the City Manager, too, is bound by Article 16 and violates the Agreement by directing or permitting Director Muscadin to ignore its provisions. The City claims that OPO's conduct does not violate Article 16 because it is based on the Memorandum and Ordinance. Yet the Agreement's effective date is

¹ Apparently it did so to its detriment, because when the Agreement was reached APA dismissed a pending lawsuit with claims allegedly related to those presented herein.

² While this provision also notes that it has no application to any Independent Investigation authorized by the Chief of Police or to the City Manager that is not an issue herein.

November 15, 2018– almost two (2) weeks after the Memorandum issued. The City Manager knew, or should have known, that the subsequent Agreement, including Article 16’s provisions, would control, as LRO Desai recognized:

Because the contract would supersede any sort of memo or, or this or that, because this change – in effect, the way I describe it is, this changes state law. So for us this is state law. This book is state law. Until, you know, November 15th of 2022, this is state law. Tr. page 646, lines 3-8.

And the TLGC provides that 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. Thus, the City’s reliance on the Ordinance and the Memorandum as means to circumvent Article 16’s provisions is misplaced: Neither justifies the City’s failure to comply with any portion of Article 16 or the City Manager’s alleged direction to Director Muscadin to act contrary to certain provisions. Based on all of the foregoing, the undersigned determines that the City, including but not limited to the City Manager and his appointee, Director Muscadin, are bound by, and must comply with all provisions, of Article 16.

Contractual Violations

APA argues the City allowed OPO to violate the Agreement by investigating complaints, collecting evidence and interviewing witnesses which, except as specifically permitted in Article 16, Section 1(d) prohibits. The evidence reflected -- with regard to Officer Hewitt’s situation at least³ -- that OPO had to have performed some kind of initial “investigation” because it subsequently identified a number of alleged policy violations based solely on a complainant reporting only that he had been “harassed” by a police officer. While Section 3(3) does permit OPO to recommend classification of an external complaint to IA, the Complaint Intake process Section 3 describes does not envision an in-depth review such as OPO seems to be performing. Rather, it refers to “the taking of the information provided in Section 3(b)(2)” and information in connection with the filing of an Officer misconduct complaint is specified as: The complainant’s personal information; nature of complaint; witness information; incident location, date and time; and Officer(s) involved. The evidence demonstrated that, at least in Officer Hewitt’s matter, OPO far exceeded those contractual limitations to the scope of its investigation authority. And, as APA noted, OPO’s website represents that “Internal Affairs begins an investigation with the Office of Police Oversight” and that wording indeed suggests that OPO conducts investigations and, potentially, gives the

³ The City would not provide APA with other information it sought and, therefore, the extent of the City’s potential violations of -- or compliance with -- these portions of Article 16 cannot be determined.

impression that OPO is on an equal footing with IA: That is not accurate, and could lead to unrealistic expectations. Additionally, the fact that OPO recommends policy violations that do not appear to be gleaned from the content of the actual complaint evidences that it indeed is conducting an “investigation” rather than the process delineated in Section 3(b)(2). Additional evidence that OPO performs investigations is the fact that it substantially delays – sometimes by more than eighty (80) days – in generating a NFC, which decreases the time IA and the chain of command have to consider these matters. This occurs despite Section 3(3) requirement that OPO “shall promptly forward the completed complaint” to IA. These delays, which apparently are not uncommon, tend to indicate that OPO’s “intake” process exceeds what is specifically allowed by Section 1(d). Such delays are not fair to IA investigators, the involved Officers⁴, the Department or the public, and do not coincide with the purpose of Civilian Oversight as described in Section 1(b)(1).

As to collecting evidence, the City argues that OPO is allowed “unfettered access to Departmental material prior to an official internal affairs investigation” because it acts on behalf of the City Manager in monitoring IAD proceedings. When questioned about OPO’s access to body cam footage and DMAV, LRO Desai acknowledged those items are evidence, but explained:

I can see where the body cams are kind of, you know, Hey, how do you qualify that? But the real question to me boils down to, is this stuff that's already within the possession of APD or not, you know, and if it's not, are you trying to go out and get that evidence yourself? At which point to me it's investigating. If you're reviewing things that's already within the possession of APD, you're reviewing their, their investigation, you know, or their evidence, you know? And you're allowed to make your recommendations based off of that. Tr., page 621, lines 2-1.

However, the City Manager is bound by the Agreement and cannot direct or allow OPO to act in contravention of Article 16’s specific limitations. His alleged delegation of authority to Director Muscadin was the City’s primary basis for arguing that OPO has unfettered access to all Departmental materials at any time. However, Section 3(a) permits OPO’s Director “unfettered access to the Internal Affairs investigation process, except as provided herein” and, with regard to OPO’s complaint intake procedures, the evidence demonstrated that an IA investigation process is not initiated until OPO sends IA the NFC after initial contact with the complainant. Based on the contractual language, OPO’s access to all Departmental materials prior to any initiation of an IA investigation process does not comport with Article 16. Moreover, OPO’s access to such materials is not “unfettered” but, rather, must be requested. Former Complaint Specialist Vaho testified that:

⁴ Delays could raise questions, in subsequent Officer appeals, as to the thoroughness of IA’s investigation.

Our office in general doesn't (have independent access to BWC, DMAV or Versadex reports/databases) in general. Like, we, we can't just search body-worn camera just willy-nilly. It has to be connect- we have to have a complaint and then make the request, and then that information specifically has to be given to us by IA or APD. Tr., page 655, lines 4-8.

Such testimony tends to support APA's argument that OPO is prematurely being provided access to -- and, thus, collecting -- evidence in violation of the Agreement.

The evidence also indicated that the City is permitting OPO to exert control over the IA process in violation of Section 3(b)(4)(c), specifically as to the following:

At the conclusion of or during a break in any (IA) 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** (emphasis added).

This language means the IAD investigators have the right to make the decision according to their own judgment. Yet the unrebutted evidence showed that IA Sergeants are denied this contractual discretion in several ways. First, they now are required to forward their interview questions to OPO 72 hours in advance of an interview for review and addition or other modification of the questions, and OPO can force the IA interview to be rescheduled. The evidence also demonstrated that OPO's conduct in demanding that questions be asked has made IA Sergeants so uncomfortable that many go directly to their Lieutenant to escalate the matter and that if the Lieutenant agrees with the IA Sergeant they have to have "a really good reason" because they will later be questioned about it. Even when IA Sergeants do exercise their discretion, they are required to explain to OPO why they are not asking certain questions. These actions, which the City condones, strip the IA Investigators' contractually granted discretion to determine whether information identified by OPO is sought in any witness interview. OPO's actions also circumvent the provision that specifically prohibits it from directly questioning the Officer and witnesses during the IA interview unless "agreed to by the subject Officer or witness Officer or his/her representative and the IAD Investigator" because, by being allowed to force that its questions be asked -- which LRO Desai agreed it cannot do -- OPO essentially is questioning witnesses by proxy. These OPO actions also violate Article 16.

OPO's Threat Toward Officer Hewitt

The City contends that Director Muscadin's email to Commander Staniszewski regarding Officer Hewitt's conduct, which was copied to AC Henderson, was permitted by Article 16 because Section 3(a) explicitly authorizes the Director of OPO to inquire of the Commander of IAD, or the

Chief or his or her designee “as to the status of any pending IAD investigation.” This argument fails, however, because the email is not a mere “inquiry” into the status of a pending IAD investigation. Rather, it complains that Officer Hewitt was not sustained⁵ and foreshadows potential retaliation. Director Muscadin also chastised Commander Staniszewski and copied AC Henderson asking her to “intervene, if necessary.” In short, Director Muscadin was making demands, not inquiries. The Agreement does not grant OPO’s Director the authority to threaten Officers or to direct Commander Staniszewski or AC Henderson in performance of their jobs. Moreover, LRO Desai testified that the Agreement’s intent and spirit was not to allow OPO to “monitor” individual officers’ conduct or to threaten Commanders or other personnel about doing their jobs (Tr., page 606, lines 8-16). His testimony also indicated that he had addressed this issue with APA and Director Muscadin (see Tr., page 605, line 6 – page 606, line 3). Contrary to the City’s claim, Director Muscadin was not acting within the scope of her authority and specifically prescribed duties when she engaged in these actions, which not only violated Article 16, but are wholly at odds with the City’s argument that APD ultimately determines not only the classification of individual complaints but also the merits, because Director Muscadin clearly was seeking to dictate some future outcome rather than simply making a recommendation as Article 16 permits. Such actions also conflict with Section 1(b)(1) which defines a purpose of Civilian Oversight, in part, as “to assure timely, **fair, impartial, and objective** administrative review of complaints against police officers, **while protecting the individual rights of officers and civilians,**” negatively impact Officer morale.⁶ Moreover, these types of actions could potentially endanger the City’s residents if Officers are hesitant to engage in proactive police work, as Officer Hewitt testified⁷.

⁵ Based on the evidence presented, the undersigned does not perceive any reasonable grounds on which Officer Hewitt could have been sustained over the CTN issue. There may very well be additional information that prompted Director Muscadin’s email – which, regardless, is inappropriate and threatening – but that is unknown as the City failed to produce all of the information APA sought. The non-production matter is being decided in another forum.

⁶ Several witnesses testified that Director Muscadin had accused them of being “obstructionist” or “displaying obstructionist behavior.” Threats such as that pertaining to Officer Hewitt and accusing APA and police Officers of obstruction not promote the purposes for Civilian Oversight specified in Section 1(b). Moreover, OPO has no authority to determine discipline: Section 4(d) makes clear that “(t)he 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.”

⁷ Officer Hewitt also testified that he felt his reputation had been tarnished. The City cited the Abbott v. City of Corpus Christi case to argue that it is preserving the legislature’s intent that innocent officers “would not have their reputation smeared” but that assertion is contradicted by OPO’s treatment of Officer Hewitt.

Remedy

For the reasons discussed herein, the undersigned concludes that APA has established by a preponderance of the evidence that the City has violated Article 16. As remedy, it requests that the City be ordered to cease and desist from allowing OPO to

- investigate complaints;
- interview or contact witnesses;
- follow up with a complainant for clarification purposes or to provide an update, unless it is the closeout meeting;
- change, modify, edit or add suggestions to interview questions;
- demand a question be asked during an interview rather than letting the IA Sergeant use his/her sole discretion as to what questions will be asked;
- 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; and
- threaten individual members of APD or monitoring individual officer's conduct.


APA further requests that the City cease and desist from providing OPO any information, material or evidence prior to the initiation of an IA investigation or that is not contained within the IA file, and from requiring the IA Sergeants to provide the interview questions to OPO in advance or requiring IA Sergeants from being forced to take multiple breaks to ensure OPO's questions have been adequately answered and to provide a reason each time they decline to ask a question or investigate a recommended policy violation. For the reasons set forth herein, the requested remedy will be granted.

And, in accordance with Article 20, Section 4 of the Agreement, the fees and costs addressed therein will be apportioned between the Parties (three fourths payable by the City and one fourth payable by APA) as both are "losing" parties and, along with the entire Austin community, will continue to lose as long as the antagonistic relationship described by the evidence is allowed to persist.

AWARD

The grievances are arbitrable. The grievances are sustained. The City violated the Parties' 2018 Agreement, and is directed to cease and desist from permitting further violations of Article 16, as addressed herein.

Signed this 20th day
of December, 2021


Lynne M. Gomez