

CITY OF COLUMBUS  
STATE OF OHIO

In the Matter of the Arbitration Between:

Fraternal Order of Police	:	Grievance Nos. 23-2020 and 26-2020
Capital City Lodge No. 9	:	
and	:	Opinion and Award
The City of Columbus	:	Margaret Nancy Johnson
Franklin County, Ohio	:	Arbitrator

Statement of the Case

This matter came on for hearing on August 20, 2021, in a training room at the Columbus Police Training Academy in Columbus, Ohio. On or about July 31, 2020, the City of Columbus, Department of Public Safety, hereinafter “City,” engaged the services of BakerHostetler to conduct administrative investigations of members of the Division of Police (See Joint Exhibit 4). The Fraternal Order of Police, Capital City Lodge No. 9, hereinafter “Union” or “FOP,” filed two grievances dated July 7, 2020 and July 23, 2020 protesting the use of an external entity to conduct internal investigations of its members (Joint Exhibit 2). During a Step 4 grievance proceeding on July 29, 2020, the parties agreed to consolidate the two grievances as they arise from the same facts and concern the same contractual provisions (*Id.*). Following the August 14, 2020 denial of the Grievances, the dispute was appealed by the Union to arbitration.

At the time of the grievances, terms of a Collective Bargaining Agreement dated December 9, 2017 to December 8, 2020 were in effect (Joint Exhibit 1). Included within the Agreement is a Grievance Procedure culminating in final and binding arbitration for the resolution of disputes arising from contract provisions. The parties stipulated that the required grievance steps were timely followed and that the matter in dispute is properly before the Arbitrator.

Article 8 of the Agreement, captioned Internal Investigation Procedures, addresses procedures to be followed for “internal investigations of members.” The FOP asserts that the City contract with Baker Hostetler to conduct internal administrative investigations and the performance of those duties by Baker Hostetler is in violation of those provisions. The FOP also contends that contracting out law enforcement duties violates established past practices preserved in Article 2 and constitutes a contracting out of law enforcement duties in violation of Article 19.

While there was some initial confusion as to whether the BakerHostetler interviews were conducted pursuant to Article 8 or Article 9, the City has taken the position that its contract with BakerHostetler established an agency relationship and that the firm was acting on behalf of the City. Thus, the City contends that the Office of Public Safety Director conducted the interviews in compliance with Article 8 of the Agreement between the parties.

The case for the Union at arbitration was argued by Lathan Lipperman, Attorney with Harshman and Wannemacher, Counsel for FOP, Capital City Lodge No. 9. Stefanie Coe, Senior Attorney with the Office of the City Attorney, presented the case for the City. In accordance with the terms of their Agreement, the parties had selected Margaret Nancy Johnson to serve as Arbitrator.

Both parties had the opportunity to make opening statements, to examine and cross examine witnesses under oath, to introduce documentary evidence into the record, and closing arguments having

been waived, to file timely post hearing briefs. Upon receipt of the Briefs, the hearing was declared closed and this award is now issued in compliance with the terms of the Agreement and consent of the parties.

### Issue

The parties stipulated that the issue to be resolved may be stated as follows: Did the City of Columbus violate the terms of the collective bargaining agreement by contracting BakerHostetler, LLP to conduct administrative investigations of members of the Division of Police; and, if so, what shall the remedy be.

### Contract Provisions

The following provisions from the Agreement between the parties are deemed pertinent to a proper resolution of the pending dispute:

#### ARTICLE 2 – CONTRACT

##### 2.7 Past Benefits and Practices.

The City agrees to continue all existing practices and benefits during the term of this Contract. The Chief of Police, with the approval of the Public Safety Director, shall determine all past practices and benefits. If the Lodge disagrees as to whether a past practice or benefit does exist, the Lodge may file a grievance over the matter at Step 4 and take the question through the Grievance Procedure for a final and binding decision by an arbitrator as to whether or not a past practice or benefit exists. Nothing herein precludes the parties, through the Labor Relations Committee process, from discussion whether a past practice or benefit exists.

#### ARTICLE 8 – INTERNAL INVESTIGATION PROCEDURES

##### 8.1 Scope.

This Article is designed to address the procedures used for internal investigations of members. This Article shall apply to the investigation of allegations that could result in disciplinary action against a member. Internal investigations shall be conducted by the chain of command, by the Equal Employment Opportunity Office (EEO), and/or by personnel assigned to the Internal Affairs Bureau. Should the Office of the Public Safety Director conduct an investigation, members shall be afforded the rights applicable in an Internal Affairs Bureau investigation. The term investigator refers to the individual(s) conducting the investigation. The term “Lodge Representative” refers to a Lodge officer, Lodge Grievance Chairperson or Lodge Representative, or Lodge-designated attorney.

#### ARTICLE 9- EXTERNAL INVESTIGATION PROCEDURES

##### 9.1 External Investigation Procedures.

(A) When any City entity outside of the Department of Public Safety initiates an investigation in which a member will be either the focus or a witness, and the Department orders the member to participate in such investigation, the member shall have all rights that would otherwise apply to an investigation conducted by the Internal Affairs Bureau.

(B) When any non-City entity initiates an investigation in which a member will be the focus or witness, the Division may order the member to appear before the investigating entity. Should such an order be issued, the member shall be provided a reasonable opportunity to meet with a Lodge Representative prior to complying with the order.

## ARTICLE 19-MISCELLANEOUS

### 19.4 Contracting Out/Civilization

The City agrees not to hire any additional Public Safety Officers and further agrees not to contract out or civilianize any law enforcement duties performed by members of the bargaining unit(s) unless such matters are first discussed in good faith with the Lodge at a Labor Relations Committee meeting; If, after the Labor Relations Meeting, the City decides to proceed with the contracting out or civilianization of any law enforcement duties, the Lodge may utilize the arbitration procedure and any other relevant provisions of this Contract to contest the propriety of the decision to contract out.

### Position of the Parties

#### *The FOP*

The Union contends that contracting with BakerHostetler to conduct internal administrative investigations of Police Officers violates terms of the negotiated Agreement between the Parties, including Section 2.7, Section 8.1 and Section 19.4.

Section 8.1 of the labor Agreement clearly and unambiguously sets forth mandatory procedures to be used for internal investigations of members, including entities specifically authorized to conduct such investigations. The Agreement does not permit contracting with an external law firm to engage in internal administrative investigations. Even if Section 8.1 is deemed ambiguous, principles of contract interpretation prohibit the use of Baker Hostetler to conduct internal investigations.

The City contention that BakerHostetler was an “agent” of the Office of Public Safety cannot be sustained. Evidence establishes that BakerHostetler and not the Office of the Public Safety Director conducted the internal investigations. Even though the Agreement addresses internal investigations, the City repeatedly referenced its use of an external entity independent of the City. An external entity cannot simultaneously be an “agent” and “independent.”

By contracting with BakerHostetler to conduct the internal investigations, the City was in violation of Section 19.4 of the Agreement. Since the administrative investigations of use of force are law enforcement duties, performance of those duties cannot be contracted out. Within the Department of Police, the Internal Affairs Bureau is charged with investigating citizen complaints. In doing so, the Officers so assigned use both their practical experience and academy training. By using BakerHostetler to conduct the investigations, the City contracted law enforcement duties without following the requirements of 19.4. The Union argues the decision of the City is not justifiable and contrary to contract; but even if justifiable, the City is still required to adhere to the prerequisites contractually set forth in 19.4 and it has failed to do so in this instance.

Pursuant to Section 2.7 of the Agreement, the City has agreed to continue all existing practices and benefits. Consistently and without deviation, the City has assigned its Internal Affairs Bureau to conduct internal investigations. This practice not only meets the contractual definition of a past practice but it also satisfies the requirements which have been established by arbitral precedent.

The City must be precluded from contracting with an outside entity to conduct internal investigations. By engaging the services of BakerHostetler, the City violated several contractual commitments. Accordingly, the grievances should be sustained.

#### *The City*

Article 8.1 of the Agreement specifically authorized the Office of the Public Safety Director to conduct internal investigations. Nothing in contractual language prohibits the Office of the Public Safety Director from securing the services of an agent to perform those duties. Since the applicable contract language references an Office and not an individual, it is not necessary to specifically identify an agent or designee. In this instance the law firm of Baker Hostetler was authorized to act on behalf

of the City. Case law recognizes that when a governmental entity directs another to act, an agency relationship has been created.

Performance of investigative duties by Baker Hostetler was entirely compliant with contract requirements. Reports generated by Baker Hostetler were presented to the Internal Affairs Bureau for processing and all discipline, if necessary, proceeded through the chain of command. Sergeants were present during interviews and in the course of the interviews, no objections were made by any attendant Sergeant. The City had required its agent to adhere to all contract terms and there is no evidence that any contractual protections had been violated.

Since the Office of the Public Safety Director is specifically authorized to conduct investigations, there has been no violation of a Past Practice. In the history of the relationship between the City and the Union, internal investigations have been conducted by the Office of the Public Safety. In this instance, the Office, through its authorized agent, performed the investigations in compliance with contract requirement. All interviews were conducted in a timely manner in spite of the fact that the FOP repeatedly refused to permit the extension provided for in the Agreement.

Endeavor by the City to clarify Article 8 during recent contract negotiations is not a determinant factor in this case. The proposal was to clarify and not to include conduct which the then current contract prohibited. Moreover, the City wanted to add an additional officer, an Inspector General, to offices that can conduct administrative investigations. Ultimately the parties agreed to the inclusion of Inspector General to conduct internal investigations.

An August 4, 2020 e-mail submitted by the FOP to indicate that the City was operating under Article 9 does not establish a contract violation. Testimony establishes the e-mail was sent in error and that all interviews were conducted under Article 8.

Performance of the investigative duties by Baker Hostetler does not constitute law enforcement duties any more than if the Office of Public Safety had done the investigations. Precisely because they were not performing law enforcement duties, protected information had to be first redacted before review. Nor did Baker Hostetler issue any discipline arising from a Use of Force complaint.

Under the circumstances the decision to use a law firm to conduct the investigations was reasonable and necessary. The City received voluminous complaints regarding police conduct during a period of social unrest during the spring and into the summer of 2020. In order to properly investigate these complaints in a transparent and fair process, the City properly contracted with a reputable law firm having the necessary resources and familiarity with the Agreement between the parties. Performance by Baker Hostetler was compliant with the Agreement.

## Discussion

### *Background*

These grievances-- and others precipitated by events in late spring and early summer of 2020— evolved as a consequence of extraordinary social unrest occurring in cities throughout the United States including Columbus. A teenager's phone video capturing the May 25, 2020 brutality of an on-duty Minneapolis Police Officer resulting in the murder of a Black gentleman had riveted and revolted the nation. Civil disturbances protesting years of racial injustice subsequently erupted in cities across the country.

In response to widespread turmoil within Columbus, the City deployed Police Officers in an effort to protect persons and property. Conduct of Police Officers during the ensuing chaos culminated in receipt of hundreds of citizen complaints, many regarding use of force. A City contract with a law firm to investigate those use of force complaints has given rise to the alleged contract violations now pending arbitral review.

On June 23, 2020, the Public Safety Director sent a memorandum captioned “Systemic review process to address Use of Force Complaints received via [ReportCPD@columbus.gov](mailto:ReportCPD@columbus.gov)” (Joint Exhibit 3). Referenced in the caption, the e-mail pertains to an account established by the Mayor on June 1, 2020 for the express purpose of enabling “the public to report any complaints about actions of the Columbus Division of Police in regards to ongoing protests” (*Id.*). In the memorandum the Public Safety Director outlines the review process “to thoroughly address these voluminous complaints.”

The memorandum continues:

The investigation portion of this review will not be conducted by the Internal Affairs Bureau (IAB) of the Columbus Division of Police; rather, investigations will be undertaken by the Department of Public Safety pursuant to Article 8 of the Collective Bargaining Agreement (CBA) with the Fraternal Order of Police. Specifically, the Department of Public Safety will contract with a law firm(s) to conduct the investigation.

As described in the memorandum an intake process was to determine whether excessive use of force had been alleged in the complaint and, if so, then assignment made to a law firm “who is contracted by and works under the auspices of the Office of the Public Safety Director to conduct the investigation.....” (*Id.*). The law firm was tasked with rendering a recommended disposition of the assigned complaints.

Rationale for contracting with a law firm to investigate the citizen complaints is explained in the memorandum. Reasons expressed by the Office of Public Safety include “greater transparency and public accountability to our residents who are demanding change in the investigation of Use of Force Complaints,” and insufficiency of resources within the Department of Pubic Safety to address the “tremendous number of complaints.” In regard to the later, the memorandum cites a time restriction included in Section 8.14 of the Agreement.

In accordance with this Memorandum, the Department of Public Safety entered into a contract with the law firm of BakerHostetler for investigation services (Joint Exhibit 4). On or about July 1, 2020, the City informed the Union of its use of an outside law firm to investigate allegations of excessive use of force. The Union filed two grievances alleging a contract with a law firm to conduct internal administrative investigations regarding use of force is in violation of the terms of the Collective Bargaining Agreement.

In denying the Grievances at the Fourth Step, the Safety Director determined that the investigations were conducted at the direction of the Office of Public Safety and that there was no evidence any member had been deprived of rights to which they were entitled. Second, the Public Safety Director asserted that the administrative investigations were not law enforcement duties for which the Agreement precludes subcontracting. Rejecting the Safety Director’s response, the FOP appealed the matter to arbitration for final and binding resolution.

#### *City Rationale*

The Union herein has the burden of proving the City violated the Agreement when it used outside Counsel to conduct the internal investigations. Like most grievances, however, the pending dispute arose within a factual context pertinent herein. Accordingly, prior to considering the contract language in issue, the Arbitrator first addresses the reasoning of the City which precipitated the current controversy.

Through documentary evidence and testimony of its Acting Director of Public Safety, the City provided an explanation for its decision to contract with an outside law firm to conduct internal

investigations of complaints regarding Police Officer conduct during the tumultuous events of 2020. In a June 23, 2020 memorandum to the City Mayor, the Director of the Office of Public Safety cited “greater transparency” and “public accountability to our residents who are demanding change in the investigation of Use of Force Complaints” (Joint Exhibit 3). This rationale was also stated in the Fourth Step Response of the Safety Director denying the pending grievances (See also Joint Exhibit 2).

In his testimony at the arbitration hearing, the Acting Director of Public Safety elaborated on the reasoning behind the contract with BakerHostetler. He stated the City considered concerns about possible “conflicts of interest,” the independence of the investigations, and the limited capacity of the City to properly investigate the number of complaints received (Speaks Testimony). The Acting Director testified that the contract with BakerHostetler was a “common sense” solution to the issue of investigating the extraordinary number of complaints received concerning police conduct during a period of social disturbances and at a time when a pandemic impeded social interactions.

The City decision also included the caliber of the law firm selected to conduct the investigations. Acting Public Safety Director Speaks referenced familiarity of the firm with the applicable labor contract as well as its staffing and resources available for timely performance. The issue now pending, though, is not the quality of the law firm or its ability to efficiently and effectively perform the investigations. Nor is the quantity of the work performed by Baker Hostetler, its cost to the City, or a motive behind selection of BakerHostetler at issue (See Union Post-Hearing Brief, p. 10). In dispute is whether the use of an external law firm to perform internal investigations violates the Agreement between the parties then in effect.

The public may demand “a change in the investigation of Use of Force Complaints” (See Joint Exhibit 3); but, if those demands necessitate a change in contract language, then, the only appropriate accommodation is through contract modification—which was, indeed, addressed in negotiations for a successor Agreement.<sup>1</sup> Evidence elicited at the hearing failed to establish how utilizing a private law firm “would ensure greater transparency and public accountability.”

While law firms have an ethical obligation to protect the confidentiality of their clientele, public employers are required to maintain public records which are accessible and subject to public scrutiny. All interviews conducted by the Internal Affairs Bureau are recorded and the investigation is a matter of public record (Hollis Testimony). The Legislation Report seeking authorization to compensate BakerHostetler cites “extensive logistical planning to transfer one of the largest public records requests the Division has ever processed” (City Exhibit 4). Contentions as to “greater transparency” do not support the decision in question.

In addition to allegations about transparency, the record lacks evidence establishing how or why a law firm would be more “accountable” than the Internal Affairs Bureau of the City Police Department. As a public entity, an Internal Affairs Bureau is subject not only to terms of the Collective Bargaining Agreement, but also to City laws and departmental regulations. In this instance, neither transparency nor accountability can be cited to justify entering into agreement with an Independent Contractor.

The City also cites a need to “ensure all who were interviewed were kept safe during the COVID-19 pandemic” (*Id.*) In testimony, the Public Safety Acting Director asserted that while the City lacked the capacity, Baker Hostetler could safely accommodate the number of persons involved. The post-hearing Brief of the City argued BakerHostetler “had the space to conduct the interviews and still maintain required social distancing” (City Post-Hearing Brief, p.4). There is, however, no persuasive evidence the City lacked the space in which to safely conduct the requisite interviews. Indeed, the City maintains a large state-of-the-art Police Academy Training Complex including a spacious building

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1 The then current Collective Bargaining Agreement also included a process for mid-contract modification, an option not explored and a provision not utilized in this case.

with large lecture halls, numerous classrooms, ample meeting rooms and convenient office space. Spatial and safety allegations are not determinant factors in this matter.

Justification for contracting with BakerHostetler was also based upon “the tremendous number of complaints” and the alleged lack of resources “to thoroughly investigate in accordance with contractual limitations of Section 8.14 of the CBA” (*Id*). While the memorandum outlining the review process cites a ninety (90) day limit in Section 8.14 for completion of complaints, the Agreement between the parties also specifically authorizes extensions “upon written request from the City.” Evidence confirms that not every investigation is required to be completed within ninety days, but may take longer to finish (Fester Testimony). Extension requests by BakerHostetler are beyond the scope of the Collective Bargaining Agreement and not material to this interpretation dispute. There is no evidence of a written request from the City for an extension, and the Acting Safety Director on cross-examination affirmed he had not spoken to the FOP concerning an extension under Article 8.14.

Even before BakerHostetler could review documentation, the Division of Police was initially required to access that same information so as to redact all law enforcement automated data. Then, during all interviews conducted by BakerHostetler, the presence of a Sergeant was required to ensure Garrity protections (VanDop and Edwards Testimony). Although not directly conducting the interviews, Internal Affairs Bureau Sergeants were involved in each interview (See Union Exhibit 11). Evidence does not confirm the alleged inability of the Internal Affairs Bureau to satisfactorily conclude investigations initiated in Intake or to perform the interviews for which Sergeants were, in fact, in attendance.

Data regarding the number of investigations conducted by the Internal Affairs Bureau in 2017 does not indicate a need to contract out in 2020 (See City Exhibit 4). Nor does testimony regarding the number of complaints handled by the Internal Affairs Bureau prior to the summer of 2020. Testimony establishes that BakerHostetler assigned fewer Attorneys to the disputed investigations than the number of Sergeants trained and available to do so (Edwards Testimony). Allegations as to a superior ability of an outside agency to accomplish the large number of investigations is not supported by the evidence and, importantly, does not obviate the need for contract compliance. Nor does the fact that the “process went well” address the contract issues raised by this grievance. (Speaks Testimony).

Contentions concerning potential conflicts of interest are, similarly, without sufficient supporting evidence. Although the City entered into the record evidence that most of the Sergeants assigned to Internal Affairs were also engaged in Protest Duties (See City Exhibits 2 and 3), there is no evidence that any Sergeant would have been required to investigate police conduct at a location to which he/she had been assigned or in which he/she had been involved. Nor is there any evidence explaining why, had such a conflict actually arisen, that particular investigation could not then have been performed by another Internal Affairs Officer.

In its Post-hearing Brief, the City alludes to principles of Agency (See City Post-Hearing Brief, p. 9) and provides citations in which those principles are recognized in the public sector. The City argues that BakerHostetler was acting as an Agent of the Office of Public Safety. The dispute before the Arbitrator is an issue of contract interpretation pursuant to industrial jurisprudence and not applicability of agency law. Distinguishable from the matter under review, the cases referenced in the City Post-Hearing Brief do not involve Collective Bargaining Agreements or require analysis of contract language and commitments made therein. BakerHostetler as an Independent Contractor rather than an Agent is further discussed hereinafter.

At issue in this proceeding is whether a decision to utilize a law firm to conduct internal investigations is in violation of contract language. These grievances must be resolved on the basis of precepts of contract interpretation and not upon the exigent circumstances asserted by the City. The

function of the Arbitrator herein is to determine the mutual intent of the parties in negotiating language pertaining to internal investigations of Police Officers.

*Article 8. Internal Investigation Procedures*

Article 8, captioned Internal Investigation Procedures, does not expressly prohibit use by the City of an external Agent to conduct internal investigations on behalf of the Office of the Public Safety Director. Accordingly, there is an ambiguity in applicable language which must be addressed pursuant to contract interpretation. Principles associated with discerning intent and meaning in language used in collective bargaining agreements are well-established in the authorities on industrial jurisprudence and in arbitral case law. Pertinent tools and techniques used to aid in interpretation of ambiguous language are now analyzed. While Article 8 is the focus of this dispute, in discerning intent of the parties, reference is made to other contractual provisions as is consistent with the interpretive concept that the Agreement is to be read as a whole.

a. The Contract as a Whole

The City contends that these investigations were conducted by the Office of the Public Safety Director through the agency of BakerHostetler. In the contract between the City and BakerHostetler, however, the relationship is defined as an Independent Contractor rather than Agency. Responsibility of the City for the conduct of BakerHostetler as an Independent Contractor, and specifically responsibility for compliance with the labor agreement, is problematic in this dispute.

In an Exhibit to the BakerHostetler Contract referenced in the body of the Amended Contract, the Independent Contractor (BakerHostetler) agrees its investigations “shall comport with all pertinent provisions of the Collective Bargaining Agreement” (Joint Exhibit 4). Yet, this contract is between the City and BakerHostetler, not the FOP. In the contract for services, there is no recourse for the FOP should the Independent Contractor actually deviate from or infringe upon some contractual right of a Member. Nothing in the contract between BakerHostetler and the City provides the FOP with any redress in the event of an infringement of the Collective Bargaining Agreement by the Independent Contractor.

The parties recognized the problem of preserving employee rights in the event of investigations conducted outside of the Department of Public Safety. In negotiating Article 9, External Investigation Procedures, the Agreement between the FOP and the City specifically preserves employee protections for investigations conducted by a City entity outside of the Department of Public Safety. Had the investigations been conducted pursuant to Article 9, as initially understood by the Internal Affairs Bureau, provisions of the Agreement between the FOP and the City become applicable and enforceable. Yet, as argued by the City and as evidenced by testimony elicited by the City, the Office of the Public Safety Director was conducting these interviews pursuant to the terms of Article 8.

Evidence confirms that the investigations conducted by BakerHostetler were, indeed, compliant with the Collective Bargaining Agreement. In its Brief, the City argues that “no members’ rights were violated and no member was harmed by the City’s use of an agent” (City Post Hearing Brief pp. 9-10). The “no harm” argument made by the City, however, does not address the contractual propriety of the use of BakerHostetler or the inability of the FOP to enforce compliance of BakerHostetler with Article 8.

Had there been a contractual violation by the Independent Contractor, the FOP was without avenue for redress through its Grievance Procedure. The concern here is not whether in the course of the interviews BakerHostetler infringed upon contractual rights of members; but, rather, had the Independent Contractor done so, the FOP would have been precluded from exercising its right to grieve in violation of the Agreement.

In Article I of the Agreement, a grievance is defined as an “unresolved question or dispute regarding the *City’s* interpretation and application of terms of this Contract.” And, in Section 12.5(A) a written grievance is to be submitted in writing on a grievance form “to the supervisor *whose actions* gave rise to the grievance.” The Grievance Procedure is between the City and the FOP and does not extend to an Independent Contractor.

A construction of Article 8 authorizing the City to contract out an internal investigation nullifies any recourse a member may have through the Grievance Procedures to challenge actions taken by the Independent Contractor. As a matter of contract analysis, interpreting Article 8 so as to permit an Independent Contractor to conduct internal investigations effectively undermines a significant contractual benefit afforded to the Union. Such a reading is contrary to principles of contract interpretation.

#### b. Practice of the Parties

Language in dispute states: “Internal investigations shall be conducted by the chain of command, by the Equal Employment Opportunity Office (EEO), and/or by personnel assigned to the Internal Affairs Bureau.” The section also references investigation by the Office of the Public Safety Director. In the past when the Office of the Public Safety Director conducted an investigation, the investigation was performed internally and not outside of the administration.

While the language identifies which entities may conduct internal investigations, the agreement does not authorize investigations by an Independent Contractor, and there is no evidence the City ever contracted with an external entity to conduct internal investigations. Use of force investigations have always been assigned to the Internal Affairs Bureau for investigation. Consistent practice of the parties in implementing Article 8 over decades of enforcement is informative as to the understandings set forth therein. Mutual intent of the parties is made manifest in the many years of usage.

There is a reason for keeping such investigations within the Administration. Internal policies of the Police Department include and address the non-lethal use of force by a Police Officer and the process for investigations arising therefrom. Columbus Police Officers receive extensive, on-going training on the Use of Force; and Sergeants, who immediately perform an on-the-scene or Chain of Command investigation in an instance of use of force, are specifically trained for the initial investigation. Sergeants assigned to the Internal Affairs Bureau get even more advanced training both internally and externally for investigating a Use of Force complaint (See Union Exhibits 3 and 4, Tyrone Hollis Testimony). As stated by the Acting Director of Public Safety in his testimony, “it takes months to be proficient” on use of force issues (Speaks Testimony).

In Article I of the Collective Bargaining Agreement the parties have identified a “past practice” as a “policy, procedure or practice which has been continuous and which does not have a cost factor to the City and/or monetary benefit to a member.” Not only are past practices useful tools in discerning intent in contract language, but the parties herein have expressly incorporated past practices into the Agreement. Article 2.7 states that “the City agrees to continue all existing practices and benefits during the terms of this Contract.” Should there be any question about the practice of use of force investigations being conducted by the Internal Affairs Bureau, in the Legislation Report authorizing payment to BakerHostetler (City Exhibit 4), the City specifically identified those investigations as leading to “changes in policy/practice” (City Exhibit 4). A practice having been established, however, any such change needs to be negotiated.

#### c. Bargaining History

Indeed, subsequent to the BakerHostetler investigations, the City did endeavor to extensively change the contract language included in Article 8. In general, a party will be precluded from achieving in arbitration that which it could not secure in collective bargaining. But, “even subsequent negotiations may establish the prior understanding of the parties” in contract interpretation disputes (*How Arbitration Works*, Elkouri & Elkouri, Sixth Edition, p. 454).

In this instance, during negotiations for a successor Agreement in early 2021, the City submitted proposals to overhaul the investigation procedures of Article 8, the same procedures now in contention. Intent of those proposals was to remove investigations from the Internal Affairs Bureau and enable the City to authorize investigators to perform duties of the IAB (See Union Exhibits 9 and 10). Though the parties negotiated changes to Article 8, City proposals were rejected by the Union.

Instead, the Union agreed to inclusion in Article 8 of an Office of Inspector General to conduct investigations (Fester Testimony). Bargaining history subsequent to the pending disputes affirms that applicable language in Article 8 at the time of these grievances did not include the right of the City to secure an Independent Contractor to conduct internal investigations. Rather than a clarification of a right it already had, perusal of the City proposals indicates multiple deletions and extensive modification to existing contract language. Pertinent herein, the City unsuccessfully sought language by which it could authorize individuals to conduct investigations- the process now grieved by the Union and presently under review.

#### *Article 19- Miscellaneous*

Section 19.4 of the Agreement sets forth a commitment by the City “not to contract out or civilianize any law enforcement duties performed by members of the bargaining units(s), unless such matters are first discussed in good faith with the Lodge at a Labor Relations Committee meeting.” The City contends that internal investigations conducted by the Bureau of Internal Affairs are not “law enforcement” duties. The issue is whether contracting out those duties to BakerHostetler violated Article 19.4.

The principal duty of a Police Officer is to protect persons and property through the enforcement of laws and regulations. Part of that duty includes receiving and investigating complaints reported by the public, including complaints about Police Officers and City employees. Complaints are processed in accordance with Standard Operating Procedures (See Union Exhibit 3).

Any complaint received by the Police Department requires a review and resolution, performance of which is properly deemed a law enforcement duty. Pursuant to the Standard Operating Procedures, an investigator is expected to obtain pertinent “records and evidence” such as “arrest reports” and “cruiser logs.” Investigations which include “audio and video recordings,” as in the instant case, are “regulated by applicable Federal, State, and City laws, related case law, Division Directives, and the respective collective bargaining agreement” (Union Exhibit 3, p. 40). Performance of the investigation requires knowledge of applicable law, including “Garrity,” warnings, which Edwards testified she was not authorized to administer (see *Id.*, p. 90). Accordingly, investigations including the investigations giving rise to this dispute are properly deemed one of the many components of “law enforcement.”

#### Conclusions

Review of the evidence and contract language establishes that the City violated its Agreement with the FOP when it entered into an Agreement with BakerHostetler to perform investigative services as an Independent Contractor. Pursuant to principles of contract interpretation, Article 8 of the Collective Bargaining Agreement specifies the entities that may investigate “allegations that could result in disciplinary action against a member.” Securing the services of an Independent Contractor to perform investigative duties assigned to the Internal Affairs Bureau violates Article 8.

Additionally, Article 19 precludes the subcontracting of law enforcement duties. Since internal investigations are law enforcement duties, the use of an Independent Contractor to investigate Police Officers was in violation of Article 19.

Remedy

The 2017-2020 Agreement between the parties precludes engaging an Independent Contractor to perform internal investigations of Police Officers. Accordingly, the City is directed to cease and desist from employing such an entity to investigate complaints regarding Police Officer conduct.

Award

The grievances are sustained and the City is directed to cease and desist from using an Independent Contractor to perform internal investigations.

Margaret Nancy Johnson  
Arbitrator

Dated and made effective in Columbus, Franklin County, Ohio, this 3<sup>rd</sup> day of November, 2021.